ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he should be permitted to reopen his December 28, 2015 Workers' Compensation claim based on a change in condition pursuant to §8-43-303(1), C.R.S.

2. Whether Claimant has demonstrated by a preponderance of the evidence that the left shoulder surgery recommended by William Ciccone, II, M.D. is reasonable, necessary, and causally related to his December 28, 2015 industrial injuries.

3. Whether Claimant has proven by a preponderance of the evidence that the cervical facet injections recommended by Tam Nguyen, M.D. are reasonable, necessary and related medical maintenance benefits designed to relieve the effects of his December 28, 2015 industrial injuries or prevent further deterioration of his condition pursuant to *Grover v. Industrial Comm'n.,* 759 P.2d 705 (Colo. 1988).

FINDINGS OF FACT

1. Claimant works for Employer as a Bus Driver. On December 28, 2015 he suffered admitted industrial injuries during the course and scope of his employment with Employer. Specifically, Claimant's bus was struck by a Chevrolet Suburban traveling at approximately 40 miles per hour.

2. On December 29, 2015 Claimant visited Authorized Treating Physician (ATP) Craig Anderson, M.D. for an evaluation. Claimant reported bilateral upper back, trapezius and neck pain. He denied left shoulder pain. Dr. Anderson diagnosed Claimant with cervical and thoracoscapular strains.

3. On February 23, 2016 Claimant returned to Dr. Anderson complaining of left arm discomfort. Specifically, Claimant described his pain as achy, with some tingling extending over the shoulder into the mid-bicep area. Physical examination of the left shoulder revealed "mildly limited by left upper trapezius discomfort rather than glenohumeral pain and no sign of shoulder instability." Dr. Anderson assessed Claimant with an acute cervical strain and left upper extremity pain.

4. On March 11, 2016 Claimant visited. Samuel Y. Chan, M.D. for a physiatry evaluation. Claimant described waxing and waning pain over the left cervical spine area. He also mentioned pain radiating to the left shoulder, with numbness and tingling over the left hand. Physical examination revealed "no tenderness to palpation over the bilateral AC joints, subacromial space, or bicipital tendon groove." Dr. Chan assessed Claimant with a cervical spine injury. He recommended epidural steroid injections.

5. On April 22, 2016 Claimant underwent a left C5-C6 epidural steroid injection. On May 2, 2016 he visited Dr. Chan and reported "that there is no longer any pain that radiates to the left upper extremity."

6. On June 28, 2016 Dr. Anderson released Claimant to full duty employment. Physical examination revealed full active left shoulder range of motion.

7. On July 17, 2016 Dr. Anderson determined that Claimant had reached Maximum Medical Improvement (MMI). He assigned a 12% cervical spine permanent impairment rating and recommended medical maintenance care.

8. On September 28, 2016 Claimant returned to Dr. Chan. Claimant's work activities included three routes requiring him to lift luggage. The additional work activities caused increased pain. Dr. Chan noted Claimant's "current symptoms are more suggestive of C6 radiculitis on the left side." He recommended additional diagnostic testing including an epidural steroid injection.

9. On October 20, 2016 Claimant underwent a left C5-C6 transforaminal cervical epidural steroid injection with John Sacha, M.D. In a follow-up examination with Dr. Anderson Claimant reported no radiating left upper extremity pain or numbness.

10. On December 9, 2016 Claimant returned to Dr. Anderson and reported pain radiating to the left shoulder. Dr. Anderson recommended a surgical evaluation.

11. On December 12, 2016 Claimant underwent a surgical evaluation with Andrew Castro, M.D. Dr. Castro assessed Claimant with a C5-C6 cervical radiculopathy. An MRI revealed increased protrusion at C5-C6 in comparison to the March 2015 MRI. The clinical signs were consistent with C5 left radiculitis and persistent C6 radiculitis.

12. On February 2, 2017 Claimant underwent a left epidural steroid injection at C4-C5 with Peter Reusswig, M.D. Claimant subsequently returned to Dr. Reusswig and reported that his pain had decreased but continued on the outer aspect of his left arm.

13. On April 13, 2017 Claimant returned to Dr. Chan for an examination. Claimant reported increased range of motion and decreased pain. He denied any numbness or tingling in his left upper extremity and rated his pain level as 1-2/10. Over the ensuing months, Claimant treated with Drs. Anderson, Chan and Reusswig. The working diagnosis continued to be a cervical strain with a C5-C6 disc bulge.

14. On November 14, 2017 Claimant presented to the emergency room complaining of an exacerbation of his cervical injury. Claimant reported the pain began after driving a bus over railroad tracks. He subsequently experienced numbness and heaviness in his left extremity. The emergency room physician assessed Claimant with "mild left foraminal stenosis at C5-C6 due to left eccentric disc protrusion."

15. On November 14, 2017 Dr. Anderson responded to correspondence from Respondent regarding his retraction of MMI. Dr. Anderson noted that Claimant's symptoms were approaching the severity after the initial injury. He thus reasoned that Claimant could not safely operate a bus. Dr. Anderson concluded that there was good reason to believe that the "cervical disc herniation and cervical radiculitis/radiculopathy could be the result of a substantial aggravation of the cervical condition due to the physical stresses associated with bus operation."

16. On May 30, 2018 Claimant returned to Dr. Anderson. He assessed Claimant with cervical C5-C6 discopathy/C6 left sided radiculopathy. Physical examination of the left shoulder revealed normal range of motion and strength. Dr. Anderson returned Claimant to MMI and released him to full duty employment. He recommended medical maintenance treatment in the form of massage, medications, acupuncture and electrical stimulation.

17. On June 12, 2018 Respondent filed a Final Admission of Liability (FAL) consistent with Dr. Anderson's MMI determination. The FAL also acknowledged that Claimant was entitled to receive medical maintenance benefits. Claimant did not object to the FAL.

18. On August 6, 2018 Claimant visited ATP Lloyd Thurston, D.O. for an evaluation. Dr. Thurston noted that Claimant continued to work full duty with some persistent symptoms. Claimant reported benefits from acupuncture, massage and working out.

19. On February 8, 2019 Claimant visited Dr. Thurston for an evaluation. He reported increased left-sided neck, left shoulder and other pain symptoms over the last three to four weeks. Claimant associated his increased symptoms with a new bus route that required more turning to his left. Dr. Thurston recommend cervical and left shoulder MRI's. He attributed Claimant's persistent left shoulder issues to his neck pain and sought a left shoulder MRI to rule out shoulder pathology. Dr. Thurston noted Claimant has suffered chronic left shoulder pain that has not been properly evaluated since his December 28, 2015 injuries. He recommended reopening Claimant's claim.

20. On February 19, 2019 Claimant underwent a left shoulder MRI. The MRI revealed a slight irregularity of the posterior labrum with an accompanying cyst and AC joint arthritis. The MRI did not reflect a rotator cuff tear.

21. On March 1, 2019 Claimant visited Dr. Thurston for an examination. Dr. Thurston noted Claimant's persistent left-sided neck pain that radiated across the left shoulder down his left arm. He referred Claimant to orthopedic surgeon William Ciccone, II, M.D. for a left shoulder examination and treatment.

22. On March 6, 2019 Claimant visited Dr. Ciccone for a left shoulder evaluation. The physical examination revealed no obvious muscle atrophy, normal alignment, near active range of motion and some rotator cuff weakness. Dr. Ciccone observed pain with palpation of the AC joint. He commented that the physical

examination was “really pretty normal for the shoulder although he does have some persistent pain and symptoms from the neck with radiation down the arm.” Because most of Claimant’s pain at the shoulder was around AC joint, he recommended an AC joint injection.

23. On April 30, 2019 Claimant returned to Dr. Ciccone for an examination. Dr. Ciccone noted that Claimant has suffered persistent pain and symptoms associated with impingement and AC joint pain. On May 2, 2019 Dr. Ciccone requested authorization to perform a left shoulder arthroscopy and decompression, distal clavicle resection and possible bicep tendinitis to relieve Claimant’s symptoms.

24. On May 12, 2019 Mark S. Failinger, M.D. performed a records review of the prior authorization request for left shoulder surgery. Dr. Failinger determined that Claimant did not suffer a left shoulder injury while driving a bus on December 28, 2015. He detailed that Claimant exhibited cervical and upper thoracic strain symptoms, but follow-up visits with Drs. Anderson and Chan did not reveal any shoulder abnormalities. Dr. Failinger explained “[a]lthough there was very brief mention of the left shoulder.regional discomfort in late January 2016, there were no consistent findings whatsoever in the shoulder, and essentially all tests of the shoulder were negative.” He remarked that, as of March 11, 2016, Claimant reported complete resolution of his left upper extremity complaints after the epidural injection. Dr. Failinger concluded that Claimant sustained a cervical strain and radiculopathy that were confirmed by injections. He commented that there were no significant shoulder findings throughout the next three years until Dr. Thurston felt that the shoulder should become part of the claim. However, “there was no evidence that the shoulder had any signs or symptoms of any significance or consistency throughout his early and even late post-MVA timeframe.” He specified that Claimant may have some AC joint symptoms, but they are not connected to the motor vehicle accident of December 28, 2015. Dr. Failinger reiterated that Claimant had a “complete resolution of symptoms years ago by the cervical epidural steroid injections.”

25. On June 7, 2019 Claimant filed a Petition to Reopen based on a change of condition. Specifically, Claimant sought left shoulder treatment under his Workers’ Compensation claim and approval for the proposed surgery. In response to Claimant’s Application for Hearing, Respondent obtained an independent medical evaluation performed by Carlos Cebrian, M.D.

26. On July 23, 2019 Claimant underwent an independent medical examination with Dr. Failinger. Dr. Failinger reviewed updated medical reports and performed a physical examination. He concluded that Claimant did not sustain any injury to his left shoulder in the December 28, 2015 bus accident. Dr. Failinger noted that the most important factor in determining the relationship between an event and the subsequent development of symptoms is the temporal proximity of the symptoms to the accident. He explained that the motor vehicle accident caused a contusion without any significant pathology. Furthermore, the follow-up care did not reveal any significant symptoms in the left shoulder area. Moreover, by June 23, 2016 Dr. Chan noted full resolution of left upper extremity discomfort following a series of epidural steroid

injections. Dr. Failinger summarized that Claimant did not develop any left shoulder pathology as a result of the December 28, 2015 bus accident. Therefore, the recommended left shoulder surgery is not reasonable, necessary or causally related to Claimant's industrial injuries.

27. In a report dated September 3, 2019, Dr. Cebrian agreed with Dr. Failinger that Claimant did not sustain any injury to his left shoulder in the December 28, 2015 motor vehicle accident. After conducting a physical examination and reviewing the medical records, Dr. Cebrian summarized: "(1) early medical records were consistent with cervical spine complaints with some radiation to the shoulder, left greater than right; (2) Claimant did not have findings of shoulder pathology on multiple examinations by different physicians; (3) Claimant reported resolution of his left shoulder complaints after some cervical spine injections." He also noted that on August 6, 2018 Dr. Thurston documented normal left shoulder findings. Accordingly, Dr. Cebrian concluded that Claimant's "left shoulder complaints are not causally related to the 12/28/2015 claim due to the temporal delay of over three years."

28. On September 20, 2019 Claimant treated with Susan Miget, NP, who works with Tam Nguyen, M.D. Clamant reported 50% pain relief following the C5-C6 transforaminal epidural steroid injection. He noted increased pain with his job duties, including looking up into the bus mirror and turning/twisting his head left to right to watch for traffic. NP Miget recommended a trial of cervical facet injections with consideration of medial branch blocks and radiofrequency. Dr. Nguyen recommended bilateral C4-C7 facet injections for diagnostic and therapeutic purposes.

29. Dr. Nguyen subsequently submitted a request for bilateral cervical facet injections. Respondent asked Dr. Cebrian to review the medical necessity of the facet injections. In a report dated September 30, 2019 Dr. Cebrian determined that Claimant remained at MMI. Dr. Cebrian's claim-related diagnosis included cervical spine strain with aggravation of C5-C6 disc pathology. He concluded that the request for facet injections should be denied. Dr. Cebrian reasoned that Claimant's injury is nearly four years old and he has been treated consistently for radiculopathy with 15 epidural steroid injections. Second, although there was occasional documentation regarding the facets as part of the differential diagnosis, there were never any consistent findings suggestive of facet-mediated pain. Furthermore, after Claimant had a positive response to epidural steroid injections, there was no additional documentation regarding the facets. Third, if Claimant is currently experiencing facet mediated pain, Dr. Cebrian determined that it is not related to the December 28, 2015 accident because of the "temporal delay" in his complaints.

30. Dr, Cebrian testified at the hearing in this matter. He maintained that Claimant's condition has remained stable since he reached MMI on May 30, 2018. Dr. Cebrian remarked that the medical records do not reveal that Claimant suffered a left shoulder injury on December 28, 2015. He specifically reiterated that Claimant's left shoulder MRI was unremarkable. The rotator cuff was "pristine" with no evidence of a tear or acute injury. Dr. Cebrian also explained that Dr. Chan repeatedly palpated Claimant's AC joint and there was no evidence of tenderness. He thus concluded that,

because Claimant did not suffer a left shoulder injury on December 28, 2015, his condition has no worsened. Accordingly, Claimant reached MMI on May 30, 2018 and his claim should not be reopened.

31. Dr. Cebrian also testified that the requested facet injections are not reasonable, necessary or causally related to Claimant's December 28, 2015 industrial injuries. Initially, Dr. Cebrian recounted Claimant's extensive treatment for his December 28, 2015 cervical spine injury. Claimant specifically received epidural steroid injections, massage therapy, chiropractic treatment, trigger point injections and physical therapy to address a likely C6 radiculopathy. Notably, because Claimant had a diagnostic response, the epidural steroid injections confirmed his pain generator. Claimant noted complete resolution of symptoms periodically over the years following epidural steroid injections. Based on the four-year delay and extensive treatment, Claimant's facet symptoms are not related to his industrial injury. Moreover, because diagnostic testing has not revealed proven facetogenic pain, the Chronic Pain recommendations in the Colorado Division of Workers' Compensation *Medical Treatment Guidelines* (*Guidelines*) *Guidelines* do not recommend facet injections. Dr. Cebrian thus summarized that Claimant suffers from a chronic cervical condition reflected by the waxing and waning of symptoms since his December 28, 2015 industrial injuries.

32. On November 11, 2019 the parties conducted the post-hearing evidentiary deposition of Dr. Failinger. Dr. Failinger maintained that Claimant did not suffer a left shoulder injury on December 28, 2015. He noted that a February 2019 left shoulder MRI revealed a small cyst, AC joint arthritis and "an extremely remote possibility of any torn rotator cuff." Furthermore, based on a review of the extensive medical records "there didn't seem to be any signs whatsoever that the shoulder itself was affected from this accident." Dr. Failinger remarked that the medical records did not reflect that Claimant suffered left shoulder pain and the injections to his neck relieved his pain. Because Claimant did not suffer a left shoulder injury as a result of the December 28, 2015 bus accident, Dr. Failinger reasoned that Claimant's condition has not worsened and he remains at MMI

33. Claimant has failed to establish that it is more probably true than not that he should be permitted to reopen his December 28, 2015 Workers' Compensation claim based on a change in condition pursuant to §8-43-303(1), C.R.S. The medical records and persuasive opinions of Drs. Failinger and Cebrian reflect that Claimant's left shoulder symptoms are not related to his industrial injuries. The medical records reveal that Claimant suffered a cervical spine injury in the December 28, 2015 bus accident and did not report consistent left shoulder pathology. On May 30, 2018 ATP Dr. Anderson. assessed Claimant with cervical C5-C6 discopathy/C6 left sided radiculopathy. Physical examination of the left shoulder revealed normal range of motion and strength. Dr. Anderson determined that Claimant had reached MMI and released him to full duty employment.

34. Dr. Failinger maintained that Claimant did not suffer a left shoulder injury on December 28, 2015. He noted that a February 2019 left shoulder MRI revealed "an

extremely remote possibility" of a rotator cuff tear. Dr. Failinger explained that the bus accident caused a contusion without any significant pathology. Furthermore, the follow-up care did not reveal any significant symptoms in the left shoulder area. Moreover, by June 23, 2016 Dr. Chan noted full resolution of left upper extremity discomfort following a series of epidural steroid injections. Dr. Failinger summarized that Claimant did not develop any left shoulder pathology as a result of the December 28, 2015 bus accident. He concluded that Claimant sustained a cervical strain and radiculopathy that was confirmed by injections. Dr. Cebrian agreed with Dr. Failinger that Claimant did not sustain any injury to his left shoulder in the December 28, 2015 bus accident. He maintained that Claimant's condition has remained stable since he reached MMI on May 30, 2018. Dr. Cebrian remarked that the medical records do not reveal that Claimant suffered a left shoulder injury on December 28, 2015. He specifically reiterated that Claimant's left shoulder MRI was unremarkable. The rotator cuff was "pristine" with no evidence of a tear or acute injury. Dr. Cebrian concluded that Claimant's left shoulder symptoms were not causally related to the December 28, 2015 claim because of the temporal delay of over three years. He thus reasoned that, because Claimant did not suffer a left shoulder injury on December 28, 2015, his condition has not worsened.

35. In contrast, Dr. Thurston attributed Claimant's persistent left shoulder issues to his neck pain and sought a left shoulder MRI to rule out shoulder pathology. He noted Claimant has suffered chronic left shoulder pain that has not been properly evaluated since his December 28, 2015 injuries. Dr. Thurston recommended reopening of Claimant's claim. However, based on the extensive medical records and persuasive opinions of Drs. Failinger and Cebrian, Claimant did not suffer a left shoulder injury as a result of the December 28, 2015 bus accident. Instead, Claimant sustained a cervical strain and radiculopathy that was repeatedly confirmed by epidural steroid injections. Because Claimant did not suffer a left shoulder injury on December 28, 2015, his condition has not worsened. Accordingly, Claimant's request to reopen his December 28, 2015 Workers' Compensation claim based on a change in condition is denied and dismissed.

36. Claimant has failed to demonstrate that it is more probably true than not that the left shoulder surgery recommended by Dr. Ciccone is reasonable, necessary and causally related to his December 28, 2015 industrial injury. Dr. Ciccone explained that Claimant has suffered persistent pain and symptoms associated with impingement and AC joint pain. On May 2, 2019 Dr. Ciccone requested authorization to perform a left shoulder arthroscopy and decompression, distal clavicle resection and possible bicep tendinitis to relieve Claimant's symptoms. However, as explained, the medical records and persuasive opinions of Drs. Failingwer and Cebrian demonstrate that Claimant likely did not suffer a left shoulder injury as a result of the December 28, 2015 bus accident. Accordingly, the requested left shoulder surgery is not reasonable, necessary or causally related to Claimant's industrial injuries.

37. Claimant has failed to prove that it is more probably true than not that the cervical facet injections recommended by Dr. Nguyen are reasonable, necessary and related medical maintenance benefits designed to relieve the effects of his December

28, 2015 industrial injuries or prevent further deterioration of his condition. On September 20, 2019 Claimant visited Dr. Nguyen's office and reported 50% pain relief following a C5-C6 transforaminal epidural steroid injection. However, he noted increased pain with his job duties, including looking up into the bus mirror and turning/twisting his head left to right to watch for traffic. Dr. Nguyen subsequently sought authorization for bilateral C4-C7 facet injections for diagnostic and therapeutic purposes.

38. In contrast, Dr. Cebrian persuasively explained that the request for facet injections should be denied. He reasoned that Claimant's injury is nearly four years old and he has been treated consistently for a radiculopathy with 15 epidural steroid injections. Notably, because Claimant had a diagnostic response, the epidural steroid injections confirmed his pain generator. Claimant noted complete resolution of symptoms periodically over the years following epidural steroid injections. Dr. Cebrian commented that, although there was occasional documentation regarding the facets as part of the differential diagnosis, there were never any consistent findings suggestive of facet-mediated pain. Furthermore, after Claimant had a positive response to epidural steroid injections, there was no additional documentation regarding the facets. Based on the four-year delay and extensive treatment, Claimant's facet symptoms are not related to his industrial injury. Moreover, because diagnostic testing has not revealed proven facetogenic pain, the *Guidelines* do not recommend facet injections. The persuasive opinion of Dr. Cebrian, in conjunction with the extensive medical records and diagnostic testing, demonstrate that Claimant suffered a cervical strain and radiculopathy. Because Claimant's facet symptoms are not related to his December 28, 2015 bus accident, his request for bilateral C4-C7 facet injections is denied and dismissed.

CONCLUSIONS OF LAW

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

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

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

Reopening

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

5. As found, Claimant has failed to establish by a preponderance of the evidence that he should be permitted to reopen his December 28, 2015 Workers' Compensation claim based on a change in condition pursuant to §8-43-303(1), C.R.S. The medical records and persuasive opinions of Drs. Failinger and Cebrian reflect that Claimant's left shoulder symptoms are not related to his industrial injuries. The medical records reveal that Claimant suffered a cervical spine injury in the December 28, 2015 bus accident and did not report consistent left shoulder pathology. On May 30, 2018 ATP Dr. Anderson. assessed Claimant with cervical C5-C6 discopathy/C6 left sided radiculopathy. Physical examination of the left shoulder revealed normal range of motion and strength. Dr. Anderson determined that Claimant had reached MMI and released him to full duty employment.

6. As found, Dr. Failinger maintained that Claimant did not suffer a left shoulder injury on December 28, 2015. He noted that a February 2019 left shoulder MRI revealed "an extremely remote possibility" of a rotator cuff tear. Dr. Failinger explained that the bus accident caused a contusion without any significant pathology. Furthermore, the follow-up care did not reveal any significant symptoms in the left shoulder area. Moreover, by June 23, 2016 Dr. Chan noted full resolution of left upper extremity discomfort following a series of epidural steroid injections. Dr. Failinger summarized that Claimant did not develop any left shoulder pathology as a result of the December 28, 2015 bus accident. He concluded that Claimant sustained a cervical strain and radiculopathy that was confirmed by injections. Dr. Cebrian agreed with Dr. Failinger that Claimant did not sustain any injury to his left shoulder in the December 28, 2015 bus accident. He maintained that Claimant's condition has remained stable since he reached MMI on May 30, 2018. Dr. Cebrian remarked that the medical records do

not reveal that Claimant suffered a left shoulder injury on December 28, 2015. He specifically reiterated that Claimant's left shoulder MRI was unremarkable. The rotator cuff was "pristine" with no evidence of a tear or acute injury. Dr. Cebrian concluded that Claimant's left shoulder symptoms were not causally related to the December 28, 2015 claim because of the temporal delay of over three years. He thus reasoned that, because Claimant did not suffer a left shoulder injury on December 28, 2015, his condition has not worsened.

7. As found, in contrast, Dr. Thurston attributed Claimant's persistent left shoulder issues to his neck pain and sought a left shoulder MRI to rule out shoulder pathology. He noted Claimant has suffered chronic left shoulder pain that has not been properly evaluated since his December 28, 2015 injuries. Dr. Thurston recommended reopening of Claimant's claim. However, based on the extensive medical records and persuasive opinions of Drs. Failinger and Cebrian, Claimant did not suffer a left shoulder injury as a result of the December 28, 2015 bus accident. Instead, Claimant sustained a cervical strain and radiculopathy that was repeatedly confirmed by epidural steroid injections. Because Claimant did not suffer a left shoulder injury on December 28, 2015, his condition has not worsened. Accordingly, Claimant's request to reopen his December 28, 2015 Workers' Compensation claim based on a change in condition is denied and dismissed.

Shoulder Surgery

8. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

9. As found, Claimant has failed to demonstrate by a preponderance of the evidence that the left shoulder surgery recommended by Dr. Ciccone is reasonable, necessary and causally related to his December 28, 2015 industrial injury. Dr. Ciccone explained that Claimant has suffered persistent pain and symptoms associated with impingement and AC joint pain. On May 2, 2019 Dr. Ciccone requested authorization to perform a left shoulder arthroscopy and decompression, distal clavicle resection and possible bicep tendinitis to relieve Claimant's symptoms. However, as explained, the medical records and persuasive opinions of Drs. Failingwer and Cebrian demonstrate that Claimant likely did not suffer a left shoulder injury as a result of the December 28, 2015 bus accident. Accordingly, the requested left shoulder surgery is not reasonable, necessary or causally related to Claimant's industrial injuries.

Facet Injections

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

11. It is appropriate for an ALJ to consider the *Guidelines* in determining whether a certain medical treatment is reasonable and necessary for a claimant's condition. *Deets v. Multimedia Audio Visual*, W.C. No. 4-327-591 (ICAO, Mar. 18, 2005); see *Eldi v. Montgomery Ward*, W.C. No. 3-757-021 (ICAO, Oct. 30, 1998) (noting that the *Guidelines* are a reasonable source for identifying the diagnostic criteria). The *Guidelines* are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). Nevertheless, the *Guidelines* expressly acknowledge that deviation is permissible.

12. As found, Claimant has failed to prove by a preponderance of the evidence that the cervical facet injections recommended by Dr. Nguyen are reasonable, necessary and related medical maintenance benefits designed to relieve the effects of his December 28, 2015 industrial injuries or prevent further deterioration of his condition. On September 20, 2019 Claimant visited Dr. Nguyen's office and reported 50% pain relief following a C5-C6 transforaminal epidural steroid injection. However, he noted increased pain with his job duties, including looking up into the bus mirror and turning/twisting his head left to right to watch for traffic. Dr. Nguyen subsequently sought authorization for bilateral C4-C7 facet injections for diagnostic and therapeutic purposes.

13. As found, in contrast, Dr. Cebrian persuasively explained that the request for facet injections should be denied. He reasoned that Claimant's injury is nearly four years old and he has been treated consistently for a radiculopathy with 15 epidural steroid injections. Notably, because Claimant had a diagnostic response, the epidural steroid injections confirmed his pain generator. Claimant noted complete resolution of symptoms periodically over the years following epidural steroid injections. Dr. Cebrian commented that, although there was occasional documentation regarding the facets as part of the differential diagnosis, there were never any consistent findings suggestive of facet-mediated pain. Furthermore, after Claimant had a positive response to epidural steroid injections, there was no additional documentation regarding the facets. Based on the four-year delay and extensive treatment, Claimant's facet symptoms are not related to his industrial injury. Moreover, because diagnostic testing has not revealed

proven facetogenic pain, the *Guidelines* do not recommend facet injections. The persuasive opinion of Dr. Cebrian, in conjunction with the extensive medical records and diagnostic testing, demonstrate that Claimant suffered a cervical strain and radiculopathy. Because Claimant's facet symptoms are not related to his December 28, 2015 bus accident, his request for bilateral C4-C7 facet injections is denied and dismissed.

ORDER

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

1. Claimant's request to reopen his December 28, 2015 Workers' Compensation claim based on a change in condition is denied and dismissed.

2. The requested left shoulder surgery is not reasonable, necessary or causally related to Claimant's industrial injuries.

3. Because Claimant's facet symptoms are not related to his December 28, 2015 bus accident, his request for bilateral C4-C7 facet injections is denied and dismissed.

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

DATED: January 2, 2020.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-074-897-001

ISSUES

I. Whether Claimant established that he suffered a compensable injury on February 19, 2018.

II. Whether Claimant established that he is entitled to reasonable, necessary, and related medical treatment.

III. Whether Claimant established he is entitled to temporary total disability benefits.

IV. Claimant's average weekly wage.[1]

V. Whether David Yamamoto, M.D., is an authorized treating provider.

VI. Penalties:

a) Penalties against Respondents.

b) Penalties against Claimant.

FINDINGS OF FACT

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

1. Claimant was born on April 18, 1975, and was 48 years of age at the time of the hearing.
2. Pro Logistics – Employbridge - (i.e., Employer) is an employee staffing company.
3. On July 20, 2016, Claimant was hired by Pro Logistics – Employbridge Holding Company – to work as a mail sorter, at a UPS (United Parcel Service) facility.
4. Claimant performed his job duties at a UPS facility. Claimant's job duties included going into a delivery truck with a pallet jack and removing pallets of boxes. Once the boxes were removed from the truck and were inside the UPS facility, Claimant would sort the mail.
5. Claimant's supervisor, who also worked for Pro Logistics – Employbridge - was Aaron Grimes. Mr. Grimes, however, did not work at the UPS facility with Claimant.

[1] The issue of Claimant's average weekly wage based on his concurrent employment is reserved for future determination - if the Claim is found compensable.

6. Mark Mathies also works for Pro Logistics – Employbridge – and worked at the UPS facility. Mr. Mathies was responsible for supervising the Pro Logistics' – Employbridge – employees, which included Claimant, who were working at the UPS facility. Mr. Mathies, however, worked under the supervision of Mr. Grimes.

7. On February 19, 2018, Claimant was working and unloading a UPS truck with a pallet jack. Claimant testified that while moving a pallet, a box weighing at least 100 pounds fell off the top of a load because it was not shrink wrapped and landed on him. Claimant testified that after the 100-pound box landed on him, two coworkers, Gabe and Lance, had to come over and physically lift the 100-pound box off of him.

8. Claimant testified that he did not feel pain until about 15 minutes later when he started sorting mail at his station. Claimant testified he felt pain in his neck, right side of his neck, right shoulder, right side of his back, and the lower right side of his back. Claimant testified that approximately 40 minutes after the incident, he went to his supervisor, Mr. Mathies, and told him that he was not feeling well and was going to leave work. Claimant did not, however, tell Mr. Mathies he was leaving because he had just been injured.

9. Claimant further testified that after the incident, he left work between 5 and 6 a.m. and walked to a light rail station in order to go straight to the Emergency Room at Denver Health. However, the medical report from Denver Health indicates Claimant arrived at 10:50 a.m. It does not seem reasonable for it to have taken Claimant approximately 5 hours to get to the emergency room. Therefore, Claimant's testimony that he left work and went straight to Denver Health is inconsistent with the medical records from Denver Health. Consequently, Claimant's testimony regarding this issue is not found to be credible.

10. According to the medical records, Claimant arrived at the Denver Health Emergency Room at 10:50 a.m. Claimant was seen by Physicians Assistant William Drew at 11:35 a.m. The history documented by PA Drew indicates a package weighing 50-100 pounds fell on Claimant's right shoulder. PA Drew also documented that Claimant denied any neck pain or back pain. Claimant's testimony at hearing that the box weighed at least 100 pounds and that he developed pain in his neck and low back after the incident is inconsistent with the medical records from Denver Health. Therefore, Claimant's testimony regarding the weight of the box and the symptoms he felt after the box fell and hit him is not found to be credible.

11. PA Drew physically examined Claimant's right shoulder. The only findings he noted was some tenderness on the posterior of Claimant's right shoulder girdle.[2] PA Drew specifically noted Claimant's right shoulder had normal range of motion and there was no swelling or deformity. X-rays were taken, and they were normal. At discharge, Claimant was diagnosed with a contusion. He was prescribed ibuprofen (Advil/Motrin) and was told to take it as needed for mild

[2] These findings are similar to those noted when Claimant presented to Denver Health on July 13, 2016, approximately 2 weeks after Claimant was involved in an automobile accident.

pain, which was specifically noted to be only a 1-2. Claimant was also instructed to call his employer in order to see to which workers' compensation facility he should follow up with and to file a claim. As found above, despite Claimant's testimony to the contrary, there was no indication in the medical records from that date that Claimant was also complaining of neck and low back pain on February 19, 2018.

12. On February 19, 2018, a To Whom It May Concern letter was prepared by PA Drew which states, "Doron Foster was seen and treated in our emergency department on 2/19/2018. He may return to work on 02/21/18." There was no indication in the letter why Claimant could not work for one day and there was no indication Claimant might have been injured at work.

13. Claimant testified he called his supervisor Mr. Mathies and then sent him a text with a picture of the note taking him off work for one day. Claimant testified Mr. Mathies said he would call Mr. Grimes and discuss the matter with him.

14. Mr. Mathies also testified at hearing. Mr. Mathies testified Claimant did tell him on February 19, 2018, that he was not feeling well and wanted to go home. Mr. Mathies also testified that Claimant did not tell him that he was injured due to a box falling on him at work or due to any other incident at work.

15. Mr. Mathies testified that Claimant did send him a text with the letter from Denver Health excusing Claimant from work. He also testified that once he found out Claimant was alleging he was hurt by a box falling on him at work, he investigated the matter by talking to various co-workers. After investigating the matter, it was his understanding that a box did fall off a pallet, but yet it grazed Claimants' shoulder. This was confirmed by another co-worker, or manager, Kyle, who told Mr. Mathies he heard a box hit the floor the morning of the incident. Mr. Mathies' testimony is found to be credible and persuasive. Moreover, his testimony discredits Claimant's testimony that the box fell on Claimant and two co-workers, Lance and Gabe, had to lift the 100-pound box off of Claimant. If the box fell directly on Claimant, as he described during his testimony, and two co-workers had to lift the box off of him, Kyle would not have heard the box fall to the ground since it would have landed on Claimant instead of the floor.

16. On or about June 30, 2016, prior to being hired by Employer, Claimant was involved in a motor vehicle accident in which he injured his right shoulder.

17. On July 13, 2016, approximately two weeks after the motor vehicle accident, Claimant sought medical treatment at Denver Health for his right shoulder injury. Claimant complained of right shoulder pain for the last 2 weeks. The chart note also indicates Claimant had a "GSW (gunshot wound)" under past medical history. At the July 13, 2016, evaluation, Claimant's musculoskeletal examination demonstrated decreased range of motion, tenderness and pain and spasm in the right shoulder. Moreover, review of the pain diagram shows Claimant's pain to be in the right back scapula area.

18. At hearing, Claimant was questioned about the extent of the injuries he sustained in the 2016 motor vehicle accident. Claimant testified that he was not hurt in the accident, but that he just went to the doctor to make sure he was not hurt. Claimant also added that the 2016 motor vehicle accident resulted in "just pain in back." First, it does not make sense that Claimant felt he was not hurt in the motor vehicle accident, but without any symptoms, went to the emergency room to make sure he was not hurt. Moreover, the July 13, 2016, medical report from Denver Health is in stark contrast to Claimant's hearing testimony. As found above, the July 13, 2016, medical report demonstrates Claimant complained of hurting his right shoulder and that he also had pain in the back of his right scapula. The clinic notes also indicate Claimant had decreased range of motion, tenderness, pain, and spasm in his right shoulder. In addition, the pain diagram showed Claimant's pain to be in the right back scapula area. Claimant's misrepresentation that the 2016 automobile accident only caused back pain, but not right shoulder pain, severely discredits Claimant's testimony as well as the statements he made to various medical providers and Employer about the incident that occurred on February 19, 2018.

19. On March 16, 2018, Claimant returned to Denver Health. At this visit, Claimant sought treatment for a rash. And, despite Claimant's contention that he suffered a significant shoulder, neck, and back injury, after a 100-pound box fell on him – there was no notation made that Claimant was having any other medical problems. The report from that visit indicates Claimant:

    a. Was in no apparent distress,

    b. His neck had normal range of motion, and

    c. All other musculoskeletal systems had normal range of motion.

    Claimant also testified at hearing that due to his work accident, he is in pretty bad shape. Such testimony is inconsistent with going to Denver Health's emergency department for treatment of a rash, without any notation being made about what Claimant contends is quite a debilitating work injury that effects his neck, right shoulder, and low back. Although Claimant testified that Denver Health told him they do not treat work injuries, and appears to be contending that is why they did not note any pain complaints related to his alleged work injury in the March 16, 2018, medical note, such contention is not found to be credible. If Claimant complained of other musculoskeletal problems, such complaints would have most likely made it into the medical record from that visit. Therefore, Claimant's presentation to Denver Health on March 16, 2018, for a rash, without concurrent complaints of the symptoms he contends were caused by the work accident, discredits Claimant's contention that he suffered a compensable injury at work and that such injury requires ongoing treatment.

20. On March 26, 2018, Claimant was evaluated by Dr. Yamamoto. Claimant was directed to Dr. Yamamoto by his attorney. Although the Denver Health records note Claimant's reported pain on the date of the accident was 1-2/10, Claimant reported to Dr. Yamamoto that his shoulder and upper back pain was 8/10. Claimant also complained of low back pain, although it is not clear if he indicated

that his low back pain was also 8/10. Dr. Yamamoto ultimately diagnosed Claimant with strain of the right shoulder, strain of the upper back, and strain of the lumbar region. He also placed Claimant on modified duty and gave Claimant restrictions of no reaching overhead with right arm, a lifting limit of no more than 10 pounds, no repetitive lifting more than 5 pounds, no carrying over 5 pounds, and no pushing or pulling more than 10 pounds.

21. On April 26, 2018, Dr. Yamamoto evaluated Claimant again and noted that based on Claimant's persistent complaints, Claimant needs an MRI of his right shoulder and physical therapy for his upper and lower back. Dr. Yamamoto also continued Claimant's restrictions.

22. On May 21, 2018, Dr. Yamamoto again evaluated Claimant and indicated Claimant started experiencing increased pain going down his right arm and numbness in his right arm and hand. Dr. Yamamoto recommended Claimant receive an EMG.

23. On July 18, 2018, Dr. Yamamoto evaluated Claimant and diagnosed Claimant with a strain of the right shoulder muscle, strain of the back wall thorax, strain of the cervical muscle, paresthesia of the right arm, and thoracic outlet syndrome. He again opined that Claimant's need for treatment is due to his work related injury.

24. On August 20, 2018, respondents took the deposition of Dr. David Yamamoto. Dr. Yamamoto opined Claimant suffered a work related injury on August 19, 2018 and opined Claimant needs ongoing care and has ongoing restrictions. Dr. Yamamoto opined Claimant's report of injury has been consistent throughout treatment and Claimant's report of injury was also consistent with the medical records from Denver Health. However, the ALJ does not find Dr. Yamamoto's opinions to be reliable or persuasive because he relied upon the statements of Claimant in formulating his opinions and the ALJ has found Claimant's statements regarding the incident and the development of his symptoms after the incident to not be credible.

25. Mr. Grimes testified at hearing. He testified he called Claimant on February 20th and informed him that he had to come into the office and fill out some paperwork regarding his workers' compensation claim. He further testified that Claimant never returned to work or came into the Pro Logistics office to complete any paperwork regarding his alleged workers' compensation claim.

26. Claimant testified he notified Employer of the injury via a text message to Mr. Grimes. Claimant submitted various text messages between himself and Mr. Grimes. *See Ex. 5.* On February 21, 2018, the day Claimant was able to return to work, pursuant to the letter from PA Drew, there are some text messages indicating he called in and said he could not work because his back was sore. There is also a text message in which Claimant states he went to the doctor and they said "I need to do work comp." *See Ex. 5.*

27. However, Mr. Grimes also testified that the text messages submitted by Claimant do not appear to contain all of their communications via text. The text messages

provided by Claimant in Exhibit 5 do not appear to be complete regarding the conversations between Mr. Grimes and Claimant. The ALJ finds Mr. Grimes' testimony regarding this issue to be credible and persuasive.

28. Mr. Grimes also testified that he attempted to follow up with Claimant a number of times, but was never able to get in touch with him to discuss in detail the alleged accident and to have Claimant come in and fill out the proper paperwork. The ALJ also credits this portion of Mr. Grimes' testimony.

29. Allison M. Fall, M.D. performed an Independent Medical Examination on behalf of Respondents. She issued a report and testified via deposition.

30. As set forth in her report, Dr. Fall noted that Claimant's physical examination at Denver Health's emergency department was benign. She also indicated that despite escalating pain complaints, her examination of Claimant was unremarkable. She concluded by stating that Claimant's escalating pain complaints with high levels of reported pain involving multiple areas of his body were non-physiologic and were not supported by objective findings. Dr. Fall's findings and conclusions are found to be credible and persuasive.

31. During her deposition, Dr. Fall was offered and accepted as a medical expert in physical medicine and rehabilitation. Dr. Fall testified, and her testimony is found to be credible and persuasive, that there is no objective medical evidence to support any diagnosis other than a contusion to the back of the right shoulder as of February 19, 2018.

32. Dr. Fall testified, and her testimony is found to be credible and persuasive, that there were no residual findings of the contusion when she evaluated Claimant in August of 2018. Dr. Fall further testified based upon the objective medical evidence, Claimant may not have required any treatment for the contusion.

33. Dr. Fall specifically testified, and her testimony is found to be credible and persuasive, there is no objective medical evidence to support any type of lumbar spine diagnosis as it relates to the incident of February 19, 2018, nor is there any objective medical evidence to support neck pain as a result of the alleged incident, right arm numbness, or thoracic outlet syndrome.

CONCLUSIONS OF LAW

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

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a

fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

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

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

Compensability

Claimant was required to prove by a preponderance of the evidence that at the time of the alleged injury he was performing service arising out of and in the course of the employment, and that the alleged injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The Act creates a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" contemplates the physical or emotional trauma caused by an "accident." An "accident" is the cause and an "injury" is the result. No benefits flow to the victim of an industrial accident unless the accident causes a compensable "injury." A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.,* W.C. No. 4-650-711 (ICAO February 15, 2007).

Moreover, a pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990).

As set forth above, Claimant's testimony was not found to be credible or reliable for a number of reasons. First, Claimant testified that although he was involved in a motor vehicle accident in 2016, he did not injure his right shoulder in that accident. According to Claimant's testimony, the only injury or pain that resulted from the motor vehicle accident was back pain. However, as set forth in the medical records from 2016 involving treatment for the motor vehicle accident, Claimant was treated for a right shoulder injury.

Second, not only did Claimant deny hurting his shoulder during the 2016 motor vehicle accident, Claimant's right shoulder symptoms which resulted from the 2016 motor vehicle accident are very similar to the symptoms he relates to the February 19, 2018, work incident.

Third, Claimant testified that after the incident, and before he was seen at Denver Health, he developed pain in his neck, right shoulder, and right lower back. However, despite this testimony, Claimant's medical records from Denver Health indicate Claimant denied neck and back pain.

Fourth, on the day of the accident, Claimant's pain complaints were minimal. His pain complaints were a 1-2 and Claimant was prescribed Motrin/Advil. Then, on March 16, 2018, Claimant returned to Denver Health due to a rash. The medical records from this visit are silent as to any ongoing shoulder or other musculoskeletal pain complaints. Thereafter, on March 26, 2018, Claimant presented to Dr. Yamamoto with 8/10 shoulder and upper back pain complaints as well as ongoing low back pain.

Fifth, Dr. Fall evaluated Claimant. As set forth in her report, Claimant's physical examination at Denver Health's emergency department was benign. Moreover, despite escalating pain complaints, her examination of Claimant was unremarkable. She also opined that Claimant's escalating pain complaints with high levels of reported pain involving multiple areas of his body are nonphysiologic and are not supported by objective findings. Dr. Fall also testified that Claimant might not have required any medical treatment. Dr. Fall's opinions are consistent with the medical records from Denver Health and the testimony of the Employer witnesses and therefore the ALJ found her opinions to be credible and persuasive.

Sixth, there was testimony at hearing that another co-worker or manager heard a box hit the ground the morning of February 19, 2018. However, there was no credible corroborating evidence presented that the box landed on Claimant and that two co-workers had to lift the box off of him- as alleged by Claimant. Had such occurred, it would be unlikely a co-worker would have heard the box hit the floor.

Seventh, Claimant indicated that after the accident occurred, he left work approximately 30 minutes later and went straight to Denver Health. However, medical records from Denver Health indicate Claimant did not arrive at Denver Health until approximately 5 hours after Claimant left work. Although it is not uncommon for someone to make an honest mistake when trying to remember exactly what time an incident occurred and the timing of events after the incident, this is an additional inconsistency which caused the ALJ to find Claimant was not a credible or reliable witness or historian.

Because Claimant is not found to be credible or reliable, any diagnoses which flow from Claimant's statements as to what happened, when it happened, and the extent of his symptoms are not found to be credible or persuasive. Therefore, this ALJ does not find Dr. Yamamoto's reports and testimony to be persuasive regarding Claimant's current condition, need for treatment, restrictions, and the cause of such because he relied upon the unreliable statements of Claimant in formulating and rendering his opinions.

Moreover, the mere fact that Claimant presented to Denver Health and Dr. Yamamoto and both provided medical treatment and work restrictions does not automatically require a finding that Claimant suffered a compensable work injury. The medical treatment and work restrictions were provided to Claimant based on Claimant's statements, which again, this ALJ did not find credible or reliable. Therefore, Claimant failed to establish by a preponderance of the evidence that the incident at work caused the need for medical treatment. Moreover, Claimant failed to establish by a preponderance of the evidence that the incident at work caused any disability.

A compensable injury is one that causes disability or the need for medical treatment. The ALJ concludes Claimant failed to establish by a preponderance of the evidence that he suffered an injury at work that caused any disability or the need for medical treatment. Therefore, Claimant failed to establish that he suffered a compensable injury.

Based on the above, the remaining issues raised by the parties are moot.

ORDER

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

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

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

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

DATED: January 3, 2019

/s/ Glen Goldman

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

ISSUES

The issue raised at hearing involves Claimant's entitlement to medical benefits. The question answered by this decision is:

I. Whether Claimant established, by a preponderance of the evidence, that a L4-S1 fusion surgery, as recommended by Dr. Stanton is reasonable, necessary, and related to Claimant's July 8, 2015 injury.

FINDINGS OF FACT

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

1. Claimant, who was employed as an HVAC installer, was injured on July 8, 2015, when he fell through an unfinished ceiling and landed on his left hip injuring his left shoulder and low back.

2. The claim for injury was admitted and Claimant subsequently initiated treatment with the physicians at EmergiCare medical clinics. On July 25, 2015, Claimant underwent an MRI of the lumbar spine without contrast secondary to complaints of "leg weakness and low back pain." The MRI was completed at Peak Medical Imaging and was interpreted by Dr. Shawn Cory. Per Dr. Cory's report, the MRI revealed the following:

> A "3mm anterolisthesis, right foraminal annular tear, mild central spinal stenosis, moderate bilateral lateral recess stenosis, and moderate bilateral neural foraminal narrowing at L4-L5. Moderate to severe facet joint arthropathy and surrounding marrow edema at the same level" consistent with a degenerative etiology and at L5-S1, "a small to medium-sized left lateral recess/foraminal disc herniation . . . that displaces the traversing left S1 nerve roots and contribute to moderate left neural foraminal narrowing.

3. Given the MRI findings, Claimant was referred to Dr. Paul Stanton for orthopedic evaluation. Dr. Stanton evaluated Claimant on August 20, 2015. Dr. Stanton documented the following history:

> On 7-8-2015, [Claimant] was walking through a job site in a roof area, slipped through the roof and landed [some] number feet down onto the ground on a concrete floor. Since that time he has had increasing pain and weakness in his lower extremities.

* * *

> He reports increasing symptoms in both legs especially with overhead activity and lumbar extension. He feels shifting and clicking in his spine and at times it feels unstable with certain maneuvers.

4. Dr. Stanton performed a physical examination, obtained a set of flexion/extension x-rays and reviewed Claimant's July 25, 2015 MRI. He opined that Claimant's imaging supported a finding of a Grade I spondylolisthesis with angular motion, primarily left sided disc herniation and significant foraminal stenosis bilaterally. In combination, the imaging studies and Claimant's pronounced symptoms while upright and moving lead Dr. Stanton to opine that Claimant was suffering from dynamic instability at the L5-S1 segment in addition to the spondylolisthesis at L4-5. Dr. Stanton diagnosed Claimant with L5-S1 end stage disc disease with large left lateralizing disc bulge causing foraminal stenosis and nerve root contact; L4-5 Grade I spondylolisthesis with fluid in the facets; and left greater than right lower extremity radiculopathy and weakness. He explained that Claimant's spinal problem was "complex" and as he did not have any significant symptoms before the fall, he likely exacerbated the noted pathology at L4-5 and L5-S1 by plunging through the ceiling to the concrete below.

5. Dr. Stanton recommended conservative care to begin, including epidural steroid injections at L4 through S1. However, he opined that if Claimant failed to improve with conservative care, he would likely require stabilization surgery at L4-5 and L5-S1. He did not feel as if a discectomy would be in Claimant's best interests, primarily due to Claimant's symptoms that pointed to the presence of dynamic instability at L5-S1 as well as the existence of the spondylolisthesis at the L4-5 spinal segment.

6. In addition to his low back injury, Claimant sustained a left shoulder injury as part of his July 8, 2015 fall. This injury required surgical intervention and effected Claimant's ability to participate in low back treatment. As of June 15, 2016, Claimant had undergone 43 physical therapy appointments for his shoulder, which was doing well. But it was also reported that Claimant's "back [was] killing him." Claimant underwent a second lumbar spine MRI on June 16, 2016 at Southwest Diagnostic Centers. This MRI, per the radiologist's reading, demonstrated "moderate bilateral facet arthropathy with minimal anterolisthesis and disc bulge with mild central canal and mild bilateral foramina stenosis" at L4-5 in addition to "mild disc [bulging] with shallow left foraminal protrusion resulting in mild to moderate left foramina stenosis with no central canal or right foramina stenosis" at L5-S1. No comparison to the July 25, 2015 MRI was made.

7. Claimant was referred to Dr. Michael Rauzzino for further surgical evaluation on August 17, 2016. As of this appointment, it was noted that Claimant had SI joint injections, but no other injections for his lower back, despite the recommendation by Dr. Stanton a year prior. Claimant reported continued achy 2/10 pain in his low back aggravated by standing, walking, sitting, driving and climbing stairs.

He reported numbness in the left thigh radiating down to his left foot at times. Dr. Rauzzino referenced the June 16, 2016 MRI noting that he did not have the film available for review. He requested that Claimant obtain the films for review. He also noted a need to obtain new flexion and extension x-rays of the back to address Claimant's "stability".

8. Claimant returned to Dr. Rauzzino for follow-up on September 26, 2016. In his report from this encounter, Dr. Rauzzino references that an August MRI "showed L4-L5 anterolisthesis with left sided L5-S1 protrusion and multilevel degenerative changes. Based upon the evidence presented, the ALJ finds Dr. Rauzzino's reference to an August MRI a likely error. There is no convincing evidence to support a finding that Claimant underwent magnetic resonance imaging in August. Careful review of the MRI findings from July 25, 2015 and June 16, 2016 leads the ALJ to find that Dr. Rauzzino was probably referencing the findings of the June 16, 2016 MRI in his September 26, 2016 report. The ALJ finds no record support to indicate that Dr. Rauzzino ever reviewed the findings of Claimant's July 25, 2015 lumbar MRI.

9. Claimant's flexion and extension x-rays, as performed in Dr. Rauzzino's office and reviewed by him, revealed retrolisthesis of L5 on S1 that did not change from neutral position in flexion/extension. He agreed with Dr. Stanton's assessment that there was a Grade I spondylolisthesis at L4-5 which he (Dr. Rauzzino), did not feel changed in flexion but had some reduction in extension. Dr. Rauzzino explained to Claimant that there is not a "easy" surgery that one would do that would have a high likelihood of success." He recommended facet injections and ESIs to avoid surgery, "if at all possible." Contrary to Respondents' assertion, the ALJ does not interpret Dr. Rauzzino's statements concerning surgery as an absolute indication that Claimant is a non-surgical candidate. Rather, the ALJ finds that Dr. Rauzzino simply indicated that any surgery contemplated would not be "easy" and should be avoided if possible because the chances of success were not great.

10. Post examination with Dr. Rauzzino, Claimant underwent injections with Dr. Simon Blau, additional care at Concentra, and was subsequently placed at maximum medical improvement (MMI) on December 23, 2016, by Dr. Nicholas Kurz. Claimant contested the findings/conclusions of Dr. Kurz and requested a Division Independent Medical Examination (DIME). Claimant underwent the requested DIME with Dr. Timothy Hall on April 10, 2017. Dr. Hall found that Claimant was not at MMI and recommended further treatment with Dr. Blau.

11. Claimant returned to Dr. Blau on September 5, 2017 for bilateral medial branch blocks at L4-5 and L5-S1. Dr. Blau documented on September 11, 2017 that Claimant continued to have back pain, noting that it can be sharp in nature at times. On physical examination, Claimant was tender to palpation of the bilateral lumbar vertebral muscles and that there was pain with facet loading bilaterally. It was documented that Claimant had a diagnostic response to the blocks and Dr. Blau recommended repeating them to confirm.

12. Claimant underwent a second set of bilateral medial branch blocks at L4-5, L5-S1 on October 31, 2017. It was noted that Claimant's pain was a level 3 out of 10 at the time, but he reported his pain shoots up to around 8/10 with aggravating activities, such as traversing stairs. Claimant subsequently underwent bilateral L4-5, L5-S1 radiofrequency neurotomies with Dr. Blau on November 28, 2017. Claimant reported 100% relief of his symptoms 30 minutes after the procedure. Claimant followed up with Dr. Blau on December 21, 2017 reporting about 40% improvement in his lower back symptoms. Nonetheless, Claimant continued to have left sided lower back pain radiating into his left iliac crest, buttock, and posterior thigh, as well as some right-sided lower back pain that was not radiating. Dr. Blau recommended physical therapy and core strengthening as post lumbar RF protocol. At Claimant's next visit with Dr. Blau on January 12, 2018, he recommended continued physical therapy and low back trigger point injections. The aforementioned trigger point injections were administered on January 26, 2018. The trigger point injections provided no relief and Claimant reported continued left sided lower back pain with internal rotation of his left hip. Consequently, Dr. Blau recommended a left hip MRI to see if Claimant's pain was emanating from the hip. A left hip MRI was performed February 22, 2018 and was interpreted as unremarkable for hip pathology.

13. On March 15, 2018, Claimant reported to Concentra with complaints of severe 10/10 pain that occurred "while he was just sitting there". Claimant complained of radicular pain. Straight leg raise on the left was positive on physical examination. Consequently, Dr. Natasha Deonarain recommended a repeat MRI, along with a referral to an orthopedic spine surgeon. The aforementioned MRI was performed immediately following Dr. Deonarian's evaluation and demonstrated minimal spondylosis of the L4-5-disc space with a small annular fissure in the right foraminal portion of the disc associated with mild to moderate arthropathy of the facet joints. The radiologist could not rule out a small fracture of the facets. The radiologist also noted minimal spondylosis of the L5-S1 disc space without evidence of nerve root impingement or cauda equina syndrome, along with a small annular fissure in the left foraminal portion of the disc.

14. On April 11, 2018, Claimant underwent a follow-up DIME with Dr. Hall, who recorded that he reported that the procedures performed by Dr. Blau had led to 50%-60% improvement in low back pain. "This is in the area of the belt line. Lower and out to the right, he still has a lot of symptoms". Dr. Hall reviewed the March 15, 2018 MRI scan and opined that he did not find it to be all that different from the original MRI. He also noted that his examination on this date was not that much different than his prior examination and that neurologic examination of the lower extremities reveals no specific motor weakness. No wasting, reflexes were symmetrical, straight leg raise (SLR) caused some tightness and pulling in his back, but no leg symptoms. Dr. Hall opined that Claimant had reached MMI as of January 8, 2018, and provided impairment ratings for both his injured shoulder and low back. He also recommended ongoing maintenance care for Claimant's lumbar spine for at least the next three years.

15. On April 20, 2018, Claimant returned to Dr. Blau noting that he continued to have pain along his lateral lower back region bilaterally. Dr. Blau recorded that "[Claimant] states that the pain feels as if he was wearing at tight belt." At hearing Claimant testified that at this appointment, he advised Dr. Blau, that he was experiencing radiculopathy down his legs. He further stated that he had as he had repeatedly advised Dr. Blau of these symptoms in the past. On this date, Dr. Blau issued a report noting that upon examination claimant's neurologic examination was negative, and that he had reviewed the March 15, 2018 MRI scan, and "this does not appear to be surgical". Dr. Blau agreed with Dr. Hall's opinions regarding MMI, and his impairment ratings.

16. Respondents filed a Final Admission of Liability (FAL) admitting to the impairment rating provided by Dr. Hall. The FAL also admitted to reasonable, necessary and causally related medical benefits by an authorized treating physician post MMI.

17. As noted, Dr. Deonarain referred Claimant for additional orthopedic evaluation after he experienced an increase in his pain on March 15, 2018. Claimant returned to Dr. Stanton for said evaluation on April 24, 2018. Dr. Stanton documented that Claimant had undergone a lot of non-surgical care for his back, including rhizotomy, all without providing long-term relief. Claimant reported continued "shifting and clicking" in his spine with lifting, bending, and twisting, and stated that he felt better while lying in the supine position. On physical examination, Dr. Stanton appreciated a "step off" in the spinous process of the lumbar spine. He performed additional flexion and extension x-rays in his office on the date of this visit and "opined that these x-rays demonstrated significant collapse at the L5-S1 disc space with bone on bone contact posteriorly and retrolisthesis, facet spondylosis, and resultant foraminal stenosis. Dr. Stanton measured the L4-5 spondylolisthesis to be approximately 4mm. He indicated further that the MRI of Claimant's lumbar spine demonstrated a reduction in his spondylolisthesis at L4-5 when lying supine indicating mobility of the lumbar spine.

18. Dr. Stanton opined, "At this point, I think [Claimant's] symptoms are mainly one of dynamic instability." He indicated that Claimant had obvious signs of instability at the L4-5 level in tandem with significant collapse at his L5-S1 level, which was consistent with Claimant's dermatomal symptomatology. Dr. Stanton felt a discectomy and laminectomy would only destabilize Claimant's spine further, so he proposed a reconstruction of Claimant's L4 through S1 segments to fully address the instability and stenosis. Dr. Stanton formally requested authorization to perform an L4-S1 anterior-posterior fusion for spondylolisthesis, stenosis, and lumbar degenerative disc disease on April 27, 2018. Respondents subsequently denied the request on May 10, 2018 and sought an independent medical examination (IME) with Dr. Brain Reiss.

19. Dr. Reiss completed a records review, took a history from Claimant and completed a physical examination as part of his IME. His review of the records documented only one mention of a complaint of back pain and stiffness prior to the July 8, 2015 industrial injury. Following his IME Dr. Reiss authored a report in which he

opined that the findings at L4-5 on the September 14, 2016 flexion/extension x-rays represented a "degenerative spondylolisthesis" that was "probably" minimal and "probably" not meeting the definition of instability. Nonetheless, he indicated that he was unable to accurately measure the extent of the spondylolisthesis from this x-ray. In review of the MRIs, Dr. Reiss opined that, as of the 2018 MRI, he did not believe the foraminal stenosis at L5-S1 was clinically significant enough to cause nerve root irritation. He felt it possible, though not probable, that a fusion at L4-5 may improve Claimant's symptomatology, but he did not see a reason for the L5-S1 to be fused.[1] Dr. Reiss felt Claimant needed nothing more than core strengthening exercises to address his ongoing symptoms. Despite his acknowledgement of Claimant's lack of pre-existing symptoms or treatment for his lower back condition, Dr. Reiss opined that surgery for Claimant's spondylolisthesis would be unrelated to the work incident where Claimant fell through a ceiling and injured his back. Similar to his prior reports to Dr. Stanton, Claimant reported to Dr. Reiss that he felt better while lying down, and that if he moved, he would get a sharp pain.

20. After complete review of the medical record and the diagnostic imaging, Dr. Reiss disagrees that a fusion is indicated for the following medical reasons:

- His review of the diagnostic studies, fails to reflect presence loss of disc space height; or dynamic instability; but rather, refutes this assertion;

- The flexion/extension x-rays do not evidence sufficient movement per the Low Back Treatment Medical Treatment Guidelines to warrant consideration of a fusion; and,

- The medical record evidences that Claimant has repeatedly and consistently demonstrated a normal neurologic evaluation, which supports the conclusion that no radiculopathy exists; and hence, pursuant to the Medical Treatment Guidelines, and as admitted by Dr. Stanton in his deposition, fusion surgeries have poor outcomes for the treatment of primarily low back pain**.**

21. Dr. Timothy Hall's deposition was taken on September 26, 2018. Dr. Hall was of the opinion that if Claimant required surgery, it would certainly be work related; however, he was not confident that Claimant's pain generator had been adequately identified based on review of the records he had at the time of the DIME and the recent IME report from Dr. Reiss. (Depo. 11:8 – 12:6). Nonetheless, based upon the information he had, Dr. Hall opined that it is unlikely that this claimant will do well with a large fusion procedure. (Dr. Hall Dep., p. 8-11).

[1] However, Dr. Reiss did indicate that there is already degeneration above and below the L4-L5 level. (Clmt. Ex. 12, p. 271).

22. Dr. Stanton's deposition was taken on October 23, 2018 in his capacity as an expert in orthopedic surgery that was fellowship trained in orthopedic spine surgery. Dr. Stanton performs several surgeries of the lumbar spine per week and commonly performs the same procedure he is proposing for Claimant. (Dr. Stanton Dep., pp. 5:9 – 6:4). Dr. Stanton clarified that in his medical records, such as the August 20, 2015 note, that the diagnoses listed under assessment only have to do with coding and their software, and that his diagnoses of Claimant were numbered 1, 2, and 3 below the 7 documented diagnoses. (Dr. Stanton Dep., pp. 10:11 – 11:4). Dr. Stanton explained his first diagnosis was that of L5-S1 end stage disc disease with large lateralizing disc bulge causing foraminal stenosis and nerve root contact, meaning the disc is collapsing and bulging as a component of the collapse, and that would cause "sciatic" type pain down the leg. His second diagnosis of L4-5 Grade 1 spondylolisthesis with fluid in the facets meant that there is instability at the L4-5 level, and that the fluid collecting in the facet joint indicates there is gapping in the facet, which is also consistent with a spondylolisthesis or movement at the L4-5 level. (Dr. Stanton Dep., p. 11:5-21). Dr. Stanton based his original opinion on his examination of Claimant, flexion/extension x-rays, and the July 2015 MRI. He also made it clear that he reviews the films himself before reading the report of the radiologist. (Dr. Stanton Dep., p. 12:2-21).

23. Dr. Stanton opined that once instability or movement of the spine is found, removing the disc alone typically does not resolve the symptoms and the patient will eventually require a revision surgery in the near future. (Dr. Stanton Dep., p. 13:7-15). Dr. Stanton was asked about dynamic instability of the spine, which he explained is collapse of the disc space under physiologic load. So standing, lifting, bending, twisting, or moving causes collapse of the disc space because the disc is insufficient in strength to hold the spine stable. Typically, a patient's symptoms diminish when they are laying down on their back because there is less gravity on the spine. Dynamic instability is typically treated with a fusion surgery. (Dr. Stanton Dep., pp. 13:16 – 14:9).

24. Dr. Stanton also testified that Claimant had spondylolisthesis, which is a different type of spinal instability where one vertebral body slips forward on another. He used the analogy of dynamic instability being up and down collapse, like the shocks on a car, whereas spondylolisthesis is forward movement or slippage of the vertebra on one another. (Dr. Stanton Dep., pp. 14:19 – 15:8). As noted above, Dr. Stanton documented a "step off" of Claimant's lumbar spine during his physical examination. He testified that a step off that can be palpated is an indication that you are able to feel the instability or spondylolisthesis at the segmental level involved, i.e. the L4-5 level in this case. (Dr. Stanton Dep., pp. 15:25 – 16:9). Dr. Stanton clarified exactly what was performed in his office regarding the x-rays. There are standing x-rays, including flexion and extension, which shows the spine under the physiologic load of gravity. "When the patient moved, we saw significant collapse at the L5-S1 level or disc space with bone-on-bone contact in the back of the spine and retrolisthesis. This means the vertebral body is sliding backwards. As a result of that, there was a decrease in the nerve root window or height or foraminal stenosis. It also demonstrated again the spondylolisthesis or forward slipping of the vertebral body at L4-5." (Dr. Stanton Dep., pp. 16:16 – 17:9).

Dr. Stanton indicated that his proposed surgery would be intended to relieve Claimant of both his back pain and increase his function. (Dr. Stanton Dep., p. 18:9-14).

25. Dr. Stanton was asked questions about Dr. Reiss's report specifically. Dr. Stanton essentially agreed with Dr. Reiss's readings of the MRIs, but explained that without the context of the x-rays, the MRI alone "certainly does not provide the diagnosis" and therefore, the justification for surgery. He reiterated his opinion that the findings on imaging while lying down are not indicative of Claimant's condition while standing as there is no gravity on the spine when lying supine. Accordingly, if somebody were to read the MRI without contemporaneous comparison with the weight bearing x-rays, they would miss or not be able to diagnose Claimant's pathology correctly. (Dr. Stanton Dep., p. 19:1-22).

26. Dr. Stanton was asked about Dr. Reiss's opinion on page three of his report, paragraph 8, and his disagreement with Dr. Stanton's reading of the imaging. Dr. Stanton explained the following as to why Dr. Reiss's opinion is incorrect: "I think there is more rotational movement on the standing X-rays. I think there is more translational movement or reduction on the supine MRI, and that's why it's important to compare those two things. And as to say -- you know, contrary to my suggestion of bone on bone at L5-S1, when people think of bone-on-bone contact, they are looking at the center of the disc space. And I agree, in the center of the disc space, where you would typically look, there is not bone-on-bone contact; but at the back of that disc space, during that retrolisthesis, there is contact. And that's what generates the foraminal narrowing. Typically, that's the more common scenario in dynamic instability of this nature." (Dr. Stanton Dep., pp. 20:16 – 21:6). Dr. Stanton opined that he personally found enough instability to warrant surgery. He explained that four or more millimeters of movement is typically the accepted definition for what is approved for surgery by most insurance companies, although he would say as little as 2 to 3 millimeters of movement can be symptomatic, depending on the patient's individual anatomy. Regarding Claimant's spondylolisthesis Dr. Stanton was clear when he stated, ". . . I measured it, he had four millimeters or greater in his L4-5 level." (Dr. Stanton Dep., pp. 21:7 – 22:1).

27. Dr. Stanton also addressed Dr. Reiss's suggestion that Claimant only required additional core strengthening to treat his ongoing symptoms. Dr. Stanton testified: "At this point, I don't think it's likely to provide good results. Certainly there is a role early on for core strengthening to see if stabilizing some of the musculature is able to stop the spondylolisthesis, but the important thing to remember is that the lumbar musculature is not designed to decrease translation in a front/back position or an up/down position. The lumbar musculature's job is to contract in an up/down position; so, therefore, those muscles are not optimally aligned to stop spinal instability. So if early therapy is not successful, it's unlikely that adding additional visits is going to solve that problem." (Dr. Stanton Dep., pp. 22:2 – 23-1).

28. Dr. Stanton further disagreed with Dr. Reiss's opinion that Claimant's spondylolisthesis may not represent his pain generator. Dr. Stanton believed it was a

pain generator given Claimant's dermatomal representation of pain, meaning that the areas where he locates nerve pain on examination was consistent with the L4-5, L5-S1 issues. (Dr. Stanton Dep., pp. 23:14 – 24:1). When asked if he felt Claimant had "true instability," Dr. Stanton responded, "For sure." (Dr. Stanton Dep., p. 24:2-4). Dr. Stanton explained that the L5-S1 level should also be fused because fusing just L4-5 would stiffen the spine and make the dynamic collapse at L5-S1 even worse, which would likely precipitate a second surgery. He indicated that he would not recommend the fusion if it were limited to the L4-5 level only. (Dr. Stanton Dep., p. 24:5-23). Dr. Stanton reiterated that Claimant's examination, the location of his pain complaints, and the imaging results all supported his opinion that L4-5 and L5-S1 were the likely pain generators in this case. (Dr. Stanton Dep., pp. 24:24 – 25:10).

29. Dr. Stanton agreed with Dr. Reiss that a fusion surgery should not be performed for axial back pain alone due to arthritis, or for a disc problem without instability, However, he noted that "in the setting of instability, it's very well documented that back pain and associated neurologic symptoms are very well treated and resolved by a lumbar fusion surgery." (Dr. Stanton Dep., pp. 25:11 – 26:8). Dr. Stanton did not feel that more could be done to identify the pain generator in this case. (Dr. Stanton Dep., pp. 26:9 – 27:6).

30. On cross-examination, Dr. Stanton noted that he is not Level II Accredited and is not familiar with the Low Back Medical Treatment Guidelines published by the Division of Workers' Compensation. Regarding the Guidelines, he stated, "whatever the Workmen's Compensation Guidelines are, that has little or nothing to do with the active practice of medicine." (Dr. Stanton Dep. p. 43). Dr. Stanton would go on to state: "If the guidelines will or will not approve a fusion, that's up to the guidelines. I treat each patient individually based on what I think they medically need, based on what their symptoms are, their physical exam shows, and what their imaging shows. So I don't actually look at the insurance many times to find out if it's Workmen's Comp or private insurance or government insurance, it doesn't matter. Every patient gets treated equally using the same good treatment principles and guidelines. Whatever Work Comp has constructed to say that's appropriate for surgery, that's their business. As a board certified practicing spine surgeon, I use good medical practices to take care of all patients in the same way. The Workmen's Compensation population, for me, does not get a second set of guidelines; they don't get treated differently, everybody gets the same care." (Dr. Stanton Depo., pp. 43:13 – 44:13).

31. Dr. Brian Reiss testified at hearing as an expert in the field of orthopedic surgery. Dr. Reiss has been Board Certified in orthopedics for the past 28 years and currently limits his medical practice to disorders of the spine. He has performed a substantial number of fusion surgeries and has been Level II Accredited with the Division of Workers' Compensation since the onset of its program. He is familiar with the content of the Low Back Medical Treatment Guidelines.

32. After reviewing the pertinent records and imaging, including the x-rays obtained at Dr. Stanton's office, Dr. Reiss opined that the hard-medical evidence refutes

the basis for the performance of the surgery recommended by Dr. Stanton. Dr. Reiss opined that while Claimant is probably suffering from work-related back pain, an extensive fusion surgery is not indicated for this back pain. Rather, Dr. Reiss indicated that due to the significant amount of time that has elapsed since the date of injury, Claimant is deconditioned and should partake in core strengthening exercises, which will assist in the relief of his back pain. He explained that Claimant should have undergone core strengthening, which he described as a three-hour course of an exercise program per week for two or three months, early on in the course of his recovery from his injuries. He disagreed with Dr. Stanton's opinion that core strengthening was unlikely to provide any benefit to Claimant three plus years after the fact. Dr. Reiss finds support for his opinion that no surgery of any kind is indicated based upon the content of the reports authored by Drs. Rauzzino, Blau and Hall.

33. Dr. Reiss opined further that Claimant's spondylolisthesis would not be work related. In opining as such, Dr. Reiss noted that, more likely than not, Claimant had a spondylolisthesis prior to his injury but it was not symptomatic because he was not deconditioned. Dr. Reiss testified that he felt Dr. Stanton was "totally speculating" when he opined that Claimant's nerve root at L5 is getting compressed when he stands up. Dr. Reiss agreed that the flexion and extension x-rays taken by Dr. Stanton demonstrated slippage of the L4-5 vertebrae supporting the diagnosis of spondylolisthesis, but he measured it at about 3mm whereas Dr. Stanton measured it to be 4mm or greater. At hearing, Dr. Reiss was asked to measure the slippage at L4-5. He explained that, in order to do this, "You have to use those lovely tools on the top and place the little dot exactly in the appropriate spot and then it measures it for you. The difficulty is placing it in the exact spot." Dr. Reiss reiterated that "[d]epending on where you place your next little dot it can be difficult to measure." Dr. Reiss did admit that Claimant's slippage is "borderline" but was not jumping out as "being unstable" to him.

34. Dr. Reiss also disagrees that the alleged finding recorded by Dr. Stanton in the nature of extensor halluces longus (EHL) and tibialis anterior weakness justifies consideration of surgery. Dr. Reiss opined that Dr. Stanton hedged at his deposition that this finding may be associated with pain. Contrary to this testimony, Dr. Reiss explained that this is not a finding necessitating a fusion, and this alleged neurologic deficit in the L5 distribution was not noted by any other physician, at any other time**.** Dr. Reiss opined that Dr. Stanton's opinion regarding alleged radicular findings is pure speculation and is not supported by Drs. Rauzzino, any reading radiologist or other examining physician or other objective evidence.

35. Dr. Reiss disagrees with Dr. Stanton's opinion that the March 15, 2018 MRI evidences a large broad-based disc bulge at L5-S1 with significant tightness around the nerve root. Using the MRI images in Court, Dr. Reiss pointed to where the L5-S1 nerve root lied and opined that no compression existed to support Dr. Stanton's claim of nerve root compression. Dr. Reiss opined that without true radiculopathy, or neurologic compromise, a fusion is not indicated.

36. The ALJ finds that Claimant has established by a preponderance of the evidence that the surgery recommended by Dr. Stanton is reasonably necessary and related to the original work injury.

CONCLUSIONS OF LAW

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

Generally

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

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

C. Assessing weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the ALJ. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo.App. 2008). To the extent, expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); see also, *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo.App. 1992) (ALJ may credit one medical opinion to the

exclusion of a contrary opinion). When considered in its totality, the ALJ concludes that the evidence in this case supports a reasonable inference/conclusion that Claimant suffers from both a L4-5 spondylolisthesis and dynamic instability at L5-S1. Here, the evidenced presented supports a conclusion that Claimant's low back symptoms are in part emanating from an L4-5 spondylolisthesis that was probably aggravated by falling through a ceiling to a concrete floor below. While Dr. Reiss opines that this pre-existing spondylolisthesis became symptomatic due to deconditioning, the ALJ concludes that deconditioning a direct consequence of his fall through the ceiling. Consequently, the ALJ agrees with Dr. Reiss that Claimant's low back pain is likely work related. Where the ALJ finds Dr. Reiss's opinions dubious is where he concludes that fusion surgery is not reasonable or necessary because core strengthening can address Claimant's ongoing symptoms because he is deconditioned. In this case, the content of the medical records demonstrates that Claimant has failed conservative care and continues to experience functional decline secondary to back pain likely originating from both the failure of the disc at L5-S1 and the forward slipping of the vertebral segment at L4-5. The evidence presented convinces the ALJ that this pathology and not merely a weak core is substantially causing Claimant's ongoing symptoms. Given the mechanism of injury coupled with the content of the treatment records as a whole, the ALJ concludes that the medical analyses and opinions of Dr. Paul Stanton are credible and more persuasive than the contrary opinions of Dr. Reiss and Dr. Rauzzino, to the extent that Dr. Rauzzino can be interpreted as indicating that Claimant is not a surgical candidate as noted above

Medical Benefits
The Proposed L4-L5, L5-S1 Spinal Surgery Recommended by Dr. Stanton

D. A claimant is entitled to medical benefits that are reasonably necessary to cure or relieve the effects of the industrial injury. *See* § 8-42-101(1), C.R.S. 2003; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office, supra*. Similarly, the question of whether medical treatment is reasonable and necessary to cure or relieve the effects of an industrial injury is one of fact. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003).

E. The mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability were caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970); § 8-41-301(1)(c), C.R.S. 2013. Based upon the evidence presented, the ALJ concludes that Claimant has proven that L4-L5, L5-S1 fusion surgery recommended by Dr. Stanton is

reasonable and necessary. The medical reports outline persistent pain and functional decline in the face of failed conservative treatment leading Dr. Stanton to recommend surgical intervention.

F. The Medical Treatment Guidelines are regarded as the accepted professional standards for care under the Workers' Compensation Act. *Hernandez v. University of Colorado Hospital*, W.C. No. 4-714-372 (January 11, 2008); see also *Rook V. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo.App. 2005). The Medical Treatment Guidelines, Rule 17-2(A), W.C.R.P. provide: All health care providers shall use the Medical Treatment Guidelines adopted by the Division. In spite of this direction, it is generally acknowledged that the Guidelines are not sacrosanct and may be deviated from under appropriate circumstances. *See*, Section 8-43-201(3) (C.R.S. 2014); *Nunn v. United Airlines,* W.C. 4-785-790 (ICAO September 9, 2011). Nonetheless, they carry substantial weight. Moreover, the MTGs have been accepted in the assessment of low back pain. While the MTGs provide for that several pre-operative surgical indications should be considered before surgery is undertaken, including assessment/definition and treatment of all likely pain generators along with x-ray, MRI or CT myelography findings consistent with spinal stenosis with instability or disc pathology, the Court is not bound by the MTGs in deciding individual cases on the guidelines or the principles contained therein alone. Indeed, § 8-43-201(3) specifically provides:

> It is appropriate for the director or an administrative law judge to consider the medical treatment guidelines adopted under section 8-42-101(3) in determining whether certain medical treatment is reasonable, necessary, and related to an industrial injury or occupational disease. The director or administrative law judge is not required to utilize the medical treatment guidelines as the sole basis for such determinations.

G. Concerning the issue presented, the MTG's indicate that "[t]here is some evidence that fusion is likely to have a higher beneficial effect compared to multidisciplinary rehabilitation for patients with isthmic spondylolisthesis, as differentiated from those without the condition who suffered from chronic low back pain." (WCRP 17 Ex. 1, p. 98). Pursuant to WCRP 17, Ex. 1(G)(4)(d)(ii), diagnostic indications may include the following: "Segmental instability: Excessive motion, as in degenerative spondylolisthesis 4mm or greater, surgically induced segmental instability." Another indication for a spinal fusion per the Guidelines is for primary mechanical back pain/functional spinal unit failure: Multiple pain generators involving two or more of the following: (a) internal disc disruption, (b) painful motion segment, as in annular tears, (c) disc resorption, (d) facet syndrome, and/or (e) ligamentous tear. WCRP 17 Ex. 1(G)(4)(d)(iii). In this case, the evidence presented supports a conclusion that Claimant meets the two of the above requirements as MRI imaging indicates that Claimant has both internal disc disruption at L4-5 and annular tearing. Moreover, the March 15, 2018 MRI raises suspicion for facet pathology consistent with instability.

H. Addressing part two of the aforementioned section of the Guidelines, fusion surgery is indicated when there is segmental instability, defined as excessive motion, as in degenerative spondylolisthesis 4mm or greater. Although Claimant's spondylolisthesis was measured by Dr. Reiss to be closer to 3mm, "give or take .2mm," the ALJ is convinced based on the testimony of Dr. Stanton, as well as objective imaging evidence, that Claimant does in fact have a "true instability" of the spine warranting surgery under the Guidelines.

I. WCRP 17 Ex. 1(G)(4)(e) addresses what the Guidelines feel are appropriate in terms of workup prior to proceeding with surgery. First, all pain generators must be adequately identified and treated. Given the results of Claimant's imaging studies coupled with Claimant's physical examinations and the treatment he has received to date, the ALJ credits Dr. Stanton's opinion that he is confident that Claimant's pain generators have been identified and treated. While the second prong of the MTG's indicates that all physical medicine and manual therapy have been completed, which was not apparently done in this case, the ALJ credits the testimony of Dr. Stanton that core strengthening is unlikely to provide any significant benefit at this point, especially considering the fact that the muscles of the spine are not optimally aligned to stop spinal instability. Prong three of the Guidelines for proceeding with surgery is satisfied as the imaging in this case documents what the ALJ concludes, based upon the persuasive testimony and examinations of Dr. Stanton, constitutes segmental instability, both laterally and vertically at L4-5 and L5-S1 respectively. Prong four is met as the spine pathology is limited to two levels. Prong five is not applicable given Claimant's diagnosis of spondylolisthesis, and prong six is merely a recommendation regarding smoking that has not been fleshed out by the parties. Taken in its entirety, the ALJ concludes that the evidentiary record contains substantial evidence to support a conclusion that the recommended procedure is reasonable and necessary to cure and relieve Claimant from the ongoing effects of his compensable injury and restore his function. Based upon the evidence presented and in keeping with the MTGs, the ALJ concludes that Claimant's surgery has been contemplated within the context of expected functional outcome and not merely for the purposes of pain relief.

ORDER

It is therefore ordered that:

1. Respondents shall authorize and pay, pursuant to the Workers' Compensation medical benefits fee schedule, for the L4-5, L5-S1 fusion and all expenses associated therewith as recommended by Dr. Paul Stanton.

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

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

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

DATED: January 7, 2019

/s/ Richard M. Lamphere

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

ISSUES

I. What is the appropriate burden of proof to be applied to the DIME opinion of Dr. Hall regarding Claimant's admitted right shoulder injury?

II. Applying this burden of proof, what is Claimant's Impairment Rating for her right shoulder?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Claimant has worked for Employer for several years, in part as an airline baggage handler. On June 1, 2013, Claimant sustained a compensable industrial injury to her right shoulder.

2. Respondents filed a General Admission of Liability ("GAL") on December 10, 2013.

3. At some point, Claimant was authorized for treatment by orthopedist John Pak, MD. However, the ALJ is in possession of exactly two reports prepared by Dr. Pak, to wit: his postoperative report dated 11/2/16. (Ex. 3), and his "Letter of MMI" dated 3/29/16 (Ex. A, p. 2). Thus, the ALJ is otherwise entirely dependent upon the interpretations of what Dr. Pak said, and did, by the DIME physician, Dr. Timothy Hall, and Respondents' IME physician, Dr. Eric Ridings.

4. Clamant suffered a torn rotator cuff, and underwent an initial repair surgery by Dr. Pak on 8/5/2015. Dr. Hall describes the procedure as: Right shoulder arthroscopy, subacromial decompression, **acromioplasty,** *and* rotator cuff repair (Ex. 2, p. 13). Dr. Ridings describes the procedure as a subacromial decompression, **acromioplasty,** *and* rotator cuff repair. (Ex. C, p. 10) (emphasis added).

5. According to Dr. Hall, Claimant was initially placed at MMI by Dr. Pak on 3/**29**/2016. (Ex. 3, p. 14). In fact, Dr. Pak's letter (dated 3/29/16) says MMI was reached on 3/**21**/2016). (Ex. A, p. 2). Dr. Ridings does not address the initial MMI date-although according to Dr. Hall, Dr. Ridings performed an initial IME (not in evidence herein), wherein he acknowledged causation of her work injury (Ex. 3, p. 14).

6. Following this first surgery, on August 12, 2016, Respondents filed a Final Admission of Liability admitting to a 6% scheduled right shoulder rating pursuant to authorized treating provider John Pak, M.D.'s opinion of March 29, 2016. (Ex. A).

7. However, Claimant's condition worsened. By accounts of both Drs. Hall and Ridings, Claimant had a new MRI. (Dr. Hall dates the MRI at 8/15/16-Ex. 3, p. 14) (Dr. Ridings

does not date the MRI at all-Ex C. p. 11). In any event, this MRI showed a re-tear of the same rotator cuff.

8. Dr. Hall then references a revision surgery occurring on 4/3/2016 (Ex. 3, p. 14). The ALJ finds this to be in error; the revision surgery, according to Dr. Pak, occurred 11/2/2016. (Ex. 3, p. 18). (This better fits the logical timelines; the ALJ notes that this surgery would not have occurred four months **before** the MRI took place.)

9. Dr. Pak's own surgical notes indicate what the revision surgery involved: "Right shoulder arthroscopy, removal of hardware and sutures, debridement, lysis of adhesions, and rotator cuff repair" (as well as **left** shoulder subacromial cortisone injection) (Ex. 3, p. 18).

10. According to Dr. Ridings, Claimant was again placed at MMI by Dr. Pak on 7/9/17 at the time of a Functional Capacity Exam ("FCE"); however, Dr. Ridings goes on to say that Dr. Pak issued a "letter of MMI" dated 10/30/17, wherein Dr. Pak performs range of motion measurements. At this time Dr. Pak assigns a 4% right extremity rating. (Ex. C, p. 11). (The ALJ notes that this report by Dr. Pak is not in evidence).

11. Dr. Hall, in contrast, references a "closing note" from Dr. Pak, placing Claimant at MMI on 8/18/17. (Ex. 3, p. 14).

12. The procedural record thereafter is silent; however, the ALJ infers that Claimant took exception to this second Impairment Rating assigned by Dr. Pak, and requested a DIME examination.

13. Claimant underwent this Division Independent Medical Examination by Dr. Hall, on July 11, 2018. Dr. Hall noted in his review of records that the second MRI was consistent with a large "read as re-tear" of the rotator cuff. Dr. Hall noted Claimant once again underwent a right shoulder arthroscopy with debridement, subacromial decompression, acromioplasty, rotator cuff repair and arthroscopic biceps arthrodesis.

14. Dr. Hall further noted Claimant returned to Dr. Pak, who placed Claimant back at MMI as of July 19, 2017. Based upon the FCE and repeat range of motion measurements, Dr. Pak this time determined Claimant's range of motion loss was 4% right upper extremity.

15. Under 'History of Present Illness' Dr. Hall documented the Claimant returned to doing the same work she did that "created these injuries." Dr. Hall further noted, "she had surgery, went back to work, released to full duty, re-injured the shoulder, had a subsequent surgery, and now is better than she had been following the re-injury, but not quite as good as she was after the first surgery". (Ex. B, p. 8).

16. With regard to Claimant's pain profile, Dr. Hall noted, "she does have some upper extremity symptoms, which are transient including tingling in the arm and hands and aching in the hand distally. She has more of these symptoms on the right than the left but no reports of focal weakness." *Id.*

17. Dr. Hall's assessment was rotator cuff tear x2 with two surgeries, myofascial pain and transit neurologic symptoms.

18. At Dr. Hall's evaluation he noted, "the bulk of her problem is the rotator cuff tear itself, which is what is rated. Range of motion reveals a 5% impairment per the worksheet. *She did have the* ***acromioplasty*** *which is the additional 5% which adds to 10 percent impairment."* (Ex. 2, p. 15) (emphasis added).

19. Claimant was evaluated by Eric O. Ridings, M.D. on two separate occasions. The first on October 19, 2014 and the second on September 10, 2018. Dr. Ridings noted, "This is an occupational disease claim in which Ms. Ford injured her right shoulder moving luggage at the airport working at the ticket counter and the gate for Delta Airlines." (Ex. C).

20. According to the second IME report, Claimant told Dr. Ridings, "when I was taking the chronological history and discussing her Division Independent Medical Examination, she stated that the entire visit in the room with her by Dr. Hall lasted only about 5 minutes. She also offered that she did not recall Dr. Hall using any measuring device to determine her right shoulder range of motion. She volunteered that she recalled at her last IME with me that she remembered having done so (about 3 yrs. ago) but really did not think that Dr. Hall had taken specific measurements at the Division IME (2 months ago). (Ex. C, pp. 12-13).

21. On physical examination Dr. Ridings found Claimant's upper extremity reflexes were 2 plus and symmetric, strength was 5/5, sensation to pin prick was intact. Structurally, although Claimant had some tenderness to palpation she did not have a painful ark, Hawkins Impingement maneuver was negative and right shoulder range of motion was fluid.

22. Based upon Dr. Ridings measurements at his IME on that date Claimant had a 7% impairment of the right upper extremity. He opined that this should remain a scheduled impairment rating only. Dr. Ridings prepared a range of motion worksheet in support of his findings. (Ex. C, p. 15).

23. With regard to Dr. Hall's addition of a 5% impairment rating for "acromioplasty," Dr. Ridings noted:

> The Division examiner in this case assigned an additional 5% impairment in addition to the range of motion impairment (which he found to be somewhat less, as 5% of the right upper extremity) for **"acromioplasty",** which is shaving off some of the underside of the acromion superior to the supraspinatus tendon. I do not recall ever seeing a rotator cuff repair surgery that also did not include this procedure as a routine part of the process. As taught in the Division of Workers' Compensation Level II Reaccreditation Courses, and as discussed in Desk Aid No. 11-Impairment Rating Tips, Page 7, routine rotator cuff arthroscopic surgery is rated simply based on range of motion impairment. The AMA Guides, Third Edition Revised include consideration of expected residual

> symptoms at a joint and assigned a certain percentage impairment for a certain degree of range of motion loss. As it says in the Impairment Rating Tips on Page 7 the "AMA Guides Fourth and Fifth Additions continue to suggest that **subacromial arthroplasty** should be rated using ROM, and when appropriate "joint crepitation with motion" from the "Other Disorders" section. In general, when any additional rating for subacromial arthroplasty is deemed appropriate in a case with or without crepitus because …**other factors** have not adequately rated the extent of the impairment it should not exceed 10%." (Ex. C, p. 14) (emphasis added).

24. Dr. Ridings explained that Dr. Hall did not make any argument in his DIME report why, in this case, Claimant should have any additional impairment beyond the decreased range of motion, instead simply noting that she had an acromioplasty. Dr. Ridings further opined in this case the Claimant had a typical outcome for a rotator cuff repair surgery and successfully returned to her previous job with the ability to lift 50 pounds. Given the absence of unusual circumstances indicating a worse than typical outcome, the Division Examiner is in error in assigning an additional 5%.

25. At hearing, Dr. Ridings was offered and accepted as a medical expert in physical medicine and rehabilitation with education, training and experience to examine, diagnosis and treat patients who have shoulder injuries. In addition, Dr. Ridings has been Level II Accredited since 1997.

26. Dr. Ridings opined that undergoing an acromioplasty does not cause increased functional limitation. Dr. Ridings further testified an acromioplasty does not cause permanent medical impairment.

27. Dr. Ridings testified that undergoing an acromioplasty is not ratable pursuant to the AMA Guides Evaluation of Permanent Medical Impairment Third Edition Revised. Dr. Ridings explained, as the whole purpose of the acromioplasty is to improve function and as part of that improved range of motion its purpose is to decrease not increase impairment.

28. Dr. Ridings reviewed Dr. Hall's report, and his deposition testimony. Dr. Ridings opined that Dr. Hall's citation to the AMA Guides Page 48, Section 3.1(j) as support for providing the additional 5% for the acromioplasty was in error. Not only did Dr. Hall not provide documentation justifying application for the additional 5% rating, his [Dr. Hall's] own physical examination did not support providing an additional 5% for the acromioplasty.

29. Dr. Ridings explained that Dr. Hall's attempt to use increased myofascial tone as justification was erroneous. So to, were complaints of pain.

30. At hearing, and without objection, Dr. Ridings testified-consistent with his IME report-that Claimant told him about the five-minute DIME with Dr. Hall, and her lack of recall of any formal range of motion testing.

31. Dr. Hall was deposed on October 23, 2018. Dr. Hall had read Dr. Ridings' second IME report, and when asked why he disagreed with it, he stated:

> A. Because I didn't think the range of motion impairment, in and of itself, completely described her impairment…..And the point of adding this five percent, even though we do it under this heading of acromioplasty, it's generally given when the rating does not adequately relate the extent of the impairment….." So I thought she deserved additional impairment due to those additional problems around the shoulder girdle.
>
> And it is the case that she did have acromioplasty. I mean, one can argue what exactly that means, but either way, I felt she deserved more than just a range of motion impairment, because her only problem was not range of motion. She also had this *pain* around the shoulder girdle that was *impairing*, as well. (Hall depo, pp. 6-7) (emphasis added).

32. Dr. Hall later clarified that he was referring not to the 3rd Edition of the AMA guidelines directly, but to **page 7 of the Impairment Rating Tips** issued in connection therewith (Hall depo. Pp. 9-10) (emphasis added).

> In general, when any additional rating for *subacromial arthroplasty* is deemed appropriate in a case *with or without crepitus* because, quote, **other factors** have not adequately rated the extent of the impairment, end quote, it should not exceed ten percent. (Hall depo, p. 10) (emphasis added).

33. When asked if Claimant's rating should be as an extremity or whole person, Dr. Hall stated:

> You know, I didn't get any report of neck symptoms. She does have some periscapular pain, but I don't—I mean, I don't see why this would necessarily be converted to whole person. No, I think it's essentially an extremity rating. (Hall depo, pp. 7-8).

CONCLUSIONS OF LAW

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

Generally

A. The purpose of the Workers' Compensation Act of Colorado is to assure quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1).* Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is

that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as the fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990) Moreover, the ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion). In this instance, the ALJ finds that both Dr. Hall (through his deposition testimony and DIME report) and Dr. Ridings (through his hearing testimony and IME report) are sincere, credible, and professional. In the end, they simply have certain differences in medical opinions, which the ALJ must resolve.

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

Burden of Proof

D. The findings of a DIME physician concerning the Claimant's medical impairment rating shall be overcome by clear and convincing evidence. *Qual-Med., Inc. v. ICAO,* 134 P.3rd 475, 482 (Colo. App. 1998). However, the heightened burden does not apply to scheduled injuries. *Maestas v. American* Furniture *Warehouse,* WC 4-662-369, 2007 (ICAO 2007). While not an issue formally endorsed for hearing, the ALJ, therefore, must still determine whether Claimant's injuries will remain scheduled, or converted to the whole person. Only then can the ALJ determine the deference to be given the DIME opinion, and thus apply the proper burden of proof.

E. In resolving whether Claimant sustained a "loss of an arm at the shoulder" within the meaning of 8-42-107(2)(a) or a whole person impairment under 8-42-107(8), the trier of fact must determine the situs of the functional impairment which is not necessarily the location of the injury. *See Newsome v. King Soopers,* W.C. 4-941-297-02 (October 14, 2016). In this instance, Claimant did not testify. Dr. Pak's records, with the exceptions noted, are not in evidence. Dr. Ridings opined that this injury should be scheduled, and not converted. By his deposition testimony, Dr. Hall concurred. Based

upon the record, the ALJ concludes that there is insufficient evidence to convert Claimant's shoulder injury to the whole person; thus Claimant bears the burden of proof, by a preponderance of the evidence, to show entitlement to her impairment rating.

Range of Motion

F. Respondents urge that Dr. Pak's range of motion figures be accepted. In this case, Dr. Pak assigned a 4% range of motion rating to Claimant's shoulder after the revision surgery. However, neither Dr. Pak's worksheet, nor his narrative report are in evidence when he placed Claimant at MMI following the *revision* surgery. The range of motion worksheet following the *initial* surgery (Ex. A, pp. 2-4) (6% extremity) is of little value herein. The ALJ simply cannot rely upon the 4% figure, without evidence in support. Thus, the ALJ must compare Dr. Hall's range of motion to that of Dr. Ridings, both of which are supported by their respective worksheets.

G. Dr. Ridings conducted his second IME with Claimant on 9/10/18. In his narrative report, Dr. Ridings notes that Claimant told him that Dr. Hall spent only "about five minutes" with her during her entire DIME exam. Further, that she told Dr. Ridings that she does not recall Dr. Hall using any measuring device during the DIME exam to measure her range of motion. Dr. Ridings testified at hearing, without objection, to essentially the same two things.

H. The ALJ makes the following observations. First, Dr. Ridings accurately recorded, and then truthfully testified, about what Claimant told him during his IME. Secondly, Claimant's statements to Dr. Ridings as noted in his narrative are admissible, as being an integral part of his *medical report*. Third, Dr. Ridings' *testimony* in this regard drew no objection. If objected to, Claimant's statements to Dr. Ridings would not have been admissible as a "Declaration against Interest", under C.R.E. 804(b)(3), since Claimant was legally 'available' to testify. Interestingly, Claimant would not have known *at that moment* that her statements were *against her own interest*-in fact, Dr. Ridings eventually produced a more generous range of motion rating than did Dr. Hall.

I. Nonetheless, under a broad reading of C.R.E. 801(d)(2), such statements would be admitted as "non-hearsay"- despite the wording of the caption of this Rule ostensibly labelling such statements as "Admissions" by a party-opponent. Such statement was hardly an "admission," since, as noted, Claimant had no understanding of the possible effect of her "admissions" on these proceedings. However, the text of this Rule is more broadly written, and Claimant is plainly a "party-opponent".

J. While her statements are thus admitted, Claimant was not called by either side to clarify what she may have actually meant, nor her degree of certainty of her recall of the DIME exam. As such, the ALJ places comparatively little weight to what Claimant told Dr. Ridings about the DIME exam. It is further noted that Claimant's statements to Dr. Ridings were known by both parties at the time Dr. Hall was deposed on 10/23/18, yet Dr. Hall himself was not asked about the "five-minute DIME" by either party.

K. Nonetheless, the ALJ must choose. Due to the aforementioned issues, and the fact that Dr. Ridings' measurements were actually taken later in time, the ALJ will adopt Dr. Ridings' range of motion figures of 7% upper right extremity, not converted to the whole person, and with no apportionment.

Dr. Hall's Assignment of an Additional 5% Rating, Under the Ratings Tips

L. Dr. Hall's DIME report, standing alone, simply states that Claimant had an acromioplasty, for which he added an additional 5% to the 5% range of motion, for a total of 10%. His report does nothing further to justify this additional 5%, beyond the fact of the surgery itself. Had Dr. Hall not testified, this would have been inadequate to assign this additional 5%. The Desk Aid #11, Impairment Rating Tips (for which the ALJ takes administrative notice), however, was referenced by Dr. Hall in his deposition. During his deposition, Dr. Hall then clarified that he was supplying the additional 5% for shoulder *pain*- an *"other factor"* beyond the fact of the surgery itself. The pertinent part of the Rating Tips, reads, in pertinent part:

> The AMA Guides 4th and 5th Editions continue to suggest that subacromial **arthroplasty** should be rated using ROM, and *when appropriate*, 'joint crepitation with motion' from the "Other Disorders" section. In general, when any additional rating for subacromial arthroplasty is deemed appropriate in a case **with <u>or without</u> crepitus** because "…**other factors** have not adequately rated the extent of the impairment," it should not exceed 10%. (AMA Guides 3rd Edition (rev.) p. 48). (Desk Aid #1, Ratings Tips, p. 7) (emphasis added).

M. Parsing the above language, it appears that the Tips contemplate that there can be "other factors" *besides crepitus* which, if articulated, can justify an additional rating *of up* to 10%. It appears to be a "catch-all", vesting discretion in the rating physician. Dr. Hall assigned 5%, on the basis of **pain** following these procedures. Respondents argue that pain, being subjective, is not ratable. However, in the context of these Rating Tips, there appears to be no such exclusion for pain. Had the authors intended to exclude pain, it would have been easy for them to so state. The ALJ concludes that Dr. Hall had sufficient discretion, under the Rating Tips, to assign the additional 5% for Claimant's pain.

N. However, to qualify for an additional impairment rating under these Tips, the above section contemplates that a **subacromial arthroplasty** has occurred. Dr. Pak's notes from his *revision* surgery do not appear to describe such a procedure. Dr. Pak's surgical notes from the *first procedure* are not in the record. However, the first procedure has been described by both Dr. Hall and Dr. Ridings as an **acromioplasty.** The term **arthroplasty** does not appear to be defined in the AMA Guidelines, 3rd Edition. However, the *<u>American Heritage Stedman's Medical Dictionary</u>* defines the term thusly:

> 1. The creation of an artificial joint. 2. The surgical restoration of the integrity and functional power of a joint.

O. This second definition of arthroplasty encompasses an acromioplasty. Dr. Ridings himself appears to concede this definitional point in his discussion, using acromioplasty and subacromial arthroplasty in the same context. Dr. Ridings' real issue is Dr. Hall's use of ***pain*** *as an "other factor" besides crepitus.* He reasons that there is no residual, ratable, impairment from this surgery beyond her diminished range of motion. He describes Claimant's current condition as an expected result of a routine rotator cuff repair.

P. However, once at MMI, one would not expect the patient to suffer ongoing pain. The point of the surgery is not merely to restore function; rather it is to alleviate the patient's *pain* as well. For whatever reason, even at MMI, Claimant still has pain-in apparent contrast to others similarly situated. For this reason, the ALJ does not concur with Dr. Ridings' interpretation of the Tips by excluding consideration for pain.

Q. For the foregoing reasons, the ALJ finds, by a preponderance of the evidence, that there is ample evidence in support of Dr. Hall's 5% additional impairment rating for pain in her right upper extremity.

ORDER

It is therefore Ordered that:

1. Claimant's Impairment Rating for her upper right extremity is 12%, not converted to whole person, and with no apportionment.

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

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

DATED: January 7, 2019

/s/ William G. Edie

William G. Edie
Administrative Law Judge

ISSUES

- Did Claimant prove an L4-S1 fusion performed by Dr. Jamrich on June 27, 2018 was reasonably necessary treatment for his admitted injury?

FINDINGS OF FACT

1. Claimant worked for Employer as an IT professional for approximately 12 years. He suffered an admitted injury to his low back on July 24, 2017 lifting a sixty-pound box of cable locks. He felt no symptoms immediately but developed numbness in his buttock approximately 20 minutes later. Shortly thereafter, he had severe pain. Claimant discussed the matter with his supervisor, who sent him home.

2. The pain intensified that night, so Claimant called Employer at 8:00 AM the next morning and explained he needed to see a doctor. Employer did not refer Claimant to a physician, but asked him if he had a doctor in mind. Claimant knew of Dr. Eric Jamrich, an orthopedic surgeon who had treated one of his colleagues, so he made an appointment with Dr. Jamrich for later that afternoon.

3. Claimant explained to Dr. Jamrich his symptoms began shortly after lifting the box at work, and quickly progressed to become "excruciating." He described stabbing pain in his low back, aching pain in his buttock, with numbness down the back of his left leg into his foot.[1] Dr. Jamrich observed Claimant was "clearly uncomfortable." The physical examination was challenging due to the severe pain, but Dr. Jamrich appreciated decreased sensation to light touch in the left foot and an "exquisitely positive" straight leg raise on the left. X-rays showed moderate degeneration at L5-S1 with no evidence of instability. Dr. Jamrich opined Claimant probably had a herniated disc "secondary to lifting a heavy item at work yesterday." He prescribed a Medrol Dosepak, a muscle relaxer, and ordered a lumbar MRI. He asked Claimant to return "as quickly as possible" after the MRI because of his severe symptoms. The report also noted Claimant was a ¼ pack-per-day smoker "for a couple of years."

4. Claimant had the lumbar MRI the next day. The radiologist interpreted it as showing a right-sided disc protrusion at L4-5 moderately compressing the right L5 nerve root.

5. Claimant followed up with Dr. Jamrich on July 27, 2017. Claimant was feeling "significantly better" after the Medrol Dosepak. Dr. Jamrich suggested they could

[1] The exact distribution of radicular symptoms is unclear, because the patient intake form references pain and numbness in the right leg and foot, but the accompanying pain diagram indicates symptoms going down the left leg. Dr. Castro suggested Dr. Jamrich's references to the left leg were typographical errors, which seems reasonably likely.

try another Dosepak or an epidural steroid injection. He also referred Claimant for four weeks of physical therapy.

6. On September 1, 2017, Claimant had a transforaminal lumbar ESI targeting the right L5 nerve root. The injection only helped for a few days.

7. The next documented appointment with Dr. Jamrich was on January 11, 2018. Claimant was "somewhat" improved since the initial treatment with the Medrol Dosepak but still having constant pain in his low back into his leg. He also reported numb toes on the right foot. After reviewing the x-rays and MRI again, Dr. Jamrich confusingly opined, "most of his problem seems to be coming from "a markedly degenerative disc [at L5-S1]."

8. Claimant started physical therapy on February 21, 2018. He reported numbness in his feet, generally worse on the right, and a "heavy feeling" in his hips and legs. Claimant attended five therapy sessions over the following several weeks without significant improvement.

9. A repeat MRI was done on February 21, 2018. Compared to the previous MRI, there was now a disc extrusion at L4-5, whereas it was previously a protrusion. There was severe right lateral recess stenosis and moderate canal stenosis at L4-5 and severe compression of the right L5 nerve root.

10. Claimant followed up with Dr. Jamrich to review the new MRI on March 27, 2018. Dr. Jamrich noted Claimant had tried physical therapy, a lumbar ESI, pain medications, and oral steroids with minimal relief. He opined Claimant had failed conservative care and recommended an L4-S1 decompression and fusion.

11. Insurer obtained a timely Rule 16 peer review with Dr. Peter Garcia, an orthopedic surgeon. Dr. Garcia recommended denying the surgery because did not believe conservative care had been adequately exhausted. Additionally, he saw no updated physical examination findings, and Claimant had not undergone a psychological evaluation as discussed in the MTGs.

12. On April 13, 2018, Dr. Jamrich requested reconsideration of the denial. Insurer obtained another orthopedic peer review, this time with Dr. James Cain. Dr. Jamrich and Dr. Cain discussed the surgery by telephone on April 17, 2018. Dr. Cain requested an "in-depth" physical and neurological examination and flexion-extension x-rays. Dr. Cain also requested Dr. Jamrich explain why a fusion was necessary as opposed to a decompression. Dr. Jamrich "agreed that the documentation presented at this time did not reach a level to support the medical necessity for a two-level lumbar fusion in a young individual." The surgery request was denied pending the additional evaluation.

13. Dr. Jamrich re-evaluated Claimant on April 19, 2018. Claimant described severe weakness and numbness in his right leg, significant back pain, and pain radiating down his right leg. Dr. Jamrich opined the distribution of symptoms corresponded to the L4 and L5 nerve roots. On examination, Claimant had no left-sided symptoms. On the right, strength was 4/5 in the EHL, 4-/5 in the tibialis anterior, and 4/5 in the quad. Straight

leg raise was positive at approximately 40° on the right, and the right patella tendon reflex was mildly decreased as compared to the left side. Dr. Jamrich reviewed the MRI and noted a central disc herniation at L4-5 and a far lateral herniation at L4-5 in contact with the L4 nerve root. He opined, "this is giving him a combination of both L4 and L5 symptoms. Although he has a far lateral protrusion on the left side at L5-S1, this is not symptomatic." The flexion-extension x-rays showed 5 mm of retrolisthesis at L4-5 with extension that resolved with flexion. Dr. Jamrich concluded,

> This is a patient who has not responded to conservative care. He has both L4 and L5 distribution symptoms from both a far lateral and a central disc herniation at the L4-5 level. He has instability of the L4-5 level. He has weakness in the quad to the tibialis anterior and the EHL with dysesthetic pain in both an L4 and L5 distribution. He has a positive straight leg raise in a seated position at 40°.
>
> [A]lthough he has changes at the L5-S1 level, these are not symptomatic at this point. For this reason, Work Comp will certainly not want to address these. At the L4-5 level, however, he has both instability and impingement of nerve roots centrally and foraminal only that can only be addressed with a fusion. Given the fact that we are only going to address one level, I suggested an anterior interbody fusion at L4-5.

14. Based on his re-evaluation of Claimant, Dr. Jamrich submitted another request for authorization of surgery, this time a fusion at L4-5 only. The request was denied based on Rule 16 peer review by Dr. Kimberly Terry, a neurosurgeon. Dr. Terry cited the following factors in denying the surgery: (1) the MRI identified no significant stenosis at L4-5;[2] (2) Dr. Jamrich did not submit the flexion-extension x-rays to verify the 5mm of retrolisthesis he observed; and (3) Claimant had not undergone a presurgical psychological assessment as required by the MTGs.

15. Rather than wait for the litigation process to play out, Claimant elected to have the surgery under his private health insurance. On June 27, 2018, Dr. Jamrich performed an anterior interbody fusion at L4-5.

16. Claimant enjoyed immediate and substantial relief after surgery, particularly regarding his leg symptoms. His tolerance for functional activities steadily improved through the date of the hearing. Although the fusion is still consolidating and it is too early to draw a definitive conclusion about the outcome, all current indicators show the surgery was successful.

17. Dr. Andrew Castro performed an IME at Respondents' request on October 22, 2018. Dr. Castro agreed Claimant probably herniated the disc at work. He also agreed surgery at L4-5 was reasonably necessary to treat the injury. But Dr. Castro opined a fusion was not warranted, and Claimant should have had a microdiscectomy and

[2] This rationale is inconsistent with the MRI addendum report, which described "severe right lateral recess stenosis and moderate canal stenosis at L4-5." Close inspection of Dr. Terry's report suggests she did not have the addendum report.

decompression instead. He described Claimant's situation as "a very routine presentation of a disc herniation with radiculopathy or nerve root symptoms." Dr. Castro opined there was no evidence of instability to warrant arthrodesis. He based that opinion on the MRI, which showed minimal fluid in the facet joints. Dr. Castro did not acknowledge or discuss the flexion-extension x-rays showing 5 mm of retrolisthesis with extension. He also noted Claimant's smoking as a contraindication to fusion. Dr. Castro stated Claimant's symptoms had "markedly improved" since surgery and opined he was probably at MMI.

18. Claimant's testimony at hearing was credible.

19. Claimant proved by a preponderance of the evidence the L4-5 lumbar fusion performed by Dr. Jamrich was reasonably necessary to cure and relieve the effects of his industrial injury.

CONCLUSIONS OF LAW

The respondents are liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997). Even if the respondents admit liability, they retain the right to dispute the relatedness of any particular treatment, and the mere occurrence of a compensable injury does not compel the ALJ to find that all subsequent medical treatment was caused by the industrial injury. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997); *McIntyre v. KI, LLC*, W.C. No. 4-805-040 (July 2, 2010). Where the respondents dispute the claimant's entitlement to medical benefits, the claimant must prove that an injury directly and proximately caused the condition for which he seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must prove entitlement to medical benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally, for either claimant or respondents. Section 8-43-201.

The Director has adopted Medical Treatment Guidelines (MTGs) to advance the statutory mandate to assure the quick and efficient delivery of medical benefits to injured workers at a reasonable cost to employers. WCRP Rule 17, Exhibit 1 addresses treatment for low back injuries. As the arbiter of disputes regarding treatment, the ALJ may consider the MTGs as an evidentiary tool but is not bound by the MTGs when determining whether requested treatment is reasonably necessary or injury-related. Section 8-43-201(3); *Logiudice v. Siemans Westinghouse*, W.C. No. 4-665-873 (January 25, 2011).

As found, Claimant proved the L4-5 lumbar fusion performed by Dr. Jamrich was reasonably necessary. The evidence convincingly shows Claimant herniated his L4-5 disc at work on July 24, 2017. Although he initially responded to oral steroids, his condition worsened over the following nine months, with progressive neurological deficits and steady decline in his functional capacity. There is no persuasive evidence of any intervening cause, and the deterioration reflected the natural progression of the industrial

injury. There is no persuasive reason to expect additional therapy or other nonsurgical measures would have resolved Claimant's condition, and further delay could have resulted in permanent nerve damage. Indeed, the MTGs suggest patients with herniated discs and radiculopathy should undergo surgical decompression within six to twelve weeks after the injury. *See* Rule 17, Exhibit 1 § (G). Dr. Castro agreed surgery was reasonable but thought a fusion inappropriate because "there is no instability." Dr. Castro's opinion in that regard is not persuasive because he overlooked the flexion-extension x-rays showing 5mm of vertebral movement. The MTGs provide that 4mm of motion is a sufficient indication for fusion surgery. *See* Rule 17, Exhibit 1 § (G)(4). Although Claimant did not have a pre-surgical psychological assessment, there were no red flags suggesting psychological unfitness for surgery. In any event, the MTGs do not strictly require a pre-surgical psychological evaluation in cases involving spondylolisthesis with radiculopathy and neurologic signs. *See* Rule 17, Exhibit 1 § (G)(4)(e)(v). The most significant contraindication for arthrodesis was Claimant's smoking habit. But the MTGs only "recommend" cessation of smoking; they do not require it. Dr. Jamrich knew Claimant smoked but decided the surgery was appropriate anyway. On balance, the ALJ is persuaded the L4-5 fusion was consistent with the MTGs and reasonably necessary to cure and relieve the effects of Claimant's injury.

ORDER

It is therefore ordered that:

1. Insurer shall cover the cost of the June 27, 2018 L4-5 fusion surgery performed by Dr. Jamrich and all ancillary charges relating to the surgery.

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

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

DATED: January 8, 2019

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

ISSUES

- Did Claimant meet his burden of proof by a preponderance of the evidence that his AWW was higher than the admitted AWW?

- Did Respondents meet their burden of proof to establish Claimant willfully violated a safety rule adopted by Employer, allowing a 50% reduction of his indemnity benefits.

FINDINGS OF FACT

1. Claimant began working for Employer on June 12, 2017. He was employed as an Installed Product Specialist. Claimant was hired at a rate of $21.00 per hour.[1]

2. Claimant was referred for this position by Rob G_____, with whom he had worked at a company called ICI. Mr. G_____ received a $450.00 referral bonus when Claimant was hired by Employer.

3. Claimant's wife, Jessica testified at the hearing. They have been married three years and together for a total of five years. She testified Claimant met Mr. G_____ while working at ICI. He applied to work for Employer for additional stability and security, as well as the benefits.

4. Claimant's wife testified she understood Claimant was entitled to a sign-on bonus after he completed the 90-day probationary period. Claimant's wife testified he worked overtime while he worked for Employer. It was her understanding Claimant was going to sign up for health insurance benefits before he was injured. Ms. B_____(Claimant's wife) also testified Claimant took some time off in July 2017 when his son was visiting, which was why he did not work full 40-hour work week. The ALJ credited that explanation.

5. Mr. G_____ testified as a witness on behalf of Employer and is employed as the production manager. He said he knew Claimant through his prior employment at ICI. Once he gave notice, Claimant contacted him to come work for Employer. Mr. G_____ testified Claimant was entitled to a sign-on bonus in the amount of $600.00. The ALJ inferred Mr. G_____ discussed a sign-on bonus with Claimant.

[1] Exhibit E, p. 37; Exhibit 10, p. 60.

6. Mr. G_____ testified Claimant was aware of the safety rule involving fall protection. This included the rule that workers were not allowed to unhook a safety harness while working at heights above 6 feet. Mr. G_____ attended the regular safety meetings, which occurred on Tuesday. The meetings lasted thirty (30) minutes and sometimes involved hands-on class participation involving a safety harness. The fall protection training included the rule that it was a violation of company policy to untie if you are working above six (6) feet. Mr. G_____ did not work at the Fort Lupton job site where Claimant was injured.

7. Mr. G_____ testified that the harness system has a two-part locking process. Neither of the two locks could accidentally unclip. To unlock this mechanism, an employee had to manually open the clipping mechanism.

8. Claimant's job description (Installed Product Specialist) required that he comply with Employer's safety policies. It specified Claimant was:

> **"Summary**
>
> …Responsible for observing and following all OSHA and Company Safety policies and procedures".
>
> Complying with safety rules was an essential function of this position, as follows:
>
> **"Essential Functions**
>
> Installs product per work order, manufacturer, quality and safety guidelines".[2]

9. Employer adopted a written safety policy, which established standards for fall protection. This document was entitled TrueTeam Standard and Guideline-Fall Protection Program. More particularly, there was a section entitled General Requirements that delineated when fall protection was required. That section provided in pertinent part:

> "Section 1—General Requirements
>
> **Program Overview**
>
> Some type of fall protection shall be employed anytime an employee is performing work from elevated heights and is exposed to a potential fall of six (6) feet or more in construction and four (4) feet or more manufacturing and warehousing. Employees who are exposed to any fall hazard from an impaling hazard, energized electrical hazard, exposed moving machinery parts, window, elevator, door or any other opening shall be protected from fall exposures four (4)

[2] Exhibit E, p. 67.

feet or more in all situations. In these situations, fall protection suitable to prevent injury shall be employed.

The following hierarchy shall be used when choosing methods to eliminate or control fall hazards:

1. **Elimination or substitution**--i.e. removal of the hazard

2. **Passive Fall Protection**--i.e. isolating or separating the hazard from the workers

3. **Fall Restraint**--i.e. preventing the person (CSS) from reaching fall hazard

4. **Fall Arrest**--i.e. attaching a person to system designed to stop a fall after it has started

Fall arrest systems may only be used when one of the three methods of fall prevention outlined are not feasible".[3]

10. The ALJ concluded Employer's fall protection program required methods to be employed to prevent falls when an employee worked at a height of 6 feet or higher in construction. This policy was in force at the job site where Claimant was injured.

11. Joshua W_____ is a division manager and testified on behalf of Employer. He oversees the day-to-day operations from production to the books. Claimant worked as part of Employer's infield production staff in Mr. W_____'s division. When Claimant was hired on June 12, 2017, it was for a full-time, forty hour per week position. Mr. W_____ testified employees could work overtime hours (depending on the project) and could put in a request for those hours.

12. Mr. W_____ testified Employer has safety guidelines and Claimant was responsible for following those guidelines. Claimant was advised of the safety guidelines, starting with the onboarding process. At the time of the onboarding, all types of safety related topics were discussed, including fall protection, PPE (personal protective equipment), scaffolding, ladder training, lift training and the like. Claimant would have received training on these subjects the first two days of his employment. Employer also holds weekly safety meetings. Mr. W_____ testified Claimant attended a safety meeting on fall protection after his initial training. As part of the training, he would have been taught not to clip while working at heights. A sign in sheet confirmed Claimant attended a meeting.

13. Mr. W_____ stated Claimant was required to use fall protection equipment while working on a roof. This included a full body harness, horizontal lifeline, along with a yo-yo and lanyard, which attaches to the backside of the equipment. The

[3] Exhibit F, pp.97-98.

horizontal lifeline is tied off to the anchorage point (on the building), which then hooks into the harness. Employees are required to use fall protection any time they are operating at heights above six (6) feet. An employee is allowed to unhook from the fall protection system once that employee is on the ground. If an employee is observed unhooking the harness while working at height by Mr. W_____ or a supervisor, that employee is taken from the job and disciplinary action would follow.

14. Mr. W_____ confirmed the fall protection safety plan which was in force on the Fort Lupton job where Claimant was injured.[4] Estaban C_____ was foreman on the job and was responsible for making sure the fall protection plan was implemented and the system installed. Mr. C_____ had 15 years of experience and was familiar with the system and how it was to be installed. Mr. C_____ was responsible for the job site where Claimant was working.

15. Mr. W_____ testified he would know if an employee would be entitled to a signing bonus and he would have to approve it as the division manager. He did not do that in this case. There was a referral bonus Mr. G_____ in the amount of $450.00. Mr. W_____ did not know what the retention bonus was.

16. Rose D_____ testified on behalf of Employer. Her position was Senior Manager of Human Resources Information Systems. In that capacity, she oversaw Employer's HR operations, including managing HR information system and benefits. Ms. D_____ testified there was no record Claimant was entitled to a sign-on bonus and if he was eligible for a sign-on bonus, this would have been included in the offer letter. If Claimant had been eligible for a sign-on bonus, the first half would be paid after three months of employment, the second half paid after six months of employment.

17. Ms. D_____ testified Claimant was eligible for employee benefits which included health, dental and vision insurance. There was also a short term disability/long term disability ("STD/LTD") plan in which employees were automatically enrolled at the beginning of their employment. Ms. D_____ confirmed Employer's benefits package included tuition reimbursement, EAP, flexible spending accounts and life insurance.

18. Ms. D_____ said employees were eligible to enroll in health insurance benefits any time during the initial 90-day period of employment. Ms. D_____ testified employees were required to make such an election within that period of time in order to secure coverage. Employer has an electronic system (ESS) on which employees can sign up for insurance. Ms. D_____ stated if the employee enrolled for health insurance coverage, the coverage would begin on the first day of the following month. If Claimant had signed up, his health insurance coverage would have been effective on October 1, 2017.

19. The deadline for Claimant to enroll for health insurance coverage was September 10, 2017. Ms. D_____ verified Claimant did not elect health insurance

[4] Exhibit G, p. 243.

within the first ninety (90) days of his employment and was not eligible for this benefit. He did not have vison or dental coverage. On cross-examination, Ms. D_____ was asked about two calls made by Claimant after midnight on September 11, 2017, which concerned a password reset. Ms. D_____ testified that was too late to sign up for insurance as this was past the September 10, 2017 deadline.

20. Claimant was enrolled in the STD/LTD policy when he began his employment.[5] Claimant made a contribution for that coverage in the first pay period in which he was eligible. Ms. D_____ testified that because he was not working after the 90-day period, this coverage was not in force, as the policy specified you had to be an active employee. The ALJ did not find this explanation credible. Although Ms. D_____ said Employer returned premiums to Claimant, the ALJ finds it is more probable than not that Claimant was covered by Employer's STD/LTD policy at the time of his accident by virtue of Employer's acceptance of the premiums. There was no evidence in the record whether employer paid some portion of the premiums related to this policy. There was also insufficient evidence for the ALJ to determine whether STD/LTD premiums should be included in Claimant's AWW.

21. Claimant participated in safety training while working for Employer and his training record was admitted into evidence. More particularly, he attended safety training on June 19, 2017. The subject was fall protection. Claimant also completed training on August 8, 2017 and the subjects were: fall protection, PPE and scaffolding training. The ALJ inferred Employer promulgated its safety policies and rules during the trainings Claimant attended.

22. Mr. C_____ worked for Employer as a foreman, a position he has held for two years. He has worked for Employer for a total of 17 years. As a foreman, he was responsible for reporting any issues with safety cables and the retractable cable. He was also responsible for making sure employees stay tied off throughout the day. He also set up the clamps that connect to the retractable cables, which attach to the main rafters. He set up the cable system and moved it as the job progressed. Mr. C_____ testified that if an employee was 6 feet or higher, that employee had to be tied off.

23. Claimant was injured on September 22, 2017 while working for Employer. He was working on a jobsite located in Fort Lupton, Colorado. Claimant was working at a height of anywhere from 24 to 30 feet and was unclipped from his safety harness when he fell.

24. Mr. C_____ was working with Claimant on the day of the accident. Jesus P_____ and Carlos R_____ were also working that day. Mr. C_____ stated they got to the roof by way of a scissor lift and had to hook into the fall protection system before untying from the scissor lift. They were putting insulation on the roof, which involved stacking rolls on the second rafter and then rolling out the insulation.

[5] The policy was not admitted into evidence at the hearing.

The insulation was installed between the purlins. The fall protection system was in place on the building and a horizontal safety line ran from one end, with the anchors were set on the main beams. Mr. C_____ testified that if an employee was more than six feet inside of an edge on this type of roof, that person did not have to be tied off.[6] The ALJ inferred Mr. C_____ believed there were some circumstances when employees could unhook from the safety harness, even when working above 6 feet.

25. Mr. C_____ had moved to set up a retractable line at a different location on the roof. He saw Claimant and Mr. P_____ walking over to the other part of the roof. Neither Mr. B_____ nor Mr. P_____ was hooked up.[7] Mr. C_____ did not see either unhook their harnesses. Mr. C_____ started cussing, asking them what they were doing, as they had unhooked from the retractable. He saw Claimant step on the insulation and fall.

26. Mr. P_____ testified at hearing. He has worked for Employer as an installer for eleven (11) years. At the time of the accident, he was working overtime hours and has continued to do so since then. He was helping Mr. C_____ run the rolls of insulation from one edge of the roof to the next. This took approximately hour and a half and he was clipped in while he was working. Once they were finished running the rolls, they would get on top of the roof and help everybody else run the overlays.

27. Mr. P_____ testified he unclipped his harness when he walked across with Claimant. He was the first to walk across and both of them unhooked from the horizontal line to walk along the edge of the building. Mr. P_____ stated walking across the roof and near the edge while unhooked was a violation of company policy. He was aware of the company policy. Mr. P_____ testified they were supposed to be clipped in at all times. Mr. C_____ did not tell him to stop walking across after he unclipped. They had done it many times on that job. Mr. P_____ said there were not safety lines on the roof where they were located. He saw Claimant fall backwards.

28. Mr. P_____ stated they worked to install the overlay without being clipped in before September 22, 2017. Mr. P_____ testified he was never disciplined or reprimanded for unclipping his harness while working.[8] That included discipline imposed by Mr. C_____.

29. Mr. W_____ testified he was not aware that Mr. C_____, Mr. R_____, Claimant, and Mr. P_____ worked unclipped from the fall protection system. If he had received notice from the manager that they were working unclipped, these employees would have been pulled from the job site and disciplined accordingly.

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[6] Hearing Transcript Volume I ("Hrg. Tr. Vol. I"), p. 209:11-16.

[7] Hrg. Tr. Vol. I, p. 196: 6-11.

[8] Hrg. Tr. Vol. I, p. 270: 24-25.

If an employee was unclipped at high heights, that was a terminable offense, as this was one of the most dangerous things an employee can do in there in this industry. Mr. W_____ testified employees were encouraged to discuss the violations they witnessed.

30. There was no evidence in the record that Mr. W_____ disciplined employee(s) for unhooking safety harness while working at heights. Mr. C_____ testified he did not discipline employees for unhooking safety harnesses. Mr. P_____ was not disciplined for unhooking his harness on the jobsite on the date Claimant was injured. The ALJ found these were examples of Employer not enforcing the fall protection safety policy.

31. Photographs of the accident site were admitted at hearing.[9] These showed the area where Claimant fell, including a section of the insulation that was open through which Claimant fell. The pictures also depicted the roof on the building, which was partially completed, as well as area where insulation had been laid between the perlins.

32. A drawing/reconstruction of the area where Claimant was also admitted at hearing. This depicted the area in which Claimant, Mr. P_____ and Mr. C_____ was working. There was an area of exposed insulation where Claimant fell.

33. There was no evidence that equipment failure, including the harness Claimant was wearing and the lanyard, was a cause of the accident.

34. On October 10, 2017, a General Admission of Liability ("GAL") was filed on behalf of Respondents, admitting for wage and medical benefits. The GAL admitted for an AWW of $813.27, which gave a TTD rate of $542.18. This GAL reduced Claimant's TTD benefits by 50% for a safety rule violation and these benefits have been paid at a rate of $271.09 per week.

35. An Employer’s First Report of Injury was completed on December 5, 2017. It stated Claimant was installing insulation when he fell.

36. An expert report prepared by David Glabe, PE, dated April 16, 2018 was admitted into evidence. His areas of specialty included fall protection, scaffolding, shoring, forming and construction engineering. Mr. Glabe, who is a structural engineer, was retained by Respondents and offered several opinions related to the subject accident. First, he concluded Employer complied with the applicable OSHA regulations regarding safe workplaces, training and fall protection. Mr. Glabe also concluded Claimant did not comply with applicable OSHA regulations; this failure to do so resulted in his accident and injuries. Third, Mr. Glabe concluded Employer provided effective fall arrest systems that not only complied with applicable OSHA regulations, but also provided Claimant with fall arrest protection for the work activity he was doing at the time of his fall.

[9] Exhibit 1.

37. Mr. Glabe testified as an expert in civil engineering, as well as fall protection safety and fall protection systems. Mr. Glabe opined the accident was caused when Claimant unhooked his lanyard from the safety line and he had no protection to either arrest the fall or restrain him from a fall. This was the cause of his injuries. Mr. Glabe concluded Employer complied with applicable OSHA regulations regarding safe workplaces, training and fall protection. This was based upon his knowledge and understanding of the OSHA standards and expectations that come out of those standards. He also reviewed Employer's training program for fall protection and stated Employer did a thorough job as far as written documentation. Employees knew they needed to use fall protection and there was training on the program.

38. Mr. Glabe testified that the fall protection system in place at the time of the Claimant's fault complied with OSHA regulations. The horizontal lifeline installed at the jobsite was the correct choice and retractable lanyards (also known as yo-yos) were also in use. These locked up to prevent any further fall. Fixed length lanyards were in use and connected directly to horizontal life line. Mr. Glabe stated the system in place would have work had it been used. He testified Claimant did not comply with section 5(b), which requires employees to comply with OSHA standards. Mr. Glabe opined it was Claimant's failure to use the system and hook into a lifeline which resulted in his non-arrested fall to the floor below.

39. David Johnson testified as an expert on behalf of Claimant. He was qualified as an expert in construction safety, OSHA compliance and general industry standards. His job duties/responsibilities over the past twenty-four years has included jobsite visits to inspect, audit and evaluate how workers are following policies/procedures and OSHA regulations. He prepared two reports, the first of which was preliminary (February 20, 2018) and detailed what records he needed to provide a more complete opinion. In the report dated May 3, 2018, Mr. Johnson concluded that this accident could have been prevented with proper planning, training and supervision at the site level. He opined no site specific fall protection plan was created for this site as required by company policy. He modified the first opinion in his report, noting that based upon the testimony of witnesses, Claimant was likely not going to use the ladder that was underneath the area where the fall occurred. He reaffirmed the second opinion, namely that the fall protection plan in place at the job site where Claimant was injured was not sufficient.

40. Mr. Johnson testified fall protection was in place at the roof structure, but opined it was not adequate. The horizontal lifeline system which was in place and installed was beneficial for the area of the roof where it was installed. However, it did not protect work being done in other areas of the building, which also needed fall protection. Mr. Johnson said that there should have been another horizontal lifeline for Claimant and Mr. P_____ to clip into once they got to the flat roof. He noted Mr. C_____ was secured by a 40-foot retractable lifeline and he was going to secure them to that, allowing the next worker to walk over using that lifeline. Mr. Johnson believed that was a reasonable plan for getting to the flat roof. However, there was no

place for the workers to connect at the flat roof. Even if Claimant had been able to tie off at the purlins, there were not anchor points he could have tied into, as he was wearing an 11-foot self-retracting life line.

41. Mr. Johnson testified there was not a specific fall protection plan in place that laid out the sequence of what was to occur when workers were moved around to different positions on the roof. Specifically, there was a gap in the fall protection in terms of what steps were going to be taken once the big rolls of insulation were rolled out. Mr. Johnson testified the gap in the fall protection and was present once the workers got nearer to the finished roof section. On cross-examination, Mr. Johnson agreed that a fall protection plan did not have to be in writing. He agreed Mr. C_____ was right in not yelling at Claimant and Mr. P_____. Mr. Johnson stated once they got to the stable portion of the roof, Mr. C_____ should have (as a competent person) stopped the work and required Claimant and Mr. P_____ go to the middle of the roof, as opposed to the edge. He should have talked with them and possibly installed an anchor point for them to tie off. Mr. Johnson opined that Mr. C_____ was not enforcing Employer's safety rules requiring fall protection. The ALJ noted this was borne out by the specific circumstances of Claimant's fall and credited this testimony.

42. Mr. Johnson was present for the testimony where Mr. P_____ related that he stayed at a particular location (Point E) for approximately five minutes. Mr. Johnson opined Mr. C_____ should have made sure that there was an adequate fall protection systems available throughout the work area. This was evidence to him of a lackadaisical attitude and complacency regarding fall protection on the project, as the employees were right near the edge of the roof and didn't tie off. Mr. C_____ was responsible for enforcing the plan. On cross-examination, Mr. Johnson agreed that if Claimant had remained at Point E and didn't unhook the harness, he would not have fallen. Mr. Johnson said Claimant would not have been able to stay hooked in while Mr. C_____ moved the horizontal lifeline system.

43. The ALJ finds the admitted AWW did not fairly compensate Claimant. Claimant proved he was entitled to a signing bonus in the amount of $600.00, which should be included in his AWW. Since Claimant worked for three months, the ALJ determined his AWW should be increased $50.00 per week, which was determined by dividing the amount of the signing bonus by 12 weeks.

44. Claimant's wages varied from week to week before his injury. In addition, the testimony of Claimant's wife led the ALJ to conclude that the weeks in July when Claimant took off to spend time with his son caused the calculation of AWW to be low. The ALJ found the calculation of Claimant's average weekly wage should include the total wages earned from July 23, 2017 through September 17, 2017, which included weeks in which Claimant worked overtime hours. Claimant's earnings during this 10 week period totaled $8,859.03. This gave an average of $885.90 earned per week.

45. Claimant failed to prove he was entitled to a higher average weekly wage based upon the value of health insurance benefits. The evidence showed that Claimant

did not sign up for health insurance within the specified period and was not covered under Employer's health insurance plan.

46. The ALJ was unable to determine whether Claimant's average weekly wage should be increased by the value of the STD/LTD benefits.

47. Employer adopted a safety policy which covered its workers who worked at a height above 6 feet, including Claimant. Employer's safety policy required any employee who worked at a height of above 6 feet required that employee to utilize some type of fall protection.

48. The ALJ finds Employer trained its employees on the fall protection safety policy and communicated its terms to employees, including Claimant. Claimant attended training sessions in which the safety policy that required workers to be connected to a harness while working at height was discussed. The ALJ inferred Claimant knew of the rule which prohibited unhooking the safety harness when he was working at heights 6 feet or above.

49. The ALJ was unable to conclude Claimant willfully violated the safety rule when he unhooked the safety harness on September 22, 2017, as there was evidence that a co-worker (Mr. P_____) also violated the safety rule at the same time. The ALJ was unable to determine Claimant's state of mind prior to the fall either directly or indirectly from the evidence.

50. Employer did not uniformly enforce the safety policy which required all employees to be hooked in while working at height.

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

CONCLUSIONS OF LAW

Generally

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

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. (2016). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). In the case at bench, the credibility of Employer's witnesses, as well as experts determined whether there was a willful violation of a safety rule.

AWW

§ 8-42-102(2), C.R.S. (2016) requires the ALJ to calculate Claimant's AWW based on the earnings at the time of injury as measured by the Claimant's monthly, weekly, daily, hourly or other earnings. This section establishes the so-called "default" method for calculating Claimant's AWW.

However, if for any reason, the ALJ determines the default method will not fairly calculate the AWW, § 8-42-102(3), C.R.S. (2016) affords the ALJ discretion to determine the AWW in such other manner as will fairly determine the wage. § 8-42-102(3), C.R.S. establishes the so-called "discretionary exception". *Benchmark/Elite, Inc. v. Simpson,* 232 P.3d 777 (Colo. 2010); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of Claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra; Avalanche Industries v. ICAO*, 166 P.3d 147 (Colo. App. 2007)

In *Campbell*, Claimant's initial injury occurred ten years before her deteriorating condition caused her to cease working. Her employer argued that her AWW should be based on the wages she earned at the time of her initial injury, rather than the higher wages she had earned through salary increases and promotions during the intervening years. The Colorado Court of Appeals determined that it would be "manifestly unjust to base Claimant's disability benefits in 1986 and 1989 on her substantially lower earnings in 1979", and determined that her AWW should be based upon the higher salary earned at the time her deteriorating condition caused her to stop working. *Campbell v. IBM Corp., supra,* 867 P.2d at 82. The rationale for the Court's decision was one of fairness and Justice Plank stated:

"The entire objective of wage calculation [under the Act] is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. Although [AWW] generally is determined from the employee's wage at the time of injury, if for any reason this general method will not render a fair computation of wages, the administrative tribunal has long been vested with discretionary authority to use an alternative method in determining a fair wage". *Campbell v. IBM Corp., supra,* 867 P.2d at 82.

Likewise, in *Pizza Hut v. ICAO*, 18 P.3d 867, (Colo. App. 2001), Claimant was injured while working as a delivery driver. He then obtained a second job at a hospital. Claimant concurrently held two jobs for a short period, then quit the delivery job. The

Colorado Court of Appeals affirmed the increase in Claimant's average weekly wage and reinforced the principle that the ALJ had discretion to calculate Claimant's wages based on earnings from a subsequent employer and not upon wages earned at the time of injury, as the former represented a fairer calculation of Claimant's AWW.

In the case at bench, there was a dispute whether Claimant was entitled to a signing bonus while working for Employer. Claimant argued his AWW should be increased by the amount related to the signing bonus. Respondents, relying on the testimony of Ms. D_____ and Mr. W_____ asserted there was no evidence Claimant was entitled to a signing bonus, as it was not referenced in the offer letter. (Findings of Fact 15-16). As found, Claimant was entitled to a higher AWW, as it was more probable than not he was to receive a signing bonus. (Finding of Fact 38). The ALJ credited the testimony of Ms. Burd, as well as Mr. G_____ on this subject. (Findings of Fact 4-5). The ALJ determined Claimant was entitled to a signing bonus and prorated the amount of that bonus over the first three months of his employment, thereby increasing the average wage by $50.00 per week.

Claimant further argued that his average weekly wage should be increased to include the value of fringe benefits to which he was entitled (health, dental, and STD/LTD). Including signing bonus with all other benefits he expected to receive, Claimant asserted his AWW should be increased to $1,422.23, the maximum benefit rate for 2017. Respondents averred Claimant's admitted average weekly wage was correct and fair reflection of what Claimant was earning at the time of his injury. Respondents noted the admitted AWW calculation was based on Claimant's total earnings during his time of employment, $11,395.83 earned in 14 weeks from June 12, 2017 to September 17, 2017, equals $813.27 per week. Respondents contended Claimant failed to prove an entitlement to a higher AWW based upon a signing bonus and various fringe benefits.

As found, Claimant did not enroll in Employer's health insurance plan within the time period for enrollment and therefore that cannot be included in the AWW. (Finding of Fact 45). Likewise, there was insufficient evidence which would allow the ALJ to determine whether the STD/LTD policy should be included in the AWW. (Findings of Fact 20, 46).

The ALJ determined the fairest assessment of Claimant's AWW was to consider his wages from July 23, 2017 through September 17, 2017. This accounted for weeks when Claimant took time off in July. This also included weeks when he worked less than 40 hours, along with those when he qualified for overtime. Claimant earned a total of $8,859.03 over those 10 weeks, which gives an AWW of $885.90 per week. When the sign-on bonus is included, Claimant's average weekly wage should be increased to $935.90 per week.

Willful Violation of a Safety Rule

Section 8-42-112(1)(b), C.R.S. governs the imposition of a penalty for a violation of a safety rule. That section provides for a 50 percent reduction in Claimant's

compensation when Respondents prove "the injury is caused by the employee's willful failure to obey any reasonable rule adopted by the employer for the safety of the employee". The question of whether the Respondents met their burden and proved a willful safety rule violation by a preponderance of the evidence is generally one of fact for determination by the ALJ. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office,* 907 P.2d 715, 719 (Colo. App. 1995).

In *Lori's Family Dining*, Claimant was engaged in horseplay with co-employees, which escalated to an altercation. Claimant was injured when he fell and broke his arm. The employer prohibited horseplay and had warned employees against such conduct. Employer's policies required three written warnings before termination. The ALJ declined to impose a 50% penalty for a safety rule violation on the grounds that employer had not enforced safety rule, which was affirmed by the Industrial Claim Appeals Office. The Colorado Court of Appeals considered whether the denial of the penalty was appropriate under those circumstances. Justice Hume noted the most frequent ground for rejecting a penalty for violation of a safety rule was the "lack of enforcement of the rule or policy by an employer with knowledge of and acquiescence in its violation". The Court affirmed the ALJ's denial of the safety rule violation. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office,* 907 P.2d at 719.

As a starting point, the ALJ concluded Employer adopted a written safety policy which was in force at the time Claimant was injured. (Finding of Fact 9). This policy was expressed in Employer's Fall Protection Program. The specific policy at issue was the Safety and Hazard Communication Program, which required employees to wear a harness when working at heights above six feet. (Findings of Fact 10, 47).

As determined in Findings of Fact 7-10, Employer took steps to insure its employees were informed of the policies and the safety rules were reinforced throughout their employment. The testimony of Mr. G_____ and Mr. W_____ established Claimant receive training, specifically Employer's fall protection rules. (Findings of Fact 6, 12). The ALJ concluded that Employer communicated the safety policies to Claimant, who underwent training on fall protection. (Finding of Fact 10). Claimant's completion of the safety training was established by Employer. The ALJ concluded (by both direct evidence and inferences) that Claimant was aware of the safety policy. (Finding of Fact 48). Therefore, Respondents proved there was a safety rule which was communicated to employees, including Claimant. That does not end the inquiry, however. The ALJ next considered whether Employer enforced the subject safety policy.

The ALJ concluded Employer had not enforced the safety rule. First, there was direct evidence in the form of witness testimony which established employees worked on the subject jobsite and unhooked the safety harnesses in violation of the policy. Mr. C_____, who was the supervisor of the job site confirmed he witnessed Claimant and Mr. P_____ unhook their safety harnesses. (Finding of Fact 25). Mr. P_____ testified he unhooked the safety harness and was not subject to discipline. (Finding of Fact 27.) Mr. P_____ testified he had unhooked several occasions at this job site.

This evidence was apposite to the ALJ's determination that Employer did not enforce the safety rule at all times.

As determined in Findings of Fact 13, 29-30, Employer witnesses testified that violations of the rule against unhooking a safety harness subjected employees to discipline, up to and including termination. The written terms of the fall protection policy also described the failure to follow it as a disciplinable offense. (Finding of Fact 9). However, the evidence showed Employer did not discipline employees who violated the rule against unhooking safety harnesses. No contrary evidence was introduced to refute this. There was no evidence any employee was disciplined for what occurred on the date when the Claimant was injured. (Findings of Fact 29-30). Thus, while the evidence before the ALJ proved Employer had an established policy, which was communicated to employees, the Employer acquiesced in the violations of the policy. This fits within *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office, supra*, and its progeny. Where an Employer does not enforce a safety rule it adopted, this denudes the safety rule of its force and effect. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office,* 907 P.2d at 719. Under these circumstances, Respondents were not entitled to reduce Claimant's benefits for violation of the safety rule.

Second, there was dissonance between the written text of Employer's safety rule governing fall protection and its employees' understanding of the rule. As found, Employer's fall protection policy required any employee who worked at the height of 6 feet or above was required to wear protection at all times. (Findings of Fact 9-10). Employer management witnesses, Mr. G_____ and Mr. W_____ testified that wearing fall protection was required at all times when employees worked above 6 feet. (Findings of Fact 6, 13). These Employer witnesses uniformly testified it was a violation of the safety rule to unhook from the harness plan for working higher than 6 feet off the ground.

However, Mr. C_____, who supervised the jobsite where Claimant was injured, testified an employee could unhook the harness working on the roof, as long as the employee was more than 6 feet from any edge.[10] The ALJ noted Employer's written policy did not make such a distinction, but the fact that the supervisor at the jobsite thought there was such a distinction led the ALJ to find there was a divergence between the written policy and Mr. C_____'s understanding of the policy.

Third and finally, the ALJ was unable to conclude that Claimant's willful violation of the safety rule was the cause of the fall. Respondents were required to show Claimant's conduct was willful, that is; he knew the rule, then intentionally did what the rule prohibited. *Bennett Props. Co. v. Indus. Comm'n*, 165 Colo. 135, 140, 437 P.2d 548, 551 (1968). On this element, Respondents failed to meet their burden. As used in this statute, the word "willful" means "with deliberate intent", *City of Las Animas v. Maupin*, 804 P.2d 285, 286 (Colo. App. 1990) [citation omitted], or "the intentional doing

[10] Respondents' expert Glabe testified OSHA regulations refer to a warning line which is installed within 6 feet of the edge of the roof. A warning line has flags on it and is installed to inform workers some sort of fall protection system must be used. [Hrg. Tr. Vol. II, p. 73: 24-74:15].

of something either with the knowledge that it is likely to result in serious injury, or with a wanton and reckless disregard of its probable consequences". *Johnson v. Denver Tramway Corp.*, 115 Colo. 214, 222, 171 P.2d 410, 414 (1946) (emphasis omitted) [quoting 1 William R. Schneider, *The Law of Workmen's Compensation* § 282, at 876 (2d ed. 1932)].

Respondents argued, relying on the testimony of Messrs. W_____ , G_____ and Glade, that Claimant intended to unhook the safety harness because two physical actions were required to unhook the harness. Because Claimant attended training on the safety policy, Respondents asserted this knowledge, coupled with the physical action required to unhook the harness, led to the conclusion this was a willful violation of a safety rule. *Bennett Props. Co. v. Indus. Comm'n*, *supra,*165 Colo. 135; *Scott Triplett, v. Evergreen Builders, Inc. and St. Paul Fire and Marine Ins. Co.,* W. C. No. 4-576-463. (ICAO May 11, 2004). However, Respondents were required to show that Claimant's conduct in violating the safety rule was intentional, which required a deliberate decision on the part of Claimant. *Scott Triplett v. Evergreen Builders, Inc, and St. Paul Fire and Marine Ins. Co., supra.*

The ALJ found that while Claimant had knowledge of the safety rule, this did not necessarily prove his conduct was entirely volitional. (Finding of Fact 49). Given the fact that Mr. P_____ also concurrently violated the safety rule and there were no repercussions, Claimant may have thought unhooking the safety harness was allowed in limited circumstances. Under the facts present in this case, the ALJ was unable to determine Claimant's violation of the safety rule was willful. (Finding of Fact 29).

For these reasons, the ALJ determined Respondents failed to meet their burden of proof. Claimant did not willfully violate Respondent-Employer's fall protection safety rule and Respondents are required to pay the full amount of Claimant's TTD benefits.

ORDER

IT IS ORDERED:

1. Respondents failed to prove Claimant willfully violated a safety rule. Claimant is entitled to receive 100% of his indemnity benefits.

2. Respondents shall pay 100% of Claimant's indemnity benefits.

3. Claimant's AWW is increased to $935.90 per week. Claimant TTD benefits shall be paid at the rate of $623.93 per week

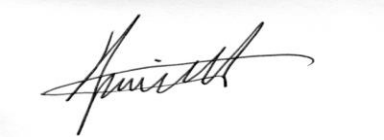
4. Respondents shall file an Amended GAL reflecting Claimant's higher AWW and for the full amount of TTD benefits.

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

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

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

DATED: January 8, 2019



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

ISSUES

1. Whether the claimant has demonstrated, by a preponderance of the evidence, that on April 11, 2018 she suffered an injury to her left knee arising out of and in the course and scope of her employment.

2. If the claimant proves a compensable injury, whether the claimant has demonstrated, by a preponderance of the evidence, that the left knee arthroscopy recommended by Dr. Kennan Vance is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the April 11, 2018 work injury.

STIPULATIONS

At hearing the parties stipulated to the following:

1. If the claimant proves a compensable injury, her average weekly wage (AWW) is $429.95.

2. If the claimant proves a compensable injury, she is entitled to temporary total disability (TTD) benefits for the period of April 12, 2018 through May 26, 2018.

3. If the claimant proves a compensable injury, she is entitled to temporary partial disability (TPD) benefits for the period of May 27, 2018 through June 9, 2018.

FINDINGS OF FACT

1. The claimant was employed with the employer as a hair stylist. When performing a haircut, the claimant would stand on a "cutting mat". The claimant testified that April 11, 2018, she was cutting a client's hair when she stepped off the cutting mat with her right foot and slipped on some hair trimmings. While she was slipping, the claimant attempted to catch herself and in doing so she twisted and hyperextended her left knee.

2. The claimant reported the incident to the employer and was referred to St. Mary's Occupational Health for treatment. Upon contacting St. Mary's Occupational Health, the claimant was able to schedule an appointment for April 12, 2018. In addition, the claimant was informed that if she wished to seek medical treatment prior to that appointment she could go to the emergency room (ER).

3. The claimant sought treatment at the ER at Community Hospital on April 11, 2018 and was seen by Amber Carpenter, PA. At that time, the claimant described the slipping incident and reported that she twisted her left knee and experienced immediate pain and swelling. Ms. Carpenter diagnosed a knee sprain and excused the

claimant from work for two days. While at Community Hospital, x-rays were taken of the claimant's left knee and showed unremarkable soft tissues and no fracture.

4. On April 12, 2018, the claimant was seen by James Harkreader, NP at St. Mary's Occupational Health. The claimant described the April 11, 2018 incident and stated that she stepped of the mat with her right foot, which slipped, and while trying to hold herself up, her left knee twisted and flexed. Again the claimant reported that she had immediate swelling. Mr. Harkreader diagnosed a knee sprain and recommended ice, elevation, and crutches.

5. The claimant returned to Mr. Harkreader on April 17, 2018 and reported continued left knee pain, swelling, and the feeling that her knee was unstable. Mr. Harkreader recommend a magnetic resonance image (MRI) of the claimant's left knee and referred the claimant to Dr. Kennan Vance for an orthopedic consultation.

6. An MRI of the claimant's knee was performed on April 24, 2018 and showed advanced focal chondromalacia in the inferior lateral facet of the patella with subchondral cystic changes with mild lateral patellar tilt. The MRI also showed degeneration and fraying of the root of the posterior horn of the medial meniscus with mild medial meniscal extrusion.

7. On April 26, 2018, the claimant was seen by Dr. Vance. At that time, the claimant described the April 11, 2018 incident and stated that her left knee twisted. Dr. Vance completed a physical examination and reviewed the MRI images and diagnosed a tear of the medial meniscus of the left knee with synovitis and chondromalacia. Dr. Vance recommended that the claimant undergo a left knee arthroscopy with possible meniscal root repair.

8. A request for authorization of the recommended surgery was sent to the respondents on April 27, 2018. On May 7, 2018, the respondents filed a Notice of Contest.

9. The medical records entered into evidence show that the claimant received treatment for left knee related issues in April 2017 and October 2017 while she was living in California. The claimant testified that she considered these prior incidents to be minor sprains. The claimant also testified that her failure to report these prior incidents to her medical providers related to this workers' compensation claim was an oversight.

10. On April 15, 2017, the claimant sought treatment for pain in her left knee and reported that on April 14, 2017 she hyperextended her left knee. The claimant was diagnosed with a sprain and possible micro tears. The claimant testified that the April 14, 2017 incident occurred when she was hiking and "stepped wrong", which resulted in pain. The claimant also testified that the left knee pain and swelling she experienced in April 2017 resolved and she was able to perform her normal job duties.

11. On October 8, 2017, the claimant felt a pop and pain in her left knee while jogging. As a result, she sought medical treatment. The medical record dated October 9, 2017 indicates that the claimant was "running downhill when all of the sudden she had left knee pain."

12. With regard to the October 2017 left knee incident, the claimant testified that she stepped off a curb while jogging and felt pain in her left knee. On October 19, 2017, the claimant was seen by her personal physician, Dr. Michael MacMurray, for a physical. At that time, the claimant reported left knee pain and Dr. MacMurray recommended an MRI and physical therapy. Although an MRI and physical therapy were recommended, the claimant did not pursue either of these treatments. The claimant testified that her left knee pain resolved and she did not miss work related to the October 2017 incident.

13. At the request of the respondents, on August 14, 2018, the claimant attended an independent medical examination (IME) with Dr. James Lindberg. In connection with the IME, Dr. Lindberg reviewed the claimant's medical records, obtained a history from the claimant, and completed a physical examination. In his IME report Dr. Lindberg opined that the recommended arthroscopy was not indicated. In support of this opinion Dr. Lindberg noted his belief that the claimant's descriptions of the April 11, 2018 incident were inconsistent. Dr. Lindberg also pointed to the claimant's prior knee injuries in 2017. Dr. Lindberg further opined that the claimant's symptoms were due to an old injury "that just had a re-exacerbation of it." In his IME report, Dr. Lindberg indicated that he contacted the radiologist regarding the April 24, 2018 MRI and discussed the imaging and the findings and "agreed that there is no medial meniscal tear." Dr. Lindberg's testimony at hearing was consisted with his written report.

14. Dr. Vance testified by deposition in this matter and reiterated his recommendation for the left knee arthroscopy. Dr. Vance testified that his diagnosis is a tear of the claimant's left medial meniscus root. In support of this diagnosis Dr. Vance testified that the claimant's mechanism of injury is consistent with a tear and the MRI showed increased signal in the root of the medial meniscus. In addition, Dr. Vance stated that the recommended surgery is reasonable and necessary to treat the claimant's symptoms.

15. The claimant credibly testified that the left knee symptoms she experienced in April 2017 and October 2017 are different than those symptoms she has had since the April 11, 2018 incident at work. The claimant testified that her current symptoms include pain and swelling in her left knee. In addition, she feels that her left knee is not stable and it "locks", "gives out", and "catches". The claimant testified that she would like to get the recommended left knee surgery.

16. The ALJ credits the medical records, the claimant's testimony, and the opinion of Dr. Vance over the contrary opinion of Dr. Lindberg. The ALJ finds that the claimant has demonstrated that it is more likely than not that on April 11, 2018 she suffered an injury to her left knee at work.

17. The ALJ credits the medical records, the claimant's testimony, and the opinion of Dr. Vance over the contrary opinion of Dr. Lindberg. The ALJ finds that that the claimant has demonstrated it is more likely than not that the surgery recommended by Dr. Vance is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the April 11, 2018 work injury. While the April 11, 2018 incident at work did not cause the claimant's torn meniscus, the slip and subsequent twisting of her left knee aggravated and accelerated the preexisting condition of the claimant's left knee, necessitating surgery.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2016).

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

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

5. As found, the claimant has demonstrated by a preponderance of the evidence that she suffered an injury to her left knee arising out of and in the course and scope of her employment on April 11, 2018. As found, the medical records, the claimant's testimony, and the opinion of Dr. Vance are credible and persuasive.

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

7. As found, the claimant has demonstrated by a preponderance of the evidence that the knee surgery recommended by Dr. Vance is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury. As found, the April 11, 2018 incident at work aggravated and accelerated the claimant's preexisting left knee condition, necessitating surgery. As found, the medical records, the claimant's testimony, and the opinion of Dr. Vance are credible and persuasive.

ORDER

It is therefore ordered:

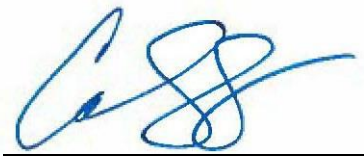
1. The claimant suffered a compensable injury to her left knee.

2. The respondents shall pay for the left knee arthroscopy recommended by Dr. Vance, subject to the Colorado Medical Fee Schedule.

3. The ALJ adopts and stipulation of the parties regarding AWW, TTD, and TPD.

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

Dated January 9, 2019



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

STATE OF COLORADO
OFFICE OF ADMINISTRATIVE COURTS
Workers' Compensation No. 5-078-773

ISSUE

- Whether Claimant has proven, by a preponderance of the evidence, that he sustained both an "accident" and a resulting compensable "injury" to his left shoulder on April 26, 2018?

PROCEDURAL MATTERS

Respondents' and Claimant jointly submitted exhibits A-H without objection.

FINDINGS OF FACT

Claimant Alleges Incident at Work on April 26, 2018

1. Claimant testified that he worked as a water technician for Employer at a jobsite in Wyoming. He testified that at the time of the alleged injury Employer assigned him to stay at the jobsite in Wyoming for a period of two weeks.

2. Claimant testified that he sustained an injury to his left shoulder on April 26, 2018 when wind blew shut a heavy steel door of a diesel container. He testified that the door hit his left upper arm.

3. Claimant testified that the impact of the door against his shoulder caused his alleged work injury. Specifically, Claimant alleges that he sustained an acute rotator cuff tear because of this impact incident.

4. Claimant did not provide an adequate explanation of either (1) how a gust of wind would push a heavy steel door hard enough into his shoulder to cause an actual injury; or (2) how a simple impact incident to the shoulder could cause a rotator cuff tear.

5. Dr. Timothy O'Brien, a board certified orthopedic surgeon, performed an IME in this case. He testified by deposition that the mechanism of injury as described by Claimant would not result in an acute rotator cuff tear. Rather, the mechanism of injury more likely and at the most would cause a contusion/bruise to the outside/lateral aspect of the left arm. Dr. O'Brien explained that rotator cuff tears occur when the arm is positioned overhead, which was not the case here.

6. Dr. O'Brien further explained that with the mechanism of injury as described – a blow to the outside of the left arm – force would dissipate into the deltoid muscle rather than the rotator cuff. As a result, he testified that, even if Claimant had a pre-existing cuff tear, it would be very unlikely for the mechanism of injury as described to aggravate the tear.

Although Admittedly Trained To Report Injuries Immediately, Claimant Did Not Report the Alleged Injury for a Week

7. Claimant conceded that Employer provided instructions and bout how to report work injuries. Specifically, Employer requires that an employee timely report a potential work injury.

8. Despite his training, Claimant conceded he did not report a work injury to his employer until May 3, 2018, after returning to Denver from the Wyoming job site. As a result, he delayed reporting the alleged incident to Employer for a week.

Claimant Continues Heavy Lifting and Full Duties after Alleged Injury

9. Claimant continued to work at full duty after his alleged injury for a total of between three and six days. During this time, he conceded that he was able to perform his normal job duties and that he did not have help from other employees during this time.

10. Claimant explained that his job required heavy lifting of more than fifty pounds several times a day. Specifically, Claimant testified that he lifted chemical bags weighing at least fifty pounds three to four times a day after his alleged injury. He explained that he lifted the chemical bags from the ground to a height of approximately five feet to pour them into water containers.

11. Claimant also testified that he lifted and connected hoses two or three times per day, and that the hoses weighed in excess of fifty pounds.

12. Dr. O'Brien testified that Claimant's testimony was completely inconsistent with sustaining an acute work injury to his left. Dr. O'Brien testified that both acute rotator cuff tears and aggravations of rotator cuff tears are some of the "most disabling injuries we see" and that they are associated with "substantial weakness" and inability to lift the affected arm.

13. Dr. O'Brien specifically and persuasively testified that the likelihood Claimant would be able perform his full duties after an acute new tear, or an acute new-on-chronic tear, was almost zero percent. And that it would be almost impossible for Claimant to be able to continue to lift 50-pound objects and pull hoses with that injured extremity.

14. The ALJ finds and determines that Claimant's testimony that he was able to perform his full job duties, including heavy lifting of 50 pounds to a five foot height, is inconsistent with sustaining either an acute rotator cuff tear or an aggravation of a pre-existing tear. In so finding, the ALJ credits both Claimant's testimony regarding his job duties and Dr. O'Brien's testimony regarding Claimant's level of function.

Claimant Has Intervening Incident at Home Prior to Reporting the Injury or Seeking Medical Treatment for the First Time

15. After working three to six days after the alleged work injury, Claimant returned to his Denver home. Claimant still did not report a work injury or seek medical

care. Claimant did not provide a persuasive explanation of why he did not timely report the alleged work injury.

16. Claimant testified that after he returned to Denver (but prior to his hospital visit on May 2, 2018), he bumped his left shoulder when going down the stairs in his home. He testified that prior to this incident, he had pain that "bothered" him, but it was not so bad. After the incident in his home where his shoulder hit a wall, he had more pain.

17. After hitting his shoulder against the wall at home, Claimant sought medical care at the emergency room the next day, May 2. Claimant admittedly never reported a work injury or sought medical care before his home incident.

18. The hospital record from May 2, 2018 documents that, at admission, Claimant reported new pain in his left shoulder occurring the night prior. Specifically, he reported hitting a wall after walking down stairs and missing a step.

Claimant Reported a Work Incident Which Occurred a "Few Months Ago" at the Hospital

19. At the hospital, Claimant reported that he hit his arm on a steel door at work *a few months ago*. As a result, the initial medical record was inconsistent with an injury occurring a week prior at work as Claimant alleged.

20. Dr. O'Brien testified that the need for medical attention on May 2, 2018 appeared to be due to the incident occurring in Claimant's home. He based this opinion on the fact that the home incident required Claimant to obtain treatment within twenty-four hours of its occurrence. However, based on the hospital's triage history, the reported work injury occurred months earlier.

21. The ALJ finds and determines that the incident that occurred in Claimant's home motivated him to seek medical treatment on May 2, 2018.

22. As noted above, Claimant conceded that prior to the home incident, he was able to perform his regular job duties.

23. The ALJ finds and determines that this history further proves that Claimant's need for disability and lost wages is related to the home incident rather than the alleged work incident.

Initial Medical Record Inconsistent with an April 26, 2018 Injury

24. As noted above, Claimant went to St. Anthony's emergency room on May 2, 2018 after the incident in his home. The record documents that immediately prior to admission, Claimant sustained an injury to his left shoulder on his staircase at his house.

25. The history of illness taken by the hospital's triage nurse documents that a few months prior to admission Claimant hurt his left shoulder.

26. The ALJ infers that the history of present illness is inconsistent with the assertion of the need for medical treatment due to an alleged injury occurring on April 26, 2018. Specifically, the ALJ finds and determines that Claimant's report that he sustained an injury two months prior to admission would render the date of injury in early March 2018 rather than a week prior on April 26, 2018.

Claimant Finally Reports the Alleged Work Injury to the Employer after the Incident at Home and the ER Visit

27. Claimant eventually reported the alleged work injury to Employer after the incident at home and the hospital visit. Specifically, Claimant reported the alleged work injury on May 3, 2018 after having the incident at home and seeking medical care. Thus, Claimant did not report the alleged work injury for a week.

Claimant Fails to Disclose the Incident that Occurred at Home to His Treating Providers for the Work Injury

28. The ALJ finds that the medical record establishes that none of Claimant's medical providers documented the incident at Claimant's home and prompted him to seek medical treatment. Claimant failed to tell the workers' compensation providers about the home incident.

29. Claimant disclosed the home incident during litigation after it was clear that Respondents would obtain the emergency room records.

No Acute Findings on MRI Performed Less than Month after Alleged Injury

30. Claimant underwent a left shoulder MRI on May 21, 2018. The study established an irregular 2.5 cm full-thickness tear of the rotator cuff with retraction and edema, subscapularis tendinopathy without tear, partial tear/tendinopathy in the biceps with degenerative SLAP lesion, and an os acromiale with synchondrosis.

31. Dr. O'Brien reviewed the MRI scan and opined the radiographic findings were not acute. Rather, he testified that the findings were chronic and long-standing with greater than 99 percent assurance.

32. Specifically, Dr. O'Brien testified that the MRI's findings were chronic and long-standing due to the following:

- A complete absence of an accumulation of blood or fluid which is anticipated in any acute tear of muscle or tendon;
- The size of the tear – 2.5 centimeters – without bleeding suggests that the muscle has been malfunctioning for a long period of time;
- The AC joint had arthritis in it suggesting a long-standing problem; and

- The presence of retraction at the tear suggests a chronic pull of a muscle over time rather than an acute tear.

33. Dr. O'Brien additionally testified that the MRI is such a sensitive test that it would be able to pick up even a very minor tear (i.e. an acute aggravation of a pre-existing tear). He testified that the MRI did not show that such a minor tear occurred, because there was still no accumulation of blood or posttraumatic fluid that you would anticipate even with a minor tear.

34. The ALJ finds and determines that the MRI does not support a finding that Claimant sustained an acute rotator cuff tear or an acute aggravation of a pre-existing tear.

Claimant Failed to Establish a Compensable Injury on April 26, 2018

36. The ALJ finds and determines Claimant failed to meet his burden to establish he sustained an acute compensable injury on April 26, 2018. The ALJ finds and determines there is insufficient objective evidence to support a finding that the need for medical treatment or disability after the alleged incident causally related to an incident occurring on April 26, 2018. In so finding, the ALJ finds the initial emergency room record documenting an intervening home incident and the testimony of Dr. O'Brien regarding the emergency room record and MRI to be persuasive and credible.

37. The ALJ additionally finds and determines that Claimant presented insufficient evidence that any incident occurring on April 26, 2018 aggravated, accelerated, or combined with a pre-existing condition to cause the need for medical care or disability. In so finding, the ALJ finds the testimony of Dr. O'Brien regarding Claimant's MRI to be persuasive and credible.

CONCLUSIONS OF LAW

General Legal Principles

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

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

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

When determining credibility, the ALJ should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co.*, 57 P.2d at 1205.

The ALJ has found Claimant's testimony is not credible or consistent with the totality of the evidence. The ALJ weighs Claimant's testimony accordingly.

Claimant Failed to Prove a Work-Related Accident on April 26, 2018 that Resulted in a Compensable Injury

A compensable industrial accident is one that results in an injury requiring formal medical treatment or causing disability. As a result, there needs to be both an "accident" and compensable "injury" which requires the need for formal medical care. *Wherry v. City and Cty. of Denver*, W.C. No. 4-475-818 (I.C.A.O., March 7, 2002). The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990).

The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse*, 805 P.2d 1167; *see also Subsequent Injury Fund*, 793 P.2d 576. A work related injury is compensable if it "aggravates, accelerates, or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse,* 805 P.2d at 1167*.*

As found, Claimant did not persuasively explain how wind could blow a heavy steel door into his shoulder to cause an injury. Claimant did not persuasively explain how an impact to the outside of his upper left arm could cause a rotator cuff tear.

The claimant's behavior immediately after the alleged incident including, but not limited to, not reporting the incident and continuing his full job tasks requiring heavy lifting to shoulder level, is inconsistent with the claimant sustaining a compensable injury on April 26, 2018. Although an "accident" may have potentially occurred, there was no resulting compensable "injury" requiring the need for medical treatment. Instead, the need for medical care only arose after the incident that claimant had at home.

The ALJ also finds significant the initial medical record of the emergency room where Claimant described the subsequent home injury and the alleged work incident was noted as taking place well before the reported injury date.

The ALJ specifically credits the opinions of Dr. O'Brien that the MRI revealed no acute radiographic abnormalities and that all of the radiographic findings where chronic and long-standing. Consequently, per the credible and persuasive report of Dr. O'Brien, there is insufficient evidence in the totality of the record that Claimant sustained an injury on April 26, 2018, that required medical treatment or disability. *Wherry*, W.C. No. 4-475-818. Claimant's claim for benefits related to an alleged April 26, 2018 incident is denied and dismissed.

Also as found, there is insufficient evidence in the medical records that any incident occurring on April 26, 2018 aggravated, accelerated, or combined with a pre-existing condition to cause the need for medical care or disability. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949). In so finding, the ALJ specifically credits the testimony of Dr. O'Brien that no radiographic findings on the MRI would suggest a new-on-chronic injury to the shoulder. Claimant's claim for benefits related to an alleged April 26, 2018 aggravation is denied and dismissed.

ORDER

1. Claimant failed to prove by a preponderance of the evidence that he sustained either an acute compensable injury or a compensable aggravation of a pre-existing condition during the course and scope of his employment with employer on April 26, 2018. Claimant's claim for medical treatment and Workers' Compensation benefits is denied and dismissed with prejudice.

Dated January 9, 2019

/s/ Kimberly Turnbow
Administrative Law Judge
Office of Administrative COurts
1525 Sherman Street #400
Denver, CO 80203

If you are dissatisfied with the Judge's Order, you may file a Petition to Review the Order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the Order, as indicated on the certificate of mailing or service; otherwise, the Judge's Order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the Order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see § 8-43- 301(2), C.R.S. (as amended, SB 09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a Petition to Review at http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUE

- Whether Claimant met his burden of proving by a preponderance of the evidence that his right shoulder labrum tear caused by the July 26, 2007 incident that injured his elbow?

FINDINGS OF FACT

1. Claimant suffered an injury to his right upper extremity on July 26, 2007.

2. On July 27, 2007, Claimant described the injury as occurring "when loading patient into the medic unit I felt a pop in my elbow and significant pain in my right elbow bicep area." Claimant testified at hearing that he personally entered this description into the Littleton Accident/Injury/Incident Report, and that it was true and accurate.

3. Claimant did not immediately seek treatment for his right upper extremity injury. Almost two weeks later on August 9, 2017, while attending a medical appointment for a left upper extremity injury, Claimant described to Sharon Walker, M.D., that while lifting a pram "he felt 2 pops in the right antecubital fossa [anterior elbow]. He got immediate bad pain in this area." There is no mention of a right shoulder injury or pain in Dr. Walker's report, and Claimant testified at hearing that he did not complain of right shoulder problems to Dr. Walker during the August 9, 2017 examination. Nor is there any indication in the medical record of any pain or injury proximal to the elbow. Consistent with the absence of any right shoulder injury, or even an injury proximal to the elbow, Claimant waived any physical examination of the right shoulder.

4. Claimant continued to work his regular job duties without complaints or restriction on the use of his right shoulder. According to Claimant's testimony, this included the active and strenuous use of his right shoulder.

5. Claimant returned for treatment of his right elbow only with Dr. Walker on October 16, 2017. Dr. Walker noted that the chief complaint was to his right elbow.

6. On December 29, 2017, Respondents filed a General Admission of Liability for the July 26, 2017 incident and authorized medical treatment to cure and relieve Claimant from the effects of the right elbow injury.

7. Dr. Walker did not diagnose a right shoulder injury until April 6, 2018, assessing a right shoulder strain, and ordering an MRI. The MRI report showed a labrum tear, "age unknown," and chronic arthrosis. After the MRI, Dr. Walker referred Claimant to Dr. Hatzidakis for "labral tear & arthritis." Respondents authorized this initial evaluation,

including the MRI. Respondents then sought a record review completed by Carlos Cebrian, M.D. on July 5, 2018, to address the causation of newly alleged shoulder injury. Thereafter, Respondents challenged the compensability of the shoulder injury.

8. Renne M. Charest, PA-C at Western Orthopedics evaluated Claimant on May 1, 2018. At that time, Claimant inaccurately, and inconsistent with the contemporaneous record, provided a history of experiencing "pain into his shoulder" on July 26, 2017. This inaccurate history repeats throughout Claimant's treatment at Western Orthopedics, including evaluations on June 28, 2018, noting "continuing right shoulder pain," August 23, 2018, describing "right shoulder pain since a work-related injury on July 26, 2017." This inaccurate history culminates in the operative report inaccurately assuming "an injury to his shoulder on July 26, 2017." To the extent any of the reports by medical professionals at Western Orthopedics express an opinion that the shoulder surgery related to the alleged July 26, 2017 incident, those opinions are unreliable because of the inaccurate history provided by Claimant.

9. Dr. Walker attempted to explain the absence of contemporaneous shoulder complaints by suggesting that Claimant had a high pain threshold. This explanation is lacking because Claimant complained of pain in the elbow immediately per his report to Littleton, and to Dr. Walker on August 9, 2017, without mentioning shoulder problem.

10. More compelling is Dr. Carlos Cebrian's opinion that the mechanism of the injury described by Claimant "would not have injured the shoulder labral at the same time as a distal biceps tendon rupture." Dr. Cebrian elaborated, noting that because the maximum force was at the elbow causing a tendon tear, there "would not have been simultaneous force of a significant level to the labrum to cause a SLAP tear in the shoulder." As Dr. Cebrian explained at his deposition:

> There would not have been sufficient force simultaneously at two opposite ends of the humerus at the distal end to tear the biceps and at the upper end to cause a labral tear. The biceps was probably torn with some extension when Mr. Goorman was dealing with a combative patient, which is how distal biceps typically tear, when there is a forceful extension at that joint. So, if the force is primarily at the elbow, there wouldn't have been the same level of significant force at the shoulder which would have caused the humeral head to pull out of the socket to cause a labral tear of an acute nature.

11. Dr. Cebrian additionally explained that the mechanism of injury Claimant described is not typically associated with labrum tears, stating that Claimant may have "had a mild traction pull on his arm, but not to the significant extent that would have caused a labral tear at the same time as a distal biceps tendon rupture."

12. Unlike Dr. Walker's opinion, Dr. Cebrian's opinion is consistent with the contemporaneous record indicating pain in the elbow, not the shoulder.

CONCLUSIONS OF LAW

The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. The Claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 592 P.2d 792, 800 (Colo. 1979). The facts in a worker's compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. A worker's compensation case is decided on its merits. Section 8-43-201, C.R.S. (2018).

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Ins. Co. v. Cline*, 57 P.2d 1205, 1209 (Colo. 1936) overruled in part on other grounds by *Lockwood v. Travelers Ins. Co*., 498 P.2d 947 (Colo. 1972).

The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

The Claimant must prove a causal nexus between the claimed need for treatment and the work-related occupational disease or injury. *Singleton v. Kenya Corp.*, 961 P.2d 571 (Colo. App. 1998). Here, Claimant has failed to meet his burden of proof that the labrum tear is causally related to the July 26, 2017 incident. The contemporaneous report of the injury mentions only an elbow injury and elbow pain, without any mention of a shoulder injury or pain. This is shortly followed by Claimant's detailed description of an elbow injury and elbow pain to the Dr. Walker on August 9, 2017, again without any reference to a right shoulder injury or pain. These contemporaneous records recorded at the time of the injury and shortly thereafter are a reliable indication that the extent of the injury suffered by Claimant was limited to the elbow.

Moreover, in the context of Claimant's obligation to meet the burden of proof, the evidence fails to sufficiently explain the absence of shoulder complaints at the time of the injury. The MRI revealed a labrum tear of uncertain age. Dr. Walker's surmise that

Claimant has a high pain threshold does not adequately explain the repeated contemporaneous and detailed descriptions of an injury to, and pain in, the elbow but no reports of pain in the shoulder. The fact that Claimant continued to work full duty after July 26, 2017 using his shoulder for strenuous activities, and reported an elbow injury and pain, but did not report or complain of a shoulder injury is further undisputed evidence not refuted by Claimant by a preponderance of the evidence.

The medical opinions of Dr. Cebrian that (1) the contemporaneous medical record does not support a labrum tear, and (2) the mechanism of the injury would not cause the elbow injury and at the same time generate enough force (or traction) to tear the labrum are found credible and persuasive.

Overall, the medical opinion and factual evidence presented by Respondents outweigh the evidence supplied by Claimant. Claimant has failed to prove by a preponderance of the evidence that he suffered a shoulder labrum tear caused by the injury on July 26, 2017. Because Claimant has failed to establish a causal nexus between the incident and his shoulder complaints, the issue raised about medical payments is moot.

ORDER

Based on the foregoing findings of fact and conclusions of law, it is Ordered that the claim for benefits related to the alleged right shoulder condition are denied and dismissed.

Dated this 11th day of January 2019.

/s/ Kimberly Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman, #400
Denver, CO 80203

If you are dissatisfied with the Judge's Order, you may file a Petition to Review the Order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the Order, as indicated on the certificate of mailing or service; otherwise, the Judge's Order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the Order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see § 8-43- 301(2), C.R.S. (as amended, SB 09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a Petition to Review at http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

The issue raised at hearing involves Claimant's entitlement to additional medical benefits. The questions answered by this decision are:

I. Whether Claimant's claim is closed by virtue of his failure to object to a December 10, 2014 final admission of liability (FAL).

II. If the claim is closed, whether Claimant established, by a preponderance of the evidence, that he is entitled to reopen it based on an alleged worsening of condition or whether Claimant is barred from reopening the claim pursuant to the two-year statute of limitations enumerated at C.R.S. § 8-43-303(2)(b).

III. Whether Claimant's need for L3-4 epidural injections as recommended by Dr. Vikas Patel is reasonable, necessary and related to this 2010 industrial injury.

Because the ALJ is convinced, based upon the evidence presented, that Claimant's need for injections at L3-4 is probably unrelated to his May 4, 2010 industrial injury, this order does not address Respondents' assertions that his claim is closed (for failure to object to a final admission of liability) or that Claimant is prevented from seeking additional medical benefits because the pertinent statute of limitations enumerated at C.R.S. § 8-43-303(2)(b) has run.

FINDINGS OF FACT

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

Issue and Background

1. The threshold issue in this case is whether Claimant's need for epidural injections at L3-4 are causally related to his May 5, 2010 industrial injury based upon the assertion that a prior work-related surgical fusion at L4-5 caused adjacent segment disease or alternatively that that fusion accelerated Claimant's pre-existing spinal/disc degeneration sufficient to cause the L3-4 level to become symptomatic and require treatment in the form of said injections.

2. Based upon the complexity of the issue presented, the passage of time, and an intervening and complex medical history, the following additional background is necessary to completely appreciate the nature of the parties' dispute:

- Claimant injured his low back in a work related incident on May 4, 2010. At that time, Claimant "bent down to lift and maneuver a

heavy a light pole to change ballast. After manipulating the pole, Claimant stood up to turn and walk away at which time he experienced severe pain in his back causing him to fall to the ground.

- Claimant was subsequently evaluated by Dr. Rakesch Khosla on May 17, 2010. At that time, Claimant reported a bit of vacillating back pain over the last couple weeks. After additional work-up, including urinalysis to exclude the presence of kidney stones, Claimant was diagnosed with mechanical back pain and degenerative disk disease.

- X-rays of the lumbar spine obtained May 21, 2010 revealed degenerative changes in the thoracic and lumbar spine, including "some lateral bridging osteophytes, particularly at the superior endplate of L4 in addition to a 1-2 mm anterior subluxation of L4 on L5.

- An MRI of the lumbar spine was done on June 7, 2010, a few weeks after Claimant first sought treatment for his back from his primary care physician (PCP). This MRI included in its findings, disc desiccation from L2-S1, a bilobed disk bulge or mild protrusion with intraforaminal extension on the right at L3-4 causing "mild compromise of the neural foramen without definite L3 entrapment" along with a broad-based central disc bulge or mild protrusion and bilateral facet and ligamentum flavum hypertrophy at L4-5. This study also demonstrated the presence of bone edema in the posterior laminar arch on the left at L4 and the right L5 pedicle suggestive of advanced stress reaction at L4-5. Finally, the MRI revealed mild dextroscoliosis in upper mid lumbar region, which Dr. Patel explained is a rotational curvature of the spine.

- A First Report of Injury was filed and Respondent's admitted liability for Claimant's injury by way of a General Admission of Liability (GAL) filed August 31, 2010.

- Claimant would subsequently undertake substantial conservative treatment to cure and relieve him from the effects of his low back injury.

- An MRI of the lumbar spine was repeated on April 18, 2011. Findings from that MRI were similar to those revealed in the study dated June 7, 2010 with the interpreting radiologist noting that when technical differences were accounted for, he did not suspect significant change at L4-5. The L3-4 level according to this MRI demonstrated minor disc desiccation.

- Claimant was placed at maximum medical improvement (MMI) on March 5, 2012 by Dr. Richard Nanes with 20% whole person impairment. Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Nanes opinions concerning MMI and impairment on March 19, 2012. This admission admitted liability for reasonable, necessary and related medical treatment and/or medications after MMI.

- The claim was then voluntarily reopened by way of a GAL on June 12, 2012. Following the reopening, Claimant underwent an MRI of the lumbar spine which demonstrated a 1-2 mm increase in the subtle spondylolisthesis first noted on Claimant's April 18, 2011 MRI. Minor disc desiccation as previously noted by MRI dated April 18, 2011 was "unchanged". Claimant subsequently underwent an L4-5 fusion procedure with Dr. Stephen Shogan on November 28, 2012. Dr. Shogan performed the aforementioned procedure using an "Aspen Device".

- On January 11, 2013, x-ray imaging demonstrated a 6 mm anterolisthesis of L4 on L5 along with facet arthropathy and disc space narrowing.

- Repeat MRI of the lumbar spine with contrast enhancement performed March 25, 2013 revealed no detectable spondylolisthesis at L4-5; however, the was lateral disc bulging into the foramina greater on the left than right side without significant change on the left. The L3-4-disc level demonstrated "mild enhancement of the facet joints with minor disc bulging without stenosis or interval change.

- On June 20, 2013, flexion and extension x-rays were obtained demonstrating an "anterospondylolisthesis of L4 in relation to L5 measuring 7 mm. In extension anterospondylolisthesis measures 5 mm and during flexion anterospondylolisthesis measures 9 mm."

- On September 9, 2013 a CT myelogram of the lumbar spine was performed which revealed [m]oderate-severe central spinal stenosis and moderate bilateral foraminal narrowing at L4-5 secondary to a combination of degenerative disc disease, facet arthropathy, and degenerative listhesis". When this study was compared with an MRI performed November 14, 2012, it was felt that Claimant's central stenosis at this spinal level had progressed. At the L3-4 segment, the CT demonstrated degenerative changes including "mild concentric disc bulging and facet arthropathy causing mild central spinal stenosis with AP dimension of the thecal

sac measuring 9 mm".

- Claimant also underwent an electrodiagnostic (EMG) study on September 9, 2013, during which it was documented that he underwent low back surgery for severe pain and that while he initially appeared to recover "quite well", in the last few months before the EMG he had a recurrence of progressive and low back pain radiating down into the buttocks and posterior thighs. Claimant's EMG was interpreted as mildly abnormal with findings of chronic denervation.

- It was determined that Claimant's November 28, 2012 fusion procedure, as performed by Dr. Shogan, had failed and that a second, i.e. revision surgery would be necessary to correct a likely pseudoarthritis and achieve stability at the L4-5 spinal segment. Therefore, on March 3, 2014. Dr. Patel performed an L4-5 revision surgery utilizing a interbody cage device and pedicle screws and rods to correct Claimant's nonunion. Correct positioning of the pedicle screws and alignment of the remaining hardware placed during surgery was confirmed by x-ray imaging.

- On April 21, 2014, post-surgical x-rays demonstrated no evidence of hardware failure along with "moderate disc space narrowing and proliferative endplate degenerative changes . . . at the thoracolumbar junction".

- At his six-month postop appointment on September 2, 2014, Claimant reported being pleased with resolution of his leg pain. Nonetheless, he reported residual back pain. Consequently, x-rays were obtained which demonstrated that Claimant's L4-5 bone graft had not yet incorporated.

- Following post-surgical care Claimant was again placed at MMI with 19% permanent impairment by Dr. Nanes on November 26, 2014. Claimant returned to full unrestricted work duty.

- Respondents filed a FAL consistent with Dr. Nanes' opinions on December 10, 2014. The FAL also admitted to reasonable and necessary and related post MMI medical treatment and/or medications.

- On March 3, 2015, Claimant returned to Dr. Patel for a one-year postop follow-up. During this appointment, Claimant reported having pain with "strenuous activity" associated with work, twisting and cold weather but otherwise was doing well. X-rays were obtained. The imaging revealed no acute abnormality, postsurgical

changes at L4-5 with progressive incorporation of the bone graft and "[m]ultilevel degenerative disc disease in the lower thoracic spine and upper lumbar spine . . . without significant change".

- Due to persistent complaints of back pain, Claimant was referred by Dr. Nanes for yet another MRI. This MRI was completed August 12, 2015. Imaging addressed the entire lumbar spine segments from T-11 through S1. Regarding the L3-4 spinal segment, the MRI revealed a "mild broad based disc bulge and small posterior osteophytes which appear new, accompanied by bilateral facet joint degeneration producing mild central canal stenosis, moderate left neural foraminal stenosis, and mild right neural foraminal stenosis". Comparison was made with the MRI dated March 25, 2013. No comparison to the September 9, 2013 appears to have been done. As noted by report, the September 9, 2013 CT scan demonstrated degenerative changes including "mild concentric disc bulging and facet arthropathy causing mild central spinal stenosis with AP dimension of the thecal sac measuring 9 mm". Comparison of the reports from the September 9, 2013 CT scan and the August 12, 2015 MRI reveal the following consistencies: mild disc bulging and mild central canal stenosis.

- Claimant returned to Dr. Patel on August 18, 2015. During this appointment, Claimant reported increasing pain, similar to that he had pre-operatively. The August 12, 2015 MRI was reviewed and interpreted as demonstrating degeneration and disc herniation at L3-4. Aggressive conservative care, including core strengthening and PT was suggested along with a "bilateral transforaminal epidural steroid injection to assist with diagnosis and treatment of Claimant's L3-4-disc herniation.

- On September 15, 2015, Dr. Patel administered bilateral transforaminal epidural steroid injections at L3-4.

- On September 29, 2015, Claimant suffered an injury to his left knee after tripping over 4 by 4 blocks.

- On September 30, 2015, Claimant returned to Dr. Nanes for follow-up for his low back during which appointment he reported no benefit from the injections administered approximately two weeks prior.

- On February 5, 2016, Claimant underwent a left arthroscopic arthroplasty and loose body removal of the left knee with Dr. David Weinstein. Post-surgical care focused on the left knee without much attention paid to Claimant's low back throughout the balance

of 2016.

- On March 20, 2017, Claimant underwent additional MRI of the lumbar spine on the referral of his PCP. Comparison of the results of this MRI to the MRI dated August 12, 2015 were done. The L3-4 segment demonstrated broad based disc bulging, moderate-severe central canal narrowing and hypertrophic change causing moderate to severe bilateral neural foraminal stenosis. The impression provided was documented as "[p]rogressive disc and hypertrophic degenerative disc disease throughout the lumbar spine with varying degree of canal and foraminal narrowing.

- On May 9, 2017, Claimant returned to the medical offices of Dr. Patel for a follow-up visit. Claimant was evaluated by Nurse Practitioner (NP)Susan Estes. According to NP Estes, Claimant's fusion appeared to be healed but he had "adjacent level disc degeneration and stenosis at L3-4 and some facet arthritis below the fusion at L5-S1". She opined that disc degeneration and stenosis at L3-4 was "likely caused from the increased pressure that the L4-5 fusion has put on the L3-4 region". Dr. Patel felt that Claimant's symptoms were likely emanating from the L3-4 segment due to the stenosis present at this level. He recommended an epidural steroid injection to help "verify" this. Plans were made to have Claimant schedule bilateral injections through Kaiser to "keep his out of pocket cost down".

- The recommended injection was submitted to Insurer for authorization. The request was denied leading Claimant to file an Application for Hearing along with a Petition to Reopen based upon an alleged change of condition.

Claimant's Hearing Testimony

3. Claimant testified that he did not believe that he was at MMI on November 26, 2014 as opined by Dr. Nanes. This testimony is supported by Claimant's pain diagram completed November 26, 2014 at his MMI appointment whereon he noted that he had 2/10 pain in his low back 100% of the time. Claimant also testified that after MMI and his surgeries he "gradually started having more problems with his back".

Dr. Patel's Deposition Testimony

4. Dr. Patel by deposition on October 1, 2018. Dr. Patel is a fellowship trained orthopedic surgeon. He is currently Chief of Orthopedic Spine Surgery at Colorado University (CU) Medical Center. Dr. Patel has not seen Claimant since May 9, 2017. As noted, the evaluation on this date was performed by NP Estes.

5. Dr. Patel testified that it is not uncommon for patients who have undergone fusion procedures to develop adjacent level problems above or below the fusion.

6. As set forth above, it is Claimant's assertion that he suffers from adjacent segment disease. He argues that treatment, i.e. the epidural steroid injection is now needed at L3-4, adjacent (above) the L4-5 fusion because wear and tear caused by the fusion has degenerated and made symptomatic the L3-4 segmental level.

7. Dr. Patel testified that he believed that claimant required an transforaminal injection at L3-4 to assist in determining whether Claimant's pain was emanating from that level. Simply put, Dr. Patel noted that an L3-4 injection would help for diagnostic purposes.

8. Dr. Patel did not recall reviewing Claimant's June 7, 2010 MRI report. After reviewing the June 7, 2010 MRI report at deposition, Dr. Patel conceded that it demonstrated disc desiccation and a bilobed disc bulge, meaning that the disc at this spinal segment was bulging to two different directions prior to the L4-5 fusion.

9. Dr. Patel testified that it is difficult to predict when symptoms associated with adjacent level disease may manifest themselves. He noted that it can vary with some patients manifesting symptoms as early as six months while in others cases it could be as long as 20 years. He also testified that there is no easy way to know if the extra forces placed on an adjacent level by a fusion is "pushing something over the edge as opposed to the natural progression of [degenerative] disease." He said, "it's hard to know whether that was going to happen anyway or whether it was going to happen because of the increased stress that you put on that level because of the fusion surgery."

10. When asked if the findings noted on Claimant's 2010 MRI could produce symptoms emanating from L3-4 level by 2017, in the absence of the L4-5 fusion, Dr. Patel responded: ". . . yes, it is possible that he would have had symptoms at L3-4 without having had a fusion at L4-5". He also testified that he could not, simply by looking at the multiple imaging reports, opine that the findings noted on the 2017 MRI report represented the natural progression of degenerative change over time. However, Dr. Patel did agree with the general concept that over the course of eight years, it would be expected that a degenerative condition would worsen, testifying "[t]hat is the natural history of degenerative conditions, that they do slowly progress and slowly worsen."

11. Dr. Kathleen D'Angelo performed an independent medical examination (IME) at the request of respondents. As part of her IME Dr. D'Angelo completed an extensive review/summary of the existing medical records in addition to completing an interview and examination. Thereafter, Dr. D'Angelo authored a lengthy report dated January 6, 2018, in which she concludes that Claimant's current low back symptoms are not consistent with adjacent level disease and that his current need for treatment at L3-4 is not related to Claimant's L4-5 fusion and therefore, his May 4, 2010 industrial

injury.

12. Dr. D'Angelo testified in support of her opinions by deposition on October 24, 2018. Dr. D'Angelo is board certified in internal medicine and has been Level II Accredited through the Division of Workers' Compensation since 2001. Her medical practice is currently limited to occupational medicine.

13. As part of her Level II certification, Dr. D'Angelo testified that she studied and taught concepts for assessing causality in the field of workers' compensation.

14. Dr. D'Angelo reviewed a substantial number of the imaging reports associated with this case opining that, overtime, the reports demonstrate a "very clear progression of disc desiccation, bulging, and other degenerative changes, including facet joint abnormalities at L3-L4, as well as progressive disc desiccations at other levels". She testified further that is what would be expected with degenerative spine disease.

15. Dr. D'Angelo reiterated her opinion that Claimant's pattern of persistent and unremitting symptoms following his fusion surgery is not consistent with adjacent segment disease. Dr. D'Angelo cited studies of long term follow up after fusion surgery which showed that adjacent segment disease requires many years to develop, not months, as is the case here based upon the record supporting that Claimant's recurrence of pain occurred 6 months or less after his lumbar fusion at L4-5. Dr. D'Angelo noted that the natural history of osteoarthritis is for progression of findings on radiological studies and intermittent flares of pain. She opined that claimant's current complaints are related to the natural progression of the underlying degenerative condition of his spine. As stated Dr. Dr. D'Angelo: "[H]ere you have a gentleman with a preexisting disc protrusion with evidence of preexisting facet joint arthropathy at that level who now is presenting with diffuse disc desiccations, multiple profuse – protrusions…multiple levels at which you have ligamentous hypertrophy and facet joint arthropathy. I am not sure why we are saying, Oh, L3-L4 is different just because that is adjacent to the surgical site".

16. In her deposition, Dr. D'Angelo also addressed the proposed treatment at L3-4. She testified that Claimant's diffuse low back pain and leg pain rendered it difficult to determine what level or levels were causing his pain. She questioned whether the proposed injection would be diagnostic in this case leading her to opine that the Claimant "would be where he is right now with or without those surgeries, with or without that injury". The ALJ interprets this testimony to indicate that Dr. D'Angelo believes that Claimant's current symptoms are all related to the ongoing degenerative process present in Claimant's thoracic and lumbar spine.

17. Based upon careful review of Dr. Patel's deposition testimony, the ALJ finds a lack of evidence to support Claimant's suggestion that Dr. Patel espouses the opinion that Claimant's ongoing symptoms/need for treatment are related to adjacent level disease at L3-4 caused by the L4-5 fusion. Rather, the ALJ finds from the

deposition transcript that Dr. Patel agrees generally that adjacent level disease can develop in some patients who have undergone fusion after an indeterminate period of time. Moreover, while Claimant could have adjacent level disease, Dr. Patel was careful to note that there is "no easy" way to tell whether failure of an adjacent level is due to the forces applied on it from an adjacent fusion versus the natural progression of a pre-existing degenerative process. The content of his deposition also fails to persuade the ALJ that Dr. Patel addressed the question of whether Claimant's L4-5 fusion likely accelerated Claimant's pre-existing degenerative spine disease to cause the symptoms he suspects are emanating from L3-4.

18. In this case, Dr. Patel testified that if a patient gets good relief from an injection, then it can be implied that the area where the medication was administered is the probable source of the pain. Consequently, injections can be diagnostic in nature. As noted above, Claimant underwent bilateral transforaminal epidural injections at the L3-4 level on September 15, 2015 for symptoms similar to both which he was experiencing prior to his revision surgery and what he is currently reporting. The injection failed to result in any benefit and it was documented by Dr. Nanes on September 30, 2015 that Claimant was "still in about the same amount of low back pain as compared to [his] last visit". While a second injection was supported by Dr. Nanes, Claimant never followed-up for receipt of the same. Given Claimant's response to prior injections, the ALJ finds Dr. D'Angelo's skepticism about the efficacy of trying more, as well as her suspicion that Claimant's current pain may not be emanating from the L3-4 level persuasive. Indeed, Claimant reports diffuse pain and the imaging studies conclusively establish that he has degenerative disease at multiple levels of the thoracic and lumbar spines, any of which are probably contributing to his present symptoms. Moreover, even if Claimant's pain is emanating from the L3-4 level, Claimant failed to establish that his need for an epidural injection at L3-4 is causally related to his May 4, 2010 industrial injury. Consequently, his claim for additional medical treatment, in the form of repeat injections, must be denied and dismissed.

CONCLUSIONS OF LAW

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

Generally

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

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and

resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Assessing weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the ALJ. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). While the ALJ is convinced that Claimant's reports of persistent low back pain are credible and the recommended treatment is reasonable and necessary, the medical evidence persuades the ALJ that the need for such treatment is not causally related to his May 4, 2010 industrial injury.

D. The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo.App. 2008). To the extent, expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); see also, *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo.App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary opinion). When considered in its totality, the ALJ concludes that the evidence in this case supports a reasonable inference/conclusion that Claimant suffers from progressive degenerative disc and spine disease, the natural progression of which has probably resulted in his current symptoms and need for treatment at L3-4. While it is true that Claimant underwent fusion at L4-5, the evidence that this fusion applied additional force and strain on the L3-4 level to cause adjacent level disease is not as persuasive as the evidence presented, primarily through Dr. D'Angelo, establishing that Claimant's pre-existing degenerative condition progressed naturally to cause symptoms at this level. Similarly, there is a dearth of evidence to suggest that the L-4-5 fusion accelerated Claimant's degenerative process to cause the L3-4 level to fail and require treatment.

Dr. Patel's recommended L3-4 Transforaminal Epidural Steroid Injections

E. The claimant in a workers' compensation claim bears the burden of establishing entitlement to medical treatment. *See Snyder v. Industrial Claim Appeals*

Office, 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). Once a claimant has established a compensable work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo.App. 1990). However, a claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of the his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949). Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970). As found here, Claimant has failed to establish, by a preponderance of the evidence, that his L4-5 fusion acted upon the L3-4 level to cause adjacent level disease or that this fusion aggravated/acceleration Claimant's degenerative disc/spine disease and that this aggravation/acceleration caused his need for medical treatment, including the recommended injections.

F. A pre-existing condition "does not disqualify a claimant from receiving workers' compensation benefits." *Duncan v. Indus. Claims Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). However, an employer is not liable for the natural progression of pre-existing conditions if a claimant's employment duties, or as in this case, a prior work-related injury does not aggravate, accelerate or combine with the pre-existing infirmity or disease to produce disability and/or the need for treatment. *See generally, H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990); Roberts v. Industrial Commission, 509 P.2d 1285 (Colo.App. 1973). Even temporary aggravations of pre-existing conditions may be compensable. *Eisnack v. Industrial Commission*, 633 P.2d 502 (Colo.App. 1981). Pain is a typical symptom from the aggravation of a pre-existing condition. Thus, a claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment–related activities or in this case by the side effects of treatment for a compensable injury and not the underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1940).

G. As found in this case, the totality of the evidence presented persuades the ALJ that Claimant's current symptoms and need for treatment, specifically a L3-4 transforaminal epidural steroid injection is probably related to age, genetic predisposition and his long standing pre-existing progressive disc/spinal disease. While the ALJ is convinced that Claimant's need for the aforementioned injection is reasonable and necessary, the ALJ credits Dr. D'Angelo's opinions to conclude that Claimant's current need for L3-4 treatment is, more probably than not, related to the natural progression of his pre-existing degenerative spinal disc disease rather than an

industrial cause, including his prior L4-5 fusion surgery. Consequently, the ALJ concludes that Claimant has failed to prove that there is a causal connection between his May 4, 2010 industrial injury and the resulting condition for which he seeks medical treatment benefits. §8-43-201, C.R.S.; *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). Accordingly, his request for treatment under this claim must be denied and dismissed.

ORDER

It is therefore ordered that:

1. Claimants claim for medical benefits, in the form of additional L3-4 injections is denied and dismissed.

2. The stay concerning Claimant's obligation to reimburse Respondents' out of pocket expenses associated with the untimely cancellation of Dr. D'Angelo's anticipated hearing testimony is hereby lifted. Claimant shall reimburse Pinnacol Assurance in accordance with the Colorado Workers' Compensation fee schedule for a total of eight (8) units of expert witness time as set aside by Dr. D'Angelo for hearing preparation and anticipated testimony.

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

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

DATED: January 11, 2019

/s/ Richard M. Lamphere_____

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

ISSUES

- Whether the claimant has demonstrated by a preponderance of the evidence that permanent placement of a spinal cord stimulator, as recommended by Dr. Edward Maurin, is reasonable medical treatment necessary to maintain the claimant at maximum medical improvement (MMI).

The parties agreed that the issue of reopening the claimant's claim would be held in abeyance, without prejudice.

FINDINGS OF FACT

1. The claimant was injured on October 16, 2012. At that time, the claimant was working for the employer as a driller. The injury occurred when the claimant stepped on some grease, which caused him to slip and fall onto his back. The claimant testified his knees, shoulders, and back were injured in the October 16, 2012 fall.

2. The claimant has had extensive medical treatment since the 2012 work injury. This treatment has included physical therapy; spinal injections; magnetic resonance imaging (MRI) of his left shoulder, cervical spine, lumbar spine, and left knee; surgeries to the claimant's left knee and left shoulder; a L5-S1 spinal fusion; and various pain medications, including opioids. During this claim the claimant's authorized treating physician (ATP) has been Dr. Randal Jernigan.

3. On March 3, 2014, Dr. Jernigan placed the claimant at maximum medical improvement (MMI). At that time, Dr. Jernigan assessed a whole person impairment of 36% and imposed permanent restrictions of no lifting over 40 pounds.

4. The claimant testified that since being placed at MMI, he has had increasing low back symptoms that include pain that radiates into his left leg. On April 6, 2015, Dr. Jernigan noted that the claimant was still experiencing back pain. On January 11 2016, Dr. Jernigan noted that the claimant was experiencing left leg sciatica that was impacting the claimant's ability to sleep.

5. On May 24, 2016, the claimant was seen at Spine Colorado by Dr. Douglas Orndorff to discuss whether additional spinal surgery would be warranted given the claimant's continued left sided radiculopathy. At that time, Dr. Orndorff assured the claimant that there was union of the spinal fusion. Dr. Orndorff did not recommend additional surgery for the claimant.

6. On June 14, 2016, Dr. Jernigan noted that the claimant continued to have very severe low back pain that was radiating into both legs with numbness and tingling. Subsequently, Dr. Jernigan referred the claimant for an additional neurology consultation at San Juan Regional Neurology. On August 23, 2016 and August 30,

2016, the claimant was seen at San Juan Regional Neurology by Dr. Karen LeComte. It was at these appointments that Dr. LeComte noted that the claimant's asymmetrical symptoms were not typical of lumbar sacral radiculopathy or spinal stenosis. Dr. LeComte recommended the claimant undergo a brain MRI to address the possibility of demyelinating disease (multiple sclerosis).

7. On August 31, 2016 the claimant sought treatment with Dr. Jernigan. However, Dr. Jernigan sent the claimant to the emergency department because the claimant was experiencing symptoms of facial droop and an inability to speak. On that same date, the claimant was treated at Mercy Regional Medical Center for these symptoms. The claimant was diagnosed with transient aphasia, likely related to anxiety. A brain MRI performed on that date was normal.

8. On February 8, 2018, Dr. Jernigan referred the claimant to Dr. Tashof Bernton for testing and evaluation for complex regional pain syndrome (CRPS). The claimant was seen by Dr. Bernton on February 26, 2018. After testing, Dr. Bernton noted in his report that the evaluation was negative for CRPS. Dr. Bernton noted a differential diagnosis of lumbar radiculopathy.

9. The claimant continued to complain of low back pain that radiated in to both legs. Subsequently, Dr. Jernigan referred the claimant to Dr. Edward Maurin for a neurology consultation. On May 8, 2018, the claimant was seen by Dr. Maurin and reported three years of low back pain and left leg symptoms. Dr. Maurin opined that the claimant has chronic pain syndrome and recommended a spinal cord stimulator (SCS) trial.

10. The recommended SCS trial began on July 12, 2018. Following the SCS trial, the claimant reported to Emily Godfrey, PA-C that during the trial his pain symptoms were improved by 50%. Following the success of the trial, Dr. Maurin recommended permanent placement of a SCS device.

11. The claimant testified that during the SCS trial he had a reduction in his pain symptoms. With that reduction is his pain, the claimant was more active, was able to be on his feet more, and walk further when compared to his function prior to the SCS trial. The claimant also testified that he slept better during the SCS trial and was able to reduce his use of pain medications. The claimant testified that he took only half of his normal dosage of pain medication, Nucynta, during the SCS trial.

12. The claimant testified that he would like to undergo the recommended permanent SCS placement because he believes that it will improve his pain management and allow him to wean off his pain medications.

13. Dr. Jernigan testified that he agrees with Dr. Maurin's recommendation for permanent placement of an SCS. Dr. Jernigan noted in his testimony that the claimant experienced a 50% improvement in his back pain and had better use of his legs. Dr. Jernigan also testified that a permanent SCS device would increase the claimant's function and reduce, or even eliminate, the claimant's need for pain medication.

14. On July 27, 2018, Dr. John Douthit performed a review of the claimant's medical records related to the recommended permanent placement of an SCS device. In his report, Dr. Douthit opined that the claimant's SCS trial was not a valid trial under the Colorado Medical Treatment Guidelines (the guidelines), which require a functional assessment both before and after the trial. Dr. Douthit noted that the claimant's reports of improved function were subjective. Therefore, Dr. Douthit recommended an additional SCS trial before consideration of permanent SCS placement. Following Dr. Douthit's report, the respondents denied authorization of permanent placement of an SCS device.

15. The ALJ credits the medical records and the testimony of the claimant regarding the claimant's symptoms and the results of the SCS trial. The ALJ also credits the opinions of Drs. Maurin and Jernigan over the contrary opinion of Dr. Douthit. The ALJ finds that the claimant experienced functional improvement during the SCS trial. The ALJ finds that the claimant has demonstrated that it is more likely than not that permanent placement of a SCS device is reasonable medical treatment necessary to maintain claimant at MMI.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2012).

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

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

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

6. The Colorado Workers' Compensation Medical Treatment Guidelines (the guidelines) are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). The statement of purpose of the guidelines is as follows: "In an effort to comply with its legislative charge to assure appropriate medical care at a reasonable cost, the director of the Division has promulgated these 'Medical Treatment Guidelines.' This rule provides a system of evaluation and treatment guidelines for high cost or high frequency categories of occupational injury or disease to assure appropriate medical care at a reasonable cost." W.C.R.P. 17-1(A). W.C.R.P. 17-5(C) provides: "The treatment guidelines set forth care that is generally considered reasonable for most injured workers. However, the Division recognizes that reasonable medical practice may include deviations from these guidelines, as individual cases dictate."

7. While it is appropriate for an ALJ to consider the guidelines while weighing evidence, the Medical Treatment Guidelines are not definitive. *See Jones v. T.T.C. Illinois*, Inc., W.C. No. 4-503-150 (May 5, 2006); ***aff'd Jones v. Industrial Claim Appeals Office*** No. 06CA1053 (Colo. App. March 1, 2007) (not selected for publication) (it is appropriate for the ALJ to consider the guidelines on questions such as diagnosis, but the guidelines are not definitive); *see also Burchard v. Preferred Machining*, W.C. No. 4-652-824 (July 23, 2008) (declining to require application of medical treatment guidelines for carpal tunnel syndrome in determining issue of PTD); *see also Stamey v. C2 Utility Contractors et al*, W.C. No. 4-503-974 (August 21, 2008) (even if specific indications for a cervical surgery under the medical treatment guidelines were not shown to be present, ICAO was not persuaded that such a determination would be definitive)

8. As found, the claimant has demonstrated by a preponderance of the evidence that permanent placement of a spinal cord stimulator recommended by Dr. Maurin is reasonable medical treatment necessary to maintain claimant at MMI. As found, the medical records, the testimony of the claimant, and the opinions of Drs. Maurin and Jernigan are credible and persuasive.

ORDER

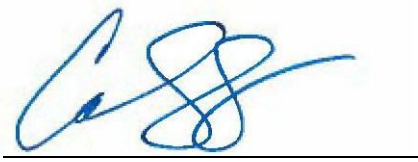
It is therefore ordered:

1. The respondents shall pay for permanent placement of a spinal cord stimulator, pursuant to the Colorado Medical Fee Schedule.

2. The issue of reopening the claimant's claim is held in abeyance, without prejudice.

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

Dated January 14, 2019



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

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

ISSUES

- Whether claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment with employer?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that the medical treatment he received was reasonable, necessary and related to his work injury?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that the need for knee surgery recommended by Dr. Christopher George is related to the work injury?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that claimant is entitled to an award of temporary total disability ("TTD") benefits from June 1, 2018 and ongoing until terminated by law or statute?

- If claimant has proven a compensable injury, whether respondents have proven by a preponderance of the evidence that claimant is prohibited from receiving TTD benefits due to the fact that he committed a volitional act that led to his separation of employment with employer?

- If the claim is compensable, the parties stipulated to an average weekly wage ("AWW") of $452.09.

FINDINGS OF FACT

1. Claimant testified at hearing that he was employed performing automotive and motorcycle repair work for employer. Claimant testified that on May 24, 2018 he was working on sealing the cab over part of a recreational vehicle ("RV") for employer when he came down the ladder of the RV and jumped to the ground. Claimant testified his right knee buckled when he landed on the ground.

2. Claimant testified he reported the incident to his supervisor, Mr. S_____, but did not seek medical treatment because he did not think his knee buckling was a big deal. Claimant testified he continued to work for employer and began wearing a knee brace.

3. Claimant testified on May 29, 2018, claimant and Mr. S_____ were discussing about repairing a water pump on a Class A Motorcoach, described by claimant as an RV the size of a bus. Claimant testified he and Mr. S_____ were inside the motorcoach and he stepped to go down the stairs out the RV when slipped

and hurt his right knee again. Claimant testified Mr. S_____ was five to eight feet away from him in the drivers' seat of the RV when he slipped. Claimant testified Mr. S_____ asked claimant if he was trying to hurt himself on purpose and told claimant to calm himself down.

4. Claimant testified he and Mr. S_____ then went to the office for employer and contacted the insurance company to file a workers' compensation claim. Claimant testified that in reporting the incident to the insurance company, he did not mention the incident on May 29, 2018 and only mentioned the May 24, 2018 incident. Claimant identified a handwritten report of both incidents he provided to employer on May 29, 2018.

5. Claimant testified that he raced motorcycles for nearly 20 years. Claimant testified that he rides single-track, off-road trails with friends and also participates in motorcycle races with a racing circuit. Evidence of a motorcycle accident claimant was involved in on December 2017 that was videotaped by claimant using a "go-pro" camera was entered into evidence. Following the accident, claimant is heard complaining of hyper-extending his right knee.

6. Matthew S_____, owner/operator of employer, testified at hearing. Mr. S_____ testified that he on occasion observed claimant wearing a knee brace at work or having a limp. Mr. S_____ testified claimant appeared at work on May 29, 2018 and had crutches and was hobbling. Mr. S_____ testified claimant reported that his knee injury from the prior week had gotten worse. Mr. S_____ testified claimant reported he wanted to file a workers' compensation claim and that they filled out the paperwork prior to working on any of the vehicles. Mr. S_____ testified that they then went to work on the vehicles and he thought claimant was going to seek medical treatment after work.

7. Mr. S_____ testified claimant reported the May 24, 2018 incident to him on the date it occurred. Mr. S_____ testified claimant was dragging his leg behind him on May 24, 2018. Mr. S_____ testified he continued to check on claimant on May 25, 2018.

8. Complicating matters in this case, claimant and employer had engaged in discussions regarding claimant's future with employer. Mr. S_____ testified that Claimant had indicated he wanted to resign his employment on or about May 18, 2018. Claimant testified he had given employer his two weeks notice as of approximately May 22, 2018, and that his last day of employment would be June 1, 2018. Mr. S_____ testified that after claimant had given his two weeks notice, he had spoken to claimant about staying with employer through the summer which was employer's busy season, and if claimant improved his performance, he would be provided a raise. The parties agreed to sever claimant's employer with employer as of June 1, 2018, however.

9. Mr. S_____ provided testimony that conflicted with the order of events that claimant testified to regarding his injury. Mr. S_____ testified that claimant arrived at work on May 29, 2018 using crutches, and requested medical treatment and

to report his May 24, 2018 incident as a workers' compensation injury. He testified that he and claimant called insurer to report the May 24, 2018 claim. Mr. S_____ testified this all occurred before claimant began to perform work on May 29, 2018.

10. Claimant testified that he was not using crutches when he arrived at work on May 29. Claimant testified he did not use crutches until May 31, 2018.

11. Mr. S_____ testified that he did not file a second report of injury with regard to the May 29, 2018 incident because it was agreed that claimant would report the second incident to doctors when he obtained medical treatment.

12. Insurer completed a First Report of Injury dated May 29, 2018. The First Report of Injury refers only to the May 24, 2018 incident. The report noted claimant jumped off a ladder, sustaining injury to his right knee.

13. Cynthia B_____ testified at hearing. Ms. B_____ performs bookkeeping work for employer on a periodic basis and testified that she would come by employer's business usually on Wednesdays. Ms. B_____ testified that she believed she came by employer's place of business on Wednesday, May 30, 2018 and had a short conversation with claimant. Ms. B_____ testified she noticed claimant was limping and when she inquired as to why he was limping, claimant stated he had injured his knee while motorcycle riding over the weekend and then had just jumped off a ladder of an RV and hurt his knee some more.

14. Ms. B_____ testified that Mr. S_____ was sitting at his desk, approximately 10-12 feet away. Ms. B_____ testified that she told Ms. S_____ of the conversation and told him that it wasn't very smart of claimant to jump off an RV ladder when he had already hurt his knee. Ms. B_____ did not testify that claimant was using crutches as of the date of her conversation.

15. Claimant produced another handwritten report dated June 12, 2018 for insurer at employer's request on a form provided by insurer. Claimant again described the May 24, 2018 incident. Claimant also noted the May 29, 2018 injury. Claimant reported his prior December 2017 knee injury and noted that he had returned to riding and racing after that incident.

16. Claimant was seen by Mr. Quinn, a physicians' assistant ("PA") on May 31, 2018. PA Quinn noted an accident history that documented both the May 24 and May 29 incidents, as well as the December 3, 2017 motorcycle incident. PA Quinn noted that on May 24 claimant had jumped off a ladder from an RV and felt his knee buckle inward with pain. PA Quinn noted that on May 29, claimant slipped as he stepped off the top landing of an RV, and his right knee had pain and swelling after he landed awkwardly. PA Quinn noted that after the incident, claimant "hobbled around" and tried to do some work, but went home early, and was on limited work duty the following two days.

17. PA Quinn also described claimant's December 3, 2017 incident with his motorcycle. PA Quin noted claimant had significant pain and swelling, but that his knee

had resolved and was back to his baseline until the May injuries. PA Quinn noted claimant had crutches at home. The records do not document claimant presenting to the appointment with the crutches. PA Quinn recommended x-rays and a magnetic resonance imaging ("MRI") scan of the right knee, as well as a hinged knee brace. PA Quinn took claimant off of work completely.

18. The x-ray of claimant's right knee taken on May 31, 2018 showed small to moderate-sized patellofemoral effusion.

19. Claimant was referred by employer to Dr. Konrad Nau for medical treatment. Claimant was evaluated by Dr. Nau on June 6, 2018. Dr. Nau took claimant's accident history and documented both the May 24 and May 29 incidents. Dr. Nau also recorded a history of claimant's December 3, 2017 motorcycle accident. Physical examination performed by Dr. Nau revealed moderate effusion of the right knee, a positive anterior drawers' sign and tender medial cruciate ligament ("MCL") with increased pain with valgus stress. Dr. Nau recommended that claimant undergo a right knee MRI scan. Dr. Nau provided claimant with work restrictions that included no work until June 12, 2018.

20. Claimant underwent an MRI scan on June 20, 2018. The MRI revealed a complete tear of the lateral meniscus, a medial meniscus tear, a torn ACL, and a large joint effusion.

21. Claimant returned to Dr. Nau on June 21, 2018. Dr. Nau noted the tears revealed on the right knee MRI scan. Dr. Nau opined that the tears were a result of injury when claimant jumped down from ladder on RV that he was working on. Dr. Nau opined that the injury was solely work related as opposed to related to a pre-existing injury. Dr. Nau recommended claimant undergo surgery to address his right knee condition and referred claimant to Dr. Christopher George for orthopedic consultation. Dr. Nau kept claimant off of work.

22. Claimant saw Christopher George on July 31, 2018. Dr. George described both the May 24 and May 29 incidents in the accident history Dr. George also described claimant's sprain type right knee injury that occurred in December 2017. Dr. George noted that Claimant improved after this injury, and was able to continue riding motorcycle. Claimant reported to Dr. George that he was not having any symptoms of pain or instability in his knee over the next almost six months.

23. Dr. George reviewed claimant's imaging studies, and noted clamant had a complete ACL tear, a bucket-handle lateral meniscus tear, and a medial meniscus tear. Dr. George noted that claimant's current symptoms and findings on his MRI correlated with his injury mechanism of the injury he described as occurring at work on May 24, 2018. With regard to claimant's knee injury in December 2017, Dr. George noted that he did not think that claimant's knee injury in December likely resulted in these injuries.

24. Respondents denied liability for claimant's work injury and did not approve the recommended surgery.

25. Claimant continued to follow up with Dr. Nau after his consultation with Dr. George. Dr. Nau last evaluated claimant on November 15, 2018. Dr. Nau noted claimant was continuing to ambulate with crutches and using a knee brace for additional support. Claimant was treating his knee with home physical therapy exercises including a stationary cycle. Dr. Nau noted that claimant was developing significant quadriceps atrophy that could affect claimant's eventual rehabilitation. Dr. Nau noted claimant continued to have work restrictions that included no work. Claimant has not returned to full work duty or been placed at maximum medical improvement ("MMI").

26. Respondents obtained a records review independent medical examination ("IME") with Dr. Frederick Scherr. Dr. Scherr reviewed claimant's medical records and produced a report dated October 22, 2018. Dr. Scherr noted claimant's prior medical history, including a long history of joint traumas, relating back to his high school sports and motocross injuries. Dr. Scherr noted that the medical records documented several iterations of claimant's right knee injury. Dr. Scherr noted that the medical records the knee buckling inwards when he jumped off the ladder. Dr. Scherr indicates in his report that if the knee did buckle inwards, it would be difficult for claimant to fall forward as he described. Dr. Scherr also noted that claimant continued to work after the knee injury and opined that if he sustained an acute tear of the ACL at that time, there would be significant swelling that would make walking and bending/extending the knee very difficult.

27. Dr. Scherr opines in the report that while claimant reported swelling following the May 29, 2018 incident, claimant did not report a pop or a twisting or hyper-extension of the knee.

28. Dr. Scherr testified at hearing consistent with his IME report. Dr. Scherr noted that he found some variations in the narrative that claimant gave to various treating physicians in this case and the therefore concluded that claimant's knee injury was unlikely to be related to a work injury. Dr. Scherr testified the tears shown on the MRI scan appear acute, and noted that edema was present in the knee according to the MRI. Dr. Scherr noted that this was a fairly significant injury and would require quite a bit of trauma. Dr. Scherr testified that if claimant had suffered the injuries shown on the MRI on May 24, 2018, performing his work on May 24, and May 25 would have been very difficult.

29. The ALJ credits claimant's testimony at hearing along with the medical reports from Dr. Nau and Dr. George and finds that claimant has established that it is more probable than not that he sustained a compensable injury arising out of and in the course of his employment with employer on May 29, 2018 when he slipped while getting out of the RV and noticed swelling in his right knee.

30. The ALJ notes the significant contradictions in the testimony in this case regarding the circumstances surrounding claimant's injury. Claimant was involved in an incident on May 24, 2018 when he jumped off a ladder of an RV, felt his knee buckle, and fell to the ground. Claimant reported this incident to his employer.

31. Claimant had a second incident on May 29, 2018 when he slipped while getting out of an RV and fell. Mr. S_____, claimant's employer, was present for this fall, and while he did not witness the fall, he heard it and acknowledged claimant afterwards.

32. The issue in this case becomes whether claimant reported his injury to the insurer prior to the fall while getting out of the RV or if the injury was reported after the fall getting out of the RV. Notably, if claimant was using crutches prior to falling on May 29, 2018, there is no indication in the employer records that claimant's limitations were taken into consideration when assigning his work after reporting the injury to insurer. For instance, there is an indication in the First Report of Injury that allows for employer to indicate when claimant initially received medical treatment, which is left blank. There is no indication in the employer's records that claimant had shown up for work on May 29, 2018, before he sought medical treatment, with crutches. Nor is there any indication as to how claimant would have been able to check the water pump, that he was directed to do by Mr. S_____, if he was on crutches. Mr. S_____ testified he did not believe claimant had the crutches with him inside the RV on May 29 before the fall, but also testified on cross examination that he was unaware of where the water pump would be located on the RV that he instructed claimant to check on May 29, 2018.

33. Likewise, the ALJ is unable to rectify the testimony of Ms. B_____ who testified she saw claimant on May 30, 2018, but did not report claimant using crutches. Moreover, while she testified that claimant had reported to her that he had injured his knee the previous weekend while riding his motorcycle, when Ms. B_____ reported this conversation to Ms. S_____, there is no credible evidence that employer took any steps to report this information to insurer in the immediate aftermath of receiving this information.

34. With regard to the prior injury in December 2017 to claimant's knee, the MRI shows changes in the knee that have been described as acute and are not likely to be related to any potential injury that occurred some five and a half months prior to the MRI.

35. Based on the evidence presented at hearing, the ALJ determines that it is more likely than not that the injury to claimant's knee occurred when he slipped in the RV on May 29, 2018. While respondents posit that claimant injured his knee over Memorial Day weekend prior to the May 29, 2018 incident, claimant specifically denied that he was riding motorcycles that weekend and denied any other prior injuries to his knee.

36. Claimant provided a credible accident history to his physicians which noted the prior December 2017 injury to his knee. Therefore, insofar as claimant's testimony is consistent with the accident histories provided by claimant to his treating physicians, the claimant's testimony in this case is determined to be credible and persuasive on the issue of compensability.

37. Claimant testified at hearing that he has not returned to work since May 31, 2018. Claimant testified that when he gave his two weeks notice to employer, prior to his injury, he had planned on starting his own business selling parts and supplies at racetracks, and planned to perform some automotive repair at his own home. Claimant testified that he was unable to perform that work, and had been unable to apply for any other jobs, because of his right knee condition.

38. Mr. S_____ testified at hearing that he had not offered claimant any modified duty work since May 31, 2018.

39. The ALJ credits claimant's testimony that he has not returned to work for any employer since May 31 2018, due to his disability and effects of the work injury. The ALJ finds that claimant's medical providers have not released claimant to return to work nor have they placed him at MMI. The ALJ finds claimant has established that it is more likely true than not that he is entitled to an award of TTD benefits beginning June 1, 2018 and ongoing until terminated by law.

40. With regard to respondents' argument that claimant's resignation constitutes a volitional act that led to his termination of employment, the resignation was provided to employer prior to his work injury. Moreover, the ALJ finds that claimant's work restrictions consisted of no work for employer May 31, 2018. Therefore, claimant has established that the basis of his wage loss is the work injury, and not his resignation of employment.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

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

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

4. As found, claimant has established by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment with employer. As found, claimant has a pre-existing condition involving his low back, but the injury on April 15, 2017 aggravated, accelerated or combined with his pre-existing condition to cause the disability or need for medical treatment and therefore represents a compensable injury.

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

6. As found, claimant has proven by a preponderance of the evidence that the surgery treatment claimant received from PA Quinn, Dr. Nau, and Dr. George was reasonable medical treatment necessary to cure and relieve claimant from the effects of the work injury. As found, claimant has proven by a preponderance of the evidence that the surgery recommended by Dr. George is reasonable medical treatment related to claimant's work injury.

7. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), C.R.S., requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*.

8. As found, claimant has established by a preponderance of the evidence that he is entitled to an award of TTD benefits beginning June 1, 2018 after he was taken off of work by PA Quinn. As found, the medical records in this case document that claimant was continually kept off of work by his treating physicians after his work injury and claimant is entitled to an ongoing award of TTD benefits.

9. Sections 8-42-105(4) and 8-42-103(1)(g), C.R.S., contain identical language stating that in cases "where it is determined that a temporarily disabled employee is responsible for termination of employment the resulting wage loss shall not be attributable to the on-the-job injury." In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P3d 1061 (Colo. App. 2002), the court held that the term "responsible" reintroduced into the Workers' Compensation Act the concept of "fault" applicable prior to the decision in *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Hence, the concept of "fault" as it is used in the unemployment insurance context is instructive for purposes of the termination statutes. *Kaufman v. Noffsinger Manufacturing*, W.C. No. 4-608-836 (Industrial Claim Appeals Office, April 18, 2005). In that context, "fault" requires that the claimant must have performed some volitional act or exercised a degree of control over the circumstances resulting in the termination. *See Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1995) *opinion after remand* 908 P.2d 1185 (Colo. App. 1995).

10. In this case, claimant voluntarily resigned his employment with employer on or about May 22, 2018 when he gave his two weeks notice. After giving his two weeks notice and before his final day of work, claimant sustained the work injury in this case resulting in work restrictions that prohibited claimant from returning to work.

11. As noted by claimant, in *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004), the Colorado Supreme Court held that the provisions the termination statutes are not a permanent bar to receipt of temporary disability benefits. The court held if a worsened condition and not the termination of employment caused the wage loss, the claimant was entitled to temporary disability benefits.

12. In this case, prior to claimant's final scheduled day of work, claimant sustained the work injury that resulted in restrictions that led to claimant's wage loss. Therefore, the ALJ finds that the wage loss in this case is not the result of claimant's resignation of employment, but instead the work injury suffered by claimant on May 29, 2018.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the medical treatment that is reasonable and necessary to cure and relieve claimant from the effects of the injury.

2. Respondents shall pay claimant TTD benefits beginning June 1, 2018 and continuing until terminated by law or statute and based on the stipulated AWW.

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

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

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

DATED: January 14, 2019

Keith E. Mottram

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-006-625-001

ISSUES

The issue set for determination included:

(1) Did Respondents prove Claimant received an overpayment of benefits?

(2) If Respondents proved there was an overpayment, by what terms is Claimant required to repay the overpayment to Respondents?

FINDINGS OF FACT

1. On May 18, 2015, Claimant suffered an admitted industrial injury while working for Employer. Claimant injured his lumbar spine.

2. A General Admission of Liability ("GAL") was filed on behalf of Respondents on March 30, 2016. The GAL admitted for medical benefits only.

3. On October 4, 2016, Claimant was placed at MMI by Kathy McCranie, M.D., who was an ATP. Dr. McCranie assigned a 13% whole person medical impairment rating. This included 5% for a spinal disorder and 8% based on a loss of range of motion ("ROM") under the *AMA Guides*.

4. Respondents filed a Final Admission of Liability ("FAL") based upon Dr. McCranie's 13% whole person rating. The PPD award for that 13% rating to $30,397.64.

5. Claimant underwent a DOWC Independent Medical Examination, which was performed by Linda Mitchell, M.D. Dr. Mitchell determined Claimant was not at MMI.

6. On April 27, 2017, a GAL was filed on behalf of Respondents for medical benefits, based upon the DIME physician's determination.

7. Claimant received further treatment, including an injection to the lumbar spine, as well as undergoing an MRI.

8. Claimant returned to Dr. Mitchell on March 29, 2018 for a follow-up DIME. Dr. Mitchell determined Claimant was at MMI as of December 12, 2017. Dr. Mitchell assigned a 5% whole person medical impairment rating, pursuant to the *AMA Guides*. Because Claimant's ROM measurements were not considered valid, no impairment was assigned due to loss of range of motion in the lumbar spine.

9. On May 21, 2018, Respondents filed a FAL based upon Dr. Mitchell's rating. The 5% rating entitled Claimant to a PPD award in the amount of $11,691.40.

The FAL specified that an overpayment of PPD benefits existed in the amount of $18,706.24. Marchelle R_____ filed the FAL on behalf of Respondent-Insurer.

10. Ms. R_____ testified at hearing. She has been a claim professional for 19 years. In that capacity, she oversees and manages workers' compensation claims. This includes payment of medical bills, as well as indemnity payments. She is the claims professional to whom this case has been assigned.

11. Ms. R_____ testified she is familiar with the case, including the pleadings filed. She confirmed that the PPD benefits admitted to in the November 29, 2016 FAL were paid out completely. The PPD totaled $30,397.64. Ms. R_____ testified there were two lump sum payments in the amount of $10,000 taken on the PPD award and the lump sum discount was applied.

12. Ms. R_____ confirmed there was no objection or Application for Hearing filed in response to the May 21, 2018 FAL.

13. Claimant testified that he did not dispute an overpayment existed by virtue of the FAL filed in May 2018.

14. Respondents established an overpayment occurred because Claimant received more in PPD benefits than he was entitled to, based upon the DIME physician's rating.

15. Claimant testified that he is not working and intends to repay Insurer. Claimant stated he continues to experience pain in his low back due to his injury, which limits his activities. The ALJ inferred Claimant is suffering from financial exigencies due to his lack of income.

16. The ALJ determined that a payment in the amount of $65.00 per month will avoid undue hardship to Claimant, while requiring repayment of the overpaid PPD benefits to Respondents. The amount is roughly equivalent to dividing the amount of the total overpayment $18,706.24 (at the time of the FAL) by Claimant's life expectancy of 21.8 years.[1]

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

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be

[1] The Colorado life expectancy table is found in WCRP 7-3 [7CCR 1103-01].

interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

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

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

Overpayment

In the case at bench, Respondents bore the burden of proof to establish Claimant received an overpayment of benefits. The Colorado Workers' Compensation Act defines an overpayment as "money received by a Claimant that exceed the amount that should have been paid, or which Claimant was not entitled to receive… For an overpayment to result, it is not necessary for the overpayment exist at the time the claimant received disability or death benefits under said articles". § 8-40-201(15.5) C.R.S. (2017).

An overpayment in the amount of $18,706.24 occurred in this case by virtue of the fact that Respondents originally admitted for a higher medical impairment rating, as issued by the ATP. (Finding of Fact 3). PPD benefits based upon that rating were paid in full. (Finding of Fact 11). This was confirmed by Ms. R_____, the claims professional for Respondents-Insurer who testified at hearing. (Finding of Fact 11). After Claimant requested a DIME, that physician (Dr. Mitchell) concluded Claimant's permanent medical impairment was lower, which resulted in the overpayment. (Finding of Fact 9). As found, Claimant did not contest that such an overpayment of benefits existed. (Finding of Fact 13).

§ 8-42-113.5(1)(c), C.R.S. (2017) provides authority for Insurer in the instant case to seek an order for repayment of an overpayment of benefits. § 8-43-207(q) C.R.S. (2017) grants express authority to an ALJ to conduct a hearing to require repayment of overpayment of benefits. The ALJ has discretion to determine the terms required of Claimant for the repayment. *Louisiana Pacific Corp. v. Smith*, 881 P.2d 456 (Colo. App.1994). See also *Leah Turner v. Chipotle Mexican Grill*, W.C. No.4-893-631-07 (ICAO February 8, 2018). Neither the Colorado Workers' Compensation Act, nor the WCRP requires or prescribes a certain method for such reimbursement.

Appellate courts which have considered this issue and evaluated the terms of repayment have upheld the discretion of the trial court, beginning with *Johnson v. Industrial Commission,* 761 P.2d 1140 (Colo.1988). In *Johnson*, the Colorado Supreme Court approved an offset of the amount overpaid by an insurer against future workers' compensation disability benefits that might be awarded to the Claimant. Justice Quinn's opinion did not determine what method of recoupment was proper, nor did it provide specific guidance as to how Claimant was to repay the overpayment.

In *Louisiana Pacific Corp. v. Smith*, 881 P.2d 456, *supra,* Claimant received Social Security disability benefits and was overpaid permanent total disability benefits. The ALJ ordered a reduction of Claimant's permanent disability benefits over Claimant's life expectancy until the overpayment was fully recouped. The ALJ reasoned this would avoid undue hardship to Claimant. The Industrial Claims Appeals Office affirmed the decision, as did the Colorado Court of Appeals, which reasoned there was not an abuse of discretion. *Id; Simpson v. Industrial Claim Appeals Office,* 219 P.3d 354, 360-361 (Colo. App. 2009).

As found, Claimant's economic circumstances because he was not working led the ALJ to balance the potential of undue hardship with Insurer's right to recoup the overpayment. (Finding of Fact 16). Accordingly, the ALJ determined that payment in the amount of $65.00 per month was warranted under the circumstances of this case.

ORDER

It is therefore ordered:

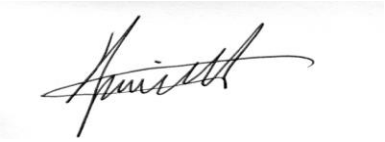
1. Respondents met their burden of proof and established Claimant was overpaid in the amount of $18,706.24.

2. Claimant shall repay Respondents at the rate of $65.00 per month.

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

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

DATED: January 14, 2019



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

ISSUES

- Did Claimant prove he suffered a compensable injury to his right knee on December 8, 2017?
- Did Claimant prove entitlement to reasonably necessary medical treatment to cure and relieve the effects of his injury?
- What is Claimant's average weekly wage?

STIPULATIONS

The parties agreed if the claim is compensable, Claimant is entitled to temporary partial disability (TPD) from December 9, 2017 through May 11, 2018, and temporary total disability (TTD) from May 12, 2018 through May 14, 2018, based on the AWW determined by the ALJ.

FINDINGS OF FACT

1. Claimant worked for Employer on the I-25 ILEX construction project in Pueblo. Although his formal job title was heavy equipment operator, he worked approximately 85% to 90% of the time as a laborer. The work was physically demanding and required heavy lifting, bending, squatting, and walking on uneven surfaces.

2. On December 8, 2017, Claimant was prepping an area between two bridges for asphalt. He was carrying an 8-foot long L-shaped metal cage estimated to weigh approximately 20 pounds. The work area was somewhat sloped. When he was ready to put the cage down, he stepped forward onto his right leg and the knee "popped" and "buckled." Claimant felt immediate pain in the knee after the incident.

3. Claimant's co-worker, Richard P[Redacted], was working nearby and heard Claimant exclaim "Ow, my knee!" Claimant was limping and in obvious pain. Mr. P[Redacted] helped Claimant walk to their boss's truck to rest.

4. Claimant has a significant history of prior problems with his right knee. He suffered a work-related knee injury in January 2014 when he stepped on a rock. Claimant underwent a right knee arthroscopy with patellar chondroplasty and plica excision on February 6, 2015. The operative note indicates grade 3 chondral fissuring of the patellar apex, grade 1 chondromalacia of the lateral tibial plateau and grade 1-2 chondromalacia of the medial tibial plateau.

5. Claimant's knee remained symptomatic after MMI. He underwent viscosupplementation injections in 2015 with limited benefit. He was eventually put at MMI in May 2016 with a 24% scheduled lower extremity rating. On the advice of his ATP,

he went to the gym regularly to aggressively strengthen his quadriceps muscles and lose weight. Claimant's knee problems slowly improved, and after several months of working out his symptoms resolved. Claimant's testimony regarding the resolution of his prior knee symptoms is corroborated by Mr. P[Redacted]'s testimony and the lack of any medical records relating to his knee between July 2016 and December 2017. Additionally, Claimant worked a physically demanding job for eight months between April 2017 and December 2017 without limitation or difficulty. Mr. P[Redacted] worked closely with Claimant on a daily basis for approximately two months before the accident and observed no knee problems or limitations before December 8, 2017. The records also show Claimant lost 30 pounds between May 11, 2016 and December 11, 2017.

6. Claimant's right knee caused no disability and required no medical treatment immediately before December 8, 2017.

7. After the December 8 accident, Employer referred Claimant to CCOM. Claimant saw Brendan Madrid, NP at the initial appointment on December 11, 2017. He described the mechanism of injury consistent with his testimony at hearing. Mr. Madrid diagnosed a right knee "sprain" and ordered an MRI. Mr. Madrid imposed restrictions of carrying no over 20 pounds, no kneeling, squatting, or walking on uneven surfaces, and frequent breaks to allow for icing and to elevate the knee. Mr. Madrid opined the objective findings were consistent with a work-related injury.

8. Claimant saw Dr. Centi at his next CCOM appointment on December 19, 2017. He was having "constant" right knee pain and still waiting for the MRI. Physical examination showed moderate edema and effusion, medial joint line tenderness, equivocal Lachman's and anterior drawer test, and an antalgic gait. Dr. Centi changed Claimant's restrictions to sedentary work "sitting 95% of the time." He also opined, "the cause of this problem is related to work activities."

9. Claimant had a right knee MRI on January 19, 2018. It showed a small joint effusion and no evidence of torn ligaments. Dr. Centi referred Claimant to Dr. Ronald Royce for an orthopedic evaluation.

10. Claimant saw Dr. Royce on February 7, 2018. Dr. Royce recommended physical therapy and gave Claimant a cortisone injection for the pain and swelling.

11. The cortisone injection was minimally helpful, so Dr. Centi referred Claimant to Dr. Derek Purcell for a second orthopedic opinion.

12. Claimant saw Dr. Purcell on March 22, 2018. Dr. Purcell diagnosed "right knee early patellofemoral osteoarthritis, exacerbated by a work-related injury versus caused by a work-related injury." Dr. Purcell opined, "I would recommend that he exhaust conservative measures. A reasonable approach at this point would be viscosupplementation."

13. Claimant saw Dr. Timothy Hall for an IME at his counsel's request on May 23, 2018. Claimant told Dr. Hall his knee symptoms were "totally different" from the pain he had from the previous injury. Dr. Hall diagnosed chondromalacia patella exacerbated

by the work injury. Dr. Hall opined Claimant's ongoing knee symptoms were most likely related to the December 8, 2017 event. He further opined Claimant's previous knee condition made him more susceptible to injury. Dr. Hall agreed Claimant should try viscosupplementation injections.

14. Dr. William Ciccone performed an IME for Respondents on August 7, 2018. Dr. Ciccone diagnosed right knee pain with chondromalacia. Dr. Ciccone noted Claimant did not fall or twist his knee, and opined the mechanism Claimant described would not have aggravated or accelerated any degenerative process already occurring in his knee. Dr. Ciccone concluded Claimant sustained no new injury and his symptoms were due to degenerative arthritis without contribution from his work.

15. Dr. Ciccone testified in deposition for Respondents on October 31, 2018. He reiterated his opinion the mechanism Claimant described was not one he would associate with injury to a joint. He indicated there was no evidence of any new pathology because of the December 8, 2017 incident. Dr. Ciccone testified chondromalacia tends to worsen over time, and symptoms can wax and wane from day to day. He further noted viscosupplementation is generally used for arthritis and other degenerative conditions.

16. Claimant and Mr. P[Redacted] are credible.

17. Dr. Hall, Dr. Centi, and Dr. Purcell's causation opinions are more persuasive than the contrary opinions offered by Dr. Ciccone.

18. Claimant proved he suffered a compensable aggravation of his pre-existing right knee condition as a direct result of his work activities on December 8, 2017.

19. The evaluations and treatment Claimant received by and through CCOM were reasonably necessary to diagnose and treat the compensable injury.

20. Claimant proved viscosupplementation injections are reasonably necessary to cure and relieve the effects of the compensable injury and try to bring Claimant back to baseline.

21. Claimant's wages from Employer were relatively stable, without significant seasonal fluctuations. The ALJ finds the 12 weeks before the injury provide the best approximation of Claimant's typical preinjury wages and the wage loss caused by the injury. Claimant earned $19,517.51 during the 12 weeks before his injury, [1] which equates to an average weekly wage of $1,626.46.

[1] The 12-week window actually ends on December 9, 2017. Although the final pay period included the date of injury, the final paystub shows Claimant's wages for that period were not impacted by the injury, as Claimant had worked 40 hours plus 17.5 hours overtime.

CONCLUSIONS OF LAW

A. Claimant proved a compensable injury

To receive compensation or medical benefits, a claimant must prove he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which she seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

If an industrial injury aggravates, accelerates, or combines with a pre-existing condition to produce disability or a need for treatment, the claim is compensable. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Compensable medical treatment includes evaluations or diagnostic procedures to investigate the existence, nature, or extent of an industrial injury. *Garcia v. Express Personnel*, W.C. No. 4-587-458 (August 24, 2000). Pain is a typical symptom from the aggravation of a pre-existing condition, and if the pain triggers the claimant's need for medical treatment, the claimant has suffered a compensable injury. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-921-616-03 (September 9, 2016). But the mere fact that a claimant experiences symptoms at work does not necessarily mean the employment aggravated or accelerated the pre-existing condition. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005). Rather, the ALJ must determine whether the need for treatment was the proximate result of an industrial aggravation or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

To prove an aggravation, a claimant need not show an injury objectively caused any identifiable structural change to their underlying anatomy. Rather, a purely symptomatic aggravation is a sufficient basis for an award of medical benefits if it caused the claimant to need treatment he would not otherwise have required but for the accident. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-921-616-03 (September 9, 2016).

In *City of Brighton v. Rodriguez*, 318 P.2d 496 (Colo. 2014), the Supreme Court addressed whether an unexplained fall at work satisfies the "arising out of" test. The court identified three categories of risks that cause injuries to employees: (1) employment risk directly tied to the work itself; (2) personal risks, which are inherently personal; and (3) neutral risks, which are neither employment -related more personal. The first category of risks encompasses risks inherent to the work environment and are compensable, whereas the second category of risks is not compensable, unless an exception applies. The court further defined the category of personal risks to encompass so-called idiopathic injuries, which are considered "self-originated" injuries that spring from a personal risk of the claimant, such as heart disease, epilepsy, or similar conditions. The third category —

"neutral risks" — are compensable if the application of a "but for" test shows any employee would have been injured simply by virtue of being at work. The court was careful to point out that the "but for" test does not relieve the claimant the burden of proving causation, nor does it suggest that all injuries occurring at work are compensable.

When a claimant's injury is "precipitated" by a pre-existing condition, the injury is not compensable unless a "special hazard" of employment increased the probability or severity of the injury. *National Health Laboratories v. Industrial Claim Appeals Office*, 844 P.2d 1259 (Colo. App. 1992); *Gates Rubber Co. v. Industrial Commission*, 705 P.2d 6 (Colo. App. 1985). The classic case is the employee who suffers an epileptic seizure at work that causes him to fall from a scaffold or ladder. *E.g., Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989).

As found, Claimant proved he suffered a compensable injury to his right knee on December 8, 2017. The testimony of Claimant and his coworker, Mr. P[Redacted], was credible and persuasive. Although Claimant had a prior right knee injury that resulted in a permanent impairment rating, his condition subsequently improved and was not causing any significant problems immediately before December 8, 2017. Claimant was working a physically demanding job without limitation or difficulty and had pursued no formal treatment for his right knee for more than a year.

Claimant's injury arose out of an employment risk and was precipitated by the act of placing weight on his right leg and bending down while carrying a metal cage. The injury was not precipitated by his pre-existing condition or any other purely personal risk. The ALJ infers the additional weight of the cage subjected Claimant's knee to a greater force than would otherwise be associated with taking a normal step. The ALJ also credits Dr. Hall's opinion that Claimant's prior injury rendered the knee more susceptible to injury from forces that might not otherwise be injurious to a healthy knee. The causation opinions of Dr. Centi, Dr. Purcell, and Dr. Hall are more persuasive than the contrary opinions offered by Dr. Ciccone. The persuasive evidence shows the work accident aggravated Claimant's pre-existing condition, proximately causing disability and at least a need for diagnostic testing and conservative care.

Respondents cite *Alexander v. Emergency Courier Services*, W.C. No. 4-917-156-01 (October 14, 2014) to support their position that Claimant's injury is not compensable. The ALJ finds *Alexander* factually distinguishable. In that case, the claimant's knee spontaneously popped while he was extending his leg to take a step. No weight or other force was being applied to the claimant's knee at the moment of injury. By contrast, Claimant's injury occurred when he stepped onto his right leg while carrying a twenty-pound metal cage. Moreover, the Panel in *Alexander* did not hold the claimant's injury was noncompensable as a matter of law but merely upheld the ALJ's factual finding under the substantial evidence rule.

B. Viscosupplementation injections are reasonably necessary.

The respondents are liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a); *Snyder v. Industrial*

Claim Appeals Office, 942 P .2d 1337 (Colo. App. 1997). Compensable medical treatment includes evaluations or diagnostic procedures to investigate the existence, nature, or extent of an industrial injury. *Garcia v. Express Personnel*, W.C. No. 4-587-458 (August 24, 2000). Where the respondents dispute the claimant's entitlement to medical benefits, the claimant must prove that an injury directly and proximately caused the condition for which he seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999).

As found, the viscosupplementation injections recommended by Dr. Purcell are reasonably necessary to treat the compensable injury. Dr. Ciccone explained it is reasonable to try viscosupplementation if, as here, cortisone injections are not effective. His primary disagreement was based on his opinion Claimant suffered no compensable injury. Since the ALJ has found Claimant symptomatically aggravated his pre-existing condition, it is reasonable to use viscosupplementation to try to bring Claimant back to baseline.

Claimant's request for PRP injections recommended by Dr. Ciccone must be denied. The ALJ can only award treatment recommended by an ATP and lacks jurisdiction to order treatment recommended solely by an IME. *Torres v. City and County of Denver*, W.C. No. 4-937-329-03 (May 15, 2018); *Short v. Property Management of Telluride*, W.C. No. 3-100-726 (May 4, 1995).

C. Claimant's average weekly wage is $1,626.46

Section 8-42-102(2), C.R.S. provides that compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But § 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that seems most appropriate under the circumstances. The entire objective of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993).

As found, Claimant's AWW is $1,626.46. The ALJ agrees with Claimant's argument that the most reasonable method to calculate his AWW is to average the 12 weeks leading up to Claimant's injury.

ORDER

It is therefore ordered that:

1. Claimant's claim for a right knee injury on December 8, 2017 is compensable.

2. Insurer shall cover medical treatment from authorized providers reasonably necessary to cure and relieve the effects of Claimant's injury, including treatment from CCOM, Dr. Royce, and a trial of viscosupplementation as recommended by Dr. Purcell.

3. Claimant's request for PRP injections based on Dr. Ciccone's recommendation is denied and dismissed.[2]

4. Insurer shall pay Claimant TPD benefits from December 9, 2017 through May 11, 2018, and TTD benefits from May 12, 2018 through May 14, 2018, based on an AWW of $1,626.46, subject to the maximum compensation rate in effect on Claimant's date of injury.

5. Insurer shall pay statutory interest of 8% per annum on all benefits not paid when due.

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

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

DATED: January 15, 2019

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

[2] This order is not intended to limit Claimant's right to pursue PRP injections if later recommended by an ATP, nor Respondents' right to contest same.

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that he suffered a compensable injury while working for Employer on August 7, 2018?

II. Has Claimant shown, by a preponderance of the evidence, that he is entitled to all reasonable and necessary medical treatment related to a work injury?

III. Has Claimant shown, by a preponderance of the evidence, that he is entitled to Temporary Total Disability payments?

STIPULATIONS

The parties stipulated that Claimant's Average Weekly Wage is $700.60. The ALJ accepted this stipulation.

PRESERVED PROCEDURAL ISSUE

At the outset of hearing, Claimant wished to enter a stipulation that Claimant's cardiac arrest of August 7, 2018 was not work-related for purposes of the hearing, without entirely waiving the right to argue work-relatedness of the cardiac arrest at some future date, if warranted. Counsel for Respondents objected, reasoning that Claimant's theory of recovery at hearing was that he sustained a work-related injury due to a special hazard of employment. Such analysis is dependent upon a finding that Claimant sustained an initial *non-work related* event from a personal medical condition.

Therefore, Respondent asserted, that by attempting to preserve the right to argue relatedness of the cardiac arrest for some hypothetical later date, Claimant was attempting to improperly preserve a second attempt to litigate compensability for the same event under two contradictory theories of recovery. The ALJ permitted Claimant to proceed with the stipulation that the cardiac arrest was not work-related. However, the ALJ deferred any ruling on Claimant's future ability to raise the work-relatedness of his heart attack until such occasion might arise, if it ever should. The ALJ duly notes that Respondents have preserved their objection to moving forward at today's hearing, absent an express waiver by Claimant from ever litigating a possible link between his heart attack and this work incident. (The ALJ further notes that the evidence presented at hearing supports a finding that this heart attack was indeed not work-related).

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Claimant was employed as a drywall installer for Employer. On August 7, 2018, Claimant sustained a cardiac arrest while working in a scissor lift. He lost consciousness and collapsed, falling inside the scissor lift. Claimant is not contending that his cardiac arrest was caused by his employment.

2. Colorado Springs Fire Department (CSFD) personnel were the first responders to the incident. Bystanders reported that Claimant fell from a standing position. Those bystanders were performing CPR upon the CSFD's arrival. (Ex. D, p. 81). Claimant was inside the scissor lift at that time (which had lowered to ground level) and was then removed from the lift to continue medical treatment. Claimant was noted to have a hematoma on the left occipital portion of his head. American Medical Response arrived on site, diagnosed Claimant with a cardiac arrest, and transported Claimant to UC Health Memorial Hospital. (Ex. E).

3. Claimant was assessed at Memorial Hospital with a cardiac arrest secondary to anterior and inferior myocardial infarction, coronary artery disease, and ischemic cardiomyopathy. (Ex. F, p. 98). He was separately diagnosed with a scalp hematoma. Claimant was noted to have bruising behind his left ear from his fall, which resulted in cervical and head CTs being administered. The head CT was negative and the cervical CT only showed multilevel degenerative changes.

4. Claimant was placed in a cervical collar. *Id. at 128.* As of August 9, 2018, Claimant was noted to be awake, off of pressor medication, and appearing 'much better.' *Id. at 104.* He was evaluated by the wound/ostomy/skin team which noted he was awake and "able to turn self." *Id. at 182.* He was to be started on beta-blocker and ACE inhibitor medications. *Id. at 203.*

5. On August 10, 2018, Dr. Kanchan Kanel performed Claimant's daily medical evaluation on that day and noted Claimant "feels okay." *Id. at 213.* Claimant's neck was noted to be supple without any documented complaints of pain. *Id.*

6. Claimant was evaluated by Memorial Hospital physical therapy staff on August 11, 2018. Claimant demonstrated independence with bed mobility, transfers and ambulation for 500 feet. *Id. at 215.* Katie McCord, P.T., felt that Claimant did not require any physical therapy at that time. On August 11, 2018, Claimant was noted to have 'normal' neck range of motion. *Id. at 217.* He was discharged later that day. His discharge summary, prepared by Dr. Kanel, noted that he had no complaints and 'felt good'.

7. Claimant next sought medical treatment on August 16, 2018. He was examined at the Parkview Medical Center. (Ex. G). He complained of headaches and pain in the right side of his neck "over the past week since fall," which had been

improving but then worsened gradually the day prior. *Id.* On exam, Claimant had full range of motion in his neck, but with complaints of pain and with muscle tenderness and spasm. *Id* at *241.* He was provided trigger point injections at the right posterior upper cervical paraspinal muscles. A CT scan taken that day showed "a right sided C3-C4 facet joint *effusion*." (Ex. 2, p. 3) (emphasis added).

8. Claimant was then evaluated at CCOM in Pueblo on August 17, 2018 by Brendon Madrid, N.P. (Ex. H, p. 248). Inspection showed purplish bruising on the left side of the neck due to drainage when he [Claimant] hit his head. (Ex. 3, p. 37). Claimant reported 10/10 neck pain but he denied headaches or numbness and tingling in his upper extremities. He also denied any memory loss. On exam, Claimant had "very little range of motion in his neck." *Id.* Mr. Madrid diagnosed Claimant with a concussion, a muscular strain, and referred Claimant for physical therapy.

9. Claimant returned to CCOM on 9/4/18, and saw Dr. Olsen. Dr. Olsen noted that Claimant still had tenderness along the right posterior neck muscles. Claimant's pain diagram referenced the right neck area, with pain at 7/10. Further, it was noted by Dr. Olsen:

> Looking at his neck he does have some improved range of motion. Right rotation is still somewhat limited. He does have pain on palpation of the sternocleidomastoid and posterior neck muscles. (Ex. 3, p. 33).

Dr. Olsen set the goal for Claimant to be able to "turn his neck all the way to the right without pain in the next 3 weeks" *Id at p. 35.*

10. Claimant returned to CCOM on 9/11/18. Claimant continued to have muscle spasms in his neck. Rotating his neck causes a spasm either right or left, but particularly to the left. "Palpation does show some tightness of the cervical muscles along the lateral portion of the neck as well as his trap" (Ex. 3, pp. 28-29). A cervical MRI was requested. *Id at p. 25.*

11. Dr. Olsen again saw Claimant on 9/25/18. He noted that Claimant "continues to have limitations and neck range of motion in all directions. He has about 30° rotation both left and right. Flexion and extension are limited." Under his *diagnosis*, Dr. Olsen put: "1. Concussion with loss of consciousness of 30 minutes or less, subsequent encounter; 2. Strain of muscle, fascia and tendon at neck level, subsequent encounter" (Ex. 3, p. 24).

12. Claimant was referred to see Michael Sparr, M.D. with Accelerated Recovery Specialists. He evaluated Claimant on October 1, 2018. Claimant reported his pain as between 7-10/10. (Ex. J, Ex. 5). He described bilateral cervical pain radiating to his trapezii and with numbness in his left biceps. Claimant also complained of headaches occurring 2-3 times per week. Claimant had "profoundly" limited cervical extension and limited flexion as well. *Id. at 278.*

13. Dr. Sparr diagnosed a cervical facet dysfunction with myofasciitis, with the possibility of a cervical disc herniation, associated with headaches. He recommended a cervical MRI, since it is **"reasonable, necessary and appropriate given the severity of pain and direct trauma that the patient experienced."** (Ex. 5, p. 105). (emphasis added). He also recommended trigger point injections, massage therapy, occipital nerve blocks, and possibly facet injections. Those were never authorized.

14. Claimant returned to CCOM to see Dr. Olsen on 10/16/18. At this time, Dr. Olsen noted that Claimant's "neck range of motion showed *improvement.* He still has some limitations with left rotation. Also extension is limited" (Ex. 3, p. 21) (emphasis added). His goal was still to be able to turn his neck all the way to the right without pain. *Id at p. 22*.

15. The last entry from Dr. Olsen is from 11/13/18. Dr. Olsen noted that by this time, Claimant was negative for headache, and had regained much of his range of motion. Dr. Olsen further noted in his narrative "He is scheduled to see Dr. Sparr "tomorrow" but so far his treatment has not been authorized (Ex. 3, p. 16). Pain was down to 3/10, 30% of the time. *Id.* Claimant's most recent work restrictions were "no lifting over 30 pounds, no pushing or pulling over 40 pounds" *Id at p. 17.* Follow up with Dr. Olsen was set for one month, at which time Claimant was anticipated to be at MMI. *Id.*

16. Kathleen D'Angelo, M.D. performed an Independent Medical Exam ("IME") of Claimant on Respondents' behalf. A report was issued on November 4, 2018. (Ex. C). Claimant reported his pain was between 7-9/10. *Id at 8.* Dr. D'Angelo inquired of the events of the accident. She noted that Claimant stated he went up in the lift, "we had to come back down and that's when I think I passed out." She inquired whether Claimant fell first and then had the heart attack, or had the heart attack resulting in the fall. Claimant was not certain. He stated it "could have been" that he fell first. *Id at 16*. Claimant ultimately stated he did not remember when he fell. When pressed on why he thought he might have fallen before his cardiac arrest, Claimant stated it was because the lift was wobbly and he may have lost his balance when coming down in the lift.

17. Claimant reported to Dr. D'Angelo that he began having headaches and neck pain "about the day after I got out of the hospital." *Id. at 11.* Claimant also reported having dizziness, and Dr. D'Angelo noted discussing with him that his blood pressure medications he recently started (Metroprolol and Lisinpril) can cause dizziness. Claimant also reported tingling down his left arm 2-3 times per week. Dr. D'Angelo noted she found no evidence to corroborate his memory complaints on exam and that his recall of dates, events, and names was 'excellent.' *Id at 23-24.*

18. Dr. D'Angelo opined that Claimant had full cervical range of motion, but some complaints of muscle tenderness upon palpation. *Id at 24.* Claimant's neurological exam was normal. She opined that Claimant's cardiac conditions were all non-work related. She noted that head injuries were not a recognized cause of cardiac arrest, but the cardiac arrest was a recognized cause of loss of consciousness. She felt

that any contusion he sustained to his left occipital scalp would have been secondary to his cardiac event and did not *cause* the cardiac event.

19. Dr. D'Angelo also noted that Claimant's complaints of dizziness, confusion, depression, and impaired memory and cognition may be caused by his medications. She also opined that there was no reason to suggest Claimant's current extensive subjective symptoms, including headaches, neck pain, upper back pain, and his cognitive complaints were related to the head contusion. She later clarified she was not opining on the *legal question* of whether those conditions would be considered work-related after they arose from a non-work related cardiac arrest. *Id at 42-43.*

20. Robert Ayala testified at hearing. Mr. Ayala is Claimant's brother, and also works for Employer. He was working directly with Claimant on August 7, 2018. He testified he and his brother were using the scissor lift to raise up to 30 feet to perform their work. He described the lift as a 5' x 8' cage lift on 4 wheels, made out of metal, which went up and down like an elevator. He testified that if the lift is not level, it will sound an alert and stop moving. Photographs of a scissor lift Claimant identified at hearing as a similar model, if not the exact lift, are contained in Exhibit L. (At hearing, the parties concurred that the portion of the scissor cage marked in green highlighter is the mid-level bar which Claimant struck when he fell. Respondents argue that said bar was likely "hollow" instead of solid metal. The ALJ concurs that this bar is indeed quite likely to be boxed steel (thus 'hollow'), and not solid. The significance of this distinction, or lack thereof, will be addressed in the Conclusions of Law, *infra).*

21. Mr. Ayala testified that as they were going up in the lift, the "buzzer" went off, indicating the lift was not stable. Mr. Ayala therefore told Claimant they should go back down. He testified that after they had gone all the way down, he began stepping backwards to climb out of the lift, facing Claimant, who was still standing inside the lift. He testified it was at this time that he saw Claimant fall and hit the back of his head on the middle rail of the lift. He stated that the lift was not moving, and was stable at the time Claimant passed out. He testified the middle rail was about 2 feet off of ground level. He testified he did not see Claimant's head strike any protruding parts from the rail, corner of the rail, or control box.

22. Claimant testified at hearing. Claimant testified the scissor lift he was working on had two rails, a top rail and mid rail, with the mid rail about 2 feet high and the top rail about 4 feet high. He testified the rails had squared edges. He testified the rails and floor were made of metal. Claimant testified him and his brother had been placing plywood under the lift to keep it balanced during that day. He testified the lift would wobble the higher up it went. Claimant testified he and his brother were going up, the lift began beeping to notify that it was unstable, they began descending in the lift, "and that was when I kind of lost consciousness and hit the rail." He testified he remembered passing out, and after that his next memory is waking up in the hospital. As of the hearing, Claimant has not returned to work, but has continued, per his testimony, to see his ATP, Dr. Olsen.

23. Claimant confirmed that he remembered losing consciousness while the lift was moving downward. He testified his brother was operating the lever which moved the lift downward when he lost consciousness. Claimant testified the gear box, which his brother was operating, was on the "front" of the lift, which is the opposite side of where the gate to enter/exit the lift is located. Claimant testified he was standing closer to the gate, or the "back" side. When asked on cross-examination whether his brother was exiting the lift at the time he lost consciousness, Claimant testified he was not. Claimant testified when he lost consciousness, his brother was looking at him to see if he was ready to come down.

24. Claimant testified his brother was asking him if he was ready to come down - meaning whether he was holding onto a rail - but he also testified they were already coming down. He testified his brother was facing the gear box on the front side of the lift while turning his head to look at Claimant near the back side of the lift. Claimant agreed he had no memory of what he struck his head on.

25. Claimant initially testified that during his stay at Memorial Hospital he was in bed the whole time without performing any physical activities. He testified his neck pain gradually got worse as he began sitting up at home after he left the hospital.

26. On cross-examination, Claimant testified he woke up in the hospital on August 9th and he did not have neck pain at that time. When asked if he had neck pain when he was discharged from the hospital, he could only state his pain began as he began standing and walking, and the first time he did so was upon discharge. Claimant was asked about the physical therapy evaluation from August 11, 2018. (Ex. F, p. 215). Claimant testified he did not remember that evaluation. When asked about the notes documenting him walking up to 500 ft. in the hospital, moving out of bed, and other tasks, Claimant stated he could not remember those activities. Claimant then testified he had neck pain when he was leaving the hospital at the time of discharge.

27. At hearing, Claimant was shown Dr. D'Angelo's note, wherein he informed her his first neck pain arose the day after he was discharged. Claimant then testified his first pain was in fact on August 12, and not the day before when he was discharged. He then testified he had a hard time remembering when his pain began. Claimant testified that he could barely move his neck when he was seen on August 16 at Parkview. When presented with the Parkview records documenting he had full range of motion in his neck without restriction, he testified those records were not correct.

28. Claimant testified he thinks he reported neck pain while at Memorial Hospital, but he could not state for certain. He did not elaborate why he thought he had informed someone at Memorial Hospital that he had neck pain, if he was also alleging he first felt neck pain upon being discharged from the hospital.

29. Claimant testified he had headaches while at Memorial Hospital and was told by a cardiologist that he should take Tylenol. Claimant testified when asked if he was surprised that this was not a documented condition, he stated that his headaches

actually started when he began walking after discharge. Claimant testified he had memory issues during his stay at Memorial Hospital and that he informed his provider at CCOM on August 17, 2018 of his memory complaints. When presented with the August 17, 2018 treatment note that documented he denied memory loss issues at that time, he testified that this record was not correct. (re: Ex. H, p. 248). Claimant testified he "most likely" had upper back pain first when he was discharged, and walking out of the hospital.

30. Dr. D'Angelo testified at hearing as an expert in the fields of internal medicine and occupational medicine. She testified Claimant's fall directly resulted from his cardiac arrest. She confirmed Claimant told her at the IME that his first symptoms in his head or neck began on August 12, 2018. She testified it was not medically likely he would first feel symptoms in his head and neck on August 12 which would be related to hitting his head on August 7th. She testified trauma to the head or cervical spine is acutely symptomatic.

31. She also testified that Claimant was taken off a respirator on August 9; his sedation stopped on that day, and by August 11, he was noted to be completely asymptomatic. She also noted Claimant had not been sedated or provided any pain killers which may have masked his symptoms while in the hospital, after he had been taken off the respirator on August 9. She also noted that Claimant's treating physicians had addressed his hematoma, and evaluated Claimant for a head and neck injuries in addition to his cardiac arrest, without documentation of those symptoms.

32. Dr. D'Angelo testified that in her opinion, it was not medically likely that, after having documented full range of motion on August 16 at Parkview, any severe restrictions documented on exam on August 17 would be related to an incident which had occurred ten days prior. She noted that the notes of Dr. Keller and the triage nurse at Parkview would have likely recognized abnormalities if present. Dr. D'Angelo testified that suffering a sudden seizing event such as a cardiac arrest, then laying immobile for several days can cause myofascial (muscular) problems, including spasms as were documented at Parkview. She noted that while at Parkview, Claimant was provided a trigger point injection, which is typically used to treat cervical myofascial spasms, as opposed to disc herniation or other cervical abnormalities which could be caused by acute trauma. She testified there was no sign of traumatic injury on Claimant's cervical imaging. She testified Claimant's exam during her IME was benign, and she could not find any evidence of neurological, facet, cervical, or even myofascial injury at that time.

33. Dr. D'Angelo testified any headache complaints Claimant had at Memorial would be more likely related to Nitroglycerin-based medications that he was administered for his cardiac issues. She testified the medications Claimant was provided for his cardiac arrest can also cause mentation issues, such as the cognitive problems of which Claimant complained. She testified Claimant's complaints of intermittent left arm numbness was not consistent with a cervical radiculopathy, but was more consistent with ongoing angina from his cardiac issues. She opined that Claimant

demonstrated during her IME excellent anterograde and retrograde memory by his recollection of events immediately prior to the fall and upon regaining consciousness. She testified this was the appropriate test for memory loss related to a concussion/brain injury, and in her opinion, Claimant demonstrated no signs of a concussion.

34. Dr. D'Angelo testified Claimant had no objective findings of injury to his head, neck, or back related to the incident subsequent to his hospitalization at Memorial Hospital. Therefore, it was her opinion that Claimant sustained no disability or required medical treatment from the August 7, 2018 incident aside from his unrelated cardiac arrest issues.

CONCLUSIONS OF LAW

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

Generally

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

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as the fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990) Moreover, the ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion).

C. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item

contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

D. In this case, the ALJ notes that Claimant has not been entirely consistent between his testimony and what he told his providers. There are gaps in his memory- not unsurprising given his medical condition. His onset of symptoms, and reporting of same, do not follow a medically predictable trajectory - but a failure to follow said trajectory does not render it false. Indeed, the Workers Compensation system is replete with examples of injured workers setting follow-up appointments which do not yield the expected results. MMI gets postponed, more testing ordered, referrals rendered, new discoveries made, experts confounded. And persons possibly suffering post-concussive symptoms might not be the best judge of their own memory. While the ALJ would not rely exclusively upon Claimant's testimony at hearing to make a decision, that is hardly necessary. The ALJ finds that Claimant, while not an entirely reliable medical historian, has been sincere throughout the process, including to his medical providers, in an earnest attempt to simply return to health. He fell at work, woke up in the hospital, and had to start anew. He has always answered the questions asked of him to the best of his present ability. As did, the ALJ finds, Robert Ayala.

E. The ALJ finds Dr. D'Angelo to be highly credentialed and respected. While the ALJ likewise finds Dr. D'Angelo to be sincere and credible in rendering her medical opinions, it does not necessarily render her *persuasive* on the ultimate issues. It is duly noted that greater persuasiveness sometimes occurs when one does not approach that line between expert and advocate. There is simply no need.

Compensability, Generally

F. A compensable injury is one that arises out of and occurs within the course and scope of employment. § 8-41-301(1)(b), C.R.S. An injury occurs in the course of employment when it was sustained within the appropriate time, place, and circumstances of an employee's job function. *Wild West Radio v. Indus. Claim Apps. Office*, 905 P.2d 6 (Colo. App. 1995). An injury arises out of employment when there is a sufficient causal connection between the employment and the injury. *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014). Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove, by a preponderance of the evidence, a causal relationship between the work injury and the condition for which benefits are sought. *Snyder v. Indus. Claim Apps. Office*, 942 P.2d 1337 (Colo. App. 1997).

Mechanism of Injury

G. Respondents argue that the mechanism of injury has not been shown with sufficient particularity. The ALJ cannot concur. While it is true that there are differences in Claimant's recall of events and that of his brother, such differences are of insufficient materiality. In fact, when all details match perfectly is when one should take pause. Given what he went through, Claimant can be forgiven for being fuzzy on details, as

previously noted. He did his best at all times pertinent, and combined with that of Robert Ayala, his testimony and medical records are sufficient for the ALJ to conclude that 1) Claimant was standing on the scissor lift with Robert Ayala while on the job, 2) While on the scissor lift, Claimant suffered a heart attack - said heart attack not alleged to be caused by his employment - and lost consciousness, 3) Upon losing consciousness, Claimant fell within the scissor lift platform, striking his left occipital region on the mid-level metal bar- a distance of around 3 feet. The ALJ concludes that this mechanism is sufficient to cause the injuries Claimant suffers from.

Special Hazard of Employment

H. Purely idiopathic or personal injuries are generally not compensable under the Act, unless an exception applies. *City of Brighton v. Rodriguez,* 318 P. 3d 496, 503 (Colo. 2014). When it comes to idiopathic injuries, the "special hazard" doctrine represents an exception to the general rule of non-compensability, where an injury is compensable if the most direct cause of that injury is a preexisting idiopathic disease or condition so long as a special employment hazard also *contributed to* the injury. *Mitchell v. Food Bank of the Rockies*, W.C. No. 4-860-191-01 (ICAO August 16, 2012). However, to be considered an employment hazard, the employment condition must not be a ubiquitous one; it must be a special hazard not generally encountered. *Ramsdell v. Horn*, 781 P.2d 150, 151 (Colo. App. 1989). A special hazard of employment is one which increases either the risk of injury or the severity of injury when combined with the pre-existing condition, which is the direct or precipitating cause of the injury. *Id.* Stated another way, the question is whether the claimant was exposed to an employment hazard *not generally encountered outside the workplace. National Health Laboratories v. Industrial Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992).

I. As noted by Claimant, a line of cases has found the existence of a special hazard-thus compensability- in a variety of contexts. In *Murray v. Colorado Department of Transportation*, W.C. No. 4-921-576-02 (June 10, 2014), sufficient evidence existed for a 'special hazard' when Claimant was injured on a set of 'stairs' on a ladder to a front end loader, in contrast to an ordinary staircase. In *Briggs v. Safeway, Inc*., W.C. No. 4-950-808-01 (July 8, 2015), a 'special hazard' was found to be present when the claimant fell, for an unexplained reason, onto a metal work table, injuring her head. The ALJ in that case found the existence of this metal work table to be more than simply a ubiquitous condition found in everyday life outside the workplace. The table itself was larger, heavier, fixed and more rigid than a table one might ordinarily find in a residential kitchen. That distinction was found to be sufficient for the ICAO.

J. Respondents seek to distinguish this case from *Briggs,* since the boxed steel bars in this scissor lift might be "hollow", and thus not "solid" like the table in *Briggs.* The ALJ is prepared to conclude that whether this scissor lift's mid-level bar is of "solid" or "hollow" construction is immaterial. Either way, when a worker strikes his head on this bar, it is the worker's head, and not the bar, that will bear the full force of the damage - unless this worker's name should be 'Curly'. Even if one assumes this steel bar is no different (which the ALJ does not) from the edge of a coffee table, it can hardly

be characterized as a hazard one might encounter in ordinary life outside of work. An essential component of Claimant's job duties is to climb into the confines of this metal platform, then rise up to 30 foot in the air. Should the platform not be sufficiently level and stable, one must return to earth to 'shim' the device and try again, lest the device fall over with all occupants aboard. Should a worker fall within the 'cage' for whatever reason, striking one of these steel bars in one direction or the other in some fashion is all but inevitable.

K. The ALJ therefore concludes that the scissor lift platform that Claimant occupied when he fell does fall within the ambit of "special hazard" of employment, in that it increased the likelihood of injury and/or severity of injury combined with Claimant's admittedly preexisting condition. This was more than an ordinary obstacle one might encounter in everyday life. Additionally, the risk of enhanced injury is greater when one hovers 30 foot above ground level.

Causal Relationship of Claimant's Injuries to the Work Accident

L. An "accident" is defined under the Act as an "unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual or undersigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident and includes disability. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *see also*, §8-40-201(2). Consequently, a "compensable" injury is one which requires medical treatment or causes disability. *Id*.; *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO Sept. 24, 2004). No benefits are payable unless the accident results in a compensable "injury." § 8-41-301, C.R.S.

M. As noted earlier, Claimant has not followed the expected medical trajectory in reporting his symptoms and recovering from same. It happens. This Claimant was not acutely symptomatic for a few days - then he was. It is noted that his own ATPs, including Dr. Olsen, continued to treat his head and neck issues as *work injuries*, with possible post-concussive symptoms. Work restrictions were imposed, gradually loosened, but *remain in place as of November, 2018.* While the records suggest no objective evidence of disc or facet damage from this fall, the MRI did note an *effusion* which remains unexplained.

N. Dr. Olsen suspected soft tissue damage, in the form of a strain, to the cervical region, and made referrals to Dr. Sparr, who recommended treatment options, including trigger point injections. Those never occurred. No physician in Claimant's entire medical team suspected malingering. The ALJ finds unpersuasive the suggestion that Claimant's continuing neck problems might be due to remaining stationary in bed for a few days - instead of falling and bouncing his head on a steel bar at an oblique angle from several feet up, then falling two more feet to the floor. The latter is more likely, and the ALJ so finds.

Medical Benefits

O. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. § 8-42-101, C.R.S. Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Indus. Comm'n*, 491 P.2d 106 (Colo. App. 1971); *Indus. Comm'n v. Royal Indemnity Co.,* 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Indus. Comm'n v. Jones*, 688 P.2d 1116 (Colo. 1984); *Indus. Comm'n v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

P. In this case, the ALJ finds, by a preponderance of the evidence, that Claimant is entitled to all reasonable and necessary medical treatment for this work injury. His injuries are likely myofascial, possibly post-concussive, but his ATPs are to be the judge of that for now. He is not yet at MMI. Dr. Sparr's suggested treatment regimen should be followed, assuming it is still recommended at this point.

Temporary Total Disability

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

R. The ALJ finds, by a preponderance of the evidence, that Claimant is entitled to TTD benefits. He suffered a compensable injury, and has been placed on restrictions by his ATP which prevent him from returning to work. There is no evidence of modified duty being offered to him by employer. The work restrictions provided by

his ATP remain in effect as of this Order, although hopefully Claimant can return to work soon with the medical treatment he is duly owed.

ORDER

It is therefore Ordered that:

1. Claimant's claim is compensable.

2. Respondents shall pay for all reasonable and necessary medical treatment to treat Claimant for his work injuries.

3. Claimant's Average Weekly Wage is $700.60.

4. Respondents shall pay Claimant Temporary Total Disability payments until terminated by operation of law.

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

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

DATED: January 15, 2019

/s/ William G. Edie

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

ISSUES

- Whether claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment with employer?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that the medical treatment he received from Dr. Miller was reasonable, necessary and related to his work injury?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that claimant is entitled to an award of temporary total disability benefits from April 25-28, 2018 and from May 4-6, 2018, and on May 11, 2018.

- If the claim is compensable, the parties stipulated to an average weekly wage ("AWW") of $2,034.89.

FINDINGS OF FACT

1. Claimant was employed with employer for 10 ½ years. On April 15, 2017, Claimant's job was employed as the District Fire Training Chief for employer. Claimant testified that on April 15, 2017, claimant was involved with Firefighter I practice practical for the new recruits. Claimant testified that while participating in the training, he dragged a 185 pound rescue dummy underneath a stairwell, and felt a pop in his back. Claimant testified he felt immediate pain in his back and down his right leg.

2. Claimant exited the building and immediately reported the injury to Mr. C_____, but did not immediately seek medical treatment.

3. Claimant has a history of a prior low back injury involving a surgery that occurred on May 29, 2013. Claimant's surgery involved an L4 through S1 fusion.

4. Claimant testified that he spoke to a representative from insurer in June 2017 regarding his condition and informed employer that he needed to see a physician.

5. Claimant was initially evaluated on June 22, 107 by Ms. Bjerstedt, a physicians' assistant with Dr. Coleman. Ms. Bjerstedt noted claimant's accident history of having felt a pop in his back while dragging a mannequin and feeling symptoms in his right low back, radiating down his posterior thigh. Ms. Bjersted ordered physical therapy.

6. Claimant underwent a magnetic resonance image ("MRI") exam on August 1, 2017. The MR revealed post fusion changes at L4-5 and L5-S1 and progressive degenerative changes most significantly at L3-4.

7. Claimant returned to PA Bell with Dr. Clifford's office on August 16,2017. Mr. Bell reported that claimant was doing well until he was lifting a 180 pound mannequin and felt sudden pain in his back. Mr. Bell noted claimant complained of right leg pain radiating down to the posterior calf.

8. Claimant was again examined by Ms. Bjerstedt on August 18, 2018. Ms. Bjerstadt noted that claimant had undergone an MRI study and recommended claimant continue work full duty and return in one month. Dr. Clifford recommended claimant undergo an L3-4 epidural steroid injection.

9. Respondents obtained an independent medical examination ("IME") with Dr. McCranie on October 3, 2017. Dr. McCranie reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with her IME. Dr. McCranie opined that claimant sustained an exacerbation to his low back and right leg extremity pain. Dr. McCranie opined that claimant did not sustain a permanent aggravation of his pre-existing condition in the injury, however. Dr. McCranie opined that claimant sustained a temporary aggravation of his pre-existing condtion. Dr. McCranie noted that claimant's future medical treatment could include an epidural steroid injection and electromyelogram ("EMG").

10. Claimant was examined by Ms. Bjerstedt on October 23, 2017. Ms. Bjerstedt noted claimant had not heard back about the ESI and recommended claimant undergo the EMG study. Ms. Bierstedt cautioned claimant about his job and advised him to avoid any activity where he could endanger himself or a victim.

11. Claimant underwent an EMG on November 13, 2017 under the auspices of Dr. Burnbaum. Claimant's EMG demonstrated evidence of an old L5 root injury on the right with denervation and reinnervation but no evidence of ongoing denervation.

12. Claimant returned to Ms. Bjerstedt on November 29, 2017. Ms. Bjerstedt noted the results of claimant's EMG study and referred claimant for an ESI with Dr. Gebhardt's office. Claimant was instructed to follow up with Dr. Coleman for treatment of his neuropathy that was revealed in the EMG.

13. Claimant underwent the first ESI with Dr. Grazillo on December 8, 2017. Claimant testified that the first ESI helped for about a week and the second helped for about 2 weeks. Claimant testified that his pain shooting down his right leg returned after the second ESI. Dr. Grazillo referred claimant to Dr. Miller.

14. Claimant testified that during this time he was kept at full duty but was only doing the administrative portion of his job. This testimony is supported by the medical records that document claimant was continuing to complain of symptoms but was not provided with work restrictions by the treating physicians.

15. Claimant returned to Ms. Bjerstedt on March 29, 108. Ms. Bjersted had noted that she and Dr. Miller had requested a repeat MRI, but it had been denied by insurer.

16. Dr. Miller examined claimant on April 4, 2018. Dr. Miller noted claimant's history of low back pain and current presentation. Dr. Miller recommended an open lumbar re-exploration with removal of posterior final hardware followed by a complete L3-4 decompressive laminectomy facetoctomies and extension of instrumented fusion to L3-4 including an interbody fusion.

17. Claimant testified he underwent the proposed surgery with Dr. Miller on April 23, 2018 and had good results from the surgery.

18. Claimant testified that after the surgery with Dr. Miller, he was off of work from April 25, through April 28, 2018. Claimant testified he returned to work on May 3, 2018 for an all-staff meeting. Claimant testified he then missed work on May 4, May 5 and May 6, 2018. Claimant also missed work on May 11, 2018 before he returned to work on May 12, 2018 and has worked for employer since that time.

19. Claimant returned to Ms. Bjerstadt on May 29, 2018. Ms. Bjerstadt note claimant's surgery with Dr. Miller and recommended claimant continue to follow up with Dr. Miller. Claimant underwent an x-ray of the lumbar spine on June 5, 2018. The x-ray demonstrated no significant change when compared to the April 23, 2018 x-ray.

20. Claimant returned to Dr. Miller on June 5, 2018. Dr. Miller noted claimant reported considerable improvement in his preoperative symptoms. Dr. Miller recommended physician therapy.

21. Claimant returned to Ms. Bjerstedt on July 24, 2018. Ms. Bjerstadt noted claimant was three months post lumbar intervertebral fusion and removal of hardware. Ms. Bjerstedt placed claimant at maximum medical improvement ("MMI") and referred claimant for an impairment rating.

22. Respondents obtained a records review independent medical examination ("IME") of claimant on July 28, 2018 with Dr. Messenbaugh. Dr. Messenbaugh reviewed claimant's medical records and provided a report that set forth his medical opinions. Dr. Messenbaugh opined that claimant's condition was the result of the natural progression of his pre=existing condition dating back to prior to 2013. Dr. Messenbaugh opined that the events of April 15, 2017 caused claimant to experience a lumbar spine soft tissue myofascial strain and sprain with probable right lower extremity radiculopathy involving the L5 nerve root. Dr. Messenbaugh further opined that claimant's chronic pathology previously noted at the L3-L4 level were the cause of claimant's need for surgery. Dr. Messenbaugh opined that the events of April 15, 2017 caused a temporary exacerbation of claimant's pre-existing condition. Dr. Messenbaugh opined that claimant was at MMI as of March 21, 2018. Dr. Messenbaugh opined claimant did not sustain any permanent impairment as a result of the April 15, 2017 events.

23. Dr. Miller testified at hearing in this matter. Dr. Miller testified that prior to his evaluation of claimant, claimant had not received treatment at the L3-4 level. Dr. Miller testified that claimant's symptoms were consistent with both a lumbar and sacral nerve impingement. Dr. Miller testified that claimant's condition was caused by the lifting injury and it was not reasonable to assume that contemporaneous with the lifting incident, his pre-existing condition just happened to manifest itself at that time.

24. Dr. Miller testified that the L3-4 area was the most significant area and likely causing claimant's symptoms. Dr. Miller opined that claimant's L4 nerve roots were compressed and testified that he performed surgery at that level because he believed surgery at that level would treat claimant's symptoms.

25. Dr. McCranie testified by deposition in this case. Dr. McCranie testified consistent with her IME report. Dr. McCranie testified that is was her impression that claimant had an exacerbation of his low back and right lower extremity pain that was a temporary aggravation of claimant's pre-existing condition Dr. McCranie testified that claimant could have undergone an epidural steroid injection that would bring his symptoms down to baseline levels.

26. Dr. McCranie testified claimant's EMG showed an old L5 nerve root injury with evidence of reinnervation. Dr. McCranie testified it was her opinion that another MRI of the lumbar spine was not reasonable and necessary. Dr. McCranie testified that claimant's symptoms after his injury were in the L5-S1 distribution. Dr. McCranie opined that claimant's issues at the L3-4 level represented degenerative changes.

27. In this case, claimant does have a prior history of low back pain resulting in medical treatment, including a surgery in 2013 involving an L4-5 and L5-S1 fusion. However, claimant established at hearing that the incident in question on April 15, 2017 represents at least an aggravation of his pre-existing condition representing a new injury

28. The ALJ credits claimant's testimony at hearing along with the medical records entered into evidence and the testimony of Dr. Miller and finds that claimant has established by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment with employer. The ALJ acknowledges the contrary opinions expressed by Dr. McCranie and Dr. Messenbaugh, but relies on the claimant's testimony along with the medical records that document claimant experiencing an onset of new symptoms following the incident on April 15, 2017 and finds that this constitutes a new injury under the Colorado Workers' Compensation Act.

29. The ALJ credits the testimony of claimant along with the medical records entered into evidence in this case and finds that claimant has established that it is more probable than not that the medical treatment provided by Dr. Miller including the surgery was reasonable medical treatment necessary to cure and relieve claimant from the effects of his work injury.

30. The ALJ credits the testimony of claimant and finds that claimant has established that it is more probable than not that he is entitled to an award of temporary disability benefits for the periods of time he missed from work following the surgery performed by Dr. Miller. The ALJ credits the medical records and claimant's testimony with regard to the issue of temporary disability benefits.

31. Claimant testified at hearing that following the surgery with Dr. Miller on April 23, 2018, he took four days of sick leave. Claimant testified he missed April 25, through the 28th. Claimant testified he went back to work on May 3, for a staff meeting and missed May 4-6 and May 11 before returning to work May 12, 2018.

32. The ALJ credits claimant's testimony regarding the dates he missed from work due to the injury and finds that claimant has proven that it is more likely than not that he is entitled to an award of temporary disability benefits as a result of the injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. C*_____, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

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

disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. As found, claimant has established by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment with employer. As found, claimant has a pre-existing condition involving his low back, but the injury on April 15, 2017 aggravated, accelerated or combined with his pre-existing condition to cause the disability or need for medical treatment and therefore represents a compensable injury.

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

6. As found, claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment with employer on April 15, 2017. As found, claimant's testimony along with the medical records entered into evidence are credible with regard to this issue.

7. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), C.R.S., requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*.

8. As found, claimant has established by a preponderance of the evidence that he is entitled to an award of TTD benefits following his surgery on April 23, 2018. As found, claimant's testimony regarding the days he missed from work is found to be credible on this issue.

ORDER

It is therefore ordered that:

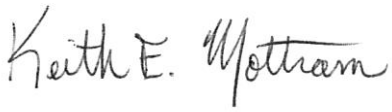
1. Respondents shall pay for the medical treatment that is reasonable and necessary to cure and relieve claimant from the effects of the injury.

2. Respondents shall pay claimant TTD benefits beginning April 25, 2018 through April 28, 2018 from May 4 through May 6, 2018 and May 11, 2018 based on the stipulated AWW. The TTD award is subject to any statutory waiting period that may be applicable to the TTD benefits.

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

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

DATED: January 17, 2019



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

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that medical treatment she received from North Suburban Medical Center Emergency Department and Diversified Radiology of Colorado on May 11, 2018, Montgomery Eye Care on May 17, 2018 and May 23, 2018, Dr. Chen on May 31, 2018, and Dr. Hamman on August 30, 2018 and November 8, 2018 was causally related to her May 9, 2018 industrial injury.

II. Whether Claimant proved by a preponderance of the evidence she is entitled to temporary indemnity benefits from May 9, 2018 through August 10, 2018.

STIPULATIONS

I. The parties stipulated to an average weekly wage ("AWW") of $776.98.

FINDINGS OF FACT

1. Claimant is a 51 year old woman who works for Employer as a head clerk.

2. On May 9, 2018, Claimant sustained an admitted industrial injury to her upper and lower extremities when she tripped on a shopping cart and fell.

3. The ALJ observed security footage of the incident. Claimant is observed taking a few steps then falling forward onto her knees and elbows. One camera angle clearly shows Claimant did not strike her head nor experience any whiplash-type motion from the fall. Claimant is observed immediately getting up, adjusting her clothes, checking her elbows and knees, smiling, laughing and talking to co-workers. Claimant does not appear to be confused or to have any issue walking and talking.

4. Claimant completed an Associate Work Related Injury/Illness Report approximately two hours after the fall. Claimant submitted a detailed handwritten three-page report regarding the incident. Under "Injury/Illness Type" Claimant wrote, "Both elbows both knees – wrist right hard time with filling out paper wrist (*sic*)." In describing the incident, Claimant wrote, in relevant part,

> I fell flat on floor landing on elbows & knees. Doug asked if I was ok I said not sure. I felt the pain from fall – I looked at elbows and knees after getting up. Doug left with buggy. I stayed back talking to RoseMarie and Emily. We looked at my elbows they started to have a knot and bruise. Looked at both knees they had bruises on both.

5. Claimant was wearing a wrist brace on her right wrist at the time of the fall. Claimant's written statement contains no mention of any alleged head injury or associated symptoms.

6. Claimant's supervisor, Doug Anton, was present during the fall and completed an In-Store Investigation Report. Mr. Anton documented that Claimant "tripped on buggie near time clocks and fell onto knees, elbow (right) and right wrist." Other co-workers also submitted written statements regarding Claimant's fall. None of the statements include any reference to any mechanism of injury to Claimant's head. Claimant was provided a designated providers list on May 9, 2018.

7. Claimant finished her shift on May 9, 2018 and worked her regular shift on May 10, 2018. She alleges she "got lost" on her way home from work on both May 9, 2018 and May 10, 2018 and had to call her mother for directions. There is no evidence Claimant reported these alleged incidents to Employer, experienced any cognitive issues affecting her ability to perform her regular job duties on these days, or sought medical attention on these days.

8. Claimant testified she was slurring her words by the morning of May 11, 2018 and sought treatment at authorized treating provider Concentra. Claimant presented to Darla Draper, M.D. on May 11, 2018 with complaints of bilateral knee pain, bilateral elbow pain and right hand soreness. Dr. Draper noted,

> While walking the pt tripped on a buggy and fell forward onto the elbows & knees onto tiled floor. She thinks she hit her head and had LOC for a couple seconds. R sided HA since injury + dyseqilibrium. She can't focus or think as well and writing penmanship is not as good as usual. Pt describes that she took wrong turns and was going in circles, trying to get to clinic. + nausea. Denies vomiting. Has a little numbness of R elbow. Bilateral hip and knee pain.

9. On physical examination Dr. Draper noted Claimant's judgment and insight were normal, her speech, mood and affect were appropriate, and her recent and remote memory was intact. She diagnosed Claimant with bilateral elbow and knee contusions and a concussion with loss of consciousness < 30 min. Due to Claimant's reports of a head injury and subjective complaints of associated symptoms, Dr. Draper instructed Claimant to have a friend or family member drive her to the emergency room. She also removed Claimant from work.

10. Claimant presented to the emergency department at North Suburban Medical Center at 3:14 p.m. on May 11, 2018 and was evaluated by the triage nurse at 3:22 p.m. It is noted that Claimant's chief complaint was head pain/injury. Meaghan M. Mercer, D.O. evaluated Claimant at 3:33 p.m. Claimant reported hitting her elbows and knees during a fall at work two days prior. Dr. Mercer noted, "Her next memory is looking up and seeing customers heading towards her. Pt reports unknown LOC, but positive head trauma. She went back to work for a couple hours immediately after the fall. She has felt confused since." Claimant complained of nausea, dizziness,

generalized pain, headache, fogginess and issues with memory. Dr. Mercer noted an atraumatic head, eyes, ears, nose, and throat exam, a normal neurological exam with normal mental status and normal cognition, and a GCS (Glasgow Coma Score) of 15. When reevaluated at 4:39 p.m., Claimant's pain had improved after receiving Toradol, and lab results were normal. However, at 5:01 p.m., it was noted "Pt is now c/o slurred speech and new onset left sided weakness in the past 20 minutes. On re-exam, pt had normal finger-nose, no pronator drift, no BLE drift but obvious weakness on left, subjective decreased sensation on left face and LUE." X-rays and CT scans were negative for acute abnormalities. A stroke evaluation and brain MRI were conducted. The MRI did not evidence any acute intracranial abnormality. Dr. Mercer's primary impression was post-concussive syndrome. Claimant was discharged with instructions to follow up with her physician.

11. Dr. Draper reevaluated Claimant on May 15, 2018. Claimant complained of right-sided headache, dysequilibrium, and issues with focusing and penmanship. Claimant also complained of changes in vision, forgetting what she was talking about mid-sentence, difficulty with word-finding, repeating things, and going off on tangents. On physical exam, Dr. Draper noted that Claimant's judgment, insight, speech, memory, mood and affect were normal. Her assessment included concussion with loss of consciousness, knee and elbow contusions, blurry vision and vertigo. She prescribed Claimant butalbital and meclizine for vertigo, physical therapy for the left knee, vestibular rehabilitation, and cognitive therapy. She referred Claimant for an ophthalmology evaluation and to Crosby and Chen, PLLC for a neurological evaluation for Claimant's "head/face." Dr. Draper released Claimant to modified duty on May 16, 2018 with the following restrictions: working two hours per day performing sedentary seated office duties, only in quiet darkened room, no work requiring high cognitive ability, and no driving to work.

12. Claimant also provided a 47-minute recorded statement to the claims adjuster on May 15, 2018. The ALJ listened to the entire recording in which Claimant coherently recalls and describes the May 9, 2018 work incident and subsequent events in great detail. Claimant's presentation on the recording is inconsistent with her reported symptoms of cognitive difficulties to her providers.

13. On May 17, 2018, Claimant saw Gary Mannheimer, O.D. at Montgomery Eye Care per the referral of Dr. Draper. Claimant reported hitting her head during a fall at work. She complained of decreased, cloudy, and foggy vision, as well as light sensitivity, pressure, floaters, flashes of light, and headaches. Claimant was assessed with unspecified visual field defects and prescribed eye drops for dry eye syndrome. Claimant attended a follow-up appointment at Montgomery Eye Care with James Montgomery, O.D. on May 23, 2018.

14. Dr. Draper reevaluated Claimant on May 18, 2018. Dr. Draper noted that referrals for a neurological evaluation, cognitive therapy, physical therapy and vestibular rehab were denied. Her assessment continued to include concussion with loss of consciousness. She continued Claimant's same work restrictions.

15. Claimant was seen by Debra J. Smith, M.D. at Concentra on May 23, 2018 and May 30, 2018 with continued complaints of headaches, dizziness, sensitivity to light and sound, and cognitive and memory problems. Dr. Smith's assessment included concussion with loss of consciousness, knee contusions, vertigo, and blurry vision. Claimant's work restrictions were as follows: working two hours a day performing simple, sedentary office tasks in a quiet setting, no climbing ladders, no driving to work, no working in safety sensitive positions, and no working at heights.

16. On May 31, 2018, Claimant saw Hua Judy Chen, M.D. at Crosby and Chen, PLLC for a neurological evaluation per the referral of Dr. Draper. Claimant reported thinking she hit her face and head when she fell during the work incident. On examination, Dr. Chen noted Claimant had an awake and alert mental status with no aphasia or dysarthia. Dr. Chen opined Claimant was likely suffering from a tension headache from a mild concussion and possible post-concussion syndrome with symptoms of cognitive difficulty.

17. Dr. Smith continued Claimant's same work restrictions on June 6, 2018 and June 18, 2016.

18. On July 2, 2018, Dr. Smith changed Claimant's restrictions to the following: working four hours a day in a quiet area performing simple tasks, no walking on uneven terrain, no climbing ladders, and no working is safety sensitive positions. Her assessment at the time was left knee contusion, right shoulder contusion and acute post-traumatic headache. She referred Claimant to Daniel R. Hamman, M.D. for evaluation and treatment of Claimant's left knee contusion. Dr. Hamman performed a prior knee replacement on Claimant in 2014.

19. On July 16, 2018, Dr. Smith's assessment was acute post-traumatic headache, left knee contusion, concussion with loss of consciousness, cognitive deficits, and right shoulder contusion. She again referred Claimant to Dr. Hamman, this time for both the left knee and right shoulder. Dr. Smith continued Claimant's same work restrictions.

20. On July 19, 2018, Dr. Hamman evaluated Claimant for left knee pain and performed a knee injection.

21. Dr. Smith reevaluated Claimant on July 26, 2018, noting Claimant received a shoulder injection and that physical therapy for Claimant's shoulder had been approved. Dr. Smith's assessment was acute post-traumatic headache, left knee contusion and right shoulder contusion. Dr. Smith assigned the following work restrictions: working six hours a day, lifting/pushing/pulling up to 10 pounds, taking a break every two hours to rest the knee, no reaching above shoulder with affected extremities, no repetitive motion with the right upper extremity, no climbing ladders, and no walking on uneven terrain.

22. On August 10, 2018, Dr. Smith released Claimant to work her entire shift with the same restrictions as assigned on July 26, 2018.

23. Claimant returned to Dr. Hamman for a follow-up evaluation on August 30, 2018. Dr. Hamman gave an assessment of acute right shoulder pain, right shoulder impingement, and left knee stiffness. He performed a right shoulder injection.

24. Claimant was referred to Kathy McCranie, M.D. for a psychiatric evaluation and impairment rating. Dr. McCranie reviewed Claimant's medical records and physically examined Claimant on October 26, 2018. Regarding the mechanism of injury, Claimant reported falling straight forward and striking her arms, left knee and head. Claimant denied any loss of consciousness. Dr. McCranie opined Claimant's work-related injury involved a left knee contusion, right shoulder sprain and posttraumatic headache. She assigned permanent impairment ratings for Claimant's right shoulder, left knee, and posttraumatic headaches.

25. On November 5, 2018 John Burris, M.D. performed an Independent Medical Evaluation ("IME") at the request of Respondent. Dr. Burris performed a medical record review, physically examined Claimant, and reviewed security footage of the May 9, 2018 work incident. He noted Claimant fell to the ground on her legs and elbows, did not strike her head, and was able to get up immediately. Dr. Burris noted no objective findings on his examination. He opined Claimant did not meet the criteria for a concussion or mild traumatic brain injury resulting from the May 9, 2018 work incident. He explained,

> Most importantly, she did not strike her head when she fell (which is clearly documented on the video footage of the event). Furthermore, there was no sign of head trauma at her medical evaluations (with GCS 15), no documented loss of conscious, no retrograde amnesia, repeated normal neurologic examinations, and a negative diagnostic workup (head CT and MRI). Throughout her care, [Claimant's] work restrictions assigned by her primary providers were focused on a presumed head injury. Because there was no head injury, these restrictions were not consistent with the nature of her injury, which was isolated soft tissue contusions. These types of injuries do not typically require any formal activity modification.

26. Dr. Burris opined Claimant's only work-related diagnoses were minor knee and elbow contusions. He concluded Claimant was at maximum medical improvement ("MMI") with no permanent impairment, restrictions or need for additional care.

27. Dr. Draper placed Claimant at MMI on November 7, 2018 with the impairment ratings assigned by Dr. McCranie. Dr. Draper recommended maintenance care in the form of appointments with a primary occupational provider for medication management for one year. Claimant was not assigned any permanent work restrictions.

28. There is no evidence Dr. Draper or Dr. Smith reviewed video footage of Claimant's May 9, 2018 fall. Despite Claimant's reports of a head injury, cognitive issues, and other associated symptoms, Dr. Draper and Dr. Smith consistently noted normal psychiatric findings on physical examination.

29. Dr. Hamman reevaluated Claimant on November 8, 2018 for left knee and right shoulder issues. He recommended surgical intervention for the left knee.

30. On December 1, 2018, Dr. McCranie performed an additional medical record review to assess whether there was evidence of a mechanism of injury for a head injury. Dr. McCranie reviewed Claimant's May 15, 2018 recorded audio statement, Dr. Burris' IME report, Dr. Hamman's records, and video footage of the work event. She noted Claimant was able to give a very detailed history of her work injury in her audio statement, with no evidence of retrograde or anterograde amnesia or cognitive impairment. Dr. McCranie further noted that video footage of the incident revealed Claimant did not hit her head and there was no loss of consciousness.

31. Based on her review of the additional information, Dr. McCranie opined there was no longer an impairment for Claimant's brain due to a lack of work-related mechanism of injury. She explained,

> ...it is clear there was no head injury. There was no impact to the head. There was no significant force that was involved that would cause a coup or countercoup head injury. There was no evidence of loss of consciousness. There was no amnesia. Previous review of the emergency records indicated a Glasgow coma scale of 15. MRI of the brain was negative as was a CAT scan of the head. There was no objective evidence that the patient sustained an injury to her head. Although she reported headaches and initially a blurred vision and cognitive symptoms, medical records reviewed by Dr. Burris showed that these were also preexisting conditions. For this reason, it is not reasonable that the patient would have a permanent impairment of the brain for either cognitive symptoms or headaches as there is no mechanism of injury to warrant an impairment in this regard.

32. Dr. Burris testified at hearing as an expert in occupational medicine. He continued to opine Claimant did not sustain any concussion or head injury as a result of the May 9, 2018 work event, based on the medical records, video footage of the incident, Claimant's May 9, 2018 written statement, and Claimant's May 15, 2018 recorded statement. Dr. Burris testified the video footage of the work incident clearly shows Claimant did not strike her head, lose consciousness, or have disequilibrium. He testified Claimant's complaints to Concentra were inconsistent with the video footage of her fall, her ability to walk after the fall, and Claimant's May 9, 2018 written statement, which went into great detail and showed no impairment of mental functioning.

33. Dr. Burris testified there was nothing unusual about Claimant's presentation for elbow and knee contusions that would have required an emergency department visit, and the medical records establish that Dr. Draper sent Claimant to North Suburban Medical Center Emergency Department only because of Claimant's subjective complaints of striking her head with loss of consciousness with associated symptoms. Dr. Burris testified that despite Claimant's subjective complaints, Claimant's emergency room evaluation showed no head abnormalities and a normal mental examination with a

GCS score of 15, which is the maximum rating showing normal cognitive functioning. Dr. Burris noted Claimant did not begin complaining of slurred speech until some later point in her emergency room evaluation, and testified her increased complaints over time were inconsistent with a closed head injury, as symptoms of a concussion are almost always worse immediately after the fall and begin to lessen over time.

34. As part of his evaluation, Dr. Burris listened to the entire recorded statement Claimant gave on May 15, 2018 and testified Claimant's mental status during the recorded statement "seemed perfectly normal." He testified Claimant spoke in normal speech patterns, answered questions appropriately, and seemed very aware and detail-oriented during the recording. Dr. Burris opined Claimant displayed complete recall of events despite her making some subjective comments about her inability to recall certain things. Dr. Burris testified there was no evidence in the recorded audio statement on to substantiate Claimant's subjective complaints of memory loss, cognitive difficulties or communication problems to Dr. Draper on that same date.

35. Dr. Burris testified the care Claimant received at North Suburban Medical Center Emergency Department, Montgomery Eye Care, and Crosby and Chen were due to a presumed head injury that did not occur, and thus were not causally-related to Claimant's work injury. Dr. Burris testified that medical records evidenced complaints of blurred vision and other vision problems prior to the work injury. He further testified the work restrictions imposed on Claimant from May 11, 2018 through July 25, 2018 were not reasonable, necessary or related to Claimant's knee and elbow injuries.

36. Claimant testified at hearing but did not offer any testimony regarding the mechanism of injury or any purported inability to work due to her knee and elbow injuries. She testified she received treatment at North Suburban Medical Center, Montgomery Eye Care, Crosby and Chen, Diversified Radiology of Colorado, P.C. and Dr. Hamman per the referrals of Drs. Draper and Smith.

37. The medical bill for Diversified Radiology of Colorado, P.C. reflects charges for the x-rays, CT scans and MRI obtained at North Suburban Medical Center Emergency Department on May 11, 2018.

38. Claimant did not work or earn any wages from May 11, 2018 through June 23, 2018 because Employer could not accommodate her work restrictions. Employer began accommodating Claimant's work restrictions on June 24, 2018, when Claimant returned to work for two hours a day. Claimant continued working in a modified capacity through August 10, 2018, earning less than her normal wage. Claimant returned to making her normal wage on August 11, 2018 when she was released to work her entire shift.

39. The ALJ credits the opinions of Drs. Burris and McCranie, as supported by the medical records, employment records, video security footage and audio recorded statement, over the conflicting opinions of Drs. Draper and Smith and finds Claimant did not sustain a head injury or associated symptoms as a result of the May 9, 2018 work event.

40. Claimant failed to prove by a preponderance of the evidence the medical treatment she received at North Suburban Medical Center Emergency Department (including Diversified Radiology of Colorado) on May 11, 2018, Montgomery Eye Care on May 17, 2018 and May 23, 2018, and Crosby and Chen on May 31, 2018 was causally related to the May 9, 2018 work injury. This treatment was for the purpose of evaluating a presumed head injury and associated symptoms, which were unrelated to Claimant's May 9, 2018 work injury.

41. Claimant proved by a preponderance of the evidence the medical treatment provided by Dr. Hamman to address Claimant's left knee and right upper extremity on August 30, 2018 and November 8, 2018 was causally related to her May 9, 2018 work injury.

42. Claimant failed to prove by a preponderance of the evidence she is entitled to temporary indemnity benefits from May 9, 2018 through July 25, 2018. Claimant did not suffer any actual wage loss on May 9, 2018 or May 10, 2018. While Claimant suffered wage loss from May 11, 2018 through July 25, 2018, the wage loss was not the result of a disability caused by the industrial injury. Claimant's work restrictions from May 11, 2018 through July 25, 2018 specifically addressed Claimant's alleged head injury associated symptoms, were unrelated to the May 9, 2018 work injury.

43. Claimant proved by a preponderance of the evidence she is entitled to TPD from July 26, 2018 through August 10, 2018. During such time period, Claimant suffered actual wage loss due to restrictions that specifically addressed her upper and lower extremities, which were caused by the May 9, 2018 industrial injury.

44. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

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

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

is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

Medical Treatment

A respondent is liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. *See generally Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company*, W. C. No. 4-445-060 (February 22, 2002). The question of whether the need for treatment is causally related to an industrial injury is also one of fact for the ALJ. *Walmart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 521 (Colo. App. 1999). Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo.App.1997).

Authorization to provide medical treatment refers to a medical provider's legal authority to provide medical treatment to the claimant with the expectation that the provider will be compensated by the insurer for providing treatment. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). Authorized providers include those medical providers to whom the claimant is directly referred by the employer, as well as providers to whom an authorized treating physician refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997)

Claimant argues Respondent is liable for the cost of treatment provided by North Suburban Medical Center Emergency Department, Montgomery Eye Care, Dr. Chen, and Dr. Hamman because such treatment fell within the scope of authorized treatment. While Claimant received the aforementioned treatment upon the referral of her authorized treating physicians, this is not by itself, dispositive of whether the treatment was causally related to Claimant's work injury.

As found, the treatment provided by North Suburban Medical Center Emergency Department, Montgomery Eye Care, and Dr. Chen was not casually related to Claimant's May 9, 2018 industrial injury. The overwhelming evidence establishes Claimant did not sustain a head injury or associated symptoms as a result of the May 9, 2018 work injury. Video footage of the incident refutes Claimant's reported version of events, clearly showing Claimant did not strike her head, experience any whiplash-type motion, or lose consciousness. Claimant immediately got up from the floor after falling, spoke to her co-workers, laughed and smiled. Her detailed written incident report contains no mention of any alleged head trauma or associated symptoms. Claimant finished her shift on May 9, 2018 and worked her normal shift on May 10, 2018, with no evidence of any cognitive inability to perform her duties. While she alleges she got lost returning home from work on both days, there is no evidence Claimant reported this to Employer or sought medical attention at the time, which would be expected had such events actually occurred.

Claimant's course of treatment with respect to an alleged head injury and associated symptoms was based on Claimant's misrepresentations regarding the mechanism of injury and her subjective complaints. At her initial evaluation, Claimant informed Dr. Draper she thought she hit her head and had loss of consciousness during the May 9, 2018 work event. She complained of headaches, confusion, dysequilibrium and other cognitive issues. Claimant continued to misrepresent the mechanism of injury and report the same or increasing symptoms to her providers throughout the course of her treatment. Drs. Burris and McCranie are the only doctors who had the benefit of reviewing video footage of the work even and the recorded audio statement. Both Drs. Burris and McCranie credibly and persuasively opine Claimant did not sustain any injury to her head as a result of the May 9, 2018 work event.

Despite the absence of any objective findings of head trauma, Claimant was referred for evaluation of her head complaints based on an erroneous belief there was, in fact, a mechanism of injury to Claimant's head. Dr. Burris credibly testified that Dr. Draper sent Claimant to the emergency room due to a presumed head injury, and that Claimant's upper and lower extremity injuries did not require emergent care. Claimant was subsequently referred to Montgomery Eye Care and Dr. Chen for vision and neurological evaluations due to the presumed head injury. As Claimant did not sustain a head injury during her May 9, 2018 work event, this treatment was not causally related. Based on the totality of the evidence, Claimant failed to meet her burden to prove the treatment provided by North Suburban Medical Center Emergency Department,

Montgomery Eye Care, and Dr. Chen were causally related to the injuries Claimant sustained on May 9, 2018.

Claimant did meet her burden, however, to prove the treatment provided by Dr. Hamman on August 30, 2018 and November 8, 2018 was casually related to the May 9, 2018 work event. The treatment provided by Dr. Hamman was directed at Claimant's left knee and right extremity, which were injured in Claimant's fall on May 9, 2018.

Temporary Indemnity Benefits

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

As found, Claimant failed to prove by a preponderance of the evidence she is entitled to TTD or TPD benefits from May 9, 2018 through July 25, 2018. Claimant finished her shift on May 9, 2018 and worked her normal shift on May 10, 2018. As such, she did not suffer any wage loss for those two day. Claimant's subsequent wage loss from May 11, 2018 through July 25, 2018 was due to restrictions specifically imposed to address Claimant's alleged head injury, which was not causally related to the May 9, 2018 work event. Dr. Burris credibly testified Claimant's work restrictions during this time period were not reasonable, necessary or related to the upper and lower extremity injuries Claimant sustained as a result of the May 9, 2018 work event. There is insufficient credible and persuasive evidence establishing that the industrial injury, which consisted of injuries to Claimant's upper and lower extremities, produced a disability resulting in actual wage loss from May 11, 2018 through July 25, 2018.

As found, Claimant did, however, meet her burden to prove entitlement to TPD July 26, 2018 through August 10, 2018. During such time period, Claimant did not earn her normal wage due to work restrictions limiting her hours. The restrictions assigned by Dr. Smith during this time period specifically addressed Claimant's knee and upper extremity conditions, which were related to the May 9, 2018 work injury.

ORDER

It is therefore ordered that:

1. Respondent shall pay for the medical treatment provided by Dr. Hamman on August 30, 2018 and November 8, 2018, subject to the Medical Fee Schedule.

2. Respondent is not liable for the cost of medical treatment provided by North Suburban Medical Center Emergency Department and Diversified Radiology of Colorado on May 11, 2018, Montgomery Eye Care on May 17, 2018 and May 23, 2018, and Dr. Chen on May 31, 2018, as such treatment was not casually related to Claimant's May 9, 2018 industrial injury. Claimant's claim for these specific benefits is denied and dismissed.

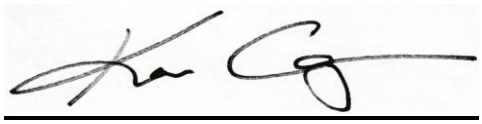
3. Respondent shall pay Claimant TPD from beginning July 26, 2018 through August 10, 2018.

4. Claimant claim for temporary indemnity benefits beginning May 9, 2018 through July 25, 2018 is denied and dismissed.

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

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

DATED: January 17, 2019



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Did Claimant prove he suffered a compensable low back injury?
- If Claimant suffered a compensable injury, are Respondents entitled to apportionment of medical benefits?
- Is Claimant entitled to TTD benefits from April 16, 2017 through August 14, 2017?

FINDINGS OF FACT

1. This claim involves an alleged low back injury with an injury date of May 1, 2016. Claimant has alleged both an occupational disease and an accidental injury.

2. Claimant has a long history of low back problems, including two surgeries. In 1986, he herniated disc after an episode of severe coughing. He tried conservative treatment for approximately a year-and-a-half and eventually had a discectomy in 1988. He did well until 2010 when his "sciatic" pain recurred with no specific injury or identifiable cause. In April 2011, he had an L4 laminectomy and L3 laminotomy for severe stenosis. The surgery was successful and Claimant returned to his regular work.

3. Claimant has worked as an automobile mechanic since approximately 1980. He worked at Employer's Honda dealership from April 2013 through December 7, 2017. Claimant's job is physically demanding, requiring frequent lifting, bending, stooping, twisting, and working in awkward postures.

4. In early May 2016, Claimant was removing a wheel from a vehicle when he felt "kind of a funny twinge in my back."[1] Claimant took some Advil he had in his toolbox and continued working. Claimant did not report the incident to Employer or seek medical treatment.

5. Claimant saw his PCP, Dr. Patrick Shahan, on June 15, 2016, but said nothing about any back or leg symptoms. The documented musculoskeletal examination shows no abnormalities of the thoracic or lumbar spine.

6. Claimant next saw Dr. Shahan on January 11, 2016. His immediate problem was an infected right great toe that had been painful for five days. Claimant also reported two months of "spasmodic type" central low back pain, "intermittent" radiating pain down both legs, and "occasional" numbness in the back of both legs. Claimant did not attribute the symptoms to any specific incident and denied any trauma to his back. Dr. Shahan noted Claimant was "overweight and does a fair amount of lifting at work as a mechanic."

[1] Claimant testified he was not sure the exact injury date, and used May 1, 2016 as his best approximation. He testified the incident happened "in May."

Physical examination showed no neurological deficits, no lumbar tenderness, and only "mild" pain with flexion and extension. Dr. Shahan diagnosed mechanical back pain and opined Claimant "could have" re-herniated a disc or it "could be muscular." He thought an MRI was not warranted because there were no neurological findings. Claimant declined physical therapy and no specific treatment was recommended. Dr. Shahan advised Claimant to "minimize" lifting at work, and completed a form clearing Claimant to drive for Uber.

7. On August 29, 2016, Claimant saw a chiropractor, Dr. Kevin Miller. He reported symptoms from his neck to his right sacroiliac area. His most significant complaints were "constant" 9/10 pain in the upper back, and "constant" 7/10 tightness/discomfort in the mid-chest. Dr. Miller palpated "mild" muscle spasms in the right sacroiliac, lower thoracic, and upper thoracic areas. Lumbar extension and flexion were "mildly reduced" with pain. The report contains no indication of any neurologic symptoms or deficits.

8. Claimant saw a massage therapist roughly every month in 2016. He started the massages on June 14, 2015, and reported pain in neck and trapezius muscles, low back, and the back of both thighs. In December 2015, February 2016, and March 2016 he received massage for low back pain. On April 25, 2016 (before the alleged date of injury), Claimant reported pain in his low back into the right leg.[2] The low back pain appears to have improved after that, because the June 2016 report does not mention Claimant's low back, and records from July and August only refer to low back "tightness."

9. Claimant worked regular duties with no limitation throughout the summer and into the fall of 2016.

10. On September 29, 2016, Claimant started feeling dizzy while repairing an airbag. His friend and co-worker, Jeff Buckham, drove Claimant to Walgreens to check his blood pressure. The reading was dangerously high, so they went to Claimant's cardiologist, who directed Claimant to the Penrose Hospital emergency room.

11. Claimant told the ER physician he felt "fine" until earlier that morning when he "developed abrupt onset of chest pain with associated chills, diaphoresis, and lightheadedness." The medical history section of the report notes "chronic" low back pain radiating to the right leg, but the review of systems indicates no current back pain. Claimant said nothing about any injury, received no workup for back pain or radicular symptoms, and received no diagnosis related to his back. Cardiac workup was negative, and Claimant was sent home.

12. Within a few days of the emergency room visit, Claimant developed severe low back pain. On October 3, 2016, Claimant reported the symptoms to Employer and completed an accident report. Claimant described "spasms" in his low back and stated

[2] As noted previously, Claimant's alleged date of injury is an approximation of when symptoms began, and Claimant's counsel argues the symptoms described in this note may be related to the incident at work. But the report contains no mention of Claimant's work and gives no suggestion the symptoms were work-related.

they were from “heavy lifting, crawling under dashes of vehicles.” Claimant listed the injury date as “May 2016.” Employer referred Claimant to its designated provider, CCOM.

13. Claimant saw Dr. Kathryn Murray at CCOM on October 3. Claimant reported back spasms and pain in both legs. She noted his prior back surgeries and that “he has had some level of back pain ever since.” Regarding the current symptoms, Dr. Murray documented,

> He states approximately 5/1/2016 his back pain worsened. He denies any one injury on that particular day or around that time and May 2016. He denies any trauma. He denies anything out of the ordinary such as longer working hours, heavier lifting, unusual positions, or increased workload.

Dr. Murray concluded,

> [T]his is not a work-related injury. Patient did not have one incident, anyone trauma, or anything out of the ordinary other than his normal day-to-day job. He has a pre-existing history of a herniated disc that required surgery in 1988 followed by laminectomy of his lumbar region and 2010. He has had some degree of ongoing back pain since that time. Would recommend for him to work with his PCP for further evaluation and treatment of his back pain.

14. Dr. Murray released Claimant at MMI with no restrictions.

15. Claimant also had a massage therapy appointment on October 3, 2016. He reported low back pain going down the right leg.

16. Employer completed a First Report of Injury on October 5, 2016, listing May 1, 2016 as the date of injury. The report indicates Claimant “said it is from heavy lifting and crawling in the course of his job.” There was no mention of a specific incident.

17. Claimant identified Mr. Buckham as a witness to the injury. Mr. Buckham testified at the hearing for Respondents. Mr. Buckham worked with Claimant daily in the adjoining service bay since June 2015. He and Claimant became friends outside of work. Mr. Buckham denied witnessing any accident involving Claimant’s low back. Mr. Buckham further testified exhibited no outward signs of back pain or any limitations before October 2016. Claimant said nothing about any back pain or leg symptoms on September 29 while Mr. Buckham was driving him around town and taking him to the ER. He spoke with Claimant at work on October 3, 2016, and Claimant said he had injured his back “a couple of months prior.” That was the first time Claimant mentioned any back injury to Mr. Buckham. The ALJ finds Mr. Buckham’s testimony credible.

18. Respondents filed a Notice of Contest on October 18, 2016.

19. On October 27, 2016, Claimant saw Dr. Kenneth Finn, a physical medicine and rehabilitation specialist. Claimant told Dr. Finn he recovered well after his last back surgery “with no pain until about May 2016 noticed a gradual increase of back pain with

radiation to the groin and both legs, right more than left." Dr. Finn noted, "his work is very physical and may be a contributing factor." Dr. Finn prescribed Norco and ordered a lumbar MRI.

20. The MRI was done on November 15, 2016. As compared to Claimant's prior March 2011 MRI, the radiologist noted a new L3-L4 disc extrusion or sequestration with caudal migration resulting in severe canal stenosis and moderate to severe left lateral recess stenosis. There was also mild to moderate caudal stenosis and moderate to severe bilateral foraminal stenosis at L4-L5.

21. Dr. Finn administered a lumbar epidural steroid injection, which gave Claimant 80% relief for one day. Dr. Finn upon further ESIs were not appropriate given the short duration of relief and recommended a surgical evaluation.

22. Claimant saw Dr. Paul Stanton, a spine surgeon, on January 24, 2017. Claimant told Dr. Stanton his pain started "mid-May of 2016" and worsened in October 2016. Claimant described the September 2016 hypertension episode and stated, "approximately one day after this he was having severe low back pain as well as right lower extremity weakness." The history portion of the report contains no discussion of any possible work-related etiology. Dr. Stanton ordered x-rays and reviewed the MRI images, which he interpreted as showing "severe central stenosis due to ligamentum flavum facet hypertrophy with a superimposed disc herniation" and disc space collapse with severe foraminal stenosis at L3-4 and L4-5 bilaterally. Dr. Stanton opined the only reasonable surgical option was an L3-L5 fusion.

23. Dr. Stanton subsequently issued an "addendum" to his report and stated, "based on a reasonable degree of medical certainty, at least 51% of probability [Claimant's] occupation as an automobile mechanic had a role in causing or aggravating and making him symptomatic of his lumbar spine."

24. Dr. Stanton performed a L3-4 and L4-5 decompression fusion on April 17, 2017 under Claimant's private health insurance. Dr. Stanton described the "operative indications" as "history of previous lumbar laminectomy with continued degeneration and progressive stenosis." Intraoperatively, Dr. Stanton observed significant scar tissue "due to the previous laminectomy" at L4-5 compressing the L5 nerve root. He also noted osteophytes and partial segmental ankyloses requiring facet osteotomy. Findings were similar at L3-4.

25. Dr. Kathy McCranie performed an IME for Respondents on December 28, 2017. Claimant attributed the back injury to the May 2016 incident lifting a wheel. He told Dr. McCranie his symptoms "escalated" in October 2016 after the ER visit. Claimant was recovering well from the April 2017 fusion and had returned to work in August 2017. Dr. McCranie opined Claimant's assertion that his back problems were triggered by lifting a wheel in May 2016 was not supported by the medical records. She noted work activities such as heavy lifting or combined lifting and twisting *can* contribute to low back pain and cause a disc herniation, but she did not believe they caused Claimant's back pain. Rather, Dr. McCranie concluded, "considering the degree of degenerative disc disease in the

patient's lumbar spine, it is medically probable that the symptoms would have developed regardless of his work activities." Dr. McCranie did not have Claimant's PCP records, so she remained open to changing her opinion "if there were additional medical records [that] supported [Claimant's] assertion that he had a specific work injury involving heavy lifting and twisting with the immediate onset of pain."

26. Dr. McCranie testified via deposition on January 30, 2018. She reviewed Dr. Shahan's records before the deposition and saw no reference to lifting a wheel in May 2016, or any other specific incident. The additional records reinforced Dr. McCranie's conclusion that claimant's back problems are not work-related. Dr. McCranie reiterated her opinion Claimant's symptoms and resulting surgery reflected the natural progression of his underlying pre-existing degenerative spine pathology. If (contrary to her opinion) the claim was ultimately deemed compensable, Dr. McCranie would apportion only 30% to 40% to the work injury.

27. The causation opinions of Dr. McCranie and Dr. Murray are credible and more persuasive than the contrary opinions in the record.

28. Claimant failed to prove he suffered a compensable accidental injury or occupational disease.

CONCLUSIONS OF LAW

To receive compensation or medical benefits, a claimant must prove he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which he seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

The Workers' Compensation Act recognizes a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence," whereas an "injury" is the physical trauma caused by the accident. Section 8-40-201(1). In other words, an "accident" is the cause, and an "injury" is the result. *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967). Workers' compensation benefits are only payable if an accident results in a compensable "injury." The mere fact that an incident occurred at work and caused symptoms does not establish a compensable injury. Rather, a compensable injury is one that requires medical treatment or causes disability. *E.g., Montgomery v. HSS, Inc*., W.C. No. 4-989-682-01 (August 17, 2016).

The mere existence of a pre-existing condition does not disqualify a claim for compensation or medical benefits. If an industrial injury aggravates, accelerates, or combines with a pre-existing condition to produce disability or a need for treatment, the claim is compensable. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). In evaluating whether a claimant suffered a compensable aggravation, the ALJ must determine if the need for treatment was the proximate result of the claimant's work or is

merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

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

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

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

As found, Claimant failed to prove a compensable accidental injury or occupational disease. The ALJ does not doubt the incident with the tire occurred as Claimant described around May 1, 2016. The problem is the lack of persuasive evidence linking that incident to the significant escalation of symptoms in October 2016 and eventual surgery. When Claimant saw his PCP on June 15, 2016, he said nothing about any back or leg symptoms. On July 11, 2016, Claimant reported back spasms and pain radiating down both legs "intermittently," but did not attribute the symptoms to any specific incident or activity. Physical examination at that visit showed no neurological deficits, no lumbar tenderness, and only "mild" pain with flexion and extension. An MRI was not warranted because there were no neurological findings. Claimant declined PT, and no specific treatment was recommended. In August 2016, Claimant's chiropractor documented nonspecific pain in multiple areas of his back, but there was no mention of any leg symptoms. Nor is there any suggestion the symptoms were related to Claimant's work. Massage records from June through August 2016 document no specific complaints and only "tightness" of Claimant's entire back. Claimant continued working without limitation through at least September 2016. The September 29, 2016 emergency room report noted a history of chronic low back and right leg pain, but mentions no current back or radicular symptoms. He had no workup for back pain and received no diagnosis related to his back. Claimant later told Dr. Stanton his back and leg symptoms became severe "approximately one day" after being treated at the emergency room. That coincides with the massage

therapy records, which consistently showed ongoing low back pain radiating to the right leg beginning on October 3, 2016, but not before.

The opinion evidence also points away from a compensable injury. Dr. Finn opined Claimant's work "may" have played a causal role in the development of his symptoms, but did not say a causal connection was probable. Although Dr. Stanton opined the symptoms are probably work-related, his opinion was conclusory and not accompanied by any detailed analysis. The ALJ finds the analysis and conclusions of Dr. McCranie and Dr. Murray more credible and persuasive than those offered by Dr. Finn and Dr. Stanton.

Except for the disc extrusion, the pathology shown on the MRI and observed intraoperatively was long-standing and degenerative in nature. Given the available medical records and other persuasive evidence regarding Claimant's condition before October 2016, the ALJ finds it implausible the disc extrusion occurred in May while lifting the wheel. Claimant may have suffered a minor back strain in May 2016, but it did not result in a compensable "injury" because it required no treatment and caused no disability. Although Claimant's job was physically demanding and could cause or aggravate a back condition over time, there is no persuasive evidence it did so in this case. The spontaneous worsening of Claimant's condition in October 2016 was probably due to the natural progression of his underlying degenerative pathology, without contribution from his work.

ORDER

It is therefore ordered that:

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

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

DATED: January 17, 2019

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

ISSUES

- Did Claimant prove by a preponderance of the evidence that 12 occupational therapy sessions recommended by her treating surgeon, Dr. Cassidy, are reasonably necessary to cure and relieve the effects of her compensable injury?

FINDINGS OF FACT

1. Claimant worked for Employer as a stockbroker. She suffered an admitted injury to her right hand and thumb on July 19, 2015. The injury was initially diagnosed and treated as a CMC joint sprain. Over time, Claimant developed ligamentous instability in her MP joint and her ATP recommended an MP joint fusion.

2. Respondents denied the surgery and the case went to hearing before ALJ Edie on April 18, 2018. ALJ Edie approved the surgery in an order dated May 24, 2018. ALJ Edie's order contains detailed findings of fact regarding the claim history leading up to the hearing, which need not be repeated here. Neither party appealed ALJ Edie's order.

3. Surgery is now scheduled for May 31, 2019. The delay in proceeding with surgery was caused by two factors. The primary issue relates to Claimant's job. Her job with Employer was terminated in late March 2018. Claimant found new employment in May 2018, but she must be employed there for at least one year to qualify for FMLA leave.

4. The second factor was the retirement of Claimant's treating surgeon, Dr. Idler, in June 2018. Claimant was directed to Dr. Dale Cassidy, Dr. Idler's replacement at the Colorado Springs Orthopedic Group. Due to scheduling difficulties, Claimant did not see Dr. Cassidy until August 13, 2018.

5. Dr. Cassidy agreed with the recommendation for an MP joint fusion. He noted Claimant wears a thumb splint "full time" to prevent movement of the thumb. Dr. Cassidy occupational therapy while Claimant waits for surgery. Specifically, Dr. Cassidy stated, "we are going to get her working some with therapy on her range of motion and strengthening to help protect [the] area [as] she awaits surgical intervention."

6. On August 20, 2019, Dr. Cassidy submitted a request for 12 sessions of occupational therapy. The recommended modalities included paraffin, ultrasound, iontophoresis, and electrical stimulation.

7. Dr. Wallace Larson, an orthopedic surgeon, performed a records review regarding the therapy request on August 21, 2018. Dr. Larson opined therapy was not reasonably necessary because it would not help the ligamentous instability. He opined Claimant could do home exercises and strengthening, but formal physical therapy was not warranted.

8. Dr. Cassidy's opinions are more persuasive than the contrary opinions offered by Dr. Larson.

9. Claimant proved the 12 occupational therapy sessions recommended by Dr. Cassidy are reasonably necessary treatment for her admitted injury.

CONCLUSIONS OF LAW

The respondents are liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997). Even if the respondents admit liability, they retain the right to dispute the relatedness of any particular treatment, and the mere occurrence of a compensable injury does not compel the ALJ to find that all subsequent medical treatment was caused by the industrial injury. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997); *McIntyre v. KI, LLC*, W.C. No. 4-805-040 (July 2, 2010). Where the respondents dispute the claimant's entitlement to medical benefits, the claimant must prove that an injury directly and proximately caused the condition for which he seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must prove entitlement to medical benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally, for either claimant or respondents. Section 8-43-201.

As found, Claimant proved the 12 occupational therapy sessions recommended by Dr. Cassidy are reasonable and necessary. Dr. Larson's rationale that therapy is unnecessary because it will not improve ligamentous instability is unpersuasive because Dr. Cassidy ordered therapy primarily as a prophylactic and preparatory measure pending surgery. Strengthening the thumb and hand is certainly reasonable given the long period of relative disuse. It is also reasonable to have the guidance of a therapist and other modalities not available at Claimant's home. Claimant has been through a protracted process of treatment and delay, culminating in the surgery scheduled for May 31, 2019, and it is both parties interest that she have a good result from surgery. The best way to improve her odds is to follow the recommendations of her surgeon.

ORDER

It is therefore ordered that:

1. Insurer shall cover the 12 occupational therapy sessions recommended by Dr. Cassidy.

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

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

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

DATED: January 18, 2019

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

ISSUES

- Whether claimant has proven by a preponderance of the evidence that the recommended spinal cord stimulator trial and psychologic treatment are reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted June 6, 2017 work injury?

FINDINGS OF FACT

1. Claimant sustained a compensable injury arising out of and in the course of his employment on June 6, 2017 when a 900 pound cart rolled onto claimant's right foot and ankle. Claimant was taken to Workpartners for medical treatment. Claimant was evaluated by physicians' assistant ("PA") Erica Herrera on June 7, 2017. PA Herrera noted claimant's accident history and noted that x-rays revealed a hallux valgus deformity but were otherwise negative for any acute bone abnormalities. PA Herrera recommended conservative treatment including rest, ice, compression and elevation ("RICE") and provided claimant with work restrictions.

2. Claimant eventually underwent testing and was diagnosed with complex regional pain syndrome ("CRPS") as a result of his injury. Claimant testified he was referred to Dr. Stagg and Dr. Price for treatment of the CRPS, in addition to evaluations and treatment with Dr. Chavda.

3. Respondents obtained an independent medical examination ("IME") with Dr. Bernton on September 7, 2017. Dr. Bernton reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME. Dr. Bernton noted claimant presented with unexplained persistent pain, swelling and discoloration of the right foot and opined that claimant was a candidate for autonomic testing battery and stress thermography. Dr. Bernton noted that the stress thermography and autonomic testing battery were both positive for presence of complex regional pain syndrome. Dr. Bernton recommended treatment including medications and physical therapy. Dr. Bernton also noted that use of a sympathetic blockade may also be helpful in conjunction with physical therapy and antineuritic medications. Dr. Bernton also recommended discontinuing the use of immobilization.

4. Claimant was referred to Dr. Sohn for sympathetic blocks on October 24, 2017. Dr. Sohn noted claimant's diagnosis of CRPS along with claimant's report of having an undiagnosed bipolar disorder. Dr. Sohn performed the sympathetic block, noting that if claimant failed to gain adequate relief with the sympathetic blocks, a spinal cord stimulator may be a good option to consider.

5. Respondents obtained an IME with Dr. Scott on March 13, 2018. Dr. Scott reviewed claimant's medical records, obtained a medical history and performed a

physical examination in connection with his IME. Dr. Scott noted claimant's history that the sympathetic block did not provide relief for claimant. Dr. Scott noted claimant's history of treatment including the physical therapy and clonidine patches, which did not provide significant relief. Dr. Scott diagnosed claimant with CRPS and recommended treatment that included reviewing the documentation of the sympathetic block performed by Dr. Sohn on November 26, 2017, and if claimant reported reduction of pain complaints of 50% or more, an additional lumbar sympathetic block be performed. Dr. Scott noted that if the lumbar sympathetic blocks were not diagnostic or therapeutic, claimant could consider a trial of spinal cord stimulation, but only after a psychological evaluation.

6. Claimant was evaluated by Dr. Chavda on April 25, 2018. Dr. Chavda noted that claimant had treated with gabapentin and lyrica which did not give him pain relief. Dr. Chavda noted that claimant was currently in physical therapy ("PT") for desensitization therapy. Dr. Chavda noted that due to failing neuropathics he is an excellent candidate for a spinal cord stimulator. Dr. Chavda referred claimant to Dr. Miller for the psychological evaluation prior to the spinal cord stimulator trial.

7. Claimant was examined by Dr. Price on July 30, 2018. Dr. Price reviewed claimant's medical records and noted in her report following her examination that she agreed with Dr. Chavda and Dr. Scott and recommended claimant consider a dorsal column stimulator trial.

8. Claimant testified at hearing that no treatment has provided him with long term pain relief or an increase in his functionality. Claimant testified that his treatment has included physical therapy, acupuncture, medications, topical creams and sympathetic blocks. Claimant testified his current symptoms include the bottom of his foot feeling like it is on fire and pain shooting up the side of his foot. Claimant testified his physical therapy has consisted of 6-8 sessions and he only had one session of acupuncture. Claimant testified he had one sympathetic block, after which he experienced symptoms that included vomiting and diarrhea.

9. Claimant was referred for an IME with Dr. Cebrian on June 29, 2018. Dr. Cebrian reviewed claimant's medical records, obtained a medical history and performed a physical evaluation in connection with his IME. Dr. Cebrian opined in his July 16, 21018 report that claimant had not failed full conservative therapy and opined that claimant was therefore not reasonable or necessary. Dr. Cebrian opined that in spinal cord stimulators, especially in workers' compensation settings, have poorer outcomes and recommended claimant have a psychiatric IME.

10. Claimant underwent a psychiatric IME with Dr. Kleinman on September 5, 2018. Dr. Kleinman noted claimant's pre-existing history of psychiatric treatment in his report. Dr. Kleinman opined in his report that claimant had several long standing psychiatric diagnoses including depression, anxiety and post-traumatic stress disorder ("PTSD"). Dr. Kleinman opined in his report that claimant had psychiatric diagnoses that were unrelated to his work injury and that none of his mental health treatment or psychiatric medications were related to the work injury. Dr. Kleinman ultimately appears to opine that claimant is not a psychiatric candidate for the spinal cord stimulator.

11. The ALJ credits the opinions expressed by Dr. Chavda and Dr. Price along with Dr. Scott and finds that claimant has established that it is more likely than not that the recommended spinal cord stimulator is reasonable medical treatment necessary to cure and relieve claimant from the effects of the industrial injury. The ALJ credits the recommendation of Dr. Chavda and finds that respondents are liable for the referral to Dr. Miller for psychiatric consultation prior to the spinal cord stimulator trial.

12. While the opinions of Dr. Kleinman regarding claimant's psychiatric condition are noted, the IME from Dr. Kleinman does not substitute for the referral from Dr. Chavda to Dr. Miller for psychiatric consultation. The ALJ finds that the referral from Dr. Chavda to Dr. Miller is reasonable medical treatment necessary to determine if claimant is a psychiatric candidate for the trial spinal cord stimulator. Therefore, respondents are liable for the medical treatment related to the work injury.

13. The ALJ further credits the opinions of Dr. Price that claimant is a candidate for a spinal cord stimulator and finds this opinion to be credible and persuasive. The ALJ recognizes that Dr. Cebrian has provided a contrary opinion based on claimant's failure to have failed full conservative therapy, but finds the opinions of Dr. Price and Dr. Chavda to be more persuasive with regard to this issue.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

3. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury.

Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

4. As found, claimant has proven by a preponderance of the evidence that the trial spinal cord stimulator recommended by Dr. Chavda and Dr. Price is reasonable medical treatment necessary to cure and relieve claimant from the effects of the work injury. Likewise, the recommended psychological consultation is found to be reasonable medical treatment necessary to cure and relieve claimant from the effects of the work injury.

5. As found, the opinions expressed by Dr. Chavda and Dr. Price with regard to this issue are found to be credible and persuasive.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the medical treatment that is reasonable and necessary to cure and relieve claimant from the effects of the injury including the recommended psychological evaluation and trial spinal cord stimulator.

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

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

DATED: January 22, 2019

Keith E. Mottram

_____

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-952-264-001

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on January 2, 2019, in Denver, Colorado. The hearing was digitally recorded (reference: 1/2/19, Courtroom 3, beginning at 1:30 PM, and ending at 2:00 PM).

Respondents' Exhibits A and A-1 were admitted into evidence, without objection.

At the conclusion of the unilateral hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Respondents, which was filed, electronically on January 11, 2019. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUE

The issue designated on Respondents' Application for Hearing and to be determined by this decision concerns an overpayment to the Claimant of $48,512.76.

Respondents bear the burden of proof by a preponderance of the evidence.

FINDINGS OF FACT

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

Notice

1. The ALJ takes administrative notice of the files and records of the Office of Administrative Courts (OAC) and the Division of Workers Compensation (DOWC), which disclose that the Claimant's last known, regular and registered address is xxxxxxx

2. Notice of the hearing, scheduled for January 2, 2019 at 1:30 PM, in Denver, CO, at the OAC, was mailed and emailed to the Claimant at his last known, regular and registered address; and, emailed to the Claimant at his registered email address on November 6, 2018. The ALJ takes administrative notice of the official acts of the OAC and the DOWC.

3. None of the Notices of the January 2, 2019 hearing mailed or emailed to the Claimant were returned as undeliverable. Therefore, there is a legal presumption of receipt, and the ALJ finds that the Claimant received notice of the hearing and elected not to appear.

4. Exhibit A-1 establishes that Respondents sent a letter to the Claimant at his last known, regular and registered address, 7656 Dusk Street, Littleton, CO 80125, via certified mail. The mailing was returned, marked "unclaimed." The ALJ infers and finds that the Claimant chose not to claim the letter.

Overpayment

5. Respondents paid a total of $126,587.95 in temporary total disability (TTD) benefits to the Claimant from June 20, 2016 through February 14, 2017 (Exhibit A).

6. ALJ Margot W. Jones, in her Order of June 6, 2018, determined that the Claimant's date of maximum medical improvement (MMI) was February 15, 2016, with a permanent 4% upper extremity impairment rating, thus, the Claimant was overpaid in TTD benefits.

7. Consistent with ALJ Jones' Order, Respondents filed a Final Admission of Liability (FAL) on July 20, 2018. In the FAL, Respondents admitted to payment of TTD benefits from June 20, 2014 through February 15, 2016 for a total of $75,786.36. Respondents also admitted to a 4% upper extremity impairment rating resulting in permanent partial disability (PPD) benefits of $2,288.83. A total of $78,075.19 in indemnity benefits were admitted. Claimant did **not** timely contest the FAL. Therefore, the Claimant was overpaid $48,512.76 ($126,587.95 - $78,786.36 = $48, 512.76).

Ultimate Finding

8. The ALJ finds that Respondents have overpaid the Claimant in the amount of $48,512.76 (Exhibit A).

CONCLUSIONS OF LAW

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

Notice

a. As found, Notice of the hearing was sent to the Claimant at his last known, regular and registered address of 7656 Dusk Street, Littleton, CO 80125, and by email at thor4u@gmail.com The mailed notice was not returned to the sender, as undeliverable, and the email notice was not returned as "undeliverable." Therefore, as found, there was a legal presumption of receipt and the ALJ found that the Claimant received notice of the hearing and failed to appear.. *See Olsen v. Davidson,* 142 Colo. 205, 350 P.2d 338 (1960); *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993).

Overpayment

b. An overpayment is defined as "money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive …" §8-40-201(15.5), C.R.S.

c. Respondents are entitled to recover an overpayment of TTD benefits. *In the Matter of the Claim of Brian Josue, Claimant*, W.C. No. 4-954-271-04, 2016 WL 3455466 [Indus. Claim Appeals Office (ICAO), June 17, 2016]; *Mattorano v. United Airlines*, W.C. No. 4-861-370 (ICAO, July 25, 2013); *Franco v. Denver Public Schools*, W.C. No. 4-818-570 (ICAO, November 13, 2014).

d. Further, §8-42-113.5(1)(c), C.R.S. provides that respondents can seek an order for repayment of an overpayment. §8-42-207(q), C.R.S. grants ALJs authority to conduct hearings to require repayment of an overpayment. *In the Matter of the Claim of: Leah Turner, Claimant*, W.C. No. 4-893-631-07, 2018 WL 852425 (ICAO,Feb. 8, 2018); *Simpson v. Indus. Claim Appeals Office*, 219 P.3d 354 (Colo. App. 2009), *rev'd on other grounds, Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010).

e. Based on ALJ Jones' Order, which was not appealed, an overpayment in the amount of $48,512.76. resulted.

Burden of Proof

f. The burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO),

March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a c *v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, Respondents have satisfied their burden that Claimant was overpaid $48,512.76.

ORDER

IT IS, THEREFORE, ORDERED THAT:

The Claimant shall pay the Respondents, in one lump sum, the amount of $48,512.76.

DATED this 23rd day of January 2019.

EDWIN L. FELTER, JR.
Administrative Law Judge

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

ISSUES

- Did Claimant prove entitlement TTD benefits from March 8, 2018 to August 6, 2018?

- Did Respondents prove Claimant was responsible for termination of his employment?

- If Claimant is entitled to TTD, did Respondents prove entitlement to an offset for unemployment benefits?

- Did Respondents prove a March 20, 2018 motor vehicle accident was an "intervening event" sufficient to sever the causal relationship between Claimant's work injury and his wage loss?

FINDINGS OF FACT

1. Claimant worked for employer as a pest exterminator. His job duties included traveling to job sites in a company vehicle and providing extermination services.

2. Claimant suffered an admitted injury on June 23, 2016 when he rolled his ankle and tore his left Achilles tendon.

3. Dr. Michael Simpson surgically repaired the ruptured Achilles tendon on July 14, 2016. Claimant subsequently developed problems with keloid scar formation.

4. Claimant was put at MMI on December 20, 2016 with a permanent impairment rating. Respondents filed an FAL admitting for the rating and medical benefits after MMI.

5. Dr. Sandell subsequently took over as Claimant's primary ATP. Dr. Sandell referred Claimant to Dr. Heinz, a plastic surgeon, to consider keloid scar removal surgery.

6. Respondents obtained an IME from Dr. Kathy McCranie on March 15, 2017. Dr. McCranie agreed surgical scar revision was reasonably necessary but opined, "As this surgery is not likely to change the patient's overall function, I would recommend that this be done under maintenance care."

7. Dr. Heinz performed keloid excision surgery on May 17, 2017.

8. Notwithstanding Dr. McCranie's opinion surgery could have been done under maintenance care, Respondents reopened the case and paid additional TTD benefits. The admitted average weekly wage is $845.91, with a corresponding TTD rate of $562.97 per week.

9. Claimant recovered from the surgery in approximately two months, and Dr. Sandell put him back at MMI on July 31, 2017. Dr. Sandell assessed no work restrictions or additional permanent impairment.

10. Respondents filed another FAL on September 21, 2017 based on Dr. Sandell's July 31, 2017 MMI report. Claimant objected to the FAL and requested a DIME.

11. Claimant underwent a DIME with Dr. J. Stephen Gray on January 3, 2018. Dr. Gray agreed Claimant reached MMI on July 31, 2017 as determined by Dr. Sandell. He assigned a 7% scheduled lower extremity rating for range of motion and 10% whole person rating for Class II permanent skin impairment. Dr. Gray recommended bi-annual follow-up visits with Dr. Heinz for potential keloid scar revisions. He noted that, "[Claimant's] care may be handled under 'maintenance care,' although he may require temporary restrictions postoperatively."

12. Claimant followed up with Dr. Heinz on February 6, 2018. He was working full duty and "doing reasonably well." The scar was "much better than previous," and Dr. Heinz opined surgery was "certainly" not indicated at that time. He gave Claimant a Kenalog injection and advised him to wear a silicone insert under his sock.

13. Employer terminated Claimant's employment on February 20, 2018, due to discrepancies between Claimant's service tickets and corresponding "MOBI" reports showing Claimant's location from a GPS tracking system on his vehicle.

14. Respondents filed an FAL on March 5, 2018 based on Dr. Gray's DIME report. The FAL admitted for reasonable and necessary medical care.

15. Claimant had a follow-up appointment with Dr. Heinz on March 8, 2018. The recurrent keloid had progressed and was causing significant pain, particularly by the end of the workday. Dr. Heinz opined if Claimant were not improved by his next follow-up, he would revise the scar "one last time."

16. Claimant saw Dr. Sandell on March 20, 2018. He reported "increased pain" and return of the keloid. Dr. Sandell agreed surgery was appropriate but deferred to Dr. Heinz regarding the timing of surgery.

17. Also on March 20, 2018, Claimant was involved in a rear-end motor vehicle accident. Claimant presented the Penrose St. Francis emergency department on March 21, 2018. He indicated he hit his head, but did not lose consciousness. He described back pain, chest pain, headaches, nausea, neck pain, and vomiting. There is no indication Claimant injured his left leg or foot.

18. Claimant saw a chiropractor on March 21, 2018 for additional treatment relating to the MVA. On the intake form, he reported sore muscles, low back problems, and dizziness. He also checked a box stating, "I cannot do my usual work" due to neck pain. Claimant had six additional chiropractic visits through the end of April 2018.

19. Claimant followed up with Dr. Sandell on May 8, 2018. Dr. Sandell opined Claimant was no longer at MMI, stating, "I feel he should be off MMI status as of the date that his surgeon recommended that he have repeat surgery. That date is March 8, 2018."

20. Dr. Heinz performed the scar revision surgery on May 21, 2018. Respondents covered the procedure, but believe surgery was "maintenance care" and Claimant remains at MMI.

21. Claimant saw Dr. Sandell on June 14, 2018, and reported, "This was one of the more painful surgeries he went through." He was using a walking boot and following restrictions "as per his surgeon's recommendations." Dr. Sandell continued Claimant "off of MMI."

22. On July 16, 2018, Dr. Sandell noted Claimant was restricted to working no more than six hours per day, with no work on ladders, stairs, or uneven ground. He was continuing to improve from surgery. Claimant was "anxious to get back to work" and hoping Dr. Heinz would remove the restrictions at his next appointment.

23. Claimant followed up with Dr. Sandell on August 6, 2018, who noted, "he continues to improve and recover from surgery. He is doing better with regards to pain control." Dr. Sandell released Claimant to return to work without restrictions.

24. On October 2, 2018, Dr. Sandell described Claimant as "doing well" and "stable," with "decreasing" pain. He refilled Claimant's pain medication and released him to follow-up "as needed." Dr. Sandell later opined Claimant had reached MMI on October 2, 2018 with no additional impairment.

25. Dr. McCranie testified at hearing for Respondents. Dr. McCranie explained keloids are essentially a fibrotic tumor that grows over a wound. Surgical excision is the most common treatment, but recurrence rates typically run between 70% and 100%. In Claimant's case, the keloid formed because of the original Achilles tendon surgery. Dr. McCranie agreed the keloid surgeries were reasonably necessary but opined the surgery is best described as maintenance care. A keloid scar is a chronic condition that worsens over time as it slowly regrows. Dr. McCranie opined the purpose of the surgery was to keep Claimant's condition from worsening due to the natural disease process inherent in keloid scar formation.

26. Claimant filed for unemployment (UI) benefits in mid-April 2018. He was eventually approved for $474 per week, commencing the week ending April 14, 2018. Claimant did not request or receive UI benefits from May 20, 2018 through June 23, 2018 (5 weeks) because of the surgery. Claimant's UI benefits resumed effective June 24, 2018 and continued through October 6, 2018.

27. Dr. Sandell's opinions regarding MMI are credible and more persuasive than the contrary opinions offered by Dr. McCranie. Claimant was no longer at MMI as of March 8, 2018.

28. The keloid revision surgery was intended to cure and relieve the effects of Claimant's injury. It was not "maintenance" care.

29. Respondents proved Claimant was responsible for termination of his employment on February 20, 2018.

30. Claimant proved his condition worsened and caused increased disability as of May 21, 2018, the date of the surgery. The worsened condition caused a wage loss starting on May 21, 2018. Claimant failed to prove he had increased disability or any injury-related wage loss before May 21, 2018.

31. Claimant's eligibility for TTD benefits ended on August 6, 2018 when Dr. Sandell released him to return to regular employment.

32. Respondents proved an offset for UI benefits from June 24, 2018 through August 5, 2018.

CONCLUSIONS OF LAW

A. Claimant's condition worsened after the July 31, 2017 MMI date

Section 8-43-303 authorizes an ALJ to reopen any award on the grounds of error, mistake, or a change in condition. The allowance for reopening reflects a "strong legislative policy" that the goal of achieving a fair and just result overrides the interests of litigants in obtaining final resolution of their dispute. *Padilla v. Industrial Commission*, 696 P.2d 273, 278 (Colo. 1985). Thus, a "final" award means only that the matter has been concluded subject to reopening if warranted under the applicable statutory criteria. *Renz v. Larimer County School District Poudre R-1*, 924 P.2d 1177 (Colo. App. 1996). The authority to reopen a claim is permissive, and whether to reopen a claim if the statutory criteria have been met is left to the ALJ's discretion. *Id*. The party requesting reopening bears the burden of proof. Section 8-43-304(4).

Claimant requests his claim be reopened based on mistake, error, or a change of condition. A "change in condition" refers either to a change in the condition of the original compensable injury, or a change in the claimant's physical or mental condition that can be causally related to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo. App. 1985). If a claimant's condition is shown to have changed, the ALJ should consider whether the change represents the natural progression of the industrial injury, or results from an intervening cause. *Goble v. Sam's Wholesale Club*, W.C. No. 4-297-675 (May 3, 2001).

As found, Claimant proved his condition worsened since he was put at MMI on July 31, 2017. Medical records from Dr. Heinz and Dr. Sandell show a steady worsening of the keloid and increasing pain in early 2018, culminating in the recommendation for surgery.

B. MMI and impact on Claimant's earning capacity

Even if a claimant's condition has worsened, reopening is only appropriate if additional benefits can be awarded. *Richards v. Industrial Claim Appeals Office*, 996 P.2d 756 (Colo. App. 2000). Here, Claimant seeks reopening for additional TTD benefits. Claimant's eligibility for TTD hinges on two questions. First, was the May 21, 2018 surgery "curative" or merely "maintenance" in nature? Second, did Claimant's worsened condition cause increased disability and contribute to a wage loss?

The type of treatment is not dispositive of whether the treatment is intended to "cure and relieve" or simply "relieve" the claimant's condition. It is the *purpose* for which treatment is provided, rather than the *nature* of the treatment, that determines whether the treatment is curative or provided for permissible post-MMI purposes. *Milco Construction v. Cowan*, 860 P.2d 539, 542 (Colo. App. 1992). Here, the ALJ is persuaded the May 21, 2018 surgery was intended to improve Claimant's condition rather than simply relieve symptoms or prevent deterioration. Claimant's condition had worsened, and the surgery was undertaken to restore him to his baseline level as of the original July 31, 2017 MMI date. Moreover, the surgery required a convalescence and recovery period of two and one-half months, which also supports a finding it was more than "maintenance." The ALJ credits Dr. Sandell's opinion Claimant was no longer at MMI as of March 8, 2018.

A worsening after MMI does not automatically entitle a claimant to additional TTD benefits, unless the worsened condition causes a "greater impact upon [the] claimant's temporary work capability." *City of Colorado Springs Disposal v. Industrial Claim Appeals Office*, 954 P.2d 677 (Colo. App. 1997). The dispositive question is whether the claimant proves "increased disability, as measured by [their] capacity to earn wages." *Friesz v. Wal-Mart Stores, Inc*., W.C. No. 4-823-944-01 (July 26, 2012). The ICAO has repeatedly held that *City of Colorado Springs* does not require a claimant to establish an "actual wage loss," and a claimant may recover TTD even if he not working immediately before his condition worsened. *E.g.*, *Hebert v. Blac Frac Tanks, Inc*., W.C. No. 4-919-279-01 (October 19, 2018); *Garcia v. Frontier Airlines*, W.C. No. 4-677-511 (August 17, 2011); *Moss v. Denny's Restaurants*, W.C. No. 4-440-517 (September 27, 2006). As the Panel explained in *Friesz v. Wal-Mart, supra*,

> [T]he critical issue in cases controlled by *City of Colorado Springs* is not whether the worsened condition actually resulted in additional temporary wage loss, but whether the worsened condition has had a greater impact on the claimant's temporary work "capacity." . . . It therefore follows that it is the impact on the claimant's work "capacity," not proof of an actual wage loss, which determines whether the claimant has established entitlement to TTD benefits in connection with a worsening of condition after MMI. [Internal citations omitted].

As found, Claimant's worsened condition caused a greater impact on his work capacity as of May 21, 2018, the date of surgery.

C. The termination statutes do not bar an award of TTD

Sections 8-42-103(1)(g) and 8-42-105(4) preclude an award of TTD benefits if a claimant was "responsible for termination" of his employment. The respondents must prove by a preponderance of the evidence that a claimant was terminated for cause or was responsible for the separation from employment. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). To establish that a claimant was responsible for termination, the respondents must show the claimant performed a volitional act or otherwise exercised "some degree of control over the circumstances which led to the termination." *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 5 P.3d 1061, 1062 (Colo. App. 2002); *Padilla v. Digital Equipment Corp*., 902 P.2d 414 (Colo. App. 1995); *Velo v. Employment Solutions Personnel*, 988 P.2d 1139 (Colo. App. 1988).

Respondents proved Claimant was responsible for termination of his employment on February 20, 2018. But the termination statutes are not a permanent bar to receiving temporary disability benefits, and a claimant can reestablish eligibility for TTD by showing a worsened condition that causes a subsequent wage loss. *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004). A post-termination wage loss is "caused by a worsened condition" if the worsening results in limitations or restrictions which did not exist at the time of the termination, and which cause a limitation on the claimant's temporary earning capacity that did not exist when she caused the termination. *Martinez v. Denver Health*, W.C. No. 4-527-415 (ICAO, August 8, 2005). The mere imposition of additional work restrictions does not automatically establish a worsened condition. *Apex Transportation, Inc. v. Industrial Claim Appeals Office*, 321 P.3d 630 (Colo. App. 2014). The burden of proof to establish a subsequent worsening and consequent decrease of earning capacity is on the claimant. *Green v. Job Site, Inc.*, W.C. No. 4-587-025 (ICAO, July 19, 2005).

As found, Claimant proved that his injury-related medical condition deteriorated and caused greater limitations on his ability to work than were present at the time of his termination. The ALJ is persuaded Claimant was precluded from performing any work activity for at least a brief period after surgery, and then remained under restrictions that prevented returning to his regular work. These facts are sufficient to commence TTD as of May 21, 2018.

D. Termination of TTD based on release to full duty

Once commenced, TTD benefits continue until one of the terminating events enumerated in § 8-42-105(3). Here, Dr. Sandell released Claimant to return to regular duty on August 6, 2018. *See* § 8-42-105(3)(c). Thus, Claimant is entitled to a closed period of TTD benefits from May 21, 2018 through August 5, 2018.

E. Respondents proved an offset for UI benefits

Section 8-42-103(1)(f) provides that TTD benefits shall be reduced by any concurrent unemployment benefits a Claimant received. As found, Claimant was paid UI

benefits from June 24, 2018 through the end of the closed period of TTD. Thus, Respondents are entitled to an offset for UI benefits from June 24 through August 5, 2018, a period of 6 1/7 weeks (43 days).

F. Respondents' intervening event defense is moot

Even if the ALJ found the March 20, 2018 MVA was an intervening event regarding Claimant's wage loss, the May 21 surgery substantially increased his disability and re-established a causal nexus between the injury and his wage loss. Since the ALJ has awarded no TTD benefits before the surgery, Respondents' intervening event defense is moot.

ORDER

It is therefore ordered that:

1. Claimant's request for TTD benefits from March 8, 2018 through May 20, 2018 is denied and dismissed.

2. Insurer shall pay Claimant TTD benefits at the admitted rate from May 21, 2018 through August 5, 2018, subject to an offset for UI benefits Claimant received from June 24, 2018 through August 5, 2018.

3. Insurer shall pay Claimant statutory interest of 8% per annum on all benefits not paid when due.

4. Respondents' intervening event defense is denied and dismissed as moot.

5. All issues not decided herein are reserved for future determination.

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

DATED: January 23, 2019

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

ISSUES

Whether Claimant has proven by a preponderance of the evidence that the lumbar peripheral cluneal nerve stimulator **trial** proposed by Giancarlo Barolat, M.D. is reasonable and necessary to relieve the effects of his September 9, 2010 industrial injury.

FINDINGS OF FACT

1. Claimant worked for Employer as a Branch Manager. On September 9, 2010 he suffered an admitted industrial injury to his lower back while lifting reams of paper.

2. Claimant initially received medical care from David W. Yamamoto, M.D. He was subsequently referred to various providers for treatment. Claimant has undergone multiple surgeries including an unsuccessful L5-S1 anterior fusion on November 3, 2011, a posterior fusion at L5-S1 on January 31, 2013 and hardware removal on June 9, 2015.

3. Dr. Yamamoto referred Claimant to Walter J. Torres, Ph.D. in December of 2012 for a pre-surgical evaluation. As part of his evaluation, Dr. Torres completed a clinical examination along with psychological testing that included the Millon Behavioral Medical Diagnostic and the Millon Clinical Multiaxial Inventory-III. Dr. Torres provided Claimant with both Axis 1 and Axis II diagnoses. Claimant's Axis 1 diagnoses included pain disorder associated with psychological and medical factors, major depression, anxiety disorder and alcohol dependence that was under current control based on Claimant's report. The Axis II diagnoses included a personality disorder with dependent, schizotypal, narcissistic and borderline personality features.

4. After Dr. Torres completed his evaluation of Claimant he issued a written report dated February 5, 2013. He concluded that Claimant was a very poor candidate for invasive procedures and it would not be surprising if he did not respond well or developed complications. Dr. Torres also remarked that Claimant had a history of alcohol dependence and posed a significant risk of opioid abuse or dependence.

5. On October 29, 2013 Claimant visited Ron Carbaugh, Psy.D for a psychological assessment related to a spinal cord stimulator trial. Dr. Carbaugh conducted an evaluation but did not complete any testing as a result of Claimant's dramatic pain behavior, subjective discomfort and reported visual difficulties. He diagnosed Claimant with a somatic symptom disorder and "probable persistent depressive disorder." Dr. Carbaugh concluded that Claimant was at best a fair candidate for any type of invasive procedure and noted there were concerns regarding his response to a stimulator trial because of his poor reaction to previous treatment.

6. On January 14, 2014 Claimant underwent an independent medical examination with Lawrence A. Lesnak, D.O. After reviewing Claimant's medical records and conducting a physical examination, Dr. Lesnak agreed that Claimant was not a suitable candidate for additional invasive procedures. He observed that Claimant had failed to improve with treatment over the past three and one-half years.

7. L. Barton Goldman, M.D. conducted follow-up independent medical examinations of Claimant on November 3, 2014 and December 12, 2014. He strongly agreed with other providers who had determined Claimant was not a suitable candidate for further invasive procedures.

8. On July 21, 2015 Claimant reached Maximum Medical Improvement (MMI) for his September 9, 2010 industrial lower back injury.

9. After a hearing, a spinal cord stimulator trial was authorized by Order dated November 16, 2015.

10. The stimulator trial occurred between January 20, 2016 and January 27, 2016. Giancarlo Barolat, M.D. and Robert Brown, M.D. each noted that Claimant had experienced good pain relief in the leg and lower back from the stimulator. However, the stimulation was not reaching the right medial buttock area. Nevertheless, Dr. Barolat recommended proceeding with permanent implantation. The permanent device was implanted on March 15, 2016.

11. Prior to receiving the spinal cord stimulator Claimant was taking the following pain medications as reflected in Dr. Yamamoto's records: (1) Acetaminophin-oxycodone hydrochloride tablet (Percocet) 325 mg-10mg tabs, every six hours; (2) Meloxicam tablet, 15 mg 1 tabs, three times per day; (3) Lyrica; (4) Baclofen, 10mg tab three times daily; (5) Fentanyl 50 mcg/hr film, extended release one patch every 48 hours; and (6) Depakote.

12. At Claimant's first visit with Dr. Yamamoto after the spinal cord stimulator implant he reported that his back pain had ceased and his right buttock pain was down to 1-2 out of 10. Based on Dr. Yamamoto's records Claimant continued his medications but his Percocet decreased from 10 mg to 7.5 mg and his Fentanyl decreased from 50 mcg to 25 mcg.

13. Claimant's pain management was eventually transferred to Michael Tracy, D.O. He initially visited Dr. Tracy on April 12, 2018 and reported an overall pain level of 9/10. Claimant's medications included Fentanyl, Percocet, methocarbamol, Lyrica and Nucynta.

14. Dr. Tracy evaluated Claimant approximately once per month and recommended various treatment interventions including medication adjustments and injections. On June 12, 2018 Dr. Tracy sought to proceed with Suboxone detoxification.

15. In a June 27, 2018 Order Claimant was determined to be permanently and totally disabled.

16. Claimant's Suboxone detoxification began on June 25, 2018 and continued over the following two months. Claimant reported significant worsening of his leg pain but increasing lower back pain.

17. On August 1, 2018 Giancarlo Barolat, M.D. proposed a trial of lumbar peripheral cluneal nerve stimulation for Claimant's pain. He explained:

> The stimulation is clearly helping him with the medial buttock pain, which was at the time of the implant the worst pain. The patient, however, has continued to complain of pain in the lumbar area following the multiple surgical procedures on his lumbar spine. The pain in the lumbar area has been controlled relatively well by narcotic intake; however, the patient has developed side effects to the narcotics. He wants to try to discontinue the use of the narcotics. Unfortunately, if he decreases the intake of narcotics, the back pain comes back immediately. His pain is fairly well localized in the lower lumbar area. I think that this pain could very well be addressed by lumbar cluneal nerve stimulation.

18. On August 13, 2018 Marc Steinmetz, M.D. completed a records review of Dr. Barolat's request for the trial of a lumbar peripheral cluneal nerve stimulator. Dr. Steinmetz determined that the request for the peripheral nerve stimulator trial was not reasonable and necessary or consistent with the Colorado Level II *Medical Treatment Guidelines* (*Guidelines*). He referenced the numerous prior providers who had recommended against invasive procedures as well as Claimant's lack of psychological clearance for a neurostimulator. Dr. Steinmetz further explained that the requirements set forth in the *Guidelines* had not been met with respect to the original stimulator because Claimant had not achieved any increase in function or decrease in pain medications.

19. On August 27, 2018 Claimant asked Dr. Tracy to transition him back to opiates because of decreasing functional ability. Claimant specifically noted that he was unable to perform household chores. Dr. Tracy commented that Claimant's "current pain intake form [was] identical to his initial patient evaluation where he rate[d] his pain at best a 4 and worst a 9 and noted that subsequent visits had been fairly consistent with a rating of 9 out of 10." He remarked that it was "striking" that Claimant complained of more axial back pain after the spinal cord stimulator "was adjusted to capture more symptoms consistent with the S1 radiculopathy that has been documented across the record."

20. On November 12, 2018 Claimant's treating psychologist Lupe Ledezma, Ph.D. determined that Claimant did not have any psychological impediments that would interfere with a trial of lumbar peripheral cluneal nerve stimulation. He detailed that "[a]fter several sessions discussing the neurostimulator trial and lead placement surgery, it is my opinion that there is no reason from a psychological standpoint that [Claimant] should not move forward with the trial process."

21. Robert E. Kleinman, M.D. conducted a psychiatric independent medical examination of Claimant on July 16, 2018. He issued addenda on August 10, 2018 and November 13, 2018 to address Dr. Barolat's requests for a spinal cord stimulator and a

peripheral nerve stimulator. Dr. Kleinman explained that the record did not support a conclusion that Claimant was a suitable psychological candidate for a stimulator. He reasoned that Claimant did not satisfy the *Guidelines* for determining whether he was an appropriate candidate. Dr. Kleinman remarked that the *Guidelines* require a psychiatric examination, complete review of the medical records and at least two psychological tests.

22. On November 13, 2018 the parties conducted the pre-hearing evidentiary deposition of Dr. Steinmetz. Dr. Steinmetz noted that Claimant did not have a good response to his existing spinal cord stimulator. He explained that, if the stimulator had worked and had a significant impact on Claimant's symptoms, his pain medications would have been reduced earlier than two years after the implantation. Moreover, Claimant has not demonstrated any increased functionality.

23. In a note dated November 26, 2018 Dr. Yamamoto agreed that Claimant should proceed with the peripheral cluneal nerve stimulator trial. He remarked that "Claimant has responded positively to the stimulator regarding the buttock pain."

24. On November 15, 2018 the parties conducted the pre-hearing evidentiary deposition of Dr. Barolat. Dr. Barolat explained that neurostimulation is designed to address chronic pain. He noted that he implanted a spinal cord stimulator into Claimant in March of 2016 and it decreased pain in the areas it was designed to reach. Dr. Barolat also commented that the spinal cord stimulator has helped Claimant reduce his pain medications for the symptoms in his legs and buttocks. However, Claimant continues to suffer lumbar spine symptoms. Dr. Barolat explained that the trial of a peripheral nerve stimulator would be the "most effective and the least invasive procedure." He detailed that he would place electrodes in the painful lower back area over the nerves in the lumbar region. If the procedure provided Claimant with more than a 50% relief of pain he would insert the lumbar peripheral cluneal nerve stimulator. Dr. Barolat summarized that the proposed procedure is approximately 70% less invasive than the insertion of the spinal cord stimulator. He commented that the purpose of the lumbar peripheral cluneal nerve stimulator was to decrease Claimant's lumbar spine pain and increase his function.

25. On November 28, 2018 the parties conducted the pre-hearing evidentiary deposition of Dr. Kleinman. He maintained that Claimant was not a suitable psychological candidate to undergo the peripheral cluneal nerve stimulator trial requested by Dr. Barolat. Dr. Kleinman also reiterated that the *Guidelines* require psychological clearance prior to proceeding with the stimulator trial and make no distinction in the type of stimulator under consideration. He further determined that the original stimulator had not resulted in any increase of function or reduction of pain medication for over two years after implantation. Because the spinal cord stimulator was not a success further treatment through neurostimulation is not appropriate.

26. Claimant testified at the hearing in this matter. He explained that the spinal cord stimulator implanted on March 15, 2016 had successfully relieved his leg and buttock symptoms. However, the stimulator was not designed to address his lower back symptoms. Although Claimant sought to discontinue his pain medications, his lower back

symptoms worsened with reduced medications. Claimant remarked that his continuing use of pain medications addressed his persistent lower back pain. Because the peripheral cluneal nerve stimulator would reduce the pain in his lower back and decrease his reliance on medications, he sought to proceed with the procedure.

27. Claimant has proven that it is more probably true than not that the lumbar peripheral cluneal nerve stimulator **trial** proposed by Dr. Barolat is reasonable and necessary to relieve the effects of his September 9, 2010 industrial injury. Initially, on September 9, 2010 Claimant suffered an admitted industrial injury to his lower back while lifting reams of paper. He subsequently underwent multiple back surgeries and required numerous pain medications. Despite psychological concerns, Claimant ultimately underwent a spinal cord stimulator implant through Dr. Barolat on March 15, 2016.

28. Claimant explained that he was able to reduce his pain medications after the spinal cord stimulator implant. He obtained Suboxone detoxification treatment through Dr. Tracy. Claimant's treatment began on June 25, 2018 and continued over the following two months. However, Claimant reported significant worsening of his leg pain and increasing lower back pain during the reduction of his pain medications. On August 1, 2018 Dr. Barolat proposed a trial of lumbar peripheral cluneal nerve stimulation for Claimant's pain. Dr. Barolat explained that the spinal cord stimulator had decreased Claimant's medial buttock pain. However, Claimant's lumbar spine pain continued and any decrease in pain medications increased his lower back pain. Dr. Barolat thus reasoned that the implantation of a peripheral cluneal nerve stimulator would decrease Claimant's lower back pain and use of narcotic pain medications.

29. In contrast, Dr. Steinmetz determined that the request for the peripheral nerve stimulator trial was not reasonable and necessary or consistent with the *Guidelines*. He referenced the numerous prior providers who had recommended against invasive procedures as well as Claimant's lack of psychological clearance for a neurostimulator. Moreover, Dr. Kleinman maintained that Claimant was not a suitable psychological candidate to undergo the peripheral cluneal nerve stimulator trial requested by Dr. Barolat. He explained that the *Guidelines* require psychological clearance prior to proceeding with the stimulator trial and make no distinction in the type of stimulator under consideration. Dr. Kleinman also noted that the original stimulator had not resulted in any increase of function or reduction of pain medication for over two years after implantation.

30. Despite the concerns of Drs. Steinmetz and Kleinman, the persuasive evidence reveals that the implantation of the lumbar peripheral cluneal nerve stimulator will likely decrease Claimant's pain medications and improve his function. Dr. Barolat noted that he implanted a spinal cord stimulator into Claimant in March of 2016 and it decreased pain in the areas it was designed to reach. He also commented that the spinal cord stimulator has helped Claimant reduce his pain medications for the symptoms in his legs and buttocks. However, Claimant continues to suffer lumbar spine symptoms. Dr. Barolat explained that the trial of a peripheral nerve stimulator would be the "most effective and the least invasive procedure." He summarized that the purpose of the lumbar peripheral cluneal nerve stimulator.was to decrease Claimant's lumbar spine pain

and increase his function. Moreover, Dr. Yamamoto agreed that Claimant should proceed with the peripheral cluneal nerve stimulator **trial**. He remarked that "Claimant has responded positively to the stimulator regarding the buttock pain." Furthermore, Claimant noted that, because the peripheral cluneal nerve stimulator would reduce the pain in his lower back and decrease his reliance on medications, he sought to proceed with the procedure. Finally, despite the detailed procedure mentioned in the *Guidelines*, the record reveals that Claimant is an appropriate psychological candidate for the implantation of a peripheral nerve stimulator. Claimant's treating psychologist Dr. Ledezma determined that Claimant did not have any psychological impediments that would interfere with a trial of lumbar peripheral cluneal nerve stimulation. He detailed that "[a]fter several sessions discussing the neurostimulator trial and lead placement surgery, it is my opinion that there is no reason from a psychological standpoint that [Claimant] should not move forward with the trial process." Accordingly, Claimant's request for a lumbar peripheral cluneal nerve stimulator **trial** is granted.

CONCLUSIONS OF LAW

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

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

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

4. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to

produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

5. It is appropriate for an ALJ to consider the *Guidelines* in determining whether a certain medical treatment is reasonable and necessary for a claimant's condition. *Deets v. Multimedia Audio Visual*, W.C. No. 4-327-591 (ICAP, Mar. 18, 2005); see *Eldi v. Montgomery Ward*, W.C. No. 3-757-021 (ICAP, Oct. 30, 1998) (noting that the *Guidelines* are a reasonable source for identifying the diagnostic criteria). The *Guidelines* are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). Nevertheless, the *Guidelines* expressly acknowledge that deviation is permissible.

6. The Guidelines provide a list of surgical indications for spinal cord stimulators. Spinal cord stimulators are appropriate for patients who exhibit the following:

> persistent functionally limiting radicular pain greater than axial pain who have failed conservative therapy including active and/or passive therapy, pre-stimulator trial psychiatric evaluation and treatment, medication management, and therapeutic injections.

W.C.R.P. 17 Exhibit 9(H)(1)(c). Prior to a stimulator trial a candidate must undergo a "comprehensive psychiatric or psychological evaluation." The evaluation should include the following:

> a standardized detailed personality inventory with validity scales (e.g., MMPI-2, MMPI-2-RF, or PAI); pain inventory with validity measures (e.g., BHI 2, MBMD); clinical interview and complete review of the medical records. The psychologist or psychiatrist performing these evaluations should not be an employee of the physician performing the implantation. This evaluation must be completed, with favorable findings, before the screening trial is scheduled.

W.C.R.P. 17 Exhibit 9(H)((1)(c)(ii). Moreover, neurostimulation is inappropriate unless there are no psychiatric "red flags," the patient understands the risks and benefits of the procedure; the patient has demonstrated a history of adherence to prescribed treatments and all reasonable surgical and non-surgical treatment has been exhausted. W.C.R.P. 17 Exhibit 9(H)(1)(c)(ii).

7. The *Guidelines* specify that peripheral nerve stimulation should only be utilized "with a clear nerve injury or when the majority of pain is clearly in a nerve distribution" for patients who have completed six months of therapy. W.C.R.P. 17 Exhibit 9(H)(3). Implantation of a peripheral nerve stimulator requires the same "pre-trial psychosocial evaluation and treatment" as those recommended for a spinal cord stimulator. A trial is considered successful when a patient experiences a 50% decrease

in pain and "demonstrates objective functional gains or decreased utilization of pain medications." W.C.R.P. 17 Exhibit 9(H)(3).

8. As found, Claimant has proven by a preponderance of the evidence that the lumbar peripheral cluneal nerve stimulator **trial** proposed by Dr. Barolat is reasonable and necessary to relieve the effects of his September 9, 2010 industrial injury. Initially, on September 9, 2010 Claimant suffered an admitted industrial injury to his lower back while lifting reams of paper. He subsequently underwent multiple back surgeries and required numerous pain medications. Despite psychological concerns, Claimant ultimately underwent a spinal cord stimulator implant through Dr. Barolat on March 15, 2016.

9. As found, Claimant explained that he was able to reduce his pain medications after the spinal cord stimulator implant. He obtained Suboxone detoxification treatment through Dr. Tracy. Claimant's treatment began on June 25, 2018 and continued over the following two months. However, Claimant reported significant worsening of his leg pain and increasing lower back pain during the reduction of his pain medications. On August 1, 2018 Dr. Barolat proposed a trial of lumbar peripheral cluneal nerve stimulation for Claimant's pain. Dr. Barolat explained that the spinal cord stimulator had decreased Claimant's medial buttock pain. However, Claimant's lumbar spine pain continued and any decrease in pain medications increased his lower back pain. Dr. Barolat thus reasoned that the implantation of a peripheral cluneal nerve stimulator would decrease Claimant's lower back pain and use of narcotic pain medications.

10. As found, in contrast, Dr. Steinmetz determined that the request for the peripheral nerve stimulator trial was not reasonable and necessary or consistent with the *Guidelines*. He referenced the numerous prior providers who had recommended against invasive procedures as well as Claimant's lack of psychological clearance for a neurostimulator. Moreover, Dr. Kleinman maintained that Claimant was not a suitable psychological candidate to undergo the peripheral cluneal nerve stimulator trial requested by Dr. Barolat. He explained that the *Guidelines* require psychological clearance prior to proceeding with the stimulator trial and make no distinction in the type of stimulator under consideration. Dr. Kleinman also noted that the original stimulator had not resulted in any increase of function or reduction of pain medication for over two years after implantation.

11. Despite the concerns of Drs. Steinmetz and Kleinman, the persuasive evidence reveals that the implantation of the lumbar peripheral cluneal nerve stimulator will likely decrease Claimant's pain medications and improve his function. Dr. Barolat noted that he implanted a spinal cord stimulator into Claimant in March of 2016 and it decreased pain in the areas it was designed to reach. He also commented that the spinal cord stimulator has helped Claimant reduce his pain medications for the symptoms in his legs and buttocks. However, Claimant continues to suffer lumbar spine symptoms. Dr. Barolat explained that the trial of a peripheral nerve stimulator would be the "most effective and the least invasive procedure." He summarized that the purpose of the lumbar peripheral cluneal nerve stimulator.was to decrease Claimant's lumbar spine pain and increase his function. Moreover, Dr. Yamamoto agreed that Claimant should proceed with the peripheral cluneal nerve stimulator **trial**. He remarked that "Claimant has

responded positively to the stimulator regarding the buttock pain." Furthermore, Claimant noted that, because the peripheral cluneal nerve stimulator would reduce the pain in his lower back and decrease his reliance on medications, he sought to proceed with the procedure. Finally, despite the detailed procedure mentioned in the *Guidelines*, the record reveals that Claimant is an appropriate psychological candidate for the implantation of a peripheral nerve stimulator. Claimant's treating psychologist Dr. Ledezma determined that Claimant did not have any psychological impediments that would interfere with a trial of lumbar peripheral cluneal nerve stimulation. He detailed that "[a]fter several sessions discussing the neurostimulator trial and lead placement surgery, it is my opinion that there is no reason from a psychological standpoint that [Claimant] should not move forward with the trial process." Accordingly, Claimant's request for a lumbar peripheral cluneal nerve stimulator **trial** is granted.

ORDER

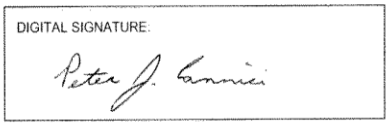
Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request for a lumbar peripheral cluneal nerve stimulator **trial** is granted.

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

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

DATED: January 24, 2019.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Are the facet-joint injections, at levels L3-L4, L4-L5, and L5-S1, as recommended by Dr. Castrejon, reasonable and necessary for Claimant's medical maintenance treatment, and related to his original work injury?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

The Injury

1. Claimant was a patrol officer for the City of P____ when he sustained an injury to his low back on October 5, 2007. On the date of the injury, he was in pursuit of a stolen car. The driver of that car abandoned the vehicle, which continued to move without a driver on board. Claimant positioned his police cruiser to stop the moving vehicle. It struck the patrol cruiser's driver's side door. Claimant described the impact like someone "kicking him in the tailbone." He initially presented with radiculopathy on both the right and left.

Early Care Notes

2. After failed conservative care, Dr. James Bee recommended an L5-S1 decompression and fusion. This was performed the operation on April 8, 2008.

3. Claimant was placed at maximum medical improvement (MMI) by his authorized treating provider, Dr. Daniel Olson, on January 16, 2009. Dr. Olson assessed Claimant with an apportioned 16% whole person impairment rating. Dr. Ridings, who performed the Division Independent Medical Examination, agreed with the MMI date and assigned a 15% apportioned whole person rating. Respondent admitted to this rating and to post-MMI medical maintenance.

4. Claimant continued treatment, including with Dr. Bradley Sisson of the Colorado Clinic. On 7/20/2017, Claimant received Radio Frequency Ablation ("RFA") treatment, bilaterally, at L3, L4, L5 levels (Ex. 2, pp. 26-30). In the history provided at this visit, Dr. Sisson noted:

> About 3 or 4 years ago, the patient had lumbar radiofrequency nerve ablation done. *The patient states that that procedure reduce the local the pain by 80-90%* (sic). *Id at .27* (emphasis added).

It was further noted by Dr. Sisson:

> The patient reports that he had an SI joint injection performed by Dr. Jenks in July 26, 2016. He reports the SI joint pain reduced his SI generated pain by approximately 80%. He did not have to take Norco as a pain analgesic for several months after that specific injection……In

November 2016, he felt that the SI joint injection was wearing off and Dr. Jenks ordered another SI joint injection which was denied by the insurance carrier.

Trigger point injections were administered by Dr. Sisson in lieu of the SI injection.

5. At his follow-up visit on 8/8/2017, Claimant reported to Dr. Sisson that this most recent RFA procedure was *90% helpful for pain relief* (Ex. 2, p. 22).

6. A lumbar MRI was taken at Parkview Medical Center on September 1, 2017. The primary care physician was not noted in the report. Under Findings, the following was noted:

> L3-L4: No significant disc bulge or spinal canal stenosis. *Minimal facet hypertrophy*. No significant foraminal narrowing.
>
> L4-L5: There is a broad-based disc bulge and *moderate facet hypertrophy* that minimally narrow the spinal canal. There is mild right greater than left foraminal narrowing.
>
> L5-S1: There are postsurgical changes from prior posterior decompression. An intervertebral disc spacer is identified. There is no significant spinal canal stenosis. *There is facet hypertrophy* and mild foraminal narrowing. (Ex. 1, p. 1) (emphasis added).

Recent Maintenance Medical Care

7. On January 11, 2018, maintenance care was transferred to Miguel Castrejon. Dr. Castrejon noted in his report that Dr. Jenks had provided multiple injections for pain management, including SI-Joint injections and facet joint injections. He also noted a prior SI-joint rhizotomy, and radiofrequency ablations. After Dr. Jenks lost his medical license, care was transferred to Dr. Shell of the Colorado Clinic, who resumed a series of injections. On his patient intake forms, Claimant reported pain in the SI area with constant ache and occasional stabbing on the right side into the groin area. This was worsened by sitting or standing on hard surfaces.

8. Claimant also reported pain in his buttocks and leg on the right side, with occasional shooting pain from hip down into the leg. He had a deep ache in his low back, and rated his pain as 4-5/10. Physical examination revealed that Claimant weighed 205 pounds, with a slow but normal gait. Facet loading was *equivocal* bilaterally. Claimant was neurologically intact, with negative straight leg raises but some evidence of pelvic obliquity. (Ex. 4, p. 80).

9. Based on Dr. Castrejon's review of the medical history, on 1/11/2018 he opined, "Having had the opportunity to discuss results of the prior SI-Joint injection as well as the risks associated with ongoing spinal injections, the recommendation of this examiner that the Claimant not undergo any further spinal injections including facet and sacroiliac." (Ex. J, p. 45, Ex. 4, p. 83).

10. Claimant returned to Dr. Castrejon on February 6, 2018. Physical examination revealed the same weight, along with slow but normal gait. He had mild tenderness in the area of the piriformis to a lesser degree than the SI-Joint. Facet loading was *negative.* There was evidence of pelvic obliquity. Straight leg raises were negative. Claimant remained neurologically intact. (Ex. K, p. 54).

11. Claimant returned to Dr. Castrejon on March 7, 2018. Physical examination remained relatively unchanged. However, he now noted that Claimant was *tender* at L5-S1 facet region, but that facet loading was still *negative*. Dr. Castrejon recommended physical therapy, but by this time, he had discussed a right SI-Joint injection. (Ex. L, p. 58, Ex. 4, p. 62).

12. At the next visit, on April 5, 2018, Dr. Castrejon noted improvement with physical therapy, and felt that Claimant could transition to his home exercise program. Claimant's physical examination remained relatively unchanged. Facet loading was still *negative.* Dr. Castrejon noted that patient was at risk for ongoing flare-ups, which would require treatment that may include spinal injections, physical therapy, and ongoing use of medications for indefinite period of time. (Ex. N, p. 65).

13. At a May 21, 2018 appointment with Dr. Castrejon, Claimant's physical examination remained largely unchanged. (Ex. O, p. 67). Facet loading was still *negative.* (Ex. 4, p 60). Claimant reported pain 4/10, with sciatic symptoms running down both legs occasionally. *Id at 69.* Dr. Castrejon recommended chiropractic care.

14. At a June 13, 2018 return visit, Claimant's physical examination remained largely unchanged. Facet loading was still *negative.* (Ex. P, p. 70, Ex. 4, p. 56). Dr. Castrejon recommended an SI-Joint injection. *Id at 71, 57.*

15. On June 27, 2018, Claimant reported withdrawal symptoms from switching between Butrans and Belbuca. The switch was initially made because of skin irritation caused by the Butrans patches. Based on Claimant's withdrawal symptoms and lack of pain control, Dr. Castrejon increased Claimant's dosage of Belbuca from 75 mg to 150 mg. (Ex. Q, pp. 72-73).

16. On July 18, 2018, Claimant reported that he was unsure of the benefit of the SI-Joint injection, indicating that he felt slightly worse. Claimant voiced right-sided low back pain extending into the buttock, with no referred pain or paresthesia. There was no groin pain. Claimant's physical examination remained unchanged. Facet loading still *negative.* (Ex. R, p. 74, Ex. 4, p. 52). Dr. Castrejon placed Claimant back on Butrans because of additional side effects with the Belbuca. He recommended six massage therapy sessions to decrease back muscles spasms. *Id*

17. On August 6, 2018, Claimant reported to Dr. Castrejon a severe flare-up of low back pain, which Claimant described as midline, and which worsened with extension. There was no radiation noted of pain into his legs. Physical examination revealed *moderate tenderness with extension* now with *positive facet loading* and tenderness at L5-S1

facet. Claimant continued to be neurologically intact. (Ex. S, p. 76, Ex. 4, p. 49). At this appointment, Dr. Castrejon noted:

> The patient is here for flare-up of low back pain *that presents as facet mediated pain.* I have discussed his medical condition and treatment recommendations. I am requesting authorization for bilateral L5, S1 facet joint injections with Dr. Steven Ford. Today, I have administered 5 trigger point injections utilizing a solution of 1% lidocaine and .25% Marcaine to the paraspinal musculature. I have dispensed a TENS unit for purchase to assist with muscle spasm. I have dispensed a tapering oral course of prednisone and robaxin 750 mg#60. He will return in 4 weeks. (Ex. 4, p. 50) (emphasis added).

18. On October 5, 2018, Dr. Allison Fall reviewed the request for bilateral L5-S1 facet joint injections. She opined that L5-S1 facet joints were not likely the cause of Claimant's symptoms. Claimant was fused at that level and therefore, there would be no movement in those joints to produce pain. (Ex. T, p. 78). She further opined that facet joint injections are not considered diagnostic under the Colorado Medical Treatment Guidelines; rather, medial branch blocks are the proper diagnostic tool. Additionally, Dr. Fall noted that Claimant had had multiple trigger point injections, prednisone, and a TENS unit, which would be more appropriate to addressing Claimant's flare-up than an interventional procedure. (Ex. T, p. 79).

19. A September 21, 2018 medical report from Dr. Castrejon indicated that Claimant was now on 300 mg of Belbuca (which had previously been ineffective in controlling Claimant's pain) because of a severe skin rash caused by the Butrans. Dr. Castrejon noted improvement in Claimant's pain level and function following massage therapy.

20. Claimant indicated that his pain was still 5/10. (Ex. U, p. 82). Physical examination now revealed *moderate* pain with *positive* facet loading and *tenderness* at L4-S1 and midline L3-S1. Dr. Castrejon prescribed LidoPro to provide additional pain control. Dr. Castrejon also noted:

> His examination *continues to support* ***facet mediated pain***…..A request for lumbar facet injections was not approved by the carrier…..**Please recall that a lumber MRI confirmed the presence of minimal facet hypertrophy at L3-4 and moderate at L4-5.** I am again requesting authorization for bilateral L3-4 and L4-5 facet injections wit Dr. Ford…(Ex. 4, p. 46)(emphasis added).

21. On November 14, 2018, Claimant indicated that his July 17, 2018 right SI-Joint injection did not result in any lasting benefit. (Ex. W, p. 86). In his medical report, Dr. Castrejon noted that Claimant's condition was actually worse by this time. Based on this finding, Dr. Castrejon began considering the L5-S1 region as a possible pain generator. (Ex. W, p. 87). At that appointment, Claimant reported a 25-pound weight gain; however, Dr. Castrejon's report continues to list Claimant's weight as 205 pounds.

22. Dr. Castrejon then provided a lengthy review of an article from the journal *Pain Medicine*. (Ex. AA.) Dr. Castrejon noted that the article showed evidence for post-fusion facet pain as being a possible pain generator; he thus supported his recommendation for bilateral L5-S1 facet joint injections. He believed that this article supported his decision to seek treatment of the fused joint, and undermined Dr. Fall's opinion that the fused facet could not be the pain generator. (Ex. W, p. 87).

23. Dr. Castrejon, also responded to Dr. Fall's report, noting these observations:

> This examiner notes that the patient underwent rhizotomy bilaterally at L3, L4, and L5 on 7/20/17. Record review documented 90% pain relief. Prior to the rhizotomy records document the patient as having undergone two prior facet injections at bilateral L3-4 and L4-5. At one point Dr. Fall argued that this did not follow diagnostic criteria. With all respect, the outcome was on of 90% benefit with pain having decreased to 1/10. This outcome in and of itself (sic). Deviating from "diagnostic criteria" recommendations is a medical decision that resulted in substantial benefit. Addressing the facet joints above the level of the fusion was medically reasonable on the basis of *adjacent level disease* that is often seen post fusion. In all medical probability the patient's treating physician was attempting to identify whether the patient's ongoing symptoms were *related to facet-mediated pain* coming from above the level of fusion. Excellent benefit was achieved with the rhizotomy procedure that satisfied the treatment guideline criteria….
>
> Given that there was no benefit following the SI injection I took into consideration the facet joints. I noted that the patient had previously undergone facet rhizotomy above the level of fusion with excellent benefit….Please recall that the patient underwent a surgical fusion procedure at this level (L5-S1). As a result, the structures contained at this level are no longer virgin territory having been violated by the surgical procedure and placing the patient *at risk for pain from structures directly manipulated, as well as adjoining and distal to the site of surgery*. (Ex. 4, p. 33) (emphasis added).

Dr. Fall's IME Report

24. On November 19, 2018, Dr. Fall issued a response to Dr. Castrejon's November 14 report. She also reviewed the journal article referenced by Dr. Castrejon. Dr. Fall pointed out that the article on which Dr. Castrejon was basing his treatment decisions showed no statistically significant change in facet joint pain between pre-and post-fusion for those with low back pain. (Ex. X, p. 89). Additionally, Dr. Fall opined that the article did not support Dr. Castrejon's assertion that a fused facet joint could be a possible pain generator. Instead, all of the patients with zygapophyseal pain in the study had the pain at adjacent levels to where the fusion was.

25. She concluded there was absolutely no documentation of facetogenic pain at the fused level in the entire article. (Ex. X, p. 90). Finally, Dr. Fall noted that the article was merely a preliminary look at some factors that may be implicated in ongoing low back pain after a fusion. There was nothing definitive in the article; further, one article would not be the proper basis for altering medical treatment parameters. i.e., the Colorado Medical Treatment Guidelines.

26. In her report, Dr. Fall further noted inconsistencies in the reported benefit from Claimant's July 2018 SI-Joint injection between his answers to interrogatories and what had been documented in Dr. Castrejon's reports. She explained that such inconsistencies are not uncommon in a chronic pain situation; that is in part why interventional procedures like facet injections are not recommended by the Colorado Medical Treatment Guidelines.

Deposition Testimony of Dr. Fall

27. Dr. Fall testified by evidentiary deposition on November 14, 2018. She was qualified as an expert in the field of physical medicine and rehabilitation. She further testified that she was Level II accredited and familiar with the Colorado Medical Treatment Guidelines.

28. Dr. Fall testified that facet joint injections are 'frowned upon', unless they are part of a functionally-directed rehabilitation program, but are not appropriate for patients with recurrent pain. She further opined that generally facet joint injections are not appropriate to address diffuse and divergent pain complaints.

29. Concerning Dr. Castrejon's L5-S1 request, she testified that this would not be a possible pain generator because of the fusion at that level. Moreover, because this was a chronic pain syndrome case, it was not appropriate to continue to manage Claimant's pain with spinal injections, particularly where Claimant had had inconsistent responses to those procedures. She further opined that this was consistent with Dr. Castrejon's *initial* recommendations in the case.

30. Dr. Fall testified that Claimant did have radiating pain down the back of his legs, but that it was not radicular in nature. Additionally, she testified that there was no indication that the fusion was unstable. She explained that the Colorado Medical Treatment Guidelines for chronic pain recommend against moving back and forth between various suspected pain generators with injections. She then explained that there was no basis in the medical records, or Claimant's fluctuating symptoms following Dr. Castrejon's initial January 11, 2018 report which would warrant a change in Dr. Castrejon's initial recommendation against continued spinal injections.

31. Dr. Fall explained that, at this point in the 11 years of treatment for chronic pain, the risks from continued spinal injections simply outweighed any benefit, which, at best, had been inconsistent throughout the case. The morbidities associate with continuing such

injections included deterioration of the joints being injected, allergic reaction, bleeding, infection, and spinal nerve injury. Additionally, she opined that in a chronic pain situation these types of interventional injections, specifically the facet joint injections, should not be utilized. Instead, it is more appropriate to treat a flare-up with anti-inflammatories, topical patches, massage, or a TENS unit. Moreover, the term "flare-up" indicates something short-lived, and Claimant's subjective reports were consistent with an underlying chronic pain condition with no specific pain generator. Additionally, she noted that facet joint injections should not be used to promote weight loss or facilitate exercise.

32. Concerning facet joint injections at levels above the fusion (specifically L3-L4 and L4-L5), Dr. Fall testified that this would be chasing diffuse complaints with no obvious pain generator. Additionally, she opined that the facet joints at those higher levels were pain generators from Claimant's pre-existing injury that was not related to this claim. However, no evidence in support of this proposition was cited by Dr. Fall.

33. Dr. Fall did acknowledge that facet joint pain is a potential pain generator in the lumbar spine, but disagreed that between 15% and 40% of low back pain is due to facet joints. Instead, she opined, and later confirmed her opinion, that 90% of all low back pain cases one cannot identify the source of the pain generator.

34. Further, after discussion of the interplay between Claimant's SI joint issues and the RFA on his facet joints, the following discussion was noted on p. 44 of her deposition:

> Q. Okay. So even if the RFA gives a patient 90 percent pain relief for a facet-mediated pain, you're saying that if they have pain that's *also* coming from the SI region they shouldn't get an RFA?
>
> A: That's correct.
>
> Q: That that's your interpretation of the [Medical Treatment] guidelines?
>
> A: Yes.

Claimant's Testimony

35. Claimant testified, at hearing. He stated that he was unable to engage in physical therapy because stretching was painful. He further indicated that he was not able to do home exercises. He testified that the TENS unit that was provided did not work. He also testified that massage therapy only provided momentary relief.

36. Claimant further testified that he did benefit significantly from the first Radio Frequency Ablation, and would like to repeat this process, since he had to take less Norco afterwards.

37. Claimant acknowledged that his sleep had improved since October 2017, but he had gained approximately 20 to 25 pounds during this period. He testified that following the July 17, 2018 SI-Joint injection performed by Dr. Stephen Ford, he noticed a decrease in the pain that he experienced while sitting. He noticed a lessening in the pain associated with walking on hard floors, and that he could now walk for longer periods of time. He acknowledged that following the facet rhizotomy that he received in 2017, that it did not improve his pain with sitting on hard surfaces or standing on hard ground. He did acknowledge that his condition improved with physical therapy conducted by Dr. Castrejon and that he was able to transition to a home exercise program.

38. Claimant testified that his reported weight did not accurately reflect his actual weight throughout the course of his treatment, including the November 14, 2018 report, which listed his weight at 205 pounds.

Testimony or Ray Wilbur

39. Ray Wilbur is a Claims Adjuster for Insurer. Mr. Wilbur testified about the claims process in this case, including his denial of the treatment being requested by Claimant. While the ALJ finds this witness to be truthful in his testimony, his professional decision making process is not pertinent to the issues currently before the ALJ.

CONCLUSIONS OF LAW

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

Generally

a. The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, *et seq.*, C.R.S. (2018), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102 (1), C.R.S. (2018). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201 (1), C.R.S. (2018). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. § 8-42-201 (1), C.R.S. (2018).

b. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A workers' compensation case is decided on its merits. § 8-43-201 (1), C.R.S. (2018).

c. In this case, the ALJ finds Claimant's testimony to be sincere and credible, limited though it is in addressing the medical issue presented. The ALJ further finds that both Dr. Castrejon and Dr. Fall have reported, and testified, to the best of their professional abilities. As such, the ALJ must analyze their medical opinions on the basis of relative *persuasiveness,* and not *credibility* per se.

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

Medical Treatment, Generally

e. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. § 8-42-101, C.R.S. (2018). However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. § 8-41-301 (1) (c), C.R.S. (2018); *Faulkner v. ICAO,* 12 P.3d 844, 846 (Colo. App. 2000).

f. The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. ICAO, supra*; *Wal-Mart Stores, Inc. v. ICAO,* 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990).

Medical Treatment Guidelines

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

> It is appropriate for the director or an administrative law judge to consider the medical treatment guidelines adopted under section 8-42-101(3) in determining whether certain medical treatment is reasonable, necessary, and related to an industrial injury or occupational disease. *The*

director or administrative law judge is not required to utilize the medical treatment guidelines as the sole basis for such determinations. (emphasis added).

h. As noted by Claimant, Dr. Castrejon actually largely adhered to the Guidelines when he recommended the usage of facet injections. The Guidelines in Rule 17, Exhibit 1(F)(3)(e)(iii) on p. 54 [re Zygapophyseal (Facet) Injection] provide:

> Indications- *Patients with pain 1) suspected to be facet in origin based on exam findings and 2) affecting activity;* OR patients who have refused a rhizotomy and appear clinically to have facet pain; OR patients who have facet findings with a thoracic component. The physician should document the findings which, for lumbar and cervical spine, consist of pain with *extension and lateral bending with referral patterns consistent with the expected pathologic level*. **In these patients, facet injections may be occasionally useful in facilitating a functionally-directed rehabilitation program and to aid in identifying pain generators.** Patients with recurrent pain should be evaluated with more definitive diagnostic injections, such as medial nerve branch injections, to determine the need for a rhizotomy. Because facet injections are not likely to produce long-term benefit by themselves and are not the most accurate diagnostic tool, they should not be performed at more than two levels, unilaterally or bilaterally. Due to the lack of proof that these injections improve outcome, *prior authorization is required.* A high quality meta-analysis provides good evidence against the use of lumbar facet or epidural injections for relief of non-radicular low back pain. All injections should be preceded by an MRI or a CT scan. (emphasis added).

i. Claimant met the 'Indications' criteria. The findings were sufficiently documented to note pain with extension, with consistent referral patterns. Dr. Castrejon felt that these facet injections could be useful for both treatment, and diagnostic purposes. The ALJ finds Dr. Castrejon had substantial evidence in support of his opinions. While it is duly noted that the Guidelines recommend no more than two levels of facet injections at one time, the ALJ finds that under the circumstances herein, and as documented by ATP Castrejon, that the three levels being requested are nonetheless justified in this case. This is especially so, given the existing fusion at L5-S1, and the prior beneficial effects of RFA at the same three levels. The ALJ is not persuaded by Dr. Fall's analysis that Dr. Castrejon's request does not adhere to the Guidelines. And, to paraphrase Dr. Castrejon, it's hard to argue with success. The point, after all, is to provide beneficial medical treatment to injured workers.

Reasonable, Necessary, and Related

j. The ALJ further concludes that the reason Dr. Castrejon selected the three levels he did for facet injections is that these are the three areas of concern that

were documented in a MRI scan. The MRI of September 1, 2017, showed facet hypertrophy at L3-4, L4-5, and L5-S1. The Guidelines also state that an MRI scan should precede a facet injection. A clear reason is that one can then focus on the areas where the facet joints are showing some hypertrophy as a possible source of facet-mediated pain. Dr. Michael Shell previously looked at the hypertrophy on the MRI scan and treated the levels at L3-4, and L4-5. Dr. Castrejon, reasonably enough, now wants to also explore the possibility of facet pain coming from the L5-S1 level, where hypertrophy is also present- either because of the fusion, or perhaps in spite of it. Either way, his request is medically reasonable.

k. While the ALJ is mindful that Dr. Fall harbors a different medical opinion, it cannot be ignored that Dr. Fall clearly opined that a pain generator cannot be identified in 90% of lower back pain cases. The ALJ finds Dr. Castrejon more persuasive on this issue. He is attempting to identify and treat Claimant's pain generators, instead of classifying it as chronic back pain and prescribing medication. Further, Dr. Fall opined that 90% relief from facet-mediated pain from a prior RFA treatment does not justify a second RFA treatment *if SI pain is <u>also</u> present.* This logic escapes the ALJ, and renders Dr. Fall's other medical opinions less persuasive.

l. While Independent Medical Examinations hold a justifiably significant role in the Workers Compensation system, it cannot be ignored that Dr. Castrejon has regularly treated Claimant, in his ATP capacity, for over a year. His treatment notes are detailed, and indicate that the possible risks of the proposed procedures were understood by both he and the patient. The ATP and Claimant are both willing to take said risks. Dr. Fall opines that nothing justified Dr. Castrejon's change of opinion regarding the advisability of facet injections along the way. The ALJ once again does not concur. The physical examination *began* to show facet loading, beginning in the summer of 2018. Tenderness was also now noted at the facet joints. Claimant was beginning to show pain from extension. Conservative care was not providing the degree of relief that had been hoped for. And Dr. Castrejon did what he could to separate the source of the pain from prior, but related, SI issues. Further, while a sudden spike in symptoms might be described as a 'flare-up', this does not connote that such condition must be temporary, and will somehow resolve on its own. While that might prove to be the case, this does not mandate, ipso facto, conservative care. A 'flare-up' could also be the sudden onset of symptoms which could remain indefinitely, if not treated. It could herald the onset of something long-term. Certainly as of this Hearing, Claimant's 'flare-up" had not resolved.

m. Time will tell if Claimant benefits from the procedures being proposed by Dr. Castrejon, but Claimant has earned the right to find out. The ALJ concludes, by a preponderance of the evidence, that the medical procedures being proposed by Dr. Castrejon are reasonable and necessary to treat Claimant for his work injury. The ALJ further finds that symptoms Claimant experiences in connection therewith are related to his work injury, and not due to some other, undefined non-work injury.

ORDER

It is therefore Ordered that:

1. Respondents shall pay for the facet-joint injections as recommended by Dr. Castrejon, at levels L3-L4, L4-L5, and L5-S1, and all costs associated therewith.

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

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

DATED: January 25, 2019

/s/ William G. Edie

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

ISSUES

- Whether claimant has proven by a preponderance of the evidence that the left total knee arthroplasty recommended by Dr. Singh is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted February 25, 2016 work injury?

FINDINGS OF FACT

1. Claimant was employed by employer beginning on approximately March 15, 2015. Claimant's job duties included home visits with first time expectant mothers. Claimant sustained an admitted injury on February 25, 2016 she caught her toe on concrete and fell to the ground while finishing a home visit. Claimant was evaluated at the emergency room ("ER") the next day and was noted to be complaining of pain on weight bearing and pain involving her left wrist. Claimant was referred for x-rays and was diagnosed with a fracture of her left patella.

2. Claimant was referred for medical treatment to Dr. Frazetta by employer. Dr. Frazetta evaluated claimant on March 1, 2016 and noted claimant's accident history of falling at work on February 25, 2016 while carrying equipment and supplies. Claimant reported to Dr. Frazetta that she had immediate swelling of her knee and pain in her wrist. Dr. Frazetta reported claimant was diagnosed with a left wrist sprain as well as a non-displaced fracture of her left patella. Dr. Frazetta took claimant off of work and noted that claimant had an appointment with Dr. Singh in two days.

3. Claimant was examined by Dr. Singh on March 3, 2016. Dr. Singh noted claimant's accident history and obtained additional x-rays of claimant's wrist and knee. The x-rays showed that the patellar fracture had not changed. Dr. Singh recommended claimant be full weight bearing in her straight leg brace and kept claimant off of work until March 28, 2016.

4. Claimant returned to Dr. Singh on March 22, 2016. Dr. Singh noted claimant was fully weight bearing with a straight leg brace. Dr. Singh noted minimal swelling about the left patella with minimal tenderness to palpation over the mid-portion with no tenderness over the superior pole or inferior pole. Examination of the left wrist demonstrated a little bit of discomfort over the ulnocarpal joint, but was otherwise unremarkable. Dr. Singh noted claimant could return to work as of April 11, 2016.

5. Claimant returned to Dr. Frazetta on April 18, 2016. Dr. Frazetta noted claimant had been back to work as of April 11, 2016 after being released by Dr. Singh and noted claimant was doing well with her recovery.

6. Claimant was examined by Dr. Frazetta on May 16, 2016 and noted she would get a sharp pain in her knee, which Dr. Frazetta attributed to patella tracking.

Claimant testified that during May 2016, she began getting physical therapy for her knee, which did not help her pain.

7. On June 21, 2016, claimant returned to Dr. Singh and noted that while her knee was better, she did have some residual discomfort. Claimant reported pain on stairs and Dr. Singh noted crepitation in her knee that was occasionally sharp enough to shoot up to 10 out of 10 on the pain scale. Claimant denied significant knee pain prior to the injury. Claimant underwent a lidocaine injection into her knee under the auspices of Dr. Singh during this exam. Claimant testified that the injection helped immediately, but did not last.

8. Claimant returned to Dr. Singh on August 30, 2016. Dr. Singh noted that the blunt trauma from the fall had resulted in a patella fracture that had healed, but appeared to have exacerbated her patellofemoral joint. Dr. Singh noted that on claimant's previous visit, he had performed an injection that provided excellent relief, but that her pain had returned. Dr. Singh recommended a Synvisc injection into the left knee. Claimant also began reporting symptoms into her right hip.

9. Claimant eventually underwent a Synvisc injection in October 2016. Claimant testified that the Synvisc injection eased her pain a little by, but it only lasted approximately three months.

10. Claimant eventually underwent a total hip replacement of her right hip on January 30, 2017. Claimant testified that following her total hip replacement surgery, her left knee pain continued to progress.

11. Claimant returned to Dr. Frazetta on May 15, 2017. Dr. Frazetta noted was uncomfortable and she could feel crepitus and some popping in claimant's knee on examination with flexion and extension. Dr. Frazetta ultimately ordered a magnetic resonance image ("MRI") of the left knee.

12. The MRI was performed on May 24, 2017. The MRI revealed a radial tear of the posterior horn of the medical meniscus causing mild extrusion of the meniscus. Generalized moderate bipolar chondral loss in the medial compartment was also noted. The MRI made a comparison to a prior MRI dated February 26, 2011.

13. Claimant returned to Dr. Singh on June 20, 2017. Dr. Singh noted claimant had undergone the MRI and opined that claimant had findings of some degenerative changes in the left knee with some existent meniscal pathology and joint surface wearing. Dr. Singh discussed claimant's treatment options, including oral medications or corticosteroid injection. Dr. Singh noted that sometimes they can do a knee arthroscopy with the intent of evaluating her for long term possibility of unicompartmental arthroplasty versus a total knee arthroplasty. Claimant testified at hearing that she was not ready to undergo surgery at that time and elected to proceed with a corticosteroid injection into the knee which occurred on July 18, 2017. Claimant had a Synvisc injection on September 19, 2017.

14. Claimant returned to Dr. Singh on February 15, 2018. Dr. Singh noted that claimant had start up pain when she gets out of her bed or gets out of a car or

chair. Dr. Singh noted claimant had tried physical therapy as well as corticosteroid and Synvisc injections that were not of long term benefit. Dr. Singh performed weight bearing x-rays that demonstrated medial joint space narrowing as well as some patellofemoral changes. Dr. Singh recommended claimant consider a total knee arthroplasty.

15. Respondents obtained a records review from Dr. Ciccone on February 26, 2018. Dr. Ciccone reviewed claimant's medical records and opined that claimant had a work related injury when she tripped on February 25, 2016, but that this work related injury did not aggravate or accelerate the already on going degenerative process occurring in claimant's knee. Dr. Ciccone noted that throughout the medical records, claimant reports knee pain that varies in intensity and location and opined that these complaints were related to the underlying degenerative joint disease, and not any acute injury.

16. Respondents denied the recommended surgery.

17. Dr. Singh ultimately performed a left total knee arthroplasty on April 30, 2018. Claimant testified that after the surgery she had been improving and has been doing physical therapy. Claimant testified at the July 26, 2018 hearing that she did not have any knee injuries prior to her work injury and was not aware of any knee arthritis. Claimant further denied having undergone an MRI of the left knee on February 26, 2011. No records pertaining to the February 26, 2011 MRI were entered at the hearing.

18. Respondents' obtained an independent medical examination with Dr. Lindberg on June 19, 2018. Dr. Lindberg reviewed claimant's medical records, obtained a medical history from claimant, but did not perform a physical examination as claimant had recently had the left knee total arthroplasty.

19. Dr. Lindberg issued a report and noted that the probable reason claimant tripped and fell was secondary to the decreased mobility related to the degenerative joint disease in her knee and hip. Dr. Lindberg noted that claimant had a non-displaced fracture in her knee and likely did not aggravate the knee or hip condition in the fall. Dr. Lindberg noted that claimant had severe osteoarthritis that caused the need for the total knee replacement and opined that the hip condition was unrelated to the fall.

20. Dr. Lindberg testified at hearing in this matter consistent with his IME report. Dr. Lindberg opined that claimant had a non-displaced fracture as a result of the work injury that was treated conservatively and claimant gradually got better. Dr. Lindberg testified that claimant then gradually7 got worse, but noted that the patella did not have any loss of the articular cartilage. Dr. Lindberg testified that claimant's MRI showed significant changes in three compartmental joints resulting in decreased joint space throughout the entire knee joint. Dr. Lindberg testified that this decreased joint space was not caused by the fall at work on February 25, 2016.

21. Despite claimant's testimony that she did not have any complaints of pain in her left knee prior to the work injury and her denial of having undergone a prior MRI, evidence was obtained following the hearing that demonstrated that claimant did have treatment to her left knee in 2011. Claimant testified at the November 6, 2018 hearing

that she did not recall the prior MRI to her left knee. Claimant further testified that if the prior MRI had shown any significant injury, she would have remembered the MRI. Claimant testified that she worked with Dr. Singh in 2011 and obtained medical treatment with Dr. Singh and nurse practitioner Carmody around this time. Claimant testified she did not receive further medical treatment after the February 26, 2011 MRI. Claimant testified she did not have injections of treatment for her left knee prior to the work injury and did not miss work due to her knee pain.

22. Dr. Lindberg testified at the November 6, 2018 hearing for respondents. Dr. Lindberg testified that the 2011 MRI and medical records from nurse practitioner Carmody confirmed his prior opinion that claimant's degenerative findings were not related to her work injury. Dr. Lindberg testified that the 2011 MRI showed arthritic changes in the area where her meniscus tear appeared in the 2017 MRI. Dr. Lindberg testified claimant's 2017 MRI showed findings of a degenerative tear, and not a traumatic tear. Dr. Lindberg opined that claimant's findings were more consistent with the progression of claimant's chronic changes than findings associated with a patella fracture.

23. Dr. Lindberg testified that claimant's total knee arthroplasty was due to the lateral joint line degenerative changes in the medial joint. Dr. Lindberg testified that mechanism of injury in this case would not cause a lateral meniscal tear or the medial meniscus injury. Dr. Lindberg opined that the total knee arthroplasty was reasonable, but not related to the work injury.

24. The ALJ had previously credited claimant's testimony in finding that the total knee arthroplasty was related to claimant's work injury. However, this finding was based on claimant's credible testimony that she did not have symptoms in her left knee prior to the work injury. Claimant specifically denied at the July 26, 2018 hearing that she had undergone an MRI of the left knee in 2011. This testimony turned out to be contradicted by additional records that respondents did not have at the time of the injury.

25. The ALJ notes that the claimant's prior treatment included an MRI of the same body part performed almost exactly 5 years prior to her work injury. The ALJ notes that the MRI was not of such a remote time that it would be reasonable for claimant to forget the MRI occurring nor the symptoms that resulted in claimant seeking treatment for the knee that resulted in the recommendation for the MRI.

26. Based on the new evidence presented in this case, the ALJ cannot find that claimant's testimony regarding the condition of the left knee prior to the work injury, including her history of medical treatment to the left knee, to be credible. As such, the ALJ is unable to find that claimant has met her burden of proof of establishing that the left knee arthroplasty was related to her February 25, 2016 work injury.

27. The ALJ finds that the testimony of Dr. Lindberg provided at hearing on November 6, 2018 is credible and persuasive regarding the relatedness of claimant's total knee arthroplasty to her work related injury. The ALJ credits the testimony of Dr. Lindberg and finds that claimant has failed to establish by a preponderance of the

evidence that the total knee arthroplasty was reasonable medical treatment necessary to cure and relieve claimant from the effects of the work injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S, 2008. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

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

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

5. As found, claimant has failed to establish by a preponderance of the evidence that the left total knee arthroplasty recommended by Dr. Singh is reasonable medical treatment necessary to cure and relieve claimant from the effects of the injury. As found, claimant's initial testimony in this case denied any prior issues or treatment to her left knee. As found, the reopened evidence establishes that claimant was under treatment with Dr. Singh in 2011 that included an MRI of the left knee As found,

claimant has failed to establish by a preponderance of the evidence that her March 15, 2015 work injury aggravated, accelerated or combined with her pre-existing condition to cause the need for the left total knee arthroplasty.

6. As found, the ALJ credits the testimony of Dr. Lindberg and finds that claimant has failed to prove by a preponderance of the evidence that the total knee arthroplasty is related to her February 25, 2016 work injury.

ORDER

It is therefore ordered that:

1. Claimant's claim for medical benefits related to the left total knee arthroplasty performed by Dr. Singh on April 30, 2018 is hereby denied and dismissed.

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

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

DATED: January 22, 2019

Keith E. Mottram

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

ISSUES

- Whether the claimant has demonstrated by a preponderance of the evidence that permanent placement of a spinal cord stimulator, as recommended by Dr. Edward Maurin, is reasonable medical treatment necessary to maintain the claimant at maximum medical improvement (MMI).

The parties agreed that the issue of reopening the claimant's claim would be held in abeyance, without prejudice.

FINDINGS OF FACT

1. The claimant was injured on October 16, 2012. At that time, the claimant was working for the employer as a driller. The injury occurred when the claimant stepped on some grease, which caused him to slip and fall onto his back. The claimant testified his knees, shoulders, and back were injured in the October 16, 2012 fall.

2. The claimant has had extensive medical treatment since the 2012 work injury. This treatment has included physical therapy; spinal injections; magnetic resonance imaging (MRI) of his left shoulder, cervical spine, lumbar spine, and left knee; surgeries to the claimant's left knee and left shoulder; a L5-S1 spinal fusion; and various pain medications, including opioids. During this claim the claimant's authorized treating physician (ATP) has been Dr. Randal Jernigan.

3. On March 3, 2014, Dr. Jernigan placed the claimant at maximum medical improvement (MMI). At that time, Dr. Jernigan assessed a whole person impairment of 36% and imposed permanent restrictions of no lifting over 40 pounds.

4. The claimant testified that since being placed at MMI, he has had increasing low back symptoms that include pain that radiates into his left leg. On April 6, 2015, Dr. Jernigan noted that the claimant was still experiencing back pain. On January 11 2016, Dr. Jernigan noted that the claimant was experiencing left leg sciatica that was impacting the claimant's ability to sleep.

5. On May 24, 2016, the claimant was seen at Spine Colorado by Dr. Douglas Orndorff to discuss whether additional spinal surgery would be warranted given the claimant's continued left sided radiculopathy. At that time, Dr. Orndorff assured the claimant that there was union of the spinal fusion. Dr. Orndorff did not recommend additional surgery for the claimant.

6. On June 14, 2016, Dr. Jernigan noted that the claimant continued to have very severe low back pain that was radiating into both legs with numbness and tingling. Subsequently, Dr. Jernigan referred the claimant for an additional neurology consultation at San Juan Regional Neurology. On August 23, 2016 and August 30,

2016, the claimant was seen at San Juan Regional Neurology by Dr. Karen LeComte. It was at these appointments that Dr. LeComte noted that the claimant's asymmetrical symptoms were not typical of lumbar sacral radiculopathy or spinal stenosis. Dr. LeComte recommended the claimant undergo a brain MRI to address the possibility of demyelinating disease (multiple sclerosis).

7. On August 31, 2016 the claimant sought treatment with Dr. Jernigan. However, Dr. Jernigan sent the claimant to the emergency department because the claimant was experiencing symptoms of facial droop and an inability to speak. On that same date, the claimant was treated at Mercy Regional Medical Center for these symptoms. The claimant was diagnosed with transient aphasia, likely related to anxiety. A brain MRI performed on that date was normal.

8. On February 8, 2018, Dr. Jernigan referred the claimant to Dr. Tashof Bernton for testing and evaluation for complex regional pain syndrome (CRPS). The claimant was seen by Dr. Bernton on February 26, 2018. After testing, Dr. Bernton noted in his report that the evaluation was negative for CRPS. Dr. Bernton noted a differential diagnosis of lumbar radiculopathy.

9. The claimant continued to complain of low back pain that radiated in to both legs. Subsequently, Dr. Jernigan referred the claimant to Dr. Edward Maurin for a neurology consultation. On May 8, 2018, the claimant was seen by Dr. Maurin and reported three years of low back pain and left leg symptoms. Dr. Maurin opined that the claimant has chronic pain syndrome and recommended a spinal cord stimulator (SCS) trial.

10. The recommended SCS trial began on July 12, 2018. Following the SCS trial, the claimant reported to Emily Godfrey, PA-C that during the trial his pain symptoms were improved by 50%. Following the success of the trial, Dr. Maurin recommended permanent placement of a SCS device.

11. The claimant testified that during the SCS trial he had a reduction in his pain symptoms. With that reduction is his pain, the claimant was more active, was able to be on his feet more, and walk further when compared to his function prior to the SCS trial. The claimant also testified that he slept better during the SCS trial and was able to reduce his use of pain medications. The claimant testified that he took only half of his normal dosage of pain medication, Nucynta, during the SCS trial.

12. The claimant testified that he would like to undergo the recommended permanent SCS placement because he believes that it will improve his pain management and allow him to wean off his pain medications.

13. Dr. Jernigan testified that he agrees with Dr. Maurin's recommendation for permanent placement of an SCS. Dr. Jernigan noted in his testimony that the claimant experienced a 50% improvement in his back pain and had better use of his legs. Dr. Jernigan also testified that a permanent SCS device would increase the claimant's function and reduce, or even eliminate, the claimant's need for pain medication.

14. On July 27, 2018, Dr. John Douthit performed a review of the claimant's medical records related to the recommended permanent placement of an SCS device. In his report, Dr. Douthit opined that the claimant's SCS trial was not a valid trial under the Colorado Medical Treatment Guidelines (the guidelines), which require a functional assessment both before and after the trial. Dr. Douthit noted that the claimant's reports of improved function were subjective. Therefore, Dr. Douthit recommended an additional SCS trial before consideration of permanent SCS placement. Following Dr. Douthit's report, the respondents denied authorization of permanent placement of an SCS device.

15. The ALJ credits the medical records and the testimony of the claimant regarding the claimant's symptoms and the results of the SCS trial. The ALJ also credits the opinions of Drs. Maurin and Jernigan over the contrary opinion of Dr. Douthit. The ALJ finds that the claimant experienced functional improvement during the SCS trial. The ALJ finds that the claimant has demonstrated that it is more likely than not that permanent placement of a SCS device is reasonable medical treatment necessary to maintain claimant at MMI.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2012).

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

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

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

6. The Colorado Workers' Compensation Medical Treatment Guidelines (the guidelines) are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). The statement of purpose of the guidelines is as follows: "In an effort to comply with its legislative charge to assure appropriate medical care at a reasonable cost, the director of the Division has promulgated these 'Medical Treatment Guidelines.' This rule provides a system of evaluation and treatment guidelines for high cost or high frequency categories of occupational injury or disease to assure appropriate medical care at a reasonable cost." W.C.R.P. 17-1(A). W.C.R.P. 17-5(C) provides: "The treatment guidelines set forth care that is generally considered reasonable for most injured workers. However, the Division recognizes that reasonable medical practice may include deviations from these guidelines, as individual cases dictate."

7. While it is appropriate for an ALJ to consider the guidelines while weighing evidence, the Medical Treatment Guidelines are not definitive. *See Jones v. T.T.C. Illinois*, Inc., W.C. No. 4-503-150 (May 5, 2006); ***aff'd Jones v. Industrial Claim Appeals Office*** No. 06CA1053 (Colo. App. March 1, 2007) (not selected for publication) (it is appropriate for the ALJ to consider the guidelines on questions such as diagnosis, but the guidelines are not definitive); *see also Burchard v. Preferred Machining*, W.C. No. 4-652-824 (July 23, 2008) (declining to require application of medical treatment guidelines for carpal tunnel syndrome in determining issue of PTD); *see also Stamey v. C2 Utility Contractors et al*, W.C. No. 4-503-974 (August 21, 2008) (even if specific indications for a cervical surgery under the medical treatment guidelines were not shown to be present, ICAO was not persuaded that such a determination would be definitive)

8. As found, the claimant has demonstrated by a preponderance of the evidence that permanent placement of a spinal cord stimulator recommended by Dr. Maurin is reasonable medical treatment necessary to maintain claimant at MMI. As found, the medical records, the testimony of the claimant, and the opinions of Drs. Maurin and Jernigan are credible and persuasive.

ORDER

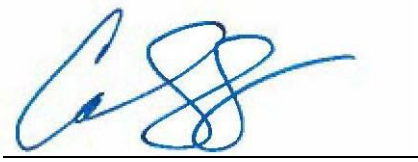
It is therefore ordered:

1. The respondents shall pay for permanent placement of a spinal cord stimulator, pursuant to the Colorado Medical Fee Schedule.

2. The issue of reopening the claimant's claim is held in abeyance, without prejudice.

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

Dated January 14, 2019



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

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-078-666-001

CORRECTED FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

,

Claimant,

v.

,

Employer,

and

,

Insurer / Respondents.

No further hearings have been held in the above-captioned matter. On January 28, 2019, counsel Claimant filed a Motion for Corrected Order, based solely on the proposition that temporary partial disability (TPD) benefits were improperly calculated. The Motion is well taken and the Full Findings of Fact, Conclusions of Law and Order, served on the parties on January 24, 2019, is hereby corrected accordingly.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on December 18, 2018, in Denver, Colorado. The hearing was digitally recorded (reference:) 12/18/18, Courtroom 3, beginning at 8:30 AM, and ending at 11:00 AM). The official Spanish/English Interpreter was Portia Berrey.

The Claimant was present in person and represented by_____, Esq. Respondents were represented by _____, Esq.

Hereinafter [Redacted], shall be referred to as the “Claimant." [Redacted], ’s shall be referred to as the “Employer.” All other parties shall be referred to by name.

Claimant's Exhibits 1 through 10 were admitted into evidence, without objection. Respondents' Exhibits A through F were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, which was filed, electronically, on December 24, 2018. Respondent was given two working days within which to file objections as to form. No timely objections were filed. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern compensability; if compensable, temporary partial disability (TPD) benefits from March 23, 2018 through June 22, 2018. At the commencement of the hearing, the parties stipulated that the Claimant's average weekly wage (AWW) is $547.40, and the ALJ so finds.

FINDINGS OF FACT

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

Preliminary Findings

1. The Claimant is a 33-year old woman employed by the Employer. Prior to March 23, 2018, she worked as a waitress on the "Event" staff, and as a busser in the restaurant. Her stipulated AWW is $547.40.

2. The Claimant has had no prior injuries to her cervical spine or right shoulder.

3. Prior to the date of the Claimant's industrial injury she was able to perform her full work duties as both a waitress and busser.

The Compensable Event of March 23, 2018

4. The Claimant sustained a work-related injury on Friday March 23, 2018. The incident happened around 11:00 AM on the Employer's property as the Claimant was walking into her place of employment. The Claimant was roughly 12-15 feet from the Employer's entrance when the wind randomly blew a nearby plastic "A-Frame" sign into a 3 to 4 foot tall light post; the top of which broke off and sent debris into the air. The Claimant was talking on her cell phone when she noticed the debris was flying toward her. This caused the her to quickly turn away from the debris and attempt to protect herself with her bag which was draped over her right shoulder. Despite the attempt to protect herself, the Claimant was stuck in the right side of the face by the

debris. She quickly developed facial pain, headache, and vision issues with her left eye.

First Reporting of the Work Injury

5. The Claimant's manager, Cassandra Dunning, was walking behind the Claimant and witnessed the incident. Dunning approached the Claimant immediately thereafter to check on her wellbeing. Dunning then escorted the Claimant into the Employer's offices and helped the Claimant report a work injury.

6. An "Employer's First Report of Injury" was filed on March 23, 2018 at approximately 11:00 AM. Cassandra Dunning is listed as a witness. The incident as described in paragraph 4 above, is described as the mechanism of injury in the First Report.

Medical Treatment

7. The Claimant had an initial evaluation at Concentra around 1:00 PM on March 23, 2018. She was treated for an injury to her left eye, facial pain, and headache. She was given eye drops, instructed to wear protective eye wear while at work, and she scheduled for a follow-up appointment for Monday March 26, 2018.

8. After being discharged from Concentra, the Claimant returned to work for the Employer as a busser for the night. While working, the Claimant began experiencing pain in her neck and right shoulder. She did not work the next two days but continued to have issues with her neck and right shoulder.

9. The Claimant was evaluated at Concentra on Monday March 26, 2018 and she reported neck and right shoulder pain that began a few hours after being discharged on March 23, 2018. The Claimant was diagnosed with a cervical strain, prescribed medication, and referred for physical therapy (PT).

10. Thereafter, the Claimant underwent a course of cervical and right shoulder treatment inclusive of evaluations, work restrictions, PT, massage therapy, acupuncture, and injections.

11. The Claimant was placed at maximum medical improvement (MMI) on June 22, 2018.

Corrected Temporary Partial Disability

12. The Claimant suffered temporary, partial wage loss resulting from her work injury. The wage loss was in part due to temporary work restrictions, and in part due to her inability to buss tables after injuring work injury on March 23, 2018. TPD benefits are as follows

- Pay Period 3/20/18 – 4/2/2018: Only 11 days are counted from this

pay period (3/23/2018 to 4/2/2018). The Claimant earned $591.91 for these 11 days (**14 days wages = $753.53; 11 days wages = $591.91; AWW = $547.40; 11 days is $860.20).** This produces a temporary wage loss of $268.12 per week, and yields a TPD rate of $178.74 per week for this pay period, **for aggregate subtotal TPD benefits of $280.88.**

- Pay Period 4/3/2018 – 4/16/2018, **a total of 14 days.** The Claimant earned $531.38 per week. This produces a temporary wage loss of $16.02, and yields a TPD rate of $10.68 per week for this pay period **[10.68 divided by 7 days =$1.53 X 14 days, both dates inclusive=$21.42 X 14=$299.88].**
- Pay Period 4/17/2018 – 4/30/2018, **a total of 14 days** The Claimant earned $177.79 per week. This produces a wage loss of $369.61, and yields a TPD rate of $246.41 per week for this pay period **[246.41 divided by 7=$35.20 per day X 14 days, both dates inclusive= $492.82]**.
- Pay Period 5/1/2018 – 5/14/2018, **a total of 14 days** The Claimant earned $750.40 per week Pay Period 5/15/2018 – 5/28/2018, **a total of 14 days, both dates inclusive.** The Claimant earned $214.81 per week. This produces a wage loss of $332.59 per week, and yields a TPD rate of $221.73 per week for this pay period **[221.73 divided by 7=$31.68 X 14=$443.46].**
- Pay Period 5/29/20**18 – 6/11/2018, both dates inclusive, a total of 14 days.** The Claimant earned $363.31 per week. This produces a wage loss of $184.09 per week, and yields a TPD rate of $122.73 per week for this pay period **[122.73 divided by 7=17.53 X 14=$245.46]**.
- Pay Period 6/12/2018 – 6/25/2018: Only 11 days are counted from this pay period (6/12/2018 – 6/21/2018). The Claimant earned $281.15 for these 11 days (14 days wages = $357.83; 11 days wages = $281.15; AWW = $547.40; 11 days is $860.20). This produces a temporary wage loss of $579.05, and yields a TPD rate of $386.03 **per week** for this pay period. **[386.03 divided by 7=54.72 X 11=$601.92].**

The Claimant is entitled to a grand total of **$2,364.42** in TPD benefits **[280.88+299.88+492.82+443.46+245.46+601.92=$2,364.42].**

Ultimate Findings

13. The ALJ has considered the opinions regarding causation submitted by the Claimant's IME, Dr. Stephen Gray, Respondents' IME, Dr. William Ciccone, and Dr. Robert Kawasaki. Dr. Ciccone's opinions do not support a work-related injury and largely rely on his perceived inconsistent statements by the Claimant regarding the mechanism of injury. Dr. Kawasaki's opinions do not support a work related injury in large part due to the findings on the Claimant's MRI. However, when presented with knowledge that Dunning witnessed the incident Dr. Ciccone refused to appropriately

consider this new information in his assessment of how the alleged work incident happened. Therefore, his ultimate opinions lack credibility. Further, Dr. Kawasaki gives no credence to the notion of aggravation and/or acceleration of a preexisting medical condition. This substantially detracts from his causation opinions. Dr. Gray's opinions support a work-related injury, and are based on Claimant's credible statements and supporting medical documents. The ALJ accepts Dr. Gray's opinions on causation and rejects any conflicting opinions concerning causation.

14. Between conflicting medical opinions, the ALJ makes a rational choice, based on substantial evidence, to accept Dr. Gray's causation opinions and to reject opinions to the contrary.

15. The ALJ finds that the Claimant suffered a work-related injury to her head, cervical spine, and right shoulder area on March 23, 2018, thus, sustaining compensable injuries on that date.

16. The Claimant has sustained her burden of proof, by a preponderance of the evidence, that she sustained compensable work injuries on March 23, 2018.

17. The ALJ further finds that the medical treatment the Claimant received to her cervical spine, right shoulder was authorized, reasonably necessary, and causally related to her compensable work injuries of March 23, 2018.

17. The Claimant has also sustained her burden of proof, by preponderant evidence, that she suffered a partial loss of wages from the date of her injuries, March 23, 2018, through June 21, 2018, both dates inclusive. During this period of time, she had not been released to return to full duty, and she had not reached maximum medical improvement (MMI). The Claimant is entitled to TPD benefits in the aggregate grand total amount of **$2,364.42**, as detailed in Finding No. 12 herein above.

CONCLUSIONS OF LAW

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

Credibility

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

App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the ALJ considered the opinions regarding causation submitted by the Claimant's IME, Dr. Stephen Gray, Respondents' IME, Dr. William Ciccone, and Dr. Robert Kawasaki. Dr. Ciccone's opinions do not support a work-related injury and largely rely on his perceived inconsistent statements by the Claimant regarding the mechanism of injury. Dr. Kawasaki's opinions do not support a work related injury in large part due to the findings on the Claimant's MRI. However, when presented with knowledge that Dunning witnessed the incident Dr. Ciccone refused to appropriately consider this new information in his assessment of how the alleged work incident happened. Therefore, his ultimate opinions lack credibility. Further, Dr. Kawasaki gives no credence to the notion of aggravation and/or acceleration of a preexisting medical condition. Under the present circumstances, this substantially detracts from his causation opinions and renders his opinions lacking in credibility. As found, Dr. Gray's opinions support a work-related injury, and are based on Claimant's credible statements and supporting medical documents. As further found, the ALJ accepted Dr. Gray's opinions on causation and rejected any conflicting opinions concerning causation.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of

conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting medical opinions, the ALJ made a rational choice, based on substantial evidence, to accept Dr. Gray's causation opinions and to reject opinions to the contrary.

Compensability

c. A compensable injury is one that arises out of and in the course of employment. § 8-41-301(1) (b), C.R.S. The "arising out of" test is one of causation. If an industrial injury aggravates or accelerates a preexisting condition, the resulting disability and need for treatment is a compensable consequence of the industrial injury. Thus, a claimant's personal susceptibility or predisposition to injury does not disqualify the claimant from receiving benefits. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). An injured worker has a compensable new injury **if the employment-related activities aggravate, accelerate, or combine with a pre-existing condition to cause a need for medical treatment or produce the disability for which benefits are sought.** § 8-41-301(1) (c), C.R.S. *See Merriman v. Indus. Comm'n,* 120 Colo. 400, 210 P.2d 448 (1949); *Anderson v. Brinkoff,* 859 P.2d 819 (Colo. 1993); *National Health Laboratories v. Indus. Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992); *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). An injury resulting from the concurrence of a preexisting condition and a hazard of employment is compensable. *H & H Warehouse v. Vicory*, *supra*. *Duncan v. Indus. Claims App. Office*, 107 P.3d 999 (Colo. App. 2004). Even where the direct cause of an accident is the employee's preexisting disease or condition, the resulting disability is compensable where the conditions or circumstances of employment have contributed to the injuries sustained by the employee. *Ramsdell v. Horn*, 781 P.2d 150 (Colo.App. 1989). *Also see* § 8-41-301(1) (c), C.R.S; *Parra v. Ideal Concrete,* W.C. No. 4-179-455 [Indus. Claim Appeals Office (ICAO), April 8, 1998]; *Witt v. James J. Keil Jr.,* W.C. No. 4-225-334 (ICAO, April 7, 1998). As found, the Claimant suffered work-related injuries to her head, cervical spine, and right shoulder area on March 23, 2018, thus, sustaining compensable injuries on that date.

Medical

d. To be a compensable benefit, medical care and treatment must be causalld related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, Claimant's medical treatment is causally related to the compensable aggravation and acceleration of her compensable inuries of march 23, 2018. Also, medical treatment must be reasonably necessary to

cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment was and is reasonably necessary. As found, the medical treatment the Claimant received for her cervical spine, right shoulder was authorized, reasonably necessary, and causally related to her compensable work injuries of March 23, 2018.

Temporary Partial Disability Benefits

e. To establish entitlement to temporary disability benefits, a claimant must prove that the industrial injury has caused a "disability," and that he has suffered a wage loss that, "to some degree," is the result of the industrial disability. § 8-42-103(1), C.R.S; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Disability from employment is established when the injured employee is unable to perform the usual job effectively or properly. *Jefferson Co. Schools v. Headrick*, 734 P.2d 659 (Colo. App.1986). This is true because the employee's restrictions presumably impair his opportunity to obtain employment at pre-injury wage levels. *Kiernan v. Roadway Package System*, W.C. No. 4-443-973 [Indus. Claim Appeals Office (ICAO), December 18, 2000]. There is no statutory requirement that a claimant must present medical opinion evidence from of an attending physician to establish her physical disability. See *Lymburn v. Symbois Logic*, 952 P.2d 831 (Colo. App. 1997). Rather, the Claimant's testimony alone is sufficient to establish a temporary "disability." *Id*. As found, the Claimant was temporarily and partially disabled from March 23, 2018, through June 21, 2018, both dates inclusive.

f. Once the prerequisites for TPD are met (*e.g.,* no release to return to full duty, MMI has not been reached, and a temporary wage loss is occurring in modified employment, TPD benefits are designed to compensate for temporary wage loss. As found, the Claimant suffered a partial loss of wages from the date of her injuries, March 23, 2018, through June 21, 2018, both dates inclusive. During this period of time, she had not been released to return to full duty, and she had not reached MMI.She is entitled to TPD benefits in the aggregate grand total amount of **$2,364.42**, as detailed in Finding No. 12 herein above.

Burden of Proof

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

Bi-Products, Inc., W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained her burden with respect to compensability, medical benefits and TPD benefits.

CORRECTED ORDER

IT IS, THEREFORE, ORDERED THAT:

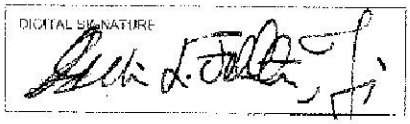
A. Respondents shall pay the costs of all authorized, reasonably necessary and causally related medical care and treatment, arising out of the compensable injuries of March 23, 2018, subject to the Division of Workers Compensation Medical Fee Schedule.

B. Respondents shall pay the Claimant temporary partial disability benefits in the aggregate grand total amount of **$ 2,364.42** which is payable retroactively and forthwith.

C. Any and all claims for temporary disability benefits from June 22, 2018, through December 18, 2018, the date of hearing, are hereby denied and dismissed.

D. Respondents shall pay the Claimant statutory interest of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

DATED this 30th day of January 2019.



EDWIN L. FELTER, JR.
Administrative Law Judge

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

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-078-666-001

CORRECTED FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

No further hearings have been held in the above-captioned matter. On January 28, 2019, counsel Claimant filed a Motion for Corrected Order, based solely on the proposition that temporary partial disability (TPD) benefits were improperly calculated. The Motion is well taken and the Full Findings of Fact, Conclusions of Law and Order, served on the parties on January 24, 2019, is hereby corrected accordingly.

Hereinafter [Redacted], shall be referred to as the “Claimant." [Redacted]’s shall be referred to as the “Employer.” All other parties shall be referred to by name.

Claimant’s Exhibits 1 through 10 were admitted into evidence, without objection. Respondents’ Exhibits A through F were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, which was filed, electronically, on December 24, 2018. Respondent was given two working days within which to file objections as to form. No timely objections were filed. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern compensability; if compensable, temporary partial disability (TPD) benefits from March 23, 2018 through June 22, 2018. At the commencement of the hearing, the parties stipulated that the Claimant's average weekly wage (AWW) is $547.40, and the ALJ so finds.

FINDINGS OF FACT

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

Preliminary Findings

1. The Claimant is a 33-year old woman employed by the Employer. Prior to March 23, 2018, she worked as a waitress on the "Event" staff, and as a busser in the restaurant. Her stipulated AWW is $547.40.

2. The Claimant has had no prior injuries to her cervical spine or right shoulder.

3. Prior to the date of the Claimant's industrial injury she was able to perform her full work duties as both a waitress and busser.

The Compensable Event of March 23, 2018

4. The Claimant sustained a work-related injury on Friday March 23, 2018. The incident happened around 11:00 AM on the Employer's property as the Claimant was walking into her place of employment. The Claimant was roughly 12-15 feet from the Employer's entrance when the wind randomly blew a nearby plastic "A-Frame" sign into a 3 to 4 foot tall light post; the top of which broke off and sent debris into the air. The Claimant was talking on her cell phone when she noticed the debris was flying toward her. This caused the her to quickly turn away from the debris and attempt to protect herself with her bag which was draped over her right shoulder. Despite the attempt to protect herself, the Claimant was stuck in the right side of the face by the debris. She quickly developed facial pain, headache, and vision issues with her left eye.

First Reporting of the Work Injury

5. The Claimant's manager, Cassandra D_____, was walking behind the Claimant and witnessed the incident. D_____ approached the Claimant immediately

thereafter to check on her wellbeing. D_____ then escorted the Claimant into the Employer's offices and helped the Claimant report a work injury.

6. An "Employer's First Report of Injury" was filed on March 23, 2018 at approximately 11:00 AM. Cassandra D_____is listed as a witness. The incident as described in paragraph 4 above, is described as the mechanism of injury in the First Report.

Medical Treatment

7. The Claimant had an initial evaluation at Concentra around 1:00 PM on March 23, 2018. She was treated for an injury to her left eye, facial pain, and headache. She was given eye drops, instructed to wear protective eye wear while at work, and she scheduled for a follow-up appointment for Monday March 26, 2018.

8. After being discharged from Concentra, the Claimant returned to work for the Employer as a busser for the night. While working, the Claimant began experiencing pain in her neck and right shoulder. She did not work the next two days but continued to have issues with her neck and right shoulder.

9. The Claimant was evaluated at Concentra on Monday March 26, 2018 and she reported neck and right shoulder pain that began a few hours after being discharged on March 23, 2018. The Claimant was diagnosed with a cervical strain, prescribed medication, and referred for physical therapy (PT).

10. Thereafter, the Claimant underwent a course of cervical and right shoulder treatment inclusive of evaluations, work restrictions, PT, massage therapy, acupuncture, and injections.

11. The Claimant was placed at maximum medical improvement (MMI) on June 22, 2018.

Corrected Temporary Partial Disability

12. The Claimant suffered temporary, partial wage loss resulting from her work injury. The wage loss was in part due to temporary work restrictions, and in part due to her inability to buss tables after injuring work injury on March 23, 2018. TPD benefits are as follows

- Pay Period 3/20/18 – 4/2/2018: Only 11 days are counted from this pay period (3/23/2018 to 4/2/2018). The Claimant earned $591.91 for these 11 days (**14 days wages = $753.53; 11 days wages = $591.91; AWW = $547.40; 11 days is $860.20).** This produces a temporary wage loss of $268.12 per week, and yields a TPD rate of $178.74 per week for this pay period, **for aggregate subtotal TPD**

benefits of $280.88.

- Pay Period 4/3/2018 – 4/16/2018, **a total of 14 days.** The Claimant earned $531.38 per week. This produces a temporary wage loss of $16.02, and yields a TPD rate of $10.68 per week for this pay period **[10.68 divided by 7 days =$1.53 X 14 days, both dates inclusive=$21.42 X 14=$299.88].**
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The Claimant is entitled to a grand total of **$2,364.42** in TPD benefits **[280.88+299.88+492.82+443.46+245.46+601.92=$2,364.42].**

Ultimate Findings

13. The ALJ has considered the opinions regarding causation submitted by the Claimant's IME, Dr. Stephen Gray, Respondents' IME, Dr. William Ciccone, and Dr. Robert Kawasaki. Dr. Ciccone's opinions do not support a work-related injury and largely rely on his perceived inconsistent statements by the Claimant regarding the mechanism of injury. Dr. Kawasaki's opinions do not support a work related injury in large part due to the findings on the Claimant's MRI. However, when presented with knowledge that D_____ witnessed the incident Dr. Ciccone refused to appropriately consider this new information in his assessment of how the alleged work incident happened. Therefore, his ultimate opinions lack credibility. Further, Dr. Kawasaki gives no credence to the notion of aggravation and/or acceleration of a preexisting medical

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15. The ALJ finds that the Claimant suffered a work-related injury to her head, cervical spine, and right shoulder area on March 23, 2018, thus, sustaining compensable injuries on that date.

16. The Claimant has sustained her burden of proof, by a preponderance of the evidence, that she sustained compensable work injuries on March 23, 2018.

17. The ALJ further finds that the medical treatment the Claimant received to her cervical spine, right shoulder was authorized, reasonably necessary, and causally related to her compensable work injuries of March 23, 2018.

17. The Claimant has also sustained her burden of proof, by preponderant evidence, that she suffered a partial loss of wages from the date of her injuries, March 23, 2018, through June 21, 2018, both dates inclusive. During this period of time, she had not been released to return to full duty, and she had not reached maximum medical improvement (MMI). The Claimant is entitled to TPD benefits in the aggregate grand total amount of **$2,364.42** as detailed in Finding No. 12 herein above.

CONCLUSIONS OF LAW

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

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a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990);

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Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder

would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting medical opinions, the ALJ made a rational choice, based on substantial evidence, to accept Dr. Gray's causation opinions and to reject opinions to the contrary.

Compensability

c. A compensable injury is one that arises out of and in the course of employment. § 8-41-301(1) (b), C.R.S. The "arising out of" test is one of causation. If an industrial injury aggravates or accelerates a preexisting condition, the resulting disability and need for treatment is a compensable consequence of the industrial injury. Thus, a claimant's personal susceptibility or predisposition to injury does not disqualify the claimant from receiving benefits. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). An injured worker has a compensable new injury **if the employment-related activities aggravate, accelerate, or combine with a pre-existing condition to cause a need for medical treatment or produce the disability for which benefits are sought.** § 8-41-301(1) (c), C.R.S. *See Merriman v. Indus. Comm'n,* 120 Colo. 400, 210 P.2d 448 (1949); *Anderson v. Brinkoff,* 859 P.2d 819 (Colo. 1993); *National Health Laboratories v. Indus. Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992); *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). An injury resulting from the concurrence of a preexisting condition and a hazard of employment is compensable. *H & H Warehouse v. Vicory*, *supra*. *Duncan v. Indus. Claims App. Office*, 107 P.3d 999 (Colo. App. 2004). Even where the direct cause of an accident is the employee's preexisting disease or condition, the resulting disability is compensable where the conditions or circumstances of employment have contributed to the injuries sustained by the employee. *Ramsdell v. Horn*, 781 P.2d 150 (Colo.App. 1989). *Also see* § 8-41-301(1) (c), C.R.S; *Parra v. Ideal Concrete,* W.C. No. 4-179-455 [Indus. Claim Appeals Office (ICAO), April 8, 1998]; *Witt v. James J. Keil Jr.,* W.C. No. 4-225-334 (ICAO, April 7, 1998). As found, the Claimant suffered work-related injuries to her head, cervical spine, and right shoulder area on March 23, 2018, thus, sustaining compensable injuries on that date.

Medical

d. To be a compensable benefit, medical care and treatment must be causalld related to an industrial injury or occupational disease. *Dependable Cleaners v.*

Vasquez, 883 P. 2d 583 (Colo. App. 1994). As found, Claimant's medical treatment is causally related to the compensable aggravation and acceleration of her compensable inuries of march 23, 2018. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment was and is reasonably necessary. As found, the medical treatment the Claimant received for her cervical spine, right shoulder was authorized, reasonably necessary, and causally related to her compensable work injuries of March 23, 2018.

Temporary Partial Disability Benefits

e. To establish entitlement to temporary disability benefits, a claimant must prove that the industrial injury has caused a "disability," and that he has suffered a wage loss that, "to some degree," is the result of the industrial disability. § 8-42-103(1), C.R.S; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Disability from employment is established when the injured employee is unable to perform the usual job effectively or properly. *Jefferson Co. Schools v. Headrick*, 734 P.2d 659 (Colo. App.1986). This is true because the employee's restrictions presumably impair his opportunity to obtain employment at pre-injury wage levels. *Kiernan v. Roadway Package System*, W.C. No. 4-443-973 [Indus. Claim Appeals Office (ICAO), December 18, 2000]. There is no statutory requirement that a claimant must present medical opinion evidence from of an attending physician to establish her physical disability. See *Lymburn v. Symbois Logic*, 952 P.2d 831 (Colo. App. 1997). Rather, the Claimant's testimony alone is sufficient to establish a temporary "disability." *Id*. As found, the Claimant was temporarily and partially disabled from March 23, 2018, through June 21, 2018, both dates inclusive.

f. Once the prerequisites for TPD are met (*e.g.,* no release to return to full duty, MMI has not been reached, and a temporary wage loss is occurring in modified employment, TPD benefits are designed to compensate for temporary wage loss. As found, the Claimant suffered a partial loss of wages from the date of her injuries, March 23, 2018, through June 21, 2018, both dates inclusive. During this period of time, she had not been released to return to full duty, and she had not reached MMI.She is entitled to TPD benefits in the aggregate grand total amount of **$2,364.42**, as detailed in Finding No. 12 herein above.

Burden of Proof

g. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App.

2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained her burden with respect to compensability, medical benefits and TPD benefits.

CORRECTED ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents shall pay the costs of all authorized, reasonably necessary and causally related medical care and treatment, arising out of the compensable injuries of March 23, 2018, subject to the Division of Workers Compensation Medical Fee Schedule.

B. Respondents shall pay the Claimant temporary partial disability benefits in the aggregate grand total amount of **$ 2,364.42** which is payable retroactively and forthwith.

C. Any and all claims for temporary disability benefits from June 22, 2018, through December 18, 2018, the date of hearing, are hereby denied and dismissed.

D. Respondents shall pay the Claimant statutory interest of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

DATED this 30th day of January 2019.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-078-769

ISSUES

- Whether Claimant sustained a compensable injury on May 31, 2018 arising out of and in the course and scope of his employment?

STIPULATIONS

The parties stipulated that if the claim were found compensable, Claimant's period of disability lasted from June 1 to August 5, 2018; all treatment Claimant received was provided by authorized treatment providers; and that the parties would stipulate to an average weekly wage within ten days of this order.

FINDINGS OF FACT

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

1. Employer employed Claimant as a concrete worker whose primary duty was building concrete tubs. Claimant alleged that he sustained an injury to his ilioinguinal nerve when he moved a metal cage off a table with a co-worker and the co-worker dropped his side.

2. Claimant suffered two prior injuries to his abdomen and groin.

- First, on August 21, 2012, Claimant suffered a prior work related hernia. Albert Hattem, M.D. evaluated him for a Division Independent Medical Evaluation on September 11, 2013. Per the report, Claimant was a driver/warehouseman for an oil company. He experienced bilateral groin pain while moving a 500-pound drum. During the course of treatment, Claimant underwent a bilateral inguinal hernia repair with mesh, a right ilioinguinal nerve transection, and suffered right ilioinguinal neuropathy manifest as chronic pain. At the time of the appointment, Claimant complained of right-sided groin pain and abdominal pain. He indicated that his condition had worsened since his discharge from care. Dr. Hattem examined the right inguinal area and noted a normal appearance with no masses or protrusions and no erythema or warmth. He noted diffuse mild tenderness to palpation. He palpated no masses in the scrotum. The left inguinal area was completely normal. Dr. Hattem assigned a 4% lower extremity rating.

- Claimant sought treatment in the emergency room at St. Anthony North Hospital on November 9, 2013. He complained of abdominal pain that

started 30 minutes prior to arrival. He indicated that he had experienced this pain in the past since undergoing hernia surgery. A CT did not show any acute abnormality and claimant was discharged.

- Second, on June 30, 2014 Claimant sustained another injury to his abdomen and groin. He initially sought treatment with Terrell Webb, M.D. He reported pain secondary to moving a 55-gallon drum of oil that weighed 410 pounds from the back of a truck onto a loading dock. He complained of pain from the right side of his stomach down his right leg. Dr. Webb assessed an abdominal wall strain and an inguinal strain.

- Nikolas Curcija, PA evaluated Claimant on September 25, 2014. Mr. Curcija noted that Claimant underwent an appendectomy in August of 2014. He released Claimant from care for his June 30, 2014 injury.

3. On May 31, 2018, Claimant initially sought treatment for this claim at Afterhours, Inc. He reported that he was moving a heavy object at work and felt a quick stabbing pain that turned into a continuous throbbing pain with a stabbing sensation with movement. He reported swelling initially which had improved significantly since onset. A history of a similar incident in the past was noted, as was a history of an indirect inguinal hernia. The inguinal canal was tender to palpation as was the right testicle. Claimant's provider diagnosed a unilateral inguinal hernia, without obstruction or gangrene and right testicular pain. The provider instructed Claimant to follow-up with Concentra for further treatment and possible surgical repair.

4. On June 1, 2018, Claimant treated with Deana Halat, NP at Concentra Medical Center. He reported that he was pulling a steel cage and felt a pop in his abdomen. "He states it started last night when he was at work and lifted a steel cage. He noticed that he had an immediate sharp pain in his right lower abdomen with swelling of the testicle. He reported a previous hernia in 2014 which was treated through Concentra." He noted that Afterhours, Inc. recommended an ultrasound, which was not performed. Ms. Halat assessed an abdominal wall strain and a groin strain, and referred Claimant for an ultrasound and to a general surgeon.

5. On June 1, 2018, Claimant underwent an abdominal ultrasound. The study was unremarkable.

6. On June 2, 2018, Claimant underwent an ultrasound of the testicles and scrotum. This revealed no evidence of epididymoorchitis, and no acute findings.

7. On June 5, 2018, Claimant treated with Ms. Halat. Per Ms. Halat, "[Claimant] returns to the clinic today for recheck of his right lower abdominal pain and right testicular swelling. He notes that at the Urgent Care he went to they did an ultrasound and told him that his intestine had fallen into his scrotal sac and this is why he

had swelling and this could be an inguinal hernia.[1] The right abdominal US was unremarkable. He is scheduled to see the general surgeon but he was quite angry today that he needed an MRI, and that he has sued us before and he has a lawyer. He left abruptly without an exam." Ms. Halat noted that there was no indication for an MRI. She assessed an abdominal wall strain and noted that claimant should follow up as previously scheduled.

8. On June 12, 2018, Claimant treated with John Lampe, M.D. Dr. Lampe noted "no hernia on exam" and indicated that he would obtain prior records.

9. On June 13, 2018, Claimant treated with Scott Richardson, M.D. Dr. Richardson noted that Dr. Lampe had called to obtain Claimant's prior records. He noted that Claimant had a prior work-related bilateral inguinal hernia repair in 2014 with nerve entrapment and an infection. Claimant admitted that he had chronic pain on the right side following the prior hernia, but alleged that his pain was more severe than usual and was higher in the abdomen. Dr. Richardson assessed an abdominal wall strain and prescribed Diclofenac Sodium 1% Transdermal Gel.

10. On August 1, 2018, Claimant treated with Dr. Sacha. Dr. Sacha opined that a one-time right ilioinguinal plus iliohypogastric nerve block under fluoroscopic guidance and conscious sedation was reasonable for diagnosis, treatment, and causality. Dr. Sacha did not perform a causation analysis.

11. On August 7, 2018, Claimant treated with Dr. Richardson. He walked in to the clinic and indicated that he needed his restrictions lightened in order to obtain a new job. Dr. Richardson complied with Claimant's request and imposed a 90-pound lifting, pushing, and pulling restriction.

12. On October 8, 2018, Alexander Jacobs, M.D. evaluated Claimant for an independent medical examination. Upon examination, Dr. Jacobs noted significant tenderness and some guarding in the right lower quadrant of the abdomen (in the region of the appendectomy). There was less tenderness in the left groin and no tenderness in the testicle. There was a modicum of dysesthesia, without true pain, in the right inner groin region, the suprapubic region, and the distribution of the ilioinguinal and hypogastric nerves. Some right thigh decreased pinprick sensation was noted. Dr. Jacobs noted, "[i]t is important to state that from the time of the original hernia, hernia repair and ilioinguinal nerve ablation he continued to have intermittent symptoms. He had bilateral symptoms on rare occasions. However, his symptoms were usually on the right side and associated with excessive straining or lifting. Sometime he had symptoms with coughing or sneezing. The pain was usually isolated to the right groin and right lower quadrant regions. After the appendectomy his symptoms continued."

13. Per Dr. Jacobs, "[e]xamination of the groin demonstrates no defect in the inguinal rings, no tenderness with compression of the inguinal area and no hernia

[1] Records associated with Claimant's May 31, 2018, visit at Afterhours, Inc., do not support a finding that an ultrasound was performed.

whatsoever (even with Valsalva maneuver.) There is no actual muscle tenderness in the right lower quadrant, thigh, or inguinal area. There is no evidence of muscle spasm or inflammation."

14. Dr. Jacobs stated, "[h]is symptoms are clearly not related to a hernia, because there is none. There is precious little evidence for muscle strain that would cause these symptoms since there is no true muscle tenderness currently. At this time, 5 months after the alleged injury, muscle symptoms should have pretty much dissipated. According to the patient these symptoms have decreased by about 40% (50 % according to his physicians)."

15. Dr. Jacobs stated, "[i]f this, indeed, was a problem with either the ilioinguinal or iliohypogastric nerve, it certainly wasn't related to the claim of May 31, 2018. Rather it would be related to the original claim of August 21, 2012, when he underwent the herniorrhaphy that resulted in entrapment of those nerves."

16. Claimant testified at hearing that the only claim he was pursuing in relation to the May 31, 2018 incident was for an injury to his iliohypogastric nerve. He agreed that he did not have a hernia arising out of that incident. He did not indicate he was pursuing a claim for a groin strain or sprain. He stated specifically, and his counsel stated, that the only alleged injury was that of his nerve.

17. With regard to Dr. Sacha's recommendation for a one-time right ilioinguinal plus iliohypogastric nerve block under fluoroscopic guidance and conscious sedation, Dr. Jacobs stated, "[t]he iliolinguinal nerve had already been resected and cauterized by radiofrequency ablation technique. If this was indeed a problem with the iliohypogastric nerve (closely related to the ilioinguinal nerve and a branch of the same parent nerve), it would not be a problem related to the current Worker's Comp claim. It would be related to the original herniorrhaphy."

18. Dr. Jacobs concluded, "[n]ot only is it fair to say that the injury of May 31, 2018 didn't cause any problems with neuropathy but it is unlikely that it aggravated or accelerated conditions that may have pre-existed from his original herniorrhaphies gives the type of symptoms that have persisted since the original surgery. His symptoms may have increased to some extent after his appendectomy."

19. It is Dr. Jacob's position that the incident on May 31, 2018 did not cause, aggravate, or accelerate any condition in claimant's abdomen or groin.

20. No persuasive medical opinion was submitted into evidence that specifically opined the May 31, 2018 incident caused, aggravated, or accelerated any condition in the claimant's iliohypogastric nerve.

21. Of note, Dr. Sacha's medical evaluation of July 18, 2018 states, "I do feel this is just a flare of a pre-existing problem." He does not make any statement the May 31, 2018 incident specifically caused the flare, nor does he state that the May 31, 2018 incident aggravated or accelerated any condition of the iliohypogastric nerve.

CONCLUSIONS OF LAW

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

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

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

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

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

A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. Section 8-41-301(1)(b) C.R.S.*; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury "arises out of and in the course of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions to be considered part of the employee's services to the employer. *General Cable Co. v. Industrial Claim Appeals Office,* 878 P.2d 118 (Colo. App. 1994).

Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove a causal relationship between a work-related accident and an injury, disease, or condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997).

The Workers' Compensation Act creates a distinction between an "accident" and an "injury". The term "accident" refers to an "unexpected, unusual, or undesigned occurrence." Section 8-40-201(1) C.R.S. In contrast, an "injury" contemplates the physical or emotional trauma caused by an "accident." An "accident" is the cause and an "injury" is the result. No benefits flow to the victim of an industrial accident unless the accident causes a compensable "injury." A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.,* WC 4-650-711 (ICAO February 15, 2007).

The determination of whether claimant proved an injury which required medical treatment is one of fact for the ALJ. *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). The ALJ has the discretion to find an industrial accident resulted in only a non-disabling injury which did not require medical treatment. *Graphman v. Amberwood Court Care Center,* W.C. No. 4-621-138 (I.C.A.O., June 29, 2005).

The persuasive and credible evidence shows that the May 31, 2017 incident did not cause, aggravate, or accelerate any condition in Claimant's abdomen or groin.

Claimant sustained prior injuries to his abdomen and groin on August 21, 2012 and June 30, 2014. Claimant's 2012 injury resulted in right ilioinguinal neuropathy manifested by chronic pain.

Claimant remained symptomatic after his reaching MMI for his August 21, 2012 injury. Per Dr. Jacobs, "[i]t is important to state that from the time of the original hernia, hernia repair and ilioinguinal nerve ablation he continued to have intermittent symptoms. He had bilateral symptoms on rare occasions. However, his symptoms were usually on the right side and associated with excessive straining or lifting. Sometime he had symptoms with coughing or sneezing. The pain was usually isolated to the right groin and right lower quadrant regions. After the appendectomy his symptoms continued."

The ALJ credits the opinion of Dr. Jacob that "[i]f this, indeed, was a problem with either the ilioinguinal or iliohypogastric nerve it certainly wasn't related to the claim of May 31, 2018. Rather it would be related to the original claim of August 21, 2012, when he underwent the herniorrhaphy that resulted in entrapment of those nerves."

The minor incident observed in the video from May 31, 2018 did not cause, aggravate, or accelerate any condition in Claimant's abdomen or groin.

The ALJ notes that Dr. Jacobs is the only physician who performed a causation analysis. This ALJ notes that no persuasive medical opinion supporting a determination that the May 31, 2018 incident caused, aggravated, or accelerated an injury to the iliohypogastric nerve has been submitted into evidence.

The ALJ notes discrepancies in Claimant's accounts of the mechanism of injury in the medical records and in the information provided to claimant's various providers. While the ALJ acknowledges an incident is visible on the video, Claimant is also seen to be moving without apparent difficulty immediately following the incident in question. The ALJ specifically rejects the testimony of Claimant.

ORDER

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

1. Claimant claim for compensation is denied and dismissed.

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

DATED: January 31, 2019

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

ISSUES

1. Whether Respondents have overcome by clear and convincing evidence the DIME physician's opinion on Claimant's permanent partial disability impairment causally related to Claimant's injury.

2. If the DIME physician's opinions on permanent impairment causally related to the work injury are overcome, determination of Claimant's appropriate permanent partial disability impairment rating and whether the impairment is scheduled or whole person.

3. Determination of Claimant's average weekly wage (AWW).

4. Whether Claimant has established by a preponderance of the evidence an entitlement to increased temporary partial disability (TPD) benefits based on an increased AWW.

5. Whether Respondents have established by a preponderance of the evidence that Claimant was responsible for his termination on July 10, 2017 and that the resulting wage loss is not attributable to the May 26, 2017 injury.

6. Whether Claimant has established by a preponderance of the evidence that he is entitled to a gym membership as a specific medical maintenance benefit.

FINDINGS OF FACT

1. Claimant worked for Employer as a forklift operator and was so employed from approximately 2013 until his termination July 10, 2017. Claimant's job duties were heavy and involved pulling orders, loading boxes, lifting boxes, and operating a forklift.

2. On May 26, 2017, while so employed, Claimant sustained an admitted work related injury. On that date, Claimant was loading boxes weighing between 50 and 100 pounds from waist level to a forklift pallet that was at ground level. Claimant pulled a box weighing approximately 92 pounds toward his body when he felt a dislocation in his left shoulder.

3. On May 26, 2017, Claimant was evaluated at Concentra. Claimant reported that he was pulling cases when he felt a twinge and burning in his left shoulder. Claimant reported the pain was in the left posterior shoulder, the pain was sharp and burning, and that the pain was constant. Claimant reported the pain level was an 8/10 and worse with

shoulder movement and rotation. Claimant was diagnosed with left shoulder strain. *See* Exhibits 3, C.

4. Claimant was referred to and underwent physical therapy during the next month for his left shoulder. He continued to complain of pain in the left shoulder. *See* Exhibits 3, C.

5. On June 1, 2017, NP Halat evaluated Claimant. Claimant had continued pain at the AC joint in his left shoulder, popping and clunking with movement, and tenderness. Claimant underwent x-rays on his left shoulder that showed AC separation. Clamant was referred for an orthopedic evaluation. *See* Exhibits 3, C.

6. On June 15, 2017, Mark Failinger, M.D. evaluated Claimant. Claimant reported pain in the upper back and with reaching. Dr. Failinger noted that Claimant's strength was fairly good, range of motion was decent, and that Claimant did have some shoulder pain to the side and reaching to the side. On examination, Dr. Failinger found left shoulder weakness and pain, minimal AC joint pain, some pain in the greater tuberosity, and forward flexion at about 50 degrees with some pain in medium ranges. Dr. Failinger reviewed an MRI of the left shoulder that showed a small tear of the supraspinatus and he diagnosed left shoulder rotator cuff supraspinatus tear. Dr. Failinger administered a cortisone injection to the left shoulder. *See* Exhibits 5, D.

7. Claimant alleges he sustained a separate injury to his right shoulder on July 5, 2017. This separate injury was not consolidated into this claim nor is the separate injury part of this case. In his evaluation on July 6, 2017 for his left shoulder, there is no mention of a new right shoulder injury or right shoulder problems. *See* Exhibit 3.

8. On July 13, 2017, Dr. Failinger evaluated Claimant. Claimant reported that the cortisone injection did not provide much relief. Claimant reported that he had the same pain and had no new injuries. Claimant reported pain at the worst was 5-6/10 and at best was 1-2/10. Claimant reported that he did not want surgery because he had surgery on the right shoulder previously that did not really help him at all. Claimant reported the pain woke him up at times and that reaching overhead bothered him some. Claimant's strength and range of motion were noted to be decent. Dr. Failinger performed another cortisone injection. *See* Exhibits 5, D.

9. Claimant continued to be evaluated for his left shoulder. In his left shoulder, Claimant had continued pain, joint stiffness, weakness, tenderness to palpation at the AC joint area, and achiness. Providers continued to note that Claimant's left shoulder had discomfort on flexion, abduction, and internal/external rotation. *See* Exhibits 3, C.

10. On August 10, 2017, Dr. Failinger evaluated Claimant. Dr. Failinger noted again that Claimant did not want surgery, but that he had little else to offer Claimant. Dr. Failinger recommended a second opinion. *See* Exhibits 5, D.

11. On August 24, 2017, John Papillion, M.D. evaluated Claimant. Dr. Papilion noted that Claimant had a prior right shoulder injury in 2014 repaired surgically but that Claimant had no prior problems with the left shoulder. Dr. Papilion found on examination of the left shoulder pain above 90 degrees, a markedly positive impingement sign type I and II, a mildly positive drop arm test, and pain with testing the supraspinatus. Dr. Papilion diagnosed moderated grade articular sided partial tear rotator cuff lesion (PASTA lesion) in the left shoulder. Dr. Papilion recommended surgical repair. Claimant was hesitant to undergo surgery due to a prior right shoulder surgery that he had undergone and due to the fact that following his prior right shoulder surgery, his right shoulder had continued symptoms. Dr. Papilion explained to Claimant that the 2014 right shoulder injury had involved a very large central tear compared to Claimant's current left shoulder tear which was much smaller and could likely be managed nicely with the recommended surgery and could likely heal completely. Claimant decided to go forward with surgery on his left shoulder. *See* Exhibits 6, E.

12. On September 8, 2017, Dr. Papilion performed surgery on Claimant's left shoulder. Dr. Papilion performed arthroscopic debridement of the labrum and rotator cuff, arthroscopic subacromial decompression with a release of the coracacromial ligament, and arthroscopic rotator cuff repair. In the operative not, Dr. Papilion noted that there was a full thickness tear of the rotator cuff. *See* Exhibits 6, E.

13. On September 19, 2017, Claimant was evaluated by Scott Richardson, M.D. Claimant was noted to still be in a sling following surgery and Claimant reported pain at a level of 5/10 with joint pain, joint stiffness, and night pain. Dr. Richardson noted that the surgical wound looked good, but noted ecchymosis and tenderness to palpation generally about the glenohumeral joint. Dr. Richardson ordered post surgery physical therapy three times per week. *See* Exhibits 3, C.

14. Claimant underwent physical therapy in October of 2017 with Chris Traut, PT. Claimant had a little bit of increased pain at a 6/10 for about 2 hours following a treatment but generally reported his pain at about a 1/10 during October. Claimant reported that he had cervical thoracic joint pain since his surgery and that he had pain with abduction in the impingement position. Claimant reported his shoulder was improving with low pain level at the anterior superior shoulder. PT Traut noted improvement in active range of motion. *See* Exhibits 10. C.

15. On November 2, 2017, Dr. Richardson evaluated Claimant. Claimant reported that his pain level was now at a 0/10 at rest and at a 2/10 with movement. Claimant was noted to be out of the sling and advancing with physical therapy. Claimant reported continued trouble with sleeping and with pain in the left cape area. Claimant was found to have tenderness to palpation at the anterior and superior glenohumeral area and the left trapezius area. *See* Exhibits 3, C.

16. On November 2, 2017, Claimant underwent physical therapy with Autumn Grove, PT. Claimant reported he was doing well with no change. Claimant reported reduced symptoms and benefit from his current treatment. *See* Exhibits 10. C.

17. On November 7, 2017, Claimant underwent physical therapy with PT Traut. Claimant reported that his shoulder felt good but weak and that his current pain was at a 1/10. Claimant reported that he still had trouble sleeping and that his shoulder pain increased at night, up to a 7/10 on days he had therapy and up to a 5/10 on days that he did not have therapy. PT Taut noted that Claimant was progressing well per protocol but was limited by neck pain. PT Traut adjusted Claimant's neck and recommended they continue to monitor and address the neck pain for regional interdependence while also continuing Claimant'' left shoulder rehabilitation. *See* Exhibits 10. C.

18. On November 9, 2017, Claimant underwent physical therapy with PT Traut. Claimant reported increased left superior shoulder pain at night and increased left cervical spine pain at night. On November 14, 2017, Claimant underwent physical therapy with PT Traut. Claimant reported his left shoulder felt tight but had no other symptoms. Claimant reported that he could elevate his shoulder and was happy about that but that his flexion was still limited. PT Traut noted that Claimant could begin resistance. PT Traut noted improved abduction and flexion and that Claimant was progressing as expected. *See* Exhibits 10. C.

19. On November 16, 2017, Claimant underwent physical therapy with PT Traut. Claimant reported pain at a 2/10. Claimant reported that he had gotten up in the middle of the night to go to the bathroom and that he experienced pain in his left cervical from the occiput to the AC joint and that all cervical motions caused pain. Claimant reported that he was doing the home exercise program two times per day and had some pain after doing the home exercise program. PT Traut noted that Claimant's active range of motion decreased from the prior visit and noted concerns over Claimant's cervical pain. Claimant reported that he was seeing a surgeon on the 30th to address his cervical pain. *See* Exhibits 10. C.

20. On November 30, 2017, Dr. Papilion evaluated Claimant. Claimant reported that he was doing well and progressing in therapy. Claimant reported that he still had some pain with overhead use and some cervical paraspinous spasms and tension that bothered him at night. Dr. Papilion found good motion of the cervical spine but some paraspinous tenderness with mild spasm. Dr. Papilion also found tenderness in the trapezius and minimally in the subacromial space. Dr. Papilion found good early strength in the rotator cuff. Dr. Papilion was very pleased with Claimant's progress and recommended Claimant continue therapy and progress to a work conditioning program primarily for strengthening and functional rehab. *See* Exhibits 6, E.

21. Claimant started strengthening and work simulation physical therapy on December 1, 2017 with PT Traut. Claimant reported he was still weak in abduction and reported soreness/pain into the left cervical spine at C5-6 worse with rotation, flexion, and extension. On December 7, 2017 at therapy, Claimant reported no new complaints and that he was doing well. PT Traut noted that Claimant was handling work conditioning well and was progressing with activity tolerance and strength. *See* Exhibits 11, C.

22. On December 7, 2017, Dr. Richardson evaluated Claimant. Claimant reported pain levels at a 1-2/10 with movement. Claimant reported continued joint pain and night pain. On exam, Claimant had tenderness in the trapezius muscle and in the anterior shoulder but was noted to be at near full range of motion with some lacking in internal rotation. *See* Exhibits 3, C.

23. On December 11, 2017, Claimant underwent therapy with PT Traut. Claimant reported the pain in his anterior shoulder was minimal. Claimant reported that he had neck pain since surgery that was unchanged and was at a 3/10 with neck motions in his left lower cervical area/suprascapular area. PT Traut noted that Claimant continued to have neck pain with relief from manual therapy. The next day, December 12, 2017, Claimant reported feeling more sore in his neck than normal. PT Traut noted Claimant's therapy and progress were as expected. PT Traut opined that Claimant's cervical pain was likely due to weak deep cervical flexors and a tight left levator. PT Traut planned to progress cervical exercises and to continue work simulation for the left shoulder. *See* Exhibits 11, C.

24. On December 13, 2017, Claimant underwent therapy with Michael Griffin, PT. Claimant reported that he had 5/10 soreness in his left shoulder/neck area following a massage the day prior. *See* Exhibits 11, C.

25. On December 18, 2017, Stephanie Best, PT noted that Claimant was there for visit 1/18 for work conditioning. Claimant reported neck/upper trapezius pain that increased with overhead activity and with sleeping. *See* Exhibits 11, C.

26. Claimant continued to undergo work-conditioning therapy. He reported continued soreness/tightness along the left upper trapezius towards the base of the skull, a headache, and tightness from his shoulder to his neck. *See* Exhibits 11, C.

27. On January 11, 2018, Dr. Papilion evaluated Claimant. Dr. Papilion noted that Claimant was doing exceedingly well and had completed therapy. Claimant reported some paracervical and trapezial muscle soreness and pain but reported no shoulder pain. On exam, Dr. Papilion found full active motion in the shoulder and excellent strength in the rotator cuff. Dr. Papilion found some mild tenderness over the trapezius and cervical paraspinous muscles and opined that those symptoms were not related to the shoulder surgery. Dr. Papilion opined that Claimant was approaching MMI with regard to his left shoulder rotator cuff repair and that Claimant had sustained permanent impairment. *See* Exhibits 6, E.

28. Claimant continued to undergo work-conditioning therapy. During this time, he reported continued pain from the shoulder up to the neck bothering him the most at night and reported that it was just always tight.

29. On January 25, 2018, Dr. Richardson evaluated Claimant. Claimant continued to have pain at a 1-2/10 with movement. Claimant also continued to have

tenderness and pain in the left trapezius muscle and left anterior shoulder. It was noted that roughly 75% of anticipated healing had taken place. *See* Exhibits 3, C.

30. On February 8, 2018, Dr. Richardson evaluated Claimant. Claimant reported he had been doing physical therapy for strengthening and that his arm still felt weak. Claimant reported pain at a 4/10. Dr. Richardson noted on examination that Claimant lacked about 20-30 degrees of internal rotation but otherwise was at/very near full range of motion. Dr. Richardson noted that Claimant's healing was almost sufficient for the safe return to regular duty work but that Claimant required another recheck prior to discharge. *See* Exhibits 3, C.

31. At work conditioning therapy on February 27, 2018, Claimant reported that he continued with the same feeling of tightness and soreness through the area of the upper trapezius. *See* Exhibits 11, C.

32. On March 8, 2018, Dr. Richardson evaluated Claimant. Claimant reported feeling stronger in his left shoulder and that he had no arm numbness. Dr. Richardson noted that Claimant had not yet found a gym to use yet and discussed finding one near Claimant's residence. Claimant reported shoulder pain at night with pressure in shoulder and joint pain and that his pain medications wore off by 2 a.m. On exam, Claimant's neck was normal and his left shoulder had tenderness to palpation at the about the glenohumeral/trapezius area. Dr. Richardson noted that Claimant was at his functional goal and ready for discharge. Dr. Richardson discussed that Claimant was at maximum medical improvement and provided an impairment rating of 3% upper extremity, 2% whole person. Dr. Richardson opined that Claimant could return to full work/activity. Dr. Richardson noted that for post MMI and future care, Claimant needed six months of maintenance care with him and Dr. Papilion and that Claimant continued to need a gym membership. *See* Exhibits 3, C.

33. On July 12, 2018, Thomas Higginbotham, D.O. performed a division independent medical examination (DIME). Dr. Higginbotham noted that the parts of the body to be evaluated included neck, bilateral shoulders, left rotator cuff injury status post surgery, injury to labrum, injury to coracoacromial ligament, separation of the left acromial joint, leg pain, insomnia, and depression. Dr. Higginbotham noted dates of injury of May 26, 2017 for the left shoulder and another date of injury of July 5, 2017 for the right shoulder that was apparently exacerbated from compensatory use as the left shoulder was healing. Dr. Higginbotham noted that it appeared that both shoulder claims were coupled together. *See* Exhibits 14, B

34. Claimant reported that on July 5, 2017 he injured his right shoulder while pulling and lifting heavy boxes and at the same time trying to protect his injured left shoulder and that his boss denied filling out a new report of injury form. Claimant reported that he retained an attorney in August or September of 2017 and that a new claim was made for the right shoulder. Claimant reported a prior injury to his right shoulder and prior surgery to his right shoulder. Claimant reported that the prior right shoulder injury settled

sometime in 2015 and that he was unsure of a rating that he was provided. *See* Exhibits 14, B

35. Claimant reported pain and discomfort in both his shoulder about the left suprascapular and cervical paraspinal areas. Claimant reported headaches, muscle cramps, joint pain and stiffness, depression and nervousness, trouble falling and staying asleep, mood swings, hot flashes, tinging and hot sensation to the hands, nausea and photophobia. Claimant reported that he had a lack of movement in both arms. On exam, Claimant had mild tenderness on moderate pressure palpation about the left deltoid muscle insertion. Claimant had no AC joint tenderness. Claimant had moderate bicipital groove tenderness. Claimant also had mild-moderate left upper trapezius and levator scapular tenderness in his cervicospinal muscles and mild left tenderness in the suboccipitals. Claimant's cervical spine range of motion was mildly limited with pain about the left paraspinal areas. *See* Exhibits 14, B

36. Dr. Higginbotham assessed pull/push/lift strain events to the bilateral shoulders, structural diagnostic evidence of a partial thickness tear of the left distal rotator cuff with surgery, and cervicalgia with strain from post-operative splintage without specific trauma to the neck at the time of the injury. Dr. Higginbotham agreed that Claimant was at MMI as of March 8, 2018 as opined by Dr. Richardson. Dr. Higginbotham opined that a whole person impairment consideration was for both shoulders and for the loss of cervical spine range of motion because of the shoulder condition and without specific injury to the cervical spine itself. Dr. Higginbotham provided an upper extremity impairment for the left shoulder at 15%, which converts to 9% whole person. He noted that included 10% upper extremity impairment for subacromial decompression/acromioplasty, and 6% for range of motion deficits. For the right shoulder, Dr. Higginbotham provided an upper extremity impairment of 6%, which converts to 4% whole person. For the cervical spine, Dr. Higginbotham provided a spine impairment of 6% whole person based entirely on range of motion deficits. Dr. Higginbotham noted that there was no specific disorder of the cervical spine and no specific injury to the cervical spine at the time of the injury but opined that Claimant had a loss or range of motion due to the bilateral shoulder conditions. Dr. Higginbotham opined that the total combined whole person impairment rating was 17%. Dr. Higginbotham opined that there was no apportionment of the cervical loss of range of motion or the left shoulder and that there were no disabling conditions of the left shoulder and neck at the time of the injury. Dr. Higginbotham noted that apportionment of the right shoulder would be appropriate but that there were no records of the prior injury and Claimant was unsure of any impairment. Thus, Dr. Higginbotham noted specifically that the 17% value was without apportionment of the right shoulder. *See* Exhibits 14, B

37. Dr. Higginbotham noted that further medical care needed and that the ongoing care would be primarily in the form of self-care and mindfulness of excessive physical activities of the shoulder along with a concerted stretching and strengthening exercise routine and auto massage techniques with tennis ball and/or foam roller. Claimant's lifting restriction was put at a maximum of 45 pounds and his above shoulder activity was limited to intermittently up to 2 hours. *See* Exhibits 14, B.

38. On October 31, 2018, John Burris, M.D. performed an independent medical evaluation. Claimant reported that he injured his left shoulder at work on May 26, 2017. Claimant reported undergoing physical therapy, injections, and surgery. Claimant reported there were no complications and that he completed physical therapy after surgery. Claimant reported pain at a 7/10 directly in his left shoulder. Claimant reported the pain could vary between 2-9/10 and on a pain diagram, Claimant localized the pain to the superior trapezius region. Claimant did not report neck pain, radiation of symptoms into his extremities or persistent numbness/weakness in extremities. Dr. Burris reviewed medical records and performed a physical examination. On exam, Claimant's cervical spine was normal, non-tender, with full fluid range of motion in all planes and negative Spurlings bilaterally. On left shoulder exam, Claimant was non-tender over the lateral edge of the acromion and bicipital groove, focally tender over the superior aspect of the left trapezius musculature, with no muscle spasm or trigger points. Claimant was non-tender through the posterior shoulder girdle. Claimant had full strength.

39. Dr. Burris noted that Claimant reported that he had a good response from his prior right shoulder workers' compensation claim with complete relief of pain that was contradicted by the medical records. Dr. Burris also noted the claimed new right shoulder injury on July 5, 2017 is not noted or documented by providers in this claim who were treating the left shoulder. Dr. Burris opined that there was clear consensus that Claimant reached MMI on March 8, 2018 for the left shoulder injury. Dr. Burris opined that Claimant's permanent impairment was 3% upper extremity for range of motion loss. Dr. Burris opined that this was consistent with Claimant's range of motion documented by all of his treating providers. Dr. Burris noted that while the rating could be converted to a 2% whole person rating, in Claimant's case there was no evidence of proximal involvement on examination so the rating remains an upper extremity rating.

40. Dr. Burris opined that DIME physician Dr. Higginbotham made several significant errors in the impairment rating calculations including rating the cervical spine without a table 53 disorder, rating the right shoulder that was unrelated to this claim, and rating for the subacromial decompression. Dr. Burris opined that Claimant did not injure the cervical spine or right shoulder on May 26, 2017. Dr. Burris noted that the Division of Workers' Compensation specifically instructs providers that "in shoulder cases with accompanying neck pain, the clinician must determine whether an additional objective work related Table 53 cervical pathology qualifies for a rating or the symptoms the patient has are those expected from the shoulder pathology and do not qualify for an additional rating." Dr. Burris opined that Claimant currently has some myofascial tenderness in the left trapezius musculature without cervical spine pain. He opined that was an expected finding after shoulder surgery and does not qualify for an additional cervical rating. Dr. Burris further noted that for shoulder surgery, the Division of Workers' Compensation instructs that "subacromial arthroplasty should be rated using range of motion, and when appropriate, joint crepitation with motion from the other disorders section." Dr. Burris noted that although there was an allowance for up to 10% upper extremity, it was recommended only if "other factors have not adequately rated the extent of the impairment." Dr. Burris opined that given the concepts, DIME physician Dr.

Higginbotham's inclusion of a 10% impairment for the subacromial decompression was inconsistent with the instructions. Further, Dr. Burris opined that the DIME physician's range of motion was significantly different from all the range of motion measurements in the records which were relatively consistent including from Dr. Richardson, Dr. Papilion, the physical therapists, and his measurements. Dr. Burris opined that no permanent work restrictions or maintenance care was indicated and that Claimant should be encouraged to actively and regularly participate in a self-directed home exercise program. See exhibit A.

41. Dr. Burris testified at hearing consistent with his independent medical evaluation report. Dr. Burris testified that he disagreed with DIME physician Higginbotham and that it was not appropriate to give a 10% rating for the subacromial decompression since range of motion should characterize most losses and that the use of the additional rating is only in extreme cases where range of motion doesn't capture the anatomical loss. Dr. Burris opined there was no reason on exam for an additional rating of 10% and that the physical therapy records, authorized treating provider records, and surgeon's records did not support the 10% additional rating. Dr. Burris noted that Claimant had good range of motion, full strength, and no work restrictions and that his range of motion adequately rated Claimant's loss as Claimant had done very well following surgery. Dr. Burris noted that his rating of 3% was supported by the range of motion measurements done by Dr. Richards, Dr. Papilion, and the physical therapists. He noted that Dr. Higginbotham's rating of 6% was not as consistent as the consistent ratings between himself and multiple other providers. Dr. Burris further noted that Claimant's irritation of musculature including the trapezius, paraspinals, rhombus can be related to shoulder surgery and can get irritated during a recovery, but that the musculature irritation is not a cervical spine injury nor does it qualify for a Table 53 diagnosis or cervical spine permanent impairment. Dr. Burris opined that the musculature irritation was a very common and expected outcome from shoulder surgery and that DIME physician Dr. Higginbotham rated the cervical spine in error since you should not rate range of motion limitations without a Table 53 diagnosis. Dr. Burris testified that in unusual cases with severe shoulder pathology there is an exception but that Claimant did not have severe pathology and had a great outcome.

42. Records show that Claimant previously received a 7% upper extremity rating of his right shoulder. This was for a work related right shoulder injury on August 12, 2014. Claimant has better range of motion in his right shoulder now than he did at the time he received a prior impairment rating. Claimant did not present testimony or persuasive evidence to support his contention that he sustained a new right shoulder injury in this case or that he is entitled to a right shoulder rating in this case. *See* Exhibits 15, I, J.

43. Wage records show that prior to his injury on May 26, 2017, Claimant's gross pay varied from week to week based on the number of hours that he worked. Claimant had some weeks with higher hours and pay and some weeks with lower hours and pay. A variance throughout his pay existed from wage records November 2015 and through his injury. In the 21 weeks prior to his injury, Claimant earned gross wages of

$18,081.15, amounting to an average weekly wage of $861.01. Respondents admitted to an average weekly wage of $862.03 using 53 weeks of wages prior to the injury. Claimant argues that the ALJ should use a 5-week period prior to the injury to calculate Claimant's average weekly wage. Claimant has not presented persuasive argument or evidence to establish that a five-week period accurately reflects Claimant's earnings or lost income potential. Rather, as the records consistently show from 2015 through the injury, Claimant's wages varied and the ALJ finds that a fair calculation includes a larger period than just 5 weeks prior to the injury. Claimant's average weekly wage is $862.03.

44. Claimant was terminated by Employer on July 10, 2017. Prior to his May 26, 2017 injury, Claimant had received two corrective action forms. On April 17, 2017 Claimant received and signed a corrective action form for insubordination. On May 19, 2017, Claimant received a corrective action noting he had accumulated 8 points against his attendance. The corrective action noted that if Claimant received 2 more points he would be terminated and noted that it was a final warning. Claimant had accumulated points for being late on March 4, 2017, March 8, 2017, March 23, 2017, April 5, 2017, April 17, 2017, and April 21, 2017. All of these were prior to his injury. Claimant accumulated two additional points for being late on May 20, 2017, May 26, 2017, June 2, 2017, and July 1, 2017 before he was terminated.

CONCLUSIONS OF LAW

Generally

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

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

discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

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

Average Weekly Wage

Section 8-42-102(2) C.R.S. requires the ALJ to base claimant's AWW on her earnings at the time of injury. Under some circumstances, the ALJ may determine a claimant's TTD rate based upon her AWW on a date other than the date of injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Section 8-42-102(3), *supra*, grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997). Where her earnings increase periodically, claimant's AWW should be calculated based upon her earnings during a given period of disability, and not based upon earnings at the time of injury. *Campbell v. IBM Corp.*, *supra*. Earnings from concurrent employment may be included in a claimant's AWW where the injury impairs earning capacity from such employment. *Jefferson County Schools v. Dragoo*, 765 P.2d 636 (Colo. App. 1988).

Wage records show that prior to his injury on May 26, 2017, Claimant’s gross pay varied from week to week based on the number of hours that he worked. Claimant had some weeks with higher hours and pay and some weeks with lower hours and pay. A variance throughout his pay existed from wage records November 2015 and through his injury. In the 21 weeks prior to his injury, Claimant earned gross wages of $18,081.15, amounting to an average weekly wage of $861.01. Respondents admitted to an average weekly wage of $862.03 using 53 weeks of wages prior to the injury. Claimant argues that the ALJ should use a 5-week period prior to the injury to calculate Claimant’s average weekly wage. Claimant has not presented persuasive argument or evidence to establish that a five-week period accurately reflects Claimant’s earnings or lost income potential. Rather, as the records consistently show from 2015 through the injury, Claimant’s wages varied and the ALJ finds that a fair calculation includes a larger period than just 5 weeks prior to the injury. Claimant’s average weekly wage is $862.03.

DIME Physician Opinion

A DIME physician must apply the AMA Guides when determining the claimant’s medical impairment rating. Section 8-42-101(3.7), C.R.S.; §8-42-107(8)(c), C.R.S. The

finding of a DIME physician concerning the claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

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

The questions of whether the DIME physician properly applied the AMA Guides, and ultimately whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000). A mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

Right Shoulder

As found above, the medical records lack any mention to treating providers of an acute right shoulder injury on July 5, 2017. Rather, the evidence is persuasive that after a work related right shoulder injury in 2014 and after surgery for that injury, Claimant continued to have issues with his right shoulder. Claimant received a permanent impairment rating for his prior right shoulder injury, which was a 7% scheduled impairment. DIME physician Dr. Higginbotham noted in his report that any prior impairment of the right shoulder should be apportioned out of this claim (where he provided a 6% right shoulder extremity rating). DIME physician Dr. Higginbotham also noted his belief that there had been a right shoulder injury and belief that the right shoulder had been consolidated into this case in his preliminary page. These "beliefs" in his report are in error. DIME physician Dr. Higginbotham clearly erred by rating and including the right shoulder. Rather than finding a causal relationship of the right shoulder to this claim, the DIME physician just rated the right shoulder. The records clearly lack any demonstrated acute right shoulder injury actually occurred on July 5, 2017 and lack any demonstrated evidence that a right shoulder injury would be in any way related to this claim where Claimant sustained an acute left shoulder injury on May 26, 2017. Even if

hypothetically Claimant sustained a right shoulder injury on July 5, 2017 that was somehow consolidated into this claim, the rating for the right shoulder would be 0. The DIME physician correctly noted that a prior right shoulder rating would have to be apportioned out yet did not have records or request records to determine how much should be apportioned out and just rated the right shoulder. The DIME physician erred by rating the right shoulder as there was no right shoulder injury and, even if there were a right shoulder injury, a prior higher rating on the same shoulder would require this rating to be 0. Claimant's right shoulder is better now than it was at the time he was rated following his 2014 injury. It is very difficult to conceive why Claimant did not concede that the right shoulder was not part of this claim and/or concede that the right shoulder was not ratable due to the prior rating and apportionment requirements. Respondents have overcome the DIME physician opinion on permanent partial impairment and have established by clear and convincing evidence that the right shoulder is not part of this claim and is not ratable.

Cervical Spine

Respondents also have stablished by clear and convincing evidence that DIME physician Dr. Higginbotham erred by providing a cervical spine impairment rating. Claimant did not injure his cervical spine on May 26, 2017. Claimant has no cervical spine objective pathology or diagnosis. Claimant has no structural change to his cervical spine. DIME physician Dr. Higginbotham noted in his report that Claimant had no injury to the cervical spine at the time of the injury event and that there is no specific disorder of Claimant's cervical spine under Table 53. Despite this, Dr. Higginbotham rated Claimant as having a cervical spine impairment. This was in error. DIME physician Dr. Higginbotham even notes in his report that the range of motion impairment he rated flowed from both of Claimant's shoulders and not from a specific cervical spine problem or Table 53 diagnosis. Although some of the muscles between the shoulder and neck were irritated after shoulder surgery, Claimant did not sustain a permanent impairment to his cervical spine allowing or requiring a rating. Claimant has no intervertebral disc lesion and no soft tissue lesion in his cervical spine. Unlike other cases where a specific scalene muscle injury was diagnosed and documented as part of an injury and was allowed to be rated, Claimant has no such diagnoses. Cervicalgia, or neck pain, is not a specific diagnosis of injury to a structure or specific muscle but is a term for neck pain. Surgeon Dr. Papilion believed Claimant's neck muscle symptoms were not related to the shoulder surgery. The DIME physician opined that the symptoms were due to post-operative splintage. However, this opinion is in error and contradicted by the overall medical records showing a lack of complaints during the splintage period. Even Claimant argues contrary to the DIME opinion on post-operative splintage and Claimant argues that he actually injured his cervical spine during a physical therapy manipulation treatment in November of 2017, two months after his left shoulder surgery. Records from therapy show an increase in neck pain and decrease in motion after waking up from sleeping during the night. Here, there was no documented injury to any areas of the cervical spine. Rather, as testified persuasively by Dr. Burris, Claimant had expected muscle soreness in areas next to his shoulder following surgery. Not only did Claimant not have a medically documented injury to his cervical spine (or any diagnosis to a specific lesion or

muscle area during his treatment), to rate there also is a requirement of pain AND rigidity. The records fail to show rigidity. Rather, Claimant does exceedingly well in physical therapy and has near full range of motion and strength. Claimant further argues that he would be allowed a cervical spine rating under the Spinal Rating Tips even if he did not qualify for a Table 53 rating, because his case is an unusual case with established severe shoulder pathology accompanied by treatment of the cervical musculature. Not only does this tip require it be to be well justified by the clinician (and DIME physician Dr. Higginbotham provides very little justification) but it also requires the case to be unusual with severe shoulder pathology. Claimant does not have severe shoulder pathology nor is his case unusual. Claimant had a shoulder tear corrected by surgery and has had an excellent outcome. Thus, the rating provided by Dr. Higginbotham is in error and has been overcome. Claimant is not entitled to a rating for his cervical spine.

DIME physician opinion – after overcome by clear and convincing evidence

Deleon v. Whole Foods Market, Inc., W.C. No. 4-600-477 (ICAO, November 16, 2006), addressed the proper evidentiary standard for determining a claimant's impairment rating after an ALJ finds that a portion of the DIME physician's impairment rating has been overcome by clear and convincing evidence. In the *Deleon* case the ALJ determined the respondents overcame by clear and convincing evidence a DIME physician's finding that the claimant sustained 5 percent impairment for lost range of motion in the lumbar spine. However, the ALJ also found that the respondents failed to overcome by clear and convincing evidence the DIME physician's finding that the claimant sustained 5 percent impairment for a specific disorder of the lumbar spine. Consequently the ALJ upheld the specific disorder portion of the rating. The ICAO ruled that once an ALJ determines "the DIME's rating has been overcome in any respect" the ALJ is "free to calculate the claimant's impairment rating based upon the preponderance of the evidence" standard. The ICAO further stated that when applying the preponderance of the evidence standard the ALJ is "not required to dissect the overall impairment rating into its numerous component parts and determine whether each part or sub-part has been overcome by clear and convincing evidence."

Left shoulder- determination of appropriate rating- scheduled vs. whole person

As the DIME physician's opinions on permanent partial disability rating has been overcome, the determination of the appropriate permanent partial disability rating may be calculated and determined based on a preponderance of the evidence. The DIME physician provided a rating for the left shoulder that included both a 10% rating for the subacromial decompression/acromioplasty and a 6% rating for range of motion deficits.

A preponderance of the evidence establishes that the appropriate permanent partial disability rating for the left shoulder range of motion deficit is 3% upper extremity and not the 6% provided by DIME physician Dr. Higginbotham. The 3% rating is consistent with the overall weight of the evidence and medical records and is consistent with the ratings provided by the authorized treating provider Dr. Richardson, Dr. Burris,

the physical therapists measurements, and the opinion of Dr. Papilion the surgeon. The range of motion permanent impairment deficit in Claimant's left shoulder is 3%.

Further, as found above, DIME physician Dr. Higginbotham provided an additional 10% rating of the left shoulder for the subacromial decompression/acromioplasty. Although the rating tips allow a 10% rating if other factors have not adequately rated the extent of Claimant's impairment, Dr. Burris is persuasive that there were no other factors in this case to provide an additional 10% rating and is persuasive that the range of motion impairment adequately rates and captures Claimant's true impairment given Claimant's excellent result following surgery. The opinion of Dr. Burris is consistent with the opinions of Dr. Richardson, Dr. Papilion, and of the records from physical therapy which show excellent progress. DIME physician Dr. Higginbotham did not explain his basis for including the extra 10% rating or explain why the range of motion did not adequately rate the extent of Claimant's impairment. The overall medical records show very little residual impairment following surgery, physical therapy, and work conditioning. Claimant cites to an untitled case where an additional 10% rating was provided and upheld as being appropriate, as range of motion did not adequately rate the extent of an impairment. In that case, the Claimant had a metal plate and multiple pins and screws permanently inserted and fixed in his shoulder. This case is entirely different. Here, Claimant had a left shoulder surgery with normal resection and stitching. Claimant had no metal plates, screws, or pins inserted. In this case, Claimant had an excellent outcome with very minimal remaining impairment. The ALJ finds, by a preponderance of the evidence and the persuasive medical evidence, that the appropriate rating for Claimant's left shoulder injury is 3% left upper extremity.

Claimant has established by a preponderance of the evidence that his 3% left upper extremity impairment should be converted to a 2% whole person impairment rating. Section 8-42-107(1)(a), C.R.S., provides that when an injury results in permanent medical impairment and the "injury" is enumerated in the schedule set forth in subsection (2) of the statute, "the employee shall be limited to the medical impairment benefits as specified in subsection (2)." If the claimant sustains an injury not found on the schedule § 8-42-107(1)(b), C.R.S., provides the claimant shall "be limited to medical impairment benefits as specified in subsection (8)," or whole person medical impairment benefits. As used in these statutes the term "injury" refers to the part or parts of the body that sustained the ultimate loss, not necessarily the situs of the injury itself. Thus, the term "injury" refers to the part or parts of the body that have been functionally disabled or impaired. *Warthen v. Industrial Claim Appeals Office,* 100 P.3d 581 (Colo. App. 2004); *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996). Under this test the ALJ is required to determine the situs of the functional impairment, not the situs of the initial harm, in deciding whether the loss is one listed on the schedule of disabilities. *Strauch v. PSL Swedish Healthcare System, supra.* Pain and discomfort that limit the claimant's use of a portion of the body may constitute functional impairment. *Johnson-Wood v. City of Colorado Springs,* W.C. No. 4-536-198 (ICAO June 20, 2005); *Vargas v. Excel Corp.,* W.C. No. 4-551-161 (ICAO April 21, 2005). The ALJ may also consider whether the injury has affected physiological structures beyond the arm at the shoulder. *Brown v. City of Aurora,* W.C. No. 4-452-408 (ICAO October 9, 2002).

Section 8-42-107(2)(a), C.R.S., provides for scheduled compensation based on "loss of an arm at the shoulder." The claimant bears the burden of proof by a preponderance of the evidence to establish functional impairment beyond the arm at the shoulder and the consequent right to PPD benefits awarded under § 8-42-107(8)(c). Whether the claimant met the burden of proof presents an issue of fact for determination by the ALJ. *Delaney v. Industrial Claim Appeals Office,* 30 P.3d 691 (Colo. App. 2001); *Johnson-Wood v. City of Colorado Springs, supra.*

Claimant's functional impairment due to his May 26, 2017 left shoulder injury, by a preponderance of the evidence, is found to extend beyond the arm at the shoulder. Claimant has pain and discomfort in the primary site of his injury to the left shoulder and pain and discomfort that refers out into musculature beyond the arm at the shoulder. The referred pain and muscular discomfort from his left shoulder can be expected as a result of the type of surgical procedure Claimant underwent. Although has no rigidity, specific lesion, or objective structural change beyond the arm at the shoulder, Claimant has established by preponderant evidence that he has pain and discomfort beyond the arm at the shoulder that cause some functional impairment beyond the arm at the shoulder. His injury, pain, and discomfort limit his overhead usage of the left arm and limit the usage of surrounding muscles that extend beyond the arm at the shoulder. Thus, Claimant has established by a preponderance of the evidence that his 3% scheduled left shoulder impairment should be converted to a 2% whole person impairment rating for his May 26, 2017 left shoulder injury.

Medical Maintenance Benefits

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

In cases where the respondents file a final admission of liability admitting for ongoing medical benefits after MMI they retain the right to challenge the compensability, reasonableness, and necessity of specific treatments. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Ford v. Regional Transportation District,* W.C. No. 4-309-217 (ICAO February 12, 2009). The question of whether the claimant proved that specific treatment is reasonable and necessary to maintain his condition after MMI or relieve ongoing symptoms is one of fact for the ALJ. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Claimant has failed to meet his burden to establish that a gym membership is reasonable and necessary to maintain his condition after MMI or to relieve his ongoing symptoms. Claimant did not explain why the home exercise program needs to be completed in a gym and why the exercises cannot be completed at home. There is insufficient evidence in the record to establish that a gym is necessary to complete his continued home exercises program.

Temporary Partial Disability Benefits and Termination

Claimant requested the ALJ order additional temporary partial disability benefits based only on Claimant's argument that Claimant's average weekly wage should have been higher and thus the benefits should be higher. As found above, the ALJ has declined to increase the average weekly wage and found Claimant's average weekly wage argument not persuasive. Therefore, the temporary partial disability benefits will not be adjusted or increased as requested.

Respondents requested that the ALJ find Claimant was responsible for the termination of his employment on July 10, 2017 and thus argued that Claimant is not entitled to benefits after that date. Section 8-42-103(1)(g), C.R.S., and § 8-42-105(4)(a), C.R.S., provide that if a temporarily disabled employee "is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." Because these statutes provide a defense to an otherwise valid claim for TTD benefits, the respondents shoulder the burden of proof by a preponderance of the evidence to establish each element of the defense. *Gilmore v. Industrial Claim Appeals Office,* 187 P.3d 1129 (Colo. App. 2008); *Brinsfield v. Excel Corp.,* W.C. No. 4-551-844 (I.C.A.O. July 18, 2003). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002), the court held the term "responsible" as used in the termination statutes reintroduces the concept of fault as it was understood prior to the Supreme Court's decision in *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Consequently, the concept of fault used in the unemployment insurance context is instructive. Fault requires a volitional act or the exercise of some control in light of the totality of the circumstances. *Padilla v. Digital Equipment Corp.,* 902 P.2d 414 (Colo. App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995); *Brinsfield v. Excel Corp., supra.*

Violation of an employer's policy does not necessarily establish the claimant acted volitionally with respect to a discharge from employment. *Gonzales v. Industrial Commission,* 740 P.2d 999 (Colo. 1987). However, a claimant may act volitionally if he is aware of what the employer requires and deliberately fails to perform accordingly. *Gilmore v. Industrial Claim Appeals Office, supra*. This is true even if the claimant is not specifically warned that failure to comply with the employer's expectations may result in termination. *See Pabst v. Industrial Claim Appeals Office,* 833 P.2d 64 (Colo. App. 1992). Ultimately, the question of whether the claimant was responsible for the termination is

one of fact for determination by the ALJ. *Gilmore v. Industrial Claim Appeals Office, supra.*

As found above, Claimant violated employer's attendance and tardiness policy. Claimant accumulated 10 points for repeated violations of the policy. Claimant presented no testimony or evidence surrounding these violations documented by Employer. Respondents established through evidence that Claimant accumulated these points, leading to his termination, on multiple dates. There are no medical records indicating sleep problems interfering with work attendance. Respondents have established, by a preponderance of the evidence that Claimant was responsible for his termination from employment on July 10, 2017 and that the resulting wage loss is not attributable to his injury.

ORDER

IT IS HEREBY ORDERED that:

1. Respondents have overcome by clear and convincing evidence DIME physician Dr. Higginbotham's opinion on Claimant's permanent partial disability impairment causally related to Claimant's May 26, 2017 injury.

2. Claimant is not entitled to a rating for his right shoulder or cervical spine.

3. Claimant's left shoulder rating is 2% whole person impairment.

4. Claimant's average weekly wage is $862.03 and he is not entitled to an increase in temporary partial indemnity benefits, as his AWW has not been increased.

5. Claimant has failed to establish by a preponderance of the evidence that a gym membership is reasonable and necessary as a specific medical maintenance benefit.

6. Respondents have established by a preponderance of the evidence that Claimant was responsible for his termination on July 10, 2017 and that the resulting wage loss is not attributable to the injury.

7. All other issues not determined are reserved for future determination.

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

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

DATED: January 31, 2019

/s/ Michelle E. Jones

_____

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

ISSUES

I. Whether Respondent overcame the DIME physician's opinion on permanent impairment.

II. Determination of Claimant's permanent impairment rating.

III. Whether Claimant proved by a preponderance of the evidence he is entitled to medical maintenance benefits.

IV. Whether Respondent provided by a preponderance of the evidence they are entitled to an overpayment in the amount of $13,126.42 for payment of temporary total disability ("TTD") benefits.

PROCEDURAL HISTORY

Hearing in this matter took place on September 18, 2018. On October 2, 2018, Claimant filed an Opposed Motion to Allow DIME Doctor to Review Hearing Transcript, requesting that Dr. Gray be permitted to review the hearing transcript prior to his post-hearing deposition scheduled for October 9, 2018. Claimant argued Dr. Gray should have the opportunity to review the hearing transcript in order to have a better understanding of Claimant's horse riding activities as they related to his determinations. On October 3, 2016, Respondent filed an Objection to Claimant's Opposed Motion to Allow DIME Doctor to Review Hearing Transcript, arguing the DIME doctor should not be provided the transcript because it would require him to make liability assessments, credibility assessment and resolve issues of fact. On October 4, 2018, Claimant filed a response to Respondent's objection, reiterating his request. The motion, response and reply were not forwarded to the ALJ Cayce until October 15, 2016. ALJ Cayce subsequently denied the motion as moot, as the deposition had already taken place. No further motions were received regarding the matter.

FINDINGS OF FACT

1. Claimant is a 46 year old right-hand-dominant male who worked for Employer as a traffic technician.

2. On February 2, 2015, Claimant sustained an admitted industrial injury when he slipped on a street sign covered with snow and fell on his left side. Claimant testified at hearing his initial symptoms were sore ribs, left-sided neck pain and left arm pain.

3. Claimant presented to Robert Broghammer, M.D. on February 5, 2015 with complaints of pain in the anterior left shoulder and across his chest and left flank. No complaints of neck pain were noted. Dr. Broghammer assessed Claimant with left

shoulder and upper flank pain and pectoral strain. Claimant began physical therapy and working modified duty.

4. On March 13, 2015, Claimant underwent a left shoulder MRI which revealed a supraspinatus small anteromedial footplate tear 2 x 4 x 3 mm, a small spur of the acromion, and mildly thickened capsule.

5. On April 7, 2015, Claimant reported shoulder pain with reaching out and forward flexion. Dr. Broghammer noted, "[Claimant] is asking if he can begin riding his horse again. He had previously called the clinic to discuss this with Anisha, our case manager, that he is not cleared to ride or participate in equestrian activities because of his shoulder problem." Dr. Broghammer continued Claimant's restrictions, limiting reaching overhead and away from the body.

6. On April 21, 2015, Claimant presented to Steven E. Horan, M.D. for an orthopedic evaluation. Claimant reported 7/10 pain in his left shoulder and neck stiffness. Claimant reported being unable to sleep on his left shoulder, with flexion and abduction being "really, really difficult for him," but also reported that his symptoms did not really interfere with his activities of daily living. Dr. Horan reviewed Claimant's MRI, noting it "clearly showed four-point type tear where the insertion of the supraspinatus has clearly peeled off the humeral head." He assessed Claimant with a rotator cuff tear and recommended surgery.

7. Claimant's care was subsequently transferred from Dr. Broghammer to William H. Miller, M.D. Claimant presented to Dr. Miller on April 24, 2015 with complaints of decreased shoulder range of motion and left trapezius pain. Dr. Miller noted, "[Claimant] is an avid horse rider, but has not done this since the injury." His continued restrictions between April 24, 2015 and September 9, 2015 were no use of the left arm. On physical exam, Dr. Miller noted markedly decreased left shoulder range of motion with cervical motion preserved, and diffuse tenderness about the shoulder girdle. He assessed Claimant with a partial rotator cuff tear.

8. Claimant testified at hearing he is an avid horse rider, having ridden horses since the age of six. Claimant and his son own three horses. Claimant testified he finds horse riding to be a major stress reliever, and rides approximately once per week. Claimant testified he returned to riding horses approximately one to two months after the initial work injury despite being aware he was not released by his physicians to do so at the time. Claimant testified that manipulating his well-trained horses is not physically demanding for him due to his experience, and that he has never fallen off of a horse. At hearing, Claimant demonstrated the positioning of his arms while riding a horse, holding both arms at his sides at 90-degree angles.

9. Claimant further testified he has competed in rodeo competitions since the age of 10 or 11. Claimant's primary event is team calf roping, which involves two participants, a heeler and a header. Claimant participates as the heeler. The header is responsible for roping the calf around the head and turning the calf, while the heeler is responsible for roping the calf's hind feet. Claimant testified he rides approximately 20 miles per hour during the team roping competitions. Claimant testified calf roping is not physically

demanding and does not require exertion of his left arm, as he relies on the horse's movement.

10. At hearing, Claimant acknowledged participating in a team roping event in the Commissioner's Classic Team Roping Hall of Fame on August 8, 2015. Claimant identified himself in two photographs taken at the event, both showing Claimant on a horse using both arms to rope a calf.

11. There is no indication in the record Claimant's treating physicians were aware Claimant had returned to participating in rodeo activities at the time.

12. On August 24, 2015, Dr. Horan performed an extensive arthroscopic debridement and mini open rotator cuff repair with partial accompanying acromionectomy on Claimant. Claimant subsequently participated in post-operative physical therapy. Claimant continued to experience symptoms.

13. On January 6, 2016, Dr. Horan opined Claimant was suffering from adhesive capsulitis and recommended manipulation under anesthesia, which Claimant underwent on January 28, 2016.

14. On April 28, 2016, a record from Medical Massage of the Rockies noted complaints of left shoulder and neck pain. Under objective findings, the record notes Claimant "is still point tender but improving slightly around clavicle, moderate pressure to all areas with light stretching to the neck."

15. Claimant subsequently transferred care from Dr. Horan to orthopedic surgeon David J. Schneider, M.D. Claimant first presented to Dr. Schneider on May 2, 2016 with complaints of stiffness, pain and instability. Dr. Schneider noted that an April 21, 2016 left shoulder MRI revealed labral tearing with high-grade tearing of the anterior posterior bands of the inferior glenohumeral ligament. He assessed Claimant with shoulder instability and pain and suspected Claimant was suffering from an infection. He recommended Claimant undergo blood work and a left shoulder arthroscopy.

16. On May 4, 2016, Dr. Miller assessed Claimant with a partial tear of the left rotator cuff and adhesive capsulitis.

17. On May 17, 2016, Dr. Schneider performed a left shoulder arthroscopic synovectomy, multiple deep culture and manipulation under anesthesia. Claimant was placed on restrictions of no pushing, pulling, lifting, reaching, or overhead work with his left arm.

18. On June 2, 2016, Sonali Hemachandra, M.D. examined Claimant's left shoulder and noted, "obvious muscle wasting about the trapezius and upper arm, and "exquisite tenderness and palpation all over the shoulder joint." Claimant was diagnosed with a P. Acnes infection and treated with antibiotics.

19. In July 2016, Dr. Miller placed Claimant on restrictions of five pounds reaching overhead and away from the body with his left upper extremity.

20. Claimant's name is referenced in a July 22, 2016 newspaper article in the White Mountain Independent regarding the results of a Pikes Peak or Bust Rodeo in Colorado Springs, Colorado that took place on July 13-16, 2016. Claimant's name is listed with another individual under the team roping category. Claimant testified he knows the individual listed and has participated in team roping competitions with that individual on other occasions; however, Claimant contends he did not participate in any rodeo competition in 2016 and believes the article is incorrect.

21. Claimant engaged in physical therapy throughout the remainder of 2016, as well as treatment that provided "ongoing transient relief." On September 9, 2016, a Medical Massage of the Rockies note documents complaints of pain in Claimant's left shoulder and neck. The record states under objective findings "all neck muscles hypertonic, also medial scapula muscles hypertonic. Mod. to deep massage in all areas with stretching the neck."

22. On March 2, 2017, L. Barton Goldman, M.D. saw Claimant upon the referral of Dr. Miller for evaluation of possible chronic regional pain syndrome ("CRPS"). Dr. Goldman opined Claimant did not have CRPS, but suggested Claimant might benefit from a round of trigger point injections.

23. On May 18, 2017, Allison M. Fall, M.D performed an Independent Medical Examination ("IME") at the request of Respondent. On examination, Dr. Fall noted unrestricted cervical range of motion per her visual inspection and no significant hypertonicity in the left upper trapezius or cervical paraspinals. She noted the following left shoulder range of motion measurements: 90 degrees of flexion, 35 degrees of extension, 80 degrees of abduction, 45 degrees of adduction, 50 degrees of internal rotation, and 50 degrees of external rotation. Dr. Fall opined Claimant reached maximum medical improvement ("MMI") as of May 18, 2017. She recommended follow-up with physicians pertaining to any infection, but did not find any indication for ongoing chiropractic or other treatment. Dr. Fall's report states the impairment rating was calculated on an accompanying worksheet, which was not introduced as evidence.

24. On July 26, 2017, Dr. Miller released Claimant to ride horses and assigned permanent restrictions of no lifting or carrying over 30 pounds and no reaching overhead or away for his body over five pounds.

25. Dr. Schneider placed Claimant at MMI on July 31, 2017, noting Claimant's continued low level of pain was his "new normal."

26. Dr. Miller placed Claimant at MMI on August 30, 2017. Claimant reported ongoing pain, stiffness, headaches, cramps, and a "new complaint" of neck pain. Dr. Miller noted Claimant did not have prior cervical complaints. Dr. Miller documented that Claimant had transient relief from his chiropractic treatment, with no functional gains after more than 20 sessions. He further noted trigger point injections were being considered, while no follow-up was warranted for any infection.

27. Dr. Miller performed an impairment evaluation on September 20, 2017. Claimant reported ongoing discomfort and decreased motion in the left shoulder, and

left-sided neck pain. Dr. Miller noted the neck pain was first voiced by Claimant to him on August 30, 2017, and there were no prior cervical complaints. On examination, Dr. Miller noted grossly intact cervical motion with discomfort. Left upper extremity range of motion measurements were as follows: 90 degrees of flexion, 30 degrees of extension, 70 degrees of abduction, 30 degrees of adduction, 0 degrees of internal rotation, and 90 degrees of external rotation. Dr. Miller assessed 15% upper extremity impairment after subtracting the contralateral shoulder impairment (4%) for purposes of normalization. He released Claimant with permanent work restrictions and recommended 25 sessions of ongoing chiropractic care, a six-month pool pass, trigger point injections, and a visit with Dr. Schneider as maintenance treatment.

28. Respondent filed a Final Admission of Liability ("FAL") on November 7, 2017 admitting for Dr. Miller's 15% upper extremity rating and reasonable, necessary and related post-MMI medical treatment. The FAL notes an overpayment of $9,341.26.

29. Claimant filed an Objection to the Admission and a Notice and Proposal to Select an Independent Medical Examiner on November 22, 2017.

30. Stephen Gray, M.D. performed a DIME on March 5, 2018. Claimant reported constant pain in his left shoulder radiating into his neck and occipital area, as well as numbness, tingling and weakness in the left upper extremity. Regarding his medical record review, Dr. Gray noted multiple medical records contained reports of neck stiffness, neck pain, left trapezius pain, and headaches as early as April 24, 2015. On examination of Claimant's neck, Dr. Gray noted diffuse tenderness over the entire left side of the neck up to the occiput, over the scalenes, and essentially over the entire trapezius muscle area with no trigger points. On examination of the left shoulder, Dr. Gray noted tenderness and pain throughout the left shoulder region, with no significant evidence of muscle atrophy in the left shoulder girdle area. Cervical range of motion measurements, as taken with double inclinometers, were as follows: flexion 63 degrees, extension 53 degrees, right lateral flexion 61 degrees, left lateral flexion 61 degrees, right rotation 86 degrees, and left rotation 87 degrees. Left shoulder range of motion measurements, as taken with a goniometer, were as follows: 70 degrees flexion, 28 degrees extension, 46 degrees adduction, 75 degrees abduction, 11 degrees internal rotation, and 75 degrees external rotation.

31. Dr. Gray opined Claimant reached MMI on July 31, 2017 with permanent restrictions. Dr. Gray assigned 13% left upper extremity impairment (8% whole person) for range of motion limitations after subtracting for the contralateral impairment (5%) for purposes of normalization. Dr. Gray opined Claimant's impairment should be considered on a whole person basis "due to the significant involvement of shared musculoskeletal structures proximal to the glenohumeral joint." He recommended an isolated cervical range of motion impairment as there was no direct injury to the neck. He assigned 2% whole person impairment due to cervical spine range of motion loss, secondary to the left shoulder injury.

32. As maintenance care, Dr. Gray recommended Claimant be afforded "quarterly follow-up visits with a Level II Accredited physician." He also recommended four

injections per year, two to four limited courses of physical therapy or manipulative therapy, and yearly follow-up visits with his surgeon.

33. Respondent filed an Application for Hearing on April 18, 2018, which became the subject of the hearing held on September 18, 2018.

34. On June 27, 2018, Claimant returned to Dr. Miller with complaints of progressive bilateral upper extremity paresthesias radiating into his arms and fingers. Dr. Miller again noted Claimant reported new symptoms of neck pain to him on August 30, 2017, had no prior cervical complaints, and did not have complaints of paresthesias into the upper extremities at that time. He referred Claimant for a cervical spine MRI.

35. On July 3, 2018, Dr. Fall reviewed additional records including, *inter alia*, Dr. Gray's DIME report, photos of Claimant's August 8, 2015 rodeo competition, and the newspaper article regarding the July 2016 rodeo competition. Dr. Fall opined Claimant's rodeo activities were significant and raised the question as to the etiology of Claimant's worsening symptoms. Dr. Fall opined Dr. Gray's 2% cervical impairment rating was in error, noting Dr. Gray was not aware of Claimant's rodeo activity, his bilateral rotation was greater than normal, and his cervical motion limitation was more likely related to underlying degenerative changes and a history of rodeo activity than a separate shoulder injury. She opined that recommendations for a pool pass, ongoing chiropractic treatment, and a cervical MRI were not reasonable, necessary or related to the work injury.

36. On July 18, 2018, Dr. Miller issued a letter clarifying the basis for his recommendation of a cervical MRI. Dr. Miller opined Claimant's cervical symptoms were not related to the February 2015 work injury, and explained that his request for a cervical MRI was not meant as maintenance care. He further explained that the purpose of the cervical MRI was to assess Claimant's cervical complaints, and additional evaluation and treatment for Claimant's cervical symptoms should occur outside of the workers' compensation system.

37. Dr. Fall performed a follow-up IME on August 8, 2018. Claimant reported soreness in both arms, neck and shoulders, spasms, and weakness. Dr. Fall spoke with Claimant regarding his participation in rodeo competitions. Claimant reported to Dr. Fall he participated in one rodeo competition after his work injury, but no others after his first surgery. On examination, Dr. Fall noted increased pain behaviors with self-limited range of motion measurements. Left shoulder active range of motion measurements were as follows: flexion 85 degrees, extension 30 degrees, abduction 70 degrees, adduction 40 degrees, internal rotation 40 degrees, and external rotation 50 degrees. Dr. Fall noted there was no crepitus, muscular wasting in the thoracic area, trigger points, or spasming. Claimant reported pain in the bilateral upper trapezii. Dr. Fall noted cervical range of motion "upon casual observation" did not appear restricted. Dr. Fall continued to opine Claimant reached MMI as of May 18, 2017 with the same impairment rating she assessed on that date. She opined Claimant's functional deficit as related to his initial work injury was only to the shoulder and not proximal to the shoulder. Dr. Fall

again opined Claimant's cervical symptoms were not causally related to the mechanism of injury and Claimant is not entitled to maintenance treatment.

38. Dr. Fall testified at hearing as a Level II accredited expert in physical medicine and rehabilitation. Dr. Hall testified consistent with her IME reports. Dr. Fall agreed with Dr. Gray's date of MMI. Regarding cervical impairment, Dr. Fall explained that, in circumstances where there is significant enough involvement of the soft tissues of the neck, an impairment for loss of range of motion can be imposed without a Table 53 rating, pursuant to the AMA Guides. She continued to opine, however, that Dr. Gray erred in assigning 2% cervical impairment in Claimant's case, as neck pain was not documented until August 30, 2017. Dr. Fall stated Claimant's rodeo activities could have an effect on his spine, although she is unable to say within a reasonable degree of medical probability that Claimant's participation in the rodeo caused problems to his cervical spine. She testified there was not any loss of function proximal to the glenohumeral joint, and Claimant's functional limitation was limited to the shoulder. She stated Claimant did not achieve functional gains or benefit from his treatment, as Claimant's complaints are now worsening and widespread. Dr. Fall testified further treatment is not reasonable, necessary or related to Claimant's work injury.

39. Dr. Gray testified by post-hearing deposition. Dr. Gray testified as a Level II accredited expert in occupational medicine. Dr. Gray initially testified consistent with his DIME report. However, on cross-examination, Dr. Gray changed his opinion on impairment upon being shown photographs of Claimant engaged in team calf roping on August 8, 2015 and the July 2016 newspaper article. Dr. Gray stated he had not before seen the photographs and Claimant had not informed him of his involvement in rodeo activity. He testified he was surprised Claimant would engage in team roping activities after surgery was deemed necessary and approved, and team roping activity would not be indicated if surgery was necessary. Dr. Gray further testified it surprised him Claimant would engage in team roping activity after undergoing revision of the shoulder surgery on May 17, 2016. He testified such activity would not be medically indicated.

40. Respondent's counsel informed Dr. Gray of Claimant's description of the team roping activity at hearing, stating:

> And [Claimant] himself testified that in team roping, which is the activity that he was engaged in, there is one person who is working on the – there is a header and heeler. One person is working on the head of the cow and gets it out, and then the heeler tries to rope the back. And he testified that he was riding about 20 miles per hour, he was roping the calf with one arm, and he was holding on to the horn of the saddle with the other.

[Dep. Transcript pp. 16:18-25, 17:1]

41. Dr. Gray stated he could not determine the structural impact of Claimant's rodeo activity on the whole person and surrounding structures. However, he repeatedly testified his opinion on impairment had now changed with the knowledge of Claimant's participation in rodeo activities:

A: And – but I'll just give you right up front that knowing what I know now, even if only part of it is true, I would say that if I had than I probably wouldn't have gone the extra mile on the impairment rating.

Q: So you would not assess the 2 percent?

A: I would – I would correct that back and probably take that away, right, because there are too many unknowns here.

[Dep. Transcript p. 19:15-23]

* * *

Q: I think you also indicated that you thought the 2 percent was appropriate because of his post surgery activity. Would seeing these photos change your mind about post surgery activity?

A: Absolutely.

[Dep. Transcript p. 20:17-21]

* * *

Q: But you would retract the 2 percent cervical rating?

A: Yeah, I think I would. I don't think that is far. I don't think that was – that is not fair considering all the knowledge I've gained.

[Dep. Transcript p. 23:7-11]

42. On re-direct, Claimant's counsel informed Dr. Gray of Claimant's testimony that Claimant has been participating in calf-roping since he was a child, purported to be very comfortable participating in the activity, and mainly uses his right upper extremity when doing so. Claimant's counsel further informed Dr. Gray of Claimant's testimony that he did not participate in rodeo activities in 2016 and that the July 2016 newspaper article is incorrect. In response, Dr. Gray testified,

A: …even if he didn't do the activity in 2016, I think that the activity that he did in 2015 confounds the issues very significantly. And the end result of that, either way, is going to be my not feeling so strongly about the 2 percent.

Because, you know, knowing that he is going on doing that sort of activity, not just that he is taking the risk, but the fact that that activity is going to cause micro tears and certainly not – not recommended by the doctors, it is still going to – I'm not going to – even without the 2016 stuff, I am not going to change my now new

> opinion that the 2 percent was kind of going overboard, not knowing all of the facts.

[Dep. Transcript p. 25:9-22]

Dr. Gray further testified that Claimant "has had pretty had pretty extreme activities before and after his surgeries, and I just think that that – I would not have gone down that road with the 2 percent if I had known that." [Dep. Transcript p. 25:9-22]. Dr. Gray opined Claimant was not entitled to a whole person rating.

43. Dr. Gray stated he no longer felt strongly that Claimant should receive injections as maintenance care, but continued to opine ongoing maintenance care was appropriate in the form of pain medications and annual visits with Claimant's surgeons.

44. Helen Sullivan works as the adjuster on Claimant's claim. She testified at hearing Claimant continued to be paid temporary total disability ("TTD") benefits after being placed at MMI at August 30, 2017 because no impairment rating had been issued at the time. Ms. Sullivan testified that, although an impairment rating was subsequently issued by Dr. Miller on September 20, 2017, Respondent did not receive the impairment rating report until on or around October 25, 2017, and that during such time Claimant continued to be paid TTD benefits. Per the FAL, Ms. Sullivan calculated an overpayment of $9,341.26 of TTD benefits between the time Claimant placed at MMI and when Respondent received the impairment rating report. She further testified that, based on the MMI date assigned by DIME physician Dr. Gray, an additional overpayment of $3,784.79 exists for TTD paid for the 31 days between July 31, 2017 and August 30, 2017. Respondent contends it is entitled to a total overpayment of $13,126.42.

45. Ms. Sullivan further testified that, as of August 2018, Claimant completed 25 sessions of chiropractic care. She stated when Dr. Miller recommended Claimant undergo a neck MRI, she requested a Rule 16 review and denied additional medical maintenance care.

46. Claimant testified he continues to experience headaches, weakness in his arm, and spasms and twitching on the left side of his neck into his shoulder. Clamant further testified he felt relief as a result of the chiropractic treatment.

47. The ALJ finds that Dr. Gray changed his DIME opinion on impairment originally expressed in his March 5, 2018 DIME report. Per his testimony under oath at his post-hearing deposition, Dr. Gray's revised opinion on impairment is that Claimant sustained 13% upper extremity impairment, with no whole person impairment.

48. On the issue of scheduled impairment, the ALJ credits the opinion of Dr. Gray over that of Dr. Miller, and finds the preponderant evidence establishes Claimant sustained 13% scheduled upper extremity impairment.

49. The ALJ credits the opinions of Drs. Miller, Fall and Gray over the testimony of Claimant and finds Claimant did not sustain functional impairment beyond the shoulder.

Claimant failed to provide by a preponderance of the evidence he is entitled to conversion of his scheduled impairment to whole person impairment.

50. Respondent has established it is more probably true than not it is entitled to recover an overpayment in the amount of $13,126.45, as Claimant received such amount in TTD benefits after being placed at MMI.

51. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

Overcoming the DIME on Permanent Impairment

The DIME physician's findings include his or her subsequent opinions, as well as his or her initial report. *Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328, 330 (Colo. App. 2005). If a DIME physician issues conflicting or ambiguous opinions concerning MMI or impairment, it is the ALJ's province to determine the Division IME's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000); *Rainwater v. Sutphin*, WC 4-815 042-04 (ICAO September 9, 2014).

While a DIME physician's opinion on MMI and non-scheduled impairment must be overcome by clear and convincing evidence, no statutory or presumptive weight is given to a DIME physician's opinion on a scheduled impairment rating. *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000). A party disputing the impairment rating of a scheduled injury bears the burden of proof by a preponderance of the evidence. *Maestas v. American Furniture Warehouse*, W.C. No. 4-662-369 (June 5, 2007); *Ortiz v. Ingersoll-Rand Co*., W.C. No. 4-981-218-04 (January 25, 2018). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001).

Dr. Gray initially opined Claimant sustained 13% left upper extremity impairment and 2% cervical whole person impairment. Upon being presented with evidence of Claimant's participation in rodeo activities in 2015 and 2016, Dr. Gray subsequently revised his opinion in post-hearing deposition testimony. Dr. Gray testified that, even if Claimant did not participate in rodeo activities in 2016 as claimed, the 2015 activities alone sufficed to "confound" the issues and serve as a basis for retraction of the 2% whole person impairment he initially assessed. Dr. Gray was unambiguous regarding his revised opinion on impairment. As found, Dr. Gray's true opinion is that Claimant is solely entitled to 13% upper extremity impairment with no whole person impairment.

Claimant argues that, despite Dr. Gray's revised opinion, a 2% whole person impairment for the cervical spine is appropriate. Claimant contends he was unduly prejudiced by Respondent's presentation of pictures and articles regarding Claimant's 2015 and 2016 rodeo activities to Dr. Gray during the post-hearing deposition. Claimant purports Dr. Gray had no context for Claimant's involvement in the rodeo and would have been in a better position to fairly assess the role calf-roping played in Claimant's injury had Dr. Gray read the hearing transcript. The ALJ disagrees Claimant was unduly prejudiced under the circumstances. Claimant identified himself in pictures showing Claimant during the actual competition. Respondent's counsel explained Claimant participated in team roping as a heeler, and what that entailed, based on Claimant's description at hearing. Claimant's counsel informed Dr. Gray of Claimant's extensive experience riding horses, and also apprised him of Claimant's contention that calf roping does not require much use of his right arm and that he did not participate in

rodeo activities in 2016. Dr. Gray specifically stated that, even if Claimant did not participate in rodeo activities in 2016 as alleged, Claimant's participation in 2015 confounded the issues enough to cause him to retract the 2% cervical impairment. Dr. Gray was provided sufficient context for Claimant's involvement in rodeo activities during the deposition.

The ALJ is most persuaded by Dr. Gray's opinion on impairment. The preponderant evidence establishes Claimant sustained 13% upper extremity impairment.

Conversion of Scheduled Impairment to Whole Person Impairment

Section 8-42-107(2)(a), C.R.S., provides for scheduled compensation based on "loss of an arm at the shoulder." The claimant bears the burden of proof by a preponderance of the evidence to establish functional impairment beyond the arm at the shoulder and the consequent right to PPD benefits awarded under § 8-42-107(8)(c), C.R.S. Whether the claimant met the burden of proof presents an issue of fact for determination by the ALJ. *Delaney v. Industrial Claim Appeals Office,* 30 P.3d 691 (Colo. App. 2001); *Johnson-Wood v. City of Colorado Springs,* W.C. No. 4-536-198 (ICAO June 20, 2005).

As used in these statutes the term "injury" refers to the part or parts of the body that sustained the ultimate loss, not necessarily the situs of the injury itself. Thus, the term "injury" refers to the part or parts of the body that have been functionally disabled or impaired. *Warthen v. Industrial Claim Appeals Office,* 100 P.3d 581 (Colo. App. 2004); *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996). Under this test the ALJ is required to determine the situs of the functional impairment, not the situs of the initial harm, in deciding whether the loss is one listed on the schedule of disabilities. *Strauch v. PSL Swedish Healthcare System, supra.* Pain and discomfort that limit the claimant's use of a portion of the body may constitute functional impairment. *Johnson-Wood v. City of Colorado Springs, supra; Vargas v. Excel Corp.,* W.C. No. 4-551-161 (ICAO April 21, 2005). The ALJ may also consider whether the injury has affected physiological structures beyond the arm at the shoulder. *Brown v. City of Aurora,* W.C. No. 4-452-408 (ICAO October 9, 2002).

Claimant failed to prove by a preponderance of the evidence he is entitled to conversion of his scheduled upper extremity impairment to whole person impairment. Dr. Miller and Dr. Fall credibly opined Claimant's cervical complaints are unrelated to the work injury. Dr. Fall credibly explained Claimant's functional deficit is limited to the shoulder. While Dr. Gray initially opined Claimant's impairment should be considered on a whole person basis, he subsequently changed his opinion, concluding Claimant is solely entitled to a scheduled impairment. Despite Claimant's testimony as to his purported pain and functional limitations, based on the totality of the evidence, Claimant did not sustain any functional impairment not listed on the schedule of disabilities.

Medical Maintenance Benefits

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

Dr. Miller opined maintenance treatment in the form of ongoing chiropractic sessions, a pool pass, trigger point injections, and a follow up with Dr. Schneider is appropriate. Although Dr. Gray changed his opinion regarding the reasonableness and necessity of trigger point injections, he continued to opine maintenance treatment in the form of follow-up with surgeons and medication is reasonable, necessary and related to Claimant's work injury. Based on the totality of the credible and persuasive evidence, future medical treatment is reasonably necessary to relieve Claimant of the effects of the work injury or prevent further deterioration of his condition. Respondent retains the right to challenge the compensability, reasonableness, and necessity of specific treatments requested by Claimant.

Overpayment

Section 8-40-201(15.5), C.R.S, defines "overpayment" as "money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive, or which results in duplicate benefits because of offsets that reduce disability or death benefits payable under said articles." The Court in *Simpson* found Section 8-40-201(15.5) provides for three categories of possible overpayment: overpayments created when a claimant receives money that exceeds the amount that should have been paid, overpayments created when a claimant receives money claimant was not entitled to receive, and overpayments created when a claimant receives money that results in duplicate benefits because of offsets that reduce disability or death benefits. *Simpson v. ICAO,* 219 P.3d 354, 358 (Colo. App. 2009).

Section 8-42-105(3), C.R.S. provides that TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

As found, Respondent established by a preponderance of the evidence it is entitled to recover an overpayment in the amount of $13,126.45. The DIME physician, Dr. Gray, opined Claimant reached MMI as of July 31, 2017. Accordingly, Claimant was no longer entitled to receive TTD benefits as of that date. Between July 31, 2017 and when Respondent received Dr. Miller's impairment rating and filed a FAL, Claimant

received a total of $13,126.45 in TTD benefits to which he was not entitled. As such, Respondent are entitled to recover an overpayment from Claimant for that amount.

ORDER

It is therefore ordered that:

1. Claimant is entitled to a 13% upper extremity rating.

2. Claimant's request for conversion of the award of scheduled impairment benefits to whole person permanent physical impairment benefits is denied and dismissed.

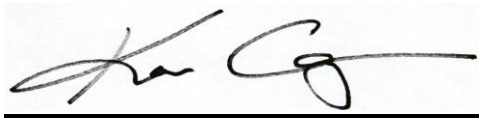
3. Respondent shall pay for reasonable, necessary and related medical maintenance care.

4. Respondent is entitled to recover an overpayment from Claimant in the amount of $13,126.45.

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

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

DATED: February 1, 2019



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-993-326-04

PROCEDURAL STATUS

A Prehearing Conference Order was issued by PALJ Harr on January 12, 2017. PALJ Harr granted Respondents' Motion to Add the Issue of Overcoming/Striking the Determination of DIME physician, Dr. Lindenbaum, based upon the allegations that Claimant violated WCRP 11. Claimant's Objection to adding the issue of overcoming the DIME physician as unripe, as closed, and as it outside the jurisdiction of an Administrative Law Judge was also added as an issue for determination at hearing. Claimant's request that his objection be treated as an attempt to have the issue struck as unripe pursuant to 8-43-211(3) was granted and preserved for future adjudication.

On August 11, 2017, Respondents filed a Motion to Add the Issue of Reopening based upon mistake. Claimant objected to that issue being added for determination at hearing.

At the August 18, 2017 hearing, the ALJ determined, based upon the procedural posture of the case, as well as a need for testimony regarding the procedural and substantive issues, an Order bifurcating the issues set for determination was in the interests of justice. Accordingly, the Court issued an Order Bifurcating the issues set for determination. The following issues were heard initially: Respondents' Motion to Add Issues at hearing; whether Respondents' requested remedy of striking the Division of Worker's Compensation IME is an available remedy under the OACRP and WCRP; whether the issue of the DIME rating was closed; whether the foregoing issues were ripe for determination.

A full Order was issued by the undersigned on May 15, 2018. A transcript of the August 18, 2017 hearing was also lodged with the Court on or about October 11, 2018. Following two status conferences (on June 18, 2018 and October 9, 2018), which were conducted with counsel for the parties, that Order was vacated and the parties were asked to submit a new proposed Order. Claimant and Respondents stipulated to the issuance of the Amended Order and requested the opportunity to present evidence on the remaining issues outlined *infra*. The Court determined it was in the interests of justice to allow Claimant and Respondents to present additional evidence on those issues.

The undersigned issued a procedural Order on September 26, 2018 for the second part of the bifurcated hearing, which added the issue of sanctions/remedy for a Rule 11 violation, if one was found. Pursuant to a Status Conference Order issued on November 1, 2018 (served November 2, 2018), the remaining issues were reserved, to be determined after the second day of hearing.

PRELIMINARY FINDINGS OF FACT

1. Claimant worked as an Assistant Principal for Employer.

2. Claimant's medical history was significant in that he previously injured his low back in 2012 in a motor vehicle accident. An MRI done in May 2012 revealed Claimant had grade 1 spondylolisthesis at the L5-S1 level, with bilateral pars defect. Moderate foraminal stenosis was also noted at this level.

3. On August 14, 2012, Claimant underwent surgery for his low back, which was performed by Hooman Melamed, M.D. The procedure performed included: partial L5 and S1 semicorporectomy (anterior retroperitoneal approach); anterior lumbar interbody arthrodesis at the L5-S1 level; anterior lumbar segmental instrumentation and L5-S1, using RSB interbody plate; insertion of the biomechanical RSB cage with 12-decree lordosis; use of local harvested autograph and allograft bone; iliac crest bone grafting on the left side, separate procedure, separate incision and modifying up to 59; use of intraoperative fluoroscopy in multiplane; use of intraoperative somatosensory evoked potential and electromyographic monitoring. The pre-and post diagnoses were: grade 1 isthmic spondylolisthesis at L5-S1 level; bilateral L5-S1 pars defects; bilateral foraminal stenosis; left leg pain, radiculitis, and sciatica; significant left L5 radiculitis; neurologic deficits in the L5 distribution on the left side; failed conservative management; and progressive worsening of the patient's symptoms of low back pain.

4. Claimant was involved in an altercation in 2014 while working. He underwent an MRI on September 17, 2014, which was ordered because of trauma and weakness in the lumbar spine. The MRI, which was read by Jaime Contreras, M.D., showed no acute findings and the anterior fusion at L5-S1, with grade one anterolisthesis of L5 on S1. Bilateral foraminal stenosis was noted at this level. The other lumbar levels were unremarkable.

5. Claimant sustained an admitted industrial injury on August 20, 2015 while working for Employer. Claimant was injured after he was struck in the parking lot by a parent in a pick-up truck.[1]

6. Claimant received treatment for his injuries, including at the North Colorado Medical Center, where he was treated in the Emergency Department.

7. On August 24, 2015, Claimant was evaluated by Jason Haas, D.C.[2] X-rays were taken and Claimant's posture and body composition was analyzed. Claimant returned to Dr. Haas' office on August 31, 2015 and received chiropractic treatments from Alisha Jacobs, D.C. Claimant's cervical, thoracic and lumbar spine were adjusted.

[1] Exhibit PP, page 477.

[2] Records of treatment with Dr. Haas before Claimant's work injury were admitted at hearing. These records included treatments on March 19, 26, May 26, August 3, 6, 13, 2015; all of which occurred before the subject injury. Claimant treated for lumbar, cervical and right foot pain, receiving chiropractic adjustments.

Claimant also received chiropractic adjustments and a physical therapy evaluation on September 2, 2015.

8. A General Admission of Liability ("GAL") was filed on September 16, 2015 Respondents admitted for medical and temporary total disability ("TTD") benefits.

9. On September 10, 2015, Dr. Melamed issued a report following a telephone conference with Claimant. The report noted Claimant was doing well until recently when he was involved in a car accident. Dr. Melamed had reviewed Claimant's MRI and the CT scan, which showed psuedoarthrosis at the L5-S1 level. The PEEK cage and plate had completely subsided into the S1 vertebral body, causing bilateral L5-S1 significant foraminal stenosis. Dr. Melamed concluded there was pseudoarthrosis and also a loss of lumbosacral lordosis. Dr. Melamed recommended a posterior pedicle screw fixation at the L5-S1, with bilateral L5-S1 foraminal decompression, requiring an osteotomy and removing the entire facet complex and the pars to open up room for the nerve. Claimant indicated he wanted to go forward with surgical intervention.

10. Claimant received treatment at the Workwell Occupational Health, the designated ATP for Employer, beginning on September 22, 2015. Claimant was evaluated by Kevin Keefe, D.O., who diagnosed sprain/strains-lumbosacral; disturbance of skin sensation. Dr. Keefe opined Claimant's problem was related to work activities and issued an M164, as well as placing Claimant on restricted duty.

11. On September 30, 2015, Claimant was evaluated by Gregory Reichhardt, M.D. On examination, Claimant demonstrated diffuse give-way weakness in the left lower extremity. His reflexes were 2/4 and symmetrical in the patellae and Achilles. Claimant had god cervical and thoracic range of motion ("ROM"). Marked limitations were found in his lumbar ROM. Dr. Reichhardt's impression was: low back pain and bilateral lower extremity pain-history of previous L5-S1 fusion for spondylytic spondylolisthesis; mechanism of injury/pedestrian-motor vehicle accident in which he was directing traffic and was hit intentionally by a truck on 8/20/15; lumbosacral spine x-rays- post-op findings at L5-S1, grade II anterolisthesis, which may be chronic; thoracic spine x-ray 8/20/15-no acute findings; pelvic x-ray 8/20/15-no acute findings; CT of the thoracic spine 9/4/15-negative for acute bony pathology; lumbar MRI 9/4/15-bilateral pars defect, L5, grade I anterolisthesis, previous interbody fusion, moderate bilateral neural foraminal narrowing, L5-S1-mild ligamentum flavum and facet overgrowth, other levels normal; CT of the lumbar spine 9/4/15: L5-S1, interior screw fixation device was well-positioned in the line, no loosening fractures, bilateral L5 spondylolisthesis, slight L5-S1 listhesis, no acute pathology; 9/29/15 thoracic MRI demonstrating a small disc extrusion T5 to T7; concern by patient's prior surgeon re: pseudoarthrosis, with osteolysis; bilateral upper extremity numbness: C-spine x-ray 8/20/15-no acute findings; C3-4 minimal disc bulge, mild bilateral foraminal narrowing, C5-6 mild disc bulge, mild left foraminal stenosis, etiology unclear; opioid use, ORT, high risk; history of Hodgkin's lymphoma; history of stomach ulcers, psoriasis of hypothyroidism; borderline renal insufficiency. Dr. Reichhardt recommended Claimant keep his evaluation by a spine surgeon and offered various referral options.

12. On December 4, 2015, Claimant was evaluated by Anant Kumar, M.D.[3] Dr. Kumar noted Claimant had an antalgic gait and used a cane. Claimant's lumbar spine had localized tenderness at L4-S1. There were no obvious motor deficits, but a subjective decrease in sensation was noted. Dr. Kumar stated Claimant had undergone and L5-S1 anterior lumbar fusion, with anterior fixation using a stand-alone plate/cage. It appeared there had been subsidence of the cage and sacrum, but Dr. Kumar did not have the immediate postoperative x-rays or imaging to compare. In 2014, an MRI showed Claimant had left-sided foraminal stenosis at the L5-S1 level and an in situ fusion at L5-S1, with associated cage subsidence. Dr. Kumar disagreed a posterior only fusion would be successful in a reduction of the spondylolisthesis. He opined a posterior decompression would not decompress Claimant's up-and-down stenosis. Dr. Kumar recommended a revision anterior followed by a posterior spinal fusion.

13. Dr. Kumar is an ATP.

14. Claimant was evaluated by Dr. Pouliot on December 21, 2015. Dr. Pouliot documented Claimant was referred by Dr. Keefe. Dr. Pouliot reviewed the MRI which showed a neural compression at L5. On examination, Claimant's sensation and proprioception were intact on the upper and lower limbs, other than slight decreased sensation on the left in the L5 distribution. Dr. Pouliot's assessment was: 44-year-old male with a work injury on August 20, 2015, reportedly struck by a vehicle speed-now with back and radicular pain bilaterally worse on left, neural compression seen at L5's MRI bilaterally. Claimant was noted to have a history of anterior lumbar interbody fusion at L4-5, with reported pseudoarthrosis and reported negative EMG. Dr. Pouliot offered bilateral L5 transforaminal injections, but felt he would need a spinal operation. Dr. Pouliot noted he would assist Claimant with medication management.

15. Claimant returned to Dr. Keefe on February 9, 2016. Dr. Keefe noted back surgery had been denied by Insurer and Claimant was deciding whether to proceed with procedure using private insurance. Dr. Keefe recommended Claimant see Dr. Mathwich regarding case closure and a potential impairment rating. Dr. Keefe opined the cause of Claimant's problem was related to work activities.

16. On February 24, 2016, Claimant underwent a posterior lumbar spine fusion at L5-S1, which was performed by Dr. Kumar. A posterior instrumented fusion using pedicle screws, local bone graft, a medium in use was performed. Dr. Kumar also did a bilateral decompression of the L5 and S1 nerve roots in the canal and sub-particular zone. Claimant's pre-and post-operative proceedings were the same and included: pseudoarthrosis at L5-S1, status post L5-S1 anterior lumbar fusion; grade 1 spondylolisthesis, with severe foraminal stenosis, bilateral lower limb radiculopathy, left worse than right; present in both upper limbs, left worse than right; inability to stand upright; severe back pain; and failure of conservative treatment.

[3] Dr. Kumar stated Claimant was referred by Insurer for an independent medical opinion. Claimant described Dr. Kumar as an ATP in his Position Statement and the referral from Dr. Pouliot was admitted as Exhibit J, p.177.

17. Dr. Kumar opined Claimant's prior L5-S1 anterior lumbar fusion had not healed appropriately and this was a revision surgery performed with no complications. Intraoperatively, Dr. Kumar found that the L5 nerve root was severely compromised and there was significant spinal stenosis in the canal, in the sub-pedicular and sub-articular zone.

18. On March 2, 2016, Claimant was evaluated by Brian Mathwich, M.D. Dr. Mathwich noted he was asked to evaluate Claimant regarding recent complications and the denial of surgery. He noted Insurer had not admitted liability for the lumbar spine and had denied the request for surgery. He spoke to Ms. Harrington, who confirmed the lumbar spine was not related. The lumbar CT and MRI showed significant issues in the lumbar spine, which was determined to be pre-existing and non-work-related. Dr. Mathwich stated Claimant underwent a conservative course of treatment.

19. At the time of Dr. Mathwich's evaluation, Claimant had complaints of bilateral arm numbness and tingling. Dr. Mathwich noted this was a difficult case due to significant pre-existing issues. Dr. Mathwich found a normal cervical spine, reviewed the neurologic and upper extremity exam from Dr. Kumar, with no further complaints from the patient regarding bilateral arm numbness. Dr. Mathwich's diagnosis was: sprain/strains-lumbosacral; disturbance of skin sensation. If there continued to be no significant issues, Dr. Mathwich would consider Claimant to be without impairment rating and would issue permanent restrictions.

20. Dr. Keefe confirmed Insurer had denied liability after speaking to Ms. Harrington and also spoke to Dr. Mathwich. Dr. Keefe determined Claimant was at MMI on March 17, 2016 and completed a M-164.

21. On April 15, 2016, an amended GAL was filed. TTD benefits were terminated based upon Claimant's return to full duty.

22. Claimant returned to Dr. Mathwich, M.D. on April 21, 2016. Dr. Mathwich said Claimant initially had discomfort in the upper extremities, with bilateral arm numbness and had a negative MRI, as well as bilateral negative EMGs. Claimant underwent surgery on February 24, 2016, which was covered by private insurance. At the time of evaluation, Dr. Mathwich found tightness in the paraspinal muscles bilaterally, with some point tenderness of the left L4-5 paraspinal muscles. Tenderness was noted, along with trigger points in the gluteus medius bilaterally, just over the iliac crest. Dr. Mathwich's diagnosis was the same as on March 2, 2016.

23. Dr. Mathwich stated the cause of this problem did not appear to be related to work activities and noted he received documentation from Insurer which said the back injury, surgery and all associated treatment were not compensable. Dr. Mathwich stated there was no choice but to keep Claimant at MMI as of March 17, 2016. He indicated he would agree to be Claimant's primary care provider, if Insurer accepted liability.

24. Respondents requested a DOWC IME and Stephen Lindenbaum, M.D. was selected as the examining physician.

25. Claimant was evaluated by Dr. Lindenbaum on July 23, 2016. At the time of the evaluation the, Claimant walked without an antalgic gait and was able to walk heel to toe without discomfort. Dr. Lindenbaum agreed with Dr. Mathwich that Claimant reached MMI on March 17, 2016. Dr. Lindenbaum noted he received records from Dr. Haas. More particularly, he stated:

> "Today, the patient brought in some records from Dr. Haas, who he had been followed prior to the injury for just basic medical and physiological well-being. The notes that were brought to me show that the patient on exams prior to the injury had range of motion of the lumbar spine of flexion over 50° and extension over 26°. The exam after the accident dating 12/28/15, which is roughly 5 months later, shows the patient only has 90° flexion and 12° of extension".

26. On examination, Claimant had no long tract signs, clonus, or atrophy in the lower extremities. He had a prior injury fusion by Dr. Melamed and advised Dr. Lindenbaum he had no problems with his back since that time, until some mild back pain related to an altercation in 2014.

27. Dr. Lindenbaum obtained valid ROM measurements during his examination. Based on the *AMA* Guides, Table 53, IIB, Claimant had a 10% impairment of the body for his specific spine disorder (lumbar spine) and a 9% range of motion deficit. Combining the range of motion deficit with the specific disorder, Dr. Lindenbaum determined Claimant sustained an 18% whole person impairment. Dr. Lindenbaum agreed with Dr. Kumar that this injury was not pre-existing and was a new injury, since he was previously asymptomatic. Dr. Lindenbaum opined that any postoperative care should have been covered under the compensation claim.

28. On August 4, 2016, the DOWC issued a Notice of Receipt of Division IME (DIME) Report DIME Process Concluded. Insurer received a copy of the Notice, as it was date stamped by its mail operations on August 5, 2016.

29. There was no evidence in the record that Respondents took any steps to procure the DIME report before August 16, 2016.

30. There was no dispute Respondents received a copy of the DIME report on August 17, 2016.

31. Pursuant to 8-42-107.2(4)(c), C.R.S., Respondents were required to either file an admission of liability or request a hearing on or before August 24, 2016.

32. On August 30, 2016, Respondents filed an Application for Hearing ("AFH"), seeking to overcome Dr. Lindenbaum's findings.[4] This was six days after the deadline for filing set by 8-42-107.2(4)(c), C.R.S. The AFH was withdrawn after Ms. Harrington discussed the case with Insurer's staff attorneys and Claimant's counsel. A Notice of Cancellation of hearing was filed, although the hearing had not been set.[5]

33. On September 12, 2016, a Final Admission of Liability ("FAL") was filed on behalf of Respondents. This was 18 days after the deadline set forth in § 8-42-107.2 (4)(c), C.R.S. Respondents admitted for PPD benefits based upon the medical impairment rating issued by Dr. Lindenbaum. Medical benefits after MMI were denied.

34. Claimant filed a timely objection to the FAL on September 15, 2016.

35. Claimant filed an AFH on October 3, 2016. The issues set for determination included medical benefits, disfigurement, *Grover* medical benefits, mileage and interest on PPD.

36. On November 16, 2016, Respondents filed a Response to the Application for Hearing ("RAH"). The issues listed included reasonableness, necessity and relatedness of any and all medical care sought and/received; authorization/authorized medical care; fee schedule; *Grover v. ICAO*. There was no reference to an alleged violation of WCRP 11 in the RAH.

37. On January 12, 2017, counsel for the parties participated in a Prehearing Conference before Prehearing Administrative Law Judge Michael Harr. PALJ Harr's Order is referenced, *supra*.

38. An AFH was filed on behalf of Claimant on February 28, 2017. The AFH listed the issues of medical benefits, disfigurement, as well as *Grover* medical benefits, mileage, and interest due on PPD.

39. A Response to the AFH was filed on behalf of Respondents on March 2, 2017. Respondents marked the following issues to be considered at hearing: medical benefits, disfigurement, permanent partial disability benefits. Other issues to be heard included reasonableness, necessity and relatedness of any and all medical care sought and/or received; authorization/authorized medical care; fee schedule; *Grover v. ICAO*; overcoming/striking the DIME; violation of Rule 11.

40. A Prehearing Conference was held on April 11, 2017 and an Order issued that same day. The Order vacated the hearing set for May 12, 2017. In addition, the Order allowed Respondents, at their discretion, to suspend payment of PPD benefits, pending a hearing. The Order also provided that if benefits remained owing after the

[4] Exhibit KK, pp. 463-465.

[5] Exhibit JJ.

hearing, Respondents were required to pay statutory interest on any amounts not paid during the duration of the suspension.

41. On April 14, 2017, Respondents filed a FAL. Respondents suspended payment of PPD benefits pending the resolution of issues at hearing.

42. On April 18, 2017, Claimant filed an Objection to the FAL.

43. On May 10, 2017, Claimant filed an AFH. He requested a hearing on the following issues medical benefits, disfigurement, along with *Grover* medicals, mileage, interest due on PPD, waiver, ripeness and closure.

44. On June 1, 2017, an RAH was filed on behalf of Respondents. The issues set for determination included medical benefits, disfigurement, and PPD benefits. Other issues include those referenced on Claimant's AFH. Respondents also sought an adjudication on reasonableness, necessity and relatedness of any and all medical care sought and/or received; authorization/authorized medical care; fee schedule; *Grover v. ICAO*; overcoming/striking the DIME; Claimant's violation of Rule 11.

FURTHER FINDINGS OF FACT

45. Dr. Haas testified JTECH is company that prepares a digital ROM assessment. The system on which this is prepared was separate from the medical record system which housed the records related to evaluations of patients.[6] The individual in his office who gathered the information for the report was Dr. Allison, the physical therapist or the PTA (Justin). Dr. Haas testified he had not reviewed Dr. Lindenbaum's report prior to the deposition. He did not have information as to what records Claimant took to the DIME.

46. Claimant brought notes documenting his ROM findings by Dr. Haas' office to the DIME, which was performed by Dr. Lindenbaum.

47. Respondents were not aware Claimant brought the ROM findings from Dr. Haas' office to the DIME.

48. Dr. Lindenbaum testified he received notes from Dr. Haas at the time of his evaluation of Claimant.[7] Dr. Lindenbaum confirmed Claimant brought these records to the evaluation.[8]

[6] Haas deposition page 16:18-25.

[7] Lindenbaum deposition page 8:14-21.

[8] Lindenbaum deposition page 8:25-9-10.

49. Dr. Lindenbaum testified in his evidentiary deposition that he did not put much weight in the documents from Dr. Haas, stating at page 9:17-10:3:

> "Well, let me preface it by saying, I didn't put very much credence in it, but I thought it was something that should be placed in my report. It just basically says--Dr. Haas is commenting that he had seen the patient before this injury, [Claimant], and his range of motion was one level. And that several months after the injury, he saw him again, and his range of motion dropped significantly.
>
> Now, let me--let me state here that this is a very-this does not mean a lot to me. Only that I think it is important to put that in here because it is a document that suggests there had been a change".

50. Dr. Lindenbaum also stated his major concerns were the findings made by orthopedic surgeons. The ALJ noted Dr. Lindenbaum concluded Claimant's medical impairment was caused by his industrial injury.

51. Dr. Lindenbaum's testimony that his opinions were not affected by review of Dr. Haas' records was persuasive to the ALJ.

52. Laura Harrington testified as a representative for Respondent-Insurer. She has been employed by Insurer as a claims adjuster for 18 years and received notice of the claim on August 25, 2015. She has been responsible for adjusting the instant claim since that time. Ms. Harrington testified she became aware of Claimant's low back condition, which required surgery in 2012, in one of her first conversations with him.

53. Ms. Harrington testified that she and Claimant exchanged the e-mails in which Claimant advised her that Benchmark would get her records. Ms. Harrington testified she sent a release for medical records to Benchmark and did not receive records. Ms. Harrington testified she did not prepare the DIME packet which was submitted to Dr. Lindenbaum. Insurer did not have a copy of Dr. Haas' JTECH records prior to the DIME. Ms. Harrington was a credible witness.

54. Ms. Harrington testified she telephoned Dr. Lindenbaum's office on August 16, 2016 and received Dr. Lindenbaum's DIME report on August 17, 2016, which was faxed to her at 3:56 p.m.[9] Insurer did not have a copy of this report prior to this time. Ms. Harrington testified she skimmed the report and believed she had 20 days from receipt of the DIME report to take a position. Ms. Harrington testified Respondents disagreed with the DIME and wished to challenge the DIME opinion.

55. The ALJ found Ms. Harrington could have determined there was a reference to Dr. Haas' ROM records in Dr. Lindenbaum's report within the time frame to take a position on the DIME. Ms. Harrington incorrectly thought the 20-day time ran

[9] Exhibit A, p.1.

upon receipt of the DIME report. An AFH could have been filed on behalf of Respondents within the 20-day period to dispute the conclusions made by the DIME physician.

56. The issues concerning the DIME were ripe for determination.

57. The Court does not have jurisdiction to adjudicate Respondents' Objection to the DIME, as the AFH was filed beyond the 20-day time limit provided by statute.

58. It is in the interests of justice to vacate the May 15, 2018 Order.

59. Testimony and evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S. (2016), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. (2016). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S. (2016).

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. (2016). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

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

RIPENESS

In the case at bench, Claimant disputed whether the issue of striking the determination of a DIME physician was ripe. The term "ripeness" refers to whether an issue is "real, immediate, and fit for adjudication". Colorado courts have held that under this doctrine "adjudication should be withheld for uncertain or contingent future matters that suppose a speculative injury which may never occur". *Olivas-Soto v. Industrial Claim Appeals Office,* 143 P.3d 1178 (Colo. App. 2006).

That is not present in the instant case. The ALJ determined that the issues related to the DIME, including Respondents' response to the Notice of Receipt of Division IME (DIME) Report DIME Process Concluded and receipt of the report of Dr. Lindenbaum were ripe for determination. (Finding of Fact 56). In addition, Respondents Motion to Strike the DIME report, as well as Claimant's assertion that § 8-42-107.2 (4) (c), C.R.S. barred any attempt to overcome the DIME physician opinions were also ripe for determination.

MOTION TO STRIKE DIME

Claimant contended Respondents' failure to request a hearing within 20 days barred Respondents' attempt to contest the DIME opinion and this Court had no jurisdiction to decide the issue. Respondents asserted that the issues admitted to in a filed FAL are closed, unless Claimant filed a timely objection, pursuant to § 8-43-203(2)(b)(II)(A). Respondents cited *Balfour v Boulder County*, W.C. No 4-020-145 (ICAO March 22, 1993) for the proposition that Respondents could then controvert their own admission of liability once the Claimant objected. Respondent further argued that it did not waive its right to contest the DIME opinion since it was not aware Claimant had provided the Dr. Haas' records to Dr. Lindenbaum.

As determined in Findings of Fact 28-30, no contrary evidence was introduced to refute the fact that Respondents received the Notice of Receipt of Division IME (DIME) Report DIME Process Concluded on August 4, 2017. Respondents were required to take a position on or before August 24, 2016 upon issuance of the Notice of Receipt of Dr. Lindenbaum's report. There was evidence in the record, specifically Ms. Harrington's testimony, that Respondent-Insurer did not have a copy of Dr. Lindenbaum's DIME report. (Finding of Fact 54). As found, Respondents took no steps to procure this report until August 17, 2016. (Finding of Fact 29). The evidence also revealed that the DIME report was not received by Respondents until August 17, 2016. (Finding of Fact 53). It was undisputed that Respondents did not have a copy of Dr. Haas' medical records (including the range of motion studies from JTECH) prior to the DIME. (Finding of Fact 30). Even though the adjuster for Insurer (Ms. Harrington) did not have JTECH report which contained the ROM readings before the evaluation, the ALJ determined she could have found the reference to those records in Dr. Lindenbaum's DIME report. (Finding of Fact 54).

The deadline set forth in § 8-42-107.2 (4) (c), C.R.S. has been held to be jurisdictional. *Leprino v. Industrial Claim Appeals Office,* 134 P.3d 475, 482 (Colo. App. 2005). In *Leprino*, Claimant suffered an admitted industrial injury and reached MMI. Claimant requested a lump sum after an FAL was filed and then requested a DIME. The DIME physician concluded Claimant was not at MMI, but Respondents took no position with regard to that opinion. The case went to hearing, the ALJ found Claimant had not reached MMI and was entitled to PPD benefits. The ALJ also determined that Respondents failed to either admit or contest liability within 30 days [the 2005 version of § 8-42-107.2 (4)] and therefore Respondents were precluded from challenging the DIME physicians' opinion.

The Colorado Court of Appeals found Respondents were bound by the DIME physician's report because they failed to contest the findings. Justice Casebolt observed:

"Both sections [§ 8-42-107.2 (4) and § 8-43-203(2)(b)(II)] are part of an overall statutory scheme designed to ensure the prompt payment of benefits without the necessity of litigation in cases that do not present a legitimate controversy. [citation omitted]. The provisions of this statute are clear and require the insurer either to contest the DIME report within thirty days or to admit in accordance with the report. *City Mkt., Inc. v. Indus. Claim Appeals Office,* 68 P.3d 601 (Colo.App.2003) [upholding the imposition of penalties for employer's failure to either contest or admit to the DIME report]. Just as an ALJ lacks jurisdiction, without a DIME, to resolve a dispute concerning an ATP's finding of MMI, *Town of Ignacio v. Indus. Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002), the ALJ also lacks jurisdiction, absent an objection to the DIME physician's findings, to resolve a dispute as to those findings". *Id* at 482.

Leprino has not been overruled and remains good law, which governs the case at bench. No contrary authority was provided to the Court. The time limit prescribed by § 8-42-107.2(4) is jurisdictional. Accordingly, Respondents' August 30, 2016 Application for Hearing was outside the jurisdictional time limit for responding to the DIME report. The ALJ determined there was no jurisdiction once the time provided for in § 8-42-107.2(4) had elapsed. In particular, the issue of whether Respondents may attempt to overcome the DIME physician's opinions by clear and convincing evidence is time-barred.

In coming to this decision, the ALJ considered the application of *Rigoberto Almanza v. Terry Johnson and R. Edeltraud Johnson*, W.C. 4-713-132-02 (ICAO December 7, 2012) to the case at bar. Citing *Leprino v. Industrial Claim Appeals Office,* 134 P.3d 475, *supra*, the Industrial Claim Appeals Panel concluded the provisions of § 8-42-107.2 (4) were jurisdictional. The Panel reversed the ALJ Order which determined Respondents had not waived their right to respond to the DIME report based on a PALJ Order which extended the time to respond. (The basis for challenging the original DIME was because there was an improper communication with the examining physician.) The Order awarding PPD benefits based upon a subsequent DIME was also set aside. The ALJ determined this case does not provide the authority to strike the DIME in its entirety, as suggested by Respondents.

Respondents also averred they did not waive the right to contest the findings of the DIME physician. Respondents correctly pointed out the requirements for waiver were not met here, as there was not a knowing, intentional and voluntary relinquishment of a known right since they were not aware Claimant brought the JTECH report to the DIME. Respondents argued they could not have waived the right to raise the issue of a Rule 11 violation because they were not aware it had occurred. The ALJ found Respondents did not have a copy of Dr. Haas' records prior to Dr. Lindembaum's DIME, which was confirmed by the testimony of Ms. Harrington. (Finding of Fact 51).

The ALJ has determined that Respondents are entitled to present evidence in support of their Petition to Reopen and/or withdrawal of the FAL. Under the particular factual circumstances of this case, the ALJ finds Respondents should be given the opportunity to present evidence on these issues at the subsequent hearing. Likewise, Claimant is entitled to present evidence on this issue.

Finally, the ALJ has determined that the question of whether Claimant violated WCRP 11 and whether sanctions should be imposed is a matter on which Claimant and Respondents may submit additional evidence at the second part of the hearing.

ORDER

It is therefore ordered:

1. The May 15, 2018 Findings of Fact, Conclusions of Law and Order is vacated.

2. The issue of Respondents' Motion to Strike the DIME is closed by virtue of § 8-42-107.2(4).

3. Claimant's Objection to Respondents adding the issue of Petition to Reopen is overruled. This issue is deemed ripe and is set for determination at the hearing following this Order.

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

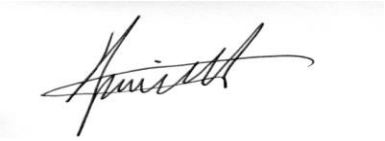
6. The following issues are ripe for determination at the upcoming hearing:

(a) Medical benefits (pre-MMI and *Grover*) and Respondents' defenses thereto;
(b) Disfigurement;
(c) Respondents' Petition to Reopen (mistake);
(d) Whether Claimant violated WCRP Rule 11;
(e) Sanctions/remedy for Rule 11 violation, if a violation is found;
(f) Interest on PPD benefits from March 27, 2016 to September 12, 2016;
(g) Resumption of permanent partial disability ("PPD") benefit payments, which were suspended pursuant to the April 11, 2017 Order.

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

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

DATED: February 4, 2019



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

ISSUES

I. Whether Claimant established by a preponderance of the evidence that he is entitled to a change of physician from Dr. Michael Volz to DaVita Medical Group due to Respondents' failure to authorize medical treatment for non-medical reasons.

II. Whether Claimant has established that Respondents are subject to penalties pursuant to § 8-43-304(1) C.R.S. for failure to comply with ALJ Spencer's March 9, 2017 Order, specifically for failing to provide all reasonable, necessary, and related care with Dr. Volz, including diagnostic testing and for failing to pay previously submitted medical billing on a "forthwith" basis to mitigate damage to Claimant's credit.

III. Whether Claimant has established by a preponderance of the evidence that Respondents are subject to penalties pursuant to § 8-43-304(1) for dictating medical care in violation of § 8-43-503(3).

IV. Whether Respondents "cured" Claimant's penalty allegations.

FINDINGS OF FACT

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

1. The claim has been the subject of a prior hearing held before ALJ Patrick Spencer on February 1, 2017. The issues presented at that hearing included Claimant's request for additional medical treatment and whether Respondents were liable for an April 19, 2016 bill from Quest Diagnostics for lab work on the grounds that the aforementioned lab work was reasonable, necessary, and causally related to Claimant's October 25, 2014 industrial injury.

2. Following the February 1, 2017 hearing, ALJ Spencer ordered Respondents to authorize and pay for omalizumab (Xolair) therapy to treat Claimant's ongoing urticarial and immunological symptoms caused by his October 25, 2014 work-related injury. ALJ Spencer also ordered Respondents to pay for additional diagnostic testing as suggested by Dr. Volz, if Claimant wanted to such testing. Finally, ALJ Spencer ordered Respondents to pay an outstanding $539.73 bill from Quest Diagnostics for lab work performed April 19, 2016. Regarding this bill, ALJ Spencer "encouraged" Respondents to pay the bill "forthwith to mitigate any further damage to Claimant's credit". The above referenced order was issued March 9, 2017.

3. The ALJ adopts, as articulated in the March 9, 2017 Order, ALJ Spencer's Findings of Fact.

4. After the hearing held before ALJ Spencer, the parties agreed to designate Dr. Volz as Claimant's authorized treating provider (ATP).[1] The change to Dr. Volz as Claimant's ATP was necessitated by the prior ATP assigned to the case leaving his medical practice.[2]

5. Based upon the evidence presented, it is unclear to the ALJ when the change of physician to Dr. Volz took place. The record evidence supports that Leigha N_____, paralegal to Respondents' counsel, responded to a request from "Sar" (Sareang S_____) of Dr. Volz' office on December 18, 2017 indicating that she (Ms. N_____) would gather the medical records and send them to Dr. Volz' office.

6. Claimant was evaluated in Dr. Volz' office on January 4, 2018. At 1:54 p.m. "Sar" emailed Ms. N_____ indicating a PFT test needed to be done and she asked how she was to get approval for said testing. Ms. N_____ responded, stating, "Everything will go through the adjuster, contact info below" and the contact information for Susan B_____ with Sedgwick CMS was provided.

7. Ms. S_____ emailed Ms. N_____ again on January 8, 2018. Ms. S_____ stated that she had attempted to contact Ms. B_____ twice already with no response. The email message states:

> **Everything is on hold as for right now until we get approval for testing**. She were (sic) suppose (sic) to send me approval for the PFT that was done on the same day, still nothing. And Dr. Volz order (sic) blood work so we are not moving forward until approval [is] received. Just an FYI since the appointment was scheduled by you. Please let me know if you hear anything from Susan. Thanks.

Ms. N_____ responded indicating she would pass the information along to Respondents' counsel.

8. The ALJ finds from the above email message and the medical records submitted into evidence that pulmonary function testing was completed during Claimant's January 4, 2018 appointment with Dr. Volz. The ALJ finds further that Dr. Volz' office was to receive approval for this testing the same day it was completed but the approval was not forthcoming. Moreover, the ALJ finds that after two additional failed attempts to obtain approval to "move forward" with additional diagnostic testing, Dr. Volz' office elected to put "everything on hold" until approval was secured. Ms. N_____ responded by noting as follows: "I will pass along to the attorney as well and see if we can help get this moving forward".

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[1] Dr. Volz had previously performed an Independent Medical Examination (IME) of Claimant on November 17, 2016.

[2] Dr. Matthew Bowdish was acting ATP until he left his medical practice at which time the parties agreed that since Dr. Volz was familiar with Claimant's medical situation and Dr. Bowdish had left his practice, it was appropriate to allow Dr. Volz to assume Claimant's care.

9. On April 10, 2018, Claimant filed an Application for Hearing endorsing "[p]enalties from March 29, 2017 through the present and ongoing pursuant to §8-43-304(1) for failure to comply with ALJ Spencer's March 9, 2017 Order that Respondents shall pay for all reasonable and necessary medical treatment to cure and relieve the effects of Claimant's injury, specifically the additional diagnostic testing suggested by Dr. Volz". Claimant sought a $1000.00/day penalty for each day that Respondents unreasonably delayed Claimant's treatment. Claimant also sought a $1000.00/day penalty pursuant to §8-43-304(1) for "dictating medical care in violation of §8-43-503(3) by repeatedly failing to respond to an authorized provider's requests for treatment. Finally, Claimant sought penalties in the amount of $1000.00/day for Respondent's failure to pay for treatment already performed. Claimant requested the imposition of penalties at $1000.00/day pursuant to §8-43-304(1) beginning January 5, 2018 and ongoing for this violation. Claimant did not include any claim for a penalty for failing to pay the Quest Diagnostic bill "forthwith" as ordered by ALJ Spencer in the April 10, 2018 Application for Hearing. Claimant also failed to endorse "Change of Physician" or "Right of Selection" as an issue for hearing in the April 10, 2018 Application for Hearing.

10. Claimant notified Respondents' counsel of his decision to file an Application for Hearing endorsing penalties. Notice was provided via email dated April 10, 2018 at 11:44 a.m. At 11:53 a.m. on April 10, 2018, Respondents counsel notified Claimant's counsel via email response that a new adjuster had been assigned to the claim as of the previous Friday. The ALJ takes judicial notice that the Friday before Tuesday, April 10, 2018 was April 6, 2018. In his responsive email Respondents' counsel identified the new adjuster as Christina Smith with Sedgwick CMS, noting further that Ms. Smith and her supervisor had authorized treatment but not the lab requests of Dr. Volz. He also advised Claimant's counsel that he spoke with Sar in Dr. Volz' office to provide her Ms. Smith's authorization for treatment and telephone number to "confirm anything necessary".

11. The evidentiary record contains a note from Ms. S_____, dated April 10, 2018 reflecting that a new adjuster had been assigned to the claim. According to this note, the claim was assigned to "Christina Smith" who could be reached at 214-922-0664. The ALJ finds this information was provided by Respondents' counsel to Dr. Volz' office per the April 10, 2018, email referenced above.

12. On April 12, 2018, Respondent's counsel sent an email to Claimant's counsel asking if he was "still having lab scheduling issues".

13. On May 1, 2018, Ms. Smith verbally authorized the use of Xolair to "rule out causation issues" as evidenced by an email message generated by Dr. Volz' office. On May 3, 2018, Ms. Smith, via email, authorized the following treatment: OV (office visit), Allergy skin testing, spirometry, and "any labs that needs (sic) to be ordered". The approval to proceed with the above was forwarded to Ms. S_____. The ALJ finds that this email effectively transmitted Insurer's authorization for the additional testing requested by Dr. Volz on January 4, 2018.

14. It was not documented that Dr. Volz's office attempted to contact Claimant for a follow-up until Ms. S_____'s note dated May 21, 2018.

15. Claimant testified that he called Dr. Volz's office multiple times after January 4, 2018 about a follow-up appointment. Claimant never returned to Dr. Volz for additional testing/treatment, as it was his understanding that the testing/treatment recommended by Dr. Volz had not been approved by Respondents. The ALJ finds this consistent with the January 8, 2018 email message to Ms. N_____ from Sar at Dr. Volz' office notifying her that everything had been placed on hold pending authorization.

16. Lacking authorization to continue to treat with Dr. Volz, Claimant presented to DaVita Medical Group (DaVita), specifically Dr. Christopher Webber on April 16, 2018 for "chronic idiopathic uticaria and exertional shortness of breath". Claimant testified that he sought treatment from Dr. Webber because Dr. Volz would not see him and he needed to see a doctor because he had been breaking out in hives nearly every day for the past year and was having a lot of difficulty breathing. Claimant specifically testified that he felt he was in "dire straits" and needed treatment for his condition despite Respondents' lack of attention to this claim. Claimant testified that he began receiving the Xolair treatment with Dr. Webber and that by his second round of treatment, he was no longer breaking out in hives and his breathing issues had subsided slightly. It was Claimant's understanding that he was supposed to have up to six Xolair shots to continue treatment for his condition.

17. The deposition of the new adjuster, Ms. Christina Smith, was taken on October 31, 2018, forty-three days after the hearing. Ms. Smith testified that she took over Claimant's claim from Susan B_____ around the end of March, beginning of April, 2018. This was due to Ms. B_____ taking medical leave. (Depo. p. 5:2-17). On cross-examination, Ms. Smith testified that she had absolutely no knowledge of whether anybody with the Insurer was covering for Ms. B_____'s claims while she was out on medical leave, but the last notes in the file were from Ms. B_____. (Depo. pp. 6:22 – 7:9).

18. Ms. Smith testified that Respondents' counsel alerted her in April of 2018 regarding the testing requests from Dr. Volz's office. She was then asked if she authorized the treatment, and if so, when. Ms. Smith testified, "Yes, I did. I did it verbally on May 1st, and then I putting [sic] it in writing on – on May the 5th, 2018. (Depo. pp. 5:18 – 6:5). On re-direct, Respondent's counsel asked, "And just to be clear, you had advised them prior to May 1st that the treatment was authorized; is that correct?" To which Ms. Smith stated, "That's correct." (Depo. pp. 7:25 – 8-3). Ms. Smith's testimony suggesting that she advised Dr. Volz' office that treatment was authorized before May 1, 2018 is inconsistent with the more persuasive evidence that she authorized Xolair treatment on May 1, 2018 and additional treatment, including testing on May 3, 2018. The ALJ finds Ms. Smith's testimony that she authorized treatment prior to May 1, 2018 unsupported by the record. The ALJ finds this testimony unreliable and unpersuasive.

19. Claimant's Exhibit 7 reveals that Respondents did not pay the Quest Diagnostics bill until August 30, 2017.

CONCLUSIONS OF LAW

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

I. Generally

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

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

II. Claimant's Right to Select a Physician to Attend to his Ongoing Medical Symptoms

C. Authorization refers to a physician's legal status to treat an injured worker's industrially related injury(ies) at the respondents' expense. *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381 (Colo.App. 2006); *Popke v. Industrial Claim Appeals Office*, 944 p.2d 677 (Colo.App. 1997). Under §8-43-404(5)(a)(I)(A), C.R.S., the employer has the right in the first instance to designate the authorized provider to treat the claimant's compensable condition(s). The rationale for this principle is that the respondents may ultimately be liable for the claimant's medical bills and, therefore, have an interest in knowing what treatment is being provided. *Andrade v. Industrial Claim Appeals Office*, 121 P.3d 328 (Colo.App. 2005). Consequently, if the claimant obtains unauthorized medical treatment, the respondents are not required to pay for it. *Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228 (Colo.App. 1999); Pickett v. Colorado State Hospital, 32 Colo. App. 282, 513 P.2d 228 (1973).

D. Section 8-43-404(10)(a) and (b) provides the mechanism by which a

claimant may secure a change of physician in the event that an authorized physician refuses to treat an injured worker or discharges said injured employee for non-medical reasons. In determining whether an injured employee is entitled to select his/her treating physician under the circumstances presented, § 8-43-404(10)(a) provides that "[t]he director or any administrative law judge of the office of administrative courts has jurisdiction to resolve disputes regarding whether a refusal to provide medical treatment . . . was for medical or nonmedical reasons". Although the "change of physician/right of selection" issue presented at hearing was not specifically endorsed in this case, the ALJ concludes that the issue was tried by consent as Respondents voiced no objection to hearing the same at the outset of the hearing, elicited testimony from Claimant regarding his treatment with DaVita and addressed the issue directly in his post hearing position statement. Accordingly, the ALJ concludes that he has jurisdiction to determine whether Dr. Volz' decision to not schedule Claimant for a follow-up medical appointment was secondary to non-medical reasons. Here, the evidence presented supports a conclusion that Dr. Volz' office placed "everything", i.e. treatment/testing on hold due until "approval" was received from the adjuster. The approval was not forthcoming until May 3, 2018 when Ms. Smith emailed Dr. Volz' the requested authorization for additional treatment and testing. Based upon the evidence presented, the ALJ is convinced that Dr. Volz' elected not to treat Claimant because he was not given authority to do so. The ALJ concludes that this is a nonmedical reason.

E. Because he was denied treatment/testing for nonmedical reasons and Respondents did not designate a new doctor to attend to his condition after Dr. Volz put treatment on hold, Claimant asserts that he is entitled to select a new provider to attend to his medical condition. Based upon the evidence presented, the ALJ is not convinced. In this case, the evidence fails to establish compliance with § 8-43-404(10)(b), C.R.S. which provides in relevant part:

> If the insurer or self-insured employer receives written notice pursuant to paragraph (a) of this subsection (10)[3], or if the insurer or self-insured employer and the authorized treating physician receive written notice by certified mail, return receipt requested, from the injured employee or the injured employee's legal representative that an authorized physician refused to provide medical treatment to the injured employee or discharged the injured employee from medical care for nonmedical reasons when such injured employee requires medical treatment to cure or relieve the effects of the work injury, and there is no authorized physician willing to provide medical treatment, then the insurer or self-insured employer shall, within fifteen calendar days from receiving the written notice, designate a new authorized physician willing to provide medical treatment. If the insurer of self-insured employer fails to

[3] Paragraph (a) provides an authorized physician refusing to treat for nonmedical reason to, within three business days from the refusal, to provide written notice of the refusal by certified mail, return receipt requested, to the injured employee explaining the reasons for the refusal to treat. Based upon the evidence presented, the ALJ finds that Dr. Volz failed to provide such notice.

designate a new physician pursuant to this paragraph (b), then the injured employee may select the physician who attends to the injured employee.

F. Because Dr. Volz' office and Claimant or his legal representative failed to comply with the notice requirements of § 8-43-404(10)(a) and (b) prior to presenting to DaVita, Respondents were never afforded the opportunity to designate a new physician willing to provide medical treatment designed to cure and relief Claimant of the ongoing effects of his industrial injury. The ALJ concludes, from the evidence presented, that Claimant's decision to present to DaVita without first affording Respondents the opportunity to designate a new provider by providing notice as set forth in § 8-43-404(10)(a) and (b) is fatal to his claim that he was entitled to select DaVita as his authorized provider in this case. Consequently, the ALJ finds the services rendered there unauthorized relieving Respondents of the obligation to pay for this care. *Yeck v. Industrial Claim Appeals Office, supra.*

III. Penalties

G. Section 8-43-304(1) authorizes the imposition of penalties when an employer or insurer: (1) Violates any provision of the Act; (2) does any act prohibited by the Act; (3) fails or refuses to perform any duty lawfully mandated within the time prescribed by the director or Panel; or (4) fails, neglects, or refuses to obey any lawful order of the director or Panel. *Pena v. Industrial Claim Appeals Office*, 117 P.3d 84 (Colo. App. 2005). The imposition of penalties under §8-43-304(1), supra, requires a two-step analysis. First, the ALJ must determine whether the disputed conduct constituted a violation of a rule or order. *Allison v. Industrial Claim Appeals Office,* 916 P.2d 623 (Colo.App. 1995). If the ALJ finds a violation, the ALJ must then determine whether the insurer or employer's actions which resulted in the violation were objectively reasonable. *See City Market, Inc. v. Industrial Claim Appeals Office*, 68 P.3d 601 (Colo.App. 2003). Objectively unreasonable conduct will result in the imposition of penalties. *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 907 P.2d 676 (Colo.App. 1995). The reasonableness of the employer's action depends on whether it is predicated in a rational argument based in law or fact. *Jiminez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo.App. 2003). Section 8-43-304(4) also provides that an application for penalties "shall state with specificity the grounds on which the penalty is being asserted."

H. A purported violator can "cure" a penalty by paying the benefits or complying with the statute or order which was allegedly violated. Section 8-43-304(4) provides that any party alleged to have committed any violation categorized above shall have twenty days to cure the violation from the date of mailing of an application for hearing in which penalties are alleged. Section 8-43-304(4) also provides that if the alleged violator cures the violation within the twenty-day period, and the party seeking a penalty fails to prove by clear and convincing evidence that the alleged violator knew or reasonably should have known such person was in violation, no penalty shall be assessed. The cure statute effectively adds an element of proof to a claim for penalties in cases where a cure is proven. In the ordinary case, it is not necessary for the party

seeking penalties to prove that the violator knew or reasonably should have known they were in violation. All that is necessary is that the party seeking penalties prove the putative violator acted unreasonably under an objective standard. *See Jiminez v. Indus. Claim Appeals Office,* 107 P.3d 965 (Colo.App.2003); *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo.App. 1996). Section 8-43-304(4) modifies this rule and adds an extra element of proof when a cure has been effected. Accordingly, when a penalty allegation has been cured the party seeking penalties must prove the violator had actual or constructive knowledge that its conduct was unreasonable. *Diversified Veterans Corporate Center v. Hewuse,* 942 P.2d 1312 (Colo.App. 1997); *Ray v. New World Van Lines of Colorado* W. C. No. 4-520-251 (October 12, 2004).

I. In this case, Claimant has asserted two separate penalties for a violation of ALJ Spencer's March 9, 2017 Order in addition to a penalty for Respondents asserted dictation of medical care in violation of § 8-43-503(3) C.R.S. As noted, a violation of an order occurs when a party authorized or obligated to perform does an action prohibited by the order, or fails to take an action required by the order. *See Dworkin, Chambers and Williams, P.C. v. Provo,* 81 P.3d 1053, 1058 (Colo. 2003). Respondents contend that they have cured any violations and that Claimant's penalties claims have not been pled or are vague and lack specificity as required by § 8-43-304(4). Accordingly, Respondents request dismissal of the penalty claims. As the claims for penalties are separate and based on specific conduct, they are discussed independently below.

J. First is the issue of whether Respondents are subject to penalties for failing to pay for all reasonable and necessary medical treatment to cure and relieve the effects of Claimant's injury, including additional diagnostic testing suggested by Dr. Volz in keeping with ALJ Spencer's March 9, 2017 order. Respondents' assert that this penalty is not pled with specificity and even if it was, the penalty was cured requiring Claimant to prove the penalty by clear and convincing evidence which he failed to do. Before analyzing this penalty claim, the ALJ notes that ALJ Spencer's March 9, 2017 order became final on March 29, 2017 as Respondents did not appeal it.

K. Concerning Respondents' claim that the penalty claim was not plead with specificity, the ALJ disagrees. In the Application for Hearing filed April 10, 2018, Claimant specifically noted that he was seeking penalties beginning "March 29, 2017 through the present and ongoing pursuant to § 8-43-304(1) for failure to comply with ALJ Spencer's Order that Respondents shall pay for all reasonable and necessary treatment to cure and relieve the effects of Claimant's injuries, specifically the additional diagnostic testing suggested by Dr. Volz". Claimant requested penalties at a rate of $1000.00/day for this alleged violation. The ALJ concludes that Claimant's penalty statement is sufficient, pursuant to § 8-43-304(4), to place Respondents on notice of the basis for the penalty by noting that the alleged conduct resulting in the penalty allegation was the purported violation of ALJ Spencer's order, specifically that portion which required Respondents to pay for additional diagnostic testing, in violation of § 8-43-304(1).

L. Regarding Respondents claim that this penalty was cured within twenty (20) days from the mailing of the April 10, 2018 Application of Hearing, the undersigned also disagrees. Here, Respondents contend that they cured the penalty as early as April 10-12, 2018 and this cure was subsequently clarified between May 1 and May 3, 2018 in writing. As found, at 11:53 a.m. on April 10, 2018, after being notified of the Application for Hearing, Respondents counsel advised Claimant's counsel that a new adjuster had been assigned to the claim. In his email, Respondents' counsel identified the new adjuster as Christina Smith with Sedgwick CMS, noting further that Ms. Smith and her supervisor had authorized treatment but not the lab requests of Dr. Volz. He also advised that he spoken with Sar in Dr. Volz' office to provide her Ms. Smith's authorization for treatment and telephone number to "confirm anything necessary". On April 12, 2018, Respondent's counsel sent an email to Claimant's counsel asking if he was "still having lab scheduling issues" suggesting that authorization to proceed had not been forthcoming. Based upon the evidence presented, the ALJ is not convinced that the email exchange between Counsel for Respondents and Dr. Volz' office served to "authorize" the additional diagnostic care that had been suggested by Dr. Volz. Rather, the email merely notified both Claimant's counsel and Dr. Volz' office that there was a new adjuster assigned to the claim and that this adjuster had verbalized a willingness to authorize care but not lab/diagnostic work. Based upon the email evidence, the ALJ concludes that without receiving written authorization for diagnostic work-up, including lab work, Dr. Volz and Claimant were left wondering if the same had specifically been authorized. Ms. Smith did not actually authorize the any care or diagnostic work-up, including lab work, skin testing and spirometry until May 3, 2018 when she emailed Dr. Volz' office providing written confirmation/authorization of the same. This authorization came 23 days after mailing of the April 10, 2018 Application for Hearing endorsing penalties. Consequently, the ALJ concludes that Respondents did not effectively cure the alleged violation of ALJ Spencer's order within twenty (20) days as required by § 8-43-304(4), C.R.S. Accordingly, the ALJ concludes that Claimant is only required to prove the penalty by a preponderance of the evidence.

M. Based upon the totality of the evidence presented, the ALJ concludes that Respondents violated ALJ Spencer's order requiring the payment of all reasonable and necessary medical treatment, specifically the additional diagnostic testing as requested by Dr. Volz. The ALJ notes that counsel for both parties explained there was difficulty in finding Claimant an authorized treating physician after Dr. Bowdish left his practice. Consequently, the ALJ is declining to impose penalties for the time period before Claimant established treatment with Dr. Volz during which the request for additional diagnostic testing was made.[4] Indeed the conduct giving rise to the penalty claim

[4] Although not raised in his post hearing position statement, Respondent's counsel made a fleeting reference during his opening remarks at hearing that Claimant's claimed penalty for violation of ALJ Spencer's order for failing to pay for additional diagnostic testing was "time-barred" as he was seeking penalties from March 29, 2017 and the Application for Hearing was filed April 10, 2018, or more than one year after the date for which penalties per the Application for Hearing in contravention of § 8-43-304(5), C.R.S. Because the ALJ finds that Claimant only became aware of and first knew of the facts giving rise to the penalty allegation in January 2018, after Dr. Volz placed treatment on hold for lack of authorization

arose, as found above, on January 8, 2018, when Dr. Volz' office put all treatment, including diagnostic testing on hold pending authorization. Accordingly, the ALJ determines the period for the imposition of penalties extends from January 8, 2018, the date by which Claimant's care was placed on hold for lack of authorization to perform blood testing and pulmonary function tests (PFT) through May 2, 2018, as the aforementioned diagnostic testing was approved May 3, 2018. This represents a period of 114 days. Once a violation occurs, each subsequent day that the violation continues constitutes a separate violation which may be joined with the first for purposes of adjudicating the violator's total liability for penalties. *Spracklin v. Industrial Claim Appeals Office,* 66 P.3d at 177-178. Thus, a violation occurs and is subject to penalties from the day the improper conduct occurs.

N. While the evidence presented supports that a violation of ALJ Spencer's order occurred for failure to authorize the requested additional diagnostic testing, it is necessary to analyze whether the insurer's delay in and failure to authorize this care despite being ordered to do so was objectively reasonable. The evidence presented establishes that, at or around the time Claimant first presented to Dr. Volz's office for treatment, Susan B_____ was the claims adjuster assigned to this case. Per Ms. Smith's testimony, Ms. B_____ was out on medical leave and Ms. Smith did not take over the handling of Claimant's claim until around the end of March or early April, 2018. Ms. Smith testified that she was unaware whether anybody was even assigned to Claimant's claim for proper claims adjusting once Ms. B_____ went on medical leave, but could state that the last note in the file prior to her taking over said file was from Ms. B_____. It was Insured's duty, based upon the March 9, 2017 order, either through Ms. B_____ or another representative to provide a response to Dr. Volz's office for requested treatment, which it failed to do. Of importance is that the office of Respondents' counsel specifically informed Ms. S_____ to contact Susan B_____ for authorization, and yet nothing was done by Respondents until the date Claimant filed his application for hearing. Even with Claimant's application for hearing being filed April 10, 2018, it was not until May 3, 2018, twenty-three (23) days later, that Dr. Volz's office was given written authorization to provide the requested care for Claimant.

O. Respondents acknowledge the existence of "authorization issues" but contend that the language of ALJ Spencer's Order is so vague and ambiguous that they could not be expected to know what medical treatment he ordered Respondents to pay for. Moreover, Respondents assert that Claimant's medical situation was "fluid and changing". As such, Respondents couch the issue confronting the ALJ not as a penalty for violating the order, but as a "delay with an explanation and justification" for not authorizing the treatment/testing earlier. The ALJ is not persuaded. While this case clearly has a complex procedural history and Claimant's treatment was interrupted by Dr. Bowdish leaving his practice, the ALJ notes from the evidence submitted that Insurer has been represented continuously during the claim by qualified counsel since

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and because he filed his Application asserting penalties on April 10, 2018, within a year of having that knowledge, the ALJ concludes that this penalty allegation was filed timely.

the February 1, 2017 hearing before ALJ Spencer. It is because this case has a complex history, created by the litigation that has ensued, that the undersigned finds it highly improbable that Respondents would not know that they were obligated to provide additional diagnostic testing and that failure to authorize the same would result in a violation of ALJ Spencer's directive. Based upon the evidence presented, the ALJ concludes that Insurer simply failed to take action on the order, probably because Ms. B_____ was on leave and had not assigned the matter to a new adjuster. While the ALJ understands the precarious position Ms. Smith finds herself in, Insurer's negligence in assigning this claim to another adjuster in the absence of Ms. B_____ and their failure to act upon the order for 114 days after the testing was requested is objectively unreasonable. This is especially true in light of the efforts of Dr. Volz' office to secure authorization. Simply asserting that a change of Adjusters somehow excuses Insurers failure to act on the request for authorization in light of the order is unpersuasive. Respondents additional assertions that Ms. Smith never denied care, that Claimant's lab testing resulted in normal outcomes and that he was unaffected by the delay in authorizing the aforementioned testing are equally unpersuasive. It is the failure to follow the order that justifies the imposition of penalties in this case.

P. Concerning Claimant's second claim for penalties for failing to pay the Quest Diagnostics bill "forthwith" as ordered by ALJ Spencer, the ALJ agrees with Respondents that this asserted penalty was not pled, let alone with specificity as required by § 8-43-304(4), C.R.S., in the April 10, 2018 Application for Hearing. Indeed, the April 10, 2018 Application for Hearing is silent on the specifics of this penalty claim. Moreover, Respondents' counsel stated, at the outset of hearing, that he was unaware that failure to pay the Quest Diagnostic billing was an issue for hearing. Because the penalty was not pled and Respondents were not apprised/noticed regarding the nature of the penalty, the ALJ concludes that it was not properly placed before the ALJ at the September 19, 2018 hearing.

Q. Due process requires that parties be given advance notice of the issues that may be considered at a hearing. *See Shaw v. Valdez,* 819 F.2d 965 (10th Cir. 1987). The fundamental requirements of due process are notice and an opportunity to be heard. Due process contemplates that the parties will be apprised of the evidence to be considered and afforded a reasonable opportunity to present evidence and argument in support of their positions. Inherent in these requirements is the rule that a party will receive adequate notice of both the factual and legal bases of the claims and defenses to be litigated. *See Hendricks v. Industrial Claim Appeals Office,* 809 P.2d 1076, 1077 (Colo.App. 1990). As established above, such notice was not properly given concerning the alleged penalty for failing to pay the Quest Diagnostic billing. Any contention that this issue was also tried by consent is unpersuasive. Although issues may be "tried by consent," unendorsed issues should not be heard unless there no reasonable doubt exists that the issue was intentionally and actually tried. *Bill Dreiling Motor Co. v. Schultz*, 168 Colo. 59, 450 P.2d 70 (Colo. 1969); *Bradford v. Nationsway Transport Service*, W. C. No. 4-349-599 (March 16, 2000). It is not enough that some evidence connected to the issue has been

received. *Id.* In light of the exchange between the ALJ and counsel at the outset of hearing specifically wherein Respondent specifically noted that he was not aware that penalties for failing to pay the Quest Diagnostic billing were an issue for hearing, the ALJ concludes that the issue of penalties for failing to pay the aforementioned billing "forthwith" was not properly before the undersigned ALJ for adjudication.

R. Finally, Claimant contends that Respondents are subject to penalties for "dictating" medical care in contravention of § 8-43-503(3), C.R.S. "by repeatedly failing to respond to an authorized provider's requests for treatment and for failing to pay for treatment already performed for (sic) an authorized provider". As the ALJ interprets Claimant's contention, Respondents delay in authorizing treatment is tantamount to dictating care. The ALJ is not persuaded.

S. Section 8-43-503(3) C.R.S. states: "Employers, insurers, claimants, or their representatives shall not dictate to any physician the type or duration of treatment or degree of physical impairment. "Dictate" is defined as ordering or instructing what is to be said or written. Black's Law Dictionary, *Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern*, Sixth Ed. 1990. By analogy, dictating medical care would be to order or instruct what medical treatment is to be given. A fair reading of § 8-43-503(3), when replacing the word "dictate" with "order or instruct" would be: "Employers, insurers, claimants, or their representatives shall not order or instruct any physician concerning the type or duration of treatment or degree of physical impairment. In support of his claim for penalties for dictating medical care, Claimant relies on the decision of the Industrial Claims Appeals Office (ICAO) announced in the case of *Jose Casillas v*. *Bemas Construction*, *Inc.,* W.C. No. 4-777-652, (May 24, 2010). Claimant contends that the Casillas decision stands for the proposition that Respondents in the instant matter can be penalized under § 8-43-503(3) for unduly delaying authorization of medical treatment. The ALJ finds Claimant's interpretation of the *Casillas* matter misplaced.

T. In the *Casillas* matter, ICAO upheld the ALJ's determination that Respondents violated § 8-43-503(3) C.R.S., not as a direct result of undue delay in authorizing care, but rather for the adjuster issuing a command, i.e. dictating to the authorized treating physician that his request for an EMG be done through a "gatekeeper" agency known as One Call (OC). In affirming the ALJ's decision to impose penalties for dictation of care, the Panel noted:

> The Respondents' arguments notwithstanding, there is substantial evidence in the record to supporting (sic) the ALJ's conclusion that the insurer effectively dictated the claimant's treatment by unilaterally attempting to modify Dr. Ogin's status as a ATP by dictating that before he performed the EMG he was required to go through "vetting" by OC, the insured "gatekeeper".

The Panel went on to note that the adjuster's requirement that Dr. Ogin adhere to the "gatekeeper" policy resulted in the adjuster effectively commanding that Dr. Ogin take

an action he was "not legally required to take in order to secure payment for the EMG" and that this mandate by the adjuster "prolonged the duration of claimant's treatment by influencing Dr. Ogin not to perform the EMG" as he had planned. Accordingly, the Panel affirmed the imposition of penalties on the grounds that the adjusters affirmative command/order/instruction to Dr. Ogin, not only dictated the type of care Claimant was to receive but also the duration of that care. Simply put, the prolonged duration of care was occasioned by the adjuster's "unjustified demand" that the EMG be performed by OC. In contrast, the instant matter does not involve the overt influence or unjustified commands, instructions or orders of the adjuster assigned to the claim. Indeed, the adjuster in the instant matter took no action to influence Claimant's ability to seek care with Dr. Volz or see to it that the order of ALJ Spencer's was obeyed. The delay in procuring treatment, which may have impacted the type and duration of future care in this case, was not caused by the dictation of medical care in this case, but rather the negligence of Insurer in failing to take action to authorize diagnostic testing that had been ordered by ALJ Spencer. It is that conduct with subjects Respondents to penalties, rather than the claim that the Respondents were dictating medical care for Claimant.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish that the right to select a physician passed to him following Dr. Volz' decision to place all treatment on hold and not treat for nonmedical reasons. Claimant's request that DaVita Medical Group be considered an authorized provider in this case is denied and dismissed.

2. Respondents shall pay to Claimant a penalty in the amount of two hundred ($200.00) dollars per day for 114 days for a total penalty of $22,800.00 for their violation of ALJ Spencer's order requiring payment of all reasonable and necessary medical treatment to cure and relieve the effects of Claimant's injury, including additional diagnostic testing suggested by Dr. Volz.

3. Pursuant to § 8-43-304(1) the penalty assessed is apportioned between Claimant and the Colorado uninsured employer fund created in § 8-67-105. Fifty percent (50%) of the penalty assessed shall be paid to Claimant and the remaining fifty percent of the penalty assessed shall be paid to the Colorado uninsured employers fund.

4. Claimant's request for penalties for failure to pay the billing associated with Claimant's diagnostic testing through Quest Diagnostics is denied and dismissed.

5. Claimant's request for penalties for dictation of medical care in violation of § 8-43-503(3) is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor,

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

DATED: February 6, 2019

/s/ Richard M. Lamphere

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

ISSUES

I. Determination of Claimant's average weekly wage ("AWW").

II. Whether Claimant is equitably estopped from seeking an increase in his AWW.

III. Whether Respondents are entitled to a credit against permanent partial disability benefits based on the net proceeds of Claimant's third party settlement.

IV. Whether Respondents are entitled to recover an overpayment.

STIPULATIONS

1. Claimant's AWW on date of injury, December 30, 2014, is $126.25. Claimant was an employee for Employer on the date of injury and was operating under an independent contractor agreement. The AWW on the date of injury was derived by subtracting the expenses incurred by Claimant to provide transportation service from his gross earnings as a cab driver.

2. If applicable, Claimant's AWW on the date of MMI, April 20, 2017, was $984.20.

3. Claimant's net proceeds from settlement of his third-party personal injury action was $24,205.79. At the time of settlement, Respondents' lien was $52,320.12 based upon the payment of $43,275.39 in medical benefits and $9,044.82 in disability benefits. Respondents have previously recovered $28,300.00 in satisfaction of their subrogation lien.

4. Claimant received an overpayment in temporary total disability ("TTD") benefits from January 8, 2017 to April 19, 2017 in the amount of $924.84. Respondents are entitled to credit that amount against liability for future indemnity benefits.

FINDINGS OF FACT

1. Claimant is a 57 year old male who worked for Employer as a cab driver. At the time of his industrial injury, Claimant had been working for Employer for eight years.

2. On December 30, 2014, Claimant sustained an admitted industrial injury when he was involved in a motor vehicle accident. Claimant was initially placed on restrictions of no lifting/pushing/pulling more than 10 pounds, no reaching above shoulders with affected extremities, no commercial driving, and performing only sedentary work.

3. Claimant returned to work for Employer approximately one month after the motor vehicle accident with work restrictions. Claimant underwent physical therapy, epidural steroid injections, trigger points injections and a knee injection.

4. Claimant testified he ceased working as a cab driver at some point in 2015 and began receiving TTD benefits.

5. Claimant relocated from Colorado to Georgia in August or September of 2016.

6. Christopher Taylor, M.D. assumed Claimant's care upon his relocation to Georgia. On October 20, 2016, Claimant presented to Dr. Taylor with complaints of right-sided low back pain and right knee pain. Dr. Taylor noted Claimant was currently working as a lighting consultant with restrictions of no lifting over 30 pounds, no kneeling and a two hour break every 10 hours of work. He diagnosed Claimant with a right knee meniscus tear and possible lumbar discogenic pain and assigned work restrictions no lifting greater than 30 pounds, no kneeling, and taking a two hour break for every 10 hours of work.

7. Claimant testified he began employment as a conservation energy representative in January 2017. Claimant described the job as an entry-level position that involves approaching customers to perform energy assessments in small commercial businesses.

8. On February 8, 2017, Claimant filed an Application for Hearing ("AFH") endorsing the issues of medical benefits (authorization of a right knee arthroscopy), temporary indemnity benefits from the date of injury onward, and AWW. A hearing was scheduled and then ultimately rescheduled for July 25, 2017.

9. On April 20, 2017, Dr. Taylor placed Claimant at maximum medical improvement ("MMI") and imposed a permanent work restriction of no lifting over 100 pounds.

10. On May 18, 2017, the parties attended a prehearing conference before PALJ John A. Steninger during which Respondents sought supplemental answers to interrogatories, including provision of Claimant's 2015 and 2016 income tax returns, and "a detailed explanation and basis for the AWW claimed by the Claimant." In an order dated May 18, 2017, PALJ Steninger ordered Claimant to "submit clarification and supplementation as to the basis for Claimant's AWW".

11. Claimant complied with ALJ Steninger's order, submitting supplemental responses on May 31, 2017. The first interrogatory asked Claimant to "state the [AWW] sought by [him] and produce copies of all documentary evidence upon which Claimant will rely at hearing to support this claimed [AWW]." Claimant stated that, based upon his 2014 tax records, he "asserts an AWW of $126.25 based on $6,565 in net profits."

12. Claimant subsequently moved to withdraw the February 8, 2017 AFH, without prejudice, and vacate the July 25, 2017 hearing. ALJ Michelle Jones granted Claimant's motion in an order dated July 20, 2017.

13. On July 17, 2017, Allison Fall, M.D. performed an impairment assessment. Dr. Fall treated Claimant prior to his relocation to Georgia. Claimant reported low back complaints. Dr. Fall noted Claimant had new employment in Georgia and listed the name of the company. She examined Claimant's knees and found full range of motion, mild bilateral crepitance, and no instability. There were no shoulder complaints. Dr. Fall's final assessment was chronic low back pain with degenerative changes following a MVA. Dr. Fall concurred Claimant reached MMI as of April 20, 2017. She assigned a combined whole person impairment of 16% for lumbar range of motion deficits and a rightward disc protrusion at L4-5. She agreed with Dr. Taylor's permanent restrictions.

14. July 20, 2017, ALJ Michelle Jones granted Claimant's unopposed motion to withdraw the Application for hearing without prejudice and vacate the July 25, 2017 hearing.

15. On August 7, 2017, Respondents filed a Final Admission of Liability ("FAL") based on Dr. Fall's report, admitting to 16% whole person impairment, permanent partial disability based on an AWW of $63.47. Claimant objected to the August 7, 2017 FAL and requested a Division Independent Medical Examination ("DIME").

16. Brian Shea, D.O. performed the DIME on December 21, 2017. Dr. Shea documented that Claimant resided in the Atlanta metro area and worked as an energy computer business consultant. Dr. Shea noted Claimant complained of low back and left shoulder stiffness and some neck pain, but continued to improve and was "highly functional." He agreed Claimant reached MMI as of April 20, 2017 and found 1% cervical range of motion impairment, 4% for Table 53 cervical impairment, 7% for Table 53 lumbar impairment, and 10% lumbar range of motion impairment. The spinal impairment ratings combined for 20%. Dr. Shea also awarded Claimant 8% upper extremity impairment which converted to 5% whole person impairment. The spinal and converted extremity ratings combined for a 24% whole person impairment rating. Dr. Shea found no lower extremity impairment and rendered no opinion as to permanent restrictions of any kind.

17. On January 31, 2018, Respondents filed a FAL admitting to a 24% whole person impairment per Dr. Shea's report, and PPD benefits based on an AWW of $63.47.

18. On February 28, 2018, Claimant filed an AFH endorsing PPD and AWW at the time of MMI. A hearing was scheduled for June 21, 2018.

19. On March 27, 2018, Respondents filed an Amended FAL admitting to the 24% whole person impairment rating assigned by Dr. Shea, and PPD based on an AWW of $126.25. On April 7, 2018, Claimant objected to the Amended FAL, noting a hearing was already scheduled for June 21, 2018.

20. The June 21, 2018 hearing was rescheduled to August 21, 2018 and subsequently vacated so the parties could attend a settlement conference. An order dated August 15, 2018 singed by Designated Clerk Gabriela Chavez granted Claimant's motion to withdraw the AFH without prejudice and vacate the August 21, 2018 hearing.

21. On September 6, 2018, Claimant filed another AFH endorsing, among other things, AWW and PPD. The AFH states, "Claimant is not challenging the impairment rating. PPD is endorse (*sic*) by Claimant solely for purposes of increasing the PPD award based on an increase in AWW."

22. Claimant testified t he graduated school with an associate degree in renewable energy shortly before the admitted industrial injury and that he had been actively seeking employment in the renewable energy industry in the time, in the fields of solar, wind and geothermal heating. Claimant testified entry-level positions in the industry require physical activities including climbing wind towers, standing on roofs, and installation of solar panels and heat pumps in construction areas. Claimant testified that his temporary physical restrictions arising out of his work-related injury precluded him from pursuing job opportunities in the field of renewable energy. Claimant testified that he was precluded from obtaining on-the-job training from prospective employers to further his career goals and advancement in the renewable energy field due to the physical limitations caused by his work injury. Claimant testified he was unable to take tests to prove he could climb a 100 foot tower while carrying safety gear to obtain employment in the wind industry due to the weight of the gear exceeding Claimant's lifting restrictions. Claimant testified that, as a result, he did not apply for jobs in the wind industry that carried these requirements. Claimant also testified that he did not apply for jobs that required installation of solar panels on uneven roofs as these jobs exceeded his physical capacity arising out of his work-related injuries. Claimant testified that the renewable energy jobs in the construction field typically required minimum lifting requirement of 50 pounds which exceeded Claimant's temporary restrictions following his injury.

23. Claimant testified he relocated from Colorado to Georgia to assist in the care of a family member and to pursue employment prospects in the renewable energy industry, which he stated were more plentiful on the east coast. Claimant testified he had been unable to obtain entry-level employment in the renewable energy field after his injury while living in Colorado.

24. Claimant testified he obtained entry-level employment in the renewable energy field in December 2016 and began the employment on January 8, 2017. Claimant's job as a conservation energy representative involves approaching customers to provide energy assessments for small commercial businesses. Claimant testified his job duties do not involve the wind or solar energy field and he is not able to obtain the experience and career advancement opportunities he desires in wind or solar energy through his current position. Claimant testified he believes he is precluded from obtaining employment in the wind and solar industry due to the physical limitations arising out of his work injury.

25. Regarding the May 2017 supplemental discovery responses, Claimant testified he provided his 2014 tax records "to show that my income is much less than it currently is in 2017" and to support how he came to an AWW of $126.25, which would be the AWW at the date of injury. Claimant testified that he notified Insurer of his relocation to

Georgia so that his TTD checks could be forwarded. Claimant testified he did not notify Respondents of his employment and wages in Georgia.

26. Amber Castillo testified as a claims representative for Insurer. Ms. Castillo is the adjustor on Claimant's workers' compensation claim and has been adjusting claims in Colorado for approximately 10 years. Ms. Castillo testified she used a net income figure derived from Employer's records in preparing admissions of liability. Ms. Castillo testified that, when Claimant provided supplemental discovery responses in May 2017, she did not dispute the AWW figure stated therein as it was based on tax records and was consistent with the manner in which she calculated the AWW of independent contractors such as Claimant. She testified that, between Claimant's relocation to Georgia in December 2016 and Claimant's return to Colorado for an impairment rating with Dr. Fall in July 2017, Ms. Castillo received no information as to Claimant's Georgia wages.

27. Ms. Castillo testified she admitted to the impairment rating from Dr. Fall based on a cost-benefit analysis that included Claimant's asserted low AWW. Ms. Castillo testified she would not have admitted to the impairment rating from Dr. Fall if Claimant had previously asserted an AWW of $984.20. Ms. Castillo further testified that the DIME physician, Dr. Shea, provided a higher rating than Dr. Fall and issued an impairment rating on the schedule of injuries. Ms. Castillo testified she would not have converted the schedule rating to a whole person rating and admitted to a combined whole person rating if Claimant would have previously asserted an AWW of $984.20. Ms. Castillo testified the cost-benefit analysis of the higher AWW would have resulted in Respondents admitting to the schedule impairment rating which would result in a lower PPD award. She testified that by the time she received notice Claimant was seeking a higher wage, it was too late for her to initiate the hearing process to overcome the DIME.

28. Claimant filed a complaint in Denver District Court against another individual for causing the December 30, 2014 accident and his resulting injuries. The case settled on May 2, 2018. In compromise of the existing lien, Claimant paid Respondents $28,300.00.

29. Claimant's testimony regarding the effects of the work injury on his future earning capacity is not found credible or persuasive.

30. The ALJ finds that Claimant's AWW at the time of injury, $126.25, is a fair approximation of Claimant's wage loss and diminished earning capacity.

31. The ALJ finds Respondents are entitled to a credit against future workers' compensation benefits for the $24,205.79 in net recovery proceeds from Claimant's third party lawsuit.

32. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

Equitable Estoppel

Respondents argue Claimant's request to increase his AWW is barred by the doctrine of equitable estoppel.

To establish an application of the doctrine of equitable estoppel, the claimant must prove four elements: (1) the party to be estopped must know the relevant facts; (2) the party to be estopped must also intend that its conduct be acted on or must so act that the party asserting the estoppel has a right to believe the other party's conduct is so intended; (3) the party asserting the estoppel must be ignorant of the true facts; and (4)

the party asserting the estoppel must reasonably rely on the other party's conduct to his or her detriment. *Johnson v. Industrial Commission*, 761 P.2d 1140, 1146; *Sneath v. Express Messenger Service*, 931 P.2d 565 (Colo. App. 1996).

Respondents contend Claimant was aware of his increased wages when he was placed at MMI and when he provided supplemental discovery responses claiming an AWW of only $126.25. Respondents maintain they had a right to believe Claimant intended to assert an AWW of $126.25 moving forward, based on the supplemental discovery responses, and that they were unaware of Claimant's Georgia employment and wages until after admitting to the DIME's impairment rating. Lastly, Respondents assert they detrimentally relied on Claimant's failure to disclose his Georgia wages in making their decision not to contest the impairment ratings of Dr. Fall and Dr. Shea. The ALJ disagrees each element of equitable estoppel has been met here.

Claimant was aware of the relevant facts. He began employment in Georgia in January 2017 and was earning wages from such employment at the time he was placed at MMI in April 2017. Thus, at the time Claimant submitted supplemental discovery responses, he was aware his AWW at the time of MMI was higher than $126.25. Claimant was also aware he did not notify Employer of his Georgia employment or wages.

Nonetheless, the ALJ is not persuaded Claimant intended his conduct to be acted on or acted so that Respondents had a right to believe Claimant's conduct was so intended. In his May 2017 supplemental responses, Claimant claimed at AWW of $126.25 based on 2014 tax records, the date of injury. Although Claimant had been placed at MMI by the time he submitted the supplemental responses, no impairment evaluation had taken place and no definitive impairment rating had been assigned. Claimant's February 8, 2017 AFH was subsequently withdrawn without prejudice, preserving the issue of AWW. Respondents then filed an August 7, 2017 FAL admitting to an AWW of $63.47, to which Claimant objected and requested a DIME. Pursuant to Section 8-43-203 (2)(b)(II)(A), C.R.S., Claimant was not required to file a request for hearing on the AWW issue until the DIME process was terminated. Accordingly, it was appropriate for Claimant to not file an AFH on the issue of AWW at the time of MMI in response to Respondents' August 7, 2017 FAL.

Although Claimant failed to notify Respondents of his Georgia employment and wages, there is reference to Claimant's new employment in both Dr. Fall's July 17, 2017 impairment assessment report and Dr. Shea's December 21, 2017 DIME report, which Respondents relied upon in filing the FALs. The record contains no indication that, prior to filing the August 7, 2017 and January 31, 2018 FALs, Respondents made any attempt to confirm Claimant continued to claim an AWW of $126.25, despite deciding to use that figure as their basis for not contesting the assigned impairment ratings. While it was practical for Respondents' to undergo this cost-benefit analysis, it was Respondents' choice to do so, and such choice does not result in Claimant being equitably estopped from requesting an increase in AWW under the specific circumstances.

AWW

Section 8-42-102(2), C.R.S., requires the ALJ to calculate the claimant's AWW based on the earnings at the time of injury as measured by the claimant's monthly, weekly, daily, hourly or other earnings. This section establishes the so-called "default" method for calculating the AWW. However, if for any reason the ALJ determines the default method will not fairly calculate the AWW § 8-42-102(3), C.R.S., affords the ALJ discretion to determine the AWW in such other manner as will fairly determine the wage. Section 8-42-102(3) establishes the so-called "discretionary exception." *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp.*, supra.

Claimant contends that determining his AWW at the time of MMI more fairly compensates him for his loss of future earning capacity, based on his impairment and restrictions. Claimant relies on *Pizza Hut v. ICAO*, 18 P.3d 867 (Colo. App. 2001). In *Pizza* Hut, the claimant was injured as a part-time pizza delivery driver. The claimant had recently graduated nursing school and obtained a full time job with a hospital shortly after his work-injury. Following the DIME, the respondents filed a FAL admitting to the AWW from the part-time pizza job. The claimant objected and requested an AWW based on his earnings at the hospital when he attained MMI. The Court affirmed the Panel's order upholding utilizing the AWW at the time of MMI. *Pizza Hut*, 18 P.3d. at 870.

As found, the AWW at the date of injury is a fair approximation of Claimant's wage loss and earning capacity. While Claimant obtained a degree in renewable energy shortly before sustaining the work injury, the ALJ is not persuaded by Claimant's testimony that he was unable to pursue work in this field as a result of the work injury. Claimant began an entry level position in the renewable energy field shortly after relocating to Georgia, prior to being placed at MMI. When placed at MMI, the only permanent restriction assigned to Claimant limited Claimant from lifting more than 100 pounds. The ALJ did not find Claimant's testimony regarding the physical requirements of the jobs and his inability to pursue work opportunities in the renewable energy field credible or persuasive. The ALJ is not persuaded the work injury limited Claimant in pursuing other jobs in the renewable energy industry to obtain experience and further advance his career. Claimant's AWW at the time of injury, $126.25, fairly approximates the impact of Claimant's injury on his future earning capacity.

Credit of Net Tort Recovery Against Future Indemnity Benefits

Where an employee is injured through the fault of a third party, there are two components or elements to be considered, a lien representing benefits already paid and a potential credit to be offset against the obligation to provide workers' compensation

benefits in the future. *Tate v. Industrial Claim Appeals Office*, 815 P.2d 15 (Colo. 1991); *Andrews v. Industrial Claim Appeals Office*, 952 P.2d 853 (Colo. App. 1998); *Metcalfe v. Bruning Division of AMI*, 868 P.2d 1145 (Colo. App. 1993). Mere acceptance of money to fully or partially satisfy the lien, without more, does not affect an insurer's right to claim a credit. *Metcalfe*, supra.

Here, Respondents accepted the sum of $28,300.00 to extinguish a lien of $52,320.12, resolving the lien, but not Respondents' right to a credit. The parties stipulated Claimant's net tort recovery was $24,205.79. Claimant does not contest Respondents are entitled to a credit against future workers' compensation benefits for the $24,205.79 in net recovery proceeds from the third party lawsuit.

ORDER

It is therefore ordered that:

1. Claimant's AWW is $126.25.

2. Respondents are entitled to credit the $24,205.79 representing Claimant's net recovery from the 3rd party tort action against any future indemnity benefits.

3. Respondents are entitled to a credit in the amount of $924.84 representing TTD benefits received by Claimant from January 8, 2017 to April 19, 2017 against future indemnity benefits.

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

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

DATED: February 7, 2019

Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-067-439-001

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on November 7, 2018, in Denver, Colorado. The hearing was digitally recorded (reference: 11/7/18, Courtroom 4, beginning at 1:30 PM, and ending at 4:00 PM).

Claimant's Exhibits 1 through 19 were admitted into evidence, without objection. Respondents' Exhibits A through R were admitted into evidence, without objection.

At the conclusion of the hearing, the record was left open pending the filing of the post-hearing evidentiary deposition of Brian Reiss, M.D., followed by briefs. Dr. Reiss' post-hearing evidentiary deposition was taken on November 19, 2018 and a written transcript thereof was referred to the ALJ on December 24, 2018. Respondents' opening brief in support of Petition to Terminate Benefits was referred to the ALJ on December 24, 2018. Claimant's combined brief in opposition to Respondents' opening brief and in support of payment of medical bills was referred to the ALJ on December 24, 2018. Respondents' response to Claimant's combined brief was referred to the ALJ on December 24, 2018. The matter was deemed submitted for decision on December 24, 2018.

ISSUES

The issues to be determined by this decision concern whether the Respondents' Petition to Modify, Terminate or Suspend temporary disability benefits, effective July 30, 2018, based on Claimant's alleged at-fault termination from employment (Respondents bear the burden of proof by preponderant evidence on this issue) should be granted; whether the surgery the Claimant underwent by Sharad Rajpal, M.D. on March 10, 2018 was emergency treatment, rendering it authorized although outside the chain of referrals; and, whether post-surgical treatment provided by Boulder Community Hospital is authorized as part of Claimant's allegedly ongoing emergency (Claimant bears the burden of proof by a preponderance of the evidence on these issues).

The Claimant does not dispute that she voluntarily resigned from employment to pursue other interests, however, it is her position that her condition related to the admitted injury worsened and the bar on temporary disability benefits should be lifted as of the time of worsening, without the necessity of formally filing a Petition to Re-open which, if granted, would start a new scenario wherein temporary disability benefits could be commended anew under the holding in *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004). The Claimant bears the burden of proof by preponderant evidence on this proposition.

FINDINGS OF FACT

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

Preliminary Findings

1. Respondents filed a General Admission of Liability (GAL), dated February 2, 2018, admitting for an average weekly wage (AWW) of $503.96, authorized medical benefits; and, temporary total disability (TTD) benefits of $335.99 per week from January 21, 2018 and "ongoing."

2. Respondents filed a Petition to Terminate, Modify or Suspend Compensation on July 30, 2018, alleging that Claimant voluntarily resigned from her employment on February 5, 2018.

3. On August 3, 2018, Claimant filed an Objection to Respondents' above Petition, stating that "Respondents' Motion is not supported by facts or law," and requesting that the matter be set for hearing on the Respondents' Petition. As found herein below, Respondents' Petition is **clearly supported by facts and law.**

4. The Claimant is a four-year employee of the Employer. Her date of birth is February 3, 1990, and she was 28-years old on the date of the hearing.

The Admitted Compensable Injury

5. The Claimant started working as a flight attendant for [the Employer] on February 15, 2017. She was injured on January 20, 2018, while in the course and scope of employment as a flight attendant for [the Employer] while flying from Denver, Colorado, to Edmonton, Canada.

6. The Claimant's injury occurred when severe turbulence knocked her to the ground. She landed first on her right side and then levitated, landing again, this time on her stomach. The ALJ infers and finds that by filing a GAL and continuing to pay the Claimant temporary total disability (TTD) benefits, at least until July 30, 2018, without raising the "termination of benefits" issue, the Respondents essentially conceded that the Claimant sustained a compensable injury on January 20, 2018, with significant consequences. Respondents Petition to Terminate benefits is based on an alleged "voluntary resignation," **not** on a subsequent discovery that the consequences of the Claimant's injury abated and the Claimant returned to a baseline of naturally progressing rheumatoid arthritis (RA), as opined by some of Respondents' IMEs.

At-Fault Termination

7. On February 5, 2018, the Claimant sent an email to Phally [Redacted], Chief Flight Attendant and a supervisor to the Claimant, voluntarily resigning from the Employer's company. The email read as follows:

> Hello Phally,
> Though I have greatly appreciated my time with [Employer], it is with a tremendous amount of thought and prayer that I have decided to turn in my resignation from the company today. I will forever be grateful for all the places I have seen and the people have met along the way but it is time for me to start a new chapter in my life. [Employer] has been one of the best companies I have ever worked for….
> s/Claimant.
>
> [Redacted] replied:
> Hi there…oh no…what happened [Claimant]?
>
> To which Claimant replied:

Nothing happened. I just want to pursue a new avenue…Respondents' Exhibit P, p. 144)

8. Based on the above email exchange, the ALJ finds that the Claimant voluntarily and willfully caused her separation from employment by voluntarily resigning. There is no credible evidence that would lead to an inference of any circumstance supporting a constructive discharge. Further, in her brief, the Claimant concedes that she voluntarily terminated her employment.

Medical Treatment Before Worsening

9. The Claimant immediately suffered pain as a result of this event but continued working on her flight. When she returned to Denver she was referred to Dee Jay Beach, D.O. on January 22, 2018, and then to Concentra. The Concentra records from January 27, 2018, describe the Claimant's symptoms as cervical strain, left shoulder strain, right shoulder strain and lumbar strain (Respondents' Exhibit L, bates stamp [BS] 88).

10. The Claimant was given restrictions by Concentra and she was offered modified duty by her Employer, which she commenced on February 2, 2018.

11. Following her resignation, the Claimant continued treatment with Concentra and sought a second opinion with Sharad Rajpal , M.D., at Boulder Neurological and Spine Associates Community Hospital in February 2018 (Claimant's Exhibit 10, BS 337, 339). Potential surgical intervention was discussed but no surgery decision was made.

12. The ALJ finds that the Claimant would have continued at her modified, accommodated work from February 5, 2018, through March 5, 2018, the day before her condition significantly worsened whereby she could no longer work at modified, accommodated work.

Worsening Condition

13. On March 6, 2018, the Claimant was walking in a parking lot when she felt a sharp pain in her injured right shoulder and cervical region. This pain was caused her to fall to the ground. The ALJ infers and finds that the fall and injuries were directly and proximately caused by the Claimant's condition that resulted from her compensable injuries of January 20, 2018.

14. The Claimant sought emergency care at UC Health Longs Peak on March 6, 2018, for worsening low back pain. The records from Long Peak state that the Claimant had an exacerbation of her chronic back pain with a syncopal episode (Respondents' Exhibit M, BS 112). The records indicate that Claimant had fallen on

her back and was having increased pain there. *Id*., BS 113. She also had tingling in her right arm and in her bilateral legs. The records from Longs Peak noted that the Claimant had previously undergone surgery (microdiscectomy in 2016) for back pain. The ALJ finds and pinpoints the time of a medically supported worsening of condition as March 6, 2018.

15. Thereafter, the Claimant followed-up with an appointment with Chiropractor Dr. Smith, D.C., on March 7, 2018, to whom she had been referred by Concentra. Authorized Treating Provider (ATP) Dr. Smith refused to treat the Claimant at that time, expressing concern about the severity of her symptoms.

16. On March 7, the Claimant returned home following her visit to Dr. Smith, D.C., with severe low back pain which continued worsening throughout that evening and to the next morning. Her mother transported her to UC Health Boulder Community Hospital for further emergency care on March 8, 2018.

17. The Claimant underwent an MRI (magnetic resonance imaging) on March 8, 2018, which established a large paramedian disc herniation and extrusion resulting in severe left lateral recess stenosis. *Id*., BS 291.

18. The records from Boulder Community Hospital show that the Claimant was seen on March 8, 2018, with a "2-month history of severe progressive lumbar pain and radiculopathy that worsened acutely over the last 24 to 48 hours" (Claimant's Exhibit 9, BS 271). A hospital summary accurately described the circumstances of the Claimant's hospitalization:

> HOSPITAL COURSE: Patient is a 28-year-old female patient who had previously been seen in Dr. Rajpal's office as an outpatient. She was found to have a known recurrent disc herniation at L4-L5 and also bilateral pars defect at L5-S1. She presented to the emergency room with uncontrolled pain. She was working as a flight attendant, had some turbulence in the airplane, which made her symptoms much worse. She was admitted to the hospital for pain control and definite management. We discussed risks, benefits, and alternate treatment options with the patient and after much deliberation, the patient elected to proceed with surgical intervention in the way of a redo L4-L5 diskectomy, with TLIF and posterior fusion L4-L5. The procedure was performed by Dr. Sharad Rajpal, for which there were no known complications. Please see his operative note for further details. Surgery took place on March 10, 2018. After the operation, the patient was in stable condition and was transferred from the operating room to the PACU, and from the PACU to the postsurgical

> floor. On the floor, patient received physical therapy, occupational therapy, and pain management. The patient did have some episodes of hypotension and dizziness. The hospitalist team was consulted and worked on managing this. Her symptoms improved. She was cleared by Physical Therapy and Occupational Therapy. Her postoperative x-rays demonstrated stable, well placed hardware. All drains and catheters were removed. On March 14, 2018, the patient's pain was well managed, she was cleared by the medicine team and she was subsequently discharged to home.

(Claimant's Exhibit 9, BS 267).

19. Dr. Rajpal he concluded that the Claimant required immediate fusion surgery intervention due to the presence of progressive neurological deficits impacting the lower extremity and resulting in radiculopathy, weakness, and numbness. *Id.* The Claimant underwent an L4/L5 fusion on March 10, 2018. *Id.,* BS 306. The ALJ finds Dr. Rajpal's decision credible and supportive of the need for emergency surgery. Further, the ALJ makes a rational choice, based on substantial evidence, to accept Dr. Rajpal's decision to perform emergency surgery and to reject any opinions to the contrary. Thus, the ALJ finds Dr. Rajpal's surgery reasonably necessary, causally related to the admitted compensable injury herein, and of an emergent nature. The Claimant remained hospitalized for approximately one-week post-surgery. The ALJ infers and finds that causal opinions to the contrary strain credulity because of the unlikelihood that the surgery was needed because of the natural progression of RA in a 28-year old woman, as opposed to the work-related trigger..

20. Boulder Community Hospital submitted payment for the emergency treatment rendered to the Claimant, including surgery and post-surgery care. This was denied by the Respondents (Claimant's Exhibit 19). The Claimant has continued treatment with Concentra and Nicholas K. Olsen, D.O. (Respondents' Exhibit L and Claimant's Exhibit 14.)

21. The records from Concentra show that the Claimant was seen on April 11, 2018. PAC (Certified Physician's Assistant) Ron Rasis at Concentra who stated that he "[d]iscussed need for review of significant medical records, coordination of care with neurosurgeon. . . ." *Id.,* BS 107.

22. Following surgery, the Claimant was released by Dr. Rajpal, with the following restrictions: avoiding higher powered twisting motions, no tennis until nine months post-surgery, and avoid heavy impact activities such as horseback riding. The Claimant was told that she may increase her weight by 5 lbs. per week and would be permitted to lift at least 20 - 30 lbs., as of August 13, 2018. (Claimant's Exhibit 10, BS 353).

23. According to the Claimant, since her surgery she has been unable to return to work at [the Employer] and has not again been offered modified duty by [the Employer] following her resignation.

24. Prior to her January 20 injury and while working for [the Employer] following her 2016 microdiscectomy with Fernando Techy, M.D. (Respondents' Exhibit I), the Claimant continued her physical activity which included working out several days a week, running, hiking, and horseback riding (specifically timing exercises for roping steers) although her low back began hurting more in mid-2017 (Respondents' Exhibit L, BS 65). Until her injury of January 20, 2018, the Claimant was able to perform all of the essential functions of her job. She was able to perform modified work until her voluntary resignation on February 4, 2018. Afterward her significant worsening on March 6, 2018, the Claimant was not able to perform essential job functions nor was she able to engage in the leisure activities described herein above. .

Nicholas K. Olsen, D.O., ATP

25. Concentra eventually referred the Claimant to Dr. Olsen. She underwent her first evaluation with him in August 20, 2018 (Claimant's Exhibit 14). Dr. Olsen performed an extensive records review and described the circumstances leading up to the Claimant's hospitalization based on this review. His report describes the progression of the Claimant's low back symptoms, to the events preceding her hospitalization on March 8, 2018. As of October 10, 2018, the Claimant 's restrictions were 15 lbs. repetitive lifting and maximum lifting of 40 lbs. (Claimant's Exhibit 14, BS 369).

26. Dr. Olsen noted that the Claimant had undergone a microdiscectomy in 2016, performed by Dr. Techy in July 2016 (Respondents' Exhibit I, BS 47). The Respondents argue that the Claimant's need for emergent surgery on March 10, 2018, was related directly to her prior low back injury and surgery in 2016. This contention is not persuasively borne out by the facts of this case.

27. In 2017 prior to her injury, the Claimant reported limited back problems which caused her to take time off work. She stated that these back problems arose when she was realigning seatbelts on an aircraft which required her to engage in constant bending. Although she missed work, she did not file a workers' compensation claim and returned to work full duty and, was working full duty prior to the events of January 20, 2018.

Brian Reiss, M.D., Respondents' IME

28. Respondents rely on the testimony of IME Dr. Reiss who was of the opinion that the events occurring on January 20, 2018, were insufficient to give rise to a worsening condition warranting hospitalization on March 8, 2018. He also stated the opinion that the surgery on March 10, 2018, was not reasonable or causally related to the January 20, 2018 injuries. For the reasons stated herein below, the ALJ does not find Dr. Reiss' opinions adequately founded or credible.

29. Dr. Reiss testified at his deposition on November 19, 2018, that the Claimant had suffered an aggravation of her pre-existing back problems but stated the opinion that the aggravation should have resolved within a month following her January 20, 2018, injury. The ALJ finds his opinion "should have resolved within a month" as lacking in an adequate foundation, contrary to the weight of the evidence and as significantly lacking in credibility. Dr. Reiss could point to no documents in the records showing that the Claimant had been placed at maximum medical improvement (MMI) for her medical condition related to the present injury. Dr. Reiss agreed that the surgery performed by Dr. Rajpal did not breach the medical standard of care, although he stated the opinion that there **may have been** (emphasis supplied) a violation of the Medical Treatment Guidelines (*Guidelines*) because adequate time had not passed prior to the performance of surgery. He **did not** render an opinion that the Guidelines "were vfiolated." He acknowledged, however, that the presence of significant pain could warrant the intervention of the fusion performed by Dr. Rajpal on March 10, 2018 (Dr. Reiss' deposition, November 19, 2018, p, 20, lines 6 – 13).

Ultimate Findings

30. Based on the totality of the evidence, the ALJ finds the Claimant credible. Further, the ALJ finds Dr. Rajpal's opinions to be persuasive and credible with respect to the work-relatedness, worsening of condition related to the admitted injury, and the emergent need for the surgery which was performed. To the extent other medical opinions are consistent with Dr. Rajpal's opinions, the ALJ finds them to be credible and persuasive. As found herein above, the ALJ finds the medico-legal opinions of Dr. Reiss to be contrary to the weight of the evidence and, therefore, lacking in persuasiveness and credibility. The ALJ finds the Claimant's testimony concerning the occurrence of the March 6, 2018, incident for which she sought and received emergency medical care at UC Health Boulder Community Hospital and UC Health Longs Peak credible and highly persuasive.

31. Between conflicting testimonies and evidence, the ALJ makes a rational choice, based on substantial evidence, to accept the Claimant's testimony, the opinions of Dr. Rajpal and treatment providers that support a work-related worsening of condition, and to reject any opinions to the contrary, including the opinions of Dr. Reiss.

32. The totality of the evidence establishes that the Claimant's need for low back surgery on March 10, 2018, arose as a result of a substantial worsening of condition after her fall on March 6, 2018. This required her to seek emergency medical care at UC Health Boulder Community Hospital and undergo fusion surgery.

33. There is no persuasive evidence in the record that the Claimant demanded a fusion surgery or that the Claimant's hospitalization at UC Health Boulder Community Hospital was the result of anything but the need for emergency surgery. Rather, the records establish a progression in work-related symptoms requiring her to

undergo a fusion at L4/L5 On March 10, 2018, following her debilitating fall on March 6, 2018.

34. Prior to the admitted injury of January 20, 2018, the Claimant was working full time and was able to perform a variety of physical activities without restriction; and, her need for further treatment was triggered by the worsening events of March 6, 2018.

35. The Claimant's voluntary resignation from employment served as a bar to TTD benefits from February 5, 2018, until March 6, 2018, when her condition worsened to the point that she could no longer perform modified duties for the Employer.

36. After March 6, 2018, the Claimant has been temporarily and totally disabled (TTD), and she continues to be TTD, which had previously been admitted in the GAL.

CONCLUSIONS OF LAW

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

Credibility

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

finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, based on the totality of the evidence, the Claimant was credible. Further, Dr. Rajpal's opinions were persuasive and credible with respect to the work-relatedness, worsening of condition related to the admitted injury, and the emergent need for the surgery which was performed. To the extent other medical opinions were consistent with Dr. Rajpal's opinions, they were credible and persuasive. The medico-legal opinions of Dr. Reiss, however, were contrary to the weight of the evidence and, therefore, lacking in persuasiveness and credibility. The Claimant's testimony concerning the occurrence of the March 6, 2018, incident for which she sought and received emergency medical care at UC Health Boulder Community Hospital and UC Health Longs Peak, plus Dr. Rajpal's surgery, was credible and highly persuasive..

Substantial Evidence

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

At Fault Termination

c. Respondents argue that the Claimant's entitlement to TTD benefits ceased and was barred into the future when she tendered her resignation on February 5, 2018. They request that TTD be terminated as of July 30, 2018, the date they filed the Petition to Modify, Terminate, or Suspend (Claimant's Exhibit 3). They also dispute that the fusion surgery the Claimant underwent on March 10, 2018, was the result of an emergency, was reasonably necessary, or was causally related to her January 20, 2018, injury. Ordinarily, § 8-42-105 (4), C.R.S., provides that an employee responsible for her own termination is not entitled to temporary disability benefits. This statutory provision has been interpreted to mean that "responsibility for termination" must be through a volitional act on the part of the terminated employee. *Colorado Springs Disposal v. Indus. Claim Appeals Office,* 58 P. 3d 1061 (Colo. App. 2002). A finding of fault requires a volitional act or the exercise of a degree of control by a claimant over the circumstances leading to termination. *Gilmore v. Indus. Claim Appeals Office,* 187 P.3d 1129, 1132 (Colo. App. 2008); *Apex Transport, Inc. v. Indus. Claim Appeals Office,* **2014 COA 25.** An unqualified voluntary resignation, as found herein above, qualifies as a volitional act. The Supreme Court, however, has determined that the "responsibility for termination" defense is not absolute and is vitiated when a worsening of condition occurs. *Anderson v. Longmont Toyota,* 102 P. 3d 323 (Colo. 2004). In *Longmont Toyota*, the Supreme Court did **not** indicate that the mechanistic action of filing a petition to re-open and the granting of a re-opening was necessary to end the bar on termination of temporary disability benefits. The Supreme Court quite simply held that a worsening of condition period is all that is necessary to end the bar on temporary disability benefits. Indeed, the critical facts in *Longmont Toyota* are virtually identical to the facts herein—a worsening of condition occurred after the claimant's voluntary resignation. As found, prior to the admitted injury of January 20, 2018, the Claimant was working full time and was able to perform a variety of physical activities without restriction; and, her need for further treatment was triggered by the worsening events of March 6, 2018. Her voluntary resignation from employment served as a bar to TTD benefits from February 5, 2018, until March 6, 2018, when her condition worsened to the point that she could no longer perform modified duties for the Employer. After March 6, 2018, the Claimant has been temporarily and totally disabled (TTD), and she continues to be TTD, which had been admitted in the GAL.

Medical—Emergent Care and Surgery

d. A medical emergency allows an injured worker the right to obtain treatment without undergoing the delay inherent in notifying the employer and awaiting approval. However, once the emergency has ended, the employee must give notice to the employer of the need for continuing care. *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the totality of the evidence established that the Claimant's need for low back surgery on March 10, 2018, arose as a result of a substantial worsening of condition after her fall on March 6, 2018. This required her to seek emergency medical care at UC Health Boulder Community Hospital and undergo fusion surgery. As further found, there was no persuasive evidence in the record that

the Claimant demanded a fusion surgery or that the Claimant's hospitalization at UC Health Boulder Community Hospital was the result of anything other than the need for emergency surgery. The persuasive medical records established a progression in work-related symptoms requiring her to undergo a fusion at L4/L5 On March 10, 2018, following her debilitating fall on March 6, 2018.

Burden of Proof

e. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). When a respondent seeks to terminate or suspend temporary benefits, however, the respondent bears the buden of proof by preponderant evidence. The burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Respondents sustained their burden insofar as benefits should be suspended from February 5, 2018, through March 5, 2018. Respondents, however **failed** to sustain their burden after the worsening of condition on March 6, 2018.

f. The Claimant has sustained her burden with respect to medical treatment for her work-related injuries. Indeed, the GAL admits for medical benefits. Further, the Claimant has proven that the treatment and surgery by Dr. Rajpal was of an emergent nature and, thus, the liability of Respondents although outside the chain of authorized referrals.

ORDER

IT IS, THEREFORE, ORDERED THAT:

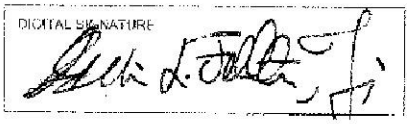
A. Respondents having failed to establish entitlement to suspend temporary disability benefits after March 6, 2018, the General Admission, dated February 2, 2018, remains in full force and effect with respect to this time period.

B. Respondents may suspend temporary disability benefits from February 5, 2018, through March 5, 2018 and to this extent the General Admission is modified accordingly.

C. Respondents shall pay the costs of all medical care and treatment, including the emergency care and surgery by Sharad Rajpal, M.D., causally related to the admitted injury of January 20, 2018, subject to the Division of Workers Compensation Medical Fee Schedule.

D. Any and all issues not determined her are reserved for future decision,

DATED this 8th day of February 2019.



_____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of February 2019, electronically in PDF format, addressed to:

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

_____
Court Clerk

Wc.ord

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-050-355-001

ISSUE

- Whether Claimant has overcome by clear and convincing evidence the Division Independent Medical Examination (DIME) opinion of Dr. Stephen Lindenbaum that Claimant sustained 0% impairment because of his work injury.

FINDINGS OF FACT

1. On March 2, 2017, Claimant and a co-worker had a dispute regarding paperwork that Claimant was advised to sign in order to complete his job duties. At the time of the incident, Claimant was 79 years old and had worked for Employer for a lengthy period as both a maintenance worker and a tax preparer.

2. During the dispute, Claimant's co-worker grabbed him by the collar of his shirt, spun him around and pushed him out a door where he fell to the ground and landed on his hands and knees. A witness called the local police department and officers responded to the incident. Claimant notified his maintenance supervisor of the incident. On March 3, 2017, Claimant's supervisor took Claimant to Concentra to initiate medical treatment for any injuries.

3. Claimant has a history of neck pain, medical treatment, and surgery. In approximately 2000, Claimant began to develop numbness in his neck. These symptoms eventually progressed to the point where Claimant began to lose function in his left arm. Claimant ultimately underwent a multi-level cervical fusion procedure. In 2006, Claimant was involved in a motor vehicle accident that required him to undergo a cervical MRI, but no medical treatment.

4. On March 3, 2017, Claimant presented to Concentra for an initial evaluation of his March 2, 2017 injury. His provider assessed a strain of his neck muscles and anterolisthesis.

5. Respondents retained orthopedic surgeon Dr. William Ciccone to perform an Independent Medical Evaluation (RIME) on October 18, 2017. Dr. Ciccone opined Claimant sustained a minor sprain/strain of the cervical spine because of his March 2, 2017 injury. Dr. Ciccone agreed with Claimant's surgeon, Dr. Ghiselli, that no need for surgical intervention related to the work injury. Dr. Ciccone noted Claimant's MRIs showed no evidence of an acute injury and opined that Claimant's continuing symptoms related to progressive cervical spine pathology and not to the work accident.

6. Claimant received conservative medical treatment at Concentra until January 30, 2018, when Dr. Amanda Cava placed him at maximum medical improvement

(MMI) with no permanent impairment, no medical maintenance, and no permanent work restrictions.

7. Claimant applied for a Division IME in response to Dr. Cava's MMI report. Dr. Stephen Lindenbaum performed the DIME on May 25, 2018. Dr. Lindenbaum agreed with Dr. Cava's January 30, 2018 MMI date and 0% impairment rating.

8. Dr. Lindenbaum evaluated Claimant and noted his nerve studies were negative for radiculopathy and that Claimant's symptoms were myofascial. Dr. Lindenbarum ultimately determined that the findings then seen in Claimant's cervical spine related to the effects of a long fusion with increased motion and stress at the levels above and below the prior fusion. Dr. Lindenbaum further opined the C6-C7 pseudoarthrosis was not related to Claimant's March 2, 2017 injury because there was no evidence of any changes in the plate positioning and it was very unlikely the pseudoarthrosis would relate to the work injury without some associated abnormalities seen on the imaging studies. In determining Claimant had a 0% impairment rating, Dr. Lindenbaum reasoned that there was no evidence of any significant structural abnormality related to the work accident and that any loss of range of motion was likely related to the prior cervical fusion. The ALJ finds Dr. Lindenbaum's opinions to be credible and persuasive and notes they are supported by the opinions of Claimant's treating providers. The ALJ finds Dr. Lindenbaum appropriately used his discretion as the DIME in determining Claimant was at MMI with 0% impairment related to his work injury.

9. Claimant testified at hearing regarding the events of his injury and his prior cervical fusion. He testified that following the injury he was no longer able to ride his motorcycle across country and that he had not ridden his motorcycle since the March 2, 2017 injury. Claimant testified that prior to the March 2, 2017 injury he had no limitations in his range of motion following his cervical neck fusion. Claimant testified that after being placed at MMI he has had tingling in his right arm, but has not had pain. Claimant testified he has returned to his regular job duties with Employer and can do everything he used to do prior to the March 2, 2017 accident, except that he can no longer replace ceiling tiles because he cannot look straight upwards.

10. Dr. Jack Rook testified at hearing on behalf of Claimant. He testified that in his opinion, Dr. Lindenbaum inappropriately provided Claimant a 0% impairment rating because claimant had 6 or more months of pain and rigidity that qualified him for an impairment rating under Table 53 of the *America Medical Association Guidelines to the Evaluation of Permanent Impairment, 3rd Ed.* Dr. Rook, however, had not reviewed the medical record and was not aware of material facts, such as Claimant having MRIs that preexisted the March 2, 2017 injury. The ALJ finds that Dr. Rook's testimony and opinions are not persuasive.

11. The ALJ finds that Claimant's testimony and the testimony and medical opinions of Dr. Rook do not amount to clear and convincing evidence to overcome the DIME of Dr. Lindenbaum.

CONCLUSIONS OF LAW

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

General Legal Principles

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

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

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

Claimant Failed to Present Clear and Convincing Evidence to Overcome the Division Independent Medical Examination (DIME) Opinion of Dr. Stephen Lindenbaum that Claimant Sustained 0% Impairment because of His Work Injury

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

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

As found, Claimant failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Lindenbaum that Claimant sustained a 0% whole person impairment as a result of his March 2, 201 admitted work injury. Claimant failed to demonstrate that Dr. Lindenbaum improperly applied the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised) (AMA Guides*) or otherwise erred in assigning a 0% impairment rating. After reviewing Claimant's medical records, Dr. Lindenbaum ultimately determined that the findings now seen in Claimant's cervical spine are related to the effects of a long fusion with increased motion and stress at the levels above and below the prior fusion. Dr. Lindenbaum further opined the C6-C7 pseudoarthrosis was not related to claimant's March 2, 2017 injury because there was no evidence of any changes in the plate positioning and it was very unlikely the pseudoarthrosis would be related to the work injury without some associated abnormalities seen on the imaging studies. In determining Claimant had a 0% impairment rating, Dr. Lindenbaum reasoned that there was no evidence of any significant structural abnormality related to the work accident and that any range of motion loss was likely related to the prior cervical fusion. Although Claimant argues that Dr. Lindenbaum's determination is incredible, Dr. Lindenbaum properly applied the *AMA Guides* and exercised his discretion in assigning a 0% impairment rating because of the March 2, 2017 injury. Accordingly, Claimant has failed to produce clear and convincing evidence that Dr. Lindenbaum's impairment determination is incorrect.

ORDER

IT IS, THEREFORE, ORDERED THAT:

1. Claimant failed to overcome the Division IME of Dr. Stephen Lindenbaum by clear and convincing evidence. Claimant sustained 0% impairment from his March 2, 2017 work injury.

DATED this 8th day of February 2019.

/s/Kimberly Turnbow
Kimberly Turnbow
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the Order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the Order, as indicated on the certificate of mailing or service; otherwise, the Judge's Order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB 09¬070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a Petition to Review form at: http://www.colorado.gov/dpa/oac/forms-wc.htm.**

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-067-453-002

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that the recommended four level cervical fusion from C3-7 is reasonable, necessary, and causally related to his admitted industrial injury.

- Whether Claimant has proven by a preponderance of the evidence that the recommended ankle arthroscopy, Brostrom procedure, and repair of peroneal tendons surgery is reasonable, necessary, and causally related to his admitted industrial injury.

FINDINGS OF FACT

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

1. On January 17, 2018, Claimant suffered an admitted injury to the left ankle, left shoulder and cervical spine. Claimant testified that he fell to the ground landing on his left shoulder. Claimant testified that he tapped his head when he fell, but his medical records did not support that testimony.

2. On the day of the fall, Claimant presented to North Suburban Medical Center with medial and lateral left ankle pain after a fall at work. A radiologist read his left ankle x-ray as normal. Claimant did not report head trauma or neck pain.

3. Also on the date of the injury, Claimant had an initial evaluation with ATP Dr. Matthew Lugliani. Claimant reported ankle pain and an inability to bear weight. Again, he reported no head trauma or neck pain. Claimant filled out a pain diagram on whic documents the sole location of pain as the left ankle. Yet at hearing, Claimant testified that after he fell, his neck was immediately sore.

4. On January 22, 2018, Claimant reported the onset of shoulder pain. A pain diagram Claimant filled out on this day documented symptoms in his left shoulder along with his left ankle. Claimant noted no neck symptoms. A January 30, 2018 pain diagram documented the same symptoms.

5. On February 16, 2018, Claimant reported symptoms radiating down his left arm, but still no neck pain or symptoms. However, Claimant testified the numbing down his arm started a week after the accident.

6. By February 21, 2018, a month after the accident, Claimant began reporting "persistent left-sided neck pain." At hearing, Claimant testified that sometime in February, "like the 21st," he informed the doctor his neck was sore and he was having

headaches. Dr. Lugliani referred Claimant to Dr. Pehler for his neck, Dr. Myers for his ankle, and Dr. Davis for his shoulder.

7. By March 28, 2018 Claimant's symptoms expanded to include aching in his head and stabbing pain at the back of his neck, as documented Claimant's pain diagram.

8. Dr. Lugliani referred Claimant to pain specialist Dr. Lesnak for treatment and an EMG.

9. On April 6, 2018, Dr. Lesnak saw Claimant. Dr. Lesnak noted diffuse complaints through the neck, scapula, shoulder and arm. Dr. Lesnak noted a history of bipolar manic depression. On physical exam, Claimant demonstrated giveway weakness in his left shoulder and significant guarding to any attempt at examination. Claimant had decreased sensation throughout his arm in a non-dermatomal distribution. Claimant demonstrated diffuse tenderness with gentle brushing on the skin on his neck, but no distinct trigger points or spasms. Overall, the findings were nonphysiologic. Dr. Lesnak noted that Claimant had no "real clear objective findings to support his complaints." Dr. Lesnak noted an extremely high level of somatic pain complaints, which "strongly suggests an underlying somatic disorder. Patients with these types of diagnoses frequently embellish/exaggerate their symptomology and their subjective complaints are commonly unreliable at best." Thus, Dr. Lesnak recommended that any medical diagnoses be based solely on reproducible objective findings, and not his complaints. Dr. Lesnak recommended moving forward with the EMG to confirm the diagnosis.

10. As part of his exam, Dr. Lesnak performed a Comprehensive Outcome Assessment, which includes a psychological assessment. Claimant's results placed him in the "distressed depressive" category, which means, "there are significant psychological factors that are influencing the patient's symptoms, recovery, and perceived function at this point in time."

11. On April 16, 2018, Dr. Lesnak performed the EMG. The EMG revealed no abnormalities of the left upper extremity, neck or scapular region. This finding concerned Dr. Lesnak, who noted no "reproducible objective findings to suggest any symptomatic cervical spine pathology." His complaints are "dramatically out of proportion to what one would expect given the mechanism of his incident." Dr. Lesnak recommended moving forward with the left shoulder MRI, and basing further recommendations off those results. Dr. Lesnak did not prescribe opioid pain medications.

12. Claimant went to the ER reporting terrible pain. Dr. Sheldon Goldberg, the attending physician at the hospital, put Claimant on a "cocktail" of painkillers. Dr. Goldberg did not perform any psychological evaluation.

13. On April 18, 2018, Dr. Lugliani performed a Comprehensive Outcome Assessment, which included a psychological assessment. Claimant's results placed him in the "distressed depressive" category, which means, "There could be significant psychological factors that could interfere with recovery." Dr. Lugliani believed this was preexisting and not related to the work injury.

14. At a follow-up on April 25, 2018, Dr. Lugliani noted that Claimant had elected to move to a different pain specialist, Dr. Goldberg, contrary to their policy, so he released Claimant from his care.

15. Dr. Stuart Myers treated Claimant's ankle. By April 9, 2018, Dr. Myers stated he had expected Claimant to be at MMI for his ankle by now, but "things seem to be progressing a bit more slowly than I initially anticipated." Dr. Myers ordered an ankle MRI that revealed intra-articular pathology. Dr. Myers recommended an ankle injection. The injection provided no benefit. Accordingly, Dr. Myers recommended an ankle arthroscopy, Brostrom, and peroneal tendon debridement repair of tendon.

16. By May 15, 2018, Claimant reported a "limited ability to do standing and walking." At hearing, Claimant testified that Dr. Myers gave him a boot for his ankle that he "pretty much wears all the time." On surveillance taken over six different days, Claimant is not wearing a protective boot.

17. At hearing, Claimant testified that he has difficulty going up steps, and has to gauge how much room he has before squaring up and stepping up. He further testified that if he is approaching a step he leads with his right foot, since his left foot is continuing to have issues. However, surveillance footage of Claimant walking while talking on a cell phone reveals no abnormal hesitation while Claimant walks up a curb, leading with his injured left foot.

18. Claimant testified that his ankle has even affected how he gets in and out of the car. Video surveillance shows Claimant getting into and out of his truck repeatedly with no obvious issue, including specifically pushing off his left injured ankle while getting into his pickup truck.

19. Dr. Stephen Pehler treated Claimant's cervical spine. Dr. Pehler noted that Claimant had "a relatively atypical nature of his presentation." Dr. Pehler cited the "fairly perplexing and concerning clinical presentation," with some symptoms "consistent with progressive spinal cord and nerve root compression . . . and some other signs and symptoms that do not match with this particular pathology."

20. Nonetheless, on May 25, 2018 Dr. Pehler recommended a C3-C7 anterior and posterior cervical decompression and fusion. Dr. Pehler noted "this is obviously an extensive undertaking," and Claimant will "likely have long-term pain and disability following this operation." Dr. Pehler opined that it would be "a fairly debilitating operation for the patient to recover from," and that he would not likely return to his work as a mechanic. Dr. Pehler further opined that given Claimant's pain symptoms, "recovery from this procedure is questionable at best.

21. Claimant testified that he needs the cervical fusion to be able to function, as his current status "is not functioning." He agreed that his current condition is so bad that he is willing to take the risk with some of the functionality issues he may have after the fusion. Dr. Castro noted his concern for performing the 4-level fusion when Claimant was functioning pretty well while washing his car and in the surveillance videos. The

surveillance shows Claimant washing his truck, using a soap brush to soap the vehicle, including lifting his injured left arm above shoulder level to remove and replace his hat with ease, and applying rigorous force while soaping his truck with a brush, using his left shoulder and neck, all with no obvious dysfunction.

22. Claimant testified at times his neck hurts to move, and specifically when looking down or turning in both directions, and that his neck symptoms have been the same for the last three to four months. The surveillance shows Claimant looking down and to the left while talking to the mail carrier, with no apparent issue. The surveillance also shows Claimant bending his head straight down without any apparent issue.

23. Claimant testified he can move his head towards his shoulder, but not all the way, and that he experiences pain like "a red-hot poker getting stuck" in him when he moves his head towards his shoulder. Dr. Castro agreed that the action of pinning a phone to your shoulder with your head is not something an individual who requires a four-level fusion would like to do, as it will bring on pain. Yet on surveillance, Claimant pins his phone against his left shoulder with his head, while he steps into his truck, with no apparent issue.

24. Claimant testified that if he is driving and has to look left and right at a stop sign, he can turn his head to a point but then has to roll his body. However, surveillance documents Claimant moving his head side to side repeatedly and with ease while driving his truck.

25. Dr. Davis is treating Claimant's shoulder. He recommended a shoulder surgery, which Insurer has authorized. However, Dr. Davis is refusing to go forward with the shoulder surgery until the neck surgery is performed. Dr. Pehler opined that the shoulder surgery could move forward before any neck surgery. Dr. Castro agreed, and stated that the shoulder may be the underlying cause of his neck issues.

Dr. Bryan Andrew Castro

26. Dr. Castro testified as a level II accredited, board certified orthopedic spine surgeon who performs surgery four to six times a week.

27. Dr. Castro testified that the recommended four-level fusion would not benefit Claimant. The surgery is typically performed for major trauma, fractures, spinal cord injury, and tumors.

28. In assessing whether to perform a four-level fusion, Dr. Castro testified that you look for a clear dermatomal pattern of persistent radiculopathy that can be fixed. Although Claimant had complaints of pain, his normal EMG and strength findings on physical exam do not support a finding of significant cervical radiculopathy. Claimant had migratory patterns that would not predict a good result. Claimant's MRI also did not match the dermatomal pattern. If the MRI results were causing radiculopathy, it would be on the thumb side, and not on the pinky side that Claimant is reporting. The pinky

side nerve is located at C8, which was patent on the MRI, with nerve channels open with no compressing.

29. Dr. Castro testified that this surgery would result in long-term pain and disability. He testified that the risks associated with this surgery are significant, including dysphagia, infection, permanent loss of range of motion, and particularly in Claimant's case fusion failure resulting in the need for additional operations. He stated that when the ramifications of a surgery are so high, it is important that you can determine the patient will be predictably better after the surgery. The ramifications for this surgery increase because it involves four levels. Dr. Castro explained that the fusion rate for a four-level fusion is in the low 40th percentile. This healing rate is before factoring Claimant's nicotine usage (chewing tobacco), which inhibits bone healing.

30. Dr. Castro testified that Dr. Pehler's opinion that the surgery is needed to ameliorate myelopathy is not supported by the actual findings for Claimant. Myelopathy spinal cord compression results in very specific findings, including balance problems, gait disturbances, hand dexterity changes, and a very unique set of reflexes that is consistent with myelopathy. Dr. Castro testified that Claimant did not have these physical findings as documented on surveillance, nor did he have the cardinal reflex findings. The surveillance does not support what any of the providers were finding on physical examination, including himself. Dr. Rook also testified that he did not find myelopathic symptoms on his physical examination. Nor did the neck MRI reveal any injury to the spinal cord.

31. Dr. Castro testified that in the workers' compensation setting the concern is not just pain amelioration but also functional improvement. Dr. Castro stated that this surgery would not be of benefit, and instead would cause a "tremendous functional worsening of his condition."

Dr. Robert Messenbaugh

32. Dr. Messenbaugh testified as a board certified, level II accredited orthopedic physician.

33. Dr. Messenbaugh testified that Claimant suffered an ankle sprain and has an MRI that shows a tear of the anterior talofibular ligament (ATFL). Dr. Messenbaugh noted that Dr. Myers' recommend surgery is for documented instability of the ankle.

34. Dr. Messenbaugh opined that the surgery was not indicated given the lack of documented instability. He noted that stress tests used to assess instability were not performed. He further noted that the surveillance videos revealed no instability or reluctance to put weight on his lower extremity. Dr. Myer's own physical exams do not document instability, as no stability physical examination testing was done given Claimant's discomfort. Dr. Messenbaugh agreed that he could not even stress Claimant's ankle sufficiently to determine whether it was unstable or not.

35. Dr. Messenbaugh physically examined Claimant, specifically looking for findings consistent with his ATFL tear. He did not find tenderness consistent with the ATFL tear, and instead found tenderness in a separate part of the ankle where the peroneal tendons pass. Since the ATFL area was not tender, he expressed concern whether a repair of that ligament would serve any good for Claimant. Meanwhile, peroneal tendinosis, which may explain Claimant's symptoms, could be caused by Claimant's age and obesity.

36. On cross, Dr. Messenbaugh agreed that Claimant stating that his ankle gives way, if the treating physician believed him, could be evidence of instability. However, the surveillance taken over six days documents Claimant walking, getting into his vehicle, and stepping up and down curbs, and shows no evidence of instability or issue.

Dr. Jack Rook

37. Dr. Jack Rook testified as a board certified physical medicine and rehabilitation level II accredited expert. Dr. Rook opined that Claimant's industrial injury caused the need for the surgeries recommended by Drs. Pehler and Myers.

38. When Dr. Rook saw Claimant for an examination, Claimant favored his left leg while walking and held his left arm in a protective manner, which is what Dr. Rook would expect with a torn ankle ligament and severe shoulder pain/pathology. Yet surveillance video documents Claimant walking without apparent limp or protective manner towards his left arm, and in fact hops down a curb onto his injured left ankle with no issue. Surveillance also documents Claimant driving himself to a physician appointment with his partner in the passenger's seat, his partner tossing him his shoulder sling prior to entering the appointment, and then removing it after the appointment, before getting back in the car to drive. Dr. Rook testified that he did not view the surveillance.

39. Dr. Rook testified that Claimant reported severe neck pain, ongoing and constant since the accident occurred, particularly when looking down. However, Claimant's neck pain began roughly a month after the accident.

40. Dr. Rook opined that the recommended ankle surgery would improve Claimant's weight bearing while walking or standing. However, surveillance documents Claimant standing, bearing his full weight on his left leg, with his right leg crossed, with no apparent issue.

41. Dr. Rook testified that Claimant reported to him a poor level of functional ability. The consideration for performing the four-level fusion is that his current function is so poor that it is worth considering this serious surgery. Surveillance footage of Claimant's functional ability contradicts Dr. Rook's opinion.

42. The ALJ does not credit the testimony of Dr. Rook. Dr. Rook's analysis is based on faulty information. Dr. Rook recommended the surgeries given the severe dysfunction Claimant reported. Dr. Rook opined that the potential benefit to improve

Claimant's function, since Claimant's condition is so poor, outweigh the risks associated with the four-level fusion. The surveillance completely contradicts the level of functional deficit Claimant alleges and reports to Dr. Rook and the other treating physicians. As Dr. Rook testified that he did not review this surveillance footage, his opinion is not persuasive.

43. Surveillance showing what Claimant is able to do fails to support his alleged disabilities and his reports to his treating physicians. Claimant's medical records document nonphysiologic complaints, unusual findings that do not match the diagnostics, and subjective complaints out of proportion to the findings. Therefore, the opinions of the physicians who viewed Claimant's surveillance, Drs. Castro and Messenbaugh, are more persuasive.

CONCLUSIONS OF LAW

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

GENERALLY

In addition to determining the sufficiency of the evidence presented, the ALJ evaluates the credibility and probative value of conflicting evidence, including competing experts and inconsistencies in a particular witness' testimony. *Johnson v. ICAO*, 973 P.2d 624, 626 (Colo. App. 1997).

The ALJ does not have to reject explicitly every theory found to be unpersuasive. Nor does the ALJ have to make findings about every piece of evidence. *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000). An ALJ may even reject uncontroverted evidence. *Mosley v. ICAO*, 78 P.3d 1150, 1153 (Colo. App. 2003).

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

MEDICAL BENEFITS

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

Whether medical treatment is reasonable and necessary is for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002); *Wal-Mart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo. App. 1999). The

claimant bears the burden of proof to establish the right to specific medical benefits. *Wal-Mart Stores, Inc. v. Industrial Claims Office, supra*.

The ALJ finds that, more likely than not, the recommended surgeries: 1) fusion from C3-C7; and 2) ankle arthroscopy, Brostrom procedure, and repair of peroneal tendons surgery, are not reasonable, necessary or related to the industrial injury. The ALJ is highly concerned about the level of disability Claimant demonstrated at hearing, testified to and reported to his treating physicians, versus his demonstrated functionality in the surveillance video when he was not aware he was being observed.

Each physician acknowledges that a 4-level fusion is a significant undertaking with significant risks. However, it may be necessary for certain severe injuries. Dr. Pehler, the spine surgeon who recommended the fusion, did so in part based on findings of myelopathy. Yet the surveillance shows none of the balance issues or gait disturbances expected if Claimant's cord was compressed. Dr. Castro noted Claimant did not present with the Cardinal reflex. Even Claimant's own IME Dr. Rook agreed that on physical exam Claimant showed no myelopathic findings. Dr. Pehler himself expressed significant reservation throughout his treatment of Claimant, noting the atypical findings throughout. Oddly, Dr. Pehler has now agreed that Claimant's shoulder surgery can proceed prior to the neck surgery. This seems contradictory to Dr. Pehler finding that the neck surgery is truly needed, since Claimant's neck must be manipulated in order to perform the shoulder surgery, and if Claimant truly had a compressed cord, it is unlikely he would be comfortable allowing the shoulder to proceed first. On the contrary, it appears that Dr. Pehler's opinion may be more in line with Dr. Castro's, in that the shoulder may be the true cause of Claimant's symptoms, if any.

Claimant's subjective complaints serve as the base for Dr. Myers and Dr. Pehler's surgical recommendation. The reasonableness of these surgical recommendations depends on the veracity of Claimant's statements to them. Given the evidence presented at hearing, Claimant's subjective complaints are not credible. At hearing Claimant appeared very debilitated, limping and demonstrating pain behaviors. He also testified to his inability to function, including experiencing "red-hot pokers" of pain in his neck with movement, and the need to constantly wear a boot on his left ankle. This is consistent with what he reported to his treating physicians. For the ankle, Claimant reported to Dr. Myers that he has a limited ability to stand/walk. Dr. Myers could not even perform a physical examination of the ankle given pain complaints.

Dr. Pehler opined that the only option given Claimant's complaints is a 4-level fusion. At hearing, when confronted with the likelihood of permanent post-surgical disability and pain, Claimant testified that he still wanted to proceed with the surgery since his current level of function was so bad.

The surveillance contradicts the level of disability Claimant reports. In viewing the surveillance, it is not obvious that Claimant has any injury at all, whether to his left ankle, left shoulder, or neck. Claimant carries himself with the ease expected of an individual his size, and he not once winces in pain or exhibits the hesitation or protective behaviors

one would expect given his alleged injuries. Claimant casually leans his full weight on his left ankle. He walks with ease, hopping up and down curbs. Claimant moves his neck repeatedly and even while applying force while soaping his vehicle, and yet exhibits no pain reactions or limitations. Even the left shoulder, which is admitted for surgery and not in dispute at this hearing, shows no obvious sign of injury, with Claimant opening his door, and lifting his arm above shoulder height without issue. In totality, the surveillance videos taken on 4/18, 5/16, 5/26, 5/31 and 6/7 contradict the disability and lack of function Claimant alleges. Claimant argued at hearing that he may have been having a good day during the surveillance. Yet the surveillance spanned six days from April 18, 2018 to June 7, 2018, and in no instance did Claimant appear disabled to the extent he is claiming.

The ALJ finds psychological issues and/or somatic disorder to be the most likely explanation for the discrepancy between Claimant's purported disability and what he demonstrates on surveillance. Unreliable subjective complaints would also explain the "atypical, unusual" findings from each of Claimant's treating physicians, including Drs. Pehler and Myers. Spine surgeon Dr. Pehler expressed concern throughout, with some symptoms consistent with cord compression and others not consistent. These physicians relied on the truthfulness of Claimant's complaints for their surgical recommendations. They do not have the benefit of viewing the surveillance and the treating records of the other physicians, which also document nonphysiologic and unusual findings. Thus, while the ALJ does not question their credentials, their opinions are undermined by their reliance on Claimant's unreliable complaints.

This ALJ gives significant weight to the opinions of Dr. Lesnak. He was a pain management treating physician, and the only physician to perform psychological testing. Claimant is bipolar manic-depressive. The psychological testing revealed that Claimant was "depressed distressed," with significant concern for somatic disorder and unreliable complaints. Because of this, Dr. Lesnak recommended relying on objective evidence, and requested an EMG. Once the EMG returned normal, Dr. Lesnak refused to prescribe opioids pending additional diagnostics for the shoulder. Once Dr. Lesnak refused to prescribe opioids, Claimant began seeing Dr. Goldberg (who did prescribe opioids *without* psychological testing), resulting in Claimant's discharge from Dr. Lugliani/Dr. Lesnak's care for noncompliance. Claimant has been on opioids since the beginning of his treatment, and sought other care as soon as he was denied opioids, yet no other physicians have performed a psychological assessment, particularly considering his baseline bipolar condition.

The ALJ finds that the recommended ankle arthroscopy, Brostrom procedure, and repair of peroneal tendons surgery is not reasonable, necessary or related to the industrial injury, as it is based on Claimant's subjective complaints and not objective evidence. Claimant's complaints of ankle instability are not credible and are not supported by the surveillance. Claimant's ankle pain complaints migrate and are not consistent, as documented by the physical exams of Drs. Messenbaugh, Rook and Myers. Also, as Dr. Messenbaugh testified, there is a lack of objective evidence documenting instability, which is the indicator for this surgery.

The ALJ also finds that the recommended cervical fusion from C3-7 is not reasonable, necessary or related to the industrial injury. The physician who recommended this surgery, Dr. Pehler, shows significant concern throughout with Claimant's atypical findings. Dr. Pehler states that Claimant will be disabled and with permanent pain, yet continues to recommend the surgery given Claimant's complaints. The ALJ credits Dr. Castro's testimony that Claimant's functioning would be far worse after the surgery than his current condition. Dr. Castro's testimony that Claimant's complaints have been nonphysiologic and inconsistent find support in the medical records, including the normal EMG and cervical MRI with degenerative pathology that would tie to different dermatomal complaints than what Claimant is alleging. Ultimately, Claimant at hearing appeared hobbled, in pain, and disabled. Yet the Claimant on surveillance went about his daily life with no obvious injury or disability. Given Claimant's demonstrated ability and the lack of objective findings in the medical records, the 4-level fusion is not reasonable, necessary or related.

ORDER

It is therefore ordered that:

1. Claimant's request for a cervical fusion from C3-7 is denied and dismissed.

2. Claimant's request for an ankle arthroscopy, Brostrom procedure, and repair of peroneal tendons is denied and dismissed.

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

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

DATED: February 12, 2019

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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she sustained a compensable right shoulder injury during the course and scope of her employment with Employer on June 21, 2018.

2. Whether Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of her industrial injury.

3. Whether Claimant has proven by a preponderance of the evidence that Respondents failed to timely provide a list of at least four designated physicians in compliance with §8-43-404(5)(a)(I)(A), C.R.S. and she is thus permitted to select a treating physician.

STIPULATIONS

The parties agreed to the following:

1. Claimant earned an Average Weekly Wage (AWW) of $401.66.

2. If the claim is compensable, Claimant is entitled to receive Temporary Partial Disability (TPD) benefits for the period June 22, 2018 through November 23, 2018.

FINDINGS OF FACT

1. Claimant worked for Employer as a Cashier. She testified that on June 21, 2018 she was helping another cashier unload a customer's cart. While lifting a six-pound package of hamburger patties across her body to place on a conveyor belt, Claimant suffered a burning sensation in her right shoulder.

2. Claimant reported her injury to her supervisor but did not initially seek medical care. Although Claimant had not received work restrictions Employer accommodated her by modifying her job duties. However, when Claimant's symptoms did not resolve, she completed a First Report of Injury on June 25, 2018.

3. Employer directed Claimant to UC Health Urgent Care for medical treatment. On June 27, 2018 Claimant visited UC Health for an examination. Claimant reported that, while working for Employer six days earlier, she lifted a six-pound package of hamburger and suffered a sharp pain in her right shoulder that radiated into her right chest area. She noted sharp pain with movement, but Advil and a heating pad provided some relief. On physical examination Claimant exhibited tenderness and decreased range of motion in her right shoulder area down to her first and second right

ribs. Jocelyn Cavender, PA-C diagnosed Claimant with somatic rib dysfunction, strain of the neck muscles and strain of the right shoulder. PA-C Cavender prescribed medications and assigned work restrictions of no lifting, carrying, pushing or pulling in excess of five pounds and no overhead reaching.

4. Claimant explained that she desired to continue follow-up treatment with UC Health. However, she commented that she had a conversation with her manager and the insurance adjuster. Claimant testified that the insurance adjuster informed her the claim was denied and she would be unable to receive any additional authorized medical care. She subsequently attempted to schedule an appointment with her primary care physician but her request was initially declined because she had suffered a work injury.

5. On July 10, 2018 Insurer filed a Notice of Contest challenging Claimant's claim. The Notice of Contest specifically provided that the claim was denied because Claimant's injury was not work-related.

6. Claimant testified that, approximately one month after her injury, Employer's Human Resources (HR) person presented her with a list of doctors. The HR person told Claimant to circle the doctor she had visited for her industrial injury. Claimant noted that she signed, but did not date, the form.

7. Claimant subsequently obtained treatment from her primary care physician. On October 24, 2018 Claimant visited David Bak-Yen Leung, N.P. at Centura Orthopedics and Spine for an initial examination. She reported that while at work in late June 2018 she was trying to lift a heavy object and felt a burning sensation in her right shoulder. N.P. Leung recommended an MRI to evaluate Claimant's right shoulder pathology. He remarked that "she very likely has a biceps tendon injury but also has an exam consistent with rotator cuff injury as well."

8. On October 17, 2018 Claimant underwent an independent medical examination with Timothy S. O'Brien, M.D. Dr. O'Brien issued a report on October 31, 2018. Claimant reported that on June 21, 2018 she was unloading a customer's cart while working for Employer. She picked up a six-pound package of frozen beef and immediately experienced right shoulder pain. After considering Claimant's medical records and conducting a physical examination, Dr. O'Brien concluded that the June 21, 2018 work incident caused a "diffuse strain and sprain of the right shoulder girdle" that included the first and second right ribs. He noted that Claimant did not sustain any permanent or partial disability as a result of the work incident and does not require any additional medical treatment. Dr. O'Brien emphasized that "whatever minor injury occurred on June 21, 2018" had healed by the time of his examination. He reasoned that the mechanism of injury was "innocuous" and would not have generated sufficient energy to "result in substantial tissue breakage or yielding." Dr. O'Brien summarized that Claimant's injuries would likely have healed within four weeks of the event and her current symptoms were unrelated to the June 21, 2018 incident.

9. On November 2, 2018 Claimant underwent a right shoulder MRI. The MRI revealed a "partially healed/synovialized superior labral tear" and "short segment insertional tendinosis and low-grade interstitial split tearing" of the anterior distal rotator cuff tuberosity attachment.

10. On November 15, 2018 Dr. O'Brien issued a Supplemental Report after reviewing additional medical records and the November 2, 2018 MRI. He concluded that Claimant's right shoulder MRI was normal for her age. He reiterated that Claimant's mechanism of injury was not traumatic enough to cause "substantial tissue breakage or yielding." Dr. O'Brien summarized that Claimant's continuing pain symptoms were not organically based.

11. On November 21, 2018 Claimant returned to her primary care physician and visited orthopedic surgeon Landon Richard Fine, D.O. for continuing right shoulder symptoms. After conducting a physical examination and reviewing Claimant's November 7, 2018 right shoulder MRI, Dr. Fine diagnosed Claimant with the following: (1) a SLAP tear; (2) impingement with subacromial bursitis; and (3) a small interstitial supraspinatus rotator cuff tear. He discussed treatment options with Claimant that included possible surgery. Dr. Fine specifically noted that the arthroscopic surgery would consist of "subacromial decompressions of biceps tear pieces plus or minus rotator cuff repair." However, Claimant chose to continue conservative treatment that included medications, physical therapy and activity modifications.

12. On January 8, 2019 the partiers conducted the post-hearing evidentiary deposition of Dr. O'Brien. Dr. O'Brien maintained that Claimant's June 21, 2018 work incident did not cause a disability or require medical treatment. He specifically explained that lifting six pounds of beef from a shopping cart to a conveyor belt lacked sufficient force to cause a labral tear in Claimant's right shoulder. Dr. O'Brien detailed that lifting hamburger meat from a cart would not generate enough energy to "aggravate or accelerate a preexisting tear beyond its normal rate of progression."

13. Dr. O'Brien determined that Claimant suffered a diffuse strain and back sprain of the right shoulder girdle that included the first two ribs on the right side. He remarked that Claimant's symptoms were not the result of "substantial tissue breakage or yielding, but rather a fairly deconditioned musculoskeletal system that was performing a very innocuous activity." Claimant did not require medical treatment because her symptoms were "self-healing and self-limited." Dr. O'Brien also noted that Claimant's right shoulder MRI was normal for a 41 year-old individual.

14. Claimant has established that it is more probably true than not that she sustained a compensable right shoulder injury during the course and scope of her employment with Employer on June 21, 2018. Initially, Claimant explained that on June 21, 2018 she suffered right shoulder pain while lifting a six-pound package of hamburger meat from a customer's cart to a conveyor belt when performing her job duties. On June 27, 2018 Claimant visited UC Health and reported that, while working for Employer six days earlier, she lifted a six-pound bag of hamburger and suffered a sharp pain in her right shoulder that radiated into her right chest area. PA-C Cavender

diagnosed Claimant with somatic rib dysfunction, strain of the neck muscles and strain of the right shoulder. By October 24, 2018 Claimant visited personal provider N.P. Leung for an examination. N.P. Leung recommended a right shoulder MRI and remarked that she likely had a biceps tendon injury and an examination consistent with rotator cuff injury. The MRI revealed a partially healed labral tear. Moreover, after conducting a physical examination and reviewing the right shoulder MRI, orthopedic surgeon Dr. Fine diagnosed Claimant with the following: (1) a SLAP tear; (2) impingement with subacromial bursitis; and (3) a small interstitial supraspinatus rotator cuff tear. Finally, Dr. O'Brien determined that the June 21, 2018 work incident caused a "diffuse strain and sprain of the right shoulder girdle" that included the first and second right ribs. He noted that Claimant did not sustain any permanent or partial disability as a result of the work incident and "whatever minor injury occurred on June 21, 2018" had healed by the time of his examination. Accordingly, the bulk of the persuasive medical evidence reflects that Claimant's work activities aggravated, accelerated or combined with her pre-existing condition to produce a need for medical treatment. Claimant thus suffered a compensable right shoulder injury on June 21, 2018.

15. Claimant has established that it is more probably true than not that she is entitled to receive reasonable, necessary and causally related medical treatment for her June 21, 2018 industrial injuries. The record reflects that Claimant is seeking additional medical treatment for her right shoulder. Respondents are not challenging a specific medical benefit but instead assert that Claimant's current symptoms are not related to the injuries and seek a denial of additional medical treatment. Relying on the opinion of Dr. O'Brien, Respondents assert that Claimant is not entitled to receive any additional medical treatment because her injuries have resolved.

16. Dr. O'Brien reasoned that any injuries Claimant suffered on June 21, 2018 healed prior to his October 17, 2018 independent medical examination. He specified that "whatever minor injury occurred on June 21, 2018" had healed by the time of his examination. He reasoned that the mechanism of injury was "innocuous" and would not have generated sufficient energy to "result in substantial tissue breakage or yielding." Claimant did not require medical treatment because her symptoms were "self-healing and self-limited." Dr. O'Brien summarized that Claimant's injuries would likely have healed within four weeks of the event and her current symptoms were unrelated to the June 21, 2018 incident.

17. Relying on Dr. O'Brien's analysis requires a *de facto* finding that Claimant has reached Maximum Medical Improvement (MMI) regarding the June 21, 2018 right shoulder injury. Because Claimant is entitled to medical benefits until reaching MMI, a denial of all further medical treatment necessarily reflects an implicit determination that Claimant reached MMI for the effects of his industrial injuries. However, there has been no medical determination of MMI by an Authorized Treating Physician (ATP) or Division Independent Medical Examination (DIME) physician. Furthermore, Claimant's medical care has been reasonable, necessary and related to her June 21, 2018 industrial injury. The persuasive opinions of Claimant's treating doctors also demonstrate that she requires additional medical treatment. Accordingly, Claimant is entitled to receive

continuing reasonable, necessary and related medical treatment for her June 21, 2018 work injuries.

18. Claimant has proven that it is more probably true than not that Respondents failed to timely provide a list of at least four designated physicians and she is thus permitted to select a treating physician. After Claimant reported her injury and sought medical care Employer directed her to UC Health Urgent Care for medical treatment. On June 27, 2018 Claimant visited UC Health for an examination. Claimant was diagnosed with somatic rib dysfunction, strain of the neck muscles and strain of the right shoulder. She received medications and work restrictions. Although Claimant desired to continue treatment with UC Health, the insurance adjuster informed her the claim was denied and she would be unable to receive any additional authorized medical care. Claimant credibly testified that, approximately one month after her injury, Employer's HR person presented her with a list of doctors. The HR person told Claimant to circle the doctor she had visited for her industrial injury. Claimant noted that she signed, but did not date, the form listing the doctors. Claimant subsequently obtained treatment from her primary care physicians.

19. Although Claimant reported her June 21, 2018 right shoulder injury and completed a First Report of Injury on June 25, 2018, Employer failed to provide her with a list of at least four designated providers. In fact, Claimant was simply directed to circle the provider from which she had received treatment approximately one month after her industrial injury. The right of selection thus passed to Claimant and she was permitted to choose a treating physician. Claimant chose to obtain treatment from her personal physician and associated referrals. The record reflects that the medical treatment Claimant has received through her personal physicians and associated referrals is reasonable, necessary and related to her June 21, 2018 industrial injury. Accordingly, Respondents are financially responsible for Claimant's medical treatment.

CONCLUSIONS OF LAW

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

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

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

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

Compensability

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

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

6. As found, Claimant has established by a preponderance of the evidence that she sustained a compensable right shoulder injury during the course and scope of her employment with Employer on June 21, 2018. Initially, Claimant explained that on June 21, 2018 she suffered right shoulder pain while lifting a six-pound package of hamburger meat from a customer's cart to a conveyor belt when performing her job duties. On June 27, 2018 Claimant visited UC Health and reported that, while working for Employer six days earlier, she lifted a six-pound bag of hamburger and suffered a sharp pain in her right shoulder that radiated into her right chest area. PA-C Cavender diagnosed Claimant with somatic rib dysfunction, strain of the neck muscles and strain of the right shoulder. By October 24, 2018 Claimant visited personal provider N.P. Leung for an examination. N.P. Leung recommended a right shoulder MRI and remarked that she likely had a biceps tendon injury and an examination consistent with rotator cuff injury. The MRI revealed a partially healed labral tear. Moreover, after conducting a physical examination and reviewing the right shoulder MRI, orthopedic surgeon Dr. Fine diagnosed Claimant with the following: (1) a SLAP tear; (2) impingement with subacromial bursitis; and (3) a small interstitial supraspinatus rotator

cuff tear. Finally, Dr. O'Brien determined that the June 21, 2018 work incident caused a "diffuse strain and sprain of the right shoulder girdle" that included the first and second right ribs. He noted that Claimant did not sustain any permanent or partial disability as a result of the work incident and "whatever minor injury occurred on June 21, 2018" had healed by the time of his examination. Accordingly, the bulk of the persuasive medical evidence reflects that Claimant's work activities aggravated, accelerated or combined with her pre-existing condition to produce a need for medical treatment. Claimant thus suffered a compensable right shoulder injury on June 21, 2018.

Medical Benefits

7. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The claimant bears the burden of demonstrating a causal connection between his industrial injuries and the need for additional medical treatment. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

8. Section 8-42-101(1), C.R.S. requires the employer to provide medical benefits to cure or relieve the effects of the industrial injury, subject to the right to contest the reasonableness or necessity of any specific treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). The employer's obligation continues until the claimant reaches MMI. MMI is defined as the point in time when the claimant's condition is "stable and no further treatment is reasonably expected to improve the condition." §8-40-201(11.5), C.R.S. However, the claimant may receive medical benefits after MMI to maintain his status or prevent a deterioration of his condition. *See Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988). Furthermore, §8-42-107(8)(b)(I) & (II), C.R.S. provide that the initial determination of MMI is to be made by an ATP. If either party disputes the ATP's MMI determination, the claimant must undergo a DIME. The statute also provides that the ALJ lacks authority to determine MMI until there has been a medical determination of MMI by an ATP or a DIME. *See Story v. Industrial Claim Appeals Office,* 910 P.2d 80 (Colo. App. 1995); *In Re Bruno*, W.C. Nos. 4-947-316-01, 4-935-813-03 (ICAP, July 31, 2015).

9. As found, Claimant has established by a preponderance of the evidence that she is entitled to receive reasonable, necessary and causally related medical treatment for her June 21, 2018 industrial injuries. The record reflects that Claimant is seeking additional medical treatment for her right shoulder. Respondents are not challenging a specific medical benefit but instead assert that Claimant's current symptoms are not related to the injuries and seek a denial of additional medical

treatment. Relying on the opinion of Dr. O'Brien, Respondents assert that Claimant is not entitled to receive any additional medical treatment because her injuries have resolved.

10. As found, Dr. O'Brien reasoned that any injuries Claimant suffered on June 21, 2018 healed prior to his October 17, 2018 independent medical examination. He specified that "whatever minor injury occurred on June 21, 2018" had healed by the time of his examination. He reasoned that the mechanism of injury was "innocuous" and would not have generated sufficient energy to "result in substantial tissue breakage or yielding." Claimant did not require medical treatment because her symptoms were "self-healing and self-limited." Dr. O'Brien summarized that Claimant's injuries would likely have healed within four weeks of the event and her current symptoms were unrelated to the June 21, 2018 incident.

11. As found, relying on Dr. O'Brien's analysis requires a *de facto* finding that Claimant has reached Maximum Medical Improvement (MMI) regarding the June 21, 2018 right shoulder injury. Because Claimant is entitled to medical benefits until reaching MMI, a denial of all further medical treatment necessarily reflects an implicit determination that Claimant reached MMI for the effects of his industrial injuries. However, there has been no medical determination of MMI by an Authorized Treating Physician (ATP) or Division Independent Medical Examination (DIME) physician. Furthermore, Claimant's medical care has been reasonable, necessary and related to her June 21, 2018 industrial injury. The persuasive opinions of Claimant's treating doctors also demonstrate that she requires additional medical treatment. Accordingly, Claimant is entitled to receive continuing reasonable, necessary and related medical treatment for her June 21, 2018 work injuries. *See Story v. Industrial Claim Appeals Office,* 910 P.2d 80 (Colo. App. 1995); *In Re Bruno*, W.C. Nos. 4-947-316-01, 4-935-813-03 (ICAP, July 31, 2015) (where the claimant had not reached MMI, ALJ's finding terminating all future medical treatment reflected an implicit determination that the claimant had reached MMI and was thus erroneous); *Davis v. Little Pub,* W.C. No. 4-947-977 (June 17, 2015).

Right of Selection

12. Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). However, the Colorado Workers' Compensation Act requires that respondents must provide injured workers with a list of at least four designated treatment providers. §8-43-404(5)(a)(I)(A), C.R.S. Section 8-43-404(5)(a)(I)(A), C.R.S. states that, if the employer or insurer fails to provide an injured worker with a list of at least four physicians or corporate medical providers, "the employee shall have the right to select a physician." W.C.R.P. Rule 8-2 further clarifies that once an employer is on notice that an on-the-job injury has occurred, "the employer shall provide the injured worker with a written list of designated providers." W.C.R.P. Rule 8-2(E) additionally provides that the remedy for failure to comply with the preceding requirement is that "the injured worker may select an authorized treating physician of the worker's choosing." An employer is deemed notified of an injury when

it has “some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim.” *Bunch v. industrial Claim Appeals Office,* 148 P.3d 381, 383 (Colo. App. 2006).

13. As found, Claimant has proven by a preponderance of the evidence that Respondents failed to timely provide a list of at least four designated physicians and she is thus permitted to select a treating physician. After Claimant reported her injury and sought medical care Employer directed her to UC Health Urgent Care for medical treatment. On June 27, 2018 Claimant visited UC Health for an examination. Claimant was diagnosed with somatic rib dysfunction, strain of the neck muscles and strain of the right shoulder. She received medications and work restrictions. Although Claimant desired to continue treatment with UC Health, the insurance adjuster informed her the claim was denied and she would be unable to receive any additional authorized medical care. Claimant credibly testified that, approximately one month after her injury, Employer’s HR person presented her with a list of doctors. The HR person told Claimant to circle the doctor she had visited for her industrial injury. Claimant noted that she signed, but did not date, the form listing the doctors. Claimant subsequently obtained treatment from her primary care physicians.

14. As found, although Claimant reported her June 21, 2018 right shoulder injury and completed a First Report of Injury on June 25, 2018, Employer failed to provide her with a list of at least four designated providers. In fact, Claimant was simply directed to circle the provider from which she had received treatment approximately one month after her industrial injury. The right of selection thus passed to Claimant and she was permitted to choose a treating physician. Claimant chose to obtain treatment from her personal physician and associated referrals. The record reflects that the medical treatment Claimant has received through her personal physicians and associated referrals is reasonable, necessary and related to her June 21, 2018 industrial injury. Accordingly, Respondents are financially responsible for Claimant’s medical treatment.

ORDER

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

1. Claimant sustained a compensable right shoulder injury during the course and scope of her employment with Employer on June 21, 2018.

2. Claimant has received reasonable, necessary and causally related medical treatment for her June 21, 2018 industrial injuries. She is also entitled to receive continuing reasonable, necessary and causally related medical treatment for her right shoulder condition.

3. Because Respondents failed to timely provide a list of at least four designated physicians Claimant is permitted to select a treating physician.

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

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

DATED: February 12, 2019.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-966-735-02

ISSUES

The issues set for determination included:

(1) Did Claimant overcome the opinions of the physician who performed the DOWC Independent Medical Examination ("DIME") [John Douthit, M.D.] regarding causation and relatedness by clear and convincing evidence?

(2) If Claimant overcame the DIME's opinion, did she prove that she sustained permanent medical impairment to her low back, including the SI joint?

(3) Is Claimant entitled to *Grover* medical benefits?

PROCEDURAL STATUS

The Court issued Findings of Fact, Conclusions of Law and Order on or about December 17, 2018 (mailed on December 19, 2018). Claimant filed an Unopposed Motion for a Corrected Order on or about December 21, 2018, which was received by the undersigned on December 31, 2018. More particularly, the Motion requested the elimination of paragraph four of the previous Order. That part of the Order provided that Claimant's recovery was subject to the combined PPD/TTD limits found in § 8-42-107.5, C.R.S.[1] Claimant's Motion for a Corrected Order is granted and this Order follows.

STIPULATIONS

The parties stipulated to the following facts: (a) Claimant is at maximum medical improvement; (b) Claimant is not seeking retroactive temporary disability benefits; (c) Claimant is not challenging Dr. Douthit's extremity ratings; (d) Respondents have paid $74,544.99 in indemnity benefits to date. The Stipulations were accepted by the Court and are made part of this Order.

FINDINGS OF FACT

1. Claimant was employed as a home health LPN for Employer.

2. There was no medical evidence in the record that Claimant suffered an injury to her low back/hip or right SI joint before 2014.

[1] The ALJ notes that at the outset of the hearing when the issues to be determined were discussed, at the time the parties related the Stipulation concerning the amount of temporary benefits paid, counsel for Claimant and Respondents agreed that the question of statutory caps was an issue in the case. The parties' assent was the reason for the inclusion of § 8-42-107.5, C.R.S. in the prior Order.

3. Claimant suffered an admitted industrial injury when she was involved in a motor vehicle accident ("MVA") on November 14, 2014. She was a restrained driver, who was involved in a head-on collision with another vehicle. Claimant testified there was significant force associated with the impact and both airbags deployed in her vehicle. Claimant testified she felt pain all over after the accident, including her back and her right leg. The initial focus of her treatment was on her right leg and the tibial plateau fracture.

4. Claimant was transported by ambulance to Poudre Valley Hospital (University of Colorado Health). The EMS report and the initial documentation from University of Colorado Health documented right knee pain only.[2] Claimant complained of right knee and left foot numbness and tingling in the Emergency Department. Claimant underwent surgery (open reduction internal fixation) to repair the right tibial plateau fracture, which was performed by orthopedic surgeon Robert Baer, M.D. on November 14, 2014

5. An Employee's Report of Injury was completed on November 21, 2014 and signed by Claimant. In the injury description section, Claimant listed a right tibia plateau fracture and right lower leg to the right hip pain, which was caused by a head-on collision.

6. On December 2, 2014, Claimant was evaluated by Kevin O'Connell, M.D. In a pain diagram she completed, Claimant referenced burning in her hip and aching in her low back. Claimant testified that she advised Dr. O'Connell of pain in her low back and hip area early on when she treated with him. Dr. O'Connell's diagnosis was right tibial plateau fracture-closed. There was not a diagnosis related to the hip or low back.

7. In the physical therapy ("PT") notes authored by Jennifer Himot, PT, dated December 22, 2014, there was a reference to rib pain and reduced muscle strength in the right hip (abduction, adduction and extension). The references to reduced MMT in the right hip were reflected in PT Himot's notes through April 3, 2015.

8. Dr. O'Connell noted Claimant was making gradual progress to weight-bearing in the treatment note of January 20, 2015. Claimant reported right-sided costochondral soreness and x-rays were taken at that time. The x-rays were negative for fracture. Dr. O'Connell's record reflected claimant gradually advanced to weight-bearing. Dr. Baer noted Claimant was able to ambulate without a cane or crutch on February 11, 2015, but it was still recommended she use a cane.

9. When Claimant returned to Dr. O'Connell on March 24, 2015, it was noted she slipped in the bathroom while exiting the shower. Her right knee gave out and she impacted the right leg, as well as her right arm and shoulder. Dr. O'Connell's assessment continued to be specific to the right knee tibial plateau fracture, status post-ORIF. However, Dr. O'Connell also examined her right shoulder and right arm.

[2] Exhibit C, pp.6-11 (Exhibit 1 to Dr. Anderson-Oeser's deposition.)

10. In the six evaluations of Claimant by Dr. O'Connell which occurred between April 30, 2015 and August 28, 2015, there was no reference to low back or hip pain, although a shoulder sprain was included in Dr. O'Connell's diagnoses. Claimant underwent surgery to remove the hardware in the right knee on August 5, 2015. She continued to receive PT following that procedure.

11. On October 9, 2015, Claimant returned to Dr. O'Connell and reported right hip discomfort, which she thought was attributable to her original right knee injury. Dr. O'Connell did not list a diagnosis for the low back or hip for this visit. Claimant also reported hip/low back, as well as right leg symptoms at the November 3, 2015 appointment with Dr. O'Connell. Were documented in a pain diagram she completed. O'Connell noted Claimant there were myalgias and joint swelling present at the time of the examination.

12. Claimant testified she felt pain in her hip and SI joint once she transitioned to weight-bearing on the right leg. The ALJ found the medical records corroborated Claimant's testimony that she was not weight-bearing for a period of time and the focus of her treatment was on the right knee. Her symptoms in the low back and hip area increased as she used her leg more.

13. In a treatment note, dated December 10, 2015, Dr. O'Connell noted Claimant was experiencing more pronounced right-sided low back pain at the SI areas radiating into the right groin. The symptoms were often triggered by movements of the right hip. Dr. O'Connell's diagnoses were: tibial plateau fracture, right, closed with routine healing; labral tear of hip, degenerative; sciatica neuralgia, right. Although Dr. O'Connell initially questioned whether the back complaints were causally related to subsequent to December 2015, he made referrals for evaluation and treatment of the low back/hip. Claimant was also referred for diagnostic testing, including an MRI of the low back. The ALJ inferred this supported the conclusion Dr. O'Connell believed Claimant's low back and hip condition were related to the industrial injury.

14. Claimant was referred for an MRI of the lumbar spine on December 23, 2015. Jeremy McCue, M.D. read the films and noted a small focal right foraminal protrusion at L3-L4, contacting the exiting right L3 nerve root. The disc did not cause a significant anatomic stenosis. Mild degenerative changes with annular fissuring was also noted at L4-5 and L5-S1. The ALJ found this MRI showed objective evidence of anatomic lesions in the lumbar spine.

15. On January 12, 2016, Claimant underwent arthroscopy of the right knee, which was performed by Robert Trumper, M.D. Grade IV post-traumatic osteoarthritis was identified at that time. The ALJ inferred the traumatic osteoarthritis resulted from the MVA.

16. Dr. O'Connell continued to oversee Claimant's treatment, as she treated for symptoms in the right knee, hip, right shoulder and neck. When Claimant returned to Dr. O'Connell on January 15, 2016, additional diagnoses included neck pain,

radiculitis of the right cervical region; shoulder sprain, right; adjustment reaction; in addition to those identified in December 2015.

17. On February 10, 2016 Claimant was evaluated by Hans Coester, M.D. to whom she was referred by Dr. O'Connell. At that time, her chief complaints were listed as neck, shoulder, right arm and back pain. Dr. Coester found extension of Claimant's neck aggravated her pain, but she had no arm pain or weakness. She also had no weakness in her lower extremities. Dr. Coester noted Claimant had degenerative disc disease at multiple levels of the cervical spine. There was a small protrusion at C7-T1, without significant nerve root compression. Dr. Coester did not recommend any cervical treatment/intervention. Claimant's lumbar MRI scan showed mild degenerative disc disease at the L4-5 and L5-S1 level, but no nerve root compression. Dr. Coester did not recommend surgical intervention and thought the burning pain may be the result of the meralgia paresthetica. He recommended a physiatry evaluation and possible nerve conduction tests.

18. On March 1, 2016, Jeff Raschbacher, M.D. (Occupational Medicine) reviewed a prior authorization request related to treatment of Claimant's right hip on behalf of Insurer. Dr. Raschbacher noted the hip was mentioned in June 2015 by an orthopedic physician and it was his opinion that given the nature of the injury, this could have caused a labral tear in the right hip, the force being transmitted up the extremity proximally from the knee. He recommended a review of the PT records before authorizing the treatment.

19. Claimant was evaluated by Brian White, M.D. on March 16, 2016 with a focus on the right hip pain. She complained of worsening right hip pain, as well as low back pain, without numbness, tingling, or any significant radicular symptoms. On examination (performed by Shawn Karns, PA-C), Claimant had a non-antalgic gait, with excellent lumbar range of motion ("ROM") and no midline or paraspinal muscular tenderness. The bilateral hip exam showed flexion of the right hip to be limited as compared to the left. Straight leg test was negative for low back pain radicular symptoms and FABER test was negative for SI joint pain. No tenderness was found to palpation over the greater trochanters.

20. PA-C Karns' concluded Claimant had findings consistent with right hip femoroacetabular impingement and labral tear. Due to the extent of her pain and failure of conservative treatment, she was a candidate for hip arthroscopy surgery. Dr. White's addendum noted Claimant had significant pain with anterior impingement maneuver, otherwise good ROM. The MRI showed a labral tear. Dr. White's assessment was: Claimant had an underlying labral tear likely from a subluxation event at the time of her injury. He recommended that Claimant lose weight before undergoing hip surgery.

21. On July 22, 2016, Claimant was evaluated by Kimberly Siegel, M.D. at UC Health. Dr. Siegel noted Claimant previously treated with Dr. O'Connell, whose most recent notes indicated Claimant was approaching nearing MMI with respect to all conditions, except for the right hip labral tear. Claimant was also to have a NCS/EMG to rule out right lumbar radiculitis. Claimant's pain diagram reflected pain in the right

side of her low back, as well as radiating pain down the right leg. At the time of the evaluation, Claimant's gait demonstrated mild favoring of the right lower extremity. Cervical ROM was moderately limited in all planes and lumbar ROM was limited to about 30 to 40° flexion by right-sided low back pain. Extension was mildly limited and elicited pain, along with bilateral flexion.

22. Dr. Siegel's assessment was: labral tear of hip, degenerative; neck pain; low back pain with radiation, right; cervical myofascial pain syndrome; pain, right thigh. Dr. Siegel noted surgery was not recommended on Claimant's neck or back. Dr. Siegel opined Claimant was primarily having myofascial pain in her neck and back and thought some treatment (i.e. dry needling) directed specifically at this may be of some benefit. The ALJ inferred Dr. Siegel was of the opinion that Claimant's low back required additional treatment, as evidenced by referrals made and this opinion was persuasive.

23. Claimant was evaluated by George Girardi, M.D. on May 9, 2016. Dr. Girardi noted Claimant had a history of low back pain going into the right hip, right groin and right anterior thigh. Her MRI demonstrated a right foraminal protrusion at L3-4, which correlated with her symptoms. On examination, Claimant was able to reproduce her pain with extension and had a positive Spurling's maneuver to the right side. Claimant also had discomfort with the straight leg test on the right side of the anterior thigh and groin.

24. Dr. Girardi's assessment was: neck pain, with right radicular symptoms potentially due to a C6-7 disc protrusion; low back pain, with right anterior thigh pain, with the disc protrusion at L3-4. Dr. Girardi ordered epidural steroid injections for the lumbosacral area, as well as the cervical, thoracic region.

25. Claimant was evaluated by Raymond Van den Hoven on August 17, 2016. She was complaining of pain in the right SI joint, buttock, lateral hip, and anterior thigh region, along with burning in the right anterolateral leg. On examination, Dr. Van den Hoven found right SI joint tenderness, along with piriformis and hip adductor tenderness. Hip flexion/adduction/internal rotation resulted in pain in the right anterior hip region, but no popping or catching was noted. Claimant's lumbar spine was not tender and there was no tenderness over the ASIS region. There was negative Tinel's over the lateral femoral cutaneous nerve near ASIS. FABER testing resulted in SI joint pain and anterior hip pain. Dr. Van den Hoven also noted sensitivity in the skin around anterior knee and medial shin, but normal sensation in L3 and L4 dermatomes above the knee.

26. Dr. Van den Hoven's impression was: no acute or chronic lumbar radiculopathy in the L3 through S1 myotomes, right lower extremity; no clinical evidence for meralgia parasthetica, right lower extremity; no tarsal tunnel syndrome, bilateral lower extremities; no fibular neuropathy in the knee or ankle, bilateral lower extremities; no peripheral neuropathy. Dr. Van den Hoven opined Claimant's pain appeared to be multifactorial and related to the right SI joint strain, tendinopathy of the right abductor tendons, right anterior hip labral tear, knee issues, with right thigh pain likely being somewhat related to all of these sources. The skin sensitivity was likely due to

cutaneous nerve injuries, possibly post-surgical. Dr. Van den Hoven recommended consideration of right SI joint and right hip abductor tendon injections, along with resolving the right hip labral tear issues.

27. On October 18, 2016, Claimant underwent surgery for her right hip Adventist Hospital. Dr. White performed a right hip arthroscopy, with femoral osteoplasty, limited acetabular rim trimming, minor shaving chondroplasty, acetabular labral reconstruction and capsular closure.

28. Claimant returned to Dr. White on December 14, 2016. Claimant was described as doing really well with regard to the right hip, but having issues with her SI joint and knee on the ipsilateral side. Dr. White noted this was all stemming from the MVA. Dr. White thought Claimant's SI joint may come around with further PT. If she had continued pain, he recommended Jeffrey Donner, M.D. for an evaluation and possible injections.

29. In a follow-up to visit with PA-C Karns on February 9, 2017, he documented Claimant walked with a mildly antalgic gait, which she attributed to the knee. Mild tenderness was found over the greater trochanter. In PA-C Karns' assessment, Claimant was noted to be progressing well post-surgery, but still dealing with right knee and SI joint issues. If Claimant's hip bursa became more of an issue, a cortisone injection was recommended.

30. From February 13, 2017 through February 27, 2017, Claimant underwent three Hyalgan injections in the right knee. Relief was noted after those injections.

31 On February 15, 2017, Claimant was evaluated by Albert Hattem, M.D., at the request of Respondents. Claimant reported right leg pain and sensitivity, right-sided low back pain, right hip tenderness, along with upper back and neck tightness. Dr. Hattem's medical records summary stated there was a PT note from Orthopedic Center of the Rockies in which Claimant reported right rib, hip, low back, right knee and right ankle pain. On examination, Claimant's right knee revealed a well-healed surgical scar, with no swelling or skin discoloration. There was mild to decreased flexion and extension, but no crepitation noted. Claimant's right hip had well-healed surgical scars, very mild decreased range of motion and slight tenderness over the lateral aspect. Slight right paraspinous tenderness was noted in the lumbar spine. Claimant's cervical spine and bilateral shoulders had full range of motion, with mild use tenderness.

32. Dr. Hattem' diagnoses were: right bicondylar tibial plateau fracture, post-open reduction internal fixation by Dr. Baer on November 15, 2014; status post right knee hardware by Dr. Baer on August 5, 2015; post-traumatic osteoarthritis versus aggravation of pre-existing arthritis of medial femoral condyle right knee, status post right knee arthroscopic chondroplasty of the medial femoral condyle and chondroplasty of the patella performed by Dr. Trumper on January 12, 2016; right hip femoral acetabular impingement and labral tear, status post right arthroscopic femoral osteoplasty, limited acetabular trimming, chondroplasty, and acetabular labral

reconstruction by Dr. White on October 8, 2016; myofascial cervical and shoulder/upper back pain; mechanical nonspecific low back pain.

33. Dr. Hattem opined Claimant would be at MMI for the right knee in a month, once she completed injections. He noted the right shoulder exam was unremarkable with full ROM and Claimant's right hip was approaching MMI. Claimant was at MMI for her neck and low back. Dr. Hattem stated Claimant's right knee, right hip and low back were causally related to the November 14, 2014 work injury. He did not believe the cervical spine complaints were related to the work injury.

34. Dr. Hattem testified as an expert in Physical Medicine and Rehabilitation at hearing. He is Level II accredited pursuant to the WCRP. He testified consistently with his report and noted on evaluation Claimant did not have objective evidence of pain in the lumbar spine, including radiculopathy. He said the MRI was negative for acute pathology and Claimant had a small disc protrusion.

35. Dr. Hattem took issue with Dr. Anderson-Oeser's conclusion that a positive Faber's test and pain to palpation were objective signs. Dr. Hattem testified there was no objective evidence to establish Claimant's SI joint was involved in this case because the SI joint injection was not diagnostic, Claimant's pain complaints were subjective, and the FABER test could have been positive for Claimant's right hip pathology. Also, Claimant's arthritic knee could have caused the antalgic gait. He also concluded there was no objective evidence to establish a permanent impairment for Claimant's low back because myofascial back pain is not entitled to a permanent impairment rating. Dr. Hattem stated Claimant was not entitled to a permanent medical impairment rating for low back/hip. Dr. Hattem testified this was consistent with Dr. Siegel's findings and noted Dr. Siegel did not rate Claimant's lumbar spine.

36. On cross-examination, Dr. Hattem admitted he did not perform provocative maneuvers when he evaluated Claimant. He agreed that in his report he concluded the low back was injured as a result of the motor vehicle accident. He admitted the mechanism of injury in this accident could cause an injury to the hip/low back and the right SI joint had required treatment.

37. On April 10, 2017, Claimant was evaluated by Dr. Siegel, who concluded she was at MMI and evaluated her permanent medical impairment. Dr. Siegel noted Claimant continued to have right low back pain, which was felt to stem from right SI joint inflammation or dysfunction. Dr. Siegel referred Claimant to Dr. Donner, but she had not been evaluated by that physician. Dr. Siegel's diagnoses were: sprain of right hip; tibial plateau fracture, right, closed, with routine healing; traumatic arthritis of the knee, right; ACL laxity, right; pain of right thigh; low back pain with radiation, right; cervical myofascial pain syndrome; and chronic myofascial pain.

38. Dr. Siegel assigned a permanent medical impairment rating to Claimant's right knee and right hip. Dr. Siegel assigned a 39% extremity impairment rating for the right knee, which included range of motion loss (11%) and Table 40 diagnoses (arthritis and ACL loss. Dr. Siegel assigned a 25% impairment to the hip, which included the

right hip flexion, abduction and abduction, as well as internal and external rotation. The lower extremity impairments combined to a total of 54%, which corresponded to a 22% whole person impairment. Dr. Siegel noted Claimant's right low back pain had been felt to stem from right SI joint inflammation or dysfunction. However, Dr. Siegel did not perform range of motion testing on Claimant's lumbar spine and did not detail in her report why Claimant would or would not be entitled to a medical impairment for the lumbar spine/SI joint.

39. Dr. Siegel opined Claimant required maintenance treatment, including a follow-up with Dr. White, as well as completion of the remaining PT for her hip. Claimant was also to receive maintenance/adjustment/replacement of the knee brace, as well as viscosupplementation injections for the knee. Claimant was to follow-up with Dr. Trumper every 2-4 years to monitor functional status of right knee, as well as to continue with her prescription meds. The ALJ credited Dr. Siegel's opinion with regard to Claimant's need for maintenance treatment for her hip and knee. Claimant was authorized to follow-up with Dr. Donner possible right SI joint injection, per the prior referral. The ALJ inferred Dr. Siegel was of the opinion that treatment for the SI joint was reasonable, necessary and related to the industrial injury.

40. On June 1, 2017, Claimant was evaluated by Chris Kottonstette, PA-C. At that time, she described pain over the SI joint, including pain of the posterior sacral sulcus and along the SI joint line. Single leg standing increased her pain on the right. Shear and compressive force in the supine position increased her pain and there was a positive Lasegue's test, along with increased pain at 30° elevation during the straight leg raise. Dr. Donner was in to examine the patient, reviewed her imaging studies and treatment plan. PA-C Kottonstette noted they would set Claimant up for a right SI joint injection, as well as potential discography determine whether the two annular tears contributing to her back pain. The right SI joint injection was performed on June 28, 2017.

41. The ALJ noted there was nothing in the record to confirm Dr. Donner requested authorization for an additional procedure (injection) from Insurer. There was no follow-up with Dr. Donner after the first injection and no record in which he recommended further injections.[3]

42. Claimant underwent a DIME which was performed by Dr. Douthit on July 10, 2017. Claimant complained of pain in the right knee, low back pain and sacroiliac joint pain, which she referenced as near the sacrum. She also complained of hypersensitivity in the lower leg. Claimant stated her shoulder and hip pain had resolved. On examination, Dr. Douthit found the right knee was stable in both the Lachman and drawer maneuvers. There was no collateral ligament instability. There

[3] Dr. Anderson-Oeser was asked about an SI joint injection which Claimant underwent on June 28, 2017. (Deposition of Dr. Anderson-Oeser, p. 29:10-16.) There was no evidence before the Court which showed Dr. Donner saw Claimant after that time.

was limitation in range of motion of the right hip on extension, internal rotation and external rotation, along with mild atrophy of the gluteus muscle.

43. Dr. Douthit stated he was missing some of the early records and relied on Dr. Hattem's report for the records of the first year. This is not proscribed by the AMA Guides. Dr. Douthit said he did not find records that she was complaining of low back pain in the months after the accident and the first records that were noted were in December 2015. This was contradicted by evidence in the record. Claimant had no neurological findings and limited motion was from volitional guarding of the lumbar spine. Also, there were no medical imaging studies to indicate an injury to the SI joint occurred and the MRI finding of the lumbar spine did not demonstrate convincing evidence of an associated back injury.

44. Dr. Douthit noted the MRI showed mild labral tearing of the right hip and x-rays were equivocal/open to interpretation. He assigned 12% scheduled impairment for the mild loss of range of motion of the right hip. Dr. Douthit determined Claimant sustained a 25% impairment of the lower extremity for the right knee, which included 12% related to loss of range of motion, 10% impairment for arthritis and 5% for the possibility of attenuation of the cruciate ligament. The 25% impairment was added/combined to the 12% extremity rating for the hip which equaled 34% impairment of the lower extremity and 14% whole person impairment. Dr. Douthit did not find objective medical evidence of permanent injury of the lumbar spine, shoulder, neck or SI joint and did not assign an impairment rating to those areas of the body.

45. Claimant underwent three Hyalgan injections in the right knee in September 2017. Dr. Trumper opined Claimant would require a total knee replacement and the strategy was to defer that procedure as long as possible.[4]

46. A record review was prepared by Mark Failinger, M.D., dated December 10, 2017. After reviewing Claimant's course of treatment, Dr. Failinger opined Claimant sustained a high-energy injury to her knee which created, with reasonable medical probability, post-traumatic arthritis. This arthritis progressed with time and would not imrove. Dr. Failinger agreed with Dr. Trumper's opinion that the Claimant had a high chance that the knee had progressed to arthritis, which would, with medical probability, become recalcitrant to conservative measures, including those she had undertaken to this point. A knee replacement was the next most reasonable step, with one repetition in Claimant's lifetime. The ALJ concluded Claimant will require continuing treatment for her right knee, including possible joint replacement surgery.

47. On December 14, 2017, Claimant was evaluated by Dr. Anderson-Oeser, who performed an IME at the request of her attorney. At that time, Claimant reported an aching sensation in the right posterior shoulder girdle, along with aching pain to the lower lumbar region, including the right sacroiliac and buttocks, left buttocks and posterior thigh. She also reported burning sensation over the lateral aspect of the right

[4] Exhibit G, p.185.

lower extremity to her ankle and numbness over the right knee. The ALJ noted these latter complaints were not reported to Dr. Douthit. On her examination, Claimant's gait was mildly antalgic. Her cervical ROM was within functional limits. Claimant was tender over the lower lumbar SI joints, bilateral PSIS and bilateral sacroiliac joints, as well as right gluteal muscles. The FABER test was positive on the right.

48. Dr. Anderson-Oeser opined, based on the mechanism of Claimant's injury and the fact that she reported pain in the low back and SI region from the onset, these were causally related to the vehicle accident of November 14, 2014. Dr. Anderson-Oeser testified that a lumbar rating was appropriate for SI joint injuries. Dr. Anderson-Oeser assigned a 9% impairment of the lumbar spine due to loss of range of motion and a 5% impairment of the lumbar spine based on Table 53 II(B); for a total of 14% spinal impairment. The ALJ credited the opinion offered by Dr. Anderson-Oeser with regard to Claimant's permanent impairment in the lumbar spine/SI joint.

49. Dr. Anderson-Oeser testified as an expert in Physical Medicine and Rehabilitation, the specialty in which she is board-certified. She is Level II accredited pursuant to the WCRP. Dr. Anderson-Oeser testified that this MVA caused the front-end of the dashboard to push the femur up into the hip socket, which transferred the forces across Claimant's sacrum. This can cause an injury to the SI joint, as well as low back pain. Dr. Anderson-Oeser opined that the mechanism of injury involved in an MVA can cause injury to the SI joint and spine.[5] Dr. Anderson-Oeser concluded Claimant had a problem on the right SI joint and myofacial pain in the lower lumbar region. The ALJ credited this opinion.

50. Dr. Anderson-Oeser testified Claimant's SI joint could have constant irritation, if it was not moving appropriately. On examination, Claimant had positive Faber's sign on the right, along with tenderness to palpation. Dr. Anderson-Oeser agreed there was a subjective element to these findings. There was also spasm of the gluteal muscles, along with a loss of ROM in the lumbar spine. On the question of whether Claimant initially reported low back/hip/SI joint problems, Dr. Anderson-Oeser referenced will the pain diagram Claimant completed for Dr. O'Connell, as well as the initial report of injury. She did not recommend a DIME physician relying on the medical records summary, as Dr. Douthit did in this case. The ALJ inferred Dr. Anderson-Oeser reviewed the initial report of symptoms at as supportive of the conclusion that there was an injury to this area of body and thus, potential impairment. Also the evidence of muscle spasm and loss of ROM were objective findings. The ALJ found Dr. Anderson-Oeser's opinions to be more persuasive than Dr. Hattem.

51 Dr. Anderson-Oeser opined Claimant was at MMI for the SI joint and low back condition. She believed these conditions could be treated as part of medical maintenance.

52. Claimant suffered an injury to her low back, and right SI joint as a result of the November 14, 2014 MVA.

[5] Deposition of Dr. Anderson-Oeser, p. 8:5-17.

53. There was agreement amongst the physicians, including Dr. Douthit, Dr. Hattem and Dr. Anderson-Oeser that Claimant did not sustain a permanent medical impairment to her cervical spine or right shoulder. The dispute in the case centered on the lumbar spine and right SI joint.

54. Claimant proved she is entitled to post-MMI medical treatment, including treatment for the right knee.

55. No ATP, including Dr. Siegel, recommended further injections for Claimant's right SI joint after June 2017.

56. Claimant failed to prove she required additional treatment for her right SI joint at this juncture.

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

CONCLUSIONS OF LAW

General

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

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

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

Overcoming the DIME

In resolving the issues, the ALJ notes the question of whether Claimant overcame Dr. Douthit's opinion is governed by §§ 8-42-107(8)(b)(III) and (c), C.R.S. *Peregoy v. Indus. Claim Apps. Office*, 87 P.3d 261, 263 (Colo. App. 2004). These sections provide that the finding of a DIME physician selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence". § 8-42-107(8)(b)(III), C.R.S.; *Leprino Foods Co. v. Indus. Claim Appeals Office*, 134 16 P.3d 475, 482-83 (Colo. App. 2005); *accord Martinez v. Indus. Claim Appeals Office*, 176 P.3d 826, 827 (Colo. App. 2007).

Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995). The mere difference of medical opinions does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO July 19, 2004); see *Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (ICAO Nov. 17, 2000).

The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Indus. Claim Apps. Office*, 961 P.2d 590 (Colo. App. 1998). Since the DIME physician is required to identify and evaluate all losses and restrictions that result from the industrial injury as part of the diagnostic assessment process, the DIME physician's opinion regarding causation of those losses and restrictions is subject to the same enhanced burden of proof. *Id*. The elevated burden is evidence of the Colorado Legislature's intent to limit overcoming the DIME physician's opinion to those cases where it is more probable than not that the opinion was incorrect.

The crux of the issue represented by the case is whether Dr. Douthit's opinion that Claimant did not sustain a permanent impairment to the lumbar spine (including the SI joint) was more probably wrong. The ALJ considered the arguments proffered by Claimant and Respondents with regard to Dr. Douthit's opinion. Claimant asserted that Dr. Douthit's conclusions were erroneous because he did not review Claimant's treatment early records where she reported low back pain. Respondents' argued that the Dr. Douthit's opinions were not overcome by clear and convincing evidence, as there was a lack of objective evidence to support the conclusion there was a lumbar spine/SI joint injury. Respondents also asserted the MRI did not show evidence of an acute lumbar injury and on the occasions when Claimant had an antalgic gait, this was related to her knee injury. Respondents relied upon the testimony of Dr. Hattem to support their contentions. In the case at bar, the ALJ determined Claimant met her burden to overcome Dr. Douthit's opinion.

There are two facets to the ALJ's reasoning; first, there was a sufficient quantum of evidence introduced that Dr. Douthit's conclusions vis a' vis the lumbar spine were erroneous. As found, Dr. Douthit relied upon Dr. Hattem's summary of the

early treatment records, which does not constitute an error *per se.* However, this lessened the weight of Dr. Douthit's opinion. Dr. Douthit went on to conclude that Claimant did not complain of low back pain initially, (which is contrary to the records) as part of his conclusion Claimant sustained no permanent medical impairment for lumbar spine.

As determined in Findings of Fact 3, 5-7, 11, Claimant complained of low back/hip pain in the initial aftermath of this accident. Claimant also referenced low back pain in her report of injury (Finding of Fact 5) and testified she had low back pain after the accident. There were also references to hip pain in the PT notes admitted into evidence. (Finding of Fact 7). The medical evidence in the record supported the conclusion Claimant had low back and right sided hip/leg pain following the accident. To the extent Dr. Douthit based his opinion that Claimant did not sustain an injury to the low back/hip as a result of the MVA because there were no complaints initially, this conclusion was erroneous.

In addition, the records of Dr. Siegel (an ATP) indicate she believed that Claimant suffered an injury to her low back/SI joint, which required diagnostic testing and treatment for these areas of the body. The ALJ credited Dr. Siegel's opinions in this regard. (Finding of Fact 22.) Medical records from other physicians confirmed Claimant had symptoms and treatment involving the lumbar spine and SI joint. As found, Dr. O'Connell initially questioned causation with regard to the hip and low back complaints. (Finding of Fact 13). However, the medical evidence in the record indicated Dr. O'Connell referred Claimant for diagnostic testing (MRI) as an ATP. (Findings of Fact 13-14). Other ATPs who opined that the hip, low back and right leg complaints were related to the subject accident included Drs. Girardi, White, Van den Hoven, and Donner (ATPs). Even Respondents' IME physician, Dr. Hattem, determined Claimant's low back was injured in the subject accident. (Finding of Fact 33.)

To be sure, there was not a uniform consensus between the doctors regarding the source of Claimant's pain complaints during the course of her treatment. Several physicians identified a labral tear in Claimant's hip as the pain generator. Also, there was a delay before Claimant's treatment focused on the hip and lumbar spine. On balance, the ALJ was persuaded that based upon the evidence, including the physicians' opinions, the MVA caused an injury to Claimant's lumbar spine and SI joint which required treatment. (Finding of Fact 52).

Second, the ALJ credited Dr. Anderson-Oeser's opinion that Claimant's low back and SI joint were causally related to the subject accident and Claimant sustained a permanent medical impairment to that area of her body. At the time of her evaluation, Dr. Anderson-Oeser had reviewed Dr. Hattem's report, as well as Dr. Douthit's. Dr. Anderson-Oeser's opinion on causation was supported by Dr. Raschbacher, as well as by Respondents' expert, Dr. Hattem who in his initial report concluded the hip and low back were related. Dr. Siegel, who was an ATP, also concluded Claimant's SI joint pain was related to the subject accident and referred Claimant to Dr. Donner for an evaluation and treatment. (Finding of Fact 34). All of these physicians concluded

Claimant had an SI joint diagnosis which supported the ALJ's conclusion that Claimant was entitled to a rating for the low back/SI joint under the AMA Guides. Dr. Anderson Oeser testified, which provided a rationale and support for the conclusion Claimant suffered a permanent medical impairment to the lumbar spine and the basis for rating. This was the most complete explanation that opinion of all the opinions within the record. The ALJ credited Dr. Anderson Oeser's opinion that Claimant was entitled to a Table 53II(B) impairment under the AMA Guides and concluded Claimant's total impairment was 14% whole person. (Finding of Fact 48).

Therefore, after considering the totality of the medical evidence, the ALJ concluded Claimant sustained a permanent medical impairment to lumbar spine (including the SI joint) and was entitled to a permanent medical impairment rating. Since Dr. Douthit's conclusion that Claimant did not have lumbar impairment was based, at least in part, on the erroneous belief Claimant did not complain of symptoms, his opinion was overcome. Accordingly, Claimant is entitled to additional PPD benefits for the injury to the lumbar spine/SI joint which was injured in the subject accident.

Grover Medical Benefits

The need for medical treatment may extend beyond the point of maximum medical improvement where claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995). As found, Claimant's traumatic injury to the right knee caused post-traumatic arthritis. (Finding of Fact 46). The medical evidence revealed Claimant may require knee joint replacement for the right knee and Respondents are liable for said treatment. Claimant proved she is entitled to continuing treatment to maintain MMI for the right knee. (Findings of Fact 45, 53). In this regard, Claimant's ATP, Dr. Siegel, opined Claimant required maintenance medical treatment at the ALJ credited this opinion. (Finding of Fact 39).

Claimant offered the opinion of Dr. Anderson-Oeser to support her contention that she requires maintenance treatment for her SI joint and low back. The ALJ concluded Claimant failed to prove entitlement to those medical benefits to either maintain MMI or prevent deterioration. (Findings of Fact 54-55). As found, Dr. Siegel referred Claimant to Dr. Donner and she was evaluated by PAC Kottonstette at Dr. Donner's office on June 1, 2017. Claimant underwent one injection, but there was no evidence in the record Claimant returned to Dr. Donner after that time. Claimant failed to prove the efficacy of said injection, such that a further SI joint injection would be warranted. Based upon this failure of proof, Claimant's claim for additional medical benefits for the low back and SI joint is denied.

ORDER

It is therefore ordered:

1. Claimant's Motion for a Corrected Order is granted.

2. Claimant met her burden to overcome the DIME physician's findings with regard to causation and medical impairment by clear and convincing evidence.

3. Respondents shall pay PPD benefits to Claimant based upon a 14% whole person impairment to lumbar spine.

4. Pursuant to the Stipulation of the parties, Respondents shall pay the scheduled impairment ratings issued by Dr. Douthit. This includes a 25% scheduled impairment of the lower extremity (right knee), which was added to the 12% extremity rating (hip) and that totaled a 34% scheduled impairment of the lower extremity, which converts to a 14% whole person impairment.

5. Respondents are entitled to a credit for PPD benefits paid.

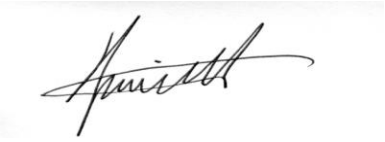
6. Respondents shall pay reasonable and necessary post-medical treatment, including treatment for post-traumatic arthritis in the right knee.

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

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

DATED: February 12, 2019

STATE OF COLORADO



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

ISSUES

The issues set for determination included:

(1) Did Claimant sustain a compensable work-related injury to her right upper extremity?

(2) If Claimant sustained a work-related injury, what medical benefits are related, reasonable and necessary to cure and relieve the effects of the industrial injury?

(3) What was Claimant's AWW?[1]

STIPULATION

The parties stipulated that should this claim be found compensable, Respondent will reimburse Claimant $10.00 for out-of-pocket expenses associated with the purchase of ibuprofen. The Stipulation was accepted by the Court and is made part of this Order.

FINDINGS OF FACT

1. Claimant has worked as a dental assistant for Employer since 2002. Claimant testified she works at the Denver Reception and Diagnosis Center and was part of the intake process for offenders. Her job duties included entering information in the data system and taking dental x-rays. Claimant testified she worked 7 AM to 3 PM, Monday through Friday.

2. Claimant testified her job duties included completing the intake procedures for anywhere from 45 to 60 offenders per day. The process of taking dental x-rays involved a panorex machine, which required the offender to put their head in a chin rest and bite on a bite stick. This required Claimant (who is 5' 3" tall) to reach overhead. Claimant was required to push a button for 25 seconds continuously while the panorex x-ray was completed. Claimant would then push print after the x-ray was completed and she was responsible for cleaning the panorex machine.

3. Claimant testified her salary was $3,775.00 per month (gross wages).

4. Claimant's prior medical records were admitted into evidence and medical history was significant in that she treated for chronic back pain. In particular, treatment records from Matthew Dickson, D.C. from July 1, 2009 through January 6, 2014 for admitted into evidence. Claimant consistently reported mid-and low back pain, as well as

[1] Claimant listed AWW as an issue to be determined at hearing in the Application for Hearing and her CIS form. However, this was not identified as an issue by either party at the outset of the hearing and neither party briefed this issue in their post-hearing submissions.

occasional cervical pain. Dr. Dickson diagnosed Claimant as suffering from lumbar, sacral, thoracic and cervical segmental dysfunction, as well as lumbar and sacrum sprain/ strain. Claimant received chiropractic manipulation on a regular basis during that time. In 2009, Claimant received 24. The ALJ noted Claimant complained of pain in both shoulder on one occasion (July 1, 2009) she complained of shoulder pain.

5. In 2010, Claimant underwent 51 chiropractic treatments and the ALJ noted there were references to pain in both of her shoulders at five visits including February 10, March 10, 15, 22, and April 12, 2010. Acquired spondylolisthesis was added to list of diagnoses. On September 7, 2010, Claimant underwent a microdiscectomy at L5-S1. Claimant received 13 chiropractic treatments in 2011 and there was no reference to shoulder pain. She underwent 28 chiropractic and 2 massage therapy treatments in 2012 and on one occasion (April 5, 2012 during a massage therapy session) there was a reference to shoulder symptoms. Additional diagnoses in 2012 included degeneration of lumbar, lumbosacral IVT; joint disorder/facet syndrome; kyphosis postural; cervical, thoracic, lumbar stiffness/restriction; unequal leg length.

6. In 2013, Claimant underwent 16 chiropractic treatments. The ALJ noted there were references to back and upper extremity symptoms on three occasions (February 7, 13, 21, 2013), as well as a reference to repetitive activities at work. In 2014, Claimant underwent one chiropractic manipulation at this facility, but there was no reference to shoulder or upper extremity pain. The ALJ inferred that Claimant's references to right upper extremity pain during the chiropractic appointments was infrequent.

7. Claimant also received chiropractic treatment from various chiropractors at the facility called The Joint in Aurora from December 2013 through December 31, 2018. The various providers noted subluxations at various levels and chiropractic manipulation was performed to the cervical, thoracic and lumbosacral spine. Claimant three adjustments in 2013 and six treatments in 2014 at this facility. Claimant underwent 31 chiropractic treatments/adjustments in 2013 and 38 in 2016. Claimant received 17 treatments in 2017. There was no reference to the right shoulder or upper extremity complaints in these records.

8. There was evidence Claimant treated for low back pain, as well as shoulder and elbow pain before 2017. On July 6, 2015, Claimant was evaluated by Daniel Hubbard, M.D. for low back. Dr. Hubbard's assessment included degeneration of what lumbar spine or lumbosacral into full disk, along with medial epicondylitis. Claimant was to continue doing daily stretches and taking medications. Claimant returned to Dr. Hubbard for elbow pain on August 25, 2015. Dr. Hubbard diagnosed medial epicondylitis of the elbow joint and lateral epicondylitis. Claimant underwent a steroidal injection.

9. The ALJ concluded Claimant's chiropractic treatment for chronic back pain was episodic in nature and the frequency varied. There was no evidence before the Court Claimant experienced anything more than periodic right upper extremity symptoms during the time she received chiropractic treatment.

10. On February 16, 2016, Claimant was evaluated by Dr. Hubbard, as she was experiencing shoulder pain and back pain. The onset of the shoulder pain was approximately nine months before, with no injury described. Claimant's back pain was described as six months in duration. Dr. Hubbard's assessment was: spinal stenosis, lumbar region, dorsalgia, chondrocostal junction syndrome, somatic dysfunction of rib cage. Medications were prescribed.

11. There was no evidence in the record Claimant had permanent restrictions related to the right upper extremity or thoracic spine before 2017.

12. Claimant testified her job duties changed in January 2017. A new computer system (EOMIS) was installed and additional keyboarding was required. Claimant said the new system at work increased the number of clicks she was doing from 44 to 64 clicks per offender. In addition, Claimant testified that the new system required manual data entry between where the panorex x-rays were stored and the computer terminal for the new system. Employer also completed an audit during the months of January through March 2017, which increased Claimant's workload. Claimant said the increased job duties caused pain in her right arm and elbow.

13. Claimant was initially evaluated by Martin Kalevik, D.O. on March 17, 2017 to whom she was referred by Employer. She was having arm pain and numbness, which she attributed to a change in the computer system at work in January which led to increased clicking and leaning on her arm. On examination, Claimant had stiffness in the right upper arm to the forearm. Mild tightness was noted in the forearm flexors, with an equivocal Phalen test.

14. Dr. Kalevik's assessment was: probable carpal tunnel syndrome, tendinitis involving extensor tendon from and forearm flexors, myofascial pain involving upper arm and lateral deltoid. Dr. Kalevik instructed Claimant on improved ergonomics, as well as stretching, along with the use of heat and ice. Claimant was provided a brace. Dr. Kalevik issued temporary work restrictions for Claimant requiring her to take a five-minute break for every 30 minutes of typing. The M-164 completed by Dr. Kalevik, who noted his objective findings were consistent with the history and/work related mechanism of the injury/illness.

15. Claimant returned to Dr. Kalevik on March 28, 2017. At that time, mild tension in the forearm was noted, but Claimant had full motion in all joints of the upper extremity. She reported numbness of the second and fifth fingers on the right hand. Dr. Kalevik's assessment was: probable carpal tunnel syndrome, mild tendinitis, with some myofascial pain in the upper arm. An EMG/nerve conduction study was pending and Claimant was to continue therapy.

16. Similar symptoms for Claimant were noted in the appointment on April 11, 2017. Dr. Kalevik's assessment was probable mild tendinitis and he also noted that the EMG was negative. Claimant was to continue therapy and Dr. Kalevik recommended a job site evaluation. Claimant was discharged by Dr. Kalevik on April 25, 2017. Dr. Kalevik noted she had no impairment or restrictions.

17. A job site evaluation was completed by Sara Shugars, MS CRC CCM, COEE, AEP (ergonomic consultant) on July 18, 2017. The job analysis gave a breakdown of daily job tasks, which included mousing (3-5 hours), keyboarding (1-2 hours), phone use (limited), scanning/printing/faxing (30 minutes-1.5 hours), handwriting (limited), assisting dentist (2-3 hours), other: counting and storing instruments (20-30 minutes). Ms. Shugars identified as a primary risk factor that was present at Claimant's worksite: four hours of wrist flexion > 45°, extension > 30°, or ulnar deviation > 20°.

18. Claimant provided additional information about her job duties by way of an addendum to the job site evaluation.[2] In the addendum, Claimant stated she would make 63 separate clicks from starting the system through entering the data for an inmate and taking an x-ray. This was in addition to typing information into the system. Claimant testified that beginning in October 2017, two x-rays per offender were taken.

19. Claimant received chiropractic treatments from January 2018 to July 2018 at which were provided by Phillip Sarver, D.C. There were references in these records to symptoms resulting from work duties.

20. An Independent Medical Examination was conducted on June 4, 2018 by Randy Burris, M.D., at the request of Respondent.[3] Dr. Burris said Claimant reported that pain in her shoulder and upper arm begin in January 2017. On examination, Claimant reported 2/10 pain throughout the right shoulder girdle in the upper arm regions. Diffuse tenderness was found throughout the posterior myofascial shoulder girdle. Numerous trigger points were present without muscle spasm. There was full ROM in the shoulder. Dr. Burris noted a negative impingement sign, speed test, Ferguson's test and drop arm sign. Claimant had full ROM at the elbow, wrist and all digits, with no tenderness noted over the medial and lateral epicondylitis. There was no pain with resisted flexion and extension of the wrist.

21. Dr. Burris' assessment was: right upper extremity myofacial pain. He noted Claimant had nonspecific myofascial complaints of the right shoulder girdle without a definitive diagnosis. Dr. Burris said Claimant's MRI findings were consistent with impingement syndrome, which was an anatomical condition that occurred absent trauma. Dr. Burris said Claimant did not meet the criteria for work-related shoulder pathology under the Colorado Division of Workers' Compensation Medical Treatment Guidelines ("DOWC MTG"). In particular, Dr. Burris analyzed the following risk factors: overhead work consisting of additive times per day of at least 30 minutes/day for a minimum of five years; work that requires shoulder movement at the rate of 15-36 repetitions per minute with no 2 second pauses for 80% of the work cycle; work that requires shoulder movement with force 10% or greater of the maximum voluntary force and has no 2 second pauses for 80% of the work cycle.[4] The ALJ found Dr. Burris did not analyze the aggravation of the underlying changes in Claimant's shoulder, limiting his analysis to the DOWC MTG.

[2] Exhibit E, pp. 32-39.

[3] Exhibit F.

[4] WCRP Rule 17, Exhibit 4, p.17

Dr. Burris opined Claimant did not the criteria to establish a work-related occupational disease of the shoulder.

22. Dr. Burris noted the job evaluation report identified some awkward posture of the risk with keyboarding and use of the mouse which may contribute to elbow/wrist conditions, however, he did not believe significant risk factors were identified for the shoulder joint. Dr. Burris based this on what he described intermittent operation of the x-ray. Dr. Burris also postulated that Claimant did not currently have a work-related occupational disease at the elbow because she had no complaints and the examination was normal. He recommended adjustments should be made to avoid awkward keyboarding postures previously identified. The ALJ noted Dr. Burris did not appear to consider Claimant's addendum, which described significant keyboarding and mousing for each inmate intake. Dr. Burris also did not consider the amount of overhead reaching Claimant performed for each intake, as well as the number of x-rays taken.

23. Claimant testified that Dr. Burris inaccurately recorded her history. More particularly, Claimant noted she did not have shoulder issues in January 2017. She also did not tell Dr. Burris that her symptoms never fully recovered. Claimant's prior treatment record records corroborated her testimony.

24. On or about July 16, 2018, Claimant completed a Worker's Claim for Compensation. It listed the date of injury as July 13, 2018 and stated her right hand, arm and shoulder were injured. The Worker's Claim said the injury was caused by excessive repetitive clicking of a computer mouse and having to reach above her head to adjust the patient's head for intake x-rays.

25. Claimant returned to Dr. Kalevik on July 18, 2018. Claimant reported she had been doing excessive repetition, with repeated mouse clicking and overhead reaching. She said her ergonomic set-up had not been changed. Claimant could move all joints of her upper extremities fully. Dr. Kalevik found mild muscle tension in the posterior right shoulder, but no scapular winging. Soreness was noted on the right lateral epicondylar area, but full motion was present with no crepitus. Mild muscle tension was present in the extensors and flexors of the right forearm. No swelling was present in the hand or fingers.

26. Dr. Kalevik's assessment was: sprain of other specified parts of thorax, initial encounter; pain in right elbow, pain in right shoulder. The ALJ noted the thorax sprain was a new diagnosis. Dr. Kalevik stated he would provide occupational therapy and encourage Claimant on a home exercise program. He recommended change of repetitive activity every 15 minutes for different activity, as well as the use of anti-inflammatory medications. The work-related diagnosis was listed as sprain of other specified parts of thorax, initial encounter. The M164 completed by Dr. Kalevik noted his objective findings were consistent with the history and/work related mechanism of the injury/illness. The ALJ credited this opinion of Dr. Kalevik and found it more persuasive than Dr. Burris' opinion.

27. An Employer's First Report of Injury was completed on or about July 18, 2018. It specified Claimant reported an aching arm, prickly sensation in fingers, side,and palm of right hand, right index finger from repetitive mouse clicking and overextending arms above head during the week of July 9, 2018.

28. A Notice of Contest was filed on behalf of Employer on August 14, 2018. The claim was being contested/denied for further investigation of Claimant's prior medical history and a job site evaluation.

29. On August 22, 2018, Claimant returned to Dr. Kalevik. Claimant had full range of motion ("ROM") of all joints in the upper extremity, with mild muscle tension of the extensors on the right. Dr. Kalevik's assessment was the same as the July 18, 2018 evaluation. Dr. Kalevik concluded Claimant was at MMI, with no permanent medical impairment. He opined Claimant did not require maintenance care, but Dr. Kalevik sent Claimant back to the therapist to go over her exercises and recommended the use of proper ergonomics.

30. Claimant underwent an MRI of the right shoulder on September 9, 2018 and the films were read by David Solsberg, M.D. Dr. Solsberg's impression was: arthritis of the acromioclavicular joint, which mildly compressed superior aspect of the supraspinatus myotendinous junction and therefore may be associated with impingement symptoms. Dr. Solsberg noted there was no rotator cuff or labral tear; there was tendinosis of the supraspinatus and infraspinatus tendon. There was subacromial sub deltoid bursitis.

31. On September 21, 2018, Claimant underwent a physical therapy ("PT") evaluation.[5] She was experiencing chronic right arm pain from repetitive motions at work and Kevin Gabrych, DPT muscular dysfunction in the right pec minor and posterior RTC. The ALJ noted these were objective signs of dysfunction in Claimant's right upper extremity. Good passive ROM was present, but AROM was limited due to pain. A six-week PT program was begun.

32. Dr. Hubbard authored a letter, dated September 24, 2018, after Claimant underwent the MRI on her shoulder. Dr. Hubbard noted the MRI showed arthritis in the AC joint with shoulder blade joined the clavicle. He wished to discuss the impingement with Claimant.

33. The ALJ found that it was more probable than not that Claimant experienced shoulder, arm and thorax symptoms on July 18, 2018 as a direct result of her work for Employer. The ALJ credited Claimant's testimony regarding the onset of her symptoms.

34. Claimant successfully proved that, on balance, it is more probable than not that the condition of her right upper extremity and thoracic spine was exacerbated by her job duties and caused her to experience symptoms.

[5] Exhibit K, pp. 391-392.

35. Claimant proved she is entitled to receive medical benefits to cure and relieve the effects of the industrial injury.

36. Respondent is required to provide treatment to Claimant to cure and relieve the effects of the industrial injury.

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

CONCLUSIONS OF LAW

General

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

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

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

Compensability-Upper Extremity

Claimant was required to prove by a preponderance of the evidence that, at the time of the injury, she was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. Sections 8-41-301(1)(b) & (c), C.R.S. (2016). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). This case presented a question of whether Claimant's work activities aggravated a pre-existing condition.

Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. *Faulkner v. Indus. Claim Appeals Office*, 12 P3d 844, 846 (Colo. App. 2000); Section 8-41-301(1)(c), C.R.S. The evidence must establish the causal connection with reasonable probability, not medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission, 491 P.2d 106* (Colo. App. 1971*)*. Claimant must establish a nexus between the work activities and the claimed disability. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The question of whether Claimant met the burden of proof is one of fact for determination by the ALJ. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant asserted she sustained a compensable occupational disease while working for Employer. Claimant attributed increased symptoms in her right shoulder and arm, as well as thoracic spine to the change and duties and increased physical requirements of her job. Respondent averred Claimant failed to meet her burden of proof to prove she suffered a compensable occupational disease arising out of and in the course of his employment. Respondent relied upon the opinions of Dr. Burris and argued Claimant's symptoms were not caused by her work duties. As the criteria under WCRP Rule 17, Exhibit 5 were not met.

As a starting point, the ALJ determined Claimant's work caused symptoms to be present in her thoracic spine, as identified by Dr. Kalevik. The medical evidence revealed Claimant required chiropractic treatment for degenerative changes in her spine prior to 2017/2018 and the ALJ determined that Claimant's work activities aggravated this condition. (Finding of Fact 33). This conclusion was supported by the Dr. Kalevik, who opined Claimant's symptoms were related to work activities. (Finding of Fact 23). This aggravation of a pre-existing condition fits within the Colorado Court of Appeal's holding in *H & H Warehouse v. Vicory, supra,* 805 P.2d at 1170 and is therefore compensable.

The ALJ also determined Claimant's duties aggravated the underlying condition of her right upper extremity, including the shoulder and thus, she suffered a compensable injury as a result of her work activities. As determined in Findings of Fact 1-3, Claimant testified that her job duties involved use of the upper extremity, which included using a keyboard and mouse. She also stated these job duties increased, specifically the x-rays taken of inmates and the number of clicks required in the intake process. (Finding of Fact 12). The ALJ found the work Claimant was doing for Employer caused an increase in symptoms. Further, the job analysis report admitted at hearing corroborated Claimant's testimony regarding the number of clicks on the mouse, typing required and movement of the right upper extremity. (Findings of Fact 15-16). This evidence was not controverted by Respondent. Thus, the ALJ determined Claimant suffered an occupational exposure which caused her to experience symptoms in the right upper extremity.

The medical evidence in the record, including the MRI performed on December 22, 2017, established there were degenerative changes in the shoulder joint, as well as impingement in Claimant's right shoulder. Tendinosis of both tendons was present. (Finding of Fact 30). No medical evidence was admitted at hearing which showed Claimant required treatment or missed time from work because of the prior treatment for her lumbar, thoracic and cervical spine. (Finding of Fact 6). In addition, Claimant's prior

treatment record revealed only intermittent shoulder symptoms over the course of several years of treatment. (Findings of Fact 4-8). Accordingly, the ALJ determined Claimant's work duties were the cause of her shoulder symptoms. (Findings of Fact 32-33).

When evaluating this issue of causation, the ALJ may consider the provisions of the DOWC MTG because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, the DOWC MTG are not dispositive of the issue of causation and the ALJ need not give them any more weight than he determines they are entitled to in light of the totality of the evidence. *See Cahill v. Patty Jewett Golf Course,* WC 4-729-518 (ICAO February 23, 2009); *Siminoe v. Worldwide Flight Services,* WC 4-535-290 (ICAO November 21, 2006).

The ALJ considered Dr. Burris' expert opinions and analysis under the DOWC MTG and concluded Claimant's job duties aggravated her shoulder, along with the elbow and forearm. In this regard, Claimant's occupational exposure and resulting constellation of symptoms do not fit neatly with in the DOWC MTG or the traditional occupational disease analysis under § 8-43-201(14), C.R.S. and *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). Nonetheless, based upon the evidence before the Court, the ALJ determined the specific physical tasks associated with Claimant's job were sufficient to cause an occupational injury.

As found, the job analysis (including Claimant's addendum) identified an exposure that the ALJ concluded could cause both the shoulder and arm symptoms. Dr. Burris conceded that the awkward positioning could cause Claimant's arm symptoms, although his opinion was circumscribed. The ALJ found Dr. Burris did not consider the overhead reaching done by Claimant, as well as the frequency of the physical movements required when x-rays were taken with each intake. As found, Claimant had substantial keyboarding, mousing and overhead reaching, particularly when her job duties changed. Also, Dr. Burris analyzed Claimant's shoulder symptoms under WCRP Rule 17 Exhibit 4, as opposed to Exhibit 5. (Finding of Fact 21). Respondents cited WCRP Rule 17, Exhibit 5 to support their contention Claimant did not sustain an occupational disease. In the case at bench, the Court determined there was a sufficient occupational exposure to be the cause of Claimant's symptoms and credited Dr. Kalevik's opinions on this subject. On balance, the ALJ determined there was sufficient evidence introduced at hearing to establish the required causal connection between Claimant's work activities and support a finding of compensability with regard to Claimant's arm condition (elbow and forearm).

Medical Benefits

Claimant is entitled to receive medical treatment that is reasonable and necessary to cure and relieve the effects of the injury. § 8-42-101(1)(a), C.R.S.; *Yeck v. Industrial Claims Appeals Office,* 996 P.2d 228 (Colo. App. 1999). Claimant bears the burden to prove by a preponderance of the evidence there was a causal relationship between the work-related injury and the condition for which treatment is sought. *Snyder v. Industrial Claims Appeals Office,* 942 P.2d 1337 (Colo. App. 1997).

The ALJ determined Claimant was entitled to medical benefits to cure and relieve the effects of her work-related injury. Respondent will be ordered to provide medical benefits through the ATP, Dr. Kalevik and any referrals made by him. In addition, pursuant to the Stipulation of the parties, Respondent shall reimburse Claimant $10.00 for out-of-pocket expense medications.

ORDER

It is therefore ordered:

1. Claimant proved she suffered a compensable injury on July 13, 2018, namely an aggravation of the preexisting degenerative changes in her right shoulder, injurious exposure to her wrist, elbow and forearm and a thoracic strain.

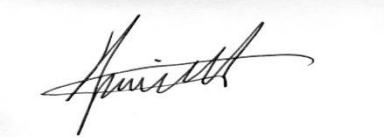
2. Respondents shall pay for medical benefits to cure and relieve the effects of Claimant's injury, including reimbursing Claimant $10.00 for out of pocket expenses.

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

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

DATED: February 12, 2019

STATE OF COLORADO



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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-074-721-001

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

,

Claimant,

v.

,

Employer,

and

,
,

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on November 20, 2018, in Denver, Colorado. The hearing was digitally recorded (reference: 11/20/18, Courtroom 4, beginning at 1:30 PM, and ending at 4:30 PM).

The Claimant was present in person and represented by _____, Esq. The Respondents were represented by _____, Esq.

Hereinafter [Redacted], shall be referred to as the “Claimant." [Redacted], shall be referred to as the “Employer.” All other parties shall be referred to by name.

Claimant’s Exhibits 1 through 11 were admitted into evidence, without objection. Respondents’ Exhibits A through H were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ established a post-hearing briefing schedule. Claimant's opening brief was filed on December 3, 2018. Respondents' answer brief was referred to the ALJ on January 11, 2019, having been timely filed on December 6, 2018. No timely reply brief was filed and the matter was deemed submitted for decision on January 11, 2019.

ISSUES

The issues to be determined by this decision concern compensability of a left elbow injury/incident of February 17 2017; if compensable, medical benefits and average weekly wage (AWW). At the commencement of the hearing, the Claimant withdrew issues concerning temporary disability, without objection.

The Claimant bears the burden of proof by a preponderance of the evidence.

FINDINGS OF FACT

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

The Incident

1. The Claimant is a four-year employee of the Employer. On February 17, 2017, she was engaged in a training exercise related to the safe handling of children. A co-employee was supposed to grab the Claimant's upper left arm, but instead, grabbed her left elbow and pulled down.

2. The incident cited as the cause of injury occurred in the course of employment. The Claimant was at work, during working hours, engaged in a work-related or mandated training exercise. The injury arose out of employment: the training exercise involved another employee grasping Claimant's arm and pulling downwards sharply, which Claimant reports caused the injury to her left elbow. Claimant's injury also satisfies the positional risk doctrine, because the conditions and obligations of her employment—training related to safe restraint and transportation of children—placed her in the position in which the injury was incurred.

3. The Claimant had not suffered any left elbow pain prior to the incident, of February 17, and it is more likely than not that the incident at work aggravated and accelerated any underlying problem. Her subsequent fall in a parking lot precipitated no further injury to her left elbow and arm injuries. This occurred, however, after Claimant began treatment, so any medical expenses incurred beforehand could not have been caused by her later fall in a parking lot. The Claimant not seeking compensation for her

broken right hand, which was unrelated to the incident at work. This subsequent injury is irrelevant to the compensability of the initial accident.

4. The Claimant reported to feel the onset of pain in her left elbow later that day and reported her injury to her Employer on February 18, 2017. Upon cross-examination conducted by the Respondent, however, the Claimant stated that she developed pain over the next week. The Employer's First Report of the Injury was completed on February 28, 2017 because—according to Respondent witness' testimony—they did not have notice of the injury until the 27th. The ALJ finds that Claimant reported her injury to an authorized Employer representative on February 27, 2017.

5. Respondents argue that the Claimant's pain allegedly began several days after the incident (the Claimant did not see a doctor for ten days afterwards) it is not the cause of the pain. Claimant states that she had no pain in her elbow before the event. The ALJ finds this testimony credible. All of the Claimant's authorized treating physician (ATPs) state in their reports that the Claimant's history of the incident is consistent. Respondent argues that there is no causation finding in the medical reports. Such an analysis is not necessary if the Claimant's testimony, coupled with the totality of the evidence supports causation, which the ALJ hereby infers and finds.

6. ATPs Dr. Davis, Dr. Brunworth, and Dr. Sollender all conclude that the Claimant has left medial epicondylitis, and Dr. Davis has recommended that Claimant receive PRP injections. Dr. Mordick disputes this and is of the opinion that the Claimant is at maximum medical improvement (MMI); however, Dr. Mordick is not an ATP, and the ALJ finds that his opinions have less weight and credibility that the opinions of the ATPs in this specific case.

Medical

7. The Claimant was first seen on March 8,2017 and was given temporary restrictions for her injury from March 8,2017 to March 29, 2017. On May 11, 2017, the Claimant was referred to Craig Davis, M.D., who diagnosed the Claimant with "left medical epicondylitis." Dr. Davis recommended a brace, injections, medications, ice and heat to the affected area. On April 17, 2018, Dr. Davis made a referral for PRP injections. Dr. Davis did not conduct a "causation analysis" as to the origin of the Claimant's injuries. Dr. Davis was an authorized referral.

8. Dr. Davis' April 17, 2018 report states that he "suggested a PRP injection which might be helpful in this situation. I went over the nature of the injection with her at some length and all questions were answered."

9. The Claimant also saw Gretchen Brunworth, M.D., for an EMG. On April 5th, 2018, Dr. Brunworth stated that the Claimant's EMG reported normal results. She

also noticed that the Claimant was suffering from rheumatoid arthritis (RA) which she was of the opinion that it "may be contributing to her prolonged healing." Dr. Brunworth did not conduct a "causation analysis" as to the origin of the Claimant's injuries. Dr. Brunworth was an authorized referral.

10. The Claimant has suffered from RA for about eight years, with pain primarily emanating from her cervical spine and lower back.

11. The Claimant was also referred to Jonathan Sollender M.D., on March 20, 2018. Dr. Sollender called for an MRI (magnetic resonance imaging) of her left elbow. On June 12, 2017, the MRI had normal results, but also showed slight changes of chronic lateral epicondyltitis. Dr. Sollender was within the chain of authorized referrals.

12. Dr. Sollender further conducted a physical examination, and noted tenderness along the medial bone of the left epicondyle. Dr. Sollender recommended additional testing for her RA. He did not recommend PRP injections, but held it was a reasonable consideration if her MRI showed any obvious medical elbow pathology. Dr. Sollender did not conduct a "causation analysis" as to the origin of the Claimant's injuries.

Thomas Mordick, M.D., Respondents' Independent Medical Examiner (IME)

13. The Claimant also saw Dr. Mordick at the request of the Respondents. Dr. Mordick disagreed with Dr. Davis' recommended PRP injections because there was no tear in the Claimant's medial epicondyle, according to Dr. Mordick. He was of the opinion that Claimant's February 17, 2017 injury was a result of her RA and there likely existed no causation between the injury and the recommended injections. The ALJ finds Dr. Mordick's opinions and testimony interesting but insufficient to outweigh the opinions of Dr. Davis and the Claimant's (a 36-before-and-after the incident of February 17, 2017) testimony. Dr. Mordick's testimony does not make it more likely than not that the Claimant's RA was **not** aggravated and accelerated by the incident of February 17, 2017. Stated in the affirmative, the ALJ finds that it is more likely than not that the incident of February 17, 2017, aggravated and accelerated the Claimant's underlying RA.

Ultimate Findings

14 The ALJ finds the Claimant's testimony concerning lack of previous problems in the left elbow credible, persuasive and they outweigh the opinions of IME Dr. Mordick. Further, the ALJ finds the medical opinions of Dr. Davis and Dr. Sollender credible, highly persuasive and they indirectly support a causal relation to the February 17, 2017 incident.

15. Between conflicting testimonies and opinions, the ALJ makes a rational choice, based on substantial evidence, to accept the Claimant's testimony as a whole, and the indirectly supporting opinions of Dr. Davis and Dr. Sollender and to reject opinions and testimony to the contrary.

16. The Claimant has established by a preponderance of the evidence that she sustained a compensable injury, or aggravation and acceleration of her underlying RA, to her left elbow on February 17, 2017.

17. The medical care and treatment that Claimant received for her left elbow, as demonstrated in the evidence, was authorized, causally related to the February 17 incident, and reasonably necessary to cure and relieve the effects of that injury.

18. On the date of injury, the Claimant was paid $14.38 an hour, based on a 35-hour week, which establishes an AWW of $503.30, which the ALJ hereby finds.

CONCLUSIONS OF LAW

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

Credibility

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

275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaner v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant's testimony concerning lack of previous problems in the left elbow was credible, persuasive and outweigh the opinions of IME Dr. Mordick. Further, the medical opinions of Dr. Davis and Dr. Sollender were credible, highly persuasive and indirectly supported a causal relation to the February 17, 2017 incident.

b. In *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997), the Court of Appeals determined that a medical opinion was not necessary to prove causation because imposing such a requirement would be reading something into the statute that was not there. *See Jacoby v. Metro Taxi, Inc.,* 851 P.2d 245 (Colo. App. 1993). § 8-41-301, C.R.S., which specifies the conditions necessary for a compensability determination (this would include the compensability of a medical procedure or diagnostic tests) does **not** provide that a medical opinion is necessary to make such a determination. As observed in *Lymburn*, to require a medical opinion to support a causality determination would be to read something into the statute that does not exist. As found herein above, the Claimant's testimony, indirectly buttressed by the opinions of Dr. Davis and Dr. Sollender, circumstantially support the compensability of the February 17, 2017 incident.

Substantial Evidence

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

evidence, to accept the Claimant's testimony as a whole, and the indirectly supporting opinions of Dr. Davis and Dr. Sollender and to reject opinions and testimony to the contrary.

Compensability

d. A compensable injury is one that arises out of and in the course of employment. Section 8-41-301(1) (b), C.R.S. The "arising out of" test is one of causation. If an industrial injury aggravates or accelerates a preexisting condition, the resulting disability and need for treatment is a compensable consequence of the industrial injury. Thus, a claimant's personal susceptibility or predisposition to injury does not disqualify the claimant from receiving benefits. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). An injured worker has a compensable new injury **if the employment-related activities aggravate, accelerate, or combine with the pre-existing condition to cause a need for medical treatment or produce the disability for which benefits are sought.** § 8-41-301(1) (c), C.R.S. *See Merriman v. Indus. Comm'n,* 120 Colo. 400, 210 P.2d 448 (1949); *Anderson v. Brinkoff,* 859 P.2d 819 (Colo. 1993); *National Health Laboratories v. Indus. Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992); *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). An injury resulting from the concurrence of a preexisting condition and a hazard of employment is compensable. *H & H Warehouse v. Vicory*, *supra*. *Duncan v. Indus. Claims App. Office*, 107 P.3d 999 (Colo. App. 2004). Even where the direct cause of an accident is the employee's preexisting disease or condition, the resulting disability is compensable where the conditions or circumstances of employment have contributed to the injuries sustained by the employee. *Ramsdell v. Horn*, 781 P.2d 150 (Colo.App. 1989). *Also see* § 8-41-301(1) (c), C.R.S; *Parra v. Ideal Concrete,* W.C. No. 4-179-455 [Indus. Claim Appeals Office (ICAO), April 8, 1998]; *Witt v. James J. Keil Jr.,* W.C. No. 4-225-334 (ICAO, April 7, 1998). As found, the incident of February 17, 2017, caused the Claimant's left elbow epicondylitis and/or an aggravated and accelerated of her underlying rheumatoid arthritis.

Medical

e. To be authorized, all referrals must remain within the chain of authorized referrals in the normal progression of authorized treatment. *See Mason Jar Restaurant v. Indus. Claim Appeals Office,* 862 P. 2d 1026 (Colo. App. 1993); *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P. 2d 501 (Colo. App. 1995); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). As found, the Claimant's medical treatment for her left elbow was the result of a referral by the Employer and thereafter further treatment remained in the authorized chain of referrals.

f. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, Claimant's medical treatment for

her left elbow is causally related to the incident of February 17, 2017. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990) to cure and relieve the effects of her compensable injury.

Average Weekly Wage

g. An AWW calculation is designed to compensate for **total** temporary wage loss. *Pizza Hut v. Indus. Claim Appeals Office,* 18 P. 3d 867 (Colo. App. 2001). *See* § 8-42-102, C.R.S. As found, Claimant's AWW is $503.30.

Burden of Proof

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

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant sustained a compensable left elbow injury on February 17, 2017.

B. Respondents shall pay the costs of all authorized, causally related and reasonably necessary medical care and treatment for the Claimant's compensable left elbow injury of February 17, 2017, subject to the Division of Workers Compensation Medical Fee Schedule.

C. The Claimant's average weekly wage is hereby established at $503.30.

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

DATED this13th day of February 2019.

EDWIN L. FELTER, JR.
Administrative Law Judge

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

ISSUES

I. Whether Respondents overcame the DIME physician's opinion on MMI by clear and convincing evidence.

FINDINGS OF FACT

1. Claimant is a 63 year old woman who began working for Employer in February 2015 as a homemaker performing housekeeping duties. Claimant subsequently became a personal care worker, which involved performing housekeeping duties and assisting clients with bathing, dressing, and ambulating. On November 24, 2015, Claimant became a certified nursing assistant ("CNA"). As a CNA, Claimant went on home visits and assisted clients with bathing, toileting, ambulating and other personal care needs. Claimant's role as a CNA required frequent bending, stooping, squatting, reaching, ascending and descending stairs, and kneeling to maneuver patients. The position also required frequent exertion of objects up to 25 pounds and occasional exertion of objects between 50-75 pounds. Claimant did not have assistance while performing her job duties for Employer. Claimant worked between 40-50 hours a week for Employer.

2. At the time of Claimant's admitted work injury, Claimant also worked 20 hours a week as a cashier at a home improvement store. Claimant's job at the home improvement store required constant standing and the ability to lift up to 50 pounds. During her employment at the home improvement store, Claimant sustained an injury to her foot in 2014 and left hand in 2016. Claimant returned to work for Employer after receiving treatment for both injuries and was able to perform her regular job duties for Employer leading up to the admitted industrial injury she sustained during the course and scope of her employment with Employer on May 8, 2016.

3. On May 8, 2016, Claimant sustained an admitted injury to her right knee during the course and scope of her employment for Employer when she attempted to transfer a large elderly client from a wheelchair to a bed. Claimant was assisting the client using a gait belt when the client lost her balance and collapsed against Claimant. Claimant attempted to use her leg to reposition the client's foot to no avail. Claimant ultimately pivoted her body to heave the client onto the bed.

4. Claimant testified she immediately felt a sharp pain and a burning sensation in her right knee. She testified she had to finish her shift as "there was no one to call." She reported the injury to Susan Jean in the human resources department the next morning. Claimant informed Ms. Jean she was hoping it was just a sprain, and would attempt to treat it on her own before seeking medical attention.

5. Claimant continued to work both jobs from May 9, 2016 to May 17, 2016. Claimant testified she braced herself on a bed and shifted her weight to her left leg

when lifting. Claimant was allowed to sit on a stool while she performed her cashier duties at the home improvement store. During this time period, Claimant treated her knee with compression, ice and elevation. Claimant ultimately decided to seek medical treatment when her symptoms worsened and she felt unable to bear weight on her right leg.

6. On May 18, 2016, Claimant presented to Colleen Moss, P.A. at Kaiser Permanente. Claimant reported she injured her right knee on May 8, 2016 when a client collapsed in her arms with her full weight. Claimant reported that she experienced symptoms that evening which had since worsened. On examination, P.A. Moss noted tenderness to palpation with no ecchymosis, erythema or laceration. She noted it was difficult to assess effusion due to Claimant's body habitus. P.A. Moss assessed Claimant with right knee pain with possible meniscal involvement and suggested Claimant follow up with a workers' compensation provider.

7. On May 20, 2016, Claimant presented to authorized provider Robert Broghammer, M.D. at HealthOne. Claimant reported to Dr. Broghammer that she injured her right knee while transferring a very large client. On examination of the right knee, Dr. Broghammer noted mild effusion and positive medial and lateral joint line pain. He assessed Claimant with a work-related right knee strain and recommended that Claimant undergo a right knee MRI, noting the "duration of symptoms, with ongoing effusion, medial joint line pain, and physical findings, as well as history, [were] highly suggestive of a meniscal tear." Claimant was placed on 20 pound lifting limit with restrictions of no crawling, kneeling, squatting or climbing.

8. Claimant underwent a right knee MRI on May 26, 2016. William R. Dunfee, M.D.'s impression was as follows: 2.1 cm long horizontal tear medial meniscus, osteoarthritis with areas of grade 2 and 3 cartilage fissuring, and small knee joint effusion and Baker's cyst.

9. On May 27, 2016, Dr. Broghammer noted Claimant's MRI revealed a large horizontal tear in the medial meniscus. He further noted,

> In addition, she has quite a bit of associated degenerative changes, not necessarily unexpected, with grade 2 and grade 3 osteoarthritic changes in multiple areas of the knee. [Claimant] was surprised by the arthritic findings because she never had symptoms. I told her that imaging studies are poorly coordinate with symptomatology, especially when it comes to arthritis.

Dr. Broghammer assessed Claimant with a right knee strain with meniscal tear, continued her work restrictions, and referred Claimant for an orthopedic evaluation.

10. On June 9, 2016, Claimant presented to John Schwappach, M.D. for an orthopedic evaluation. Claimant reported the same mechanism of injury to Dr. Schwappach. Dr. Schwappach reviewed the MRI results and opined Claimant sustained an acute right strain on top of chronic osteoarthritis. He doubted the horizontal meniscal

tear was an acute injury. Dr. Schwappach administered a right knee corticosteroid injection, recommended Claimant begin taking ibuprofen, and referred Claimant for physical therapy. Claimant reported experiencing improvement after the injection.

11. On June 17, 2016, Claimant was involved in a non-work-related motor vehicle accident ("MVA") when she was cut off by another vehicle and T-boned a truck.

12. Dr. Broghammer reexamined Claimant on July 12, 2016, noting that Claimant had been involved in a recent MVA. Claimant reported left knee, right ankle, low back, and whiplash symptoms as a result of the MVA. Dr. Broghammer noted Claimant's right knee was "status quo" after the MVA.

13. Claimant returned to Dr. Schwappach on July 28, 2018 and received a second right knee steroid injection, which caused Claimant's pain to increase. Claimant experienced intermittent swelling, difficulty walking and weight bearing. On August 9, 2016, Dr. Broghammer noted Claimant was now ambulating with a cane. Claimant reported to Dr. Broghammer that her knee had returned to feeling like it did when she was first injured.

14. On September 1, 2016, Dr. Schwappach recommended Claimant undergo a right knee arthroscopy and partial meniscectomy. In a September 2, 2016 medical note, Dr. Broghammer noted that he agreed with Dr. Schwappach's recommendation for surgery based on Claimant lack of response to conservative modalities.

15. On September 12, 2016, physician advisor Jon M. Erickson, M.D. performed a review of the requested right knee arthroscopy and partial meniscectomy. He noted Claimant's May 26, 2016 MRI revealed a degenerative horizontal tear of the medial meniscus and advanced osteoarthritic changes with no evidence of acute trauma. Dr. Erickson opined that Claimant's abnormalities were pre-existing, and that the requested arthroscopic partial medial meniscectomy would be appropriate, "with the understanding that such procedure in the face of advanced osteoarthritis holds very little chance of long term benefit." He explained that any continued substantial knee pain or need for a total knee replacement would be directly related to Claimant's pre-existing advanced osteoarthritis and not the work injury.

16. Claimant underwent a left knee MRI on September 27, 2016 in connection with her non-work-related MVA. The left knee MRI revealed a horizontal tear of the medial meniscus body, blunting of the lateral meniscus inner margin, and osteoarthritis. Claimant was subsequently with assessed a left knee medial meniscus tear with underlying osteoarthritis. Charlie C. Yang, M.D. recommended that Claimant undergo a total left knee arthroscopy.

17. On October 5, 2016, Claimant underwent a right partial medial meniscectomy, partial lateral meniscectomy and chondroplasty, performed by Dr. Schwappach. On October 17, 2016, Dr. Schwappach noted near resolution of Claimant's preoperative symptoms. However, on October 19, 2016, Claimant reported that her knee was feeling worse and increasingly achy. Claimant engaged in extensive physical therapy after the

surgery, yet Claimant continued to report constant knee pain and require the assistance of a cane. On February 20, 2017, Dr. Schwappach offered to administer a third right knee steroid injection, which Claimant declined.

18. On March 20, 2017, Claimant presented to Levi Miller, D.O. upon the referral of her authorized providers at HealthOne. Claimant reported the same mechanism of injury to Dr. Miller. Claimant rated her pain 2/10 at best and 9/10 at worst. Dr. Miller diagnosed Claimant with chronic right knee pain and a meniscal tear from the May 8, 2016 industrial injury. He recommended Claimant use a brace and prescribed a topical cream.

19. Dr. Schwappach last evaluated Claimant on June 15, 2017. Claimant reported she continued to have some pain but was making progress in physical therapy. Dr. Schwappach concluded Claimant reached MMI for her right knee and discharged her from his care.

20. Due to her ongoing pain, Claimant sought a second orthopedic opinion on her right knee with Nathan Faulkner, M.D. on June 30, 2017. Dr. Faulkner recommended Claimant undergo weight-bearing x-rays and a second right knee MRI.

21. Claimant attended a follow-up evaluation with Dr. Faulkner on August 29, 2017, reporting 3-7/10 pain. Dr. Faulkner noted that June 30, 2017 x-rays revealed mild medial joint space narrowing with well-maintained lateral and patellofemoral joint spaces. He further noted that a July 27, 2017 MRI showed grade 4 chondromalacia of the media ridge and medial patellar facet, mild/moderate chondromalacia of the medial and lateral femoral condyles, and a small recurrent vertical tear of the posterior horn medial meniscus. He opined that, despite the recurrent tear, Claimant's pain distribution and exam was more consistent with arthritis. Dr. Faulkner recommended Claimant undergo a PRP injection, which he administered on September 15, 2017.

22. On September 27, 2017, Claimant reported to Dr. Miller experiencing significant pain since receiving the PRP injection. Claimant was released to return to work in an administrative capacity working four hours per day.

23. On December 18, 2017, Dr. Faulkner reevaluated Claimant. Claimant reported 3-7/10 persistent pain. Dr. Faulkner noted that he had prescribed Claimant a Medrol Dosepak which helped Claimant with swelling but not pain. Dr. Faulkner opined that the next step for Claimant would be a total knee replacement, as Claimant had an extensive workup and had not responded to conservative treatment.

24. Claimant returned to Dr. Miller on December 27, 2017 reporting continued symptoms. Dr. Miller noted that the July 27, 2017 MRI revealed a recurrent meniscal tear with associated degenerative changes in the medial joint compartment. He further noted that Claimant was reporting locking and catching symptoms, "which may be consistent with recurrent meniscal tear and undersurface flap, as described by the radiologist."

25. On January 3, 2018, physician advisor Albert Hattem, M.D. reviewed Dr. Faulkner's recommendation for additional surgery. Dr. Hattem agreed with Dr. Erickson and opined that the recommended surgery was to treat Claimant's pre-existing degenerative joint disease, which was not caused by the work injury.

26. Dr. Miller reevaluated Claimant on January 16, 2018. He initially opined that Claimant's need for a total knee replacement was work-related, stating,

> The patient, in my opinion, is a candidate for total knee replacement to be paid for by Colorado Worker's Compensation as she suffered the knee injury while working and there is no record of prior knee complaints or treatment despite the preexisting degenerative changes as seen on the MRI, the patient has been fully functional and working full time prior to this injury; the patient's current knee pain and limited function is attributable to the industrial injury. Currently, the patient remains at a stable and stationary though substantially diminished functional status, a knee replacement would very likely return the patient to work full time without permanent restrictions.

27. Claimant also saw Dr. Faulkner on January 16, 2018. Dr. Faulkner also initially opined Claimant's need for surgery was work-related. He wrote, "It is my opinion that while her arthritis was not caused by the injury, it is as likely as not that the treatment and sequela for her work-related injury to the meniscus including including (*sic)* knee arthroscopy and partial medial meniscectomy could have caused progression of her arthritis."

28. On February 6, 2018, Kathy F. McCranie, M.D. performed an independent medical examination ("IME") at the request of Respondents. Claimant reported the same mechanism of injury to Dr. McCranie as she did to her providers. Dr. McCranie performed a records review and physically examined Claimant, noting moderate pain behaviors and complaints on examination. She opined Claimant sustained a medial meniscal tear and possible lateral meniscal tear of the right knee in relationship to the May 8, 2016 work injury. She concluded that Claimant's right knee osteoarthritis was unrelated to the work injury and agreed with Dr. Hattem and Dr. Erickson that Claimant's need for a total knee arthroplasty was related to Claimant's pre-existing osteoarthritis. Dr. McCranie opined Claimant was at MMI with a 24% lower extremity impairment and permanent restrictions limiting walking, standing, squatting, kneeling and crawling. She suggested potential maintenance care in the form of completing physical and psychotherapy sessions and use of topical analgesic cream.

29. On February 9, 2018, Dr. Miller issued a letter stating Claimant was restricted from lifting/pushing/pulling greater than 20 pounds, and was to avoid kneeling, climbing, squatting, in addition to walking or standing for greater than 10 minutes per hour. Dr. Miller reiterated his then-opinion that Claimant was an appropriate candidate for a total knee replacement, and stated that, without the knee replacement, Claimant's current restrictions would become permanent.

30. After subsequently reviewing Dr. McCranie's IME report, Dr. Miller issued a letter on February 18, 2018 stating, "I am in agreement with the opinions and recommendations of the examining physician."

31. On March 12, 2018, Dr. Miller placed Claimant at MMI with 26% lower extremity impairment. Claimant reported 3/10 pain, diminished range of motion, and swelling with activity. Dr. Miller noted continued to use a cane. His final assessment was: right knee pain associated with medial and lateral meniscal tear superimposed on pre-accident osteoarthritis, medial and lateral meniscal tear due to work-related injury 05/08/2016, status post arthroscopic partial medial and lateral meniscectomy and chondroplasty. He assigned permanent restrictions of no lifting/pushing/pulling more than 20 pounds, avoiding climbing and squatting, and avoiding walking and standing for greater than 10 minutes. He recommended Claimant complete her pending physical therapy and psychotherapy sessions and use topical analgesic cream for up to one year.

32. On March 20, 2018, Respondents filed a Final Admission of Liability ("FAL") in accordance with Dr. Miller's March 12, 2018 report, admitting for 26% scheduled impairment and reasonable, necessary and related maintenance benefits. Claimant objected to the FAL on April 2, 2018 and requested a DIME.

33. Timothy Higginbotham, M.D. performed the DIME on July 10, 2018. Dr. Higginbotham reviewed Claimant's medical records, including both right knee MRIs, and examined Claimant. Claimant reported the same mechanism of injury. Claimant denied any right knee complaints, evaluation or treatment prior to the work injury. Dr. Higginbotham noted Claimant was involved in a non-work-related MVA in 2016 and was experiencing issues with her left knee. Dr. Higginbotham noted no notable pain behaviors on examination. He assessed Claimant with, *inter alia*, a torsion strain event of the right knee, previously asymptomatic early degenerative changes of the right knee, structural diagnostic evidence of a large 2 cm radial medial meniscal tear, and post-operative structural diagnostic evidence of a recurrent medial meniscal tear superimposed upon associated degenerative joint disease. He opined was not at MMI due to her need for a total right knee arthroplasty. Dr. Higginbotham opined a total knee replacement was reasonable, necessary and related to the work injury. He assigned a provisional lower extremity impairment of 24%.

34. Dr. Higginbotham addressed the causality of the total knee replacement, specifically addressing the conflicting opinions of Drs. Schwappach, Erickson, Faulkner, Hattem, Miller, and McCranie in his report. He noted there were no medical records or personal history indicating Claimant had arthritic symptoms or loss of function prior to the work injury. Dr. Higginbotham explained,

> Surely the degenerative processes were pre-existing. However, degenerative processes in and of themselves may not connote symptomatic or dysfunctional processes. Without the so described injury mechanism and as cautioned by the WC orthopedic adviser and discussed by the latest treating orthopedist about the arthroscopic

debridement, it is merely speculative as to when, or possibly if ever, a total arthroplasty would have been necessary.

35. On October 18, 2018, Timothy S. O'Brien, M.D. performed an IME at the request of Respondents. Dr. O'Brien reviewed medical records, including the MRI imaging, and physically examined Claimant. Claimant reported the same mechanism of injury to Dr. O'Brien. Claimant reported she did not have knee pain prior to the May 8, 2016 injury and that since the injury her knee pain had not resolved. Claimant rated her knee pain 9/10. Dr. O'Brien concluded Claimant solely sustained a very minor knee strain on May 8, 2016. He opined Claimant did not sustain an acute tear of her meniscus, or any other acute injury of her right knee as a result of the May 8, 2016 work injury. He based this opinion on the MRI imaging, as well as the fact that Claimant did not seek any medical care for approximately two weeks following the injury. Dr. O'Brien stated such behavior would not be typical for someone following an acute knee injury, but would be typical for a person with pre-existing knee pain due to osteoarthritis. Dr. O'Brien explained that, if Claimant had sustained an acute injury, there would have been evidence of bleeding and post-traumatic fluid as well as an acute meniscus tear on the May 26, 2016 MRI. Dr. O'Brien opined that all of the pathology shown on Claimant's MRI was pre-existing. Additionally, Dr. O'Brien further noted that very early in the case Claimant began to develop non-organic physical findings, with Claimant's pain escalating despite a lack of physiologic or anatomic explanations. He noted that, despite Claimant's assertions she never had any right knee pain prior to the work incident, the likelihood of that was actually very small, based on his experience performing over 3000 knee replacements and treating thousands of patients with osteoarthritis of the knee.

36. Dr. O'Brien agreed with Dr. Hattem, Dr. Erickson, and Dr. McCranie that Claimant's need for a total knee replacement is not related to her admitted work injury, and that the admitted injury did not aggravate or accelerate her need for a total knee replacement. He opined that the surgery that was performed was not related and contraindicated. He further opined that Dr. Higginbotham's opinion regarding MMI was flawed because Dr. Higginbotham incorrectly stated Claimant had sustained a serious injury on May 8, 2016 and "inappropriately assumed" Claimant's continued symptomatology was work-related.

37. Drs. Miller and Faulkner subsequent reviewed Dr. O'Brien's IME report. In letters dated November 19, 2018 and November 29, 2018, Dr. Miller and Dr. Faulkner, respectively, stated they agreed with Dr. O'Brien that Claimant's need for a total right knee replacement is related to Claimant's pre-existing arthritis, which was not aggravated or accelerated by her admitted work injury.

38. Dr. Higginbotham testified by pre-hearing deposition on November 20, 2018 as a Level II accredited expert in occupational medicine. Dr. Higginbotham reviewed Dr. O'Brien's IME report and testified that, while he agreed Claimant's ongoing symptoms are due to the progression of her osteoarthritic symptomatology, he disagreed Claimant's condition is solely a personal health issue and not work-related. Dr. Higginbotham testified Claimant had degenerative changes in her knees, but opined

that her current complaints, condition, and need for treatment are related to the May 8, 2016 work injury. In support of his opinion, he explained that, prior to the work injury, Claimant was not under any treatment for her knee, was working in her usual capacity without experiencing any disabling patterns, and was not symptomatic such that she required evaluation.

39. Dr. Higginbotham reviewed additional medical records from Claimant's June 2016 MVA. He testified that the bilaterally of the knee symptoms did not change his opinion on the relatedness of the right knee total replacement, reiterating his opinion that Claimant's symptomatology was significantly aggravated by the work injury and caused the need for surgery. Dr. Higginbotham testified Claimant is an appropriate candidate for a total arthroplasty of the right knee. He expressed some concern as to the potential for success of the surgery due to Claimant's obesity but testified that, at this time, "the most appropriate and only option is the total knee replacement."

40. Dr. O'Brien testified at hearing as a Level II accredited expert in orthopedic surgery. Dr. O'Brien testified consistent with his IME report. He testified that the May 26, 2016 MRI showed significant pre-existing age-related osteoarthritic changes throughout her knee, with no evidence of any acute damage to her knee. Dr. O'Brien testified that if Claimant had aggravated or accelerated her pre-existing condition when she was injured at work she would have sought treatment immediately, the provider at Kaiser would have documented an acute injury, and/or her radiological findings would have reflected an acute injury. Dr. O'Brien explained that, in general, an aggravation or acceleration would at least be apparent from the presence of bleeding on an MRI. Dr. O'Brien also noted that in order for an aggravation or acceleration of Claimant's bone on bone osteoarthritis to be found, extensive force would have needed to be present such that a fracture would occur which was not found on Claimant's MRI, nor could such a force have been exerted given the nature of Claimant's injury.

41. Dr. O'Brien testified that it is virtually impossible for Claimant to have not experienced any sort of knee pain given her age, obesity, and radiological findings. Dr. O'Brien testified that it is typical for a patient to have no history of seeking treatment for their knees before finally coming in to be evaluated for treatment despite having long standing pain complaints. Dr. O'Brien further testified that Claimant's significant physical decline could not be explained physically or anatomically. He noted that the only way to explain her behavior is to implicate non-organic factors such as secondary gain. Dr. O'Brien noted that the bilateralism of Claimant's knee issues is further evidence that Claimant's need for a total knee replacement for her right knee is not related to her work injury. Dr. O'Brien stated he disagreed with the decision to perform a knee arthroscopy. He testified that scoping arthritic knees introduces trauma that accelerates the need for a knee replacement. Dr. O'Brien stated that had the knee arthroscopy been related to Claimant's industrial injury, the knee replacement would be related to her industrial injury.

42. Dr. O'Brien stated that Dr. Higginbotham's opinion that the absence of pre-existing pain indicates that there is a direct causal link between the incident at work and her need for the total knee replacement is clearly in error. Dr. O'Brien testified that Dr.

Higginbotham's opinion is not supported by science and logic, and that Dr. Higginbotham has never had the training to correlate an MRI scan finding with true surgical findings. Dr. O'Brien testified that Dr. Higginbotham's mental picture of the severity of Claimant's injury is not supported by any objective evidence. He further stated Dr. Higginbotham failed to explain how he came to his conclusions absent what Dr. O'Brien believed to be objective evidence of an acute injury to the right knee. Dr. O'Brien concluded that Claimant's candidacy as a patient who should undergo a total knee replacement was established radiographically years before the incident at work. Dr. O'Brien testified that Dr. Higginbotham's opinion that it is merely speculative that Claimant would ever need to undergo a total knee replacement is clearly wrong.

43. Cheryl Mochizuki testified at hearing on behalf of Claimant. She works for Employer as a paraprofessional educator and observes each CNA to ensure they are physically able to perform their job. Ms. Mochizuki explained that a CNA has to be able to bear the weight of each patient and transfer the patient from bed to chair, chair to chair, or from chair to bed. When performing a transfer, a CNA has to do a stand-to-pivot, which requires the CNA to take the sitting patient from the side of the bed, help the patient get up, turn the patient, and place them into the wheelchair. She further elaborated that heavier patients require an extensive amount of pulling, pushing, and lifting in order to be positioned correctly. When performing a stand-to-pivot motion, a CNA must demonstrate flexing at the knee and hip while also having the ability to stand with the patient. Ms. Mochizuki stated that she observed Claimant perform these motions on December 22, 2015. She also observed Claimant after this date during co-visits. Ms. Mochizuki testified she did not perceive any issues with Claimant performing these motions, nor did it appear Claimant experienced pain when performing these motions.

44. Claimant testified she did not have any knee pain or seek treatment for her knee prior to the work injury. Claimant testified she did not have any issues performing her job duties prior to the work injury. Claimant stated she did not begin using a cane until after receiving the second injection to her knee. Claimant testified that her current symptoms included pain, swelling, and an inability to walk or sit for extended periods of time. She stated she can no longer walk her three dogs, which she was able to do prior to the work injury. Claimant has permanent restrictions. She returned to work for Employer working 20 hours a week performing customer service, scheduling and other administrative duties.

45. Claimant's testimony is found credible and persuasive.

46. On the issue of relatedness of the total right knee replacement and MMI, the ALJ credits the opinion of DIME physician Dr. Higginbotham over the conflicting opinions of Drs. Miller, Faulkner, Hattem, Erickson, McCranie and O'Brien.

47. The ALJ credits Dr. Higginbotham's opinion that Claimant is a candidate for a total right knee replacement due to the work injury's significant aggravation of Claimant's pre-existing osteoarthritis.

48. Respondents failed to overcome Dr. Higginbotham's DIME opinion on MMI by clear and convincing evidence.

49. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

Overcoming the DIME on MMI

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. Under the statute MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007). A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000).

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician's finding concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). Where the evidence is subject to conflicting inferences a mere difference of opinion between qualified medical experts does not necessarily rise to the level of clear and convincing evidence. Rather it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Industries,* WC 4-712-812 (ICAO November 21, 2008). The ultimate question of whether the party challenging the DIME physician's finding of MMI has overcome it by clear and convincing evidence is one of fact for the ALJ. *Metro Moving and Storage Co. v. Gussert*, *supra*.

As found, Respondents failed to prove it is highly probable Dr. Higginbotham's DIME opinion on MMI is incorrect. Respondents point to Claimant's delay in seeking medical treatment in support of their position that Claimant only sustained a minor strain as a result of the work incident. Although Claimant did not immediately seek medical attention, she credibly testified as to the sudden onset of symptoms during the work injury and the subsequent worsening of symptoms. Claimant credibly testified she did not have prior right knee symptoms, which Dr. O'Brien opined is virtually impossible based on Claimant's MRI findings. Assuming *arguendo* Claimant did have knee pain prior to the work injury due to pre-existing degenerative changes, there is no evidence Claimant required treatment or was incapacitated to the extent she has been post-work-injury and treatment. Even with pre-existing degenerative changes, prior to the work injury Claimant was able to work two jobs that involved frequent standing, lifting, squatting, bending, and kneeling without any restrictions or accommodations. Subsequent to the work injury, Claimant has experienced continuing pain and functional

limitations, even after undergoing extensive conservative treatment and surgery which was provided within the workers' compensation system as a result of the May 8, 2016 injury. Although Dr. O'Brien opined the arthroscopy was not related or indicated, he acknowledged that such procedure introduces trauma to arthritic knees and that the trauma accelerates the need for a knee replacement.

Respondents emphasize that each of the providers, IME physicians and physician advisors in this case opine that Claimant's need for a total knee replacement is related to her pre-existing osteoarthritis, which was not aggravated or accelerated by the work injury. The ALJ notes that Drs. Faulkner and Miller initially opined Claimant's total knee replacement was due to the work injury, and that Dr. Faulkner also at one point opined that it was likely Claimant's treatment could have caused the progression of her osteoarthritis. Drs. Faulkner and Miller subsequently changed their opinions based on the reports of Drs. McCranie and O'Brien.

Dr. Higginbotham was aware of these conflicting opinions and their bases, and directly addressed them in his report and deposition testimony. Dr. Higginbotham was told the same mechanism of injury and history as the other examiners and reviewed the same MRIs and medical records. He was aware of Claimant's pre-existing bilateral degenerative condition and continued to opine the work injury significantly aggravated Claimant's right knee condition, causing the need for a total knee replacement. Dr. Higginbotham credibly opined Claimant is not at MMI due to the need for a total knee replacement, which he described as Claimant's only option at this point. As noted above, a finding that a claimant needs additional medical treatment to improve his or her injury-related medical condition is inconsistent with a finding of MMI. Although multiple opinions to the contrary are reflected in the record, the ALJ is persuaded these amount to mere differences of opinion that are insufficient to overcome Dr. Higginbotham's DIME opinion.

ORDER

It is therefore ordered that:

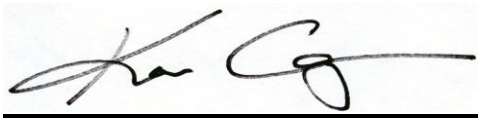
1. Respondents failed to overcome Dr. Higginbotham's DIME opinion that Claimant is not at MMI by clear and convincing evidence.

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

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

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

DATED: February 13, 2019



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-978-924-003

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Self-Insured Respondent.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on January 8, 2019, in Denver, Colorado. The hearing was digitally recorded (reference: 1/8/19, Courtroom 3, beginning at 1:30 PM, and ending at 3:15 PM).

Claimant's Exhibits 1 through 6 were admitted into evidence, without objection. Respondents' Exhibits A through O were admitted into evidence, without objection. The evidentiary deposition of William Ciccone, M.D., taken on September 12, 2018 (referred to herein after as Ciccone Depo., followed by a page number).

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, which was filed, electronically, on January 17, 2019. Respondent was given two working days within which to file objections. Objections not having been timely filed, the matter was deemed submitted for decision on January 23, 2019. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern the Claimant's Petition to Re-Open; and, if reopened, medical benefits.

The Claimant bears the burden of proof by a preponderance of the evidence.

FINDINGS OF FACT

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

Preliminary Findings

1. Respondent filed a Final Admission of Liability (FAL) on or about April 2, 2015. At the hearing, the Claimant stated that her claim arose from her attempt to climb and descend stairs in a somewhat harried fashion while under restrictions from a previous, unrelated automobile accident. Claimant's version of the incident was consistent with the medical records. Respondent did not assert any form of safety violation or similar benefit reduction in its FAL.

2. The FAL was accompanied by medical records authored by Kathy F. McCranie, M.D., and Eric Tentori, D.O., and therein Respondent agreed to "medical care that is reasonable, necessary and related and authorized by (sic) designated clinic/authorized treating physician."

3. In the FAL, Respondent also admitted for a medical impairment rating/permanent disability award of 9 percent of the whole person, apportioned out due to her "preexisting condition" and finally resulting in an award of 3% whole person. The FAL admitted a maximum medical improvement (MMI) date of February 2, 2015.

4. In his report, Dr. Tentori noted that Claimant "was provided with activity restrictions above/beyond her pre-work activity restrictions." He also was of the opinion that "this injury has resulted in permanent physical therapy (sic) impairment."

5. In her report, Dr. McCranie stated that the Claimant suffered from "low back pain predominately left sided" and "possible facetogenic pain." In the course of providing her impairment rating, including the above-referenced apportionment, Dr. McCranie also noted that the Claimant was on "irregular work restrictions" at the time of the incident.

Petition to Re-open

6. On or about July 20, 2017, the Claimant filed a timely Petition to Reopen her claim on the basis of a change in her medical condition. Attached to it was a medical report from Amy Pearson, M.D., dated February 21, 201, which stated that the Claimant's back pain had returned with the same pattern and intensity as she originally suffered from her claim. Dr. Pearson also stated that the Claimant had experienced a worsening of condition and was no longer at MMI. Dr. Pearson prescribed "additional care" in the form of physician visits, a facet block and a possible nerve ablation along with physical and aqua therapy and therapeutic massage. Dr. Pearson stated the opinion that this was necessary to bring the Claimant "back" to MMI.

7. On or about January 9, 2017, Elena Pimanova, M.D., stated the opinion that the Claimant was not at MMI, had experienced a worsening of condition and was in need of additional care (Claimant's Exhibits, p. 58).

8. Dr. Pearson confirmed Dr. Pimanova's opinion, in her medical report, dated February 21, 2017 (*Id. 18).*

9. The Claimant received a lengthy course of physical therapy (PT) through Benchmark PT during 2017. Her treatment was consistent with her presentation as referenced above by the opinions of, Dr. Pimanova and Dr. Pearson.

10. Gerald Chai, D.O. saw the Claimant regularly from early 2016 through the beginning of 2017. He was of the opinion that the Claimant had lumbar spondylosis, disuse atrophy and chronic pain syndrome for which he provided treatment which was approved by Respondents (*Id. 34*).

11. The Claimant's testimony was credible, overall, and consistent with the above medical opinions. The Claimant stated that her condition from the admitted workers' compensation claim had worsened and she requested the treatment prescribed by Dr. Pearson.

Respondent's Independent Medical Examiner (IME), William Ciccone, M.D.

12. Respondent sent the Claimant to an IME physician of its choosing in preparation for the hearing. The IME physician, Dr. Ciccone was of the overall opinion in his report that the Claimant did not suffer a workers' compensation injury and/or claim in the first place. Dr. Ciccone's opinion would have compensability re-litigated. For this reason and other reasons specified herein below, the ALJ finds Dr. Ciccone's opinion concerning "compensability," contrary to the weight of the evidence and lacking in credibility on the issue of causality.

13. In his evidentiary deposition submitted at the hearing, however, Dr. Ciccone stated that the Claimant moved "very slowly" and exhibited a left-sided limp at

the time of his examination. Dr. Ciccone stated that the Claimant was limited due to pain and had limited motion in her low back along with muscular weakness. He also noted that Claimant had reported a worsening of her pain symptomatology over time. Finally, he stated that, regardless of causation, he agreed within a reasonable degree of medical probability with Dr. Pearson's recommendations for her care (Respondents Exhibits, p. 12, lines 20-24; *Id.,* p. 13, line 2; *Id.*p. 36, lines 17-22 or Deposition transcript p. 8, lines 20-24; p. 9, line 2; p. 32, lines 17-22).

14. When taken with the evidence as a whole, Dr. Ciccone's opinion is not credible or persuasive with regard to the Claimant's not having a worsening of condition or, for that matter, the original existence of a compensable claim. His agreement(s) with her need for medical care, however, is credible and persuasive. The ALJ infers that the foundation of this opinion is either Dr. Ciccone's underlying assumption that the Claimant's treatment is for non-work related causes. The ALJ does not find this purported underlying assumption credible.

Ultimate Findings

15. The Claimant presented forthrightly and credibly. Her testimony alone supports a worsening of condition after MMI. The ALJ finds the opinions of Dr. Pearson and Dr. Pimanova, concerning a worsening of condition, unequivocal, credible and highly persuasive. On the other hand, Dr. Ciccone's causality opinions are **not** credible.

16. Between conflicting testimonies and evidence, the ALJ makes a rational choice, based on substantial evidence, to accept the Claimant's testimony and the opinions of Dr. Pearson and Dr. Pimanova, and to reject the opinions of dr. Ciccone.

17. The Claimant has proven a worsening of her condition, after MMI, by a preponderance of the evidence.

18. The Claimant has established that all authorized medical care and treatment, after the worsening of the Claimant's work-related condition, was and is causally related and reasonably necessary to cure and relieve the effects of the worsening of condition.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences

from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant's testimony alone supports a worsening of condition after MMI. *See Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo.App. 1997). As further found, the opinions of Dr. Pearson and Dr. Pimanova, concerning a worsening of condition, were unequivocal, credible and highly persuasive. On the other hand, Dr. Ciccone's causality opinions were **not** credible.

Substantial Evidence

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

evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting testimonies and evidence, the ALJ made a rational choice, based on substantial evidence, to accept the Claimant's testimony and the opinions of Dr. Pearson and Dr. Pimanova, and to reject the opinions of Dr. Ciccone.

Re-Opening

c. A workers' compensation "award" may be reopened within six years after the date of injury on the ground of fraud, an overpayment, an error, a mistake, or change in condition. § 8-43-303(1), C.R.S. A change in condition refers either "to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that can be causally connected to the original compensable injury." *Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323, 330 (Colo. 2004). As found, Claimant's condition worsened after MMI.

d. The reopening authority granted to an ALJ by § 8-43-303, C.R.S. "is permissive, and whether to reopen a prior award when the statutory criteria have been met is left to the sound discretion of the ALJ." *Renz v. Larimer County Sch. Dist. Poudre R-1*, 924 P.2d 1177, 1181 (Colo.App.1996). Moreover, whether a claimant's condition is due to the natural progression of a pre-existing condition or a new industrial accident is one of fact for resolution by the ALJ. *Pavelko v. Southwest Heating and Cooling, LLC*, W.C. No. 4-897-489-02 [Indus. Claim Appeals Office (ICAO), September 4, 2015) (citing *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999)). Further, whether a claimant proved a worsened condition, and whether the worsening was causally related to the industrial injury, are factual issues for resolution by the ALJ. *Id.* As found, the Claimant has proven a work-related worsening of condition.

Medical

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

Burden of Proof

f. The party seeking to reopen an issue or claim bears the burden of proof as to any issues sought to be reopened. § 8-43-303(4), C.R.S. A claimant has the

burden of proof in seeking to reopen a claim for a worsened condition. *Richards v. Indus. Claim Appeals Office*, 996 P.2d 756, 758 (Colo. App. 2000). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained her burden with respect to re-opening and reasonably necessary and causally related medical care and treatment.

ORDER

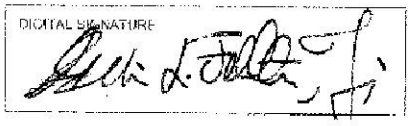
IT IS, THEREFORE, ORDERED THAT:

A. W.C. No. 4-978-924-001 is hereby re-opened.

B. Respondent shall pay the costs of all authorized, causally related and reasonably necessary medical care and treatment, subject to the Division of Workers Compensation Medical fee Schedule.

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

DATED this 14th day of February 2019.



EDWIN L. FELTER, JR.
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-080-983-001

ISSUES

I. Whether Claimant has established by a preponderance of the evidence that she sustained a compensable occupational disease to her upper extremities during the course and scope of her employment with Employer.

II. Whether Claimant has proven by a preponderance of the evidence that she is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve her from the effects of her occupational disease.

FINDINGS OF FACT

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

1. Claimant was born on July 3, 1966, and was 52 years of age at the time of the hearing.
2. At the time of the hearing, Claimant was employed by Lockheed Martin. Claimant started working at Lockheed Martin on May 6, 1986. Claimant performed her work at Lockheed Martin's Waterton Campus.
3. For the ten years prior to the hearing, Claimant worked full time (40 or more hours per week) as an electrical senior specialist. Claimant's job duties involved building by hand – and using hand tools - satellite harnesses, ground test cables, power cables, and test racks to test the satellites. Claimant is right-hand dominant.
4. Clamant testified that she performed her various job tasks using various hand tools such as wire cutters and wire crimpers. This required the repetitive and forceful gripping of various hand tools throughout her work shift.
5. Claimant also testified that she used her hands 100% of the time to perform her job tasks. Claimant described her job tasks as follows:

> When I start a project, you cut wire – you cut enough wire – when you cut, you cut, cut, cut, cut; and then when you label, you label, label, label, label; you route, route, route, route; when you twist, you twist and you tie like that.

6. Claimant credibly testified that between 2014/16 she worked 2600 hours and in 2017 she worked over 2900 hours and that from August 1 through November of 2017 she was a project lead where she worked lots of hours until her hands hurt.

7. Claimant further testified that throughout 2017, she never worked as hard as she did from August until the end of the year in 2017 because she was required to train a lot of new employees. Claimant testified that she trained the new employees how to measure, cut, label, and crimp wires and perform other prep work - all of which was done by hand.

8. Claimant testified that prior to November of 2017 she had no issues with either of her hands.

9. On December 13, 2017, Claimant was evaluated by Physicians' Assistant Amanda Doetsch, at New West Physicians, complaining of bilateral had pain and arm tingling. Claimant indicated that her pain was worse at night and that it sometimes radiated up to her shoulders and back. Her musculoskeletal examination revealed joint swelling and joint stiffness combined with bilateral wrist pain and tingling. PA Doetsch diagnosed Claimant as suffering bilateral carpal tunnel syndrome, with the left being worse than the right. She also prescribed, among other things, wrist splints.

10. Employer regularly shuts down for two weeks at the end of each year. The shutdown at the end of 2017, started around December 22, 2017, which was a Friday, and would have gone through approximately Friday, January 5, 2018.

11. On December 18, 2017, Claimant went to the Lockheed Martin Wellness Center, which is on the Waterton Campus, and was evaluated by Nurse Practitioner Tracy Jessen. NP Jessen suspected either wrist arthritis or carpal tunnel syndrome. She sent Claimant for bilateral wrist x-rays, which were unremarkable and did not demonstrate evidence of arthritis.

12. On January 4, 2018, Claimant returned to the Lockheed Martin Wellness Center on the Waterton Campus and was seen by Dr. Andrew Plotkin. Dr. Plotkin noted in his report that Claimant has worked for Employer for 30 years as an electrical specialist building electrical components requiring repetitive use of her hands while using hand tools. He noted that Claimant stated that her job tasks included crimping, routing, stripping, and wire cutting. He did note that Claimant said there might have been some mild improvement with splint use and being off work due to the shutdown. Dr. Plotkin also noted in his report that Claimant stated that she had previously had some paresthesias in her hands at night, while in bed, but that it resolved without treatment. In his assessment, Dr. Plotkin noted that Claimant presented with symmetric upper extremity pain and paresthesias. He stated in his report that:

> The mechanism of injury was reviewed and based on my initial evaluation, suggests possible risk factors for cumulative trauma disorders. The presentation, however is somewhat less typical for cumulative trauma disorder such as peripheral nerve entrapment syndromes given the sudden onset of bilateral symmetric symptoms. (Ex. A, pg. 002)

He went on to say that:

> [I]t is not clear that there were any significant changes in the work load, work tasks or ergonomic factors which may have precipitated the patient's symptoms.

He also stated that:

> Based on my evaluation, other potential causes of her underlying symptoms have not been excluded including other musculoskeletal, neurological, inflammatory, and metabolic disorders. I carefully reviewed causality issues today with the patient. Additional information is required prior to making a determination regarding causality.

In order to investigate other causative factors, Dr. Plotkin's plan involved:

a. Obtaining claimant's medical records from her primary care physician; and

b. Ordering various blood tests to check Claimant's CBC, Sed rate, RF, ANA, uric acid, and folic acid/B12 to look for a metabolic reason for Claimant's upper extremity complaints.

13. On Monday, January 8, 2018, after not working for approximately two weeks, Claimant returned to New West Physicians and saw her primary treating physician, Leanne Richardson, M.D. At this visit, Claimant's chief complaints were bilateral hand and finger numbness for approximately 2 months. It was noted in the report from this visit that Claimant reported a lot of repetitive movement with both hands at work. It was also noted that Claimant was wearing her wrist splints and was not working.

14. On January 11, 2018, Claimant returned to Dr. Plotkin. At that time, she indicated the Employer could not accommodate her restrictions and she had been off work. Dr. Plotkin noted in his report that she had stopped taking her medications but that she was still wearing her wrist splints. Despite wearing her wrist splints, Dr. Plotkin indicated that Claimant's symptoms had increased and her symptoms were symmetric and included numbness in both hands including all fingers. Dr. Plotkin also noted that he had received and reviewed Claimant's prior medical records which included the December 13, 2017, visit with PA Doetsch, in which it was noted Claimant's symptoms started the week before. Dr. Plotkin also indicated Tinel's testing was positive bilaterally, but that Phalen's testing was negative bilaterally.

Dr. Plotkin's assessment included the following statement:

> The results of her metabolic testing was normal overall except for a borderline elevated HgA1c of 5.6. The patient's presentation is quite atypical for a cumulative trauma type injury, given the sudden onset of symmetric bilateral upper extremity pain and paresthesias. No clear precipitating factor factors are noted and the patient describes her work as "the same." The distribution of her exam findings are

> diffuse and symmetric and would involve multiple nerve distributions. Based on all of the information available, I do not feel that this represents a work-related injury within a reasonable degree of medical probability. (Ex. A, pg. 5)

15. On January 15, 2018, Claimant returned to Dr. Richardson. The medical report from this visit indicates Claimant was advised by her workers' compensation physician that her symptoms were not related to her job duties and that Claimant can return to work without restrictions. The medical report also indicates that Claimant stated she continues to have the same symptoms which started after an intense project where she was doing repetitive movement with her hand tools for up to 10-14 hours per day for several months. (Ex. 4, pg. 31) Dr. Richardson noted Claimant had "***absolutely no comorbid illnesses which could explain her upper extremity symptoms***." (Emphasis added.)

16. On February 5, 2018, Claimant returned to Dr. Richardson, with continued complaints of bilateral hand pain, numbness, and weakness – which included a weakened grasp. Dr. Richardson assessed Claimant's risk factors for developing her symptoms. Dr. Richardson concluded Claimant's only risk factors were her "**job related activities**." Dr. Richardson diagnosed Claimant with carpal tunnel syndrome and continued Claimant's work restrictions which required Claimant to avoid repetitive movement of her hands and she also recommended that Claimant continue wearing her wrist splints. (Ex. 4, pg. 38.)

17. On February 21, 2018, Claimant underwent a routine physical – health maintenance evaluation. Dr. Richardson noted that Claimant's active problems included her carpal tunnel syndrome. She also noted Claimant's past medical history included:

    a. Acute upper respiratory infection,
    b. Eustacian tube dysfunction,
    c. Laryngitis,
    d. Streptococcal pharyngitis,
    e. Iron deficiency anemia due to inadequate dietary intake of iron,
    f. Oral thrush,
    g. Overweight, and
    h. Urticaria.

    (Ex. 4, pg. 36.)

18. On February 22, 2018, Claimant underwent Nerve Conduction testing at Blue Sky Neurology, which was normal, and did not demonstrate evidence of carpal tunnel syndrome. (Ex. 4, pg. 32.) However, as noted by Dr. Plotkin, the testing performed was only a screening and did not include a full electromyography, which Dr. Plotkin stated was preferable. (Dep. pg. 25.)

19. On February 23, 2018, Claimant returned to Dr. Richardson. Claimant indicated that although she still had tingling in her thumb, index, and middle finger – bilaterally – her feeling, weakness, and pain had improved. Dr. Richardson went over Claimant's nerve conduction results, which were negative. Dr. Richardson released Claimant back to full duty, as long as she could wear her wrist splints while doing repetitive and forceful work (Ex. 4, pg. 30.) Dr. Richardson also noted the following:

> She is very anxious to get back to work. She reports she still has tingling in her thumb index and middle finger bilaterally, but her feeling is improved, she still has some weakness but it's improved as well. Her pain has mostly subsided since the swelling in her wrists decreased. She has continued to do her home physical therapy exercises and states that PT has been very helpful.

Dr. Richardson also noted that her physical exam revealed a negative Tinel's sign and a negative Phalen's maneuver. Therefore, removing Claimant from performing her repetitive and forceful job duties resulted in a decrease in her symptoms and abatement of clinical findings, i.e., negative Tinel's and Phalen's testing. (Ex. 4., pg. 31). Based upon Claimant's nerve conduction studies and negative Tinel's and Phalen's testing, Dr. Richardson returned Claimant to full duty.

20. On February 26, 2018, Claimant returned to work full time and at full duty.

21. On March 12, 2018, after returning to work full time and at full duty, Claimant returned to Dr. Richardson due to an increase in symptoms. Dr. Richardson noted that Claimant returned to work on February 26, 2018, and that she was okay for the first week, which was only three days, but after the first week, Claimant's pain came back and the pain was constant. In addition to the work activities causing an increase in pain, it also caused the tingling in her hands to come back. Upon further provocative testing, Dr. Richardson also noted that after Claimant returned to work, and her symptoms got worse, she also had the reemergence of positive Tinel's and Phalen's signs. (Ex. 4., pg. 22.)

22. Dr. Richardson also indicated that although Claimant's EMG was normal, it was performed after Claimant had an extended period off from work and after her symptoms had greatly improved.

23. On June 25, 2018, after Claimant returned to work - which required the repetitive and forceful use of her hands - and caused an increase in symptoms and the reemergence of positive Tinel's and Phalen's findings, Claimant underwent another EMG. The findings of the second EMG were not symmetrical. The study showed evidence of left mild carpal tunnel syndrome without axonal loss and no electrodiagnostic evidence of right sided carpal tunnel syndrome.

24. Despite the lack of electrodiagnostic findings for right sided CTS, Dr. Horner, of Panorama Orthopedics, noted Claimant's symptoms were pretty pathognomonic – consistent – with CTS. Therefore, Dr. Horner recommended corticosteroid

injections to each carpal tunnel for diagnostic and therapeutic purposes. (Ex. 5, pg. 77.)

25. On July 3, 2018, Claimant underwent bilateral diagnostic and therapeutic corticosteroid carpal tunnel injections. The injections did not alleviate her symptoms.

26. On August 21, 2018, Dr. Lodha, from Panorama Orthopedics, evaluated Claimant. After considering the results of Claimant's physical examination and second EMG, as well as her response to the injections, Dr. Lodha opined:

> I cannot say that carpal tunnel releases would offer any benefit to this patient. I do not have a structural or pathophysiological explanation for her pain. She may benefit from potentially rheumatologic evaluation vs. evaluation with neurology for further workup. However, I am afraid we don't have anything else to offer her at this point. (Ex. 5, pg. 62).

27. On November 8, 2018, Dr. Richardson wrote a letter regarding her assessment of Claimant and addressed causation: Her letter provides:

> To Whom It May Concern:
>
> I have been the primary care Physician for [Claimant] for over 10 years. During this time she has not had significant hand or wrist complaints until seen by a PA in our office on 12/13/17. Based on her clinical symptoms she was diagnosed with carpal tunnel syndrome and conservative therapy was advised.
>
> I saw her in follow up on 1/8/18, and at that time she was working with Workman's Comp regarding her concerns, and was having similar complaints to when she was seen initially. She came back on 1/15/18 stating she was advised by Workman's Comp her symptoms were not work related. I did not have access to those records. Claimant reported her symptoms started after an intense project requiring working overtime, up to 10 to 14 hours per day for several months. Her job is described as working with hand tools/repetitive movement. Her symptoms of pain in thumbs, index and long fingers, wrist pain, numbness and swelling are consistent with CTS, which is often caused by and exacerbated by repetitive movement. Other causes for her symptoms were not evident.
>
> I am not a hand specialist or occupational medicine specialist. It seems reasonable to conclude her symptoms were caused by her occupational activities, but she was also referred to an orthopedic hand specialist for further

evaluation and treatment. I would defer to their opinion on this matter.

28. On September 17, 2018, Claimant was seen by Dr. John Froelich, at Panorama Orthopedics for a second opinion. Dr. Froehlich evaluated Claimant and many of her records, which included Dr. Lodha's, and the results from the injections and second EMG. After evaluating the matter, Dr. Froelich concluded Claimant suffers from bilateral carpal tunnel syndrome.

29. Claimant complied with Lockheed Martin's rules with regard her alleged claim. Claimant reported it to her supervisor and then went to see the Lockheed Martin in-house physician, Dr. Plotkin. Claimant also showed Dr. Plotkin the type of work she was doing and explained to him what she did every day. She laid out her tools and showed him her daily use at her workstation. Claimant ascribed her symptoms to use of a small wire cutter up to use of the big crimper. The small cutter was used in the right hand. But, sometimes she would use it in the left hand.

30. Allison M. Fall, MD, performed an IME and testified at hearing. Dr. Fall was offered and accepted as a medical expert in physical medicine and rehabilitation and is Level II Accredited. Dr. Fall was familiar with the Colorado Medical Treatment Guidelines (*Guidelines*) regarding cumulative trauma disorders in general and carpal tunnel syndrome in specific.

31. Dr. Fall explained carpal tunnel syndrome is slowing or compression of the median nerve as it passes through the wrist. She also testified that although carpal tunnel syndrome can be caused by a person's activities at work, it is not always caused by work activities.

32. Dr. Fall testified that the *Guidelines* provide a framework for performance of a causation assessment for carpal tunnel syndrome to determine whether or not it is or is not more likely due to work. Dr. Fall explained that the *Guidelines* are very specific because carpal tunnel syndrome is very prevalent in society and has been misconstrued as always being related to repetition when really there are other significant factors that people will just get carpal tunnel syndrome without any history of repetition.

33. Dr. Fall explained the *Guidelines* recognize that the etiology of carpal tunnel syndrome can be based on genetic factors or a Claimant's pre-disposition, as well as other factors that involve inflammation such as diabetes or obesity.

34. Dr. Fall indicated that in order to determine if a patient actually has carpal tunnel syndrome an expert goes on symptoms, physical examination and electrodiagnostic testing.

35. Dr. Fall evaluated Claimant on October 24, 2018 and observed and heard her testify at the hearing.

36. Dr. Fall evaluated Dr. Richardson's November 8, 2018, "To Whom It May Concern" letter. Dr. Fall explained merely because Claimant was diagnosed with carpal tunnel syndrome on December 13, 2017, based on her clinical symptoms does not mean it was due to her job duties at Lockheed Martin because a

causation analysis would need to occur to have the information as to what the exact job duties were and whether those job duties would be consistent with the risks that cause carpal tunnel syndrome if that is truly the diagnosis.

37. Dr. Fall indicated that Dr. Richardson's statement, which is contained in her November 8, 2018 letter, was not a causation analysis as required by Level II training and the cumulative trauma disorder *Guidelines*. She also testified that even if Claimant did work on a project that required working overtime up to 10 to 14 hours per day which required Claimant to use hand tools repetitively does not mean in and of itself ipso facto that her work is the cause of her symptoms that are consistent with carpal tunnel syndrome. Dr. Fall explained causation is based on the specific activities of Claimant's job duties which requires determining the force, duration, how many times per minute, and force or strength that is required to perform each task—and it is less dependent upon the total number of hours performing the tasks.

38. Dr. Fall testified that the testimony Claimant offered at hearing is insufficient, based upon her Level II training, to establish Claimant's physical complaints that are consistent with carpal tunnel were in fact caused by Claimant's job duties because pursuant to the *Guidelines*, there is specific criteria laid out for the time duration of forceful awkward movements with amounts of force listed. Dr. Fall also explained that it does not make sense that Claimant's symptoms would be present on her left wrist, her non-dominant hand.

39. As part of her record review process, Dr. Fall reviewed Dr. Plotkin's records. Dr. Plotkin noted the patient's presentation is quite atypical for a cumulative-trauma-type injury given the sudden onset of symmetrical bilateral upper extremity pain and paresthesia. Dr. Fall agreed with Dr. Plotkin's opinion and explained typically if there is going to be a cumulative trauma problem - especially with the type of work Claimant did - you would expect different symptoms on the two sides. In addition, Claimant's claim of "sudden onset" is also inconsistent with a work etiology because typically with a cumulative-trauma-type of injury the condition gradually increases over time in correlation with the work being done.

40. When Dr. Fall met and evaluated Claimant, she specifically asked Claimant whether or not something changed with her job duties before the onset of her symptoms. Claimant told Dr. Fall nothing had changed regarding her job duties. Such answer was correct. Claimant's tasks were the same, however, Claimant was doing the same tasks for longer periods of time each day.

41. Dr. Fall testified that non-work-related causes of carpal tunnel syndrome include, genetic predisposition, diabetes, anything that increases fluid volume in one's body or is a toxin to the nerves. She also testified that being overweight is a space limiting issue with more fluid in the body and that carpal tunnel syndrome is also more common in females and as one gets older.

42. Dr. Fall specifically testified there is no objective medical evidence the crimping work Claimant performed at work caused, which required the forceful use of manually operated hand tools, aggravated, accelerated or exacerbated Claimant's alleged carpal tunnel syndrome. She also testified that Claimant's

initial electrodiagnostic test, which occurred on February 22, 2018, was negative. However, the first electrodiagnostic test was described by Dr. Plotkin as merely a screening tool and not as effective as a full electromyography test for carpal tunnel syndrome.

43. The evidentiary deposition of Andrew Plotkin, M.D. was taken on November 30, 2018, and submitted as evidence. Dr. Plotkin was offered and accepted as a medical expert in occupational medicine Level II accredited. Dr. Plotkin is also familiar with the *Guidelines*.

44. Dr. Plotkin explained the causes of carpal tunnel syndrome or risk factors are being female, being older, obesity, diabetes, and other conditions.

45. Dr. Plotkin knew Claimant was an employee at Lockheed Martin because he had evaluated her for her upper extremity symptoms. Based upon Dr. Plotkin's work at Lockheed Martin, he testified that he became familiar with Claimant's job duties. Dr. Plotkin testified that he had been to Claimant's lab, walked through it a few times over the years, and was familiar with the harness shop.

46. Dr. Plotkin reviewed the chart note from New West Physician's dated December 13, 2017, and he explained that based upon Level II training, the *Guidelines*, the matrix as well as his own education, training and experience merely because someone in their mind associates symptoms with work does not mean there is a work etiology because carpal tunnel syndrome in particular has a lot of misinformation and a lot of people believe that really the only way you can get it is through work activities.

47. Dr. Plotkin also testified that although he believed she probably had nerve entrapment in her upper extremities which could be carpal tunnel syndrome, he did not feel he could say within a reasonable degree of medical probability her problem was work related because it was an unusual presentation that it was bilateral, abrupt, symmetric symptoms, and often if someone has abrupt, symmetric and bilateral symptoms it raises the suspicion there is something other underlying or systemic kind of problem something metabolic, hormonal, or inflammatory.

48. As part of his evaluation of Claimant, Dr. Plotkin actively looked for non-work related causes of Claimant's symptoms. In order to investigate other causes, Dr. Plotkin had Claimant undergo various blood tests to see if there was an underlying systemic, metabolic, hormonal, or inflammatory process that was causing Claimant's symptoms. The test results were normal. Therefore, despite his thorough investigation of alternative causes, Dr. Plotkin was unable to find an alternative cause of Claimant's symptoms.

49. Dr. Plotkin also stated that looking at Rule 17, Exhibit 5, of the cumulative trauma treatment guidelines, (the *Guidelines*) and the results of the electrodiagnostic testing in which the NCV done on February 22, 2018 was negative or normal, was not consistent with the development of an occupationally related cumulative trauma disorder.

50. However, subsequent electrodiagnostic testing did reveal carpal tunnel syndrome on the left, but not the right. Moreover, such findings were clearly not symmetric bilaterally. Moreover, even though Dr. Plotkin testified that electrodiagnostic testing is the gold standard, he also testified that a patient can still have a nerve injury which does not show up on electrodiagnostic testing. Dr. Plotkin went on to testify that in his opinion, the findings of the initial electrodiagnostic was reassuring that Claimant did not have a "severe nerve injury or a dying nerve or something like that. This is a reassuring kind of test result." (Depo. Pg. 25-26). Therefore, Dr. Plotkin merely concluded the initial electrodiagnostic testing merely ruled out a "severe" nerve injury or a "dying" nerve.

51. Based upon a complete review of all the information Dr. Plotkin was provided, his meetings with and conversations with Claimant, Dr. Plotkin testified that it was his opinion within a reasonable degree of medical probability that Claimant's bilateral upper extremity condition is not work related.

52. On cross examination, Dr. Plotkin explained that in formulating his opinion, he:

> [P]ersonally walked through the harness lab, discussed Claimant's case with April Hillman, her manager, allowed Claimant to show him all the work that she did to show him all the tools that she used, he handled the tools, he watched other employees perform the work duties that [Claimant] performed.

However, despite Dr. Plotkin's vivid description of his investigation into Claimant's job duties, which was allegedly undertaken to determine the extent of Claimant's exposure to the risk factors set forth in the *Guidelines,* Dr. Plotkin's reports and testimony fail to indicate with sufficient detail what he did find during his investigation regarding the repetition, force, awkward posture, and duration of Claimant's job duties each day. Moreover, even though Dr. Plotkin indicated in his initial report that Claimant's job involved "possible risk factors," but that he wanted to exclude other potential factors that might be causing her symptoms, he never articulated in a subsequent report or his testimony as to what the possible work risk factors were - after the other causes were ruled out. Therefore, the ALJ finds that there is a very large analytical gap between Dr. Plotkin's testimony regarding his alleged investigation into possible work related risk factors and his ultimate conclusion that Claimant's work did not cause, aggravate, or accelerate her upper extremity condition.

The ALJ further finds that Dr. Plotkin did not perform an impartial causation analysis. This finding is demonstrated by the following exchange during his deposition when he was asked whether Claimant's contention that she was working 10-14 hours a day towards the end of 2017, when her symptoms developed, would make a difference in his analysis. The exchange is as follows:

> Q. Now, hypothetically, if Ms. Moua were to testify before an administrative law judge that her symptoms started after an intense project requiring working overtime up to 10 to 14 hours per day for several months, does that, in and of itself,

pursuant to the matrix, establish a work-related etiology for carpal tunnel syndrome?

A. I do know that they work overtime often and I do know that the work hours, you know, can be increased over there. I would want to know really what the what the numbers were and try to figure out how that type of exposure and the timing of her symptoms and everything else fit together. So it's something that I would consider, and it is the reason that I had talked with her manager on two or three occasions. So I did go over there, and I wasn't -- I wasn't told that there was any kind of significant changes in the work stresses that she was exposed to. So that was my understanding when I made my determination.

As demonstrated above, Dr. Plotkin admitted that he knew Claimant often worked overtime and admitted that it would be important in determining causation if the extent and type of her exposures corresponded with her symptoms. Yet, despite these admissions, there is a lack of credible and persuasive evidence that he analyzed these factors in any sufficient detail in support of his opinion that Claimant's condition is not related to her work activities. In other words, his ultimate opinion appears highly conclusory.

53. Dr. Richardson's evidentiary deposition was taken on December 19, 2018 and submitted as evidence. Dr. Richardson testified she is a family practitioner of 21 years. Dr. Richardson is not board certified in physical medicine or rehabilitation and is not Level II accredited by the Division of Workers' Compensation. Dr. Richardson admitted she is not an expert in carpal tunnel syndrome. However, Dr. Richardson is a licensed physician and evaluated Claimant on a number of occasions. As part of her examination, she took a history and performed various diagnostic testing to diagnose Claimant's bilateral hand condition. Her testing included Phalen's and Tinel's tests. Such testing demonstrates that although Dr. Richardson is not an "expert in carpal tunnel syndrome," she is competent to assess such a condition and render an opinion as to the cause of such condition. And, in this case, Dr. Richardson concluded Claimant has carpal tunnel syndrome and the condition was caused by Claimant's work duties, after she ruled out other potential causes.

54. According to the *Guidelines*, the following Primary and Secondary Risk Factors are relevant when determining the cause off carpal tunnel syndrome:

Force & Repetition /Duration

Primary Risk Factors, include the following:

6 hours of use of 2 pounds of pinch force or 10 pounds hand force 3 times or more per minute, or

6 hours of lifting 10 pounds greater than 60 times per hour.

Secondary Risk Factors, include the following:

3 hours of use of 2 pounds of pinch force or 10 pounds hand force 3 times or more per minute, or

3 hours of lifting 10 pounds greater than 60 times per hour.

Awkward Posture & Repetition/Duration

Primary Risk Factors, include the following:

4 hours of wrist flexion greater than 45 degrees, extension greater than 30 degrees, or ulnar deviation greater than 20 degrees.

6 hours of elbow flexion of greater than 90 degrees.

4 hours of supination/pronation with task cycles 30 seconds or less or posture is used for at least 50% of a task cycle.

Secondary Risk Factors include the following:

3 hours of elbow flexion of greater than 90 degrees.

3 hours of supination/pronation of 45 degrees with power grip or lifting.

See Guidelines, Rule 17, Exhibit 5.

55. None of the physicians who offered opinions in this case documented the physical requirements of Claimant's job duties with the specificity required by the *Guidelines.* Therefore, they were unable to determine whether Claimant's job duties met the primary and/or secondary risk factors set forth in the *Guidelines.*

56. However, the *Guidelines* also indicate that there are other risk factors for the development of cumulative trauma disorders such as carpal tunnel syndrome. These include, but are not limited to, age, obesity - BMI (body mass index), diabetes, gender, and wrist depth/ratio. The Guidelines also indicate that preexisting conditions may be aggravated by, or contribute to, exposures lower than those listed in the *Guidelines*. Therefore, because Claimant has a high BMI, is female, and is over 50 (and considered older) it does not appear to this ALJ that Dr. Plotkin or Dr. Fall considered those factors which could have predisposed Claimant to develop carpal tunnel syndrome with lower exposure levels than those described in the *Guidelines*.

57. Claimant is found to be credible regarding the hours she worked, the description of her job duties, and the onset of her symptoms.

58. The ALJ finds that Claimant's job required the repetitive and forceful use of her hands at work in order to cut, strip, and crimp wires used for various products built by Employer. The ALJ finds that during the latter part of 2017, Claimant worked overtime and the overtime resulted in an increase in the amount of repetitive and forceful work performed by Claimant with her hands on daily basis.

59. The ALJ finds that the increase in repetitive and forceful work with her hands corresponded with the development of symptoms in her upper extremities and which has been diagnosed by many physicians as being carpal tunnel syndrome.

60. The ALJ finds that Claimant's work activities necessitated the need for medical treatment as of December 13, 2017, and resulted in disability which has precluded Claimant from performing her regular job duties for more than three days.

61. The ALJ does not find the opinions offered by Dr. Fall in her report and testimony to be persuasive in resolving the issues of causation in this case. Dr. Fall focused predominately on the risk factors and exposure levels set forth in the *Guidelines.* However, Dr. Fall did not adequately address the fact that the *Guidelines* indicate that exposure levels can be lower, when other risk factors are present such as Claimant's age, BMI, gender, and possibly her pre-diabetic state, as discussed by Dr. Fall. Therefore, the ALJ finds that Dr. Fall did not persuasively and credibly address causation pursuant to the *Guidelines*.

62. The ALJ credits the opinions of Dr. Richardson and Dr. Froelich that Claimant has bilateral carpal tunnel syndrome.

63. The ALJ also credits the opinion of Dr. Richardson that Claimant's carpal tunnel syndrome was caused her work activities.

64. Claimant has established by a preponderance of the evidence that she sustained an occupation disease and a compensable injury involving her wrists.

65. Claimant has established by preponderance of the evidence that she is entitled reasonable and necessary medical treatment to cure her from the effects of her occupational disease.

66. There is no dispute between the parties that Dr. Plotkin is an authorized treating physician. The medical treatment provided by Dr. Plotkin is found to be reasonable and necessary to treat Claimant's occupational disease.

67. The onset of disability is December 13, 2017, when Claimant first sought medical treatment for her symptoms.

CONCLUSIONS OF LAW

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

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in

favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

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

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. Claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

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

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

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

Compensability

The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by § 8-40-201(14), C.R.S., as:

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

This section imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). However, the existence of a preexisting condition does not defeat a claim for an occupational disease. *Id.* A claimant is entitled to recovery if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

The claimant bears the burden to prove by a preponderance of the evidence that the hazards of the employment caused, intensified or aggravated the disease for which compensation is sought. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999). The question of whether the claimant has proven causation is one of fact for the ALJ. *Faulkner v. Industrial Claim Appeals Office, supra*. In this regard the mere occurrence of symptoms in the workplace does not require the conclusion that the conditions of the employment were the cause of the symptoms, or that such symptoms represent an aggravation of a preexisting condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (I.C.A.O. August 18, 2005). Once claimant makes such a showing, the burden shifts to respondents to establish both the existence of a non-industrial cause and the extent of its contribution to the occupational disease. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

When determining the issue of causation, the ALJ may consider the provisions of the Medical Treatment Guidelines because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, the *Guidelines* are not dispositive of the issue of causation. Rather, the ALJ may decide the weight to be assigned the provisions of the *Guidelines* upon consideration of the totality of the evidence. *See Cahill v. Patty Jewett Golf Course,* WC 4-729-518 (ICAO February 23, 2009); *Siminoe v. Worldwide Flight Services,* WC 4-535-290 (ICAO November 21, 2006).

The Division of Worker's Compensation Rule 17, Exhibit 5, Cumulative Trauma Conditions Medical Treatment Guidelines specifically provides that "acceptable medical practice may include deviations from these guidelines as individual cases dictate." The *Guidelines* themselves indicate that the opinion provided by Dr. Richardson in determining causation is in line with the intent of the *Guidelines* which state:

> Mechanisms of injury for the development of cumulative trauma related conditions have been controversial. However, repetitive awkward posture, force, vibration, cold exposure, and combinations thereof are generally accepted as occupational risk factors for the development of cumulative trauma related conditions.

As found, Dr. Richardson reasonably attributed Claimant's bilateral carpal tunnel syndrome to her work activities which were found to be repetitive and forceful. The ALJ finds and concludes that the opinion of causation offered by Dr. Richardson in the medical records and her testimony, certain statements made by Dr. Plotkin, Claimant's medical records, and Claimant's credible testimony supports the ALJ's conclusion that Claimant's bilateral carpal tunnel syndrome is causally related to her work activities. Dr. Plotkin's opinions to the contrary are not persuasive. As found above, Dr. Plotkin attempted to demonstrate that he critically evaluated Claimant's job duties and Claimant's overall clinical presentation and determined that Claimant's work activities did not cause her carpal tunnel syndrome. However, as found by the ALJ, Dr. Plotkin really did not analyze Claimant's job duties to determine whether they met the primary and/or secondary risk factors set forth in the *Guidelines.* Dr. Plotkin spent more time focusing on and investigating the possibility of non-work-related factors than work related factors. And, despite not finding any non-work-related factors that were the cause of Claimant's symptoms and/or condition, he summarily and unconvincingly concluded Claimant's job did duties did not cause her condition and need for medical treatment.

Moreover, even though the *Guidelines* indicate that other preexisting conditions – and risk factors - can predispose a worker to develop carpal tunnel syndrome with exposure levels which are less than those levels set forth in the *Guidelines,* neither Dr. Plotkin nor Dr. Fall addressed how Claimant's BMI, age, gender, and history of family diabetes and her own borderline glucose levels, might have predisposed Claimant to develop bilateral carpal tunnel syndrome at lower exposure levels than those set forth in the *Guidelines*.

Moreover, even though Claimant's job duties were not quantified in sufficient detail to assess whether they met the primary or secondary risk factors outlined in the causation matrix of the *Guidelines*, the ALJ finds and concludes that the particular facts in this case based upon the totality of the evidence presented makes it more likely than not that Claimant's bilateral carpal tunnel syndrome was caused by her exposure to forceful and repetitive bilateral hand activities at work. While the *Guidelines* provide specific steps in analyzing whether there is sufficient proof to causally connect Claimant's condition and need for treatment to her job activities, the Court is not bound by the *Guidelines* in deciding individual cases on the *Guidelines* or the principles contained therein alone. Indeed, § 8-43-201(3) specifically provides:

> It is appropriate for the director or an administrative law judge to consider the medical treatment guidelines adopted under section 8-42-101(3) in determining whether certain medical treatment is reasonable, necessary, and related to an industrial injury or occupational disease. The director or

> administrative law judge is not required to utilize the medical treatment guidelines as the sole basis for such determinations.

Respondent's position regarding compensability and Claimant's entitlement to medical benefits is based primarily upon a rigid application of the *Guidelines* causation matrix. Respondent's argument primarily rests upon the assumption that the causation matrix is absolute, and provides the only source of information to which we should turn to determine causation in this case. Such assumption is misplaced. Here, the opinion of Dr. Richardson regarding the cause of Claimant's bilateral carpal tunnel syndrome is credible and persuasive. The majority of Claimant's testimony regarding her job duties, symptomatology and onset of symptoms is similarly credible, persuasive, and consistent with the development of her occupational disease. The totality of the evidence presented persuades the ALJ that Claimant has established a causal connection between her work duties and her bilateral carpal tunnel syndrome. Accordingly, the ALJ concludes that Claimant has proven by a preponderance of the evidence that she suffered an occupationally induced disease occasioned by the nature of her work, which did not come from a hazard to which she was equally exposed outside of her employment. Consequently, the injury is compensable.

Claimant has proven by a preponderance of the evidence that she suffered an occupational disease to her bilateral upper extremities in the form of bilateral carpal tunnel syndrome.

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury and occupational disease. Section 8-42-101(1)(a), C.R.S. The question of whether Claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

The medical record establishes Claimant is in need of medical treatment for her occupational disease. The ALJ finds the reports of Dr. Richardson and Dr. Froehlich to be credible and persuasive and support a finding that Claimant is in need of medical treatment for her occupationally caused carpal tunnel syndrome. Therefore, the ALJ concludes Claimant has established by a preponderance of the evidence that she is entitled to medical treatment to cure and relieve her from the effects of her occupational disease. Claimant has also established by a preponderance of the evidence that the treatment provided by Dr. Plotkin was reasonable and necessary.

ORDER

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

1. Claimant has proven by a preponderance of the evidence she suffered a compensable occupational disease in the form of bilateral carpal tunnel syndrome.
2. Claimant is entitled to reasonable and necessary medical treatment to cure and relieve her from the effects of her bilateral carpal tunnel syndrome.
3. Dr. Plotkin is an authorized provider and Respondents shall pay for the treatment provided by Dr. Plotkin.
4. Issues not expressly decided herein are reserved to the parties for future determination.

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

DATED: February 15, 2019.

/s/ Glen B. Goldman

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-052-108-001

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

[Redacted],

Claimant,

v.

[Redacted],

Employer,

and

[Redacted],

Self-Insured Respondent.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on January 17, 2019, in Denver, Colorado. The hearing was digitally recorded (reference: 1/17/19, Courtroom 3, beginning at 8:30 AM, and ending at 11:30 AM).

The Claimant was present in person and represented by [Redacted], Esq. The Respondent was represented by [Redacted], Esq.

Hereinafter [Redacted] shall be referred to as the “Claimant." [Redacted] shall be referred to as the “Employer.” All other parties shall be referred to by name.

Claimant’s Exhibits 1 through 10 were admitted into evidence, without objection. Respondent’s Exhibits A and C were admitted into evidence, without objection. Respondent’s Exhibit B was admitted into evidence, without objection, with the exception of Exhibit B, pp. 170-173 which was rejected.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant. It was filed,

electronically, on January 25, 2019. Respondent had been given 2 working days within which to file objections. None were timely filed. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUE

The sole issue to be determined by this decision concerns medical benefits, specifically, the causal relation and reasonable necessity of lumbar fusion surgery, recommended by Michael Drewek, M.D.

The Claimant bears the burden of proof by a preponderance of the evidence.

FINDINGS OF FACT

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

Preliminary Findings

1. Since 2013, the Claimant has worked as a bus driver for the Employer. On July 7, 2017, he injured his back while exiting a bus during a stop. Initially, he cringed and felt pain in his back. He thought it was a strain and finished his shift. As the day went on, he noticed increased back and left leg pain. The next morning, he was unable to get out of bed; his son had to help him get out of bed and move around the house. On July 8, 2017, the Claimant's son drove him to the Employer so that Claimant could report his injury. On August 8, 2017, Respondent filed a General Admission of Liability (GAL), admitting for medical benefits and temporary total disability (TTD) benefits. (Claimant's Exhibit 1, p. 1). The Claimant continues to receive TTD benefits.

2. On June 29, 2018, Michael Drewek, M.D., requested authorization for L4-5 transforaminal lumbar interbody fusion. On July 10, 2018, Respondent denied the surgery. Wallace K.Larson, M.D., Respondent's retained expert witness, agrees that the recommended surgery is reasonable and necessary. Dr. Larson, however, is of the opinion that the Claimant never sustained an industrial injury and that the recommended surgery is related to the Claimant's preexisting, degenerative condition. At hearing, Respondent conceded that the surgery is reasonable and necessary. Respondent argues that the surgery is not related to the Claimant's admitted, July 7, 2017 industrial injury.

3. Claimant proved by a preponderance of the evidence that the lumbar fusion surgery recommended by Michael Drewek, M.D., is reasonably necessary and causally related to his July 7, 2017 industrial injury.

Brandon Reiter, D.O. - Claimant's initial Authorized Treating Physician (ATP)

4. On July 10, 2017, the Claimant treated at Midtown Occupational Health Services with Brandon Reiter, D.O., and reported that he injured his back while stepping off a bus. The Claimant reported that he had to "twist funny" and when he stepped down off the bus he felt a pop in his back and into his hip. He then went home and his pain worsened throughout the night and the next morning he had difficulty getting up and walking. Dr. Reiter provided the Claimant with work restrictions, prescribed medications, and referred the Claimant to a chiropractor (Claimant's Exhibit 4, pp. 8-11). On July 17, 2017, the Claimant followed up with Dr. Reiter and reported ongoing back pain and increased numbness and tingling in his left leg. Dr. Reiter maintained Claimant's treatment plan and work restrictions (Claimant's Exhibit 4, pp. 12-14). The Claimant 's care was transferred to US Health Works, Lori Long Miller, M.D., which later changed to Concentra.

Lori Long Miller, M.D. – US Health Works and Concentra

5. On July 31, 2017, the Claimant first treated with Dr. Long Miller, US HealthWorks, who took over as the Claimant's ATP. The Claimant reported the nature of his injury and that he immediately felt pain. He also reported the nature of his symptoms and treatment. Dr. Long performed a physical examination and placed the Claimant on work restrictions, including 10 pounds lifting and no commercial driving, maintained his treatment plan, and ordered a MRI (magnetic resonance imaging). [Claimant's Exhibit 5, pp. 15-21). On August 17, 2017, Dr. Miller reviewed the Claimant's lumbar MRI and noted it revealed degenerative changes at L4-5. Dr. Long referred the Claimant to Spine West (Exhibit 5, pp. 27-31). On November 3, 2017, the Claimant treated with Dr. Long, who noted that the Claimant's lumbar injection provided only minimal improvement. Dr. Long maintained the Claimant's treatment plan, including second lumbar injection, and work restrictions (Claimant's Exhibit 5, pp. 37-41). On December 4, 2017, the Claimant followed-up with Dr. Long and reported that the second lumbar injection did not provide any relief and that he is now experiencing constant left leg symptoms. Dr. Long referred the Claimant to Bryan Castro, M.D. (Claimant's Exhibit 5, pp. 42-46). On December 21, 2017, the Claimant reported to Dr. Long that the third lumbar injection provided no relief and made his left leg symptoms worse (Claimant's Exhibit 5, pp. 47-51).

6. On February 20, 2018, the Claimant treated with Dr. Long, who noted that his lumbar and left leg symptoms persisted, and Dr. Long maintained the Claimant's treatment plan and work restrictions (Claimant's Exhibit 5, pp. 62-65). On May 4, 2018, the Claimant treated with Dr. Long and reported that Dr. Castro did not want to do surgery. Dr. Long referred the Claimant to Dr. Drewek (Claimant's Exhibit 5, pp. 79-84). On June 8, 2018, the Claimant reported to Dr. Long that Dr. Drewek wanted to do surgery. Dr. Long agreed with the treatment plan and maintained the Claimant's work restrictions (Claimant's Exhibit 5, pp. 85-89). On October 19, 2018, the Claimant treated with Dr. Long (now at Concentra), who noted that Claimant's surgery was denied. Dr. Long maintained the Claimant's treatment plan and work restrictions (Claimant's Exhibit 5, pp. 95-98).

Lumbar MRIs

7. On August 11, 2017, the Claimant underwent a lumbar MRI, which revealed multilevel degenerative changes, most pronounced at L4-5, where a disc bulge and facet arthropathy result in mild to moderate bilateral neural foraminal narrowing, with probably mass effect on the bilateral L4-5 nerve roots. The radiologist was of the opinion that the MRI did not reveal an acute abnormality (Claimant's Exhibit 9, pp.137-138). On April 16, 2018, the Claimant underwent a second lumbar MRI, which, when compared to the prior MRI, revealed a minimal increase in size of the L4-5 disc extrusion. The MRI revealed mild anterolisthesis at L4-5 with facet joint hypertrophy causing some narrowing of the left neural foramen along the L4 nerve root (Claimant's Exhibit 9, pp. 139-140).

John Tobey, M.D. - Spine West

8. On August 31, 2017, the Claimant first treated with Dr. Tobey, and reported the nature of his injury and ongoing symptoms. Dr. Tobey reviewed the MRI and noted a L4-5 broad based disc bulge with facet arthropathy, resulting in mild to moderate left greater than right foraminal stenosis. Dr. Tobey recommended a few weeks of therapy and medications and a left L5 transforaminal epidural steroid injection (TFESI) (Claimant's Exhibit 6, pp.99-101). On October 18, 2017, the Claimant underwent a left L5 TFESI with Dr. Tobey (Claimant's Exhibit 6, pp.102-103). The Claimant had 25% pain relief (Claimant's Exhibit 6, pp. 104-106). On December 14, 2017, the laimant underwent a L5 and S1 TFESI with Dr. Tobey (Claimant's Exhibit 6, pp. 107-108). The Claimant did not get any relief from the second injection. Dr. Tobey recommended an EMG (Claimant's Exhibit 6, pp. 109-110.) On January 31, 2018, the Claimant underwent a left leg EMG; the EMG was essentially normal (Claimant's Exhibit 6, p. 111). On February 15, 2018, the Claimant underwent a SI joint injection with Dr. Tobey (Claimant's Exhibit 6, pp. 113-114). He did not get any relief from the injection (Claimant's Exhibit 6, pp. 115-116).

Bryan Castro, M.D. – Cornerstone Orthopaedics

9. On April 4, 2018, the Claimant treated with Bryan Castro, M.D., and reported the nature of his injury and persistent pain, symptoms, and limitations with his lower back and left leg. Dr. Castro reviewed Claimant's lumbar MRI and noted no obvious signs of neural impingement but that it was a poor MRI. Dr. Castro recommended a repeat lumbar MRI. Dr. Castro also stated that he did not think Claimant would be a surgical candidate (Claimant's Exhibit 7, pp. 117-122). On April 30, 2018, the Claimant followed up with Dr. Castro, who reviewed the more recent MRI and recommended an EMG. Dr. Castro noted that if the EMG does not reveal any nerve dysfunction, then he is not recommending surgery (Claimant's Exhibit 7, pp. 123-127).

Michael Drewek, M.D. – Panorama Orthopedics

10. On June 6, 2018, the Claimant treated with Michael Drewek, M.D., and reported the nature of his injury and persistent pain, symptoms, and limitations with his lower back and left leg. Dr. Drewek noted that the Claimant's treatment related to his injury and reviewed the Claimant's lumbar MRI. Dr. Drewek had the Claimant undergo lumbar x-rays, which revealed findings that he opined explained Claimant's ongoing symptoms. Dr. Drewek recommended Claimant undergo a L4-5 transforaminal lumbar interbody fusion (Claimant's Exhibit 8, pp. 128-134). On June 29, 2018, Dr. Drewek requested authorization for this surgery (Claimant's Exhibit 8, p. 134). On July 10, 2018, Respondent denied the surgery (Respondent's Exhibit B, pp.155-161). On August 2, 2018, the Claimant followed up with Dr. Drewek, who noted Claimant's ongoing lower back and left leg symptoms and that the recommended surgery is denied. Dr. Drewek noted he does not have anything to offer Claimant other than the surgery (Claimant's Exhibit 8, pp.135-136).

Wallace K. Larson, M.D. – Respondent's Independent Medical Examiner (IME)

11. On September 25, 2018, Claimant underwent an IME with Respondent's retained expert witness, Wallace Larson, M.D. Dr. Larson noted Claimant's medical history, the nature of his injury, and his ongoing symptoms. Dr. Larson reviewed Claimant's medical records. Dr. Larson opined Claimant did not sustain a work-related injury because he did not have exposure to any unusual hazard and did not have trauma to his lumbar spine. Dr. Larson opined Claimant does not suffer from an atraumatic condition to the lumbar spine, and, therefore, any treatment required would not be related to Claimant's occupational exposure. Dr. Larson did opined that the surgery recommended by Dr. Drewek is appropriate. *Respondent's Exhibit A, pages 1-9*.

12. At Hearing, Dr. Larson testified consistently with his report. Dr. Larson opined Claimant did not sustain an industrial injury on July 7, 2017. Dr. Larson opined Claimant experienced just a manifestation of his preexisting degenerative lumbar condition and that it is coincidental Claimant started feeling symptomatic around the time of the July 7, 2017 industrial injury. Dr. Larson agreed that that no evidence exists that Claimant had any prior back injuries or treatment and that Claimant was working full duty, without restriction, prior to the July 7, 2017 industrial injury. Dr. Larson opined the surgery recommended by Dr. Drewek is reasonable and necessary but related to Claimant's preexisting, degenerative condition, not his July 7, 2017 industrial injury. The ALJ finds Dr. Larson's opinion regarding the relatedness of the lumbar surgery neither credible nor persuasive.

The Claimant

13. According to the Claimant he has no prior back injuries or treatment and he was working full duty, without restrictions prior to his July 7, 2017 industrial injury. Prior to his work injury, the Claimant was active and spent a lot of time in the gym lifting weights and working out. He was able to go for long bike rides (even upwards of 50 to 100 miles) without any problems. He rode his motorcycle and was often out on his boat.

He did not have any issues doing these activities prior to July 7, 2017. Since July 7, 2017, the Claimant has been unable to do these activities as a result of the July 7, 2017 industrial injury and the associated symptoms. Now, the Claimant has constant lower back pain and symptoms into his left leg, including numbness, tingling, and shooting pain. The ALJ finds that the Claimant's testimony concerning his before and after condition is credible and convincing.

Ultimate Findings

14. The ALJ finds the opinions of Dr. Long Miller and Dr. Drewek especially credible and persuasaive. On the other hand, the ALJ finds the opinions of Dr. Larson inadequately based, contrary to the weight of medical opinions in evidence, and lacking in credibility for the reasons herein above stated. Further, the ALJ finds the Claimant's testimony to have been straight-forward, consistent with the weight of the medical evidence and, therefore, credible and persuasive.

15. Between conflicting testimonies and opinions, the ALJ makes a rational choice, based on substantial evidence, to accept the Claimant's testimony and the opinions of Dr. Drewek and Dr. Long Miller and to reject opinions to the contrary.

16. The ALJ finds that the Claimant has proven by a preponderance of the evidence that his need for the lumbar fusion surgery recommended by Dr. Drewek is causally related to his July 7, 2017 industrial injury and reasonably necessary to cure and relieve the effects of the compensable injury of July 7, 2017.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254

(1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the opinions of Dr. Long Miller and Dr. Drewek were especially credible and persuasive. On the other hand, the opinions of Dr. Larson were inadequately based, contrary to the weight of medical opinions in evidence, and lacking in credibility. Further, as found, the Claimant's testimony was straight-forward, consistent with the weight of the medical evidence and, therefore, credible and persuasive.

Substantial Evidence

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

Medical Benefits

c. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, Claimant's medical treatment is

causally related to the compensable injury of July 7, 2017. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment was and is reasonably necessary.

Burden of Proof

d. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained his burden concerning the need for the lumbar fusion surgery recommended by Dr. Drewek, as causally related to the July 7, 2017 industrial injury and reasonably necessary to cure and relieve the effects of the injury.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The General Admission of Liability, dated August 8, 2017, shall remain in full force and effect.

B. Respondent shall pay the costs of the the lumbar fusion surgery recommended by Dr. Drewek, and the costs of all other causally related and reasonably necessary medical care and treatment, subject to the Division of Workers' Compensation Medical Fee Schedule.

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

DATED this 22nd day of February 2019.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-075-667-002

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on January 29, 2019, in Denver, Colorado. The hearing was digitally recorded (reference: 1/29/19, Courtroom 3, beginning at 8:30 AM, and ending at 11:45 AM).

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

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, which was filed, electronically, on February 7, 2019. On February 8, 2019, Respondents indicated no objection to the proposed decision. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern; compensability of an April 21, 2018 low back injury; medical benefits; average weekly wage (AWW); and, temporary partial disability (TPD) benefits.

The Claimant bears the burden of proof by a preponderance of the evidence.

FINDINGS OF FACT

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

Preliminary Findings

1. The parties stipulated, and the ALJ finds that the treatment Claimant received at St. Joseph's Hospital (Respondents' Exhibit K) and with Charles Wenzel, D.O. at Colorado Occupational Medicine Physicians (COMP) and their referrals are authorized, reasonably necessary and causally related. The parties further stipulated, and the ALJ finds, that the authorized treating physician (ATP) placed the Claimant at maximum medical improvement (MMI) on August 1, 2018.

2. The Claimant has worked for the Employer as a Material Specialist since 2010. In this position, he operates a reach truck – a standing operating forklift – to pick and store parts for the Employer.

3. The Claimant suffered a non-occupational motor vehicle accident (MVA) to his lower back on June 7, 2017. Claimant treated for this injury from June 16, 2017 through December 13, 2017.

4. On January 2, 2018, Physician's Assistant (PAC) Diana N. Kelling with Arbor Family Medicine saw the Claimant for an upper respiratory infection. Of note, PAC Kelling documented that back pain was not present.

5. On February 5, 2018, the Claimant returned to Arbor Family Medicine for a health maintenance exam and physical. PAC Sara E. Galio documented that back pain was absent, and that spine had normal movements without pain and normal strength and tone.

The Claimant's Job

6. The Material Specialist position requires the Claimant to assure that he is picking or storing the correct item by stepping off the reach truck with a scanner to ensure that the part number on the scanner matches the identification number on the item.

7. The step down on the truck is about 9 inches to 9.75 inches to the ground depending upon the model.

8. It is undisputed that the Employer has a policy directing employees to exit

the reach truck utilizing “three points of contact” meaning that three of the worker’s four extremities must be touching either the truck or the ground or both. As a result of this reasonable safety policy, the Claimant must exit the truck backwards as demonstrated in Respondents’ Exhibit P.

The Injury

9. On April 21, 2018, the Claimant was working as a Material Specialist and he exited his truck at 8:33 AM. The Claimant credibly testified that as he descended the reach truck his head and torso were twisted to the left. When the Claimant stepped down on his left foot he felt an immediate onset of low back pain.

10. According to the Employee Incident Report, the Claimant reported the incident immediately afterwards at 8:35 AM. His incident report is consistent with his testimony concerning the mechanism of injury. The Claimant also disclosed the earlier motor vehicle accident and noted that he had been cleared and pain free since November 2017.

Medical

11. The Claimant initially treated with SCL Health, St. Joseph Hospital. He was removed from work until April 25, 2018. Charles Wenzel, D.O., attended the Claimant and imposed 20-lbs. lifting restrictions. These restrictions eventually were increased on April 30, 2018 to no lifting over 10 lbs., and eventually included restrictions on the amount of hours per shift the Claimant could work.

Job Description

12. According to the Claimant, his regular employment with the Employer involves ten-hour shifts and lifting up to 50 lbs. The ALJ finds this job description undisputed and credible.

Average Weekly Wage (AWW)

13. The Claimant earns $18.38 an hour and also earns occasional overtime, and performance bonuses quarterly. Considering his testimony as well as the payroll records, the ALJ finds and concludes that a fair AWW is $735.20.

Temporary Partial Disability (TPD)

14. Based upon the payroll records (Claimant’s Exhibit 7), the Claimant is entitled to aggregate TPD benefits of $1,244.94 from April 23, 2018 to July 29, 2018 as follows

Start	End	Earnable	Earned	Wage Loss	TPD Due
4/30/18	5/6/18	$735.20	$384.14	$351.06	$234.04
5/7/18	5/13/18	$735.20	$385.98	$349.22	$232.81
5/14/18	5/20/18	$735.20	$404.36	$330.84	$220.56
5/21/18	5/27/18	$735.20	$385.98	$349.22	$232.81
5/28/18	6/3/18	$735.20	$652.49	$82.71	$55.14
6/4/18	6/10/18	$735.20	$551.40	$183.80	$122.53
6/18/18	6/24/18	$735.20	$661.68	$73.52	$49.01
7/23/18	7/29/18	$735.20	$588.16	$147.04	$98.03
					$1,244.94

Lawrence Lesnak, D.O., Respondents' Independent Medical Examiner (IME)

15. Dr Lesnak evaluated the Claimant on September 25, 2018 and produced a report (Respondents' Exhibit E). Dr. Lesnak stated the opinion that Claimant's current condition is related to his prior MVA. Dr. Lesnak stated, "The mere act of stepping backward off a platform from approximately 1 ½ feet high is not an activity that would be sufficient enough to cause a low back strain of aggravate pre-existing pathology. Unfortunately, the patient had ongoing occasional low back pains even after +6 months of treatment that included more than 43 chiropractic treatment sessions, physical therapy treatments, and massage therapy treatments, and a right-sided L3-L4 facet joint injection performed on 10.02/2017. Even when he was discharged from the motor vehicle collision, the patient continued to have ongoing occasional low back pains; and Dr. Higgins, his then treating chiropractor, noted that he most likely would have aggravation of these symptoms in the future that would require treatment. (Respondents' Exhibit E). The ALJ finds that the causality opinion of Dr. Lesniak lacks credibility, primarily for lack of a persuasive underlying rationale or explanation for the alleged "inadequacy" of the mechanism of injury.

Sander Orent, M.D.

16. Dr. Orent evaluated the Claimant on November 29, 2018 and produced a report (Claimant's Exhibit 5). Dr. Orent was of the opinion that the Claimant did, in fact, sustain an acute event leading to a low back strain as a result of the April 21, 2018 incident. Dr. Orent stated the following opinion: "This patient actually had a twisting injury of the spine and was attempting to fulfill a new training requirement of 3 points of contact on the machine as he stepped off it. This was a jarring event that occurred to his spine and caused immediate pain such that he required an emergency department visit. The concept that this mechanism was not adequate to cause the pain is obviously inaccurate not just mechanistically, but the fact

is the patient went to the emergency room after this acute event which caused the immediate onset of his back pain."

Assessment of the Evidence

17. The medical records reflect that the Claimant had two medical appointments between December 2017 up until the time before this incident at work. In both appointments, there was never a mention of back pain in those medical records. The ALJ finds this is consistent with the Claimant's testimony that he was released after the MVA, a serious accident, and the Claimant returned back to work full steam with no problems.

Ultimate Findings

18. Respondents' theory is that the Claimant had an underlying condition that was ready to surface as soon as the facet injection wore off is not credible considering the totality of the facts. The Claimant had basically recovered substantially from the effects of the MVA by the day before the incident.

19. Following the incident of April 21, 2018, the Claimant reported feeling pain immediately. He was taken to the emergency room (ER). Thereafter the Claimant was restricted to 10 lbs. no lifting for months, which he was not before. Dr. Lesnak's opinion that the April 21, 2018 incident was coincidental, and that the Claimant's back pain resulted suddenly because the effects of the facet injection wore off and the Claimant's preexisting back condition surfaced "with a vengeance" is un-persuasive and lacks credibility.

20. Dr. Orent's opinions are credible, persuasive and supported by the Claimant's testimony and the previous lack of back complaints before the incident even after the Claimant returned to work in November 2017.

21. Between conflicting testimonies and opinions, the ALJ makes a rational choice, based on substantial evidence, to accept the Claimant's testimony and the opinions of Dr. Orent concerning causality, and to reject opinions to the contrary, including the opinion of Dr. Lesnak.

22. The Claimant has demonstrated that it is more probably true than not that he sustained a compensable injury to his low back on April 21, 2018, with the combination of his stepping down nine-and-a-half inches in a twisting motion. The Employer directed the Claimant to exit the reach truck using three points of contact and this means that the Claimant is turning, doing something a little bit unusual and he is twisting. For this reason, the ALJ finds that this incident does not involve a ubiquitous condition (as argued by the Respondents). The Claimant's testimony was credible, persuasive and supported by Dr. Orent's opinions.

23. All of the Claimant's medical care the treatment that the Claimant received at St. Joseph's Hospital (Respondents' Exhibit K) and with Charles Wenzel, D.O. at Colorado Occupational Medicine Physicians (COMP) and their referrals are authorized, reasonably necessary and causally related.

24. The Claimant's authorized treating physician (ATP) placed the Claimant at maximum medical improvement (MMI) on August 1, 2018.

25. The Claimant's AWW is $735.20.

26. The Claimant is entitled to TPD benefits (2/3 of his temporary wage loss) as follows:

Start	End	Earnable	Earned	Wage Loss	TPD Due
4/30/18	5/6/18	$735.20	$384.14	$351.06	$234.04
5/7/18	5/13/18	$735.20	$385.98	$349.22	$232.81
5/14/18	5/20/18	$735.20	$404.36	$330.84	$220.56
5/21/18	5/27/18	$735.20	$385.98	$349.22	$232.81
5/28/18	6/3/18	$735.20	$652.49	$82.71	$55.14
6/4/18	6/10/18	$735.20	$551.40	$183.80	$122.53
6/18/18	6/24/18	$735.20	$661.68	$73.52	$49.01
7/23/18	7/29/18	$735.20	$588.16	$147.04	$98.03
					$1,244.94

27. The Claimant has proven compensability, entitlement to medical benefits, AWW, and entitlement toTPD benefits as herein above specified by preponderant evidence.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183

(Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, 2012 COA 85. The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, following the incident of April 21, 2018, the Claimant reported feeling pain immediately. He was taken to the emergency room (ER). Thereafter the Claimant was restricted to 10 lbs. no lifting for months, which he was not before. Dr. Lesnak's opinion that the April 21, 2018 incident was coincidental, and that the Claimant's back pain resulted suddenly because the effects of the facet injection wore off and the Claimant's preexisting back condition surfaced "with a vengeance" is un-persuasive and lacks credibility. As further found, Dr. Orent's opinions are credible, persuasive and supported by the Claimant's testimony and the previous lack of back complaints before the incident even after the Claimant returned to work in November 2017. The Claimant's testimony was credible, persuasive and supported by Dr. Orent's opinions.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985).

It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting testimonies and opinions, the ALJ made a rational choice, based on substantial evidence, to accept the Claimant's testimony and the opinions of Dr. Orent concerning causality, and to reject opinions to the contrary, including the opinion of Dr. Lesnak.

Compensability

c. In order for an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Office,* 919 P.2d 207, 210, 210 (Colo. 1996). An injury "arises out of' employment if it would not have occurred **but for** the fact that the conditions and obligations of employment placed the employee in a position that he or she was injured." *See City of Brighton v. Rodriguez,* 318 P.3d 496, **2014 CO 7** (presumption that an injury arises out of employment when an unexplained injury occurs during the course of employment.) Thereupon, it is incumbent to show that non-work related factors caused the injury. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1) (c), C.R.S. *See Faulkner v. Indus. Claim Appeals Office,* 24 P.3d 844 (Colo. App. 2000)*; Eller v. Indus. Claim Appeals Office*, 224 P.3d 397, 399 (Colo. App. 2009); *Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277, 1279 (Colo. App. 2008). The question of causation is generally one of fact for determination by an ALJ. *Faulkner* at 846; *Eller* at 399-400. As found, the Claimant sustained a compensable injury on April 21, 2018, arising out of the course and scope of his employment.

d. Employment risks are distinguished from entirely personal risks (which do not "arise out of" employment), for instance, a preexisting idiopathic illness or medical condition that is completely unrelated to employment, such as fainting spells, heart disease, or epilepsy. *See, e.g., Irwin v. Indus. Comm'n,* 695 P.2d 763 (Colo. App. 1985); *Gates Rubber Co. v. Indus. Comm'n,* 705 P.2d 6 (Colo. App. 1985). Such "personal risks" also include an assault at work arising solely from an employee's private, not professional, life. *See, e.g., Velasquez v. Indus. Comm'n,* 41 Colo. App. 201, 581 P.2d 748 (1978). As found, the ALJ rejected Respondents' argument that stepping down from the Reach machine was a ubiquitous condition. Indeed, it was a specific risk of employment.

Medical

e. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v.*

Vasquez, 883 P. 2d 583 (Colo. App. 1994). As found, Claimant's medical treatment is causally related to the compensable low back injury of April 21, 2018.. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment was and is reasonably necessary. to cure and relieve the effects of his compensable low back injury, specifically, care and treatment received at St. Joseph's Hospital (Respondents' Exhibit K) and with Charles Wenzel, D.O. at Colorado Occupational Medicine Physicians (COMP) and their referrals are authorized, reasonably necessary and causally related.

Average Weekly Wage (AWW)

f. An AWW calculation is designed to compensate for **total or partial** temporary wage loss. *Pizza Hut v. Indus. Claim Appeals Office,* 18 P. 3d 867 (Colo. App. 2001). *See* § 8-42-102, C.R.S. As found, the Claimant's AWW is $735.20, the baseline for calculating temporary wage loss.

Temporary Partial Disability

g. As found, Claimant partially lost wages from the Employer as follows:

Start	End	Earnable	Earned	Wage Loss	TPD Due
4/30/18	5/6/18	$735.20	$384.14	$351.06	$234.04
5/7/18	5/13/18	$735.20	$385.98	$349.22	$232.81
5/14/18	5/20/18	$735.20	$404.36	$330.84	$220.56
5/21/18	5/27/18	$735.20	$385.98	$349.22	$232.81
5/28/18	6/3/18	$735.20	$652.49	$82.71	$55.14
6/4/18	6/10/18	$735.20	$551.40	$183.80	$122.53
6/18/18	6/24/18	$735.20	$661.68	$73.52	$49.01
7/23/18	7/29/18	$735.20	$588.16	$147.04	$98.03
					$1,244.94

Burden of Proof

h. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). Also, the burden

of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained his burden on compensability, medical benefits, AWW, TPD, and lack of an ubiquitous syncopal event.

ORDER

IT IS, THEREFORE, ORDERED THAT:

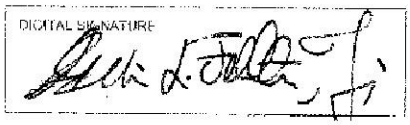
A. Respondents shall pay the costs of all authorized, causally relate and reasonably necessary medical care and treatment for the Claimant's low back injury of April 21, 2018, including care and treatment received at St. Joseph's Hospital (Respondents' Exhibit K) and with Charles Wenzel, D.O. at Colorado Occupational Medicine Physicians (COMP) and their referrals which are authorized, reasonably necessary and causally related, subject to the Division of Workers' Compensation Medical Fee Schedule.

B. Respondents shall pay the Claimant aggregate temporary partial disability benefits in the amount of $1,244.94, which is payable retroactively and forthwith.

C. Respondents shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

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

DATED this 25th day of February 2019.



EDWIN L. FELTER, JR.
Administrative Law Judge

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

ISSUES

- Whether claimant has proven by a preponderance of the evidence that he is entitled to an award of permanent total disability benefits?

- Whether respondents have proven by a preponderance of the evidence that they are entitled to an offset of claimant's award of benefits?

- Whether respondents have proven by a preponderance of the evidence that they are entitled to a credit for an overpayment of benefits?

FINDINGS OF FACT

1. Claimant was employed by employer building a wall on April 21, 2016 when he injured his low back. Claimant testified he had built the wall on the ground and was raiding the wall when he felt back pain. Claimant testified he did not report his injury that day, but worked another approximately ½ hour before going home. Claimant testified he went home following his injury and by the next morning, he could barely get out of bed and had difficulty walking. Claimant testified he returned to work and reported the injury to his supervisor Mr. B_____ and advised his employer that he was not capable of working.

2. Claimant sought medical treatment following his injury with the Marillac clinic. Claimant was initially evaluated at the Marillac clinic on April 28, 2016. Claimant testified that the Marillac clinic was his regular family doctor. Claimant testified employer did not refer claimant to a physician for medical treatment.

3. Claimant was examined by nurse practitioner ("NP") Jennings on April 28, 2016. Claimant reported he woke up four days ago and had an increase in low back pain. Claimant reported taking ibuprofen, Tylenol and aspirin without relief. Claimant was provided with a prescription for gabapentin and instructed to return in 6 months, or if symptoms worsen or fail to improve.

4. Claimant returned to Dr. Pasterz at Marillac Clinic on May 3, 2016. Dr. Pasterz noted claimant had an insidious onset of right sided lumbar back pain starting two weeks ago. Dr. Pasterz also noted claimant had a long-standing history of intermittent back problems going back about 30 years. Dr. Pasterz noted claimant already had Flexeril and prescribed oxycodone. Dr. Pastetz also provided claimant with work restrictions of no heavy lifting and no use of power tools with his medication.

5. Claimant was again evaluated by Dr. Pasterz on May 17, 2016. Dr. Pasterz had obtained x-rays of claimant's lumbar spine and noted that the films showed multilevel degenerative disc disease especially at the L3 level. Significant osteophyte

and spondylosis was also noted. Dr. Pasterz provided claimant with work restrictions of no lifting over 40 pounds.

6. Claimant returned to Dr. Pasterz on May 20, 2016. Dr. Pasterz noted claimant was using about 2 to 3 tablets of Percocet per day. Claimant reported he got a massage which seemed to help his pain. Claimant was diagnosed with acute lumbar myositis with degenerative disc disease of the lumbar spine. Dr. Pasterz referred claimant for x-rays of the lumbar spine and noted that if claimant did not improve, he would need a magnetic resonance image ("MRI") and probably an epidural.

7. Dr. Pasterz evaluated claimant on May 31, 2016. Dr. Pasterz diagnosed claimant with acute lumbar back pain with degenerative disc disease and degenerative joint disease of the lumbar spine.

8. Claimant eventually underwent the MRI of the lumbar spine on June 14, 2016. The MRI revealed levoscoliosis of the lumbar spine centered at the level of L3. The MRI also showed acute compression fractures over the mid and right lateral aspect of the L3 and L4 vertebra, along with degenerative disc disease with disc bulges at L2-3 through L5-S1. An inflamed Schmorl's node of the anterior infra plat of L1 was also noted.

9. Claimant testified at hearing that he was surprised by the severity of the MRI findings.

10. Following the MRI, claimant was referred for an orthopedic evaluation with Dr. Clifford. Claimant was examined by Dr. Clifford's physician assistant ("PA"), Mr. Ousley, who noted claimant had been experiencing low back pain for about the last two to three months. Claimant reported that the back pain came on without accident or injury but did occur fairly suddenly. Claimant reported he would occasionally get pain radiating into the right proximal thigh, but the pain did not radiate distally. Dr. Clifford noted that claimant improved very little with time and treatment. Dr. Clifford reviewed the MRI and opined that while there was a small chance the changes were degenerative in nature, it was more likely related to some degree of acute or subacute fracture.

11. Claimant returned to Dr. Clifford on July 21, 2016. Dr. Clifford indicated in this report that claimant was involved in a work injury back in April 2016. Dr. Clifford noted that claimant was three months out and still having pain. Dr. Clifford recommended some personal home based physical therapy. Dr. Clifford opined that if the physical therapy did not work, he would recommend another MRI and see if the STIR image was still strong. If the STIR image was still high, he would recommend a kyphoplasty procedure at L3 and L4. Dr. Clifford opined in the report that claimant's lumbar stenosis was not related to the work injury and noted that he would be discussing injections for this condition in two weeks.

12. Claimant testified at hearing that he did not tell Dr. Pasterz about the work injury and was initially treating the claim on his private health insurance. Claimant

testified that after he discovered the severity of the injury, he then sought to file a workers' compensation claim. Respondents subsequently admitted liability for the claim.

13. Dr. Pasterz testified by deposition in this matter consistent with his medical reports. Dr. Pasterz testified he was unaware that claimant had alleged his injury was the result of a lifting incident at work.

14. Claimant was evaluated by Dr. McLaughlin on August 8, 2016. Dr. McLaughlin noted claimant's report of being injured while at work and reviewed claimant's medical records. Dr. McLaughlin diagnosed claimant with a work injury of April 21, 2016 with subsequent L3 and L4 compression fractures. Dr. McLaughlin recommended physical therapy and provided claimant with work restrictions that included no lifting over 10 pounds, no repetitive bending and mostly sit down work with the ability to change positions as needed.

15. Claimant returned to Dr. McLaughlin on September 12, 2016. Dr. McLaughlin noted that x-rays from September 6, 2016 showed advanced lumbar spondylosis without acute abnormality. Dr. McLaughlin noted claimant was schedule to be re-evaluated by Dr. Clifford on September 12, 2016. Dr. McLaughlin discussed with claimant the likelihood that Dr. Clifford would request additional MRI or computed tomography ("CT") studies and instructed claimant to follow up after his appointment with Dr. Clifford.

16. A repeat MRI was performed on September 14, 2016. The MRI showed multilevel degenerative disc disease at all levels, with right lateral disc protrusion with neural encroachment on the right lateral recess and narrowing right neural foramen at L2-L3. Broad based spurring was also noted at the L3-S1 levels.

17. Claimant underwent rights sided L2-3 and L3-4 transforaminal epidural steroid injections ("ESI") under the auspices of Dr. Clifford on September 29, 2016. Dr. Clifford noted that post injection, claimant's leg pain was improved dramatically in the appropriate distribution. Claimant was instructed to follow up in six (6) weeks.

18. Claimant followed up with Dr. McLaughlin on October 17, 2016 and reported that he had very good resolution following the ESI of his left leg pain. Claimant reported the left leg pain had returned, but was not a bad as it was pre-injection. Dr. McLaughlin recommended continuing with therapy and provided claimant with work restrictions that included no lifting over 20 pounds and no repetitive bending with changing of positions as needed.

19. Claimant again returned to Dr. McLaughlin on November 14, 2016. Claimant reported to Dr. McLaughlin that he had significant improvement in his leg symptoms after the injection and had improved function in his activities of daily living. Claimant reported that after the injection work off, he continued to have low back pain, difficulty bending and lifting. Claimant reported he would like to undergo the recommended spinal fusion procedure.

20. Dr. Clifford performed surgery on December 6, 2016. The surgery included an L2-3, L3-4 and L4-5 lateral lumbar interbody fusion ("LLIF") with cage placement, and L2-S2 posterolateral spinal fusion ("PSF") with instrumentation and an L5-S1 transforaminal lumbar interbody fusion ("TLIF") with cage placement.

21. Claimant returned to Dr. McLaughlin on December 20, 2016. Dr. McLaughlin noted claimant's current medications and recommended claimant continue with the limitations set forth by Dr. Clifford. Claimant was again evaluated by Dr. McLaughlin on January 4, 2017. Dr. McLaughlin again noted claimant's recovery and recommended a home health evaluation to determine if he would need some assistance at home with cleaning, moving things and getting things set up.

22. Dr. Clifford noted on January 19, 2017 that claimant was doing remarkably well. Dr. Clifford instructed claimant to return in six weeks and provided him with work restrictions of no lifting over 25 pounds. Claimant was instructed to be really careful about bending, lifting, or twisting.

23. Dr. McLaughlin re-evaluated claimant on February 2, 2017, and noted claimant had not yet started physical therapy. Dr. McLaughlin reviewed a Rule 6 letter with claimant. Dr. McLaughlin noted that Dr. Clifford recommended maximum lifting of 45 pounds, but Dr. McLaughlin thought at work it would be 25 pounds max lifting, with 0 pounds for routine lifting, and no crawling, kneeling squatting or climbing. Dr. McLaughlin recommended a four hour shift with sit down work mostly and the ability to stand as needed. Claimant returned to Dr. McLaughlin on February 16, 2017. Dr. McLaughlin provided claimant with exercises to strengthen his glute muscles and continued his work restrictions.

24. Claimant was examined by Dr. Clifford on March 2, 2017. Dr. Clifford noted claimant was doing very well with back pain of 3 out of 10 and no significant leg pain. Dr. Clifford provided claimant with a 30 pound lifting restriction.

25. Claimant returned to Dr. McLaughlin on March 6, 2017. Dr. McLaughlin noted Dr. Clifford had recommended that claimant get in the gym and Dr. McLaughlin tried to show claimant some home exercises. Dr. McLaughlin recommended physical therapy as opposed to going to the gym and referred claimant to a specific physical therapist. Dr. McLaughlin recommended work restrictions of no lifting over 25 pounds.

26. Claimant was again evaluated by Dr. McLaughlin on March 27, 2017. Dr. McLaughlin recommended claimant get a gym pass along with four more visits of physical therapy. Claimant again returned to Dr. McLaughlin on April 21, 2016 and reported he was feeling better now than he did a month ago. Claimant reported that the gym pass had been very helpful. Dr. McLaughlin recommended work restrictions of maximum lifting of 30 pounds with 10 pounds routinely, along with changing positions as needed.

27. Claimant again returned to Dr. McLaughlin on May 4, 2017 after he developed some pain down his right leg. Claimant reported he had upped his weights

about 10 pounds at the gym and wondered if he overdid it. Dr. McLaughlin noted that on exam his main issues appeared to be tightness to the paraspinal muscles, just overdoing it. Dr. McLaughlin noted his concern that claimant may have a disk issue or neuropathy, which did not appear present on exam, but could be present. Claimant was provided with a prescription for Flexeril and instructed to return to physical therapy.

28. Claimant returned to Dr. McLaughlin on May 10 with reports that he was doing better, but was still sore. Dr. McLaughlin ordered x-rays which showed no acute osseous abnormalities or complications were evident. Dr. McLaughlin recommended continued physical therapy.

29. Claimant was examined by Mr. Ousley on May 31, 2017 with Dr. Clifford's office. Mr. Ousley noted claimant was six months post-op and doing fairly well overall. Claimant complained of some "burning pain" in primarily the right side of his low back, ut otherwise his pain was fairly manageable. Claimant had been trying to do some high repetition weight exercises and more walking. Mr. Ousley reviewed claimant's clinical and radiographic findings and recommended that claimant gradually increase his walking so he could slowly increase his weight training.

30. Claimant returned to Dr. McLaughlin on June 21, 2017 and noted he could be overdoing it a bit. Claimant reported he was tired, but denied radicular complaints or bowel or bladder incontinence. Claimant was provided with work restrictions that included no lifting over 10 pounds.

31. Claimant again returned to Dr. McLaughlin on August 3, 2017 and reported he had to back off his exercises because he was feeling pain through his lateral right hip and lateral aspect of the low back. Claimant denied any significant radicular symptoms and denied bowl or bladder incontinence. Dr. McLaughlin noted that he believed claimant had just been overdoing it, and noted that his lumbar range of motion was the best that it had been in quite some time. Claimant was referred to a new physical therapist and had his work restrictions continue with a maximum of 10 pounds lifting.

32. Claimant returned to Dr. McLaughlin on September 5, 2017 and noted his new physical therapy had been somewhat helpful. Physical examination revealed claimant to be very tight on the left side with marked tightness to the lumbar paraspinal muscles. Claimant reported increased pain with extension and lateral flexion left and right. Dr. McLaughlin referred claimant to Dr. Bowen, a psychologist, to evaluate and treat claimant. Claimant's work restrictions were continued at 10 pounds maximum lifting.

33. Claimant reported to Dr. McLaughlin on September 20, 2017 that he had stopped physical therapy because it was causing him more pain and he was not getting any more function. Claimant also reported his left hip hurt. Claimant was referred for an x-ray of the left hip which showed a normal pelvis and left hip. Claimant's work restrictions were continued at 10 pounds.

34. The records from the physical therapist document claimant complaining of right hip pain up until the final visit on September 9, 2017, when he complained of pain in his hips on both sides.

35. Claimant was re-examined by Dr. McLaughlin on October 5, 2017. Claimant reported that being off physical therapy had definitely helped him, and reported his pain was lower. Dr. McLaughlin noted that claimant has not worked in some time and he did not expect claimant to return to work. Dr. McLaughlin reported that he anticipated claimant to be at maximum medical improvement ("MMI") after he sees Dr. Clifford and receives a permanent impairment. Dr. McLaughlin noted that claimant would most likely be indefinitely off work.

36. Claimant continued to follow up with Dr. McLaughlin and returned to Dr. Clifford on November 30, 2017. Dr. Clifford noted that overall, claimant was doing really well. Claimant reported a little bit of pain along the right lateral incision just inferior to the incision and some mild back pain that he rated about a 2/10. Claimant reported his symptoms were worse with bending and lifting activities, but reported he was overall very pleased with the surgical management. Dr. Clifford noted some mild tenderness to deep palpation in the right paraspinal musculature, with some paresthesias over the inferior aspect of the right lateral incision down to the iliac crest. Dr. Clifford recommended claimant continue his activities including weight loss and noted that claimant had a little adjacent segment degeneration across the L1-2 level that he would keep an eye on.

37. Claimant returned to Dr. McLaughlin on December 14, 2017. Dr. McLaughlin noted that claimant was inquiring about hardware removal or altering the hardware, which Dr. McLaughlin noted would only occur if there was an issue of worsening of condition or need for further surgery to extend the fusion. Dr. McLaughlin noted that claimant was doing his home exercise program and reported feeling better than his last visit with improvements involving his flaring of pain and allowing him to be a bit more functional, moving around the house, getting in and out of vehicles and walking. Dr. McLaughlin recommended claimant finish out his consultations with Dr. Bowen and return in one month for an impairment rating. Dr. McLaughlin noted that it was very unlikely that claimant would return to any work that will have gainful employment. Dr. McLaughlin noted that he anticipated claimant would be at MMI as of this visit, but felt claimant should complete his treatment with Dr. Bowen and get a Flector patch prescription before being put at MMI.

38. Claimant returned to Dr. McLaughlin on February 6, 2018 and noted that the Flector patch had not been approved. Dr. McLaughlin again recommended the Flector patch and noted that claimant did not have side effects associated with the Flector and felt he could do more when using the Flector patch such as walk the dog and get in and out of the car. Dr. McLaughlin noted that claimant had completed his eight (8) therapy sessions with Dr. Bowen, but opined that claimant was not at MMI due to the fact that when he was using the non-steroid anti-inflammatories, he was better functionally and had better range of motion. Dr. McLaughlin therefore requested

claimant to return in one month and to determine if claimant could get his Flector patches authorized.

39. Claimant returned on February 21, 2018 at which time the insurer had approved the Flector patches. Dr. McLaughlin noted the Flector patches had been very helpful and claimant could move better and get in and out of his car better. Dr. McLaughlin opined that claimant was at MMI and provided claimant with a permanent impairment rating of 32% whole person. The impairment rating was based on 16% whole person due to a specific disorder of the lumbar spine pursuant to Table 53 of the AMA Guides to Permanent Impairment, 3rd Edition revised and 19% whole person for loss of range of motion. Dr. McLaughlin opined that claimant was permanently off work indefinitely and did not provide claimant with any permanent work restrictions based on this opinion.

40. Respondents filed a final admission of liability ("FAL") on March 22, 2018 that admitted for the 32% whole person impairment rating. Respondents also admitted for post-MMI medical benefits.

41. Claimant returned to Dr. McLaughlin on May 21, 2018 for post-MMI medical care. Dr. McLaughlin noted that claimant continued off work indefinitely and on Social Security Disability. Claimant again reported the Flector patch was helpful. Dr. McLaughlin again noted that he did not expect claimant to return to the workforce and continued on Social Security Disability.

42. Dr. McLaughlin testified by deposition in this matter. Dr. McLaughlin acknowledged the issues with regard to claimant's initial reports to his medical providers that failed to indicate a work related injury prior to onset of low back symptoms. Dr. McLaughlin testified he asked claimant about the discrepancies in the medical records and claimant indicated he liked his employer and did not want to be a burden on his employer. Dr. McLaughlin testified that it was his opinion that claimant's low back complaints and compression fractures were related to the accident history claimant provided of being injured on April 21, 2016 while working for employer. Dr. McLaughlin testified that it was possible that compression fractures could be caused by osteoporosis and confirmed that claimant had been diagnosed with osteoporosis

43. With regard to claimant's work restrictions, Dr. McLaughlin testified that Dr. Clifford provided claimant with work restrictions that included maximum lifting of 25 pounds on January 18, 2017. Dr. McLaughlin testified that based on his examination of claimant, there was nothing erroneous about this restriction. Dr. McLaughlin testified claimant could continue to work with a 25 pound lifting restriction as of March 6, 2017.

44. Dr. McLaughlin testified that when he placed claimant at MMI, he opined that claimant was off work indefinitely. Dr. McLaughlin testified that this opinion was in part because claimant was receiving Social Security Disability benefits. Dr. McLaughlin testified that claimant, in theory, could work if the job had appropriate restrictions and/or limitations. Dr. McLaughlin testified that nothing precludes claimant from performing a sit down job with maximum lifting of 10 pounds.

45. Claimant obtained a vocational evaluation from Mr. Van Iderstine to address the issue of whether he could obtain employment in the same or other field. Mr. Van Iderstine reviewed claimant's medical records, met with claimant for an interview and performed a labor market study in connection with his vocational evaluation. Mr. Van Iderstine noted that claimant had a degree but had never used it in a vocational aspect for his work other than when he worked in a business setting. Mr. Van Iderstine noted the opinion of Dr. McLaughlin that claimant was in capable of returning to work. Mr. Van Iderstine opined that based on the restrictions set forth by Dr. McLaughlin, claimant was not capable of returning to work in the same or other employment.

46. Mr. Van Iderstine testified at hearing consistent with his vocational report. Mr. Van Iderstine opined that if you considered claimant's work restrictions to be a 10 pound lifting restriction as opposed to no work, claimant's restrictions would limit him to sedentary work. Mr. Van Iderstine testified that if claimant were limited to sedentary only work, it was his opinion that claimant would be unable to obtain employment as he does not have experience in an office setting or in sales that would allow for him to perform jobs within this restriction. Mr. Van Iderstine further testified that claimant would not be able to sustain this type of employment as he does not have appropriate typing skills or computer skills that would be necessary for a sedentary type job.

47. Respondents obtained a vocational evaluation from Katie Montoya to address the issue of whether claimant could obtain employment in the same or other field. Ms. Montoya reviewed claimant's medical records, interviewed claimant, and noted claimant's transferrable skills, including his degree from Colorado State University, customer relation experience and supervisory experience. Ms. Montoya noted that claimant reported he could lift up to 10 pounds, but that a repetitive lift was not good for him. Ms. Montoya noted that claimant reported he did spend a few hours per day on his tablet.

48. Ms. Montoya opined in her report that if you used Dr. McLaughlin's work restrictions that indicated claimant was capable of lifting anywhere between 10 and 30 pounds, claimant could work some sales, cashier or driving type positions.

49. Ms. Montoya testified at hearing in this matter consistent with her report. Ms. Montoya testified that Dr. McLaughlin's prior work restrictions that limited claimant to lifting between 10 and 30 pounds would allow claimant to work. Ms. Montoya testified that if we assume Dr. McLaughlin's statement when claimant was placed at MMI was correct, claimant would not be able to return to work. Ms. Montoya testified that her lifting restriction she used for formulating her opinion was based on the 10 pound lifting restriction set forth by Dr. McLaughlin prior to MMI.

50. The ALJ credits the testimony of Dr. McLaughlin and Mr. Van Iderstine and finds that claimant has established by a preponderance of the evidence that he is incapable of earning wages in the same or other employment. The ALJ notes that the work restrictions set forth by Dr. McLaughlin are the only restrictions set forth by a

physician after MMI and finds that the testimony of Mr. Van Iderstine relying on these restrictions to be credible and persuasive.

51. Respondents maintain that the claimant's work restrictions are not substantially related to the work injury. The ALJ notes that it is claimant's burden of proof to establish that the work injury is a significant causative factor of his in ability to earn wages. The ALJ finds that claimant has established that it is more probable than not that the fusion surgery performed by Dr. Clifford was reasonable and necessary to cure and relieve the claimant from the work injury. The ALJ relies on the opinions expressed by Dr. McLaughlin in his reports and testimony along with the reports from Dr. Clifford in coming to this conclusion. The ALJ further finds that claimant has established that it is more likely true than not that the work restrictions set forth by Dr. McLaughlin are related to the fusion surgery and thus, related to the work injury.

52. Claimant testified at hearing that he was receiving social security disability ("SSDI") benefits. The Final Admission of Liability in this case did not take an offset against the SSDI benefits. However, Respondents are entitled to a statutory offset of SSDI benefits against the PTD benefits awarded in this case. The ALJ therefore finds that respondents are entitled to an offset against the award of benefits in this case based on claimant's receipt of SSDI benefits.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

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

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

5. As found, claimant has proven by a preponderance of the evidence that the work injury in this case was a significant causative factor in the work restrictions set forth by Dr. McLaughlin. As found, claimant has established by a preponderance of the evidence that he is incapable of earning wages in the same or other employment as a result of his work injury. As found, claimant has established by a preponderance of the evidence that he is entitled to an award of permanent total disability benefits.

6. As found, the testimony of Dr. McLaughlin and Mr. Van Iderstine are found to be credible and persuasive in coming to this decision. As the ALJ has determined that claimant is entitled to an award of PTD benefits, the ALJ need not address the issue of overpayments raised by respondents.

7. Respondents, however, are entitled to an offset against the PTD benefits for claimant's receipt of social security disability. Insofar as respondents are claiming an offset for SSDI benefits, respondents may do so on any subsequent Final Admission of Liability that addresses the award of PTD benefits. If there is an issue with regard to the extent of the offset, the parties may raise the issue with the Court.

ORDER

It is therefore ordered:

1. Respondents' shall pay claimant permanent total disability benefits based on the admitted average weekly wage.

2. Respondents may claim an offset for SSDI benefits against the award for PTD benefits, but the amount of the offset is governed by statute and not addressed in this Order

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

Dated February 25, 2019

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

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

ISSUES

The issues raised by the evidence presented concerns: 1) Claimant's entitlement to additional medical benefits and; 2) Whether Claimant was actually placed at MMI by Dr. Dallenbach on August 7, 2018 by closing report and reiterated in his October 1, 2018 impairment rating report, thereby depriving the ALJ of jurisdiction to resolve the medical benefits question. The precise question concerning medical benefits is whether Respondent's are liable to provide and pay for a nonindustrial right hip surgery, which Claimant contends is necessary to optimize her treatment for and recovery from her compensable left knee injury.

PROCEDURAL HISTORY

The above captioned matter is before Administrative Law Judge (ALJ) Richard M. Lamphere on **RESPONDENTS' MOTION FOR RECONSIDERATION OF AN ORDER OR IN THE ALTERNATIVE, MOTION TO REOPEN THE RECORD FOR NEWLY DISCOVERED OUTCOME DETERMINATIVE EVIDENCE,** Claimant's response filed thereto and Respondents' **PETITION TO REVIEW** filed December 12, 2018. The ALJ is fully advised in the premises of Respondents' motion and the particular errors raised by Respondents in the Petition to Review having reviewed the recitation of relevant facts contained in his November 21, 2018 Order and a Prehearing Conference Order issued by Prehearing Administrative Law Judge (PALJ) Michael J. Barbo issued January 2, 2019. This Supplemental Order supplants the Findings of Fact, Conclusions of Law and Order issued by the undersigned ALJ on November 21, 2018.

Hearing in the above captioned matter was held on October 4, 2018, before Administrative Law Judge (ALJ), Richard M. Lamphere. The ALJ held the record open through October 19, 2018 to allow counsel time to submit their written argument. Respondent's subsequently filed an unopposed motion to extend the position statement deadline to October 24, 2018. The motion to extend the filing deadline for position statements was granted and the parties position statements were timely received via electronic transmission on October 24, 2018, prompting the ALJ to issue his Order on November 21, 2018.

On December 10, 2018, a prehearing conference was held before PALJ Michael J. Barbo on Claimant's motion to stay the Division Independent Medical Examination (DIME) process. Claimant's request for a prehearing conference followed Respondents' filing of a final admission of liability (FAL) on October 23, 2018, based upon a report issued by Claimant's authorized treating physician (ATP), Dr. Michael Dallenbach on October 2, 2018, placing Claimant at maximum medical improvement (MMI) on August 7, 2018. At the prehearing conference, the parties were afforded the option of submitting position statements prior to the entry of PALJ Barbo's order. Given the holidays, the deadline for the filing of position statements was set for December 28, 2018. As part of the position statements, PALJ Barbo was made aware that Dr. Dallenbach had issued

the aforementioned October 2, 2018, placing Claimant at MMI as of August 7, 2018 with impairment. Neither, Claimant nor Respondents were aware of the existence of this report prior to proceeding to hearing on October 4, 2018. PALJ Barbo also received a report from Dr. Dallenbach dated December 20, 2018, noting that he reviewed the November 21, 2018 Order of the ALJ, noting further that if he had known that responsibility for payment of a right total hip arthroplasty was going to fall to Respondents, he would not have placed Claimant at MMI.

On December 12, 2018, Respondents filed a Petition to Review the November 21, 2018 Order contending that it is "not supported by the facts or the applicable law. . . because, unbeknownst to the parties, the claimant had been declared at MMI on August 7, 2018 for her knee injury". Because Claimant was post MMI before the hearing, which only addressed her request for pre-MMI surgery, Respondents also contend that the November 21, 2018 order is contrary to law. Along with their Petition to Review, Respondents filed a motion for reconsideration or in the alternative, a motion to reopen the record for newly discovered outcome determinative evidence. The ALJ convened a status conference with the parties on December 19, 2018 in light of Respondents' filings. The ALJ requested the reports which were presented to PALJ Barbo as part of their December 28, 2018 position statements following the December 10, 2018 prehearing conference. On December 21, 2018, the ALJ received the requested materials along with Claimant's response to Respondents' motions for reconsideration and reopening the record for newly discovered outcome determinative evidence.

On January 2, 2019, PALJ Barbo issued his order following review of the parties' December 28, 2018 position statements. In his order PALJ Barbo notes:

> Pursuant to *Town of Ignacio v. Industrial Claim Appeals Office*, 70 P.3d 513 (Colo.App. 2002), if the ATP has made a determination that the claimant is at MMI, the issue cannot be further litigated unless the party disputing the issue obtains a DIME. However, 'Ignacio' also holds that a DIME is not a prerequisite to an ALJ's determination of whether the ATP has actually determined the claimant to be at MMI. *MGM Supply Co v. Industrial Claim Appeals Office*, 62 P.3d 1001 (Colo.App. 2002), *Loyda v. Greg Farthing DDS*, W.C. 4-467-593 (Jan. 21, 2005). In the view of this PALJ, the absence of a resolution by Dr. Dallenbach regarding whether other medical treatment is reasonable and necessary in this instance to "optimize" the treatment for the claimant's work-related injury, coupled with the statement that she may need a total knee arthroplasty creates an ambiguity as to whether Dr. Dallenbach actually considers the claimant to be at MMI, regardless of his later statement about Judge Lamphere's order.

PALJ Barbo held the DIME process held in abeyance and ordered the parties to return to the Colorado Springs Office of Administrative Courts (OAC) for a determination of "whether Dr. Dallenbach actually placed Claimant at MMI". After careful consideration of Respondents' motion and Petition to Review, the FAL and the additional medical records authored by Dr. Dallenbach, the ALJ concludes that, in addition to the issue surrounding Claimant's entitlement to medical benefits, a question exists as to whether

Dr. Dallenbach actually considered Claimant to be at MMI when he opined as such in an August 7, 2018 closing report and again on October 1, 2018 in his report of MMI and impairment. Because the ALJ finds the additional medical records authored by Dr. Dallenbach potentially outcome determinative, it is appropriate to reopen the record for consideration of this evidence and analyze any impact this evidence may have on the additional medical benefits previously ordered by the undersigned on November 21, 2018. Accordingly, the ALJ issues this Supplemental Order pursuant to Section 8-43-301(5), C.R.S. 2013. As noted, this order supplants the November 21, 2018 order.

FINDINGS OF FACT

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

1. Claimant suffered an injury to her left knee on November 18, 2016, when "she was loading 50 lb. mortar into a customer's vehicle. She was on the 3rd bag and turned to the left and heard a pop in her left knee." Liability for the injury was admitted and Claimant was referred for treatment.

2. Claimant was initially seen by Brian Sefcik, DO, on November 19, 2016. [Claimant Exhibit 7, p. 198]. X-rays of the knee were obtained and were interpreted as "showing minimal degenerative changes and preservation of joint spaces."

3. Claimant was referred to physical therapy (PT), which she started on December 20, 2016.

4. During the initial PT visit on December 20, 2016, besides reporting posterolateral knee pain, Claimant reported "pain beginning at anterior left hip/groin in the past 3 weeks" which she believed was related to "walking different due to pain in knee". There were findings of antalgic gait and left knee strain with "suspected involvement of the hamstring muscles".

5. Claimant was seen by Douglas Bradley, MD, at Emergicare on December 23, 2016. There was documentation of the physician records of dull ache to the left hip without associated symptoms. The left hip pain was not addressed at this visit. It was also noted that she was no longer having antalgic gait.

6. Claimant returned to Emergicare in follow-up on January 7, 2017, at which time it was noted she had "intermittent L hip pain as well with a pain intensity of 2/10 in severity."

7. Claimant underwent MRI of the left knee on February 11, 2017. The imaging revealed "mild osteoarthritis of the left knee with chondromalacia patellae type III, lateral patellofemoral spurring, lateral patellar tracking, moderate joint effusion, a "small horizontal tear on the body of the lateral meniscus" and a mild strain versus mucoid degeneration of the ACL. No Tear."

8. Claimant was seen at Emergicare on February 25, 2017. The record generated from this date of visit is devoid of any mention of complaints regarding her hips specifically. Physical examination revealed edema in the legs bilaterally, left greater than right.

9. Claimant returned to Emergicare on March 18, 2017, with continued complaints of "achy" pain in the left knee and with a new report that her "right knee and hip [were] also starting to feel sore as well". Claimant's right hip was "tender" to palpation as were both of her knees. Claimant was referred to Dr. David Walden for an orthopedic evaluation.

10. Claimant presented to the offices of Dr. Walden on April 17, 2017 where she was evaluated by Physician Assistant (PA), Rachel Cerchia. In the history of present illness provided by Claimant it is documented that she reported radiating pain "down the outside lateral portion of her left leg and now her opposite hip is bothering her." Claimant was assessed with "primary osteoarthritis of left knee." Claimant's MRI imaging was reviewed which, according to PA Cerchia, demonstrated osteoarthritic changes in the patellofemoral joint and a meniscal tear. PA Cerchia recommended MRI review with Dr. Walden.

11. Dr. Walden evaluated Claimant on April 25, 2017, after which he recommended arthroscopic surgery of the left knee. Dr. Walden noted: "I talked to her about a possible arthroscopic partial lateral meniscectomy versus repair. She understands that arthritis is not curable by arthroscopy." It was also noted motion at the right hip was painful and she had a slight antalgic gait.

12. Claimant underwent a partial lateral meniscectomy and chondroplasty of both the patellofemoral joint and medial femoral condyle with Dr. Walden on June 28, 2017. She was referred to post-surgical PT.

13. Claimant returned to Emergicare on August 17, 2017, with complaints of constant sharp pain affecting her pain along with an associated "locking" sensation in the hip. An injection of lidocaine mixed with 20 mg of Decadron was administered to the right hip (bursa) and SI joint.

14. Claimant was seen at Emergicare for follow-up on her left knee on September 7, 2017. During this visit, Claimant reported that her knee was not feeling "good" and her condition was otherwise unchanged since her last appointment. She also reported that her "gait [was] still off" along with continued pain to her right hip. Physical examination revealed an antalgic gait and tenderness over the right hip. Claimant was assessed with, among other diagnoses, sprain of the right hip for which an MRI was ordered.

15. The aforementioned MRI was performed on September 23, 2017. The MRI demonstrated the following right hip findings: Severe right hip degeneration; large hip effusion; marginal osteophytes; maceration of the labrum and bilateral trochanteric bursitis

16. Claimant returned to Dr. Walden's care on October 3, 2017, during which appointment Dr. Walden documented the following: ". . . she reports that her hip is become (sic) significantly worse (no pain prior to injury) and she believes that it is due to her left knee". Dr. Walden noted that Claimant's MRI "showed severe right hip degeneration, cam femoral acetabular impingement and trochanteric bursitis". Dr. Walden also noted that Claimant felt as though an altered gait "exacerbated her right hip". Finally, Dr. Walden stated:

> Although her knee is somewhat better, she is still getting some muscular pain around the leg. Hopefully these will improve with independent exercises but it is difficult to know… At this point, I would recommend that the patient utilize independent exercises for stretching and strengthening and over the counter remedies for her left knee. No further orthopedic care is indicated at this point with regard to the left knee. She can be placed at maximum medical improvement after her workup is complete with regard to her additional problems.

17. Based upon the evidence presented, the ALJ finds that Dr. Walden's mention that Claimant could be placed at MMI after workup of her "additional problems" is, more probably than not, a reference to her right hip condition.

18. The claimant was referred from Emergicare to Scott Primack, DO, who saw her on November 10, 2017, for a comprehensive consultation of her left knee pain and right hip discomfort. Upon completion of his workup, Dr. Primack stated:

> This is a very complicated case. There are work-related issues and non-work-related issues. First and foremost, from a causality prospective, as I reviewed with Ms. H_____ [Claimant], her right hip OA is not work-related. This is due to the mechanism of injury, the clinical examination, the imaging studies, and the pathophysiology of osteoarthritis of the hip. Therefore, treatment would not be considered work-related. She has been through a hip injection, but this did not give her significant pain control. This would make sense; in that her OA is rather severe. Her final common pathway at right hip would be a hip replacement. However, as I reviewed with Mr. and Mrs. H_____ [Claimant], this would not be considered work-related.
>
> In reference to the work-related left hip[1] problem, the claimant's options include an impairment rating versus viscosupplementation versus regeneration options such as mesenchymal stem cells or plasma—rich protein. A knee replacement would not be considered work-related given the

[1] The ALJ finds that reference to "left hip" in the note is likely an error and that Dr. Primack probably meant to reference Claimant's "work-related left knee problem.

> mechanism of injury and degree of degenerative changes. The patient will weigh out her options for the left knee. . . . Another option would be for her to undergo her non-work-related hip replacement and see what that "does to her left knee".

19. Claimant was evaluated by Dr. Nakamura on February 23, 2018. X-rays of the right hip showed "advanced degenerative changes of the right hip with bone—on bone arthritis." After evaluation, Dr. Nakamura recommended a right total hip replacement "at some point" and "noted that she could also have a right hip steroid injection." He recommended the arthroplasty. At the left knee, he noted that she had degenerative joint disease and some point would need a total knee replacement. He added, "At this time, her hip is much worse than her knee. I recommend she hold off on treatment for her knee symptoms. She is going to have some stem cell therapy done in Denver, and I recommend that she continue with stem cell therapy in Denver."

20. Dr. Primack authored a letter concerning Claimant's condition on April 30, 2018. In his April 30, 2018 letter, Dr. Primack notes that Claimant suffers from a non-work-related right hip problem secondary to "osteoarthritis". He went on to state, "As a rehabilitation position, wanting to optimize Ms. H_____ [Claimant]'s recovery, I would recommend the right hip arthroplasty, gets done first." He goes on to state, "Once she recovers, we can talk about the care and treatment for her work-related left knee injury. This may include regenerative medicine as option".

21. Dr. Nakamura issued a similar letter on May 9, 2018, which stated:

> It is my medical opinion, that the patient, Erma H_____ [Claimant], date of birth 4-24-1967, should have a right total hip arthroplasty. From a rehabilitation position, we want to optimize Ms. H_____ [Claimant]'s recovery process. I recommend that she have a right hip arthroplasty procedure first, before addressing the left knee-work-injury issue. The patient's non-work-related right hip osteoarthritis is significant enough to be addressed initially. After patient has recovered from the hip procedure, we can discuss care and treatment for her work-related left knee injury.

22. Respondents requested an independent medical examination (IME) with Dr. Eric Ridings. Dr. Ridings performed his IME on August 27, 2018, and he noted that "[Claimant] complained that her right hip pain is much more severe than her left knee pain and is progressively worsening". He agreed with Dr. Primack and Dr. Nakamura that Claimant's right hip pain is due to non-work-related severe end stage osteoarthritis and concurred that the appropriate treatment for that would be a right hip replacement surgery.

23. Dr. Ridings concluded that Claimant's left knee osteoarthritis was not caused, aggravated or accelerated by her meniscal injury and that the severity of her right hip arthritis is a contributor to the severity of her left knee complaints. Because the right

hip arthritis is unrelated to Claimant's work duties and is, according to Dr. Ridings, a contributor to the severity of the osteoarthritic complaints in the left knee, he concluded that "any and all treatment directed toward the osteoarthritis of the left knee is also, therefore, not work related. Accordingly, Dr. Ridings concluded that any request for additional injection therapy is unrelated to this claim and should be performed outside of the workers' compensation system.

24. While Dr. Ridings provided a thorough analysis concerning the relatedness of Claimant's need for additional left knee treatment, to the original injury this case, the ALJ finds that his report does not address the precise medical question presented here. Indeed, Dr. Ridings report is devoid of any analysis concerning whether Claimant should be afforded a right hip arthroplasty on the theory that it is necessary to optimize the treatment of and recovery from her work-related left knee injury. Rather, Respondents argue that because Dr. Ridings opined that the only treatment recommended for the left knee relates to Claimant's personal degenerative condition, there is no causal connection between her need for the right hip surgery and her admitted left knee injury nor is there a medical basis to address Claimant's right hip condition before placing her at MMI for her left knee condition. Accordingly, Respondents urge the ALJ to deny the requested right hip arthroplasty.

25. On November 21, 2018, the ALJ rejected the opinions of Dr. Ridings to find that the Claimant was not currently at MMI and remained a candidate for additional treatment designed to cure and relieve her of ongoing injury related pain and dysfunction. Moreover, the evidence presented persuaded the ALJ that Dr. Primack and Dr. Nakamura were of the opinion that the efficacy of this treatment and Claimant's recovery from her knee injury could not be optimized without first treating Claimant's right hip condition. Consequently, while Claimant's right hip arthritic condition is non-work-related in origin, the ALJ was convinced that her right hip condition must be addressed surgically, as ancillary to the work-related injury in this case, in order for her to achieve optimum treatment for and recovery from her compensable left knee injury. Accordingly, the ALJ found Respondents liable for the recommended right hip arthroplasty.

26. As noted above, on December 12, 2018 Respondents' counsel filed their Motion for Reconsideration or Order or in the Alternative, Motion to Reopen the Record for Newly Discovered Outcome Determinative Evidence along with a Petition to Review. The ALJ finds Respondents' motion for inclusion of Dr. Dallenbach's medical reports from August 7, 2018, October 1, 2018 and December 20, 2018 to constitute a request to reopen the record for the submission of additional evidence. After careful consideration of the motion, the ALJ finds it meritorious for the following reasons: First, the ALJ agrees with Respondents that the aforementioned reports constitute relevant evidence, which could not have been produced/presented at the October 4, 2018 and, second, the reports address a material issue in the case, namely whether the ALJ has jurisdiction to resolve the medical benefits issue in question. Accordingly, the ALJ finds the reports have the potential to be "outcome determinative" and herby grants Respondents' motion to reopen the record in this case. Consequently, the August 7, 2018 "closing report", the October 1, 2018 report of MMI and permanent impairment and the December 20, 2018 report of Dr. Dallenbach are considered evidence.

27. Having admitted the aforementioned records into evidence, the ALJ enters the following supplemental factual findings:

a. Regardless of Dr. Ridings opinions, the additional records submitted by Respondents as part of their motion for reconsideration support a finding that Dr. Dallenbach placed Claimant at MMI on August 7, 2018. Indeed, the "closing" report attached as part of "Exhibit A" to Respondents' motion provides that Claimant was evaluated on August 7, 2018, at which time Dr. Dallenbach placed her at MMI indicating that a report of permanent partial impairment (PPI) was due on August 21, 2018. Although Dr. Dallenbach noted that the PPI report was due on August 21, 2018, he delayed in preparing the report until October 1, 2018. Based upon the evidence presented at hearing and the statements of counsel at the post hearing status conference, the existence of this report was unknown at the time of the October 4, 2018 hearing. Respondents did not receive Dr. Dallenbach's October 1, 2018 report until October 23, 2018, well after the hearing.

b. In his October 1, 2018 report, Dr. Dallenbach placed Claimant at MMI noting that his analysis was "based upon the currently available information within a reasonable degree of medical probability" including, the "history given by [Claimant]; the physical findings; the medical records and tests". He also opined that Claimant would need maintenance treatment including a possible left knee arthroplasty as maintenance care "inasmuch as her work-related injury, within a reasonable degree of medical probability led to a significant aggravation of a pre-existing previously asymptomatic condition".

c. Careful review of Dr. Dallenbach's report of MMI and impairment supports a finding that he had no reservations about placing Claimant at MMI as of August 7, 2018. The suggestion that Dr. Dallenbach simply placed Claimant at MMI because the parties were litigating the relatedness of Claimant's need for right hip treatment to the left knee injury and because this treatment, including surgery was not being covered by workers' compensation is speculative and unpersuasive. Based upon the report presented, the ALJ finds that Dr. Dallenbach unequivocally placed Claimant at MMI after his August 7, 2018 evaluation without any opinion regarding her need for right hip treatment related to the left knee injury. Indeed, Dr. Dallenbach was without an opinion regarding Claimant's need for right hip treatment related to the left knee injury until December 20, 2018 when the issue was brought to his attention by Claimant. The ALJ interprets Dr. Dallenbach's December 20, 2018 report to indicate had he known that the ALJ was going to find Respondents liable for the recommended right hip surgery, he would not have placed Claimant at MMI as of August 7, 2018. This subsequent opinion fails to convince the ALJ that Dr. Dallenbach did not opine that Claimant was at MMI as of August 7, 2018, as outlined in M164 form and the October 1, 2018 report of MMI and impairment attached collectively to Respondents' motion as Exhibit A.

d. Although the ALJ rejects Dr. Ridings opinions as unconvincing, the new outcome determinative evidence, i.e. Dr. Dallenbach's August 7, 2018, October 1, 2018 and December 20, 2018 reports, presented post hearing, persuade the ALJ that he actually placed Claimant at MMI prior to the October 4, 2018 hearing. Accordingly, the ALJ finds that, lacking a DIME, he has no jurisdiction to resolve the issue of the relatedness of Claimant's need for additional right hip treatment to her left knee injury. Claimant must avail herself to the DIME process currently being held in abeyance pending the issuance of this order.

CONCLUSIONS OF LAW

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

Respondents' Motion for Submission of Post-Hearing Evidence

A. The ALJ has discretion whether to permit the admission of post-hearing evidence. *IPMC v. Industrial Claim Appeals Office*, 753 P.2d 803 (Colo. App. 1988). In deciding whether to receive additional evidence after a party has rested his/her case, the ALJ should consider whether the evidence could have been obtained and presented at the hearing through the exercise of due diligence. *Aspen Skiing Co. v. Peer*, 804 P.2d 166 (Colo. 1991); Kennedy v. Bailey, 169 Colo. 43, 453 P.2d 808 (1969). Further, the ALJ should consider whether the evidence involves a material issue and; and whether it has the potential to be outcome determinative. *See Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691 (Colo. App. 2000); *Potomac Insurance Co. v. Industrial Commission*, 744 P.2d 765 (Colo. App. 1987). The ALJ should consider these factors and balance them against the competing interests, i.e. the expense and inconvenience, of the party opposing receipt of the additional evidence so as to guard against the potential for injustice arising from giving finality to an erroneous result. *IPMC v. Industrial Claim Appeals Office, supra; Renz v. Larimer County School District Poudre R-1*, 924 P.2d 1177 (Colo. App. 1996)(reopening authority is evidence of legislative policy that goal of achieving fair and just result overrides litigants' interests in finality); *Gurule v. Board of Developmentally Disabled*, W.C. No. 3-595-093 (February 9, 1995). In this case, the balance for admission of the additional medical records tips in favor of Respondents as the evidence likely could not have been previously discovered and presented at hearing through the exercise of due diligence since Dr. Dallenbach authored the MMI and impairment rating report giving rise to the existence of the August 7, 2018 MMI report on October 1, 2018, three days prior to hearing. More importantly, the new evidence addresses a material issue in the case, specifically the ALJ's jurisdiction to resolve the issues presented for determination. As such, the ALJ concludes that new evidence is potentially outcome determinative. Consequently, Claimant's interest in finality is outweighed by the injustice, which may result from giving final effect to an erroneous result. For these reasons, the ALJ concludes that Respondents' motion is meritorious and is, therefore GRANTED.

Supplemental Order & Other General Legal Principles

B. Section 8-43-301(5) provides that in ruling on a petition to review, the ALJ may issue a supplemental order limited to the "matters raised in the petition to review, and, as to those matters, . . . may amend or alter the original order or set the matter for further hearing." Here the ALJ concludes that a Supplemental Order is necessary to address Respondents' motions and the assertion that the ALJ erred as a matter of law because the November 21, 2018 Order failed to address the jurisdictional question raised by Dr. Dallenbach's declaration of MMI in this case.

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

D. Assessing the weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). When considered in its totality, the ALJ concludes that the evidence in this case supports a reasonable inference/conclusion that Dr. Dallenbach placed Claimant at MMI on August 7, 2018 and deferred the preparation of his impairment rating report to August 21, 2018. Unfortunately, Dr. Dallenbach failed to finalize this report until October 1, 2018, three days prior to hearing in this case.

Claimants' Request for Additional Medical Benefits

E. Given the procedural posture of the claim, the ALJ concludes that he does not have jurisdiction to resolve the question regarding Claimant's entitlement to additional medical benefits. In concluding as much, the ALJ finds the case of *May B. McCormick v. Exempla Healthcare*, W.C. No. 4-594-683 (ICAO January 27, 2006) instructive. In *McCormick*, the Panel held that in the absence of a completed DIME, an ALJ lacks jurisdiction to award or deny medical benefits to cure and relieve a claimant's condition after he/she has been placed at MMI. In reaching this conclusion the Panel noted:

> Pursuant to § 8-42-107(8)(b)(I), C.R.S. 2005, an authorized treating physician shall make the initial determination concerning the date of MMI. Once an authorized treating physician makes a determination of MMI, the termination of medical care is triggered and the ALJ lacks jurisdiction to

conduct a hearing concerning the accuracy of the authorized treating physician's determination until a DIME is conducted. §8-42-107(8)(b)(III), C.R.S. 2005; *Story v. Industrial Claim Appeals Office,* 910 P.2d 80 (Colo. App. 1995). The Colorado Supreme Court has noted that the DIME procedure is "the only way for an injured worker to challenge the treating physician's findings -- including MMI, *the availability of post-MMI treatment*, degree of non-scheduled impairments, and whether the impairment was caused by an on-the-job injury...." *Whiteside v. Smith*, 67 P.3d 1240, 1246 (Colo. 2003) (emphasis added).

* * *

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

This result is grounded in the principle that a treating physician's finding of MMI necessarily reflects the physician's determination that no further treatment is reasonably expected to improve any of the *compensable components* of the injury, and the authorized treating physician's opinion on the cause of the claimant's condition is inherent to the physician's determination of MMI. *See Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App.1998) We have previously stated that "[d]etermining MMI necessarily requires a physician to ascertain the cause or causes of the claimant's condition in order to decide whether the claimant warrants additional treatment for any work-related problem. Consequently, the issues of whether all work-related conditions are stable and do not require additional treatment are an inherent part of the DIME process...." *Ayala v. Conagra Beef Company*, W.C. No. 4-579-880 (July 22, 2004).

F. Because the current version of the statue in question has not changed and because Dr. Dallenbach is an authorized treating provider (ATP) who effectively placed Claimant at MMI, the principals announced by the Panel in *McCormick* apply to the facts of this case. Consequently, the ALJ concludes that he does not have jurisdiction to resolve questions regarding the relatedness of Claimant need for right hip surgery to her admitted left knee injury or for that matter the need for additional medical treatment to

cure and relieve her of any ongoing symptoms related to her left knee injury until completion of the DIME he has requested.

ORDER

It is therefore ordered that:

1. Questions regarding the relatedness of Claimant need for right hip surgery to her left knee injury and in general, her entitlement to additional medical treatment benefits are reserved for future determination after completion of the DIME process currently being held in abeyance as the ALJ does not have jurisdiction to resolve these issues.

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

DATED: February 25, 2019

/s/ Richard M. Lamphere

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

ISSUES

- Whether claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment with employer?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that the medical treatment he received was provided by a physician authorized to treat claimant for his injury?

- Whether claimant has proven by a preponderance of the evidence that the injuries he sustained in a motor vehicle accident on March 28, 2018 occurred in the quasi scope of his employment with employer?

- If claimant has proven a compensable injury, whether claimant has established by a preponderance of the evidence that he is entitled to temporary total disability benefits for the period of December 22, 2017 to April 20, 2018?

- If claimant has proven a compensable injury, whether respondents have proven by a preponderance of the evidence that claimant sustained an intervening injury as of March 28, 2018 that severed their liability for medical treatment?

- The parties stipulated to an average weekly wage ("AWW") of $1,647.81 as of the date of injury.

- The parties stipulated that if the claim is found compensable, claimant's AWW would increase by $248.02 as of April 1, 2018 due to the cost of claimant's COBRA benefits, for an AWW of $1,895.83.

FINDINGS OF FACT

1. Claimant was employed with employer as a derrick hand. Claimant was working on a drilling operation in Wyoming. Claimant's job duties included latching and pulling drilling pipes. Claimant began working for employer in March, 2017. Claimant's shifts while working for employer would last from 6:00 p.m. until 6:00 a.m. Claimant testified that on December 22, 2017, he was tripping pipe for employer when a board came out after the elevator hit the board causing the board to flip up about sixty degrees and strike claimant. Claimant testified he had more weight on his left side and his body jarred going down with the extension board struck him.

2. Claimant testified he reported the incident to Chris, the driller, and advised him that it hurt pretty bad when the extension board struck him. Claimant did not fill out paper work to report an injury at that time, however.

3. Claimant testified that when he went to work on December 23, 2017, he had a burning sensation on his left side and was unable to continue to latch up the drill pipe. Claimant testified he told Jamie, the night rig manager, in the dog house. Claimant testified that Jamie had him watch the mud system while Trent, a co-worker, finished latching up the drill pipe. Claimant testified that he did not request medical treatment on December 23, 2017 and instead just tried to tough it out.

4. Claimant testified that there were two times that he reported pain involving his work to his supervisor. The first accorded after tripping pipe on December 22, 2017. Claimant testified he reported the pain to his supervisor, but returned to work the next day and continued to attempt to perform his work. Claimant testified that after attempting to perform his job on December 23, 2017, and concluding that he could not perform his work, he reported again to his supervisor that he was experiencing pain and was placed on light duty by employer.

5. Claimant testified he reported to work on December 24, 2017 and reported his condition to the rig manager. Claimant testified he was put on light duty by employer. Claimant testified his light duty required him to watch the mud system. Claimant testified his hitch was scheduled to end on December 26, 2017 and he worked light duty on December 24 and December 25, 2017. Claimant testified he got into an argument with Mr. J_____, a co-worker in the early morning of December 25, 2017. Claimant testified that Mr. J_____ came into the mud house and asked claimant for help on the rig. Claimant testified he told Mr. J_____ that he could not help him because he was mixing chemicals and Mr. J_____ went and got another employee. Claimant testified Mr. J_____ and the other employee returned and when claimant informed them that he couldn't help them because he was on light duty due to an injury, they inquired as to why he had not reported the injury. Claimant testified that he agreed and then filled out an IADC form reporting the injury.

6. Mr. J_____ testified at hearing somewhat consistent with claimant's testimony. Mr. J_____ testified he confronted claimant because he did not believe claimant was pulling his weight. Mr. J_____ testified during the confrontation claimant got upset and explained that he was trying not to report the incident, but eventually said and expletive and explained that he was just going to report the injury. Mr. J_____ testified that after the confrontation, he tried to apologize to claimant, but claimant remained confrontational.

7. Mr. M_____testified at hearing for respondents. Mr. M_____testified he was claimant's supervisor and testified that all injuries should be reported to him. Mr. M_____testified that claimant reported soreness in his arm, but could not recall claimant's exact words, or the day he reported the soreness. Mr. M_____testified he asked claimant if he was injured and claimant said no. Mr. M_____testified that if claimant reported to him that claimant had been injured, Mr. M_____would have reported the injury to Mr. McKague's supervisor. Mr. M_____testified that if an employee reports that he is just sore, Mr. M_____can modify the employee's job duties while the employee is sore. Mr. M_____testified that in claimant's case, he modified

claimant's work and instructed claimant to stay off the boards. Claimant was instructed to clean and assist other co-workers as needed. Mr. M_____testified that after claimant reported pain and was assigned light duty work, claimant was not allowed to go back on the boards to his usual job. Mr. M_____testified it is the employer's policy that injured workers are not allowed to return to work until being released by a physician.

8. Mr. M_____testified that he became aware of an argument between claimant and Mr. J_____ and later found out that claimant had signed out as injured. Mr. M_____testified claimant appeared agitated when Mr. M_____spoke to him. Mr. M_____testified claimant's argument with Mr. J_____ was a couple of days after he reported to Mr. M_____that he was sore.

9. Claimant testified he filled out a report for Wyoming workers' compensation on December 26, 2017 after his hitch ended. Subsequently, a First Report of Injury for Colorado was filled out by the insurer on January 11, 2018.

10. Claimant testified he decided to seek medical treatment because he was in pain and knew he was hurt. Claimant testified he inquired with Aubrey, the safety supervisor, as to whether there was a doctor he should go to, but he was not provided with a list of physicians by employer.

11. Claimant testified he returned to Colorado following his hitch and sought treatment with St. Mary's Occupational Medicine on December 28, 2017. According to the medical records, claimant reported on the new patient intake form that the injury occurred when he was on his knees latching up pipe at a bad angle with both arms squeezing together when he felt a sharp pain in his left shoulder and bicep. Claimant reported his current pain included the left side of his neck, left shoulder, left bicep and left tricep. Mr. Harkreader, a nurse practitioner ("NP") for Dr. Stagg, noted claimant's accident history including that he was down on one knee with one leg extended in a weird position and using both arms to close the elevators around the pipe, when he had an onset of pain in his left side neck and left bicep down to his elbow. NP Harkreader performed a physical examination and diagnosed claimant with a cervical strain and left distal biceps strain. NP Harkreader recommended an x-ray of the left should and cervical spine and provided claimant with work restrictions that included no lifting over five (5) pounds.

12. Claimant returned to NP Harkreader on January 9, 2018. Claimant testified he told NP Harkreader that he was going back up to Wyoming for his next hitch. According to the medical records, NP Harkreader noted claimant complained of pain of 5 to 6 out of 10 and reported he had not made any progress. NP Harkreader mentions in his report that claimant is supposed to go back to work that night in Pinedale, Wyoming. NP Harkreader diagnosed claimant with left shoulder pain consistent with a strain, left elbow bicep strain with a mild tennis elbow/lateral epicondylitis, possible left upper extremity cervical radiculopathy and a hypoesthesia of the left heel with a decreased reflex on the left. NP Harkreader noted that radiographs were unremarkable,

but recommended a magnetic resonance image ("MRI") of the cervical spine and referred claimant to Dr. Vance for evaluation and treatment. Claimant's work restrictions continued to be set at no lifting over 5 pounds.

13. Claimant testified he returned to work on January 10, 2018 and was told to talk to "Andy" when he got back to work. Claimant testified he expected to be provided with light duty work when he returned for his next hitch. Claimant testified he was told by Andy that he could not go back to work without a full release from his doctor.

14. Claimant was examined by Dr. Vance on January 29, 2018. Dr. Vance noted claimant was reporting symptoms in his cervical area, left shoulder, left arm and left elbow. Dr. Vance performed a physical examination and noted that his left elbow was consistent with lateral epicondylitis. Dr. Vance provided claimant with a steroid injection into his left elbow and recommended he return for follow up in six weeks.

15. Claimant was evaluated by Dr. Stagg on February 14, 2018. Dr. Stagg noted claimant's accident history and recommended claimant proceed with the MRI of the cervical spine and lumbar spine. Dr. Stagg noted claimant was complaining of back pain and numbness into the right heel area. Dr. Stagg continued claimant with modified duty that included no lifting over 5-10 pounds.

16. Claimant returned to Dr. Stagg on March 7, 2018. Dr. Stagg noted claimant reported doing fairly well, but was complaining of some pain in his left shoulder. Dr. Stagg noted that the numbness had improved quite dramatically and claimant's cervical spine was not nearly as significant as it was previously. Dr. Stagg recommended claimant continue with his physical therapy and exercises. Dr. Stagg increased claimant's work restrictions to no lifting over 25 pounds.

17. Claimant returned to Dr. Vance on March 19, 2018. Dr. Vance noted that claimant continued to complain of symptoms in his cervical area, left shoulder and left elbow. Dr. Vance noted that his physical examination was similar to his prior exam and recommended claimant have a steroid injection in his shoulder and a Platelet Rich Plasma injection for his lateral epicondylitis.

18. Respondents arranged for an independent medical examination ("IME") of claimant on March 28, 2018 with Dr. Striplin in Thornton, Colorado. Dr. Striplin reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME. Dr. Stiplin noted claimant was a poor historian with regard to specific dates and medical providers. Dr. Striplin noted that claimant reported that while at work when he was leaning out from the platform to position the pipe in the elevator, which was ascending, the elevator struck the platform and claimant's left side was "jarred". Dr. Striplin noted that the next day, claimant was back on the rig attempting to latch a drill pipe and had to kneel on his right knee and forcefully close the elevator around the pipe. Claimant reported he felt pain in his left biceps, left shoulder, left neck and low back. Dr. Striplin noted that physical examination revealed no tenderness over the left medial or lateral epicondyle and no pain was elicited with forced left wrist flexion or extension. Dr. Striplin opined in his

report that claimant had no objective pathology that was related to his work injury. Dr. Striplin opined that claimant's mechanism of injury was consistent with a muscular strain of the left upper extremity which, Dr. Striplin opined required no further treatment. Dr. Striplin further opined that claimant was at maximum medical improvement as of March 30, 2018 with no permanent impairment related to the injury.

19. Claimant testified that while driving from the IME to his home in Fruita, Colorado on March 28, 2018, claimant was involved in a motor vehicle accident ("MVA"). Claimant testified the truck in front of him stopped causing him to stop his vehicle, and the car behind him rear ended claimant. Claimant provided pictures of his vehicle and the vehicle that struck him at the hearing. Claimant testified that the MVA occurred at approximately 4:40 p.m.

20. Claimant returned to Dr. Stagg on March 30, 2018. Dr. Stagg noted claimant reported some improvement with his symptoms and released claimant to return to work full duty. Claimant testified he did not mention the MVA to Dr. Stagg as this examination.

21. Claimant testified that he contacted employer on April 2, 2018 regarding returning to work. Claimant testified he contacted Rhonda inquiring about what he needed to do to return to work and was told to contact Lisa. Claimant testified he attempted to contact Lisa, but did not have his calls returned. Claimant testified he then returned to Dr. Stagg and was again placed on restrictions.

22. According to the medical records, claimant returned to Dr. Stagg on April 12, 2018. Claimant reported to Dr. Stagg that he had been involved in an MVA during this examination. Dr. Stagg noted claimant did not mention the MVA at the previous visit and reported that claimant indicated it was due to a combination of his not hurting as bad and that he really needed and wanted to get back to work. Dr. Stagg noted decreased range of motion in his cervical spine and tenderness to palpation over his paraspinal muscles. Dr. Stagg recommended x-rays of the cervical, thoracic and lumbar spine due to claimant's complaints of increased pain in his entire back following the MVA.

23. Claimant returned to Dr. Stagg on May 3, 2018. Dr. Stagg noted claimant had to move to the Wyoming area and was still having pain in his neck and low back with occasional numbness into his lower extremity. Dr. Stagg recommended a short course of physical therapy and provided claimant with work restrictions that included no lifting over 40 pounds.

24. Dr. Stagg testified by deposition in this matter. Dr. Stagg testified that based on claimant's description of the injury, it was his impression that claimant's left shoulder was pulled up and possibly back, which was a mechanism of injury that could injure the rotator cuff. Dr. Stagg testified that claimant returned for evaluation on April 12, 2018 which was earlier than when he was scheduled to return. Dr. Stagg testified that claimant was complaining of an increase in symptoms related to an MVA. Dr. Stagg testified that on the May 3, 2018 visit, claimant was complaining of tenderness

over the right trapezoid. Dr. Stagg testified that this was on the opposite side of claimant's prior complaints and represented a new complaint. Dr. Stagg testified that the reported symptoms claimant had were consistent with the MVA.

25. Dr. Stagg testified that he believed that claimant's neck pain was related to his mechanism of injury with employer. Dr. Stagg testified that he also believed claimant's back pain could be related to his work injury. Dr. Stagg testified that he was not clear as to what was causing claimant's left heel numbness, but felt the MRI's that he had requested would help determine what was causing claimant's symptoms. Dr. Stagg opined that claimant's complaints were related to the December 2017 work injury and the motor vehicle accident. Dr. Stagg noted that the x-rays performed after the MVA showed no acute findings for the lumbar spine, thoracic spine and cervical spine.

26. Dr. Stagg testified that when claimant initially presented to his office, there was no documentation that claimant was complaining of low back pain or lingering numbness into the hand.

27. Claimant returned to Dr. Striplin for another IME on June 5, 2018. Dr. Striplin noted claimant was in an MVA following the prior IME. Dr. Striplin reviewed Dr. Stagg's note from March 30, 2018 that did not mention the MVA. Dr. Striplin opined that the MVA on March 28, 2018 did not produce an objective injury and that the onset of symptoms claimant reported on April 5, 2018 was not related to the accident, but were more consistent with claimant's fluctuating symptoms following the incident at work on December 23, 2017.

28. Dr. Striplin testified by deposition in this matter consistent with his IME reports. Dr. Striplin testified that claimant's presentation on March 28, 2018 provided no objective abnormal findings. Dr. Striplin testified claimant presented with normal range of motion of the cervical spine, normal range of motion of the left shoulder and neurological examination was normal except for light touch diminution over the left heel.

29. Dr. Striplin opined that claimant had a strain of the shoulder that could resolve with conservative medical treatment. Dr. Striplin further opined that epicondylitis could be a temporary issue that could resolve without surgery. Dr. Striplin testified that when he evaluated claimant on March 28, 2018, claimant did not appear to have any ongoing problem with the epicondylitis based on the physical examination.

30. Dr. Striplin testified that claimant reported that on December 22, 2017, he was jarred. Dr. Striplin testified that he would not expect the jarring to cause any problems to any body parts of any significance. Dr. Striplin testified that it was his opinion that claimant's complaints of left heel numbness were not related to the December incident as claimant did not allege any injury to his lumbar spine. Dr. Striplin testified it was his opinion that claimant's left heel symtpoms were related to claimant's prior low back injury for which claimant received medical treatment between 2004 and 2006.

31. Dr. Striplin testified that it was his opinion that claimant did not sustain a rotator cuff tear as a result of the December incident. Dr. Striplin testified that when he evaluated claimant, claimant presented with minimal symptoms in his shoulder and normal range of motion.

32. Dr. Striplin testified that prior to his June 5, 2018 IME, he reviewed additional medical records. Dr. Striplin testified claimant reported following his IME he was heading home and was rear ended by a vehicle traveling approximately 35 miles per hour. Dr. Striplin noted that Dr. Stagg's medical records from March 30, 2018 do not document the MVA having occurred. Dr. Striplin also notes that Dr. Stagg at that time released claimant to return to work without restrictions. Dr. Striplin opined that claimant does not need additional medical treatment related to the incident of December 2017 and does not need additional medical treatment related to the March 28, 2018 MVA.

33. Claimant entered into evidence at hearing a video that showed the type of work claimant was performing at the time of his alleged injury. The video is not conclusive evidence that an injury occurred in this case, but does provide a depiction of the type of work claimant was performing for employer.

34. The ALJ credits claimant's testimony at hearing along with the medical reports from PA Harkreader and Dr. Stagg along with the testimony of Dr. Stagg and finds that claimant has established the he sustained a compensable injury arising out of and in the course of his employment with employer on December 22, 2017. The ALJ credits claimant's testimony that he reported the injury to his employer and notes that this testimony is corroborated by Mr. J_____ and Mr. M_____who confirmed that claimant reported the incident to employer and was provided with light duty work for his shift. It was claimant's inability to perform his regular job that led to the disagreement with Mr. J_____, and Mr. J_____ confirmed that he was later informed that claimant was provided with modified work based on the reported incident.

35. The ALJ notes that there was testimony regarding claimant filling out an IADC form that reported he was injured on the job days after the incident and following his argument with Mr. J_____. The ALJ finds that the delay in filling out this form and the testimony regarding claimant being at the computer following the argument with Mr. J_____ is immaterial to the determination of whether claimant sustained a compensable injury arising out of and in the course of his employment with employer.

36. The ALJ credits the medical records from St. Mary's Occupational Medicine and Dr. Vance and finds that claimant has demonstrated that it is more probable than not that the medical treatment claimant received following his work injury was reasonable and necessary to cure and relieve claimant from the effects of the work injury. The ALJ credits claimant's testimony at hearing as being consistent with the medical records entered into evidence in this case and finds that claimant has established the reasonableness and necessity of the medical treatment he received in this case. The ALJ notes that claimant complained of left heel numbness consistently following the December 22, 2017 work injury and finds claimant has established that it is

more probable than not that the treatment for the heel injury, including the lumbar spine MRI is related to claimant's December 22, 2017 work injury.

37. With regard to the issue of authorization of medical treatment, the ALJ credits claimant's testimony that employer did not refer claimant to a specific provider after he reported to employer that he had been injured at work. The ALJ further notes that employer voluntarily provided claimant with modified duty for the remained of his hitch and reasonably should have known that claimant may need medical treatment for his injury. The ALJ therefore determines that claimant is afforded the opportunity to select his choice of provider and St. Mary's Occupational Medicine and the referrals from those providers, including Dr. Vance, are thereby authorized.

38. Claimant argues that the MVA he was in on March 28, 2018 resulted in injuries that are compensable under the quasi-course of employment doctrine. Respondents conversely argue that the MVA represents an intervening event that severs their liability for ongoing medical treatment. The ALJ finds that the MVA in this case did not result in any injury to claimant, and is therefore not compensable.

39. Following claimant's MVA, claimant returned to Dr. Stagg on March 30, 2018. No mention of the MVA was made during this visit. Dr. Stagg released claimant to return to work without restrictions. Claimant returned on April 12 and complained of low back and neck pain after the MVA. The ALJ notes that claimant did not complain of any significant low back pain related to his December 2017 injury until after the March 28, 2018 MVA. However, claimant was complaining of left heel pain prior to the MVA, which the ALJ finds to be a compensable component of the December 22, 2017 work injury.

40. The ALJ credits the testimony of Dr. Stagg and Dr. Striplin and finds that the claimant's ongoing complaints of cervical spine, shoulder and left heel symptoms after the March 28, 2018 MVA are related to his December 22, 2017 work injury. The ALJ credits the medical records in coming to this finding and specifically notes that claimant's recommended medical treatment did not significantly change following the MVA. Specifically, Dr. Stagg had recommended a cervical and lumbar MRI as of February 14, 2018 and continued to recommend this course of treatment after the MVA. Moreover, claimant was complaining of low back pain as of February 14, 2018 and continued to complain of low back pain after the MVA. Lastly, the ALJ credits claimant's testimony that his primary focus at the March 30, 2018 appointment was to receive a full release to return to work to allow him to return to employer. This testimony is corroborated by the testimony of Dr. Stagg who confirmed that claimant had requested a release to return to work at the March 30, 2018 appointment.

41. Notably, while respondents argue that the MVA in this case constitutes an intervening injury, the ALJ finds that the MVA was not significant enough to cause an intervening injury. With regard to the medical restrictions that were put into place by Dr. Stagg on April 12, 2018, the ALJ finds that these relate to the December 22, 2017 work injury and not the MVA. In coming to this finding, the ALJ credits the opinions of Dr. Striplin who testified that claimant did not sustain any injury in the MVA.

42. The ALJ therefore finds that the medical treatment recommended for claimant did not change after the MRI. While Dr. Stagg did provide claimant with work restrictions of no lifting greater than 40 pounds, the ALJ credits the testimony of claimant that when he went to Dr. Stagg on March 30, 2018, his focus was to get a release that would allow him to return to work. The ALJ finds that the medical restrictions in this case set forth on April 12, 2018 relate to the December 22, 2017 work injury and are not related to the MVA.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

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

4. As found, claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment with employer on December 22, 2017 when he was tripping pipe for employer and a board struck claimant on his left side resulting in symptoms. As found, claimant's

testimony that he reported the incident to his employer and continued to experience symptoms the following day that resulted in claimant being provided with modified duty is determined to be credible and persuasive regarding this issue.

5. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Pursuant to Section 8-43-404(5), C.R.S., Respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury. Once respondents have exercised their right to select the treating physician, claimant may not change physicians without first obtaining permission from the insurer or an ALJ. *See Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996).

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

7. As found, claimant has proven by a preponderance of the evidence that the treatment claimant received from St. Mary's Occupational Medicine and their referrals, including Dr. Vance, is reasonable medical treatment necessary to cure and relieve claimant from the effects of the work injury. As found, claimant's testimony that he was not provided with a list of physicians authorized to treat claimant is determined to be credible and therefore, St. Mary's Occupational Medicine and their referrals represents authorized medical treatment in this case.

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

impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

9. As found, claimant has proven by a preponderance of the evidence that he is entitled to TTD benefits. As found, the medical records from Dr. Stagg are determined to be credible and persuasive regarding the restrictions related to claimant's work injury. As found, claimant's testimony regarding employer's inability to provide claimant with work absent a full release from a physician is determined to be credible and persuasive.

10. As found, the restrictions set forth by Dr. Stagg in his April 12, 2018 report are determined to be related to claimant's December 22, 2017 work injury. Therefore, claimant is entitled to an award of TTD benefits for the period of December 27, 2017 until March 30, 2018 and from April 12, 2018 and continuing until terminated by law.

11. Claimant argues that injuries sustained in the MVA on March 28, 2018 are compensable under the quasi-course of employment doctrine. Respondents argue that the MVA represents an intervening injury that severs their liability for workers' compensation benefits. The ALJ finds that there was no injury sustained in the MVA on March 28, 2018.

12. The "quasi-course of employment" doctrine provides that an injury occurring during authorized medical treatment is compensable because the employer is required to provide medical treatment for the industrial injury and the claimant is required to submit to the treatment. Therefore, the treatment becomes an implied part of the employment contract, and injuries sustained while attending the authorized medical treatment, are considered to be a consequence of the original industrial injury. *Excel v. Industrial Claim Appeals Office*, 860 P.2d 1393 (Colo. App. 1993). The rationale for this doctrine holds that, because the employer is required to provide reasonable and necessary medical treatment, and because claimant is required to submit to it or risk suspension or termination of benefits, treatment by the authorized physician becomes an implied part of the employment contract. *See Employers Fire Insurance Co. v. Lumbermens Mutual Casualty Co*., 964 P.2d 591 (Colo. App. 1998); *Schreiber v. Brown & Root, Inc.*, 888 P.2d 274 (Colo. App. 1993). The quasi-course doctrine is designed to attenuate the usual requisites of compensability.

13. As noted by respondents, the Industrial Claim Appeals Panel in *Trover v. Coors Ceramics and Royal and Sun Alliance*, W.C. No. 4-408-646 (ICAO, October 8, 2004) has held that injuries arising out of travel to IME appointments are not compensable under the quasi-course of employment doctrine. Because the ALJ finds that no injury occurred in the MVA, the ALJ rejects the arguments from claimant that the claim is compensable, and rejects respondents claim that the MVA represents an intervening injury.

14. As found, following the MVA, claimant was evaluated by Dr. Stagg on March 30, 2018 and did not mention the MVA. As found, claimant's testimony that his concern at that point was to get a release that would allow him to return to work is found to be credible and persuasive.

15. As found, claimant's complaints when he returned to Dr. Stagg on April 12, 2018 were markedly similar to his complaints on February 14 and March 7, 2018. During those visits, claimant's work restrictions were increased from 5-10 pounds to 25 pounds. The ALJ finds that the increase in restrictions to 40 pounds are consistent with a finding that the restrictions relate to the December 22, 2017 work injury and that the lifting of restrictions on March 30, 2018 was based on claimant's focus of obtaining a full release to return to work for employer.

16. The doctrine of intervening injury concerns the effect of a separate injury, which occurs while the claimant is receiving medical and disability benefits for a compensable injury effectively holds that respondents are not liable for injuries which occur subsequent to a compensable injury, and are not a "natural result" of the compensable injury. *Post Printing and Publishing Co. v. Erickson,* 94 Colo. 382, 30 P.2d 327 (1934). Respondents are only liable for subsequent injuries which "flow proximately and naturally" from the compensable injury. *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

17. As found, respondents have failed to prove by a preponderance of the evidence that claimant suffered an intervening injury that would sever their liability for claimant's medical treatment. As found, the recommended medical treatment remained consistent both before and after the MVA and the ALJ determines that no injury occurred in the MVA. The ALJ relies on the opinions expressed by Dr. Striplin along with the medical records from Dr. Stagg after the MVA that do not mention the MVA as being credible and persuasive in coming to the conclusion that the MVA did not cause an injury in this case.

18. Because the ALJ finds that there was no injury in the MVA, the arguments by both claimant and respondents are moot. The ALJ further notes that the recommended treatment from Dr. Stagg remained consistent before and after the MVA, including a cervical and lumbar MRI and ongoing physical therapy. This recommended medical treatment is determined to be related to claimant's December 22, 2017 work injury and not related to the MVA.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve claimant from the effects of the industrial injury of December 22, 2017.

2. The claimant's claim of injuries arising from the March 28, 2018 MVA are denied as dismissed as the MVA did not result in an injury.

3. Respondents shall pay TTD benefits for the period of December 27, 2018 through March 30, 2018 and from April 12, 2018 and ongoing until terminated by law, based on the stipulated AWW.

4. Respondents request for a finding of an intervening injury is denied and dismissed.

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

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

DATED: February 25, 2019

Keith E. Mottram

Keith E. Mottram
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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-062-858-001

ISSUES

The issues set for determination included:

(1) Was Claimant an "employee", as that term is defined by 8-40-203(1) at the time he was injured at Respondents' residence on January 22, 2016?

(2) Are Respondents an "employer", as that term is defined by the Colorado Workers' Compensation Act?

(3) If Claimant was an employee at the time he was injured, is he entitled to medical benefits to cure and relieve the effects of said injury?

PROCEDURAL STATUS

The Court issued a Summary Order on or about November 14, 2018 (mailed on November 19, 2018). Claimant filed a Request for Full Order on or about November 26, 2018, (received by the undersigned on December 3, 2018) and this Order follows.

STIPULATIONS

The parties stipulated to the following: (a) Claimant was injured on January 22, 2016; (b) Respondents Reinaldo and Marianne G_____ did not have workers' compensation insurance coverage in place at the time Claimant was injured on January 22, 2016. The Stipulations were accepted by the Court and are made part of this Order.

FINDINGS OF FACT

1. Respondent Reinaldo G_____ testified he owned commercial and residential properties. He did not employ any individuals to perform maintenance and repair work. Mr. G_____ did not hire employees to perform work on these properties, including mowing the grass and the like.

2. Mr. G_____ testified his residence was located at 14970 Clinton Street. He lives at that address, with his wife. Mr. G_____ performed work there, including managing various properties he owned.

3. Mr. G_____ testified he hired contractors to perform work on the Clinton Street property.

4. Respondents' tax return for 2016 confirmed they received income from real estate rentals. Expenses were taken for cleaning and maintenance, as well as

repairs on these properties. There were no employee expenses listed on the tax return for the rental properties.[1] Mr. G_____ used 14970 Clinton Street as the address for the G_____ Family Properties LLC, of which he was a partner.[2] There was no evidence Respondents employed other individuals were subject to the provisions of the Colorado Worker's Compensation Act.

5. Claimant testified he met Mr. G_____ in Lochbuie, Colorado. He had finished mowing the lawn at the house of a friend of his and asked Mr. G_____ if he needed any yard work done. Approximately a day or two after they met, Mr. G_____ drove Claimant to the Clinton street house and he cut the grass. Claimant did not recall the exact month this occurred, but thought it was during the summer when grass was growing and there was yard work to be done. Claimant testified he had memory issues and had trouble recalling specific dates.

6. Claimant testified he did various types of jobs at Mr. G_____ ' house, located on Clinton Street. Claimant testified his son would drive him to work and initially this was at 6:00 a.m., then at 9:00 a.m. Claimant said Kimberly H_____ and her son would pick him up at 5:00 or 6:00 p.m., depending on how long the job took and if he need to take time off.[3]

7. Claimant testified the work he performed at the Clinton Street address included landscaping, plumbing, electrical, insulation, tile work in the basement, repairing the water heater, as well as work on the roof. They leveled the air conditioners on the roof and put down roofing paper. He worked weekdays and would start at 9:00 a.m. Claimant said they would work five days per week. Claimant testified he was paid $10.00 per hour.

8. Claimant testified Mr. G_____ hired individuals to work on the Clinton street house, including a man who did framing. There were also individuals who worked on the siding, but were fired because they did not do a good job. Claimant did not know whether these individuals worked for a company.

9. Claimant also worked on other properties owned by Mr. G_____ , including 1326 Allison St., which he thought was related to an air-conditioning problem. That job took only a few hours. He also worked at 6401 W. 44th Pl., but could not recall what he did at that location. He worked at 5846 Newport St. in Commerce City and dug a 6-foot hole because there was water seeping into the basement. Claimant testified he worked until 8:00 p.m. on that job. He also worked at 6750 and 6771 Lowell Blvd., doing cleaning and plumbing.

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[1] Exhibit 3.

[2] Exhibit 4.

[3] Hearing Transcript ("Hrg. Tr.") p.24:16-24.

10. Tax assessor printouts for the various properties owned by Respondents were admitted into evidence.[4] This included houses located at 1326 Allison St., 6401 W. 44th, 6411 W. 44th, 5846 Newport St., 6796 Laurel Blvd., 6750 Lowell Blvd., 6771 Lowell Blvd. and 14790 Clinton St. This totaled eight properties, including Respondents' Clinton Street residence. The assessor records included handwritten notes by Claimant, describing tasks done at various properties. The ALJ was unable to conclude how long the various projects took for Claimant to complete, however, the ALJ inferred the work did not require forty hours per week.

11. Claimant thought there were other properties where he worked, but did not recall specifically the number of places he worked. Claimant testified he did not recall the dates on which he worked at those properties. Mr. G_____ would drive him to the various houses and would supervise his work at those properties.

12. Exhibit 8/Exhibit E[5] was a summary which purported to show the dates Claimant worked. This document was prepared on behalf of Respondents and attached to discovery responses. It listed the following payments to Claimant:

- Oct. 5-$50.00
- Oct. 6-$20.00
- Oct. 9-$90.00
- Oct. 15-$80.00
- Oct. 20-$90.00
- Oct. 27-$100.00
- Oct. 30-$75.00
- Nov. 13-$100.00
- Nov. 25-$85.00
- Nov. 27-$80.00
- Dec. 7-$100.00
- Dec. 18-$95.00
- Dec. 22-$100.00
- Dec. 31-$90.00
- Jan. 5-$85.00
- Jan. 9-$65.00
- Jan. 22-doesn't recall.

This document showed Claimant worked seven days in October, three days in November, four days in December and three days in January. This evidence was not rebutted.

13. Mr. G_____ testified Claimant did not work 40 hours per week at any time at his residence, nor did he work five days/40 hours/week at any rental property.

[4] Exhibit 14.

[5] This document was provided in conjunction with discovery responses.

When reviewing Exhibit E, Mr. G_____ testified this document reflected the days Claimant worked for him and that he started in October. Mr. G_____ said when Claimant worked at the rental properties, these were tasks that took a couple of hours.

14. Mr. G_____ stated Claimant was not paid more than $2,000.00 for any kind of work he performed 2015. Mr. G_____ testified Claimant also helped Ms. H_____ clean office buildings at night. Mr. G_____ testified a separate contractor did the framing and the siding work at the Clinton Street house. He did not provide workers' compensation coverage for those workers. Mr. G_____ testified not employ other individuals to perform maintenance work for the rental properties, as he did the work himself. Claimant was not employed in the usual and business or profession of Respondents, which was listed ranching, cattle and hay (partnership tax return), as well as management of rental properties (personal income tax return).

15. The ALJ noted Exhibit E showed a total of $1,305.00 was paid to Claimant, of which $1,155.00 was paid in 2015. No other written documentation of Claimant's earnings was introduced into evidence. The ALJ was unable to conclude the precise month when Claimant began working for Respondents, but Exhibit E documented the first cash payments were in October 2015. No further documentation was introduced into evidence which documented Claimant's earnings.

16. Claimant testified he thought he was paid more than 15 times by Mr. G_____ , as there were times he was paid every day. He was paid mostly in cash, but recalled being paid approximately three times with a check. He cashed the check at a Key Bank between Mr. G_____ ' house and his son's house. Claimant also testified that he received advances on occasion for which he then worked. He also was given a trailer and bought a car from Mr. G_____ .[6] He never received a W-2 or 1099 form from Mr. G_____ .

17. Claimant testified he was paid for work done at Respondents' son's house by Respondent. Claimant testified he had done yard work for elderly people in the neighborhood where he met Mr. G_____ . He understood that he did not have to report the income, as long as it wasn't $1,300.00 per month. Claimant did not proffer any written documents which memorialized his earnings while working for Respondents. Claimant testified his son picked him up by the flea market one time and Kimberly (Ms. _____) picked him up a couple of times.[7] The ALJ inferred from this testimony that Claimant worked less than five days per week.

18. The ALJ credited Claimant's testimony that he worked on Mr. G_____ ' rental properties and the family home on Clinton street, as well as the specific jobs he did on those properties. The ALJ concluded Claimant's testimony did not establish that he received $2,000.00 during the calendar year of 2015 working for Mr. G_____ .

[6] The ALJ noted it was unclear from the record whether this constituted some sort of remuneration.

[7] Hrg. Tr. p. 35:21-36:6.

19. Claimant's son, Jesus C_____ , testified at hearing. Mr. C_____ was living with his father in the summer of 2015, as he was going to school at the time. He said he dropped Claimant off and picked him up at Respondent's property on Clinton Street. He went there on multiple occasions. There was one occasion when he picked Claimant up by the flea market. Mr. C_____ testified his father worked more than one day a week and it could have been as many as five times per week, although he would leave the house before Claimant did.[8] The ALJ inferred Claimant's son was not able to confirm the number of days per week his father worked. He also testified that his younger brother occasionally took Claimant to work.

20. Ms. H_____ testified at hearing. She has known Claimant for approximately five years. She also knew Mr. G_____ , as she did some work for his wife and some housecleaning for his sister. The work she did for the G_____ was at the Clinton Street house.

21. Ms. H_____ testified that Claimant worked from approximately July 2015 to January, 2016. She picked Claimant up from the Commerce City address (approximately 62nd and Monaco), from different places over at Lowell, at Jonathon G_____ ' house (144th and I-25), and at the Clinton Street house. She testified Claimant worked pretty much every day, but could not remember any other locations where she picked Claimant up. She overheard Claimant talking to Mr. G_____ about what tasks were going to be done the next day. Ms. H_____ said she saw Claimant paid one time in cash.

22. Jonathon LL____ testified at hearing. He is Respondents' son and had Claimant perform work on his residence. Claimant built basement shelving in the storage area. This job took place in November 2015 and took a couple of days. He paid Claimant $200.00 in cash.

23. On January 20, 2016, Claimant was injured at Respondents' residence, located at 14970 Clinton Street. He fell from a ladder while working on siding at the house.

24. Ms. H_____ testified Claimant initially wanted to go home, but she said he was in no condition to make that decision. Claimant did not want Mr. G_____ to call an ambulance. She took Claimant to the hospital.

25. Claimant was initially evaluated at Platte Valley, at which time x-rays were taken. He was then taken to the University of Colorado hospital and evaluated in the emergency department by Vikhyat Bebarta M.D. and Travis Smith, M.D. Dr. Bebarta's impression was in the thoracic spine fracture; calconeal fracture; back pain; 25. Claimant was admitted to the hospital and treated. He was discharged on January 27, 2016.

[8] Hrg. Tr. p. 71:14-21.

26. Respondents did not designate an ATP for Claimant's treatment after he was injured.

27. A Worker's Claim for Compensation was admitted into evidence.[9] This document was completed on or about January 16, 2018. Claimant's average weekly wage was estimated to be $209.00 per week. The ALJ inferred that, by Claimant's own estimate of his AWW, he worked approximately 21 hours per week.

28. The ALJ determined that Claimant did not work at Respondents' Clinton street house or other properties 40 hours or more per week, nor did he work five days per week. The ALJ was unable to conclude from the testimony of the witnesses that Claimant's work for Respondents was anything more than intermittent.

29. Claimant's work for Respondents was casual.

30. Claimant was not an employee of Respondents.

31. Respondents were not the employer of Claimant.

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

CONCLUSIONS OF LAW

General

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

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and

[9] Exhibit 15.

bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Compensability

To establish a right to compensation under the Colorado Workers' Compensation Act, the employer and employee must be subject to the provisions of the Act and, at the time of the injury, Claimant be performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. *Martin v. Hyams*, W.C. No. 4-781-144 (ICAO November 19, 2009); §§ 8-41-301(1)(b) & (c), C.R.S. (2017).

Stated another way, Claimant must meet the definition of an "employee" under § 8-40-202(1), C.R.S. and the scope of that definition is delimited by § 8-40-301(1), C.R.S. Respondents must be an "employer", as that term is defined in § 8-40-203, C.R.S. and the scope of the term employer is set forth in § 8-40-302, C.R.S. *Roop v. Hallum*, W.C. 4-383-408 ((ICAO November 9, 1999). In this regard, §§ 8-40-302(3) and (4) C.R.S. (2017) are statutory exclusions to the general rule of coverage under the Act for those persons who perform work under a contract of hire. Those subsections provide in pertinent part:

> "(3) Articles 40 to 47 of this title are not intended to apply to…. employers of persons who do casual maintenance, repair, remodeling, yard, lawn, tree, or shrub planting or trimming, or similar work about the place of business, trade, or profession of the employer if such employers have no other employees subject to said articles 40 to 47, if such employments are casual and are not within the course of the trade, business, or profession of said employers, if the amounts expended for wages paid by the employers to casual persons employed to do maintenance, repair, remodeling, yard, lawn, tree, or shrub planting or trimming, or similar work about the place of business, trade, or profession of the employer do not exceed the sum of two thousand dollars for any calendar year…."
>
> (4) Articles 40 to 47 of this title are not intended to apply to employers of persons who do domestic work or maintenance, repair, remodeling, yard, lawn, tree, or shrub planting or trimming, or similar work about the private home of the employer if such employers have no other employees subject to said articles 40 to 47 and if such employments are not within the course of the trade, business, or profession of said employers. This exemption shall not apply to such employers if the persons who perform the work are regularly employed by such employers on a full-time basis. For purposes of this subsection (4), "full-time" means work performed for forty hours or more a week or on five days or more a week."

First, the ALJ applied the definitional section of § 8-40-202(1)(b), C.R.S., which provides that the term "employee" does not include an individual whose employment "is but casual and not in the usual course of the trade, business, profession, or occupation

of the employer". The ALJ applied this definition when determining whether the exemption in § 8-40-302(3), C.R.S. applied in this case. That section, which has several clauses separated by commas, provides the Act does not apply to individuals who perform "casual" tasks for an employer, if the employer has no other employees subject to the Act and the work is not within the course of the trade, business or profession, and if the employer does not pay more than $2,000.00 in wages for those tasks. This use of the conjunctive in § 8-40-202(1)(b), C.R.S. is evidence of the Colorado Legislature's intent that both elements are required to be present for the exemption to apply.

As determined in Findings of Fact 28-29, the ALJ found Claimant's employment with Respondents was "casual". This was based upon evidence in the record which showed Claimant worked not on a regular basis, but intermittently. (Finding of Fact 29). The written evidence submitted by Respondents documented 17 occasions on which Claimant worked from October 2015 through January, 2016. Exhibit E also led to the conclusion that Claimant's work was less than 40 hours per week. (Finding of Fact 12). Mr. Gallegos testified Claimant worked less than 40 hours per week. (Finding of Fact 13). Claimant's Worker's Claim for Compensation showed he worked less than 40 hours per week. (Finding of Fact 27). Claimant's testimony also established there were times when he took off from work while performing tasks for Respondents. (Finding of Fact 6). The Court determined that the evidence proffered by Respondents was not rebutted by Claimant.

Although Claimant testified he thought he worked more than what was shown on Exhibit E, the ALJ unable to conclude that Claimant worked on a regular basis, as there were no documents which supported the claim he worked five days per week. (Finding of Fact 12). The other evidence provided by Claimant did not lead to a different conclusion. Although Claimant's son thought he might have worked five days per week, the ALJ found the son was not present in the home when Claimant left for work. (Finding of Fact 27). Finally, Ms. H_____ 's testimony did not persuade the ALJ that Claimant worked five days per week.

In the case at bench, the evidence established Claimant did not work on a regular basis and worked less than 40 hours per week. The ALJ was unable to determine that Claimant made more than what was documented in Exhibit E, as that was supported by Mr. G_____'s testimony. This is contrasted with the situation in *Roop v. Hallum*, *supra*, where Claimant worked for approximately nine years and it was determined Respondent was an employer, despite the fact that Respondent did not own a business at the time.

Under these circumstances, the ALJ found Claimant's employment was casual. As the Colorado Supreme Court stated: "The word 'casual' is the antonym of 'regular.' [citing *Lackey v. Industrial Commission*, 249 P.662 (1926)] Casual employment may be said to be that which is occasional, incidental, temporary, emergent or haphazard". *Heckman v. Warren*, 238 P.2d 854, 860 (Colo. 1951); C.f. *Butland v. Industrial Claim Appeals Office*, 754 P. 2d 411, 414 (Colo. App. 1988).

Further, the ALJ determined Claimant was not employed in the regular business or profession of respondents. When looking at the other clauses of § 8-40-302(3), C.R.S., the ALJ determined Respondents employed no other individuals subject to the Act and Claimant was not paid more than $2000.00 in wages for those tasks. (Findings of Fact 1-4). Accordingly, the exemption found in § 8-40-302(3), C.R.S. applies in the case at bar. C.f. *Brogger v. Kezer*, 626 P.2d 700, 701 (Colo. App. 1980).

Second, the ALJ considered whether the exemption for work done on a private home [§ 8-40-302(4), C.R.S.] applied in this case. As found, there was no evidence Respondents employed other individuals were subject to the provisions of the Colorado Workers' Compensation Act. (Finding of Fact 4). In addition, Claimant did not establish he worked 40 hours or more per week or five days per week. (Findings of Fact 10,13,17, 27-28). On this subject, Claimant's testimony did not establish he was working full-time, nor did the testimony of his son or Ms. H_____ . More particularly, Claimant's testimony was that his son picked him up on a few occasions and Ms. H_____ picked him up a couple of times. This testimony did not prove Claimant was working 5 days/40 hours per week. Based upon the evidence in the record, the ALJ determined the exemption found in § 8-40-302(4), C.R.S. applied and Claimant was not an employee.

In coming to this conclusion, the ALJ considered Claimant's contentions that Respondents underreported the number of hours he worked and what he was paid. The ALJ also closely evaluated the testimony of Claimant's son, as well as Ms. H_____ , to determine whether the foregoing exemptions applied. Based upon the totality of the evidence, the ALJ determined that he was unable to conclude Claimant was an employee and therefore entitled to workers' compensation benefits.

ORDER

It is therefore ordered:

1. Claimant's claim for benefits under W.C. 5-062-858-001 is denied and dismissed.

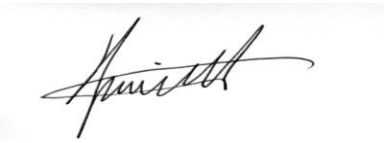
2. All matters not determined herein are reserved for future determination.

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

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

DATED: February 26, 2019

STATE OF COLORADO



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

- Whether claimant has proven by a preponderance of the evidence that she sustained a compensable occupational disease arising out of and in the course and scope of his employment with employer?

- If claimant has proven a compensable occupational disease, whether claimant has proven by a preponderance of the evidence that the medical treatment she received was reasonable and necessary to cure and relieve the claimant from the effects of the industrial injury?

- The parties agreed to reserve the issue of temporary disability benefits pending the resolution of the claim involving compensability.

FINDINGS OF FACT

1. Claimant was employed with employer as a cashier. Claimant testified she is left handed and, in the course of her employment would need to reach across her body with her left hand from her right to her left to scan items on the conveyer belt. Claimant testified that she worked at the store located at 12th and Patterson which tends to be a busy store. Claimant testified that in addition to her regular shift, she may be called in for extra hours.

2. Claimant testified that her job duties including scanning multiple items of different sizes for customers and testified that most customers had a significant number of items to scan. Claimant testified that she would work two hours before receiving 15 minute break during her shift. Claimant would then work another 2 hours before being provided with a break. Claimant testified her entire shift would last between six to eight hours. Claimant testified that scanning items would require her to do a "swim motion" consistently through the day. Claimant testified that she was required to scan heavy items including dog food, cases of soda and cases of water. Claimant testified she would also bag groceries.

3. Claimant testified that she began developing problems with her left hand. Claimant testified that initially she would wake up and think she slept wrong. Claimant testified that her symptoms continued to develop until the point that she could not work anymore.

4. Claimant testified she sought treatment with Dr. Reicks, her primary care physician. Claimant testified Dr. Reicks provided claimant with a brace for her wrist. Claimant testified that prior to May 2018, she had some similar symptoms and had undergone testing for carpal tunnel syndrome that was negative. Claimant testified that her physicians thought her symptoms could be related to her shoulder. Claimant testified that she had should surgery and her symptoms resolved.

5. Claimant's was evaluated by Ms. Farmer, a physicians' assistant with Dr. Reicks, on April 25, 2018. Claimant reported that she had noticed the pain when working and the next day. Claimant described the pain as numbness and tingling of the left hand and into the forearm all day. Claimant was diagnosed with carpal tunnel syndrome of the left wrist and de Quervain's disease. Ms. Farmer recommended a wrist brace and ice to the area with use of anti-inflammatories. Claimant was also instructed to talk to her supervisor.

6. Claimant returned to Dr. Reicks on May 17, 2018. Dr. Reicks noted claimant was being evaluated for follow up of her wrist pain and forearm pain in the left. Claimant reported she had been wearing a splint while working, but had not noted any improvement in her symptoms. Claimant reported tingling and numbness sensation in the thumb, first, second and third digits and also up into the forearm at the base of the thumb. Dr. Reicks noted a positive Tinel's test and diagnosed claimant with tendonitis of the wrist. Dr. Reicks opined that claimant's condition was related to her work as she was a cashier and performed repetitive picking and squeezing with the left hand. Dr. Reicks encouraged claimant to file a workers' compensation claim.

7. Claimant was examined by nurse practitioner ("NP") Wilson on May 24, 2018. Ms. Wilson noted claimant's complaints of symptoms into her left hand and complaints of wrist pain and finger pain and numbness and tingling. Claimant reported she was wearing a brace while working and noticed her swelling was less when the brace was on. Claimant was provided with work restrictions and instructed to follow up with Dr. Utt in one week.

8. Claimant was examined by Dr. Utt on June 1, 2018. Dr. Utt noted claimant complained of left hand and forearm discomfort since early April. Dr. Utt noted claimant had been performing her present job for 2 and a half years for 8 hours a day and 40 hours a week. Dr. Utt reported that claimant's shift consisted entirely of scanning, with some flexibility to where she works the self scanning area. Dr. Utt noted on physical examination that her left hand showed no atrophy or puffiness or swelling. Claimant had a positive Tinel's sign on the left. Dr. Utt noted that claimant could have carpal tunnel syndrome, but with claimant's history of chronic pain, it made her symptom intensity hard to sort out. Dr. Utt noted he needed more information from the employer regarding her hours and frequency of continuous non-stop work.

9. Dr. Utt provided claimant with work restrictions that included no lifting more than 3-5 pounds or pushing more than 15 pounds with the left hand or wrist. Dr. Utt noted claimant could push up to 50 pounds with the opposite hand.

10. Claimant returned to Dr. Utt on June 4, 2018. Dr. Utt noted that claimant was somewhat better after taking Saturday off. Physical examination revealed that claimant had less exquisite discomfort of the left wrist and palmar region and range of motion was noted to be less painful. Resisted wrist flexion over the cart flexor carpi naris radialis was not as painful and there was less hyperalgesia. Claimant was diagnosed with left hand paresthesia, carpal tunnel syndrome of the left wrist, right forearm pain and chronic pain syndrome. Dr. Utt recommended physical therapy and continued claimant's work restrictions with some increased restrictions on the right hand and arm.

11. Claimant returned to Dr. Utt on June 11, 2018. Dr. Utt noted no change since her last visit and complained that her work restrictions had not been accommodated very well by employer and she was continuing to do repetitive motion. Dr. Utt noted that he received claimant's job description and was able to speak with personnel about claimant's hours. Dr. Utt noted claimant averaged about 30 hours a week and her job description does describe the potential for some repetitiveness with up to 80% of the day involving twisting and bending of the wrist and use of her hands with grabbing. Dr. Utt noted that claimant's job was paced and she was not working an 8 hour shift every day. Dr. Utt opined that it was unclear as to whether her paresthesias that likely caused by the carpal tunnel was caused by her job. Dr. Utt provided claimant with continued restrictions that included no use of the cash register and up to 60 minutes of activity before doing a different activity at work.

12. Respondent obtained a Jobs Demand Analysis ("JDA") by Sara Nowotny on June 12, 2018. Ms. Nowotny issued a report dated June 15, 2018 outlining the job duties of claimant's position with employer.

13. Respondent obtained an independent medical examination ("IME") with Dr. Sollender. Dr. Sollender issued a report dated July 12, 2018. Dr. Sollender reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME. Dr. Sollender diagnosed claimant with left carpal tunnel syndrome of a moderate severity and noted it could be confirmed through electrodiagnostic testing. Dr. Sollender opined in his report that he did not believe the carpal tunnel syndrome was related to claimant's work as a cashier and noted that he had not ever seen a cashier with any of the major supermarkets who had a job that was forceful, repetitive or awkward for had usage. Dr. Sollender opined claimant had no obvious findings of any specific pathology of the right upper extremity.

14. Claimant was examined by Dr. Reicks on July 17, 2018. Dr. Reicks noted claimant's frustration with her ongoing left wrist and hand pain and numbness. Dr. Reicks continued to treat claimant for her other conditions during this visit.

15. Claimant testified that she stopped working on September 9, 2018 and has not worked anywhere since that time. Claimant testified she stopped working for employer after employer required claimant to have a full work release before she could return to work.

16. Claimant returned to Dr. Reicks on September 14, 2018. Dr. Reicks noted claimant's ongoing issues with her left wrist and referred claimant to Dr. Rose for further evaluation.

17. Claimant was examined by Dr. Rose on October 3, 2018. Dr. Rose noted claimant's report of symptoms with work, motion and exercise. Claimant described a gradual onset of the hand numbness and radial styloid pain with her work related duties over the past year or so. Dr. Rose diagnosed claimant with de Quervain tenosynovitis and referred claimant for nerve conduction studies. Dr. Rose opined that it was certainly possible that repetitive grasping and weight bearing performed by a cashier at a supermarket can be responsible for the symptoms.

18. Claimant underwent surgery on her left wrist on November 1, 2018 under the auspices of Dr. Rose. Dr. Rose noted in his operative report that claimant was status post repetitive work related injury to the best of his ability to judge in these injuries. Dr. Rose further opined that both carpal tunnel and first dorsal compartment tenosynovitis across would be associated with the type of repetitive trauma claimant described at her job.

19. Dr. Sollender issued a second IME report dated December 17, 2018. Dr. Sollender was able to review additional medical records for the second IME report. Dr. Sollender noted in his report that he had not reviewed a JDA and opined that while claimant's condition was likely not work related, this could be confirmed with a review of a JDA.

20. Dr. Sollender testified at hearing in this matter. Dr. Sollender testified that prior to the hearing, he was able to review the JDA performed by Ms. Nowotny. Dr. Sollender testified that claimant's diagnosis would be carpal tunnel syndrome of unknown etiology. Dr. Sollender testified that pursuant to Workers' Compensation Rules of Procedure 17, Exhibit 5, a causation analysis must be performed to determine if a repetitive trauma injury is related to a patient's employment. Dr. Sollender testified that the JDA will tell the evaluator risk factors and the threshold of time, force and specific angles of posture that must be met when determining whether a repetitive trauma condition is related to work.

21. Dr. Sollender testified that based on his review of the JDA, claimant's work activities were insufficient to cause a cumulative trauma condition based on the criteria set forth under the Colorado Medical Treatment Guidelines.

22. The ALJ credits the testimony and reports of Dr. Sollender and finds that claimant has failed to establish that it is more likely true than not that her carpal tunnel syndrome is related to her repetitive activities at work. The ALJ notes that Dr. Sollender reviewed the JDA and applied the Colorado Medical Treatment Guidelines in coming to this conclusion.

23. The ALJ finds that while Dr. Utt and Dr. Rose opined that it was possible that claimant's condition was related to her work with employer, they did not review the JDA performed by Ms. Nowotny in coming to this conclusion. The ALJ further notes that the opinions of Dr. Utt and Dr. Rose did not reference the Colorado Medical Treatment Guidelines and relied on claimant's subjective reports of her work duties.

24. Based on these findings, the ALJ finds that claimant has failed to establish by a preponderance of the evidence that she sustained a compensable occupational disease arising out of and in the course of her employment with employer.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

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

3. Claimant must show that the injury was sustained in the course and scope of his employment and that the injury arose out of her employment. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 579. A work-related injury is compensable if it "aggravates, accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.* Whether there is a sufficient "nexus" or relationship between the Claimant's employment and his injury is one of fact for resolution by the ALJ based on the totality of the circumstances. *In re Question Submitted by the United States Court of Appeals*, 759 P.2d 17 (Colo. 1988). The question of whether a claimant has proven that a particular disease, or aggravation of a particular disease, was caused by a work-related hazard is one of fact for determination by the ALJ. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999).

4. The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by Section 8-40-201(14), C.R.S. as:

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

5. This section imposes additional proof requirements beyond that required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). The existence of a preexisting condition does not defeat a claim for an occupational disease. *Id.* A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an

occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.* Once claimant makes such a showing, the burden shifts to respondent to establish both the existence of a non-industrial cause and the extent of its contribution to the occupational disease. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

6. The Colorado Workers' Compensation Medical Treatment Guidelines are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). The statement of purpose of the Medical Treatment Guidelines is as follows: "In an effort to comply with its legislative charge to assure appropriate medical care at a reasonable cost, the director of the Division has promulgated these 'Medical Treatment Guidelines.' This rule provides a system of evaluation and treatment guidelines for high cost or high frequency categories of occupational injury or disease to assure appropriate medical care at a reasonable cost." W.C.R.P. 17-1(A). W.C.R.P. 17-5(C) provides: "The treatment guidelines set forth care that is generally considered reasonable for most injured workers. However, the Division recognizes that reasonable medical practice may include deviations from these guidelines, as individual cases dictate."

7. While it is appropriate for an ALJ to consider the guidelines while weighing evidence, the Medical Treatment Guidelines are not definitive. *See Jones v. T.T.C. Illinois*, Inc., W.C. No. 4-503-150 (May 5, 2006); ***aff'd Jones v. Industrial Claim Appeals Office*** No. 06CA1053 (Colo. App. March 1, 2007) (not selected for publication) (it is appropriate for the ALJ to consider the guidelines on questions such as diagnosis, but the guidelines are not definitive); *see also Burchard v. Preferred Machining*, W.C. No. 4-652-824 (July 23, 2008) (declining to require application of medical treatment guidelines for carpal tunnel syndrome in determining issue of PTD); *see also Stamey v. C2 Utility Contractors et al*, W.C. No. 4-503-974 (August 21, 2008) (even if specific indications for a cervical surgery under the medical treatment guidelines were not shown to be present, ICAO was not persuaded that such a determination would be definitive).

8. As found, claimant has failed to establish by a preponderance of the evidence that she sustained a compensable occupational disease arising out of and in the course of her employment with employer.

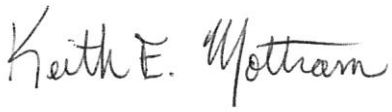
ORDER

It is therefore ordered that:

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

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

DATED: February 28, 2019



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

ISSUES

- Whether Claimant has established by a preponderance of the evidence that he sustained an injury in the course and scope of his employment on July 13, 2017.

- Whether Claimant has established by a preponderance of the evidence that he is entitled to medical benefits because of a work-related injury.

FINDINGS OF FACT

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

1. Employer is a framing and welding company owned by Michael D_____. Claimant and Mr. D_____ are first cousins. After Claimant took welding classes, he began working for Employer's welding company in May 2017 as its sole employee.

2. On July 13, 2017, Claimant was driving a three-ton company truck when a small passenger sedan hit it from behind. The other driver was at fault and the responding officer issued him a citation. Claimant testified that there was damage to the rear trailer hitch and the electrical trailer plug-in, and that he took it to a shop for repair. However, Mr. D_____ testified that he inspected the truck at the scene of the accident and that it sustained no damage. He also testified that he was unaware of any repair work performed on the truck. Photographs of the truck admitted as exhibit J show no discernable damage.

3. At the scene, Claimant told Mr. D_____ that he was not injured, and he denied medical care. However, Claimant testified that he later began experiencing symptoms.

4. That evening Claimant sought medical attention at the emergency department of Boulder Community Hospital. Records of the visit provide:

- Claimant complained of pain in his left neck and left shoulder, "no other symptoms."

- Claimant told his treating physician that his symptoms developed throughout his neck and upper back, primarily on the left side.

- Claimant reported no neurologic symptoms.

5. Claimant testified that the records were incorrect because he did not have

left-sided symptoms. He later testified that he initially had pain in both of his shoulders.

6. The emergency room provider diagnosed Claimant with an acute cervical sprain and dispensed a muscle relaxant and ibuprofen.

7. On July 21, 2017, Claimant returned to the emergency department of Boulder Community Hospital complaining of headache, ringing in his ears, left lateral neck pain, and numbness of the left hand. Claimant's testimony did not relate his headaches or the ringing in his ears as ongoing symptoms due to his work-related injury. The record details the neurological examination of Claimant's left fingers and his left hand. It also details the musculoskeletal examination, which found "vague left-sided paraspinal tenderness on palpation, which is mild extending down into his left trapezius."

8. Claimant testified that the July 21, 2017 medical record was also incorrect because he did not have left-sided symptoms.

9. Claimant initially testified that his current symptoms were numbness in three fingers of his right hand, burning extending from his right forearm through his right elbow into is right shoulder and the right side of his neck. Claimant further testified that all these symptoms had been present since he began experiencing symptoms on July 13, 2017.

10. Claimant sought medical treatment for an unrelated incident on August 17, 2017, after falling and striking his right elbow on a rock. The physician performed a comprehensive examination of twelve systems, including the neurological and musculoskeletal systems that he noted were negative except for Claimant's severely swollen right elbow. Claimant initially testified that the provider examined only his right elbow. Later, he testified that a normal examination occurred regarding other body parts. Claimant further testified that he was experiencing tingling in his right hand and fingers on August 17, 2017. However, the record does not support his claim.

11. Dr. Hattem, Respondent's expert witness and former emergency medicine practitioner, testified that performing a neck examination is a precautionary measure and standard practice for any person who reports falling.

12. Claimant returned to Boulder Community Health on August 20, 2017, to follow up regarding his right elbow. The physician did not record Claimant reporting any symptoms related to the car accident. The physician performed another review of symptoms noting only right arm swelling and pain. However, the provider specifically noted, "Neck is supple and non-tender." The medical record contradicts Claimant's testimony that no provider examined his neck when he treated for his elbow.

13. In early spring of 2018, Claimant began receiving invoices for his July 2017 emergency room visits.1

1 Neither party explained why the at-fault driver's auto insurance did not cover Claimant's treatment.

14. On April 25, 2018, Claimant reported his July 13, 2017 work injury. Employer filed a first report of injury that day, and provided Claimant with a designated provider list.

15. On April 30, 2018, Claimant sought treatment at U.S. Healthworks where Peter Mars, M.D. evaluated him. Claimant reported a 261-day history of right-sided neck pain and tingling in his right index and middle fingers. Claimant reported that with heavy activity he experienced burning pain down his posterior right arm to the elbow and that his fourth and fifth digits experienced infrequent numbness and tingling. Claimant did not report right or left shoulder pain, or left neck pain. In the eight months since Claimant had last treated, his reported symptoms migrated from the left side to the right side of his body.

16. On June 28, 2018, Dr. Shoemaker reviewed Dr. Mars' May 30, 2018 medical record, examined Claimant, and determined that Claimant's current symptoms were work related. Nothing in Dr. Shoemaker's notes indicates that Dr. Shoemaker reviewed any other records, specifically the July and August of 2017 Boulder Community Health records.

17. On August 14, 2018, Dr. Shoemaker conducted an EMG study of Claimant's right arm. An EMG provides objective evidence of radiculopathy if it is present. Claimant exhibited a C8 distribution of chronic/remote radiculopathy, but at C6-7, the test exhibited normal results.

18. Claimant has a broad-based disc herniation at C6-7, for which Dr. Gerlach offered surgery. Insurer denied the surgical request.

19. Dr. Long-Miller placed Claimant at MMI.

20. Dr. Hattem testified the Medical Treatment Guidelines consider whiplash an unlikely cause of disc herniation. Additionally, Dr. Hattem testified that Claimant reported left-sided radicular symptoms eight days after the accident.

21. Dr. Hattem relied on the Medical Treatment Guidelines which provide:

- No evidence relates degenerative disc disease related to whiplash or to non-radicular neck pain.
- Whiplash is probably an uncommon cause of cervical disc herniation.
- Early and reproducible sings of radiculopathy should support a potential causal connection between whiplash and cervical disc herniation. Claimant's initial assessment did not include any immediate or reproducible radicular symptoms.

22. Dr. Hattem testified that Claimant initially reported left-sided pain, but that when he evaluated Claimant, Claimant reported right-sided pain. Dr. Hattem explained that while errors regarding the side of pain do occur, it was unlikely the references to left-

sided symptoms were in error because they repeated throughout the July 13 and July 21 medical records in both the physician's and nurse's notes. Dr. Hattem concluded that Claimant's right-sided symptoms had not occurred at that time. The fact that Claimant's current symptoms are contralateral to those he reported on the date of and one week following the car accident indicate that Claimant's current symptoms are unrelated to the accident. Further, Dr. Hattem testified that medical providers examined Claimant twice in August 2017 and both reviews of symptoms and examinations were negative for neck symptoms.

23. Dr. Hattem was unsure if Dr. Shoemaker and the other authorized treating physicians were aware of the eight-month gap in Claimant's treatment. As a former occupational medical provider, he opined that unless a physician receives a specific prior medical record with a request to review it, physicians typically treat and test based solely on the history obtained from the patient.

24. Dr. Hattem testified that even if there had been radiculopathy at C6-7, the symptoms still would have been on the right side while Claimant's initial complaints were left-sided.

25. Dr. Hattem persuasively testified that any injury from the accident would have been minor and unlikely to produce neck pain, based on his review of the police report and Claimant's description of the accident. Dr. Hattem testified that Claimant's evaluations in August establish that his symptoms had resolved in one month. Therefore, Claimant's herniation at C6-7 disc does not relate to the July 13, 2017 accident.

26. Dr. Hattem testified that no objective evidence supported Claimant's claim for benefits in this case. Dr. Hattem concluded that Claimant's neck pain and decreased range of motion related to cervical degenerative disc disease rather than an acute work injury.

27. Claimant treated through November 19, 2018, reporting constant pain in the right side of his neck, right trapezius, and right shoulder radiating to the right upper arm, forearm, and hand.

28. On December 18, 2017, Michael D_____ provided Claimant with a notice of layoff, terminating Claimant's employment on December 22, 2017. Mr. D_____ testified that financial constraints caused Claimant's termination and that Claimant was Employer's highest paid employee. After terminating Claimant, Employer closed its welding shop and consolidated its limited welding work at the framing business location.

29. The ALJ finds it unlikely that the hospital records erred in describing Claimant's symptoms, especially given the consistent and detailed descriptions of left-sided symptoms and examinations.

30. The ALJ finds Claimant to be a poor historian with respect to his symptoms and medical treatment.

31. The ALJ finds that Claimant sustained a work-related injury on July 13, 2017 consisting of an acute cervical strain.

32. The ALJ finds that that injury resolved on its own sometime before August 17, 2017.

33. The ALJ finds Dr. Hattem's opinions and analysis to be well founded and persuasive.

34. The ALJ finds that Claimant has not met his burden of proving by a preponderance of the evidence that he sustained a right-sided work injury.

CONCLUSIONS OF LAW

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

For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. C.R.S. § 8-41-301(1)(c). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp*., 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the ALJ. *Faulkner*, 12 P.3d at 846. A compensable injury is an injury which "arises out of" and "in the course of" employment. *See* C.R.S. § 8-41-301(1)(b); *Price v. Industrial Claim Appeals*, 919 P.2d 207 (Colo. 2012).

In deciding whether the claimant has met his burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence." *See Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002).

Credibility is a significant consideration when determining compensability. In assessing credibility, the ALJ should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness of the testimony; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936).

In establishing causation, a claimant must show that the industrial injury bears a direct causal relationship between the precipitating event and the resulting disability. Respondents are liable for medical treatment that is reasonably necessary to cure and/or relieve an injured worker from the effects of an industrial injury. § 8-42-101(1)(a), C.R.S. The claimant must prove a causal nexus between the claimed disability, need for medical treatment, and the work related injury. *Singleton*, 961 P.2d 571 (Colo. App. 1998). The question of whether the claimant has met the burden to establish the requisite causal

connection and whether the medical treatment sought is reasonably necessary is one of fact for the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner*, 12 P.3d 844 (Colo. App. 2000).

Claimant has failed to meet his burden to establish the requisite causal connection between the July 13, 2017 accident and medical treatment for his right-sided symptoms. Claimant originally reported only left-sided symptoms on July 13 and 21, 2017. Furthermore, August 17 and 20, 2017 medical records indicate that no further neck, shoulder, or arm symptoms were present. Claimant's extensive testing and treatment in 2018 indicates that there is a herniated disc at C6-7, but such disc herniation is degenerative in nature. An EMG concluded that Claimant did not have right-sided radicular symptoms due to a C6-7 disc herniation. Claimant's temporary left-sided symptoms resolved within one month and his right-sided symptoms are not related to the July 13, 2017, accident.

Claimant failed to meet his burden to prove by a preponderance of the evidence that he suffered an injury other than an acute left-sided cervical strain proximately caused by and arising out of the course and scope of his employment. Claimant's testimony during the hearing was self-contradictory, inconsistent with medical records, and inconsistent with the more credible testimony of Mr. D_____ and Dr. Hattem. Two medical records indicate that immediately following the accident, Claimant was experiencing left-sided symptoms in his neck, shoulder, and, eventually, hand. Two additional medical records indicate an absence of those same symptoms one month after the accident. Nine months after the date of injury, Claimant reported new symptoms in the opposite side of his body despite seeking no additional treatment during the interim. Then, from April 2018 through November 2018, Claimant's symptoms evolved from being intermittent to constant. This again conflicted with Claimant's testimony that his symptoms had been constant since they first began.

ORDER

IT IS THEREFORE, ORDERED THAT:

A. Claimant has failed to prove that he sustained a right-sided injury in the course and scope of his employment on July 13, 2017.

B. Claimant's claim for benefits is therefore denied and dismissed.

DATED this 4th day of March, 2019.

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge

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

ISSUES

- Whether claimant has proven by a preponderance of the evidence that she sustained a worsening of condition that would entitle claimant to reopen her claim for benefits pursuant to Section 8-43-303, C.R.S.?

- If claimant has proven that he claim should be reopened, whether claimant by a preponderance of the evidence that the spine surgery recommended by Dr. Clifford is reasonable medical treatment necessary to cure and relieve claimant from the effects of her industrial injury?.

FINDINGS OF FACT

1. Claimant sustained an admitted injury on May 8, 2016 when she lifted a large bucket of ice and felt a pop and stabbing pain in her low back. Claimant testified at hearing that she had back pain for over 20 years prior to her May 8, 2016 work injury.

2. Claimant testified that she had intermittent low back pain with limited sciatica into her left hip in the years following 1994. Claimant testified that she did not see a doctor for low back problems in the late 1990s or the 2000s.

3. Claimant testified that she moved to Colorado in 2011, and began seeing Dr. Joel Gates in 2012 as her primary care physician. Claimant testified that she sought treatment with Dr. Gates primarily for gastrointestinal ("GI") issues, and that her low back pain came up during the course of those discussions. According to the medical records, claimant discussed her low back pain with Dr. Gates on October 31 and November 12, 2012. Claimant received osteopathic manipulation treatment from Dr. Gates and was sent for low back x-rays and a magnetic resonance imaging ("MRI") scan.

4. The lumbar spine x-ray was performed on November 9, 2012 and revealed scoliosis and some degenerative disc changes at the L5-S1 level. The lumbar spine MRI taken November 19, 2012 showed scoliosis with stenosis at multiple levels.

5. Claimant testified that she was aware from those scans that she had some problems with her lumbar spine, but was not very aware of her scoliosis. Claimant testified that she did not have regular medical care, did not change her activities, or have any work restrictions as a result of her low back condition in late 2012.

6. Claimant testified that she had some GI issues, a gallbladder problem, a hernia, and other problems that resulted in significant medical treatment, including multiple surgeries. Claimant testified that these issues prevented her from returning to work as a nurse. Claimant testified that she had a prescription for medical marijuana for these issues.

7. Claimant consulted with Dr. Sherwood on February 12, 2014. Dr. Sherwood noted Claimant had had a cholecystectomy – gallbladder removal surgery – in 2012. Dr. Sherwood also noted that claimant was using medical marijuana to manage her low back pain. Dr. Sherwood noted that medical marijuana was controlling Claimant's low back pain without need for other medications.

8. Claimant returned to see Dr. Sherwood on February 4, 2015. Dr. Sherwood noted Claimant had a right inguinal hernia repair surgery in September 2014. Claimant was seeing Dr. Sherwood to renew her medical marijuana prescription. Claimant noted that the need for the marijuana prescription was primarily for her lower back pain.

9. Claimant again saw Dr. Sherwood on March 28, 2016 for renewal of her medical marijuana prescription. Dr. Sherwood noted claimant used the medical marijuana to help control her low back pain, anxiety and depression. Dr. Sherwood noted Claimant's use of medical marijuana conflicted with her job as a nurse.

10. Claimant testified that she was initially unable to work as a nurse because of her other health problems, including multiple surgeries. Claimant testified that she had difficulty re-applying for nursing work because of lack of clinical experience in recent years. Claimant testified that she was unable to apply for nursing jobs while on medical marijuana due to federal regulations. However, claimant testified that in approximately 2014 she stopped using medical marijuana because she wanted to start her own home health care agency. Claimant testified that the agency did not open for business because she was unable to procure enough funding.

11. Claimant testified she began working as a dishwasher for Employer in December 2015, later becoming a barista in the café. Claimant testified she worked as a housekeeper at the Box Canyon Lodge, another business owned by the same owner as employer. Claimant testified this housekeeping job involved carrying items up and down stairs, stripping beds, cleaning linens. Claimant testified that she was also participated in recreational activities including hiking and swimming during this timeframe. Claimant testified that before this work injury, if she had a hard day at work, she would have some back pain. Claimant also testified that her back pain did not limit her ability to do her work either for employer or for the Box Canyon Lodge.

12. Following the May 8, 2016 work injury, claimant was referred to Dr. Erika Woodyard at St. Mary's Occupational Medicine. Dr. Woodyard noted on May 20, 2016, that claimant had been off of work for five years due to health problems. Dr. Woodyard noted that claimant had returned to work the previous fall. Dr. Woodyard noted that claimant reported having low back pain since lifting the ice bucket. Dr. Woodyard reported claimant had some pain in her right leg from previous injuries that had fairly well resolved prior to her present injury. Claimant reported to Dr. Woodyard that she had osteoarthritis and scoliosis contributing to chronic low back problems. Dr. Woodyard provided work restrictions and recommended physical therapy.

13. Claimant was evaluated by Dr. Sherwood on May 16, 2016. Dr. Sherwood noted that claimant had aggravated her low back pain lifting a bucket of ice.

14. Claimant had follow-up visits with Dr. Woodyard on May 27, June 10, and June 24, 2016. Claimant reported ongoing symptoms, some of which she related to her preexisting low back problems, and some she related to the work injury. Claimant testified that immediately after the injury, she had fairly severe lower back pain. Claimant testified that once the localized back pain decreased, she began noticing tingling and numbness in her legs and feet.

15. On July 8, 2016, Dr. Woodyard noted claimant's report that her back pain was doing much better in the eight to nine months before the injury and claimant had managed her back pain well until the incident lifting the ice bucket. On July 26, 2016, Dr. Woodyard noted she had reviewed claimant's medical records from prior to her injury and opined that claimant's back pain had been fairly well controlled prior to lifting the ice bucket with use of medical marijuana.

16. Claimant underwent a lumbar spine MRI on July 27, 2016. The MRI revealed scoliosis as well as disk extrusions and protrusions at levels L2 through S1, all causing moderate to severe stenosis.

17. Claimant was evaluated by Dr. Craig Stagg on July 29, 2016. Dr. Stagg reviewed claimant's MRI and referred claimant for evaluation by a neurosurgeon for severe spinal stenosis. Dr. Stagg noted claimant's prior history of chronic back issues.

18. Claimant consulted with Dr. Robert Replogle on August 3, 2016, who noted Claimant's low back pain with radiating symptoms to her right knee. Dr. Replogle noted Claimant had "dramatic worsening" of her preexisting symptoms since her work injury. Dr. Replogle reported the MRI from 2016 showed multilevel moderate to severe degenerative disease throughout the lumbar spine with some worsening of stenosis at L3-4 compared to the 2012 MRI. Dr. Replogle noted that claimant's symptoms did not appear to radiate past the knee and opined that it would be reasponable to try an epidural steroid injection.

19. Dr. Woodyard noted on August 5, 2016 that she believed Claimant's condition was not related to the work injury, but to her pre-existing condition. Dr. Woodyard noted claimant had been referred to a neurosurgeon and was awaiting approval on her recommended injections. Dr. Woodyard opined that the work activities including the lifting of the ice bucket were not the reason for her treatment and discharged claimant from her care.

20. Claimant consulted with Dr. Sherwood on August 12, 2016, concerned that Dr. Woodyard was going to close her workers' compensation case because of her previous low back pain problems. Dr. Sherwood noted claimant felt like things were collapsing down with constant pain on her right side. Dr. Sherwood noted that she reviewed Dr. Woodyard's report and did not see her opinion that claimant's condition

was not related to her work injury. Dr. Sherwood offered an opinion in her report that claimant's condition was an acute re-injury of a chronic problem.

21. Claimant was evaluated by Dr. Stagg on August 22, 2016. Dr. Stagg noted claimant's report that her symptoms had become a lot worse since her injury. Dr. Stagg noted claimant had more constant numbness into her lower extremities, which was only intermittent prior to her work injury. Claimant reported that she had numbness into the right buttock into the right foot with ambulation, as well as numbness into the left leg and foot with sitting. Claimant reported more difficulty with activities of daily living compared with prior to her injury. Dr. Stagg noted claimant did not want to pursue the injection recommended by Dr. Replogle. Dr. Stagg therefore recommended physical therapy and electrodiagnostic studies.

22. Claimant returned to Dr. Stagg on September 12, 2016. Dr. Stagg noted claimant's longstanding history of low back issues with chronic changes on MRI. Dr. Stagg opined, however, that claimant's work injury aggravated the underlying condition, and represented a temporary aggravation. Dr. Stagg recommended an additional 6 visits with the physical therapist and referred claimant to Dr. Hehmann for electrodiagnostic testing.

23. Claimant returned to Dr. Stagg on October 3, 2016. Dr. Stagg noted the electrodiagnostic testing performed by Dr. Hehmann showed lumbosacral radiculopathy with peroneal neuropathy. Dr. Stagg recommended claimant continue with her physical therapy and referred claimant to Dr. Clifford's office for consultation regarding further treatment.

24. Claimant consulted with Physicians' Assistant ("PA") Bell with Dr. Kirk Clifford's office on October 19, 2016. Claimant reported a history of lifting a bucket of ice overhead when she developed right-sided low back and leg pain. PA Bell reviewed claimant's symptoms and radiographic findings. PA Bell noted Dr. Clifford would only recommend surgery once claimant's symptoms became unbearable given the extensive nature of the surgery. PA Bell noted claimant would like to hold off on any injections for the time being and work on more conservative measures on her own.

25. Claimant returned to Dr. Stagg on October 25, 2016. Dr. Stagg noted claimant had minimal gains over her past 10 physical therapy visits and reported that at this point, claimant wanted to proceed with lumbar spine injections.

26. Claimant underwent a right-sided transforaminal epidural steroid injection at the L3-4 and L4-5 levels under the auspices of Dr. Clifford on November 17, 2016. Dr. Clifford noted that post injection, claimant's leg pain was improved in the appropriate distribution. Claimant was instructed to return in six weeks for follow up.

27. Claimant returned to Dr. Stagg on November 30, 2016. Dr. Stagg noted significant symptoms for several days following the injection, but was now doing better with pain down the right lower extremity being almost resolved. Dr. Stagg recommended working on her core strength.

28. Claimant returned to Dr. Clifford on December 29, 2016 and reported having a good response to the injections that waned over time. Claimant reported some flu like symptoms initially following the injection, but expressed an interest in undergoing a left sided injection at the L4-5 and L5-S1 levels.

29. Claimant was eventually placed at maximum medical improvement ("MMI") by Dr. Stagg on March 6, 2017. Dr. Stagg noted claimant was working full duty without restrictions before her injury, but has had "chronic persistent symptoms and was unable to work at full duty following the injury. The doctor opined Claimant had aggravated her underlying condition on May 8, 2016 and provided claimant an 8% whole person impairment. Dr. Stagg also provided claimant with permanent work restrictions pursuant to the functional capacity evaluation ("FCE"). Dr. Stagg also recommended 3 to 4 follow up visits and a possible repeat injection as maintenance medical treatment.

30. Respondents filed a Final Admission of Liability on March 15, 2017 admitting for the permanent impairment rating and maintenance medical treatment. Claimant filed a timely objection and requested a Division-sponsored Independent Medical Examination ("DIME"). Dr. Jeffrey Krebs was selected as the DIME physician.

31. Dr. Krebs performed the DIME on May 31, 2017. Dr. Krebs reviewed Claimant's history, obtained a medical history and performed a physical examination in connection with his DIME. Dr. Krebs' review of claimant's medical records included claimant's pre-existing medical records along with her post-injury imaging studies. Dr. Krebs noted that his range-of-motion measurements were valid, and provided a 24% whole person impairment rating for loss of lumbar range of motion together with a 10% whole person impairment rating for specific disorders: a total of 32% whole person. Dr. Krebs noted that he was concerned that her levoscoliosis was the primary issue for her. Dr. Krebs noted that her levoscoliosis was profound and undoubtedly had predisposed claimant to the findings on the MRI scan. Dr. Krebs, however, noted the was unable to ignore the radiological findings and provided the impairment rating without apportionment. Dr. Krebs made recommendations for maintenance treatment including Lidoderm patches and injections of up to one time per year.

32. Respondents applied for hearing to overcome the DIME rating of Dr. Krebs. Prior to proceeding to hearing, Dr. Stagg issued an opinion that claimant was no longer at MMI on October 12, 2017 and referred claimant to Dr. Price, a rehabilitation specialist, and Dr. Cohen for psychological evaluation. Dr. Stagg ultimately referred claimant back to Dr. Clifford as of November 22, 2017.

33. On November 28, 2017, PA Ousley in Dr. Clifford's office reviewed the imaging studies and noted that from a surgical standpoint, correction of claimant's lumbar spine would require a T9 to sacral fusion. PA Ousley noted that given the magnitude of this procedure, claimant would need to have her bone health evaluated with a DEXA scan.

34. Claimant followed up with PA Ousley on January 17, 2018 at which time the DEXA scan was ordered.

35. Claimant testified that after being placed at MMI, she attempted to perform caretaking work for an elderly person who needed in-home assistance. Claimant testified she was unable to do that work for more than a few hours per day due to her ongoing symptoms and ultimately stopped doing the work.

36. Claimant underwent the bone density scan and returned to PA Ousley on April 4, 2018 to determine her fitness for surgery. PA Ousley noted it was reasonable to proceed with surgical planning. Dr. Clifford requested authorization for the fusion surgery.

37. Dr. Clifford's office noted on April 6, 2018 that claimant would need to undergo a psychological evaluation prior to spinal fusion surgery.

38. Claimant presented to Dr. Dale Bowen on May 14, 2018 for a pre-surgical psychological evaluation. Dr. Bowen noted claimant was undergoing vocational rehabilitation and was taking a "refresher course" in nursing. Dr. Bowen noted the only medications claimant was using at this point were lidocaine patches and CBD oil. Dr. Bowen noted claimant understood the risks of surgery. Dr. Bowen noted claimant had a significant level of ongoing pain and physical limitation, and recommended claimant have the proposed surgery recommended by Dr. Clifford.

39. Respondents filed an application for hearing on June 8, 2018, pursuant to W.C.R.P. 16-10, contesting the request for surgery from Dr. Clifford.

40. Claimant returned to Dr. Stagg on July 9, 2018. Dr. Stagg noted that claimant's symptoms were worsening with more pain, and she was unable to control the pain with medication. Dr. Stagg opined that claimant sustained an injury that aggravated her underlying condition and recommended claimant proceed with the surgery recommended by Dr. Clifford.

41. Dr. Clifford issued a report date September 26, 2018. Dr. Clifford noted claimant had an injury at work and had undergone a prior right sided L3-4, 4-5 transforaminal epidural steroid injection. Dr. Clifford noted that claimant was not quite ready to undergo surgery when he talked to her about it in the past, but she does feel this point in time that her symptoms had progressed and gotten more significant despite her past treatment options. Dr. Clifford noted that before her injury, she had some mild back pain, but that I was exacerbated by her work injury. Dr. Clifford recommended claimant get an MRI of the lumbar spine and updated CT scan of the thoracic and lumbar spine.

42. Respondents obtained an independent medical examination ("IME") with Dr. Rauzzino. Dr. Rauzzino provided a record review IME report dated November 15, 2018. The doctor opined that the current surgical recommendation from Dr. Clifford was not related to the admitted lifting injury at work. Dr. Rauzzino opined the recommended surgery was related to claimant's pre-injury low back condition. Dr. Rauzzino noted that

claimant had a history of low back pain prior to the admitted injury for which she used medical marijuana along with a pre-existing scoliosis and spinal deformity. Dr. Rauzzino opined that the recommended medical treatment was related to her pre-existing condition and not the work injury. Dr. Rauzzino further opined that claimant was not a good surgical candidate due to her psychological condition and history of chronic pain.

43. Claimant testified that her back pain, lower extremity tingling, lower extremity numbness, pain at night, and balance had all worsened somewhat since being placed at MMI in March 2017. Claimant testified she had more difficulty performing activities of daily living, including going up and down stairs and dressing herself. Claimant testified even though she was relunctant to have the surgery, she wanted to pursue surgical intervention because she hoped that surgery would help improve her function, reduce her pain level, and help her return to work.

44. The ALJ credits that testimony of claimant at hearing along with the opinions expressed by Dr. Stagg and Dr. Clifford and finds that claimant has established that it is more likely true than not that her condition has worsened since she was placed at MMI by Dr. Stagg on March 6, 2017. The ALJ further finds that claimant has established that it is more likely true than not that the worsened condition is related to claimant's May 8, 2016 work injury.

45. The ALJ credits the opinions of Dr. Clifford and Dr. Stagg and finds that claimant has established that it is more likely true than not that the surgical procedure recommended by Dr. Clifford involving a T9-S1 fusion is reasonable medical treatment necessary to cure and relieve claimant from the effects of the May 8, 2016 work injury. The ALJ notes that contrary opinion expressed by Dr. Rauzzino, but finds the opinions expressed by Dr. Stagg and Dr. Clifford to be more credible and persuasive with regard to this issue.

46. The ALJ notes that claimant's history of prior back pain and stenosis as documented by the medical records, but finds that the evidence has established that claimant's work injury of May 8, 2016 aggravated claimant's pre-existing condition and caused the need for medical treatment including the surgery recommended by Dr. Clifford.

CONCLUSIONS OF LAW

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

employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

3. At any time within six years after the date of injury, the ALJ may reopen an award on the ground of a change in condition. Section 8-43-303(1), C.R.S. A change in condition refers to "a change in the condition of the original compensable injury or to a change in claimant's physical or mental condition which can be causally connected to the original compensable injury." *Heinicke v. Industrial Claim Appeals Office*, 197 P.3d 222 (Colo. App. 2008). The ALJ is not required to reopen a claim based upon a worsened condition whenever an authorized treating physician finds increased impairment following MMI. *Id.* The party attempting to reopen an issue or claim shall bear the burden of proof as to any issues sought to be reopened. Section 8-43-303(4).

4. As found, claimant has established by a preponderance of the evidence that she is entitled to reopen her claim based on a worsening of condition. As found, the testimony of claimant along with the medical records of Dr. Stagg and Dr. Clifford are found to be credible and persuasive with regard to this issue.

5. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990).

6. As found, claimant has established by a preponderance of the evidence that the recommended T9 through S1 fusion is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury. As found, the opinions expressed by Dr. Stagg and Dr. Clifford in their medical reports is found to be credible and persuasive regarding this issue.

ORDER

It is therefore ordered that:

1. Claimant's claim for benefits is hereby reopened.

2. Respondents shall pay for the reasonable medical treatement necessary to cure and relieve claimant from the effects of the May 8, 2016 work injury including the surgery recommended by Dr. Clifford.

3. All issues not determined herein are reserved for further determination.

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

DATED: March 4, 2019

Keith E. Mottram

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

The ALJ finds and Concludes as follows:

I. The **ISSUES** as originally cited in the Findings of Fact and Conclusions of Law, dated November 19, 2019 remain unchanged.

II. **FINDINGS OF FACT** #s 1 through 46 remain unchanged.

III. **CONCLUSIONS OF LAW** #s A through P remain unchanged.

IV. **CONCLUSIONS OF LAW** Q through V are withdrawn, and the ALJ enters the following Conclusions of Law in their place:

CONCLUSIONS OF LAW

Did Respondents waive the Issue of Safety Rule Violation by failing to address it in the Final Admission of Liability?

Q. Respondents argue in their Brief in Support of Cross-Petition to Review that once Claimant timely contested the FAL, he had effectively subjected all ripe issues to a determination by an ALJ at an adversarial hearing. Upon reconsideration, the ALJ concurs with Respondents' position. Respondents cite, among others, *Barela v. CMHIP,* W.C. 4-842-938-03 (ICAO July 29, 2013). The ALJ finds the following language of *Barela* persuasive:

> In this case, however, the claimant objected to the respondent's final admission of liability and filed an application for hearing on the issue of permanent partial disability. As we previously have recognized in Franco v. Denver Public Schools, W.C. No. 4-818-579 (April 23, 2013), a respondent may controvert its own admission of liability by timely applying for a hearing **or, as here, filing a response to the application for hearing**. See Id.; Bauer v. Boulder County, W.C. No. 4-020-145, (March 22, 1993). The court of appeals in HLJ Management Group, Inc. v. Kim, 804 P.2d 250 (Colo.App. 1990), held that an admission of liability may be contested by either party, and that the "determination of the matter thus placed in issue is subject to determination by the ALJ at the adversary hearing." Id. at 253. The court further stated that **the admission is binding only until the controverted issue is determined and the ALJ issues an order.** See Pacesetter v. Collett, 33 P.3d 1230 (Colo.App. 2001); see also Rodriguez v. Industrial Claim Appeals Office, 2012 COA 139. *(Emphasis added).*

R. The ALJ therefore concludes that Respondents herein were permitted to litigate all issues otherwise ripe for litigation-*including violation of a safety rule*-once Claimant objected to the Final Admission of Liability. By so objecting, Claimant effectively assumed the risk that other issues otherwise deemed admitted by the FAL could be revisited at hearing.

Does the Equitable Doctrine of Waiver prevent Respondents from now raising the Issue of Violation of a Safety Rule?

S. "Waiver constitutes an intentional relinquishment of a known right." *Campos v. J.C. Penney Co.*, W.C. No. 4-86-186-02 (ICAP Nov. 14, 2013). "Waiver may be explicit or implied from conduct inconsistent with assertion of the right. However, a waiver implied from conduct must unambiguously reveal the party's intention to waive the right." *Dep't of Health v. Donahue,* 690 P.2d 243, 247 (Colo. App. 1997). A ruling that a party knowingly waived a right, an application of a legal standard to facts, is subject to de novo review. *People v. Al-Yousif*, 49 P.3d 1165, 1169 (Colo. 2002). The fact that Respondents did not pursue a termination for cause defense does not imply or unambiguously reveal that the Respondents intentionally and knowingly waived their right to assert a Safety Rule Violation offset. As found in Finding of Fact #8, it is unclear from the record if Claimant was terminated for failing to wear his seat belt, or for the simple act of rolling a full cement truck, seat belt or not.

T. The ALJ makes no findings that Respondents were aware at any time prior to Claimant's admission at the DIME that he had willfully failed to wear his seatbelt. At the time of his DIME, Claimant asserted that he did not willfully fail to wear a seatbelt because it was malfunctioning. Respondents did not implicitly or expressly waive a right to assert the Safety Rule Violation offset, since facts concerning the offset were still being revealed through the date of the DIME, and then beyond.

U. The ALJ concludes, therefore, that Respondents did not expressly or impliedly waive their ability to assert the defense of Violation of a Safety Rule under C.R.S. 8-42-112(1)(a).

ORDER

It is therefore Ordered that:

1. The DIME report of Dr. Higginbotham has been overcome. Claimant's Impairment Rating of the Whole Person is 0%.

2. As Claimant willfully violated a safety rule violation, as found, a 50% offset is applicable to all disability benefits, as permitted by law.

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

If you are dissatisfied with the ALJ's Supplemental Order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. The Petition to Review shall set forth in detail the particular errors and objections relied upon, and shall be accompanied by a brief in support thereof. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts, and to all other parties. For statutory reference, see section 8-43-301(6), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 4, 2019

/s/ William G. Edie

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

ISSUES

- Did Respondent prove a basis to withdraw its admission of liability?
- Did Respondent overcome the DIME's determination Claimant is not at MMI by clear and convincing evidence?

FINDINGS OF FACT

Pre-Existing Condition

1. Claimant has a history of low back pain dating to a work-related injury on October 13, 1992. Imaging studies showed Grade 1 spondylolisthesis and a "mild" disc bulge at L5-S1, with no nerve root or cord impingement. An EMG in November 1992 showed "minor" bilateral S1 radiculopathy. Dr. Daniel Olson, who served as the primary ATP, placed Claimant at MMI as of August 10, 1993. Claimant underwent a DIME on August 25, 1994 with Dr. Velma Campbell, who affirmed MMI and provided 13% whole person rating for the lumbar spine. There is no record of ongoing treatment after the claim concluded.

2. Claimant started working for Employer in the maintenance department in 1993, and has worked in this capacity for Employer since then.

3. On January 19, 1997, Claimant sustained a work-related injury when he fell through a ceiling in an office building. Claimant complained cervical, thoracic, and lumbar pain, with pain radiating into his legs. He received conservative treatment and was placed at MMI with no additional impairment, no future medical recommendations, and no permanent restrictions.

4. Claimant continued to work full duty for Employer after the 1997 incident.

5. In October 2006, Claimant suffered another flare of his low back pain while working. He was performing computer work when he noticed pain in his back and radicular type symptoms in his left leg. Claimant had a brief course of conservative treatment and was released after three weeks with no impairment, physical restrictions, or future treatment recommendations.

6. On January 9, 2016, Claimant aggravated his back when he slipped on ice and fell directly on his back. He was evaluated at the Parkview Medical Center emergency department. Claimant disclosed his history of low back pain and noted an acute onset of spasms due to the fall. Examination of the back and lower extremities was unremarkable, except some midline tenderness of the low back. X-rays showed no fracture or other acute structural injury. Claimant was given a nonspecific diagnosis of "back pain" and released with instructions to follow up with his primary care physician.

7. Per the ER instructions, Claimant followed up with his PCP, Dr. Bradley Smith a few days later. Dr. Smith prescribed a muscle relaxer and referred Claimant to massage and physical therapy. Claimant went to PT at the Parkview Medical Center Outpatient Rehabilitation Center from January 25, 2016 to March 22, 2016. The discharge note indicates Claimant was "no longer having any pain," and "feels like a new man." Claimant saw Dr. Smith again a month later for an unrelated medical problem, but the report contains no mention of any ongoing back symptoms. The records corroborate Claimant's testimony that the symptoms resolved.

8. At hearing, Claimant testified that between 1992 and 2016 his low back flared episodically, but these flares were generally brief, rarely required any medical treatment, and he always returned to full activity. This ALJ finds Claimant to be credible in this regard. Furthermore, Claimant's testimony is supported by the medical records and his ability to work full duty during those years.

Claimant's injury and course of treatment

9. Claimant's current claim arose out of landscaping work he performed on July 21, 2016, spraying trees with the assistance of several inmates. To accomplish the task, Claimant drove a "sand rail" vehicle outfitted with a tank and sprayer. He drove the sand rail over uneven and bumpy terrain throughout his shift, including over curbs and through swales and "trenches." The vehicle had very limited suspension, and the rough ride caused significant jarring to his body throughout the day. It also vibrated badly while the engine was running.

10. Claimant credibly testified the activity bothered his back during the shift. He recalled several instances where he felt a jolt of pain when hitting a bump or driving through a trench. He explained the pain was "deep inside . . . under my belly button and went to my back." By the end of his shift, Claimant felt pain "deep" in his abdomen and his low back and spams in his back muscles. He also felt nauseous and wondered if he had caught a stomach illness that was bothering one of the inmates that day.

11. Claimant's symptoms worsened on the drive home. He laid down on the floor when he got home, hoping to alleviate the pain. The pain kept getting worse, so he called a supervisor and reported he was going to see a doctor.

12. Claimant was seen at the Southern Colorado Clinic urgent care facility later that day. The history is described as:

> This is a 56-year-old male who presents with mid abdominal pain. The symptoms began today while he was driving "a cart" spraying trees today at his work at DOC. On a scale of mild to severe, the intensity is described as moderate-severe. Pain is constant and worsened in severity since onset this afternoon.

13. On examination, his abdomen was slightly distended with diffuse tenderness and guarding on palpation of the epigastric region. No back examination was performed. The urgent care physician diagnosed abdominal pain of "unclear" etiology.

Due to the severity of symptoms, she directed him to the emergency room. The report concludes with the comment, “he was claiming this was a work-related issue but I don’t see any association with his work today driving a cart.”

14. Claimant left the urgent care clinic and went to Parkview Hospital. The emergency department was very busy, and after waiting more than an hour to be seen Claimant felt a bit better and went home to rest.

15. The next day Claimant was still in pain. He worked part of his shift — running the sand rail again — and the pain continued to intensify. He asked his supervisor to send him to a doctor, and was referred to CCOM.

16. Claimant saw PA-C Steven Quackenbush at CCOM on July 22, 2016. On the intake form, Claimant described “lower back pain, mid back pain,” which he attributed to “spraying trees in a Go Cart bouncing and turning” the day before. Claimant related his prior history of back problems, but stated, “He feels that the back pain he developed on 07/21/2016 is ‘different’ from his usual back pain symptoms.” Claimant also reported a “stinging” pain in his left foot, which was “new” since the work incident. On examination, Claimant walked with an “obvious antalgic gait.” Palpation revealed paralumbar and para thoracic muscular tenderness, mild left SI joint tenderness, and mild diffuse periumbilical muscular tenderness. Mr. Quackenbush diagnosed a low back muscular strain and opined,

> Acute findings are consistent with history and/or work-related mechanism of injury. Any chronic findings from known chronic back pain from 1997 injury are not work-related . . . . The patient has chronic back pain and may be treated back to baseline only.

17. Mr. Quackenbush imposed a five-pound lifting restriction, prescribed muscle relaxers and ibuprofen, and asked Claimant to return in three days.

18. Claimant returned to CCOM on July 25, 2016. He was somewhat better but still had aching and spasms in his low back and SI area with some radicular pain to the left knee. Physical examination showed persistent paralumbar and parathoracic muscular tenderness and left SI joint tenderness. Mr. Quackenbush maintained the 5-pound lifting restriction and referred Claimant to physical therapy.

19. On August 2, 2016, Mr. Quackenbush added tramadol for pain and ordered a lumbar MRI “to help sort out acute from chronic.”

20. On August 10, 2016, Mr. Quackenbush noted Claimant remained symptomatic with ongoing “spasms” and some radicular symptoms. Claimant said physical therapy was not helping, so Mr. Quackenbush referred him to a chiropractor. Claimant subsequently had several chiropractic sessions, which were somewhat helpful.

21. Claimant had the lumbar MRI on August 17, 2016. The most significant findings were at L5-S1, including anterolisthesis and pars defects, severe foraminal narrowing (worsen toward the left), and a left lateral disc herniation.

22. Dr. Daniel Olson took over Claimant's care on August 31, 2016. Dr. Olson noted Claimant's symptoms began "after using an all-terrain vehicle up and down some slopes spraying trees. It is a somewhat odd presentation in that he noticed discomfort in his abdomen first, then lower back pain." Claimant told Dr. Olson "while he was in physical therapy [he felt] like his spine shifted and since then he has noticed increasing thoracic pain and even muscle spasms on the left side of his anterior neck." Claimant's pain diagram reflected pain in the neck, mid-thoracic and lumbar areas, and some numbness in his left foot. On examination, Dr. Olson appreciated asymmetry of the left anterior neck musculature compared to the right, and thoracic pain on palpation with spasm. Dr. Olson liberalized Claimant's work restrictions to 10 pounds lifting and referred him for a physiatric evaluation.

23. Claimant saw Dr. Dwight Leggett, a physical medicine and rehabilitation specialist, on September 26, 2016. Claimant described the history as

> On [July 21, 2016], he states that he was given a cart to drive around to monitor inmates. He reports that the cart had minimal suspension and he had to drive over variable surfaces. This was quite "jarring." Soon after, he began to have pain in the low back as well as in his stomach muscles. He was evaluated by Mr. Quackenbush on 722/2016. He was diagnosed with a low back strain which was felt to be different from his chronic low back issues.

24. Claimant's primary area of concern was his low back, with constant stabbing, pinching, and sharp pain. He also reported intermittent pain, numbness, and tingling in the left leg. His symptoms were aggravated by prolonged standing and static postures. Claimant described muscle tension and twitching on the left side of his neck and stated, "He believes that this began on the same day as his workman's compensation claim, and has been worsening with time. This was especially true after his physical therapy visits, which seemed to intensify the spasms." Claimant also reported spasms in the abdominal muscles. Claimant told Dr. Leggett about his preinjury back problems, but was "quite specific that his current pain is very different in character from his previous back pain."

25. Dr. Leggett documented by far the most thorough physical examination performed up to that time. He noted significant myofascial tightness and tenderness in the low back with multiple palpable trigger points, and moderate tenderness in the left greater than right SI joints. He also documented significant myofascial tightness at the insertion of the abdominal muscles below the ribs. Cervical examination showed significant tension, primarily involving the left sternocleidomastoid muscle, which produced "noticeable asymmetry and muscle tension." Dr. Leggett opined Claimant's primary issue was his low back pain, mainly involving the L5-S1 facet joints. He recommended facet joint injections and a steroid injection into the pars region. He suggested a lumbar ESI if the facet injections did not help. Dr. Leggett also referenced "irritability" in the left rib/abdominal region, and opined "this will improve once we get the low back region under control." He suggested additional chiropractic treatment, with more focus on manual manipulation. Regarding the neck pain, Dr. Leggett stated, "at this point,

we have been asked to address the low back region, and any additional treatment to the neck will be left at your discretion, Dr. Olson."

26. Dr. Olson reviewed Dr. Leggett's report on October 13, 2016, and agreed with the recommendations.

27. On October 20, 2016, Claimant reported the chiropractic treatment was helpful, particularly regarding his neck spasms. He was still waiting for the facet injections to be approved.

28. Dr. Leggett reevaluated Claimant on December 5, 2016. The facet injections had been denied by a peer review due to "incomplete documentation," which Dr. Leggett could not understand given the thorough examination and detailed discussion documented after the initial visit. Claimant reported the chiropractic treatment was helpful but only giving short-term relief. Claimant was "extremely frustrated with his ongoing pain." Dr. Leggett noted the initial referral was limited to the low back, but he had now been authorized to look at the cervical region. Examination of his back revealed significant myofascial tenderness and palpable trigger points. Clinical findings regarding the neck were worse than at the previous evaluation. Dr. Leggett reiterated his recommendation for bilateral L5 S1 facet joint injections, and recommended trigger point injections for both cervical and lumbar myofascial pain. Depending on Claimant's response to the trigger point injections, he would consider an occipital nerve block or Botox injections for the neck. Dr. Leggett noted many months have passed since Claimant's injury with "minimal" treatment and opined "it is important that we be more aggressive with his treatment. I would like to prevent his acute pain from becoming chronic in nature."

29. Claimant underwent the L5 S1 facet blocks with Dr. Scheper on January 10, 2017. He followed up with Dr. Leggett on January 25, and reported approximately one week of significant pain reduction and increased function. Dr. Leggett considered it a positive diagnostic response, which "confirms that we are targeting the right pain generation." He recommended bilateral medial branch blocks, and possible rhizotomy. Dr. Leggett noted the trigger point injections had been denied.

30. Dr. Sparr performed electrodiagnostic testing on February 8, 2017, which showed no evidence of lumbosacral radiculopathy, sciatic, or distal compression neuropathy.

31. On March 15, 2017, Dr. Leggett noted the medial branch blocks had been denied. Dr. Leggett was frustrated by the ongoing difficulty obtaining authorization for treatment, which he believed was impeding Claimant's recovery. He could not understand why the blocks had been denied given the extensive and thorough documentation in his previous reports. Dr. Leggett further explained,

> On exam, there continue to be multiple areas of myofascial pain generation with clear trigger points and associated twitch responses. In the past, trigger point injections have been requested and denied. Similar was noted for the request for massage treatments.

> He has received authorization for chiropractic treatments, which were beneficial. Unfortunately, he has completed this course of treatment. I believe that the overall effect of the chiropractic treatment, while helpful, was not nearly as impactful as coordinating additional treatments. [Claimant's] pain has been going on for months, with his care being sporadic at best. We are having extreme difficulty with any sort of recommended treatment being approved. When a form of treatment is approved, it takes a significant amount of time for this to be completed. With the multiple regions of pain generation and the worsening nature of his pain, a multifactorial approach to his care is required. This is also been instructed by insurance, selecting only part of the recommended course of medical treatment. As discussed in the past, it seems of the insurance company is directing his medical care.
>
> Despite the above issues, I will continue to move forward with [Claimant's] best interest in mind. With this, I will again request trigger point injections and massage.
>
> For the ongoing neck pain, there seems to be an evolving spasticity. This is not surprising in that no treatment has been approved to target this region. . . . Botox injections may be needed, as previously discussed.
>
> I will have him return to clinic as soon as some form of treatment is authorized. Despite the disruption in his care, I will do my best to move forward with any possible treatment that I can.

32. The medial branch blocks were ultimately completed on April 4, 2017. Claimant returned to Dr. Leggett the next day to discuss his response. Almost immediately after the injections, Claimant developed severe flare of pain and muscle spasm and multiple areas including his abdomen, low back, and neck. Dr. Leggett had a lengthy discussion with Claimant, but Claimant could not separate his low back pain from the increased pain and other areas of his body. Dr. Leggett opined, "With this, I am unable to identify any specific diagnostic improvement that would support the need for radiofrequency ablation." Dr. Leggett noted his of the recommendations remained denied. He stated,

> At this point, authorizations have been quite sporadic, and no specific treatment plan has been followed. I am running out of options . . . .
>
> Highest concern right now is the increasing left a cervical tension, which is evolving into spasticity. There seems to be a developing and increasing cervical dystonia. [Ideally], trigger point injections would be the first line to target this in coordination with manual treatments. However, this has been denied. Therefore, I will request authorization for Botox injections.

33. Claimant later declined Botox due to fear of possible complications and side effects.

34. On April 14, 2017, Dr. Olson noted he was "struggling" with Claimant's symptom complex, as "nothing really seems to make sense."

35. Claimant underwent cervical and thoracic MRIs on May 13, 2017. They showed diffuse degenerative changes and multiple bulging discs, but no obvious structural instability or compromise of the spinal cord or spinal nerve roots.

36. Claimant transferred his care to CCOM's Canon City clinic in May 2017 and started seeing Dr. Thomas Centi. Commencing on May 30, 2017, Dr. Centi issued a series of reports allegedly documenting essentially normal physical examinations of all areas involved in Claimant's claim, including no pain with palpation or movement of his cervical, thoracic, or lumbar areas and normal range of motion. These cloned examination notes are inconsistent with the accompanying pain diagrams and Dr. Leggett's detailed clinical findings. Dr. Centi also repeatedly alleged Claimant had described his symptoms as "minimal" and "improving," which is also belied by the pain diagrams and Dr. Leggett's records. The ALJ finds Dr. Centi's records inaccurate and unreliable and declines to give them substantial weight. The ALJ has given far greater weight to Claimant's pain diagrams and Dr. Leggett's thorough reports.

37. Dr. Leggett last saw Claimant on June 16, 2017. He had recently spoken with Dr. Centi who was under the mistaken impression Claimant only drove the sand rail "on a completely level surface" on the date of injury. Dr. Leggett was concerned about the persistent and progressive nature of Claimant's symptoms and suggested additional workup to investigate potential diffuse neurological issues such as ALS or muscle related dystrophy. He recommended a dexamethasone steroid burst to help with any inflammatory-related pain. He concluded,

> At this point, I do not have any other options to offer [Claimant]. We have tried some interventional procedures which did not provide the anticipated benefit. There are some procedures that he is not comfortable moving forward with. Other procedures have been denied. . . . I encouraged him to follow-up with [Dr. Centi] to see how the steroid burst performed. If there are any other treatment options that are available that I can assist with, I would be more than happy to do so.

38. Dr. Centi placed Claimant at MMI with no impairment and no permanent restrictions on July 20, 2017. Dr. Centi's report contains no significant discussion or analysis of MMI, which is surprising given the complex nature of Claimant's condition and his course of care.

39. Respondent filed a Final Admission of Liability (FAL) on August 28, 2017 based on Dr. Centi's MMI report. Despite Dr. Centi's recommendation for refills of Mobic, Robaxin, and Ultram, the FAL denied medical benefits after MMI.

40. Claimant timely objected to the FAL and requested a DIME.

41. Claimant saw Dr. Miguel Castrejon for the DIME on November 15, 2017. Claimant's gait was slow and unsteady, favoring the left leg. Cervical range of motion was

reduced, with “visible spasm” of the left sternocleidomastoid muscle, and scattered trigger points with muscle hypertonicity and spasm. Dr. Castrejon also appreciated hypertonicity and spasm of the thoracic and lumbar musculature. Sensation was decreased in an S1 distribution on the left. Gastrocnemius strength was 4/5 with “evident” atrophy. Dr. Castrejon diagnosed cervical spine “dystonic features,” thoracic sprain, lumbar strain/sprain with facetitis, aggravation of pre-existing spondylolisthesis at L5-S1, and left S1 radiculopathy. He opined theses diagnoses were causally related to Claimant’s work activity on July 21, 2016. Regarding the cervical spine, he opined, “the presence of a recent traumatic event (the activity of July 21, 2016 in combination with an apparent injury during participation in physical therapy) argues toward the cervical spine as being considered industrial in nature.” Dr. Castrejon further commented that Dr. Centi’s “template examination” reports made him wonder “whether he ever reviewed Dr. Olson’s report of April 14, 2017 and respectfully question whether he examined the same individual that I, Dr. Olson and Dr. Olson’s PA examined.”

42. Dr. Castrejon determined Claimant is not at MMI. He recommended flexion and extension x-rays, a neurosurgical consultation, repeat electrodiagnostic testing, and consideration of left L5 and S1 nerve root blocks. He also recommended a psychological evaluation to help Claimant manage his chronic pain.

43. On February 2, 2018, Claimant completed an annual refresher Defensive Tactics and Pressure Points Control Tactics course, required of all employees to work around inmates. Mr. James Holcomb has taught the course for the past 10 years. Mr. Holcomb testified the PPCT testing is physically demanding and demonstrated several tactics during the hearing. Some tactics and techniques require the ability to freely turn one’s neck and twist at the waist. Others require bending at the waist and kneeling to take physical control of an inmate on the floor. Mr. Holcomb explained, “I don’t expect anyone to be an MMA fighter,” and tells the participants “when you take this class, just do the best you can.” Mr. Holcomb certified Claimant proficient after completing the refresher course in February 2018. Claimant also passed the course in approximately January or February 2017.

44. Before completing the course, Claimant completed a form on which he referenced “back and neck problems” as conditions that “may impede participation in this program.” Mr. Holcomb admitted he did not specifically recall the refresher session Claimant attended in February 2018, and his testimony merely described the techniques he teaches generally.

45. Claimant testified he struggled with the refresher course and could not complete few tactics. He recalled the 2018 course was “gentler” than some previous courses, and not as strenuous as those Mr. Holcomb described generally.

46. Dr. Allison Fall performed an IME for Respondent on March 15, 2018. She disagreed with Dr. Castrejon’s opinion Claimant is not at MMI. She opined his physical examination findings were nonphysiologic and self-limited. In contrast to examinations by Dr. Leggett and Dr. Castrejon, Dr. Fall stated there was no acute spasm on palpation of

Claimant's neck. Dr. Fall thought Claimant's presentation was exaggerated and nonsensical, and none of his ongoing complaints were related to his work.

47. Dr. Michael Rauzzino performed an IME for Respondent on April 3, 2018. His conclusions echoed those reached by Dr. Fall, namely that Claimant did not injure his back or neck at work at work on July 21, 2016, and requires no further treatment in relation to any work exposure. Specifically, Dr. Rauzzino opined,

> [Claimant's] vague and diffuse complaints have morphed over the course of his claim. There is nothing in the records to suggest that he sustained a specific injury as a result of riding in the sand rail or as a result of his treatment such that he would have sustained injury to the cervical spine, specifically dystonia or cervical facetogenic disease for which treatment has been proposed.

48. Dr. Rauzzino testified for Respondent in an evidentiary deposition on June 4, 2018. His testimony tracked the opinions expressed in his IME report. Dr. Rauzzino testified Claimant does not have cervical dystonia[1] based on his presentation and the mechanism of injury. Dr. Rauzzino opined it was not medically probable Claimant developed cervical dystonia because of any activity in therapy. Dr. Rauzzino reviewed Claimant's August 2016 lumbar MRI and identified no acute lumbar spine injury. He opined Claimant's MRI findings are consistent with a chronic disk bulge with no evidence of acute annular tear or hemorrhage to suggest any acute process.

49. Dr. Castrejon testified in an evidentiary deposition on September 26, 2018. He reviewed additional medical records before the deposition, including Dr. Rauzzino's and Dr. Fall's IME reports. Dr. Castrejon admitted he had not known about Claimant's participation in the PPCT refresher course, and would have doubted he could complete such a program. Nonetheless, none of the additional information convinced Dr. Castrejon to change his opinions regarding injury-related body parts or MMI.

50. Dr. Fall testified for Respondent in a post-hearing deposition on December 18, 2018, consistent with the opinions expressed in her IME report. She testified Claimant's presentation at Dr. Castrejon's DIME and her IME were incompatible with her general understanding of the defensive tactics in the PPCT course. Dr. Fall reiterated her opinion Claimant's presentation is "exaggerated" and "does not make physiologic sense." She maintained that Claimant is at MMI and requires no further treatment for any work-related condition.

51. Claimant's testimony regarding the onset and progression of symptoms in relation to his work is credible and persuasive.

[1] The ALJ notes Dr. Castrejon did not specifically diagnose cervical dystonia, but rather diagnosed "dystonic features."

52. Respondent failed to prove a basis to withdraw its admission of liability. The preponderance of persuasive evidence shows Claimant suffered a compensable injury on July 21, 2016.

53. Respondent failed to overcome the DIME's determination Claimant is not at MMI by clear and convincing evidence. Respondent failed to overcome the DIME's causation determination regarding Claimant's cervical spine. The contrary opinions of Dr. Fall and Dr. Rauzzino amount to "mere differences of medical opinion," which are insufficient to overcome the DIME.

CONCLUSIONS OF LAW

A. Withdrawal of admissions

By filing an admission of liability, the Respondent "admitted that the claimant sustained the burden of proving entitlement to benefits." *City of Brighton v. Rodriguez*, 318 P.3d 496, 507 (Colo. 2014). If the respondents seek to withdraw the admission of liability, they must prove by a preponderance of the evidence that the claimant suffered no compensable injury. *See* § 8-43-201(1) ("a party seeking to modify an issue determined by a general or final admission … shall bear the burden of proof for any such modification."). Under *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000), the respondents may withdraw an admission of liability even after a claimant has gone through the DIME process. But to ensure that a request to withdraw an admission is not merely a "tactical" pretext to avoid the heightened burden of proof regarding DIMEs, the respondents must prove the claimant suffered no compensable injury in the first instance. *Id*. Once the claimant crosses the threshold for compensability, determinations of MMI are driven by ATPs and the DIME process.

The existence of a pre-existing condition does not disqualify a claim for compensation if an industrial injury aggravates, accelerates, or combines with a pre-existing condition to produce disability or a need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Compensable medical treatment includes evaluations or diagnostic procedures to investigate the existence, nature, or extent of an industrial injury. *Garcia v. Express Personnel*, W.C. No. 4-587-458 (August 24, 2000). Pain is a typical symptom from the aggravation of a pre-existing condition, and if the pain triggers the claimant's need for medical treatment, the claimant has suffered a compensable injury. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-921-616-03 (September 9, 2016). But the mere fact that a claimant experiences symptoms at work does not necessarily mean the employment aggravated or accelerated the pre-existing condition. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005). Rather, the ALJ must determine whether the need for treatment was the proximate result of an industrial aggravation or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

To prove an aggravation, a claimant need not show an injury objectively caused any identifiable structural change to their underlying anatomy. Rather, a purely symptomatic aggravation is sufficient for an award of medical benefits if it caused the claimant to need treatment he would not otherwise have required. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-921-616-03 (September 9, 2016).

Even a "minor strain" or a "temporary exacerbation" of a pre-existing condition can be a sufficient basis for a compensable claim if it was caused by a claimant's work activities and caused him to seek medical treatment. *E.g., Garcia v. Express Personnel*, W.C. No. 4-587-458 (August 24, 2004); *Conry v. City of Aurora*, W.C. No. 4-195-130 (April 17, 1996).

As found, Respondents failed to prove a basis for withdrawing the admission of liability. The persuasive evidence shows Claimant more likely than not suffered at least soft tissue strains and a symptomatic aggravation of his pre-existing condition as a proximate result of his work activities on July 21, 2016. The symptoms reasonably caused a need for treatment and limitations that impeded his ability to perform his regular work. Although Claimant had prior back problems, they were tolerable and well managed before July 21, 2016. The January 2016 slip and fall temporarily aggravated Claimant's back but he recovered well after two months of therapy. Claimant's statement that his symptoms after July 21, 2016 differed greatly from before the accident is credible and supported by the medical records. The fact that Claimant's symptoms may have expanded and intensified since the original injury does not change the ALJ's conclusion he suffered a compensable injury in the first instance.

B. Overcoming the DIME

"Maximum Medical Improvement" (MMI) is defined as the point when any medically determinable physical or mental impairment as a result of the industrial injury has become stable, and no further treatment is reasonably expected to improve the condition. Section 8-40-201(11.5). The DIME's determination regarding MMI is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b) and (c); *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). In determining whether a claimant is at MMI, the DIME "inherently" must decide whether further treatment is causally related to the industrial injury, and the DIME's determination that a particular condition is or is not related to the industrial injury is binding unless overcome by clear and convincing evidence. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998). Clear and convincing evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). The party challenging a DIME's conclusions must demonstrate it is "highly probable" that the MMI finding is incorrect. *Qual-Med*, 961 P.2d at 592; *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A "mere difference of medical opinion" does not constitute clear and convincing evidence that the DIME is incorrect. *E.g., Gutierrez v. Startek USA, Inc*., W.C. No. 4-842-550-01 (March 18, 2016).

As found, Respondent failed to overcome Dr. Castrejon's MMI opinion. Reasonable physicians can disagree on whether Claimant's ongoing back and neck symptoms are causally related to his work on July 21, 2016. In his report and deposition testimony, Dr. Castrejon provided well-reasoned and thorough explanations for his opinions and conclusions. Dr. Castrejon considered Claimant credible. Dr. Leggett also believed Claimant's complaints were genuine and the lion's share of his symptoms relate to the admitted injury. Additionally, Dr. Leggett noted at least some of the worsening over time is attributable to delays in authorization and denial of some requested treatment. The record shows Claimant experienced the onset of low back and mid back pain shortly after operating the sand rail on July 21, 2016. Claimant has consistently attributed his symptoms to that activity. He has consistently stated his symptoms after July 21, 2016 were substantially different than his previous back problems. Claimant's physical condition as depicted in the medical records after July 21, 2016 appears significantly worse than before the injury. Dr. Castrejon synthesized all the available information, which led him to conclude Claimant's current back symptoms are more likely than not injury-related. Dr. Fall and Dr. Rauzzino's contrary opinions are amount to "mere differences of opinion," and do not persuade the ALJ to overturn the DIME.

Respondent's most compelling evidence is the testimony of James Holcomb. At first blush, Claimant's completion of the defensive tactics refresher course in 2018 appears inconsistent with his reported symptoms and limitations. Mr. Holcomb appeared sincere and the ALJ has no reason to doubt the general descriptions he provided of the physical maneuvers involved. But it requires supposition to connect the dots between Mr. Holcomb's general demonstration of tactics and Claimant's *actual performance* in the course. Mr. Holcomb testified he does not "expect anyone to be an MMA fighter" and tells the participants to "do the best they can." It seems reasonable to infer a wide range of proficiency among DOC employees, many of whom probably complete the course without looking like the second coming of Bruce Lee. Moreover, Mr. Holcomb admitted he had no specific recollection of Claimant's refresher training, so he cannot directly contradict Claimant's testimony of how he managed to get through the course despite his pain and limitations. The ALJ is also mindful that Dr. Leggett and Dr. Castrejon documented objective clinical findings to corroborate Claimant's reported symptoms, including muscle spasm and trigger points. Respondent's primary argument is Claimant's completion of the refresher course "is inconsistent with an ongoing need for medical care and permanent impairment." The ALJ is not persuaded to draw that inference, particularly in the context of a clear and convincing evidence burden.

Regarding the neck, Claimant asserts he injured his neck in physical therapy prescribed for his compensable injury. He told multiple providers the same thing since August 2016. Dr. Castrejon was persuaded by Claimant's assertion and incorporated it into his MMI determination. As a result, Respondent must prove a negative, *i.e.*, that Claimant did not injure his neck, by clear and convincing evidence. While there is room for legitimate disagreement on this point, Respondent's evidence does not rise to the level of clear and convincing.

Nor does the ALJ find clear and convincing evidence to overcome Dr. Castrejon's recommendations for further evaluations and treatment. Several of Dr. Castrejon's

recommendations are diagnostic in nature, which seems reasonable given the challenging and complex nature of Claimant's presentation. Diagnostic procedures are a legitimate basis to forestall MMI when such procedures have a reasonable prospect of diagnosing or defining the claimant's condition so as to suggest a course of further treatment. *Soto v. Corrections Corp. of America*, W.C. No. 4-813-582 (October 27, 2011). The ALJ concludes that standard is satisfied here.

Additionally, the ALJ sees no persuasive evidence to contradict Dr. Castrejon's opinion that Claimant would benefit from a psychological assessment and possible counseling. The Chronic Pain MTGs provide,

> All patients who are diagnosed as having chronic pain should be referred for a psychosocial evaluation, as well as concomitant interdisciplinary rehabilitation treatment. This referral should be performed in a way so as to not imply that the patient's claims are invalid or that the patient is malingering or mentally ill. Even in cases where no diagnosable mental condition is present, these evaluations can identify social, cultural, coping, and other variables that may be influencing the patient's recovery process and may be amenable to various treatments including behavioral therapy. As pain is understood to be a biocide Co. social phenomenon, these evaluations should be regarded as an integral part of the assessment of chronic pain conditions.[2]

Finally, Respondent's argument the ALJ has no authority to order treatment recommended a non-ATP (the DIME) is unpersuasive for several reasons. First, the ALJ is not ordering any specific treatment. The sole issues for determination are (1) Respondent's request to withdraw the GAL, and (2) Respondent's attempt to overcome the DIME regarding MMI. Claimant has not requested the ALJ to award any specific treatment. Second, Respondent's argument would mean a DIME could never make treatment recommendations, which would eviscerate the ability to declare a claimant not at MMI. The DIME's role is not to simply choose between treatment recommendations made by ATPs. Rather, the DIME gives an independent opinion regarding any treatment he or she believes is necessary to bring the claimant to MMI. It is then incumbent on ATPs to implement those recommendations, or for the parties to otherwise find a way to resolve the matter. The possibility that a claimant may be whipsawed between the DIME and a recalcitrant ATP, while unfortunate, is simply an inherent feature of this process. *Williams v. Kunau*, 147 P.3d 33 (Colo. 2006).

ORDER

It is therefore ordered that:

1. Respondent's request to withdraw its admission of liability is denied and dismissed.

[2] Rule 17, Exhibit 9, § (F)(2).

2. Respondent’s request to overcome the DIME regarding MMI is denied and dismissed.

3. All issues not decided herein are reserved for future determination.

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

DATED: March 5, 2019

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

ISSUE

Whether Claimant has established by a preponderance of the evidence that he is entitled to receive reasonable, necessary and related medical maintenance benefits designed to relieve the effects of his admitted June 27, 2005 lower back injury or prevent further deterioration of his condition pursuant to *Grover v. Industrial Comm'n.,* 759 P.2d 705 (Colo. 1988).

FINDINGS OF FACT

1. On June 27, 2005 Claimant suffered an admitted industrial injury to his lower back while working for Employer. Claimant received conservative medical treatment through Authorized Treating Physician (ATP) Robert Kawasaki, M.D.

2. In February 2006 Gary Ghiselli, M.D. performed microdiscectomy surgery at the L5-S1 level of Claimant's lumbar spine. However, Claimant continued to report lower back and left lower extremity symptoms. A lumbar MRI revealed recurrent disc herniation at the L5-S1 level that displaced the left S1 nerve root. Dr. Ghiselli informed Claimant that a repeat microdiscectomy would likely relieve his left lower extremity symptoms. However, because of concerns about Claimant's lower back pain, Dr. Ghiselli referred Claimant back to Dr. Kawasaki for diagnostic/therapeutic epidural steroid injections (ESIs).

3. Dr. Kawasaki administered ESIs and medial branch blocks. He also prescribed physical therapy. On November 14, 2006 Dr. Kawasaki determined that Claimant had reached Maximum Medical Improvement (MMI) and assigned a 16% whole person impairment rating.

4. In a November 28, 2006 visit with Dr. Kawasaki Claimant reported occasional decreased sensation in his genital area and erectile dysfunction (ED). Although Claimant had been experiencing the ED symptoms for several months, he was reluctant to report them to Dr. Kawasaki. Dr. Kawasaki noted that the ED symptoms failed to represent an acute change in Claimant's condition. He subsequently referred Claimant for a repeat lumbar spine MRI.

5. On January 11, 2007 Dr. Ghiselli reviewed the repeat MRI findings with Claimant. The MRI continued to reflect the recurrent disc herniation that existed on the initial MRI. Dr. Ghiselli commented that Claimant's radicular symptoms were not significant. He explained that "[d]ue to the confounding ED, it would be unreasonable to decompress the L5-S1 level. I do not think that this is the reason for his [ED] and it may be contributing to his lower back and left lower extremity complaints." Dr. Ghiselli recommended a second surgery but Claimant was reluctant to proceed. He thus referred Claimant back to Dr. Kawasaki to discuss additional treatment options.

6. Dr. Kawasaki referred Claimant to urologist Seth Glick, M.D. Dr. Glick recommended a trial of Viagra for Claimant's ED. He did not believe there were any problems with Claimant's lower urogenital tract and noted that the ED could be related to psychological issues or back pain.

7. On March 15, 2007 Claimant returned to Dr. Ghiselli for an examination. Dr. Ghiselli again recommended surgery to decompress the L5-S1 level. He reasoned that surgery would likely improve Claimant's left lower extremity complaints but would not likely correct his back pain or ED symptoms.

8. On April 24, 2007 Claimant underwent a Division Independent Medical Examination (DIME) with Greg Reichhardt, M.D. Claimant reported decreased sensation throughout the entire left side of his body including his face, arm, trunk and leg. Dr. Reichhardt noted diffuse weakness throughout the entire left upper and lower extremity. He diagnosed Claimant with lower back pain, left hemi-body sensory loss unlikely related to his industrial injury, sexual dysfunction and gross numbness of uncertain etiology. Dr. Reichhardt detailed that "Claimant's presentation raises several concerns. His sexual dysfunction is not well explained based on the lumbar MRI. In addition, he has neurologic symptoms and findings which are unexplained based on his back injury. This likely represents a neurologic condition unrelated to his work-related injury or manifestation of a non-physiologic presentation." He recommended a psychological evaluation, further urologic testing and electrodiagnostic testing. Dr. Reichhardt agreed with Dr. Kawasaki that Claimant had reached MMI on November 14, 2006. He assigned a 10% impairment for a specific disorder of the lumbar spine and a 17% rating for range of motion deficits for a total 25% whole person impairment. Dr. Reichhardt did not assign impairment ratings for sexual dysfunctions or depression because the conditions were not related to his June 27, 2005 industrial injury.

9. On October 29, 2007 Claimant visited clinical psychologist Rebecca Hawkins, PhD. for an examination. Claimant reported that he had not experienced ED problems prior to his February 2006 back surgery. Dr. Hawkins noted that, after the discectomy in February 2006, Claimant no longer had typical morning erections and did not respond to sexual stimulation. Claimant's ED did not improve with Viagra.

10. On October 31, 2007 Administrative Law Judge Michael E. Harr issued Findings of Fact, Conclusions of Law and an Order in the present matter. ALJ Harr concluded that Claimant had demonstrated his condition worsened as of September 25, 2007 and he was no longer at MMI. He thus determined that Dr. Kawasaki's recommendations for further urological testing and a psychological evaluation were reasonably necessary to cure and relieve the effects of Claimant's June 27, 2005 industrial injury. Nevertheless, ALJ Harr reasoned that Claimant's "ongoing prescription for Viagra or similar medication" was not reasonable and necessary.

11. On November 6, 2007 Claimant returned to Dr. Hawkins for an evaluation. Claimant reported multiple issues including ED, psychological concerns and postsurgical problems. Dr. Hawkins diagnosed major depressive disorder, probable male erectile disorder and a pain disorder. She determined that psychological factors

were likely contributing to his experience of pain and suffering. Dr. Hawkins also noted that Claimant's ED might be multifactorial. She recommended up to 10 psychotherapy sessions and treatment with Wellbutrin. Dr. Hawkins summarized that Claimant's depressive symptoms appeared to be "reactive to his injury, chronic pain, and limitations in his ability to function occupationally and sexually."

12. On May 5, 2008 Claimant's treating urologist Fred Grossman. M.D. addressed the cause of his ED and hypogonadism after Insurer's adjuster denied treatment for the conditions. Dr. Grossman explained that Claimant had hypogonadism or reduced testosterone as a result of "sustained action oral opioids" that subsequently caused his ED. He included "a copy of a recent article from the Journal of Pain that documented the occurrence of hypogonadism in men consuming sustained action oral opioids."

13. On May 15, 2008 urologist Richard R. Augspurger, M.D. provided his opinion on the cause of Claimant's ED after reviewing Dr. Grossman's report. He noted that he could not demonstrate that a neurological condition was causing Claimant's ED. However, he remarked that low testosterone levels may be attributed to narcotic use. Dr. Augspurger reasoned that, if Claimant's ED was related to narcotic use, the ED would be "indirectly related" to his industrial lower back injury.

14. After additional conservative medical treatment, diagnostic testing and psychological counseling Claimant returned to Dr. Kawasaki on August 25, 2009. Claimant reported that he continued to suffer leg pain and back stiffness. Dr. Kawasaki noted that he had multiple discussions with Claimant about decreasing opioid medications to restore endocrine function and "potentially" restore sexual function. He diagnosed Claimant with the following: (1) L5-S1 discectomy with postlaminectomy syndrome; (2) chronic left S1 radiculopathy; (3) chronic opioid dependence; (4) hypogonadism with hypotestosteronism secondary to opioid use that resulted in sexual dysfunction; and (5) adjustment disorder with depressed mood. Dr. Kawasaki determined that Claimant had reached MMI. However, Claimant would require significant medical maintenance treatment including a gym membership for 12 months and 10 psychological visits with Dr. Hawkins over the following 12 months. Dr. Kawasaki explained that Claimant would continue the following medications for an indefinite period: (1) Ambien CR; (2) Wellbutrin XL; (3) Ibuprofen and (4) Zoloft. He also remarked that Claimant would require follow-up care with Dr. Grossman. Dr. Grossman was prescribing Cialis, Androgel and penile injections. Finally, Dr. Kawasaki commented that Claimant was not interested in any additional surgical interventions.

15. On January 25, 2011 Claimant returned to Dr. Kawasaki for maintenance treatment. Dr. Kawasaki remarked that Claimant had been taken off multiple medications because of an elevation in liver function results after being treated for tuberculosis. Claimant reported that subsequent additional liver function testing revealed that his blood levels were returning to normal. He commented that he would be returning to Mali at the end of the week but would return in mid-March.

16. During 2015 and 2016 Claimant visited an emergency room for right-sided neck, back and hip pain. Claimant did not seek additional urological treatment during the period.

17. After additional maintenance visits with Dr. Kawasaki in 2017, Claimant returned to Dr. Hawkins for psychological treatment on January 16, 2018. Claimant reported that he had returned to the area because he had an independent medical examination scheduled with Brian D. Lambden, M.D. for the following day. He reported significant anxiety and depression as well as nocturnal panic attacks.

18. On January 17, 2018 Claimant visited Dr. Lambden for an independent medical examination. Dr. Lambden performed a physical examination and thoroughly reviewed Claimant's medical records. Claimant reported continued lower back symptoms that included low-level radiating pain down his left leg. Dr. Lambden concluded that Claimant's ED was not likely caused by opioid use, borderline low testosterone levels or surgery because his symptoms preceded his opioid use and surgery. He noted that medical literature suggested a likely psychological cause for Claimant's ED symptoms. Dr. Lambden thus determined that he was "not sure anything else" needed to be done for Claimant's ED. In addressing Claimant's chronic pain, Dr. Lambden reasoned that no further treatment was necessary because Claimant was not interested in surgical intervention and it was questionable whether surgery would provide a benefit 10 years after Claimant's industrial injury. Claimant had thus reached MMI. Regarding opioid dependence, Dr. Lambden agreed that Claimant should be switched from Opana to Percocet but attempt opioid tapering to reduce dependence. He also questioned whether Claimant required Lyrica and recommended reduction in Ibuprofen use. Finally, Dr. Lambden noted that Claimant's depression would resolve over time with case closure. He also stated that Claimant's use of anti-depressants was not unreasonable, but suggested the discontinuation of Sertraline because Claimant was not exhibiting depressive symptoms and the medication has a negative effect on ED.

19. In a March 22, 2018 report Dr. Lambden reviewed additional medical records from Dr. Kawasaki and Dr. Hawkins. He also considered a January 30, 2018 urine toxicology report that reflected Claimant's testosterone level was 291 with a normal range of 250-827.

20. On April 3, 2018 Claimant visited urologist John W. Tillett, M.D. for an examination. He evaluated Claimant's ED and hypogonadism. Claimant recounted that he had suffered an industrial lower back injury on June 27, 2005, subsequently underwent surgery and continued to experience back pain. Dr. Tillett noted that Claimant has received narcotic pain medications since 2005 and had visited Dr. Grossman since 2007 for ED and hypogonadism until Dr. Grossman's retirement. Claimant denied any ED prior to surgery and has managed his ED well with Cialis 10mg since 2008. He remarked that he currently lives in Mali but spends significant time in Denver to visit his ex-wife and children. Dr. Tillett noted that Claimant was taking the following medications: (1) Oxycodone HCL capsule; (2) Ibuprofen 800 mg oral capsule; (3) Lyrica 75 mg oral capsule; (4) Temazepam 7.5 mg oral capsule; (5) Bupropion HCL

tablet; (6) Cialis 10 mg oral tablet; and (7) Sertraline HCL 100 mg oral tablet. After conducting a physical examination, Dr. Tillett diagnosed Claimant with ED and hypogonadism or low testosterone.

21. On April 5, 2018 Dr. Tillett conducted a medical records review of Claimant's case. He recounted that Claimant had suffered an industrial lower back injury on June 27, 2005, subsequently underwent surgery and continued to experience back pain. In an addendum report dated April 24, 2018 Dr. Tillett noted that Dr. Lambden determined Claimant's ED was unrelated to chronic opioid use, low testosterone or surgery because the condition preceded surgery and opioid use. In contrast, Dr. Tillett explained that there was no evidence in the medical records that Claimant's ED existed prior to his surgery or opioid use. He also disagreed that low testosterone was unrelated to ED.

22. Claimant and Dr. Kawasaki testified at the hearing in this matter that Claimant currently takes the following medications:

a. 100 milligrams of Sertraline (an anti-anxiety medication for panic disorders);
b. Bupropion (an anti-depressant medication for major depressive disorders);
c. Ibuprofen (an anti-inflammatory medication for pain);
d. Lyrica, 75 milligrams (a neuropathic pain medication);
e. Oxycodone, 10 milligrams every six hours (a narcotic medication for pain),
f. Cialis 10 milligrams (for ED);
g. Temazepam (for sleep).

23. Respondents clarified at hearing that they were challenging the medications prescribed by Drs. Kawasaki and Tillett. Respondents specifically contested prescriptions for Cialis, Oxycodone, Lyrica and Bupropion. They did not seek a denial of all medical maintenance treatment.

24. Claimant testified at the hearing in this matter that he began suffering from constant back pain, depression and ED shortly after his June 27, 2005 industrial injury. He emphasized that he had not experienced ED prior to his lower back injury. Claimant noted that his pain medications reduce his symptoms. Although the medications do not completely eliminate his pain, they allow improved sleep and function. Claimant remarked that his psychotropic medications help him deal with anxiety and depression. Nevertheless, he continues to suffer panic attacks that are typically worse at night.

25. Dr. Kawasaki testified at the hearing in this matter. He stated that he has been Claimant's ATP since August 2005. Dr. Kawasaki explained that Claimant suffers from chronic pain as a result of his June 27, 2005 industrial injury. He requires opioid pain medications to improve his function. Without the medications Claimant would likely become non-functional and have difficulty getting out of bed. Dr. Kawasaki noted that Claimant takes a reasonable amount of opioid medications and there are no plans for weaning. Claimant specifically takes about 60 milligrams of morphine equivalent. The amount does not place Claimant in the "danger zone." In contrast, when individuals

take 90-120 milligrams of morphine equivalent, they tend to develop opioid-related problems. Dr. Kawasaki summarized that opioid medications assist Claimant in performing activities of daily living. He noted that Claimant has never presented with any addictive or aberrant behavior since he began treatment in August 2005.

26. Dr. Kawasaki explained that chronic pain can increase depression, anxiety and other psychosocial issues. He summarized that Claimant requires anti-depressant medications because of his industrial injury. Dr. Kawasaki specifically prescribed Bupropion 300 mg. Temazepam 75 mg and Sertraline 100 mg on January 15, 2018 for Claimant's symptoms of anxiety and depression. Furthermore, because Claimant has exhibited both objective and subjective pain symptoms consistent with the injured nerve in his lower back, Dr. Kawasaki prescribed Lyrica 75 mg on January 15, 2018.

27. Dr. Kawasaki explained that Claimant's extended opioid use for pain is partially responsible for his ED. He remarked that log-term use of opioid medications generally affects the endocrine system. Specifically, the use of opioids impairs the gonadal system that produces testosterone. Dr. Kawasaki commented that, although Claimant's ED was secondary to chronic opioid use, psychologic issues also contributed to his sexual dysfunction. He explained that Claimant felt powerless, had a shift in identity, lost his job, suffered pain, felt fear and experienced performance anxiety. Dr. Kawasaki commented that the preceding factors contribute to Claimant's sexual dysfunction. He detailed that Claimant underwent unsuccessful ED treatment modalities with penile injections, testosterone, clomid and Viagra. However, Claimant had success treating his ED when he began taking Cialis. Dr. Kawasaki thus continues to prescribe Cialis.

28. Dr. Tillett testified at the hearing in this matter. He explained that ED is a distressing medical condition in which a man is unable to achieve or sustain an erection. Hypogonadism refers to suboptimal production of sperm or testosterone. Dr. Tillett diagnosed Claimant with both ED and hypogonadism. He maintained that Claimant's chronic opioid use constituted a significant causative factor in his ED and hypogonadism conditions. Dr. Tillett remarked that the longer an individual is taking opioid medications, the greater the effect on erectile and testicular function. Moreover, Claimant's anxiety and depression may be contributing to his ED. Dr. Tillett determined that reducing Claimant's opioid medication now would likely not have much impact on his ED and testosterone function. The chronicity of opioid therapy has damaged Claimant's ability to recover erectile function and testosterone secretion.

29. Dr. Tillett recommended additional diagnostic testing for Claimant's hypogonadism condition. He explained that hypogonadism therapy can produce benefits such as increased sexual desire, libido, energy and lean muscle mass while also improving a general sense of well-being. The therapy can also cause improvements in emotional/psychologic parameters, lipid profiles/cholesterol levels and ED. Thus, beginning testosterone treatment could help decrease Claimant's depression while increasing his energy and level of functioning. Dr. Tillett explained that testosterone levels and erectile function are intertwined. He commented that the American Urology Association (AUA) guidelines on the management of ED recommend

that every man presenting with ED have a serum testosterone work-up. Dr. Tillett agreed with Dr. Kawasaki that Claimant should continue to use Cialis 10 mg. for treatment of his ED.

30. Dr. Lambden testified at the hearing in this matter. He maintained that Claimant should be gradually tapered from opioid medications. He specifically recommended ceasing Sertraline, Temazepam, Oxycodone, Bupropion, Lyrica and Ibuprofen. Dr. Lambden remarked that his preference for chronic pain management is to decrease opioids whenever possible. He also commented that opioids and Lyrica negatively impact ED. He explained that ED is a multifactorial problem not associated with Claimant's testosterone levels. Therefore, Claimant's use of opioids for his June 27, 2005 industrial injury did not cause his ED and Cialis should be discontinued. Furthermore, Dr. Lambden noted that Claimant was not having sufficient depressive symptoms to warrant continuing Sertraline in light of its negative effect on ED. He summarized that, once the case has been closed and Claimant has adjusted to living in Mali, his depression symptoms should resolve without medication.

31. Claimant has established that it is more probably true than not that he is entitled to receive reasonable, necessary and related medical maintenance treatment designed to relieve the effects of his admitted June 27, 2005 lower back injury or prevent further deterioration of his condition. Initially, Claimant suffered an industrial lower back injury on June 27, 2005, subsequently underwent surgery and continued to experience back pain. The record is replete with evidence that Claimant continues to suffer chronic pain, sleep disturbances, psychological problems and urological issues as a result of his June 27, 2005 injury.

32. Dr. Kawasaki has been Claimant's ATP since August 2005. He persuasively explained that Claimant suffers from chronic pain as a result of his June 22, 2005 industrial injury. He requires opioid pain medications to improve his function. Without the medications Claimant would likely become non-functional and have difficulty getting out of bed or completing activities of daily living. Dr. Kawasaki noted that Claimant takes a reasonable amount of opioid medications and there are no plans for weaning. Furthermore, Claimant noted that his pain medications reduce his symptoms. Although the medications do not completely eliminate his pain, they allow improved sleep and function.

33. Claimant remarked that his psychotropic medications help him deal with anxiety and depression. Nevertheless, he continues to suffer panic attacks that are typically worse at night. Dr. Kawasaki explained that chronic pain can increase depression, anxiety and other psychosocial issues. He summarized that Claimant requires anti-depressant medications because of his industrial injury. Dr. Kawasaki specifically prescribed Bupropion 300 mg. Temazepam 75 mg and Sertraline 100 mg on January 15, 2018 for Claimant's symptoms of anxiety and depression. Furthermore, because Claimant has exhibited both objective and subjective pain symptoms consistent with the injured nerve in his lower back, Dr. Kawasaki also prescribed Lyrica. Finally, Dr. Hawkins summarized that Claimant's depressive symptoms appeared to be

"reactive to his injury, chronic pain, and limitations in his ability to function occupationally and sexually."

34. Dr. Kawasaki further explained that Claimant's extended opioid use for pain is partially responsible for his ED. He remarked that long-term use of opioid medications generally affects the endocrine system. Specifically, the use of opioids impairs the gonadal system that produces testosterone. Dr. Kawasaki commented that, although Claimant's ED is secondary to chronic opioid use, psychologic issues also contribute to his sexual dysfunction. Similarly, Dr. Tillett diagnosed Claimant with both ED and hypogonadism. He maintained that Claimant's chronic opioid use constituted a significant causative factor in his ED and hypogonadism conditions. Dr. Tillett remarked that the longer an individual is taking opioid medications, the greater the effect on erectile and testicular function. He determined that reducing Claimant's opioid medication now would not likely have much impact on his ED and testosterone function. Furthermore, Dr. Grossman explained that Claimant had hypogonadism or reduced testosterone as a result of "sustained action oral opioids" that subsequently caused his ED. Moreover, Dr. Augspurger remarked that low testosterone levels may be attributed to narcotic use. He reasoned that, if Claimant's ED was related to narcotic use, the ED would be "indirectly related" to his industrial lower back injury.

35. Dr. Tillett also recommended additional diagnostic testing for Claimant's hypogonadism condition. He explained that hypogonadism therapy can produce benefits such as increased sexual desire, libido, energy and lean muscle mass while also providing a general sense of well-being. The therapy can also cause improvements in emotional/psychologic parameters, lipid profiles/cholesterol levels and ED. Thus, beginning testosterone treatment could help decrease Claimant's depression while increasing his energy and level of functioning.

36. In contrast, Dr. Lambden maintained that Claimant should be gradually tapered from opioid medications. Dr. Lambden concluded that Claimant's ED is a multifactorial problem not likely caused by opioid use, borderline low testosterone levels or surgery because his symptoms preceded his opioid use and surgery. He reasoned that Claimant's use of opioids as a result of his June 27, 2005 industrial injury did not cause his ED and Cialis should be discontinued. Furthermore, Dr. Lambden noted that Claimant was not having sufficient depressive symptoms to warrant continuing Sertraline in light of its negative effect on ED. He summarized that, once the case has been closed and Claimant has adjusted to living in Mali, his depression symptoms should resolve without medication. However, the persuasive evidence reveals that Claimant began suffering from constant back pain, depression and ED as a result of his June 22, 2005 industrial injury. The record and medical opinions of Drs. Kawasaki, Hawkins and Tillett reflect that Claimant's pain medications, psychotropic prescriptions and ED medications have not only reduced his pain but also maximized his level of function over an extended period of time consistent with the Division of Workers' Compensation *Medical Treatment Guidelines* (*Guidelines*). Moreover, the testosterone therapy recommended by Dr. Tillett will likely decrease Claimant's depression while improving his level of functioning. Accordingly, Claimant shall receive reasonable, necessary and

related medical maintenance benefits designed to relieve the effects of his June 27, 2005 industrial injury or prevent further deterioration of his condition.

CONCLUSIONS OF LAW

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

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

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

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

5. The *Guidelines* provide, in relevant part, that "medications should be clearly linked to improvement of function, not just pain control." WCRP 17, Exhibit 9 (H)(6). Furthermore, the *Guidelines*, specify that, "examples of routine functions include

the ability to perform work tasks, drive safely, pay bills or perform math operations, remain alert and upright for 10 hours per day, or participate in normal family and social activities." WCRP 17, Exhibit 9(H)(6).

6. As found, Claimant has established by a preponderance of the evidence that he is entitled to receive reasonable, necessary and related medical maintenance treatment designed to relieve the effects of his admitted June 27, 2005 lower back injury or prevent further deterioration of his condition. Initially, Claimant suffered an industrial lower back injury on June 27, 2005, subsequently underwent surgery and continued to experience back pain. The record is replete with evidence that Claimant continues to suffer chronic pain, sleep disturbances, psychological problems and urological issues as a result of his June 27, 2005 injury.

7. As found, Dr. Kawasaki has been Claimant's ATP since August 2005. He persuasively explained that Claimant suffers from chronic pain as a result of his June 22, 2005 industrial injury. He requires opioid pain medications to improve his function. Without the medications Claimant would likely become non-functional and have difficulty getting out of bed or completing activities of daily living. Dr. Kawasaki noted that Claimant takes a reasonable amount of opioid medications and there are no plans for weaning. Furthermore, Claimant noted that his pain medications reduce his symptoms. Although the medications do not completely eliminate his pain, they allow improved sleep and function.

8. As found, Claimant remarked that his psychotropic medications help him deal with anxiety and depression. Nevertheless, he continues to suffer panic attacks that are typically worse at night. Dr. Kawasaki explained that chronic pain can increase depression, anxiety and other psychosocial issues. He summarized that Claimant requires anti-depressant medications because of his industrial injury. Dr. Kawasaki specifically prescribed Bupropion 300 mg. Temazepam 75 mg and Sertraline 100 mg on January 15, 2018 for Claimant's symptoms of anxiety and depression. Furthermore, because Claimant has exhibited both objective and subjective pain symptoms consistent with the injured nerve in his lower back, Dr. Kawasaki also prescribed Lyrica. Finally, Dr. Hawkins summarized that Claimant's depressive symptoms appeared to be "reactive to his injury, chronic pain, and limitations in his ability to function occupationally and sexually."

9. As found, Dr. Kawasaki further explained that Claimant's extended opioid use for pain is partially responsible for his ED. He remarked that long-term use of opioid medications generally affects the endocrine system. Specifically, the use of opioids impairs the gonadal system that produces testosterone. Dr. Kawasaki commented that, although Claimant's ED is secondary to chronic opioid use, psychologic issues also contribute to his sexual dysfunction. Similarly, Dr. Tillett diagnosed Claimant with both ED and hypogonadism. He maintained that Claimant's chronic opioid use constituted a significant causative factor in his ED and hypogonadism conditions. Dr. Tillett remarked that the longer an individual is taking opioid medications, the greater the effect on erectile and testicular function. He determined that reducing Claimant's opioid medication now would not likely have much

impact on his ED and testosterone function. Furthermore, Dr. Grossman explained that Claimant had hypogonadism or reduced testosterone as a result of "sustained action oral opioids" that subsequently caused his ED. Moreover, Dr. Augspurger remarked that low testosterone levels may be attributed to narcotic use. He reasoned that, if Claimant's ED was related to narcotic use, the ED would be "indirectly related" to his industrial lower back injury.

10. As found, Dr. Tillett also recommended additional diagnostic testing for Claimant's hypogonadism condition. He explained that hypogonadism therapy can produce benefits such as increased sexual desire, libido, energy and lean muscle mass while also providing a general sense of well-being. The therapy can also cause improvements in emotional/psychologic parameters, lipid profiles/cholesterol levels and ED. Thus, beginning testosterone treatment could help decrease Claimant's depression while increasing his energy and level of functioning.

11. As found, in contrast, Dr. Lambden maintained that Claimant should be gradually tapered from opioid medications. Dr. Lambden concluded that Claimant's ED is a multifactorial problem not likely caused by opioid use, borderline low testosterone levels or surgery because his symptoms preceded his opioid use and surgery. He reasoned that Claimant's use of opioids as a result of his June 27, 2005 industrial injury did not cause his ED and Cialis should be discontinued. Furthermore, Dr. Lambden noted that Claimant was not having sufficient depressive symptoms to warrant continuing Sertraline in light of its negative effect on ED. He summarized that, once the case has been closed and Claimant has adjusted to living in Mali, his depression symptoms should resolve without medication. However, the persuasive evidence reveals that Claimant began suffering from constant back pain, depression and ED as a result of his June 22, 2005 industrial injury. The record and medical opinions of Drs. Kawasaki, Hawkins and Tillett reflect that Claimant's pain medications, psychotropic prescriptions and ED medications have not only reduced his pain but also maximized his level of function over an extended period of time consistent with the Division of Workers' Compensation *Medical Treatment Guidelines* (*Guidelines*). Moreover, the testosterone therapy recommended by Dr. Tillett will likely decrease Claimant's depression while improving his level of functioning. Accordingly, Claimant shall receive reasonable, necessary and related medical maintenance benefits designed to relieve the effects of his June 27, 2005 industrial injury or prevent further deterioration of his condition.

ORDER

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

1. Claimant shall receive specifically delineated reasonable, necessary and related medical maintenance benefits as prescribed by Drs. Kawasaki and Tillett. The medical maintenance medications that Claimant shall receive include: (1) 100 milligrams of Sertraline (an anti-anxiety medication for panic disorders); (2) Bupropion (an anti-depressant medication for major depressive disorders); (3) Ibuprofen (an anti-

inflammatory medication for pain); (4) Lyrica, 75 milligrams (a neuropathic pain medication; (5) Oxycodone, 10 milligrams every six hours (a narcotic medication for pain); (6) Cialis 10 milligrams (for ED); and (7) Temazepam (for sleep).. Claimant shall also receive the additional testosterone therapy recommended by Dr. Tillett. Respondents shall be financially responsible for the preceding medical maintenance benefits.

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

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

DATED: March 5, 2019.

DIGITAL SIGNATURE.
Peter J. Cannici

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

ISSUE

1. A determination of Claimant's Average Weekly Wage (AWW).

2. Whether Claimant is entitled to receive increased Temporary Partial Disability (TPD) and Temporary Total Disability (TTD) benefits based on a higher AWW.

STIPULATION

The parties agreed that Claimant's admitted AWW of $1,190.06 from Employer is not in dispute.

FINDINGS OF FACT

1. Employer is a rehabilitation facility that provides in-patient medical services to acutely injured and ill individuals. On December 5, 2017 Employer hired Claimant to work as an overnight Registered Nurse (RN). Employer's HR Director Rae Roberts testified that Claimant was hired to perform full-time employment consisting of three to four twelve-hour overnight RN shifts per week. Ms. Roberts explained that Claimant's position as an overnight RN included not only caring for patients but also supervising other employees.

2. Employer hired Claimant with the expectation that she would be available seven days each week. Claimant only limited her availability by requesting to have off every other weekend. Ms. Roberts explained that Employer's staffing needs changed weekly and monthly based on the number of patients who were at the facility and the acuity level of each patient. Because of the changing staffing needs, Employer did not offer Claimant a permanent, fixed schedule.

3. After Claimant secured a position with Employer, she tendered her written resignation with previous Employer Avamere on December 6, 2017. Claimant's resignation letter reflects that she ceased employment with Avamere because her new job with Employer offered an increased salary and a shorter commute.

4. Claimant explained that she had worked for Avamere since approximately 2012 as an RN performing overnight shifts. Similar to Employer, Avamere provides in-patient rehabilitation services to individuals. Claimant noted that the patients at Employer's facility tend to be more acutely ill or injured than the patients at Avamere. Otherwise, Claimant's job duties for Employer and Avamere were fairly similar.

5. Director of Nursing at Avamere Daniella Johnson, RN testified that when Claimant tendered her resignation on December 6, 2017 Avamere asked her to work on a PRN or "as needed" basis. Ms. Johnson remarked that nurses who are employed on a

PRN basis are expected to work at least one shift each month. The PRN shifts would be scheduled when Avamere required additional coverage and Claimant was available.

6. During January 2018 Claimant worked full-time for Employer. She specifically worked three to four twelve-hour shifts per week.

7. Ms. Johnson testified that in the first week or two of January 2018 she offered Claimant a full-time position at Avamere involving three shifts per week with a pay raise of $4.00-$5.00 per hour to match her pay rate from Employer. Claimant did not immediately accept the offer because she wanted to discuss the matter with her family.

8. On January 21, 2018 Claimant suffered injuries to her hip while working for Employer. She specifically slipped and fell on ice. Physicians assigned Claimant work restrictions. Claimant received Temporary Total Disability (TTD) benefits from Employer because it was unable to accommodate her restrictions. Claimant noted that Avamere was also unable to accommodate her work restrictions and she was placed on a leave of absence.

9. Ms. Johnson testified that Claimant contacted her and advised that she wanted to accept the full-time position at Avamere at the higher wage rate. However, she had just been injured in a slip and fall accident while working for Employer. Claimant agreed that she did not accept the offer to return to work full-time at the higher pay rate at Avamere prior to sustaining her work-related injuries on January 21, 2018.

10. Claimant explained that she never performed any PRN shifts at Avamere in January 2018 because they conflicted with her work schedule for Employer. She noted, and Ms. Johnson agreed, that her schedule with Employer received priority and any Avamere shifts would be scheduled around her work for Employer. Ms. Johnson confirmed that Avamere offered Claimant PRN shifts in January 2018 but Claimant was unavailable and did not work any shifts. She remarked that Avamere offers a flexible PRN schedule that could accommodate Claimant's full-time position with Employer.

11. Subsequent to her industrial injury while working for Employer, Claimant attended meetings at Avamere. The meetings permitted Claimant to remain current on her training requirements. Avamere paid Claimant for attending the meetings.

12. Claimant's rate of pay from Avamere for the period January 22, 2018 through August 15, 2018 was $30.40 per hour. Beginning August 16, 2018 Claimant's pay rate from Avamere increased to $34.00 each hour.

13. Claimant's 2017 W-2 Wage and Tax Statement from Avamere reflects that she earned total wages of $63,639.80 or an AWW of $1,223.04. Prior to December 2017 Claimant routinely worked three to five twelve-hour shifts per week at Avamere and did not have concurrent employment. She seeks to increase the admitted AWW of $1,190.06 by adding her AWW from Avamere. Claimant thus seeks a total AWW of $2,413.10.

14. Claimant's request to increase her base AWW from Employer by adding her AWW from Avamere in 2017 does not fairly approximate her wage loss or diminished

earning capacity at around the time of her Industrial injuries on January 21, 2018. Her wages from Avamere in 2017 do not reflect earnings as a result of concurrent employment. Claimant acknowledged that her 2017 wages from Avamere include weeks in which she worked five twelve-hour shifts. Working five twelve-hour overnight shifts each week at Avamere is incompatible with Employer's requirement of completing at least three twelve-hour overnight shifts each week.

15. Nevertheless, Claimant is entitled to an increase in her AWW as a result of concurrent employment with Avamere. Initially, Claimant credibly explained that she worked three to five twelve-hour shifts each week at Avamere and her employment with Employer involved similar job duties. Moreover, Claimant is required to work at least three twelve-hour shifts each week with Employer. She specifically worked three to four twelve-hour shifts per week for Employer during January 2018 but did not engage in concurrent work for Avamere during the time period.

16. Based on Claimant's credible testimony and employment records, she typically worked four twelve hour shifts or 48 hours per week at Avamere. Claimant continues employment with Avamere but is currently on a leave of absence status. She has attended paid meetings at Avamere to remain current on her training requirements. Claimant is thus concurrently employed by Employer and Avamere.

17. Because Claimant is required to work at least three twelve-hour shifts each week for Employer, adding an additional twelve-hour shift each week at Avamere accurately reflects her wage loss and diminished earning capacity. Claimant's rate of pay from Avamere beginning January 22, 2018 was $30.40 per hour. One twelve-hour shift per week times $30.40 yields an AWW from concurrent employment with Avamere of $364.80. Adding $364.80 to Claimant's admitted AWW with Employer of $1,190.06 yields a total AWW of $1554.86. A total AWW based on Claimant's work for Employer and concurrent employment with Avamere constitutes a fair approximately of her wage loss and diminished earning capacity as a result of her January 21, 2018 industrial injuries. Accordingly, Claimant is entitled to receive increased TPD and TTD benefits based on her higher total AWW of $1554.86.

CONCLUSIONS OF LAW

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

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

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

4. Section 8-42-102(2), C.R.S. requires the Judge to determine a claimant's AWW based on her earnings at the time of injury. The Judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001). However, §8-42-102(3), C.R.S. authorizes a Judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed methods will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App. 1993). The overall objective in calculating an AWW is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997). Therefore, §8-42-102(3), C.R.S. grants an ALJ substantial discretion to modify the AWW if the statutorily prescribed method will not fairly compute a claimant's wages based on the particular circumstances of the case. *In Re Broomfield,* W.C. No. 4-651-471 (ICAP, Mar. 5, 2007).

5. When a worker is concurrently employed the ALJ may, in order to achieve fairness, include all wages in the computation of the AWW. *Broadmoor Hotel and Continental Ins. Co. v. Industrial Claim Appeals Office*, 939 P.2d 460 (Colo. App. 1996); *Guerrero Barrio v. GCA Services Group, Inc.*, W.C. No. 4-813-965 (ICAO, July 28, 2010); *see Miranda v. ISS Prudential Services, Inc. and/or Denver Public Schools,* W.C. Nos. 3-833-976, 3-908-234 and 4-105-113 (ICAO, Feb. 28, 1994) (where the claimant holds concurrent employment at the time of the injury, the ALJ has discretion to calculate the AWW to include the total income from the multiple employers). However, there is no mandate that wages from concurrent employment must be included in the AWW. *Coleman v. National Produce Service,* W.C. No. 4-601-676 (ICAO, July 12, 2005); *Yankee v. Flagship International,* W.C. No. 3-862-644 (ICAO, Dec. 7, 1988).

6. As found, Claimant's request to increase her base AWW from Employer by adding her AWW from Avamere in 2017 does not fairly approximate her wage loss or diminished earning capacity at around the time of her Industrial injuries on January 21, 2018. Her wages from Avamere in 2017 do not reflect earnings as a result of concurrent employment. Claimant acknowledged that her 2017 wages from Avamere include weeks in which she worked five twelve-hour shifts. Working five twelve-hour overnight shifts

each week at Avamere is incompatible with Employer's requirement of completing at least three twelve-hour overnight shifts each week.

7. As found, nevertheless, Claimant is entitled to an increase in her AWW as a result of concurrent employment with Avamere. Initially, Claimant credibly explained that she worked three to five twelve-hour shifts each week at Avamere and her employment with Employer involved similar job duties. Moreover, Claimant is required to work at least three twelve-hour shifts each week with Employer. She specifically worked three to four twelve-hour shifts per week for Employer during January 2018 but did not engage in concurrent work for Avamere during the time period.

8. As found, based on Claimant's credible testimony and employment records, she typically worked four twelve hour shifts or 48 hours per week at Avamere. Claimant continues employment with Avamere but is currently on a leave of absence status. She has attended paid meetings at Avamere to remain current on her training requirements. Claimant is thus concurrently employed by Employer and Avamere.

9. As found, because Claimant is required to work at least three twelve-hour shifts each week for Employer, adding an additional twelve-hour shift each week at Avamere accurately reflects her wage loss and diminished earning capacity. Claimant's rate of pay from Avamere beginning January 22, 2018 was $30.40 per hour. One twelve-hour shift per week times $30.40 yields an AWW from concurrent employment with Avamere of $364.80. Adding $364.80 to Claimant's admitted AWW with Employer of $1,190.06 yields a total AWW of $1554.86. A total AWW based on Claimant's work for Employer and concurrent employment with Avamere constitutes a fair approximately of her wage loss and diminished earning capacity as a result of her January 21, 2018 industrial injuries. Accordingly, Claimant is entitled to receive increased TPD and TTD benefits based on her higher total AWW of $1554.86.

ORDER

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

1. Claimant earned an AWW of $1554.86.

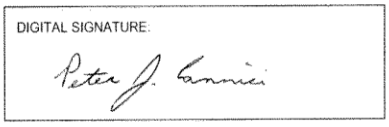
2. Claimant is entitled to receive increased TPD and TTD benefits based on her higher total AWW of $1554.86.

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

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

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

DATED: March 7, 2019.



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

ISSUES

1. Whether Respondents have established that Claimant was responsible for the termination of his employment on October 19, 2018 based on his voluntary resignation and thus is not entitled to temporary total disability (TTD) benefits after that date.

FINDINGS OF FACT

1. Claimant is a 50 year old male who was employed by Employer as a dishwasher.

2. On July 17, 2017, while working, Claimant sustained a compensable injury to his right eye. On that date, a co-worker dropped a plate and a shard of the broken plate penetrated the Claimant's right eye causing him eventually to lose almost all sight in his right eye.

3. Claimant underwent extensive treatment for his injury and M. Susan Zickenfoose, M.D. became one of his authorized treating providers. In September of 2018, Dr. Zickenfoose noted that the duration of Claimant's condition was probably life and that he may never regain full vision in his right eye and may need injections in his eye for the rest of his life. Dr. Zickenfoose noted that Claimant was unable to be around heat and steam as it caused right eye irritation. She also noted that Claimant needed another surgery on his right eye. Dr. Zickenfoose noted that Claimant had not been completely incapacitated due to his injury, but that he had been incapacitated for multiple short periods of time due to medical treatment and recovery. Dr. Zickenfoose noted that Claimant would need to be off work for the new surgery and for visits with his eye doctor. *See* Exhibit J.

4. Claimant was scheduled for an additional surgery on October 8, 2018. Claimant worked on Friday October 5, 2018, his last scheduled day of work before surgery.

5. On October 8, 2018, Claimant underwent surgery that included a vitrectomy of the right eye. Claimant's diagnoses included epiretinal membrane, right and aphakia of the right eye. *See* Exhibits 2, K.

6. The aftercare instructions for Claimant following surgery included wearing his eye patch/shield the first night, positioning himself to avoid lying flat on his back, lifting of more than 10 pounds for 1 week, and no bending, stooping, or straining for one week. Claimant was scheduled for follow up visits. *See* Exhibit 1.

7. On October 13, 2018, Claimant went to the emergency room due to a headache and pain in his right eye. He was ultimately discharged with instructions to follow up the next day.

8. On October 14, 2018, Claimant called UC Health to report that he was not sure if he could make it to his follow up appointment due to weather and the cost of a taxi. Claimant reported that his eye felt better and that he didn't know if he needed to come in. Claimant was encouraged to come in due to potential pressure that could be high and put him at risk for vision loss. Claimant reported that he would come in and have his son bring him. *See* Exhibit 3.

9. On October 14, 2018, Claimant was evaluated at UC Health by Marisa Lau, M.D. Claimant reported that following his right eye surgery he had some delay in using eye drops due to difficulty getting medications because he was going through workers' compensation. Claimant also reported that he had stopped taking a different eye drop because he did not recall being told to continue those drops. Claimant reported that the day prior he had an acute right sided headache and that he went to the emergency department. Dr. Lau recommended Claimant continue the eye drop regimen for his right eye including five different types of drops. Dr. Lau emphasized the importance of compliance with the eye drop regimen. Her diagnosis noted ruptured globe of right eye with a retinal detachment surgery. *See* Exhibit 3.

10. On October 15, 2018, M. Susan Zickenfoose, M.D. evaluated Claimant. Dr. Zickenfoose noted that Claimant underwent eye surgery on October 8, 2018 and that he then had increased eye pain on October 13, 2018 and had to go to the emergency room where they found that the pressure in Claimant's eye was increased. Dr. Zickenfoose noted that Claimant could not work until he was rechecked by an eye doctor and by her and noted his work status as unable to work from October 15 through October 24, 2018. She scheduled Claimant for a return evaluation on October 24, 2018. *See* Exhibit 4.

11. Claimant did not go to the scheduled return evaluation. Claimant did not return to work for Employer. Claimant, without notifying his Employer or physicians, moved to Texas where he thought his finances would be in better shape since he owns a home in Texas.

12. On October 19, 2018, Claimant's counsel sent a letter to Respondents' counsel. The letter indicated that Claimant owned a home in Texas and had advised their office that day that he was moving to Texas and would need a change of physician immediately. Claimant's counsel noted that his staff would cancel all future appointments set in Denver. Claimant's counsel also indicated that Claimant had to treat urgently over the last weekend due to complications following surgery and that there was the potential Claimant would need treatment very soon. *See* Exhibit H.

13. On October 29, 2018, Claimant sent a fax to Employer indicating that he was resigning because he had moved to Texas. Claimant listed his resignation date as October 19, 2018. Claimant noted that he had surgery on October 8, 2018 and was in

pain since. Claimant noted he had been hospitalized on October 13, 2018 and that after he was released he saw other doctors. Claimant reported that he had moved to Texas on October 19. *See* Exhibits 5, H.

14. On October 30, 2018, Respondents filed a Petition to Modify, Terminate, or Suspend Compensation requesting to terminate TTD benefits from October 19, 2018 to ongoing. Respondents indicated that Claimant had been working for Employer within his restrictions but that he had voluntarily moved to Texas and voluntarily terminated his position with Employer as of October 19, 2018. *See* Exhibit C.

15. On October 31, 2018, Respondents filed an Amended General Admission of Liability noting temporary total disability benefits were admitted from October 8, 2018 thru ongoing. Respondents admitted for reasonable and necessary medical treatment to the right eye and noted that Claimant had been out of work since undergoing an eye surgery on October 8, 2018. *See* Exhibit B.

16. On November 6, 2018, Claimant objected to the Petition to Modify, Terminate, or Suspend Compensation. Claimant noted that he remained on restrictions while awaiting Respondents designation of a provider in Texas and argued that temporary benefits must continue until terminated according to Rule 6. *See* Exhibit D.

17. In early November, 2018 Claimant began treatment in Texas.

18. On November 6, 2018, Claimant was evaluated by Marc Ellman, M.D. and Ahmed Sollman, M.D. in Texas. Dr. Ellman filled out a Texas Workers' Compensation Work Status Report indicating that Claimant was still prevented from returning to work as of the date of injury July 17, 2017. Claimant was expected to be prevented from returning to work through the time of recommendation from a primary care physician/retina specialist. Claimant reported to Dr. Sollman that about a year ago, a piece of glass went into his right eye and that he had multiple eye surgeries. Claimant reported that he had recently moved to Texas, had constant headaches, and sees floaters in his right eye. Claimant reported that his vision was blurry and that he had stains in the right eye that would multiply or decrease throughout the day. Claimant requested a second opinion on the vision in his right eye and reported he wanted to be able to get at least 25-30% of his vision back. The plan was to get a baseline FP/MOCT/RNFL done and to repeat the MOCT at the next visit. Dr. Sollman noted that if the MOCT was not better at the next visit, they would refer Claimant to a retina specialist. *See* Exhibits 6, 7, L.

19. On November 12, 2018, Claimant was evaluated by Dr. Sollman and Dr. Ellman. Claimant was referred to SWRC for re-evaluation in 6 weeks. Dr. Ellman filled out another Texas Workers' Compensation Work Status Report indicating that Claimant was still prevented from returning to work as of the date of the injury and was expected to continue through "per PCP." *See* Exhibits 8, 9, L.

20. On December 6, 2018, Manouchehr Refaeian, M.D. evaluated Claimant. Claimant reported that while he was at work, a piece of glass went into his right eye and

that he was 90% blind due to his injury. Claimant reported that he had multiple surgeries to his right eye with the last one being in October of 2018. Claimant reported blurry vision and poor visual acuity in his right eye. Dr. Refaeian planned a follow up in one month and told Claimant to return if the problem worsened. Dr. Refaeian noted that Claimant could perform light duty work status with no driving. He noted that Claimant could return to work with a restriction of no driving/operating heavy equipment. Dr. Refaeian noted that since moving to Texas, Claimant had only been seen by general physicians for his eye, which was not sufficient given Claimant's ongoing and very complicated issues. Dr. Refaeian requested that a retinal specialist see Claimant. *See* Exhibits 10, 11, M.

21. Prior to his injury, Claimant had worked for Employer for approximately 2.5 years as a dishwasher/utility worker. Claimant was a great employee and hard worker.

22. Throughout Claimant's treatment for this injury, Employer honored Claimant's work restrictions and found jobs he could do within his restrictions. They accommodated him by having him bus tables instead of being on dishwashing duties, and put him into a "utility position." Employer had a policy of always trying to accommodate work restrictions. In September of 2018, they provided Claimant an offer of utility worker without dishwashing to accommodate his restriction from working around steam. *See* Exhibit I.

23. After his October 8, 2018 surgery, Claimant decided to move to Texas where he owned a home due to his perceived financial stress. Claimant was aware that while receiving temporary total disability (TTD) benefits he would not get his entire salary replaced and Claimant was living on a tight budget. Claimant decided, for personal financial reasons that living in a home he owned without a mortgage in Texas would be a better decision for him.

24. Following his injury and during periods where he was not earning 100% of his normal pre-injury wages, Claimant was able to make ends meet but lived on a very limited budget. Claimant had visited food banks on occasion. Claimant felt embarrassed about this because he had never before needed assistance and had always worked multiple jobs. After his October 8, 2018 surgery, and due to his financial situation, Claimant called his son and asked his son to come get him and drive him to Texas.

25. Once in Texas, Claimant submitted his resignation letter to Employer noting that he had moved to Texas.

26. If Claimant had stayed in Colorado, Employer would have continued to employ Claimant. Employer would have continued to accommodate Claimant's restrictions as they had done throughout the claim from July of 2017 through October of 2018. Employer would have worked with Claimant to accommodate him, since Claimant was a great and valued employee.

27. On December 28, 2018, Claimant signed an affidavit comparing his expenses while living in Texas to his expenses while living in Colorado. The expenses,

overall, were very similar except in Texas Claimant pays $0 in rent as he owns a home outright while in Colorado he paid $800 per month in rent. *See* Exhibits 13, N.

28. Claimant testified at hearing. Claimant testified that after his October 8, 2018 surgery he couldn't return to work. Claimant testified that on October 13, 2018 he went to the emergency room because of the terrible pain in his eye. Claimant testified that he moved to Texas on October 19, 2018 and that he decided to move because he knew his wages would drop if he wasn't working and knew that he would have financial problems and stress if he stayed in Colorado. Claimant testified that after his injury he was under financial stress with time off work and wage replacement not covering his full wages. Claimant testified that he had to go to a food bank for food and was ashamed. Claimant testified that he felt like there was no way out if he stayed in Colorado and that he didn't want to have to go to a food bank again. Claimant testified that he is still restricted from driving and that there are not many businesses near his home with the closest one being five miles away. Claimant testified that there is no public transportation and that an Uber ride costs $45-50 roundtrip. Claimant testified that he enjoyed his job with Employer and only resigned because of the money issues.

29. Claimant testified that the last day he worked was October 5th and that although Employer knew he had surgery coming up, he did not have any conversations with Employer about returning to work after his surgery. This is not credible.

30. Neil Davis, Claimant's direct supervisor while employed with Employer, testified at hearing. Mr. Davis believed Claimant planned to return to work after the October 8, 2018 surgery. Mr. Davis was unaware that Claimant was moving to Texas. Mr. Davis was shocked by Claimant's resignation and surprised that Claimant didn't call him directly or tell him. Mr. Davis had thought that he would be getting a doctor's note to look at for restrictions so that he could continue to accommodate Claimant after the surgery and was shocked to see a resignation letter in his box at work. Mr. Davis testified that he wanted Claimant to return to work after the October 8, 2018 surgery because Claimant was a good employee and a hard worker. Mr. Davis is credible.

31. Jennifer Davidson, Employer's executive director, also testified at hearing. She also testified that Claimant was a good employee. Ms. Davison testified that after the injury, Claimant was on and off work restrictions while going through treatment and that Employer accommodated all the restrictions Claimant had completely. Ms. Davidson testified that Employer has a policy to always accommodate work restrictions. She testified that they were always glad when Claimant was at work. Claimant never asked Ms. Davidson for more hours or for a raise and did not mention financial problems to her. Claimant did not tell Ms. Davidson that he planned to move to Texas. On October 5, 2018, Ms. Davidson saw Claimant at work and wished him luck with his October 8, 2018 surgery. Ms. Davidson told Claimant to let her know when he was released by the doctor to return to work. Ms. Davidson testified that she was waiting for doctor's orders to know when Claimant could return after October 8, 2018 and what restrictions he would have. Instead, she testified that she received a faxed resignation letter from Claimant. Ms. Davidson also was surprised by the resignation. Ms. Davidson is credible.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

Termination of Employment

Section 8-42-103(1)(g), C.R.S., and § 8-42-105(4)(a), C.R.S., provide that if a temporarily disabled employee "is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." Because these statutes provide a defense to an otherwise valid claim for TTD benefits, the respondents shoulder the burden of proof by a preponderance of the evidence to establish each element of the defense. *Gilmore v. Industrial Claim Appeals Office,* 187 P.3d 1129 (Colo. App. 2008); *Brinsfield v. Excel Corp.,* W.C. No. 4-551-844 (I.C.A.O. July 18, 2003). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of

the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002), the court held the term "responsible" as used in the termination statutes reintroduces the concept of fault as it was understood prior to the Supreme Court's decision in *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Consequently, the concept of fault used in the unemployment insurance context is instructive. Fault requires a volitional act or the exercise of some control in light of the totality of the circumstances. *Padilla v. Digital Equipment Corp.,* 902 P.2d 414 (Colo. App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995); *Brinsfield v. Excel Corp., supra.* Ultimately, the question of whether the claimant was responsible for the termination is one of fact for determination by the ALJ. *Gilmore v. Industrial Claim Appeals Office, supra.*

Claimant's wage loss from October 8, 2018 through December 6, 2018 was due to Claimant's work related injury, surgery, and inability to work following surgery. Claimant was on "no work" restrictions during this period following his October 8, 2018 surgery. However, on December 6, 2018, Claimant was released to light duty work. If Claimant had stayed in Colorado, Employer would have accommodated Claimant's work restrictions as they had repeatedly done throughout the claim. Claimant thus would have been able to return to his normal full time schedule with Employer under his work restrictions of no driving or operating heavy equipment. Claimant would have resumed earning his normal full wages on December 7, 2018. However, Claimant's resignation and his voluntary decision to resign his employment with Employer and move to Texas prevented him from resuming his job and returning to his normal full wages. Thus, the cause of Claimant's wage loss beginning December 7, 2018 was Claimant's voluntary decision to quit his job. Claimant was responsible for the termination of his employment. Respondents have established by a preponderance of the evidence that any wage loss after December 6, 2018 is due to the termination of Claimant's employment for which Claimant was responsible. Respondents have established that they are entitled to terminate TTD benefits as of December 7, 2018.

Respondents' argument that TTD benefits should be terminated as of the date of Claimant's resignation, October 19, 2018, is not persuasive. The wage loss that is the consequence of Claimant's voluntary resignation did not begin until December 7, 2018. Prior to December 7, 2018, Claimant's wage loss was due to his "no work" restrictions from his medical providers. The wage loss attributable to the termination of employment did not begin until December 7, 2018.

Claimant's arguments, overall, are not found persuasive. Although Claimant was living on a very tight budget, Claimant was not compelled to resign because of his injury. The undersigned realizes that Claimant barely could meet his monthly expenses while receiving TTD, but Claimant was able to do so. Claimant was an excellent worker and Respondents had repeatedly accommodated any restrictions that Claimant had following his injury. Respondents would have continued to do so after the October 8, 2018 surgery and when Claimant was released to light duty work on December 6, 2018. If not for his

resignation, Claimant could have returned to his normal wages and normal work hours on December 7, 2018. Claimant prevented this opportunity by voluntarily resigning and moving to Texas. Any wage loss December 7, 2018 and ongoing is due to Claimant's voluntary decision to resign and move out of state. This decision was not compelled by Respondents and was not compelled by the injury but was a subjective decision made by Claimant. Claimant owned a home without mortgage in Texas. While it is understandable that Claimant would want to move and would subjectively decide that he was sick of living check to check in Colorado, this was a subjective personal choice made by Claimant and was not compelled by the injury.

ORDER

It is therefore ordered that:

1. Claimant was responsible for the termination of his employment with Employer.

2. Claimant is entitled to TTD benefits from October 8, 2018 through December 6, 2018. His wage loss during this time was due to his work related surgery and recovery from surgery.

3. Respondents have established that Claimant is not entitled to TTD benefits from December 7, 2018 and ongoing as the wage loss beginning December 7, 2018 was due to Claimant's termination of employment.

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

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

DATED: March 8, 2019

/s/ Michelle E. Jones

_____

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

ISSUES

- Did Claimant prove his claim should be reopened for further medical treatment as recommended by Dr. Miguel Castrejon?

- Did Respondent prove no further treatment is reasonably necessary or causally related to Claimant's June 9, 2008 admitted injury?

FINDINGS OF FACT

1. Claimant suffered an admitted neck injury on June 9, 2008. He was moving bleachers with three coworkers and felt a "strain sensation" in the left side of his neck. He was diagnosed with a left cervical and trapezius strain. A cervical MRI showed chronic multilevel degenerative changes, but no acute pathology. Claimant was prescribed conservative care, including therapy, muscle relaxers, and Biofreeze. In April 2009, he underwent diagnostic facet medial branch blocks at C4-5, C5-6, and C6-7, with no benefit.

2. Claimant's ATP, Dr. Richard Nanes, put him at MMI on April 28, 2009 with a 14% whole person rating. Dr. Nanes noted Claimant's condition was "pretty much unchanged" with "no response to all of our treatments." Claimant was released to work without restrictions. The only maintenance recommendations were to finish a few remaining sessions of physical therapy and a final refill of Biofreeze.

3. Thereafter, Claimant received no treatment for his neck for more than four years.

4. Claimant saw Dr. Jenks on August 8, 2013 for a DIME. Dr. Jenks assigned a 10% whole person cervical spine rating. The rating was lower than Dr. Nanes' rating because Claimant's range of motion had improved in the interim. Dr. Jenks opined, "He does not need any maintenance care."

5. Respondent filed an FAL admitting to Dr. Jenks' 10% rating and denying medical benefits after MMI. Claimant timely objected to the FAL.

6. Claimant saw Dr. Miguel Castrejon for an IME at his counsel's request on January 15, 2014. Dr. Castrejon recommended additional treatment including C3-4, C4-5, and C5-6 facet blocks and medial branch blocks, possible rhizotomy, a left greater occipital nerve block, trigger point injections, physical therapy, and a psychological evaluation.

7. Dr. Carlos Cebrian performed an IME for Respondent in July 2014. Dr. Cebrian's report was not entered into evidence, but its general content can be gleaned from other records. Dr. Cebrian disagreed with Dr. Castrejon's recommendations and opined no further treatment was required on a work-related basis.

8. The parties subsequently reached a stipulation on November 20, 2014, which provides, "Respondent agrees to admit to reasonable, necessary, and related maintenance medical treatment as related to this June 9, 2008 workers' compensation claim. Furthermore, the parties agreed to authorize a facet injection as long as this injection continues to be recommended by the new authorized treating physician, Dr. Michael Sparr." The stipulation closed the claim as to all other issues.

9. Claimant received treatment from Dr. Sparr from December 10, 2014 to February 3, 2016. Dr. Sparr provided no detailed causation analysis and simply noted he had been authorized to provide ongoing treatment for Claimant's neck symptoms. Dr. Sparr found no reliable indication for facet injections. He provided multiple trigger point injections followed immediately by chiropractic treatment. Claimant reported short-term relief, but no lasting benefit. On February 3, 2016, Dr. Sparr released Claimant to a self-directed stretching and home exercise program. On May 17, 2017, Dr. Sparr reiterated that no further active treatment was reasonably necessary.

10. Dr. Castrejon re-evaluated Claimant on November 1, 2018. His opinions and recommendations remained essentially unchanged from his original evaluation.

11. Dr. Cebrian performed another IME on September 26, 2018. Dr. Cebrian maintained his opinion Claimant requires no further treatment in relation to his June 2008 injury.

12. Dr. Castrejon and Dr. Cebrian testified consistent with the opinions expressed in their reports.

13. Dr. Cebrian's causation opinions are credible and more persuasive than those offered by Dr. Castrejon.

14. Respondent proved by a preponderance of the evidence Claimant requires no further treatment causally related to the June 2008 injury.

CONCLUSIONS OF LAW

Claimant requests that his claim be "reopened" for further treatment. But the medical portion of Claimant's claim remains open pursuant to the parties' stipulation. Therefore, reopening is moot.

Respondent seeks to withdraw its "admission" for medical treatment after MMI on the theory that no further care is reasonably necessary or causally related to the June 2008 admitted injury. Although Respondent has covered maintenance care under a stipulation rather than a formal admission, the analysis is the same. Even where the respondents admit liability for medical benefits after MMI, they retain the right to challenge the compensability, reasonableness, and necessity of specific treatment. *Hanna v. Print Expediters Inc*., 77 P.3d 863 (Colo. App. 2003). Usually, the claimant must prove entitlement to disputed medical benefits by a preponderance of the evidence. *Ford v. Regional Transportation District*, W.C. No. 4-309-217 (February 12, 2009). But the Act was amended in 2009 to place the burden of proof on the party seeking to modify an

issue determined by a previous admission or order. Where the respondents' seek to terminate all previously admitted maintenance benefits, the respondents must prove treatment is no longer reasonably necessary or causally related to the injury. Section 8-43-201(1); *Salisbury v. Prowers County School District RE2*, W.C. No. 7-702-144 (June 5, 2013); *Dunn v. St. Mary Corwin Hospital*, W.C. No. 4-754-838 (October 1, 2013).

Respondent proved there is no causal connection between any ongoing need for treatment and the 2008 admitted injury. Dr. Cebrian's causation opinions are credible and persuasive. Claimant's injury involved no significant trauma and caused no identifiable objective change to his cervical spine. The ALJ sees no persuasive connection between Claimant's current symptoms and a minor strain nearly 11 years ago. Given the pre-existing degenerative changes shown on imaging studies, the minor nature of the original incident, the lengthy interval since the accident, and the expected, natural progression of Claimant's underlying condition over time, the ALJ is persuaded the 2008 accidental injury is not the proximate cause of any current need for treatment. Claimant's current need for treatment is due to the natural progression of his personal medical condition, without contribution from the work accident.

ORDER

It is therefore ordered that:

1. Respondent's request to terminate Claimant's medical benefits is granted. Claimant's request for further medical treatment related to the June 9, 2008 injury is denied and dismissed.

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

DATED: March 8, 2019

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

ISSUES

I. Whether Claimant established by a preponderance of the evidence that he suffered compensable injuries to his back, head and hands in addition to an aggravation of his pre-existing PTSD on January 15, 2018.

II. If Claimant established that he suffered compensable injuries, whether he also established that he is entitled to reasonable, necessary, and related medical treatment.

III. If Claimant established that he sustained compensable injuries, whether he also established that he is entitled to temporary total disability benefits extending from January 15, 2018 through April 24, 2015

IV. Whether Respondents' established by a preponderance of the evidence that Claimant is responsible for his separation from employment thereby precluding his entitlement to TTD benefits.

FINDINGS OF FACT

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

1. Claimant alleges injuries as a result of being assaulted while in the course and scope of his employment on January 15, 2018. Claimant was the Director of Dining Services for Respondent-Employer. Claimant began working for Respondent-Employer on August 14, 2017. His employment with Respondent-Employer ended on January 19, 2018. As director of dining services, Claimant's duties, included, cooking, ordering food, managing kitchen staff, maintaining sanitation standards, and assist in the purchasing of food supplies.

2. Prior to the alleged January 15, 2018 assault, Claimant caught a subordinate cook (Nick) stealing t-shirts out of his office. Claimant testified that based upon his job description, he thought he had authority to terminate Nick. Claimant testified that he discussed the situation with Chris W_____ and Wendy V_____, co-workers associated with Respondent-Employer's Human Resources Department. Ms. V_____ conducted an investigation into the incident and spoke directly to Nick. According to Claimant, Nick admitted taking the shirts during his

conversation with Ms. V_____ prompting Claimant to terminate him. Per Claimant, Nick then spoke to Mr. G_____, Respondent-Employer's Executive Director who agreed to investigate the matter further. Ultimately, Mr. G_____ agreed to back Nick and reinstate him to his position.

3. Regarding this situation, Mr. G_____ testified that on January 11, 2018, he held a meeting with Claimant and Ms. V_____ to discuss Claimant's decision to terminate Nick. Ms. V_____ testified that Claimant was very upset at the meeting and was raising his voice. The ALJ infers from the evidence presented, that Claimant was upset about Nick's decision to discuss the situation with Mr. G_____ and more importantly, Mr. G_____'s decision to investigate the matter further. At the end of this meeting, Mr. G_____ asked Claimant to attend a follow-up meeting on January 12, 2018 with he and Nick to discuss the termination decision further. Claimant did not show for the meeting.

4. On January 13, 2018, Claimant, having not attended the January 12th meeting, emailed Mr. G_____ informing him that there were two cooks coming to interview for the vacant cook position the following Monday. Mr. G_____ responded that same day that he was reassessing Nick's termination and to wait on filling the position. He also requested that they discuss the matter on the following Monday. Claimant testified he felt undermined by Mr. G_____ and that he was angry with him for overriding his decision to terminate Nick. Accordingly, he sent a responsive email informing Mr. G_____ that he would "make it easy" on him by resigning on Monday so he could bring Nick back. Claimant specifically indicated to Mr. G_____ that he would prepare his letter of resignation on Monday. Claimant copied Emily C_____ with his email response to Mr. G_____. He also explained his anger/frustration with Mr. G_____ and informed her of his intent to resign.

5. Mr. G_____ responded to Claimant later on January 13, 2018, acknowledging his contributions to kitchen and explaining that Nick's firing was still in investigation so as to mitigate "possible unemployment" consequences. His email response also documented his hope that Claimant might reconsider his decision to resign. Mr. G_____ testified that he never received any indication from Claimant that he intended to withdraw his decision to resign.

6. Ms. V_____ testified that the proper procedure to terminate an employee is for the supervisor to discuss the termination with the Executive Director and then obtain the necessary paperwork documenting the termination from Ms. V_____. Before going to Mr. G_____ to discuss Nick's termination, Claimant went to Ms. V_____ to secure the paperwork necessary to document and support Nick's termination. V_____ testified that she believed that Claimant told her Mr.

G_____ had approved the termination when he requested the termination paperwork; although, it later was made clear that Mr. G_____ had not approved Nick's firing.

7. On January 14, 2018, Claimant sent an email to Mr. G_____ explaining that he was leaving for Arizona on January 22 and returning on January 27, 2018. Mr. G_____ responded to the email by indicating: "Will, I just remembered that our CCA audit will start on the 22nd and go through the 24th. I believe one of the sections of the audit will be on dietary. We need to come up with a plan on who will represent the kitchen those days. Perhaps Emily or Nicole. Let me know who will be covering the kitchen". Despite testifying that Respondent-Employer's policy requires 30 days advanced notice for requesting time off, Mr. G_____ did not mention the above referenced policy in his email response to Claimant nor did he indicate that Claimant was not approved for leave. Indeed, as far as Mr. G_____ knew, Claimant was going to resign on Monday, January 15, 2018.

8. On January 15, 2018, Ms. C_____ responded to Claimant's January 13,2018 email regarding the circumstances surrounding Nick's termination. She asked if Claimant really intended to resign. Claimant immediately responded that he was not going to resign deciding instead to "do his job". He also took the opportunity to question Mr. G_____'s leadership noting that if "Mark wants to go against his Directors and not back us then I will start looking for something one day".

9. Ms. C_____ testified that she was not Claimant's supervisor and had a limited role in the hiring and disciplinary process for Respondent-Employer. She testified she did not have authority to terminate anyone. She also testified that she was not the proper person to whom Claimant should have send his email rescinding his decision to resign his employment. Rather, Ms. C_____ testified that if Claimant had decided to rescind his resignation, he needed to inform Mr. G_____. As noted above, Mr. G_____ testified that Claimant never informed him he had changed his mind regarding his decision to resign his position with Respondent-Employer.

10. Claimant reported to work as scheduled on Monday, January 15, 2018. He testified that on January 15, 2018, at approximately 8:30 a.m. he went out to an outdoor freezer where food items are stored to do inventory and complete a food order. Claimant testified that he noticed the freezer door and back gate were partially open. According to Claimant, as he looked into the open freezer, a large man rushed out and struck him on the left forehead, knocking his glasses from his face and to the ground. Claimant testified that he fell backwards landing on the palms of his hands and buttocks as the assailant fled. He reported having abrasions resulting in a small amount of blood coming from his right hand. Claimant testified that he got up and went back inside and called Mr. G_____ to report the assault.

11. Mr. G_____ testified that he received a call from Claimant stating that he had just been hit. Mr. G_____ testified that he found Claimant calm and collected, sitting on the stairs inside the back door of the building where just outside the freezer in question is located. Mr. G_____ testified that Claimant told him he went outside to check the food truck delivery and was punched by someone when he looked into the freezer.

12. Mr. G_____ testified that he did not observe any cuts on or bleeding coming from Claimant and his glasses appeared intact. He admitted during cross examination that he did not look at Claimant's hands, but added that Claimant did not complain about injuries and did not request medical attention or that the police be called. He also questioned Claimant's report that he was going to check the food truck delivery, testifying that food trucks deliver food on Tuesdays and Fridays. The ALJ takes judicial notice that January 15, 2018 was a Monday. Moreover, the evidence presented, supports a finding that a food delivery was made on January 16, 2018 for an order placed January 15, 2018.[1]

13. Based upon the evidence presented, including Mr. G_____'s testimony that, as part of his duties, Claimant would have to go to the outside freezer to take inventory coupled with the invoice indicating that a food order was placed on January 15, 2018, the ALJ finds it reasonable to infer that Claimant had gone out to the freezer to check, i.e. inventory the food delivery from the previous Friday and order additional food items for delivery on January 16, 2018. Nonetheless, this evidence, without more is insufficient to support a finding that Claimant was assaulted as he prepared to take inventory.

14. Ms. V_____ testified that Mr. G_____ came to her office and told her to call 911 to report the assault. Ms. V_____ testified that Claimant then came into her office wearing his white chef's coat. According to Ms. V_____, the back of Claimant's coat was wrinkled[2]; however, she observed no cuts, redness or abrasions about Claimant's person. Ms. V_____ testified that Claimant was not acting anxious. The police were summoned and according to Ms. V_____, arrived about 10 minutes after she called 911. Ms. V_____ also testified that she completed an Employer's First Report of Injury and a statement regarding the circumstances surrounding the assault on January 15, 2018. However, on cross examination Ms. V_____ admitted that the statement she insisted she wrote on the

[1] Claimant would reference the January 16, 2018 delivery to Dr. Peterson during a visit later the same day.

[2] Mr. G_____ testified on cross examination that he did not specifically look at the back of Claimant's coat after the assault was reported to him.

day of the assault included events which occurred on subsequent days, leading the ALJ to find that she probably did not write her statement on January 15, 2018 as claimed.

15. Officer Cory May with the Colorado Springs Police Department investigated this incident. Office May obtained a statement from Claimant during which he reported that he had gone out to the "refrigerated lockers" to get some items for the kitchen when he noticed the locker door was open. According to Claimant's statement, he did not think much about the door being open because another member of the kitchen staff was retrieving items from the locker during the same timeframe. Claimant reported that he went into the refrigerator and was "immediately punched in the left eye". Claimant reported that he fell on his back and his glasses went "flying" off his head. Officer May took digital photographs of Claimant. He testified that he observed redness above the left eye but admitted during cross examination that he did not know what caused the redness. He also testified that Claimant's glasses may have been scratched when they impacted the ground. The ALJ scrutinized the photographs taken by Officer May. Based upon that review, the ALJ is unable to discern any observable redness, swelling, bruising, bleeding, or abrasions to the head or hands. Nevertheless, the pictures support Ms. V_____'s testimony that Claimant's white coat appeared wrinkled at the time the pictures were taken. Furthermore, the coat appears slightly dirty at the bottom as if the fabric made contact with the ground. While this constitutes some evidence that Claimant, at some point, made contact with the ground, it is not, alone conclusive evidence that Claimant was assaulted and then fell to the ground. Without more, the ALJ finds it equally plausible that the wrinkles and dirt located on the bottom of Claimant's chef's coat may have been caused by sitting on the steps where Mr. G_____ testified he found Claimant.

16. Claimant testified that there were several prior incidents involving transients loitering around the outdoor refrigerators. He testified to prior break-ins of the refrigerators noting further that safety measures, including the installation of flood lights, fencing and sirens, had been taken to help make the area more secure.[3] While Respondent-Employer undertook efforts to make the area safe for its employees, the area could not be locked off completely per the report of Officer May due to fire code restrictions. The evidence presented persuades the ALJ that thieves were able to access the freezers and the same probably occurred on January 15, 2018. Because the area was not secure and the refrigerators had been discovered and plundered before, the ALJ also finds the potential for a confrontation ending in an assault by a would be thief probable.

[3] Mr. Gardner confirmed Claimant's testimony in this regard noting that individuals would access the area of the freezer through an unlocked gate and would then proceed to cut the lock on the freezer in an effort to steal food items.

17. Claimant was evaluated by Dr. Peterson at Concentra the same day of the alleged assault, on January 15, 2018. Dr. Peterson noted under "History of Present Illness" that Claimant was hit with a fist in the left forehead by a vagrant. Dr. Peterson noted tenderness over the left frontal area of the head, but it was atraumatic with no masses, swelling, or hematoma. A small superficial abrasion on the heel of the right hand was noted as were subjective reports of burning pain in the low back between the shoulder blades. Palpation of the thoracic and lumbar spine revealed subjective reports of tenderness but without objective evidence of muscle spasm. Straight leg raise testing was negative, strength was normal and Claimant's reflexes in the upper and lower extremities were symmetric and his sensation to light touch was intact. Claimant was assessed with a contusion of the scalp, lumbosacral strain, thoracic strain, abrasion of the right hand and anxiety caused by "assault by bodily force". As for treatment, Dr. Peterson recommended Advil or Tylenol, rest and an ice pack.

18. Ms. C_____ testified that she spoke to Claimant after the alleged incident. Ms. C_____ testified that Claimant explained that he thought he heard a delivery truck pull up at the back door, so he went outside to check it. Ms. C_____ testified that this was odd because delivery trucks do not come on Mondays but arrive on Tuesdays. Ms. C_____ also testified that there were several concrete block walls between the kitchen and the outside making it very difficult to hear a delivery truck arrive.

19. On January 16, 2018, Claimant was reevaluated by Dr. Peterson. During this encounter Claimant reported that he had returned to work but felt incapable of handling food deliveries. Palpation of the back reveals left-sided muscle spasm and Claimant demonstrated limited and painful range of motion, for which Dr. Peterson prescribed Cycobenzaprine, a muscle relaxant. Claimant also reported sleeping poorly the night before his appointment secondary to nightmares he attributed to a "flare up" of his chronic PTSD prompting him to call a counselor through his employee assistance program (EAP). According to Dr. Peterson's note, Claimant's PTSD was "rendering him a bit non-functional". While the pain between Claimant's shoulder blades had resolved, he reported persistent back pain. Dr. Peterson recommended physical therapy for the back pain, referred Claimant to Dr. Gary Neuger or Dr. Herman Staudenmayer for "assistance in dealing with an acute anxiety reaction to the assault" and excused Claimant from work for two days.

20. On January 18, 2018 Claimant followed up with Dr. Peterson for continued low back pain. Claimant told Dr. Peterson that he was planning on flying to Arizona to see his son. Physical examination on this date, revealed tenderness over left frontal area, tenderness upon palpation of the left QL areas. Dr. Peterson also found persistent restricted range of motion with left-sided muscle spasms. Dr. Peterson noted Claimant appeared agitated, angry, anxious, depressed, dysphoric,

fearful, frightened, in pain, and tearful. On this date, Dr. Peterson gave Claimant work restrictions of lifting up to 10 pounds occasionally, push/pull up to 15 pounds occasionally, bending occasionally, engage in activities requiring trunk rotation occasionally, and change positions periodically to relieve discomfort.

21. On January 19, 2018, Respondent-Employer terminated Claimant's employment. On this date, Claimant met with Mr. G_____ and Ms. W_____ to discuss his job separation. During the January 19, 2018 meeting, Mr. G_____ informed Claimant that Respondent had elected to accept his resignation as tendered on January 13, 2018. Following this meeting, Mr. G_____ authored a post discharge letter which was sent to Claimant wherein he explained that the decision to accept Claimant's resignation was based upon the following performance issues:

- Failure to follow the chain of command by contacting Mr. G_____'s supervisor concerning a pay raise,
- Improper termination of the dietary employee without performing a complete and thorough investigation of the facts surrounding the misconduct along with refusing to meet with Mr. G_____ and the HR/payroll representative regarding the termination and then becoming angry, argumentative, and tendering his resignation when requested to attend the meeting,
- Providing less than thirty (30) days formal notice to take time off with an audit pending; and
- Undermining a work place investigation concerning sexual harassment by intimidating and making remarks to subordinates.[4]

22. Mr. G_____ testified that he reported to work at approximately 7:45 on Monday, January 15, 2018. He testified that he was unaware and surprised that Claimant had begun his shift Monday morning testifying that he felt that Claimant had decided to resign since he had not heard from him in response to the email message he sent Claimant on January 13, 2018 requesting that they discuss matters concerning Nick's termination and his (Claimant's) decision to tender his resignation. Absent a response, Mr. G_____ testified that he understood Claimant to have resigned. Claimant suggested that Mr. G_____ knew that Claimant had not resigned because he did not come looking for him upon arrival to work and he knew that someone had to get breakfast ready for the facilities residents. Mr. G_____

[4] While employed by Respondent-Employer in December of 2017, an anonymous complaint was received alleging that Claimant was sexually harassing co-workers. Ms. W_____ was involved in investigating the sexual harassment allegations. According to Mr. Gardner, while the matter was being investigated, Claimant became very upset and impeded the investigation through inappropriate behavior and comments.

testified that he did not look for Claimant because he had a meeting and knew that the kitchen staff could prepare the residents breakfast in Claimant's absence.

23. Claimant was reevaluated by Dr. Peterson on February 8, 2018. On this date, Claimant told Dr. Peterson that his low back pain continues but he was having nightmares again which wakes him up at night leading to drowsiness. Dr. Peterson prescribed diazepam and referred Claimant for an MRI and to Dr. Kenneth Finn or Dr. Tim Sandell for consideration of injection therapy for facet syndrome. Dr. Peterson also referred Claimant to Dr. Gary Neuger or Dr. Herman Staudenmayer for acute exacerbation of pre-existing PTSD. Claimant's work restriction remained unchanged from his prior visit with Dr.Peterson.

24. Dr. Peterson's office note of February 23, 2018 reflects that Claimant had plateaued with physical therapy. He recommended further care to include an MRI and a consult with pain management. Dr. Peterson noted that the MRI and referrals to physiatry had been denied. Dr. Peterson continued the same restrictions as given on prior visits.

25. Claimant was last seen by Dr. Peterson on March 21, 2018. Dr. Peterson noted that there were no significant changes since the last visit and the Insurer had denied all referrals. Upon physical examination, Dr. Peterson found significant tenderness at L4-5 facets with less tenderness at the SI joint. Dr. Peterson also found more pain with extension/rotation vs. flexion along with a positive Patrick's test on the left. Dr. Peterson noted that Claimant did not wish to take the diazepam due to addiction concerns. Because of this, Dr. Peterson prescribed Doxepin and Terazosin to help with nightmares and insomnia. Dr. Peterson continued the same restrictions as given on prior visits. Claimant has not returned to Dr. Peterson due to the claim being denied.

26. At Respondent's request, Claimant was evaluated by Dr. Kathleen D'Angelo on April 30, 2018. Claimant gave Dr. D'Angelo a history of going to the freezers out back and noticing the back gate and freezer door were open. The history further reveals that when Claimant stuck his head around the door, an unidentified person hit him in the head, knocking him to the ground. Claimant denied being hit with a fist but could not identify the object with which he was hit. Claimant told Dr. D'Angelo that he had a lump on his head, both his hands were scraped up and he had a cut on one hand as a result of the fall. Dr. D'Angelo testified that she reviewed the police photos and did not see any lumps, redness, or abrasions. Dr.

D'Angelo testified that the face and scalp are very vascular which causes quick swelling, ecchymosis, or bleeding with head contusions if struck.

27. Similar to Dr. Peterson's initial report, Dr. D'Angelo noted a lack of muscle spasms in Claimant's low back. She explained this was very significant because the lack of spasm did not correlate with Claimant's lumbar spine range of motion. Dr. D'Angelo explained that it was unusual to not have muscular hypertonicity, (spasm), when a patient has a lumbar strain because it is almost involuntary. D'Angelo testified that it was extraordinarily unusual to have a patient complain of severe pain, have restricted range of motion and not have muscle spasm. Dr. D'Angelo raised concerns regarding the assault itself. In support of her concern, Dr. D'Angelo pointed to the inconsistencies in Claimant's history concerning the mechanism of injury (MOI) in this case, including the "Employer Incident Report" and the history initially given to Dr. Peterson of being hit on the left side of the forehead and what she perceived to be the absence of any visible signs consistent with an assault present in the police photographs.

28. During his independent medical examination (IME), Claimant reported, to Dr. D'Angelo, a history of significant emotional trauma he had experienced, including a tumultuous childhood, a prior assault in 2003/2004, and, most significantly, his daughter's murder in 2007. Claimant reported that since his January 15, 2018 assault, he was afraid to go outside and was isolating himself. According to Dr. D'Angelo, Claimant reported that he was too afraid to go bowling with his friends, an activity he previously enjoyed doing. Dr. D'Angelo was very concerned with Claimant's mental health and recommended further psychological evaluation following her IME.

29. Ultimately, Dr. D'Angelo opined that Claimant was at MMI for claim related diagnoses of head contusion, lumbar myofascial irritation, thoracic myofascial irritation. She deferred regarding the possible aggravation of pre-existing PTSD, which she noted she would opine upon after reviewing a psychiatric assessment by Dr. Carbaugh.

30. Claimant underwent an independent medical examination with Dr. Robert Kleinman on May 30, 2018. Claimant reported to Dr. Kleinman that he was hit by an object that was in the hand of the assailant. Dr. Kleinman noted that Claimant had a long history of trauma which caused posttraumatic stress disorder, major depressive episodes, persistent depressive disorder and maladaptive personality traits. Dr. Kleinman opined that Claimant's posttraumatic stress disorder was caused by his childhood trauma and neglect and permanently aggravated by the violent murder of his

daughter. Dr. Kleinman also opined that Claimant had been persistently depressed with several episodes of major depression which again was permanently aggravated by the death of his daughter.

31. Dr. Kleinman opined that there was no indication that Claimant's psychological symptoms were any worse after the alleged assault on January 15, 2018. Dr. Kleinman opined that Claimant's PTSD was at baseline and that his depression was not exacerbated or aggravated by the January 15, 2018 incident. Dr. Kleinman opined that Claimant had persistent maladaptive personality traits evidence by six failed marriages and inconsistent work history. The MMPI 2 indicated a chronic and pervasive pattern of psychological problems. Dr. Kleinman ultimately opined that Claimant did not have a psychiatric diagnosis caused by the January 15, 2018, incident. However, Dr. Kleinman said that "taken at face value" the January 15, 2018 incident might have caused a brief temporary exacerbation of Claimant's PTSD symptoms for a few days.

32. Respondents performed a social media search wherein Facebook photographs were discovered of Claimant vacationing in Honduras. During his testimony, Claimant admitted that he took a trip to Honduras from March 23 through March 30, 2018. He testified that he travelled with his best friend for her 50th birthday. According to Claimant, he flew from Denver to Honduras with a stop in Miami and Cayman. Claimant testified that he spent time with his friend's family, relaxing and cooking out. Photographs posted to Facebook show Claimant socializing, wading/swimming, and dancing. Claimant appears relaxed and generally in good spirits in the posted pictures. Claimant reported that none of his activities while on vacation resulted in a violation of his physical restrictions, except perhaps "lifting a piece of luggage".

33. Dr. Kleinman reviewed the aforementioned photos and provided an addendum IME report on July 13, 2018. Dr. Kleinman noted that Claimant underreported his activities of daily living and attempted to appear worse than he was. Dr. Kleinman opined that Claimant version of events cannot be accepted at face value and he could not be relied upon to provide an accurate history, noting further that the fact that "Mr. McElroy is willing to misrepresent himself regarding his mental health issues, activities of daily living, interpersonal relationships, and impairment, indicates that [he] might also misrepresent himself regarding how the alleged incident occurred".

34. Dr. D'Angelo also reviewed the social media photographs and altered her opinion. One of the Facebook photographs shows Claimant underwater bent over. Dr. D'Angelo explained that Claimant's position in the photo contradicts his reported symptoms of pain in the trapezius muscles and numbness down his left lower extremity.

Dr. D'Angelo explained that bending forward, as in the pictures, would cause dural stretch and worsen Claimant's lower extremity numbness. Dr. D'Angelo also noted that flexion of the trunk and extension of the head at the neck is a tough maneuver for the trapezius muscle and Claimant did not appear uncomfortable in the photographs. Dr. D'Angelo also noted that the photographs of Claimant dancing showed him in various positions that Claimant previously reported as being difficult. Finally, Claimant's dancing, smiling, and socializing were psychologically very different than he reported his functioning to be during his IME with Dr. D'Angelo.

35. Dr. D'Angelo agreed with Dr. Kleinman, that Claimant's reliability regarding the assault was questionable specifically agreeing that he might misrepresent how the alleged incident occurred. She testified that it would be "really hard to believe" given everything involved in the case, that Claimant suffered a physical or mental injury assuming that the assault occurred. Nonetheless, she admitted that the mechanism of injury as described by Claimant can cause a low back injury and that if the assault occurred, her diagnosis would be lumbosacral myofascial irritation and thoracic myofascial irritation. Finally, Dr. D'Angelo testified that she disagreed with Dr. Peterson that more care was needed in this case.

CONCLUSIONS OF LAW

Based upon the evidence presented, including the deposition testimony of Emily C_____ and Dr. D'Angelo, the ALJ draws the following conclusions of law:

Generally

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

Claimant's Credibility

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony

and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. While there are inconsistencies in Claimant's reporting concerning how the alleged assault occurred in this case, the ALJ concludes, as noted as noted at paragraph 13 of the above findings of fact, that Claimant probably had gone out to the freezer to check, i.e. inventory the food delivery from the previous Friday and order additional food items for delivery on January 16, 2018. Consequently, the ALJ concludes that Claimant had the occasion to be in and around the area of the outdoor freezer on January 15, 2018. Moreover, as found above, the evidence presented, including Claimant's testimony, convinces the ALJ that he probably encountered a would be thief who rushed him and struck him in the head causing him to fall to the ground on his outstretched arms/hands and buttocks. This most accurately explains the wrinkles and dirt on Claimant's coat and small abrasion on the right hand. While Claimant varied on whether he was hit in the head by a fist or an object, the ALJ notes that Officer May observed redness over the left eye and Dr. Peterson documented tenderness over this area, leading the ALJ to conclude that Claimant was probably hit by something as the assailant was attempting to flee the scene. Accordingly, the ALJ finds Claimant's testimony regarding the events surrounding this assault credible. Dr. D'Angelo and Dr. Kleinman's contrary inferences/suggestions are not persuasive.

Compensability

C. A "compensable injury" is one which requires medical treatment or causes disability. *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981); *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO, Sept. 24, 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167, 1169 (Colo. App. 1990). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." *Romero*, supra; § 8-41-301, C.R.S. To sustain his burden of proof concerning compensability, Claimant must establish that the condition for which he seeks benefits was proximately caused by an "injury" arising out of and in the course of employment. *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Section 8-41-301(I)(b), C.R.S.*

D. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs in the course and scope of employment when it takes place within the time and place limits of the employment

relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). Here, the ALJ determines that Claimant has produced sufficient evidence to support a conclusion that the assault and subsequent injuries to his head, back and hands occurred in the scope of employment, specifically while he was taking inventory of food stocks and completing an order for subsequent delivery as part of his duties as the Dining Services Director for Respondent-Employer. As found, the totality of the evidence, including the prior break-ins of the onsite freezers and Mr. G_____'s testimony that Claimant did have to complete inventory of the outside freezers coupled with the objective evidence, i.e. Claimant's dirty/wrinkled uniform, the redness over the left eye observed by Officer May and the scrape on Claimant's right hand is more persuasive that an assault occurred than is Dr. D'Angelo speculation that Claimant fabricated the incident.

E. While Claimant established that he was injured in the course and scope of his employment, it is also necessary to address whether his symptoms/injury arose out of that employment before his injury can be determined to be compensable. The term "arises out of" refers to the origin or cause of an injury. *Deterts v. Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.*

F. There is no presumption that an injury, which occurs in the course of employment, also arises out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968). The determination of whether there is a sufficient "nexus" or causal relationship between a claimant's employment and the injury is one of fact and one that the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo.App. 1996). As found, the totality of the evidence presented, including the observations of Officer May and the medical reports of Dr. Peterson persuade the ALJ that the assault involved in this case probably resulted in acute soft tissue injuries to the head and right hand as well as a lumbosacral strain. Indeed, Dr. D'Angelo testified that assuming the assault to have occurred, she would diagnose Claimant with lumbosacral and thoracic myofascial irritation. While not a strain, the ALJ finds myofascial irritation a recognized diagnosis and treatable condition. Accordingly, the ALJ concludes that Claimant has proven he suffered compensable injuries to his head, right hand and low back. Nonetheless, the ALJ finds Claimant's testimony regarding the effects this encounter had on his psyche highly suspect. Here, the totality of the evidence presented, persuades the ALJ that Claimant probably over-reported his alleged psychological injuries and failed to report

important functional abilities to both Dr. D'Angelo and Dr. Kleinman. Without question, Claimant reported that his mental state was so impaired and he was so paralyzed by fear after this incident that he was isolating himself and rarely left the house. Indeed, Claimant reported that he no longer socialized, participated in bowling or went to movies. Dr. Kleinman and Dr. D'Angelo took Claimant's reports at face value and provided opinions consistent with this stated functional capacity. Dr. D'Angelo testified that she was so concerned about the state of Claimant's mental health that but for his comments about never committing suicide, she had considered placing him on a 72-hour psychiatric hold.

G. Claimant's reported psychological symptoms and functional capacity stand in stark contrast to his demonstrated psychological capabilities. Despite reporting significantly impaired psychological functioning, Claimant was able to travel to both Arizona and Honduras after the attack. Claimant failed to report to either Dr. D'Angelo or Dr. Kleinman that he was capable of traveling long distances and in the case of Honduras, if current events are to be credited, to a country plagued by substantial violence. The Facebook photos introduced into evidence demonstrate Claimant to be dancing, swimming, socializing and enjoying himself. Such evidence strongly belies Claimant's testimony suggesting that he was a virtual shut in following this attack. To be sure, the photographic evidence posted to Facebook lead Dr. Kleinman, an expert in psychiatry, to opine that Claimant was misrepresenting his mental functioning. Based upon the evidence presented, the ALJ credits the opinions of Dr. Kleinman to conclude that Claimant's mental health conditions are probably emanating from his pre-existing PTSD and persistent maladaptive personality traits without contribution from his January 15, 2018 assault as originally expressed by Dr. Kleinman following his May 30, 2018 psychiatric IME. As Claimant's psychological/psychiatric conditions did not arise from his work related assault, they are not compensable.

Medical Benefits

H. Once a claimant has established the compensable nature of his/her work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable, necessary, and related medical care to cure and relieve the effects of the work injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo.App. 1990). However, a claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970)*;* § 8-41-301(1)(c), C.R.S. Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo.App. 1997). In other words, the mere

occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, *supra*.

I. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003). The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo.App. 1984). As found here, Claimant has proven by a preponderance of the evidence that he sustained acute soft tissue injuries to his head, right hand and low back after being assaulted on January 15, 2018. The evidence presented convinces the ALJ that these compensable "injuries" are the proximate cause of Claimant's need for medical treatment including his visits to Dr. Peterson. Moreover, the totality of the evidence presented establishes that the care received was reasonable and necessary in light of the MOI and the acute nature of Claimant's symptoms. While the aforementioned conditions can be fairly traced to Claimant's assault, his claimed psychological symptoms cannot. Here, the evidence presented persuades the ALJ that Claimant's current psychological symptoms flow naturally from his non-work related PTSD and persistent maladaptive personality traits driven and reinforced by his chaotic upbringing and the tragic murder of his daughter. As Claimant's current need for psychological treatment is not proximately related to his January 15, 2018 work related assault, Respondents are not obligated to provide and pay for it.

Claimant's Separation from Employment & Entitlement to TTD

J. As Claimant's injury was after July 1, 1999, sections 8-42-105(4) and 8-42-103(1)(g), C.R.S. apply regarding her entitlement to TTD benefits. These identical provisions state, "In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." *Colorado Springs Disposal d/b/a Bestway Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002). Simply put, if the claimant is responsible for his/her termination of employment, he/she is not entitled to recover temporary disability benefits for wage loss. *Padilla v. Digital Equipment Corp., 902 P.2d 414, 416 (Colo. App. 1994).* Respondents shoulder the burden of proving by a preponderance of the evidence that Claimant was responsible for the termination. *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office,* 20 P. 3d 1209 (Colo. App. 2000).

K. The concept of "responsibility" is similar to the concept of "fault" under the previous version of the statute. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). "Fault" requires a volitional act or the exercise of some control in light of the totality of the circumstances. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1994). An employee is "responsible" if the employee precipitated the employment termination by a volitional act that an employee would reasonably expect to result in the loss of employment. *Patchek v. Colorado Department of Public Safety*, W.C. No. 4-432-301 (September 27, 2001). "Fault" does not require "willful intent" on the part of the Claimant. *Richards v. Winter Park Recreational Association*, 919 P.2d 933 (Colo. App. 1996) (unemployment insurance); *Harrison v. Dunmire Property Management, Inc.,* W.C. no. 4-676-410 (ICAO, April 9, 2008).

M. In this case, the record evidence demonstrates that prior to January 15, 2018, Claimant was considered an excellent employee. He was given a raise approximately three months after he was hired. Respondent-Employer's email reflects that Claimant was receiving accolades for saving money and for helping out when and where needed. No credible evidence was presented that Claimant had been counseled or disciplined for his job performance prior to his reporting the work related assault. From the evidence presented, Claimant was terminated on January 19, 2018 for failure to follow the chain of command, improper termination of a dietary employee and unprofessional conduct, providing late notice to take time off, and undermining a workplace investigation.

N. The failure to follow the chain of command concerns an email Claimant sent to Mr. G_____'s supervisor, David J_____, regarding a pay raise on January 12, 2018. The email response from Mr. J_____ simply indicated that the workplace culture allows employees to reach out to each other concerning work issues but any pay raise issues needs to be addressed with Mr. G_____. There was no indication in Mr. J_____'s email to Claimant that the email to Mr. J_____ was in any way improper. In fact, Mr. G_____ testified that employees can go over their supervisor's head without fear of termination. There was no credible evidence that sending the email to Mr. J_____ was in anyway improper until Claimant was terminated on January 19, 2018.

O. Concerning the late notice to take time off from work, Claimant emailed Mr. G_____ on January 14, 2018 of his intent to go to Arizona on January 22, 2018 to spend time with his family on the anniversary of his daughter's murder. Mr. G_____ responded back simply indicating that a plan needs to be devised as

to who will represent the kitchen for an upcoming audit. In this same email, Mr. G_____ suggested that Claimant contact Emily C_____ or Nicole as to coverage for the audit. There was no indication in this email exchange that Claimant was violating any rules or doing anything improper by asking for the time off. In fact, there was never an indication from Mr. G_____ that asking for the time off was problematic until after Claimant reported his work assault and injury.

P. Regarding the work place investigation, Claimant credibly testified that he did not intimidate of harass any of his subordinates or anyone else concerning the investigation and that it was his subordinates who came to him with information concerning the investigation. There was no credible evidence presented that the investigation was in any way hampered by Claimant. Moreover, there was no credible evidence presented that reflects that Claimant was disciplined for any alleged interference with the investigation.

Q. Insofar as the termination of the dietary employee Claimant admits that he did indeed terminate one of his subordinates for what Claimant thought was theft of company property. Claimant testified that he thought he had the authority to terminate an employee under his supervision without conferring with Mr. G_____. This view is supported by the job duty description for the dining director which allows for termination of employees when necessary so long as he documents and coordinates the termination with the personnel director and/or administrator. Claimant reasonably thought Wendy V_____ was the personnel director as she was the only human resources employee in the facility where Claimant worked. Mr. G_____ testified that he is both the director of the facility where Claimant worked and also the personnel director. However, when pressed, Mr. G_____ admitted that the job description for the dining services director is out of date as there is no personnel director at the facility where Claimant was injured.

R. Based on a totality of the circumstances presented, the ALJ concludes that the explanations articulated for "accepting" Claimant's resignation in Respondent-Employer's January 19, 2018 letter were pre-textual in nature and designed to cloak their real intention in separating Claimant from his employment. In this case, the evidence supports that Claimant was a valued employee up until the date he was he reported that he was assaulted. Moreover, while Claimant attempted to resign his position via email on January 13, 2018, Mr. G_____ did not accept the resignation. In fact, in response to Claimant's email, Mr. G_____ emailed Claimant indicating that he had been a good employee, was an asset to the team, and asking if he and Claimant could discuss the matter further on January 15, 2018 in

the hopes that Claimant might change his mind. Had Respondent-Employer clearly accepted Claimant's resignation on January 13, 2018 the analysis on this point would be different. Instead, the evidence reflects that Claimant was lead to believe he was still Respondent-Employer's Director of Dining Services. Moreover, the evidence presented persuades the ALJ that Claimant had changed his mind concerning resigning and Mr. G_____ knew or should have known about this fact. This evidence is reflected by Claimant's email to Ms. C_____ that he was not going to resign. Moreover, Claimant emailed Mr. G_____ on January 14, indicating that he was going to take time off to go Arizona providing constructive notice to Mr. G_____ that he did not intend to resign. In addition, Claimant showed up for his regular shift on the morning of January 15, 2018 without preparing a resignation letter as he informed Mr. G_____ he intended to do. If Mr. G_____ felt that Claimant had resigned as he testified, the ALJ finds it unpersuasive he would not take it upon himself to clarify with Claimant his intentions before he allowed him into the building to start working. Based upon the evidence presented, the ALJ finds that Respondents failed to establish that Claimant voluntarily terminated his employment in this case or was terminated for cause.

ORDER

It is therefore ordered that:

1. Claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his head, right hand and low back as a consequence of being assaulted in the course and scope of his work on January 15, 2018.

2. Respondents shall pay for all medical expenses, pursuant to the Workers' Compensation Medical Benefits Fee Schedule, to cure and relieve Claimant from the effects of his head, right hand and low back injuries, including, but not limited to the care provided by Dr. Peterson.

3. Claimant has failed to prove, by a preponderance of the evidence that his psychological symptoms and need for mental health treatment are causally related to his January 15, 2018 work related assault.

4. Respondents have failed to establish, by a preponderance of the evidence, that Claimant is responsible for his termination of employment.

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

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor,

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

DATED: March 11, 2019

/s/ Richard M. Lamphere

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

ISSUES

Whether the claimant has demonstrated by a preponderance of the evidence that her scheduled impairment rating should be converted to a whole person impairment rating.

FINDINGS OF FACT

1. The claimant suffered an admitted injury to her left shoulder on November 18, 2015. The injury occurred when the claimant was reaching overhead for a box, and a box on top of that box slipped and fell. The claimant testified that she attempted to catch the falling box with her left hand. However, as the box fell the claimant's left hand also moved downward, resulting in pain in the claimant's left shoulder.

2. During her claim, the claimant's authorized treating provider (ATP) has been Work Partners where she primarily treated with Erica Herrera, PA, but was also seen by Dr. Lori Fay.

3. Ultimately, the claimant was diagnosed with a left torn rotator cuff. On March 10, 2016, Dr. Mark Luker performed a rotator cuff repair.

4. The claimant testified that following her March 10, 2016 surgery she experienced low back pain while in physical therapy. The claimant also testified that she reported this low back pain to her chiropractor as well as to Dr. Fay and Ms. Herrera.

5. On January 27, 2017 Dr. Peter Millett performed a reverse shoulder arthroplasty. Thereafter, the claimant began a course of physical therapy. When she first began physical therapy, the claimant reported low back pain. However, on February 8, 2017, the claimant reported to Dr. Fay that her low back pain had resolved.

6. Thereafter, the claimant was seen by Dr. Millet on May 4, 2017. At that time, the claimant reported a "clunking" sensation in her left shoulder. Dr. Millett indicated this would improve with strengthening. On that date, Dr. Millet discharged the claimant from his care and instructed her to follow-up in one year.

7. On August 10, 2017, the claimant returned to Dr. Millett and reported continued popping and clunking in her left shoulder. Based upon these complaints, Dr. Millett referred Claimant for computerized tomography (CT) scan of her left shoulder.

8. On September 18, 2017, the CT scan showed an "uncomplicated left shoulder reverse arthroplasty." On November 9, 2017, Dr. Millet informed the claimant that she could return to normal activities.

9. On January 12, 2018, Dr. Fay placed the claimant at maximum medical improvement (MMI). At that time Dr. Fay assessed a permanent impairment rating of 44% for the claimant's left upper extremity (which equates to a 26% whole person impairment). At that time, Dr. Fay assessed permanent work restrictions including no lifting, repetitive lifting, carrying, pushing, or pulling over 20 pounds. In addition, no reaching overhead with her left upper extremity or reaching away from her body with her left upper extremity.

10. On February 15, 2018, the respondent filed a Final Admission of Liability (FAL) admitting for the MMI date and permanent impairment rating as assessed by Dr. Fay. The claimant objected to the FAL and proceeded to the Division sponsored independent medical examination (DIME) process.

11. On July 9, 2018, the claimant attended a DIME with Dr. Douglas Scott. As part of the DIME process, Dr. Scott reviewed the claimant's medical records, obtained a history from the claimant and completed a physical examination. Dr. Scott agreed that the claimant was properly placed at MMI on January 12, 2018. Dr. Scott assessed a permanent impairment rating of 41% for the claimant's left upper extremity. Dr. Scott also agreed with the permanent work restrictions assigned by Dr. Fay.

12. Following the DIME, the Division asked Dr. Scott to review the issue of apportionment given the claimant's **prior** injury to her left shoulder.

13. The claimant suffered a prior work related injury to her left shoulder on February 27, 2006. Dr. Scott performed a DIME for that injury on August 27, 2010. At that time, Dr. Scott assessed a permanent impairment rating of 15% for the claimant's left upper extremity.

14. On August 29, 2018, Dr. Scott issued an addendum to his July 9, 2018 DIME report with consideration of apportionment of the claimant's 2006 injury and related impairment. Dr. Scott subtracted 15% from the 44% assessment for the 2010 impairment rating. This resulted in a permanent impairment rating of 29% for the claimant's left upper extremity (which would equate to a 17% whole person impairment) for the November 18, 2015 work injury.

15. On September 18, 2018, the respondent filed a FAL admitting for the 29% permanent impairment rating for the claimant's left upper extremity.

16. On November 14, 2018, the claimant attended an independent medical examination (IME) with Dr. Allison Fall. In connection with the IME, Dr. Fall reviewed the claimant's medical records, obtained a history from the claimant and completed a physical examination. In her IME report, Dr. Fall opined that the claimant's injury was to her left shoulder. Dr. Fall specifically diagnosed the claimant with a left shoulder rotator cuff tear "acute on chronic", status post rotator cuff repair with subsequent re-tear and a reverse total shoulder arthroplasty. Dr. Fall agreed that the claimant reached MMI on January 12, 2018 and opined that the claimant's permanent impairment was appropriately determined to be a left upper extremity impairment. Dr. Fall's testimony at hearing was consistent with her written report. Dr. Fall credibly testified that the claimant's loss of function is only to her left shoulder. Dr. Fall also testified that the

claimant's complaints of pain throughout her body are likely related to the claimant's inflammatory arthritis, and not related to the claimant's left shoulder injury.

17. The claimant testified that as a result of her left shoulder injury, she has pain into her left trapezius and into her neck. The claimant also testified that the pain travels down into her ribcage and is particularly painful when she coughs. The claimant further testified that she has pain into her low back, hip, and knees. The claimant testified that she leans to the left when she walks. It is the claimant's belief that these symptoms are related to her left shoulder injury.

18. The ALJ credits the medical records and the opinions of Dr. Fall and finds that the permanent impairment rating was appropriately assessed for the claimant's left upper extremity, and there is no functional impairment beyond the claimant's left shoulder. Therefore, the ALJ finds that the claimant has failed to demonstrate that it is more likely than not that she has suffered any functional impairment that is not contained on the schedule. Therefore, the ALJ declines to convert the claimant's scheduled left upper extremity impairment rating to a full person impairment.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

3. The question of whether the claimant has sustained an "injury" which is on or off the schedule of impairment depends on whether the claimant has sustained a "functional impairment" to a part of the body that is not contained on the schedule. *Strauch v. PSL Swedish Health Care System*, 917 P.2d 366 (Colo. App. 1996). Functional impairment need not take any particular impairment. Discomfort which interferes with the claimant's ability to use a portion of his body may be considered

"impairment." *Mader v. Popejoy Construction Company, Inc.*, W.C. No. 4-198-489, (ICAO August 9, 1996). Pain and discomfort which limits a claimant's ability to use a portion of his body may be considered a "functional impairment" for determining whether an injury is on or off the schedule. *See, e.g., Beck v. Mile Hi Express Inc.*, W.C. No. 4-238-483 (ICAO February 11, 1997).

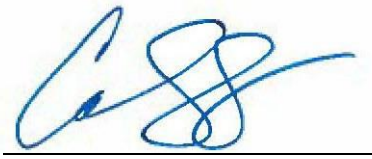
4. It is the claimant's burden of proof by a preponderance of the evidence to establish both that he suffered a permanent impairment and that the permanent impairment is either contained on the schedule set forth at subsection (2) or not on the schedule specified in subsection (2). Further, it is the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

5. As found, the claimant has failed to demonstrate by a preponderance of the evidence that she has suffered any functional impairment that is not contained on the schedule. Therefore, claimant's request to convert her scheduled impairment rating to a whole person impairment is denied. As found, the medical records and the opinions of Dr. Fall are credible and persuasive.

ORDER

It is therefore ordered that the claimant's request to convert her scheduled impairment to a whole person impairment is denied and dismissed.

Dated March 12, 2019



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

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

ISSUES

1. Whether Claimant has overcome Division Independent Medical Examination (DIME) physician Bennett Machanic's opinion that Claimant does not suffer from chronic regional pain syndrome (CRPS) causally related to her January 2, 2014 work injury by clear and convincing evidence.

2. Determination of disfigurement related to the admitted work injury.

FINDINGS OF FACT

1. Claimant is a 58 year old female who was employed by Employer.

2. On January 2, 2014, Claimant sustained an admitted work related injury. On that date, Claimant was letting passengers in and out of an exit door during a snowstorm when the door blew closed and struck her in the back.

3. After her admitted injury, Claimant underwent treatment that eventually included a lower back fusion surgery that occurred in two parts on February 26, 2015 and February 27, 2015.

4. From the fusion surgery, Claimant has scarring on both her abdomen and her back. On the lower abdomen, Claimant has a scar measuring approximately 15 inches that remains red and discolored from her normal skin tone despite adequate time for healing. On her back, Claimant has two scars each measuring approximately 1 inch in length and each remaining white and discolored from her normal skin tone despite adequate time for healing.

5. On October 29, 2015, Matthew Lugliani, M.D. evaluated Claimant. Claimant reported minimal improvement in her symptoms with continued low back pain at a 3-4/10 in severity. Claimant reported no radiating symptoms. Claimant also reported left elbow pain at a 6/10. Dr. Lugliani assessed stable chronic lumbar pain, L4-5 and L3-4 disc bulges with nerve root impingement status post fusion on February 26 and 27, 2015, and left lateral epicondylitis. *See* Exhibit H.

6. On December 12, 2016, Dr. Lugliani evaluated Claimant. Dr. Lugliani noted that Claimant was status post lumbar spine fusion from February of 2015 that was complicated by left lateral epicondylitis during physical therapy. Claimant reported persistent back pain, numbness and tingling into her bilateral legs at a 5-6/10 with aching stabbing numbness and tingling. Claimant reported that prolonged standing, walking, and lifting made her symptoms worse. Dr. Lugliani noted that Claimant was scheduled for platelet rich plasma injections for her left elbow on January 13, 2017. Dr. Lugliani

assessed chronic lumbar pain and radiculopathy following lumbar fusion and left elbow epicondylitis with tears on MRI. Claimant requested referral back to Dr. Rauzzino. *See* Exhibit 4.

7. On December 19, 2016, Usama Ghazi, D.O. evaluated Claimant. Dr. Ghazi noted that recent bilateral sciatic nerve blocks for Claimant's persistent piriformis pain and radicular symptoms had given her excellent long-term relief. Dr. Ghazi noted remarkable improvement for Claimant with Claimant being able for the first time to control sciatica and gluteal spasms. Claimant reported concern with coldness in the tips of her toes, brittle toenails that were falling off, collapse in the arches of her feet, and unexplained intermittent edema. Dr. Ghazi was concerned with chronic regional pain syndrome (CRPS) after looking at Claimant's feet. Claimant reported that the tips of all five toes on both feet would become pale and cold sometimes hyperemic. On exam, Dr. Ghazi found a cold pallor and multiple degree hypothermia compared to proximal to the MTPs at the tips of all five toes. Dr. Ghazi found Claimant's toenails to be brittle and discolored brownish-yellow and multiple areas where the toenails had flaked off and broken. Dr. Ghazi found some hyperemia of the distal shins. Dr. Ghazi found collapse of the arch more profound on the right foot and tenderness, especially with weight bearing, over the right sinus tarsi. In his impressions, Dr. Ghazi noted his significant concern for CRPS with postoperative edema, neuritic pain, cold toes, temperature differences, vasoconstriction of the toes, and brittle and flaking toes that were discolored and fragile. Dr. Ghazi opined that the type of contusion Claimant sustained could have caused mild CRPS, which could have been worsened by the fact that Claimant had chronic radiculopathy, postoperative pain, bilateral hip bursitis, and sciatic nerve compression. Dr. Ghazi planned to schedule Claimant for two sets of lumbar sympathetic blocks back to back to be diagnostic. *See* Exhibit 5.

8. On December 22, 2016, Claimant underwent bilateral lumbar sympathetic blocks performed by Dr. Ghazi. He noted pre-injection that Claimant's toes measured 84 degrees bilaterally and post injection the toes showing increased temperature of 88 degrees on the left and 86 degrees on the right. Dr. Ghazi also opined that vasodilation was noted with reduction of pallor in the bilateral toes after injection. Dr. Ghazi opined that the hyperesthesia and paresthesias in the feet and the curling of the toes was relaxed post injection and that the hypersensitivity in the tips of the toes was significant reduced. Dr. Ghazi opined that it was a successful bilateral sympathetic blockade and opined that the injections confirmed that Claimant had a portion of sympathetic mediated pain with vasoconstriction and Raynaud phenomenon. *See* Exhibit 5.

9. On February 9, 2017, Claimant again underwent bilateral lumbar sympathetic blocks performed by Dr. Ghazi. Claimant reported that after her first lumbar sympathetic blocks she did not have significant pain relief for the first week and a half but then began noticing a slow improvement in warming of the foot and toes as well as reduction in hypersensitivity especially when taking on and off her socks or having sheets tough her feet which caused 9/10 pain before. Claimant reported that now, her pain was reduced down to a 5-6/10 in the tips of the toes at rest but remained at an 8/10 with light touch when wearing socks or touching sheets. Dr. Ghazi noted some vasomotor changes

in Claimant's feet including paleness and coolness in the tips of the toes with vasoconstriction in the dorsum of the feet compared to the shins and calves. Dr. Ghazi noted no hyperhidrosis but pallor and brittle yellow toenails. After the February 9, 2017 injection Claimant reported 0/10 pain to light touch in the toes with 100% resolution of allodynia at rest and with light touch. Dr. Ghazi noted that the temperature in Claimant's left foot went from 87.2 to 91.2 degrees after injection and that the temperature in the right foot went from 87.9 to 90.2 degrees after injection with both feet showing palpable and measurable improvements consistent with successful sympathetic blockade. *See* Exhibit 5.

10. On April 3, 2017, Dr. Ghazi evaluated Claimant. Dr. Ghazi noted that Claimant's follow up MRI of the lumbar spine showed the L5-S1 fusion with right laminotomy changes and a large osteophyte in the right paracentral region causing mass effect with posterior displacement of the right S1 nerve root. He noted at L4-5 the MRI showed a diffuse disk bulge more pronounced than a prior June 2016 study and that there was moderate spinal stenosis also worsened from the prior study with possible impingement of the L5 nerve roots and possible impingement of the left L4 nerve root. At L3-4 Dr. Ghazi noted it showed mild disk bulge with facet and ligamentum flavum hypertrophy. Dr. Ghazi opined that perhaps a foraminotomy was needed for the displacement of the right S1 nerve root. Dr. Ghazi noted under history of present illness that Claimant's persistent bilateral lower extremity neuralgia appeared to be due to severe piriformis syndrome with sciatica as well as L5-S1 radiculitis with intact strength but persistent paresthesias in the S1 and L5 distributions. Dr. Ghazi also noted that Claimant had sympathetic mediated abnormalities that had progressed in the lower extremities but responded to lumbar sympathetic blocks with improvement in thermal asymmetry, pallor, and vasoconstriction. Dr. Ghazi noted that Claimant had lost almost all her toenails due to brittle vasomotor changes and that the sympathetic blocks provided 50% relief from pain but greater than 85% improvement in the vasoconstricted, cold, pale toes. Claimant reported that she was doing much better that her toes had rarely been cold and rarely had vasoconstriction since her injections. Claimant reported some return of the paresthesia and numbness and tingling as well as hypersensitivity. *See* Exhibits 5, F.

11. Claimant reported the pain radiated from her buttocks and hips into the bilateral feet along the lateral S1 distributions and then into the dorsum of the feet along the L5 distributions. Claimant noted hypersensitivity but was more concerned that she had lost almost all her toenails. Dr. Ghazi noted that on the left foot, Claimant had lost every toenail except for the fourth digit and that they had grown halfway back. On the right foot, Dr. Ghazi noted that Claimant had lost the toenails of digits four and five and that the brittleness and yellow discoloration of the toenails was improving as the nails had grown back. Dr. Ghazi also noted that Claimant was status post platelet rich plasma injection of the left medial lateral epicondyle and that Claimant reported her elbow pain was 90% improved. On physical examination, Claimant had a positive straight leg raise in the right S1 distribution. Dr. Ghazi noted that Claimant's reflexes were absent at 0/4 in the right Achilles consistent with the posteriorly displaced and compressed right S1 nerve root on MRI. Dr. Ghazi provided the impression of bilateral sciatica combined bilateral L5-S1 radiculitis with superimposed CRPS which was at least 50% improved from two

sets of sympathetic blocks. He opined that there had been some recurrence of CRPS with loss of almost all the toenails of the feet due to brittle trophic changes of the toenails from CRPS with symptoms much improved from prior injections, but wearing off. Dr. Ghazi also provided the impression of Raynaud syndrome with vasoconstriction and pallor in the toes remarkably improved after bilateral lumbar sympathetic blocks. Dr. Ghazi recommended Claimant follow up with Dr. Rauzzino regarding the left S1 flattening in displacement on the MRI. Dr. Ghazi opined that for the sciatic portion of Claimant's pain, Claimant should continue with piriformis stretches and physical therapy as well as pelvic tilt therapy and opined Claimant may eventually require PRP injections into the troachanteric and gluteal bursae/tendons. Dr. Ghazi recommended two additional lumbar sympathetic blocks for recurrence of vasomotor symptoms and the loss of toenails. Dr. Ghazi recommended repeat PRP injections to the left elbow down the road. *See* Exhibits 5, F.

12. On April 6, 2017, Dr. Ghazi requested bilateral lumbar sympathetic blocks x2 with them two weeks apart. Blocks were performed on May 18, 2017 and Claimant reported 100% anesthetic relief of the allodynia of the lower extremities. *See* Exhibits 5, F.

13. On June 9, 2017, Dr. Ghazi evaluated Claimant. Claimant reported complete resolution of the allodynia to light touch following the lumbar sympathetic blocks. Claimant reported that the changes in her toenails and the CRPS were almost reversed with the bluish-yellowish brittle nails appearing more healthy and pink and with the re-grown toenails coming in with a healthy pink color as opposed to the brittle discoloration. Claimant reported some coolness in the tips of the toes at times, especially on the right foot but overall her shins and thighs had no hypersensitivity to light touch and no allodynia for which she was grateful. Claimant was found to have radicular symptoms in the right L5-S1 distribution with the absence of the right S1 reflex/Achilles reflex. Claimant had a positive straight leg raise on the right radiating to the right L5 and S1 distribution. Palpation of the right sinus tarsi caused burning in the third, fourth, and fifth metatarsals and toes on the right side. Dr. Ghazi provided the impression of: chronic postoperative radiculopathy especially involving the right L5 and S1 distributions; sympathetic mediated pain remarkably improved after a series of lumbar sympathetic blocks; and right ankle pain with evidence of neuritic discomfort in the nerves of the right sinus tarsi. Dr. Ghazi planned to do a right S1 transforaminal epidural steroid injection combined with a block to the nerves of the right sinus tarsi. *See* Exhibit 5.

14. On August 10, 2017, Dr. Ghazi performed a right S1 lumbosacral transforaminal epidural steroid injection and a right sinus tarsi injection. Claimant reported 100% anesthetic relief and was found to have appropriate vasodilation of her foot, resolved pain, and was pain free in the leg and foot/ankle. *See* Exhibit 5.

15. On August 18, 2017, Dr. Ghazi evaluated Claimant. Dr. Ghazi noted that Claimant was significantly improved after a right sinus tarsi injection combined with a right S1 transforaminal epidural steroid injection . Claimant reported the neuralgia in her right foot and her radicular symptoms in the right leg were better and Claimant displayed a

negative straight leg raise on the right lower extremity. On exam, Dr. Ghazi found marked vasodilation of the right foot symmetric with the left side and no pallor or coolness in the toes. Dr. Ghazi found the toes of the right lateral foot appearing to be more warm than the medial aspect of the foot and the contralateral leg. He found the right piriformis and gluteal muscles to be completely relaxed, soft and pliable on the right side versus the non injected left side where there was continued gluteal spasm and almost a tight clenching with inability to relax. Dr. Ghazi opined that Claimant was doing well following the injection with a negative straight leg raise, without any allodynia, and without sympathetic mediated abnormalities. He planned to repeat a platelet rich plasma injection in the left elbow and recommended continued massage therapy and home exercises. *See* Exhibit 5.

16. On September 1, 2017, Dr. Ghazi performed an impairment rating as requested by Dr. Lugliani. Dr. Ghazi noted that Claimant had lumbar radiculopathy status post her L5-S1 fusion, postoperative chronic neuritis and sympathetic mediated pain in the lower extremities consistent with CRPS, and postoperative radicular symptoms related partially to chronic radiculopathy but mostly related to sciatic neuralgia from chronic hypertonic spasm of the gluteal and piriformis muscles. Dr. Ghazi noted that the ratable impairments would be the lumbar disk herniation with fusion, which would include lumbar range of motion, range of motion for the left elbow lateral and medial epicondylar tears, and an impairment rating for CRPS. Dr. Ghazi noted that he would not rate the persistent radiculopathy and sciatica as that would be "double dipping" since they were already rating Claimant for the most severe cause of the neuralgia in the legs with was the CRPS. For the sympathetic mediated pain, vasomotor changes, Raynaud phenomenon, and the CRPS of the bilateral lower extremities including other neuritic complaints sciatic and postradicular, Dr. Ghazi provided a 5% impairment. For the left elbow epicondylar rating, Dr. Ghazi provided a 0% rating. For the lumbar rating with history of L5-S1 anterior/posterior fusion Dr. Ghazi provided a 21% whole person impairment. Dr. Ghazi opined that the final whole person impairment rating, combing the lumbar fusion and the neuralgia/CRPS would be 25% whole person. *See* Exhibit 5.

17. Dr. Ghazi made several recommendations for maintenance treatment for Claimant's pain management. Dr. Ghazi recommended follow up with him on an as needed basis with as needed facet injections and rhizotomies above the fusion, and as needed SI joint injections and/or rhizotomies below the fusion. Dr. Ghazi recommended repeat bilateral S1 transforaminal epidural steroid injections, repeated sciatic nerve blocks, and repeat lumbar sympathetic blocks on an as needed basis including sympathetic blocks to the feet. Dr. Ghazi recommended continued medications including NSAIDs, muscle relaxants, opioids, topical pain creams and patches, and neuropathic pain medications. Dr. Ghazi recommended follow up with Dr. Rauzzino for any complications related to the fusion. Dr. Ghazi recommended updated imaging of a lumbar MRI on average of once per year as well as one set of x-rays once per year to evaluate postsurgical stability. Dr. Ghazi recommended 12 visits of physical therapy per year and 12 visits per year of either massage or chiropractic. Dr. Ghazi recommended Botox injections to the buttocks up to three times per year. Dr. Ghazi also recommended platelet rich plasma injections for the left medial and left lateral epicondyle in the elbow as needed. Dr. Ghazi recommended maintenance include surgical treatment for the left elbow if

needed as well as updated MRI and/or ultrasound of the left elbow on average once per year. *See* Exhibit 5.

18. On September 7, 2017, Dr. Ghazi issued a letter to Insurer noting that he had completed the impairment rating for Claimant. He noted that he had rated the neuralgia specifically as CRPS since Claimant had significant vasomotor changes, Raynaud phenomenon, edema, color changes, and excellent diagnostic responses with sympathetic blocks. *See* Exhibit 5.

19. On November 2, 2017, Dr. Lugliani evaluated Claimant. Dr. Lugliani noted that Claimant had recently followed up with Dr. Ghazi and received an impairment rating of her back and elbow. Dr. Lugliani noted that Claimant was status post her second platelet rich plasma injection in the elbow. Claimant reported minimal improvement and persistent pain in the lateral aspect of the elbow worse with heavy lifting. Claimant reported that her low back pain was unchanged and was achy with persistent bilateral lower extremity numbness and tingling involving her bilateral feet. Dr. Lugliani assessed: status post lumbar decompression and fusion, at MMI and left elbow epicondylitis, stable, and at MMI. Dr. Lugliani noted that Claimant would be placed on permanent work restrictions of 15 pounds lifting. He opined that Claimant would have continued maintenance follow up with Dr. Rauzzino and Dr. Ghazi indefinitely for repeat injections, medication refills, imaging, and/or surgery if deemed necessary. Dr. Lugliani also recommended 1 year of follow up with Dr. Clinkscales for the left elbow in the event Claimant required surgery for the left elbow. Dr. Lugliani opined that Claimant was at MMI and discharged her from care. *See* Exhibits 5, I.

20. On November 7, 2017, Respondents filed a final admission of liability (FAL). Respondents admitted to a 25% whole person impairment rating with an MMI date of November 2, 2017. Respondents admitted to medical maintenance benefits per Dr. Lugliani's November 2, 2017 report. *See* Exhibit 3.

21. Claimant objected to the FAL and sought a DIME. Claimant requested the DIME physician evaluate the low back, both legs and hips, CRPS, and left elbow. *See* Exhibit L.

22. On March 2, 2018, NP Fresques evaluated Claimant. Claimant reported her pain usually was a 5/10 but was up to a 9/10 that day. NP Fresques found sensory deficits in Claimant's feet migrating up to the ankle area. He found some color changes and tactile changes as well. NP Fresques assessed lower extremity CRPS and recommended a trial of Nucynta. *See* Exhibit 5.

23. On March 20, 2018, Dr. Ghazi evaluated Claimant. Claimant reported a return of some sympathetic abnormalities with neuralgia, hyperesthesia, and vasomotor changes in her lower extremities. Claimant also reported diffuse pain complaints in her legs that were best relieved with bilateral lumbar sympathetic blocks. Claimant reported thoracic pain, cervical pain, and paresthesias in the upper extremities. Claimant reported diffuse body aches and myalgias. On examination, Dr. Lugliani found hyperesthesia

throughout the lower lumbar dermatomes at L5 and S1 throughout the shins, calves, and dorsum and plantar aspect of the feet with cold purplish toes on the left greater than right side. He found no hyperhidrosis and no abnormal hair growth. Dr. Lugliani found no SI joint loading pain and extension pain limited to the SI joints. Dr. Ghazi opined that Claimant was having some return of the vasomotor abnormalities in the lower extremities combined with parethesias, coolness, pallor, hypothermia, and temperature/color changes. Dr. Ghazi opined that most of Claimant's pain was neuritic but noted that Claimant did not tolerate the anti-neuropathic pain medication very well. Dr. Ghazi discussed CBD oils and CBD salve with Claimant that were THC free and recommended a trail to help Claimant's neuropathic pain and sleep. Dr. Ghazi also planned to schedule Claimant for repeat bilateral lumbar sympathetic blocks x2 to be done back to back. Dr. Ghazi explained to Claimant that he was not treating her diffuse other areas of pain not related to the work injury and that he would be focusing on her work related injuries. *See* Exhibits 5, O.

24. On March 28, 2018, Bennett Machanic, M.D. performed a division independent medical examination (DIME). Claimant reported low back pain, bilateral leg pain, and difficulties with her left elbow. Claimant reported that her back fusion surgery helped a lot. Claimant reported that her back and her elbow both needed more help. Claimant reported low back pain bilaterally with radiation down to both legs that fluctuated. Claimant reported the pain radiated from her back, over her hips, then down the legs and that both legs were numb ad tingly and her toes sometimes felt dead. Claimant reported that her legs and toes could jerk. Dr. Machanic reviewed medical records and performed a physical examination. *See* Exhibits 9, G, M.

25. Dr. Machanic noted that after Claimant's fusion surgery, Claimant reported 70% improvement but worsening sciatic like pain. He also noted Claimant's report after fusion surgery that her leg pain was 80% reduced and her back pain was 70% reduced. On examination, Dr. Machanic found decreased pin sensation over the lower extremities diffusely over the feet and distal limbs becoming full at the mid calves. He found temperature sensation at a 2/10 to a cold metal object over the feet and at a 10/10 over the thighs. Dr. Machanic saw no signs of shrinkage or swelling of the feet, allodynia, or hyperalgesia. Dr. Machanic found no asymmetry or focal abnormalities and no perspiration. Dr. Machanic found there were no signs of CRPS or classical causalgia on his examination. *See* Exhibits 9, G, M.

26. Dr. Machanic agreed with the prior physicians that Claimant reached MMI for her back on November 2, 2017. However, Dr. Machanic opined that Claimant's elbow was not at MMI. Dr. Machanic emphasized that he found no clinical evidence or even record evidence of the true presence of CRPS and did not feel Claimant had a true causalgia. Dr. Machanic opined that most of Claimant's pain was generated from the lumbosacral spine and agreed with Dr. Rauzzino that there was post-operative scarring and chronic arachnoiditis. He also noted on clinical exam, the possibility of a small fiber neuropathy with an unknown etiology but not related in any fashion to the January 2, 2014 work injury. Dr. Machanic also noted the description of restless leg syndrome which he opined could be indirectly due to the low back problems or the small fiber neuropathy, or

both. Dr. Machanic noted that Claimant had right S1 dysfunction with an absent ankle reflex and weakness of plantar flexion plus numbness in the S1 distribution intermixed with sensory loss in both legs and provided Claimant with a 2% loss of sensation rating, 2% loss of strength in the right lower extremity, equating to 2% whole person bring Claimant to a total rating of 24% whole person permanent partial impairment rating for the lower back. He opined that the back had reached MMI and that the consequences of the low back work injury had reached permanency. Dr. Machanic opined that ongoing treatment with Dr. Ghazi and Dr. Rauzzino could be appropriate. Dr. Machanic opined that he was somewhat baffled as to why sympathetic blocks would be continued as Claimant did not have CRPS and he suggested no further injections of that sort. He opined, however, that local pain blocks might be appropriate in the future based on the opinions of Claimant's physician. Dr. Machanic opined that the left elbow was not at MMI and recommended further follow-up for the elbow. *See* Exhibits 9, G, M.

27. On April 30, 2018, Dr. Lugliani evaluated Claimant. Claimant reported her symptoms were unchanged and that she had persistent left elbow pain at a 5/10 and persistent back pain that she rated at a 6/10 involving her low back with radiating symptoms down into her feet described as numbness and tingling. Dr. Lugliani assessed Claimant to be status post lumbar decompression and fusion and at MMI for the lower back. Dr. Lugliani referred Claimant for follow up for her ongoing left elbow pain and noted Claimant may require left elbow surgery. *See* Exhibits 5, H.

28. On June 5, 2018, Carlton Clinkscales, M.D. evaluated Claimant. Claimant reported she had two platelet rich plasma injections for her chronic left lateral epicondylitis since he saw her last and reported that the injections had helped. Claimant reported that her every day aching had stopped. Dr. Clinkscales noted that Claimant had done well with right lateral epicondylitis surgery but that the right was still sore, felt different, and that she was limited on the right to 15-20 pounds lifting even with surgery. Claimant reported that she did not want to consider surgery on the left. Dr. Clinkscales opined that based on the chronicity of Claimant's left epicondylitis symptoms, the failure of non-operative treatment, the previously good results with surgery on the right, left lateral condyle debridement could be considered. Dr. Clinkscales noted that Claimant declined surgery again as she had in the past. Dr. Clinkscales opined that he had nothing further to offer Claimant regarding her left lateral epicondylitis. He opined that Claimant could accept it as is, continue non-operative treatment, get a second opinion, or undergo the left lateral epicondyle surgery. After this follow up opinion where Claimant declined left elbow surgery, Claimant returned to the DIME physician. *See* Exhibits 5, K.

29. On August 14, 2018, Dr. Machanic performed a follow up DIME. Claimant reported that her back was about the same. Claimant reported that she decided not to undergo left elbow surgery. Claimant reported a recent fall which worsened her low back pain but that it was fairly stable before the fall. Dr. Machanic found a bruise over the right side of Claimant's lumbar spine and over her right upper arm from the fall. He was unable to demonstrate any vasomotor or sympathetic changes in Claimant's legs and noted that his back and leg exam was very close to the exam he did previously. He found a change

in the elbow range of motion with additional lost range of motion compared to his prior exam. *See* Exhibits 9, M, N.

30. Dr. Machanic opined that Claimant had reached MMI in regards to both her lower back, her radicular symptoms, and her ongoing left elbow issues. He opined that MMI was reached on June 5, 2018. Dr. Machanic opined that the prior rating he did on the lumbar spine impairment was the same and included Claimant's S1 radiculopathy on the right and remained at 24% whole person. He opined that the left elbow was at a rating of 5% upper extremity, 3% whole person. Dr. Machanic noted that Claimant did have chronic low back pain and recommended that if there were exacerbation of symptoms over the lumbosacral spine perhaps one to two weeks of physical therapy in a pool be performed. He opined that an ongoing pool exercise in a health club setting or independently would be advised to maintain stability of the lumbar spine in view of the chronic pain issues and Claimant's post-operative lumbosacral arachnoiditis and scarring. He opined that it was not CRPS. He suggested additional PRP injections for the elbow pain and suggested one additional PRP injection for the elbow with Dr. Ghazi. Dr. Machanic opined that if the additional elbow PRP injection provided benefit, then Dr. Ghazi should provide a rationale for future treatment in that regard. Dr. Machanic opined that there was no indication for lumbar sympathetic blocks. The maintenance benefits recommended thus were pool exercise, and one PRP injection in the elbow. *See* Exhibits 9, M, N.

31. On August 17, 2018, Respondents filed another FAL. Respondents admitted to a whole person impairment of 24% and a scheduled impairment of 5% left upper extremity. Respondents admitted to medical maintenance benefits per Dr. Machanic's August 14, 2018 report. *See* Exhibit 3.

32. On August 31, 2018, Dr. Ghazi evaluated Claimant. Dr. Ghazi noted that Claimant had not had any steroid injections for one year and that her lower extremity pain had been controlled with a series of lumbar sympathetic blocks. Dr. Ghazi noted, unfortunately, that Dr. Machanic performed a DIME and opined that sympathetic blocks were not indicated and opined that Claimant did not have CRPS. Dr. Ghazi disagreed and opined that Claimant clearly had sympathetic mediated abnormalities. Dr. Ghazi noted that Claimant had vasomotor instability including blue toes, Raynaud type phenomenon with toes going from hot red to white to blue within minutes, multiple episodes of brittle toenails with three episodes of toenail loss after becoming brittle, intermittent edema, erythema, and thermal asymmetry. Dr. Ghazi noted that Claimant had responded positively to sympathetic blocks with marked vasodilation, increased temperature, and increased improvement in her symptomatology. Dr. Ghazi opined that Claimant met the Budapest criteria for CRPS and disagreed with the DIME. Dr. Ghazi noted that Dr. Machanic recommended thermography and QSART testing for CRPS and noted he would get that done as soon as possible. Claimant wanted to proceed with epidural steroid injections bilaterally since the lumbar sympathetic blocks were denied and reported that she had been having numbness, tingling, cramping, and instability with multiple falls where her big toe goes into extension and her other toes go into flexion causing her to be unstable. On examination, Dr. Ghazi found Claimant's toenails to be

at 75% regrowth. He found her toes to be pale and white at the tips and her feet to be several degrees cooler from the mid arch to the tips of the toes bilaterally, worse on the right foot. Dr. Ghazi also found hyperesthesia to light touch on the left foot and on the dorsum and plantar aspect of the left foot. Claimant had a positive straight leg raise shooting into the plantar aspects of both feet. Dr. Ghazi provided the impression of: failed back syndrome with history of L5-S1 fusion with a stable fusion but persistent lower extremity pain likely due to a combination of arachnoiditis, chronic post decompression radiculopathy, and sympathetic mediated pain; CRPS of the bilateral lower extremities after treating the patient for several years and documenting multiple episodes of edema, vasomotor instability, severe temperature drops in the tips of the toes, Raynaud phenomenon, loss of toenails, brittle toenails, and positive responses to multiple sympathetic blocks; and left elbow pain. Dr. Ghazi planned to request bilateral transforaminal epidural steroid injections for bilateral S1 radiculopathy, deferral of a left elbow platelet rich plasma injection, and a QSART and thermogram test to evaluate bilateral lower extremity CRPS. *See* Exhibit 5.

33. On October 25, 2018 and November 8, 2018, Dr. Ghazi performed S1 tranforaminal epidural steroid injections. Claimant reported 100% relief of the neuralgia and pain in both legs following the injections. *See* Exhibit 5.

34. On November 30, 2018, Janet Stansbury, certified massage therapist, wrote a letter. Ms. Stansbury indicated that Claimant had been a medical massage client of hers since February of 2016. Ms. Stansbury observed Claimant losing toe nails three times, Claimant's hands and feet turning blue, Claimant's legs and feet cramping, and Claimant have enough pain that she could not bend over or stand up straight. Ms. Stansbury also observed Claimant to report migraines and observed muscle spasms in Claimant's back and glutes. Ms. Stansbury noted that Claimant continued to have all those symptoms and continued to have cramps in the legs and feet during every session. Exhibit 8.

35. On December 7, 2018, Dr. Ghazi evaluated Claimant. Claimant reported that following the bilateral S1 transforaminal epidural steroid injections, her legs were doing great with 100% resolution of the nerve burning and paresthesia. Claimant reported, however, that she still had tightness and vasomotor changes including temperature, cold, purple, and pale toes and feet. Claimant noted that she had lost the toenails from her feet for the third time. Claimant reported that although the burning pain in her legs was gone, she still had persistent vasoconstriction and pallor and wanted to have repeat sympathetic blocks. On examination, Dr. Ghazi found cold, pale toes bilaterally with toenails showing signs of regrowth. Dr. Ghazi also found marked vasoconstriction and coolness in the feet bilaterally. Dr. Ghazi provided the impression of: bilateral S1 radiculopathy with resolution of radicular neuralgia in the legs following epidurals at S1; CRPS/sympathetic mediated changes in the bilateral lower extremities including Raynaud phenomenon, vasoconstriction, pallor, and repeated loss of toenails; and sympathetic dysregulation with marked vasoconstrictions in the lower extremities, also known as Raynaud phenomenon versus CRPS that responds temporarily to sympathetic blocks. Dr. Ghazi planned to request repeat sympathetic blocks. Dr. Ghazi

heartily disagreed with Dr. Machanic's opinion that it was not CRPS given Claimant's lost toenails, vasoconstriction, thermal asymmetry, temperature changes, and color changes. Dr. Ghazi noted that he had ordered QSART and thermography back in August but that the tests had not been authorized or completed. Dr. Ghazi opined, however, that Claimant's issues responded to sympathetic blocks and therefore he considered Claimant to have CRPS. Dr. Ghazi planned to refer Claimant to Dr. Ament for consultation regarding CRPS and vasculopathy and also to Dr. Schneider for sciatica sacroilitis and CRPS/Raynaud-type changes and neuritis. *See* Exhibit 5.

36. On December 20, 2018, NP Fresques evaluated Claimant. Claimant reported up to 70% relief on the left side following bilateral S1 transforaminal epidural steroid injections that she underwent in November. Claimant reported that she was doing well but chiropractic treatment aggravated her symptoms. NP Fresques noted that Claimant had elements of CRPS with tactile and color changes in the lower extremities and that Claimant had lost her toenails on three different occasions. NP Fresques opined that work comp guidelines should cover diagnostic thermography and/or QSART testing. Following this visit, Dr. Ghazi requested authorization for repeat bilateral lumbar sympathetic blocks. *See* Exhibit 5.

37. On December 27, 2018, Insurer denied Dr. Ghazi's request for bilateral lumbar sympathetic blocks. *See* Exhibit 5.

38. On January 22, 2019, NP Fresques evaluated Claimant. Claimant reported that she was overall much improved following the bilateral S1 epidural injection in November. Claimant reported a pain level of 6/10. NP Fresques noted that Claimant continued with CRPS symptoms in her lower extremities, right greater than left and had responded to past sympathetic blocks. NP Fresques noted that Dr. Machanic suggested Claimant's symptoms were not consistent with CRPS and NP Fresques opined that Claimant would be an excellent candidate for thermography and/or QSART testing for diagnosis of CRPS. On examination, NP Fresques found some slight discoloration of the right foot and some tactile changes. He assessed low back pain with radicular symptoms, S1 dermatome; history of L5-S1 fusion; and CRPS, lower extremities. *See* Exhibit 5.

39. Claimant filed an Application for Hearing endorsing the casual relationship of CRPS to her January 2, 2014 work injury. Claimant seeks a determination that DIME physician Dr. Machanic was incorrect in opining that she does not suffer from CRPS and seeks further medical maintenance treatments including ongoing sympathetic block injections as needed to maintain her condition.

40. Claimant testified at hearing that following her lumbar spine fusion surgery, she had a cluster of unusual symptoms in her lower extremities. She testified that her legs cramped, her toes curled uncontrollably, her feet and legs turn colors, and that on three occasions her toenails had fallen off and regrown. Claimant testified that the injections from Dr. Ghazi had helped reduce her symptoms and bring her pain down and that the temperature in her feet would return to normal following an injection.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

Overcoming DIME opinion

Under the statute MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining

MMI. Therefore, the DIME physician's opinions on these issues are binding unless overcome by clear and convincing evidence. *See Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

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

Dr. Machanic, the DIME physician, opined that Claimant does not suffer from CRPS and opined that Claimant did not need any treatment, including maintenance treatment of sympathetic blocks, for that condition. Dr. Machanic did not recommend or request additional testing such as QSART or thermogram. Rather, he opined that the sympathetic blocks should not be done or approved since Claimant did not suffer from work related CRPS. This causal opinion was inherent in Dr. Machanic's overall determination on MMI and must be overcome by clear and convincing evidence. Claimant has met her burden to overcome the opinion that she does not have a diagnosis of CRPS and does not need any treatment or procedures for CRPS by clear and convincing evidence.

The medical records above establish by clear and convincing evidence that Dr. Machanic erred in his opinion that Claimant does not suffer from CRPS. Claimant, as found above, has had significant symptoms consistent with CRPS following her lumbar spine fusion surgery. Claimant's testimony is credible and persuasive. The reports of Dr. Ghazi, Claimant's massage therapist, and NP Fresques are consistent in symptoms and signs of CRPS that have been identified and documented over the past several years. Claimant responded positively to sympathetic blocks, helping to confirm the CRPS diagnosis. Thermogram and QSART testing are not necessary as Claimant's response to the sympathetic blocks combined with her symptoms observed by multiple providers, confirms by clear and convincing evidence that she has the diagnosis of CRPS. Claimant, is not challenging her MMI date and she remains at MMI as of June 5, 2018. Claimant, however, has established by clear and convincing evidence that CRPS is a work related diagnosis and that she remains in need of "as needed" sympathetic blocks to manage and maintain her work related CRPS condition. Claimant has established by clear and convincing evidence that CRPS is casually related to her work injury and Claimant is therefore entitled to reasonable and necessary medical maintenance benefits including sympathetic blocks to maintain her CRPS condition and prevent deterioration.

Disfigurement

If Claimant has sustained serious permanent disfigurement to areas of the body normally exposed to public view, Claimant is entitled to additional compensation. § 8-42-108(1),(2) C.R.S. As found above, Claimant's lumbar fusion surgery required entry both on her lower abdomen and on her back and was a two part procedure. Claimant has scarring from three scars totaling approximately 17 inches in length that remain discolored from her normal skin tone despite adequate time for healing. Insurer shall pay Claimant additional compensation in the amount of $4,250 pursuant to § 8-42-108(1)C.R.S. for her disfigurement.

ORDER

It is therefore ordered that:

1. Claimant has overcome by clear and convincing evidence DIME physician Dr. Machanic's opinion on the casual relationship of CRPS to this claim. Claimant has CRPS, casually related to her work injury.

2. Claimant remains at MMI but has established an entitlement to reasonable and necessary medical maintenance benefits for her work related CRPS, including sympathetic blocks.

3. Claimant has established an entitlement to an award for disfigurement in the amount of $4,250.00.

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

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

DATED: March 12, 2019

/s/ Michelle E. Jones

_____

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

OFFICE OF ADMINISTRATIVE COURTS

STATE OF COLORADO

W.C. No. 5-010-740-003

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on March 5, 2019, in Denver, Colorado. The hearing was digitally recorded (reference: 3/5/19, Courtroom 3, beginning at 1:45 PM, and ending at 5:00 PM). The official Spanish/English Interpreter was Alice Her.

Claimant's Exhibits 1 through 24 were admitted into evidence, without objection, however, Exhibit 23 was withdrawn. Respondents' Exhibits A through CC were admitted into evidence, without objection, however, ruling on Exhibits Q through U and X was reserved. The objections to Exhibits Q through U are hereby overruled and these exhibits are hereby admitted into evidence. The objection to Exhibit X is hereby sustained and Exhibit X is rejected.

At the conclusion of the hearing, the ALJ established a post hearing briefing schedule. The Claimant's opening brief was filed, electronically, on March 8, 2019. The Respondents' answer brief was filed, electronically, on March 12, 2019. Because the Claimant has prevailed in the above-referenced matter, it is unnecessary to wait two days for a reply brief. Consequently, the matter was deemed submitted for decision on March 14, 2019.

ISSUES

The issues to be determined by this decision concern medical benefits; reasonably necessary left ankle surgery (juvenile allograft cartilage replacement) pursuant to the recommendation of Alan Ng, D.P.M., an authorized treating podiatrist.

FINDINGS OF FACT

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

Preliminary Findings

1. Respondents filed a General Admission of Liability (GAL), dated April 7, 2016, admitting for authorized, causally related and reasonably necessary medical benefits; an average weekly wage (AWW) of $723.81; and, temporary total disability (TTD) benefits of $482.54 per week from March 26, 2016 and "ongoing." The GAL remains in full force and effect (Claimant's Exhibit 1). The parties stipulated to an initial average weekly wage of $750.00, effective from the date of loss until May 31, 2018, and that the average weekly wage increased to $853.05 effective June 1, 2018, that includes the replacement cost of health insurance, and the ALJ so finds.

2. On October 9, 2015, the Claimant suffered an admitted industrial injury. Claimant's left hip was driven into by a pickup truck driven by his supervisor. Among other injuries, the Claimant sustained a left ankle injury (Respondents' Exhibit AA)

3. On November 12, 2015, the Claimant presented to his primary care provider with complaints of ankle pain after a truck bumped and pinned him between the gate and the truck. He reported low back pain which radiated down his left leg, left knee pain, and occasional ankle pain. The Claimant was diagnosed with an ankle strain. His instructions were to limit lifting, pushing, or pulling, to follow up with a workers' compensation doctor due to his injury occurring at work (Claimant's Exhibit 5).

4. On November 13, 2015, the Claimant presented to Kevin Vlahovich, M.D. at Banner Occupational Health Clinic. The Claimant reported opening a fence on October 9, 2015 when his supervisor drove the bumper of a truck into his left hip causing his left leg to twist and get pinned against the fence. The supervisor laughed and claimed it was a joke. The Claimant walked with a limp and reported pain which traveled from hip to the medial ankle. Left ankle examination was abnormal for pain on motion and palpation medially around the tibiofibular joint. The left ankle also had decreased strength and range of motion (ROM). Original x-rays of the left ankle showed abnormalities related to the incident. Objective findings were consistent with the history of a work-related etiology, specifically caused when the Claimant was hit by a vehicle on the left hip and leg while at work (Claimant's Exhibit 6)

5. On November 30, 2015, the Claimant reported popping and catching in the left ankle (Claimant's Exhibit 6).

Medical Chronology

6. On December 8, 2015, Kevin Vlahovich, M.D. of Banner Occupational Health Clinic in Greely reviewed an MRI (magnetic resonance imaging) of the left ankle which showed both acute and chronic changes. Dr. Vlahovich referred the Claimant for an orthopedic evaluation and treatment followed by a referral of physical therapy (Claimant's Exhibit 6).

7. Upon the referral of Dr. Vlahovich on December 16, 2015, the Claimant presented to orthopedic surgeon Richard Williams, M.D. The Claimant informed Dr. Williams that he was struck by a truck at work on October 9, 2015. Since then he reported left ankle pain and swelling. Dr. Williams noted a decreased range of motion in the left ankle and positive Achilles reflexes tests. Dr. Williams reviewed x-rays and MRIs and diagnosed a chronic talar dome osteochondral lesion. The Claimant desired the beginning of conservative care. Dr. Williams performed a steroid injection to the left ankle (Claimant's Exhibit 7). Dr. Williams is within the chain of authorized referrals.

8. On January 5, 2016, the Claimant reported that he was doing the same or slightly worse after being referred to Dr. Williams, who gave him an injection of steroids into the left ankle. The injection in the ankle did not decrease the pain (Claimant's Exhibit 6).

9. On January 26, 2016, the Claimant reported the ankle injection did not provide any relief. There was clicking and swelling noted. Dr. Williams gave the Claimant and ankle brace and referred him to Steven Sides., M.D. (Claimant's Exhibit 7). Dr. Sides is within the chain of authorized referrals.

10. Upon the referral of Dr. Williams on February 8, 2016, the Claimant presented to Dr. Sides. The Claimant reported that a co-worker bumped him with a car while he was opening a gate and the Claimant had since developed severe and constant left foot symptoms. Dr. Sides diagnosed an osteochondral defect of the talus and performed a left ankle steroid injection. Dr. Sides recommended continued use of an ankle brace and following the RICE protocol (Claimant's Exhibit 9).

11. On February 9, 2016, the Claimant reported pain mostly in the left ankle. The ankle still had some popping and catching (Claimant's Exhibit 6).

12. On February 23, 2016, the Claimant reported continued left ankle pain and was noted to be walking with crutches. Dr. Vlahovich referred the Claimant for a second opinion when Dr. Sides was unavailable and Dr. Vlahovich noted the left ankle was not improving with conservative measures and was delaying recovery (Claimant's Exhibit 6).

13. Upon the referral of Dr. Vlahovich on March 1, 2016, the Claimant presented to Wesley P. Jackson, M.D. for a second opinion for the left ankle pain. The Claimant stated that he was injured when a truck hit his left hip and he developed left anterior ankle pain. Dr. Jackson diagnosed left talar dome medial cystic osteochondral defect. Dr. Jackson was of the opinion that surgery at that time was unpredictable. Dr. Jackson performed a cortisone injection in the left ankle. According to Dr. Jackson, if the Claimant had a positive response, he may benefit from an arthroscopy and debridement (Claimant's Exhibit 10).

14. On March 1, 2016, Dr. Jackson, Orthopedic specialist, noted that the Claimant was 5 feet 7 inches tall and weighed 300 pounds. Dr. Jackson reported that Claimant's cysts predated the work injury. On examination, Claimant's pain was "quite

out of proportion to the findings." Dr. Jackson considered surgery unpredictable at helping the Claimant at that time but if Claimant responded well to a diagnostic injection, the Claimant may benefit from an ankle arthroscopy and debridement "albeit it would still be rather unpredictable based upon his pain pattern today" (Respondents' Exhibit G).

15. On March 30, 2016, Dr. Vlahovich noted that the Claimant had a second ankle injection on March 1st but reported no relief. A second opinion from Dr. Jackson was that the outcome would be uncertain. The Claimant's physical therapy was on hold until after the left knee surgery on April 4th (Claimant's Exhibit 6).

16. On April 4, 2016, the Claimant had a left knee arthroscopy with a trochlea microfracture (Claimant's Exhibit 7).

17. On June 28, 2017, Dr. Sides noted that the Claimant reported his left ankle pain was not getting better but in fact worse. An ankle brace did not provide relief (Claimant's Exhibit 9).

18. On July 19, 2017, Dr. Sides reviewed MRI results. He recommended an allograft transplant of the Claimant's talus and referred the Claimant to David B. Hahn, M.D. Dr. Sides was of the opinion that: "**If he does not get a replacement of his talus he will need ankle replacement soon**" (Claimant's Exhibit 9).

Division Independent Medical Examination (DIME) by Mark S. Failinger, M.D.

19. At the request of Respondents, on August 10, 2016, the Claimant presented to Dr. Failinger for a DIME. Dr. Failinger found swelling that occurred all the time with locking sensations in the ankle. The Claimant used a cane to walk sometimes and had give-away episodes. The Claimant wore a brace for the ankle that somewhat helped. Examination revealed discomfort in the anterior and anterolateral left ankle. Dr. Failinger agreed with an opinion by Dr. Williams and was of the opinion that left ankle arthroscopy was a reasonable procedure for drilling an osteochondral defect, or if the lesion is large enough, to perform an open reduction, internal fixation (ORIF) of the lesion. Due to the Claimant's "morbid obesity, however, Dr. Failinger noted that the procedure would have a lower medical probability of helping (Claimant's Exhibit 14).

20. On August 24, 2016, Dr. Vlahovich noted that the Claimant was walking as tolerated with a cane but he was awaiting a second knee surgery due to "locking" in the knee. The Claimant also reported left hip, knee, **ankle** (emphasis supplied) and low back pain (Claimant's Exhibit 6).

21. On August 26, 2016, the Claimant reported anterior and that the ankle was worse than the knee. Dr. Williams explained that if the ankle was causing the Claimant problems, Dr. Sides could perform a medial malleolus osteotomy with a talus osteochondral allograft (Claimant's Exhibit 7).

22. On September 23, 2016, Dr. Failinger issued an addendum to his August 10, 2016 DIME report --after reviewing diagnostic imaging. Dr. Failinger was of the opinion that the Claimant's morbid obesity was a major risk factor for future ankle fusion, although ankle replacement may be considered. Dr. Failinger instead recommended a subchondral bone grafting given the Claimant's age group (Claimant's Exhibit 14).

23. Dr. Williams performed left knee arthroscopy on November 3, 2016 (Claimant's Exhibit 7).

24. On November 22, 2016, Dr. Vlahovich noted that Dr. Failinger performed a DIME on August 10, 2016, which supported approval of several surgeries in the left leg. The Claimant still walked as tolerated with a cane (Claimant's Exhibit 6).

Dr. Vlahovich

25. On December 20, 2016, Dr. Vlahovich discussed left ankle surgery with bone graft over osteochondral defect. Dr. Vlahovich discussed his diet and that weight loss would likely improve surgical outcome and emphasized use of a food diary (Claimant's Exhibit 6).

26. In a letter dated December 28, 2016, Dr. Vlahovich noted that the Claimant was not at maximum medical improvement (MMI) and his MMI determination was dependent upon approval for surgical procedures (Claimant's Exhibit 6)

27. On January 6, 2017, the Claimant was using a cane to ambulate following left knee surgery (Claimant's Exhibit 7).

28. On February 2, 2017, the Claimant had a left total knee arthroplasty (total left knee replacement). (Claimant's Exhibit 7).

29. On April 24, 2017, Dr. Vlahovich noted that the Claimant had complications from the knee surgery and was walking as tolerated with a cane. The Claimant's ankle pain remained the same (Claimant's Exhibit 6).

Gregory Reichhardt, M.D. and David B. Hahn, M.D.

30. Upon the referral of Dr. Vlahovich on June 20, 2017, the Claimant presented to Dr. Reichhardt for a physiatrist consultation. Dr. Reichhardt reviewed the history of the injury including the responsible coworker laughing at him. The left ankle revealed decreased range of motion and tenderness to palpation over the anterior aspect of the ankle. Dr. Reichhardt recommended an active independent exercise program (Claimant's Exhibit 18). Dr. Reichhardt was within the chain of authorized referrals.

31. On June 30, 2017, Dr. Vlahovich noted that an MRI of the left ankle showed an osteochondral defect. The Claimant reported increased left ankle pain and Dr. Sides suggested a repeat MRI. Dr. Vlahovich ordered the MRI. (Exhibit 6)

32. On July 19, 2017, the Claimant returned to Dr. Sides to review the new left ankle MRI results and discuss treatment options. At this point, Dr. Sides recommended an allograft transplant of the Claimant's talus and referred the Claimant to Dr. Hahn. Dr. Sides was of the opinion that if the Claimant did not get a replacement of the talus soon, he would need an ankle replacement soon (Claimant's Exhibit 9).

33. Upon the referral of Dr. Sides on August 2, 2017, the Claimant presented to Dr. Hahn for a second opinion on a fresh talar allograft transplantation surgery. The Claimant reported that he felt like something was stuck in his ankle and he felt his ankle lock up intermittently. Dr. Hahn did not feel that a fresh talar allograft would be as effective as a DeNovo procedure done over the top of a subchondroplasty procedure. Dr. Hahn stated, "certainly I do think that something needs to be done (*sic*) his ankle and this is going to be a difficult process because of the patient's significant weight, but I do think it would be worth it given the patient's reasonable ankle motion, although I did tell him that **there is a very good likelihood that he will require an ankle fusion if his discomfort continues**" (Claimant's Exhibit 11). Dr Hahn was within the chain of authorized referrals.

34. On August 25, 2017, Dr. Reichhardt noted that the Claimant continued to walk with a mildly antalgic gait, favoring the left lower extremity. He reviewed Dr. Hahn's report recommending a DeNovo procedure instead of an allograft transplant procedure. The Claimant expressed frustration over the treatment plan of his left ankle. Dr. Reichhardt spoke with Dr. Sides' office who referred the Claimant to Alan Ng, D.P.M. This was reasonable from a physiatric standpoint (Claimant's Exhibit 16). Dr. Ng was within the chain of authorized referrals.

Alan Ng, D.P.M., Podiatrist

35. Upon the referral of Dr. Vlahovich, by recommendation of Dr. Hahn, on October 10, 2017 the Claimant presented to Dr. Ng, the Claimant indicated that he had stiffness and pain in the left heel and ankle. Range of motion (ROM) was limited. The Claimant reported that his symptoms were constant and he described them as mild-moderate. Dr. Ng ordered an MRI of the left ankle to evaluate a possible osteochondral defect (Claimant's Exhibit 15).

36. The Claimant returned to Dr. Ng on October 17, 2017 to review the left ankle MRI. Dr. Ng found severe osteochondritis dissecans and recommended surgical intervention, including a juvenile allograft cartilage replacement with a subchondraplasty calcium phosphate injection to stabilize the severe osteochondral defect and insufficiency fracturing (Claimant's Exhibit 15).

***Samms* Conference**

37. On October 24, 2017 Dr. Vlahovich participated in a *Samms* conference. Dr. Vlahovich explained that Dr. Ng ordered an MRI that indicated an extensive cystic medial talar osteochondral insults accompanied by a significant degree of osseous inflammatory changes with attenuation of the subchondral cortex and overlying articular cartilage without frank disruption of the subchondral cortex or collapse. Dr. Vlahovich

referred to Dr. Sides who recommended surgery. Dr. Vlahovich referred to Dr. Hahn who was of the opinion that the Claimant's obesity made treatment and recovery difficult, however, he suggested a DeNovo procedure done over the top of a subchondroplaty procedure. Since Dr. Hahn did not perform that procedure, Dr. Vlahovich referred the Claimant to Dr. Ng who recommended a different surgery than he was willing to perform, *i.e.*, juvenile allograft cartilage replacement with subchondraplasty calcium phosphate injection. Dr. Vlahovich stated:

> In my opinion, the Claimant has a lesion in his foot/ankle that needs surgery or the Claimant will not get better and will likely get worse. I am concerned that the Claimant's weight will make recovery more difficult because the Claimant may not be able to walk for over a month or two; time necessary to try and give the surgery a chance to heal before the Claimant puts all his weight on his ankle…
>
> The Claimant's cystic lesion, essentially a hole in the bone, likely preexisted the work injury, however, the Claimant was asymptomatic prior to the work injury and, as a result, the need for surgery is more likely related to the work injury.

(Claimant's Exhibit 6).

38. On December 5, 2017, Dr. Vlahovich noted further left ankle surgery was put on hold until it was confirmed that the Claimant was not allergic to any surgical materials. The Claimant reported feeling the same left ankle pain (Claimant's Exhibit 6).

39. On January 3, 2018, Dr. Vlahovich noted no problem with the allergy testing and that the Claimant may move forward with the recommendation of Dr. Ng (Claimant's Exhibit 6).

40. On January 4, 2018, the Claimant returned to Dr. Ng reporting persistent left ankle pain. Dr. Ng requested pre-authorization for an ankle scope with debridement (Claimant's Exhibit 15). The request was denied, thus, the need for the hearing herein.

Independent Medical Examination (IME) by Scott Primack, D.O.

41. Dr. Primack testified at the hearing. He was of the opinion that the Claimant is not a good surgical candidate for the following reasons:

a. Function: Claimant's function improved without surgery. Claimant exercised and lost weight. Originally, the Claimant reported that he could walk 10 - 15 minutes. Now the Claimant walks up to an hour and a half. Computerized outcome analysis reflected the Claimant's self-perception of functionality increased despite his reported symptoms of pain. Dr.

Primack stated the opinion that there is a good chance that surgery will result in increased pain and decreased function. Dr. Primack recognized that an MRI reflected objective changes but Dr. Primack pointed out that findings of objective improvement in function also exist. The decision to operate should be based on the person and functionality and not on MRI findings alone, according to Dr. Primack. The Claimant's testimony supports the fact that Dr. Ng's recommended surgery is based on the Claimant's present condition and his functionality.

b. Obesity: Claimant is obese with a BMI over 40. Dr. Primack recognized that the possibility of surgical success, regardless of the surgery, is lower due to the Claimant's morbid obesity. Dr. Primack anticipated that significant BMI will crush the graft recommended by Dr. Ng. The ALJ infers and finds that the possibility of surgical success is generally uncertain, yet patients undergo surgeries.

c. Expectations: Dr. Primack was concerned about the Claimant's mental state and expectations. Walking is a reasonable expectation and Claimant's ability to walk has improved without surgery. Running and jumping are not reasonable expectations. Returning to preinjury status is not a reasonable expectation. Reducing pain could be reasonable, however, in this case, Dr Primack was of the opinion that Claimant's pain levels are not terrible. Dr. Ng noted that the Claimant's symptoms were "mild" and that Claimant reported a pain level of 3. Dr. Primack stated that mild symptoms do not support the need for surgery. In this respect, his opinion differs from that of foot surgeon, Dr. Ng. Also, Dr. Primack anticipated that pain will increase following surgery and that surgery will most likely not reduce the Claimant's pain level below 3. Dr. Primack noted that the Claimant already underwent three knee surgeries and wants a fourth knee surgery which does not bode well for a positive result following ankle surgery, in Dr. Primack's opinion. The ALJ infers and finds that this opinion is speculative. Dr. Primack referenced that Dr. Jackson, an orthopedic surgeon, noted that Claimant's pain was out of proportion to the cysts which make surgery unpredictable. The ALJ finds a degree of speculation in this opinion. Indeed, the ALJ infers and finds that the outcomes of many surgeries are "unpredictable," yet the patients who chose to undergo these surgeries are not denied the opportunity to do so.

d. Surgery is not reasonable, according to Dr. Primack's interpretation of the Medical Treatment Guidelines (hereinafter "MTG'). According to Dr. Primack, the MTG recommend a surgical progression that starts with a microfracture. In this case, microfracture surgery is not reasonable because of the size of Claimant's cyst, according to Dr. Primack. If the microfracture fails, the MTG recommend doctors consider an Osteochondral Autograft/Allograft Transfer System (OAATS). According to Dr. Primack, the OAATS procedure is not reasonable because Claimant's BMI of 40 is greater than the recommended BMI of less than

35. Dr Ng, a podiatrist, recommended a juvenile allograft cartilage replacement with subchondraplasty calcium phosphate injection, in this respect, Dr. Ng disagrees with Dr. Primack. The ALJ finds that Dr. Ng's clinical judgment herein outweighs general provisions of the MTG, as interpreted by Dr. Primack.

42. Instead of surgery, Dr. Primack recommended ongoing exercise and weight loss, and a bracing feature to support the Claimant's ankle if Claimant reports loss of function.

43. Ultimately, Dr. Primack is of the opinion that the Claimant is "doing as well as can be expected" despite the Claimant's continuing pain and Dr. Ng's recommended surgery.

The Claimant's Testimony

44. The Claimant testified at the hearing. Several doctors told him he should lose weight to lessen the pressure on his ankle. Claimant worked out at the recreation center 1 hour to 1½ hour, five to six times per week; sometimes twice per day. On occasion he drove himself to the recreation center. Claimant primarily exercised on the treadmill, stationary bike, and elliptical machine. Claimant lost 60 pounds and currently weighs around 274 pounds. The ALJ infers and finds that the Claimant has exerted maximum effort to lose weight. The ALJ further infers and finds that the Claimant presented as a naturally heavy-set individual. None of the doctors, other than Dr. Primack specified how much weight the Claimant should lose. According to Dr. Primack the Claimant's BMI should be reduced to 35 or less. The ALJ infers and finds that this could well be an impossible goal for a heavy set individual such as the Claimant, thus, effectively precluding a class of individuals with BMI's over 35 from a surgical option for the ankle despite the expert recommendation of a foot surgeon. According to the Claimant, he cannot step and put pressure on his ankle. Nonetheless, he lost weight exercising on the treadmill and on the elliptical machine despite his ankle pain which leads the ALJ to infer and find that he is determined to lose weight to undergo Dr. Ng's recommended surgery. Dr. Ng is recommending the surgery, which consists of juvenile allograft cartilage replacement with subchondraplasty calcium phosphate injection. The ALJ infers and finds that Dr. Ng has considered the Claimant's present weight status.

Ultimate Findings

45. Although Dr. Primack makes a convincing case that the Claimant's condition is now as good as it's going to get, the Claimant still experiences pain that he would like to alleviate, and a foot surgeon, Dr. Ng, is recommending a surgical procedure, juvenile allograft cartilage replacement with subchondraplasty calcium phosphate injection, which the Claimant desires to undergo. The opinions of other physicians are not as current as Dr. Primack's opinion and the ALJ infers that they do not take into account the Claimant's present weight loss and vigorous exercise program, or Dr. Primack's opinion to the effect that the Claimant's present condition is as good as it's

going to get, which the ALJ finds to be speculative. Dr. Primack's opinion in this regard, which is speculative, tends to contraindicate Dr. Ng's surgical recommendation. Dr. Ng, an authorized and accredited podiatrist, has more specific expertise than the other physicians, including Dr. Primack, whose opinions are reflected in the evidence and Dr. Ng is recommending ankle surgery, which consists of a different procedure than has been performed in the past. Indeed, the opinions of other physicians contained in the evidence support the appropriateness of ankle surgery, with the qualification that the Claimant's obesity is a factor and he should lose weight. These opinions do not take into account that the Claimant has lost 60 pounds and is engaged in a vigorous exercise regimen. The ALJ infers and finds that a reduction to a BMI of 35 or less may create an impossibly high bar for a portly individual such as the Claimant. The ALJ infers and finds that an arbitrary distinction between portly and non-portly individuals is being made for considerations of ankle surgery. For these reasons, the ALJ finds the ultimate opinion of Dr. Ng, supported by the Claimant's testimony, more credible and persuasive than other opinions to the contrary.

46. Between conflicting medical opinions, the ALJ makes a rational choice, based on substantial evidence, to accept the opinion of Dr Ng as supported by the Claimant's testimony, and to reject opinions to the contrary.

47. The ALJ finds that the Claimant's testimony concerning his present condition and desire for Dr. Ng's recommended surgery bears considerable weight in supporting Dr. Ng's recommendation

48. Based on the totality of the evidence, including the Claimant's testimony, the ALJ finds that the surgical procedure recommended by Dr. Ng, a juvenile allograft cartilage replacement with subchondraplasty calcium phosphate injection, is causally related to the admitted injury of the admitted injury of October 9, 2015 (a GAL for that injury has remained in full force and effect since March 26, 2016) and it is reasonably necessary to cure and relieve the effects thereof.

Respondents' Position on Reasonable Necessity and Causal Relatedness of Surgery Recommended by Dr. Ng

Respondents argue that the medical records, the testimony of Dr. Primack, and the Medical Treatment Guidelines support the idea that surgery is not reasonably necessary. They argue that surgical interventions should be contemplated within the context of expected functional outcome and not purely for the purpose of pain relief. Later, however, they apparently concede that surgery may be necessary to relieve pain caused by an industrial injury. As found, the Claimant's function improved with the help of exercise and weight loss and without surgery. It is just as probable that the long-term outcome of Dr. Ng's surgery, along with a vigorous exercise regimen after the surgical recovery period, could improve the Claimant's functionality. Claimant testified that he primarily exercised on the treadmill, stationary bike, and elliptical machine, that he lost 60 pounds, and that he currently weighed around 274 pounds. Claimant admitted he works out 1 – 1 ½ hours 5 to 6 times per week. Dr. Primack pointed out that when he first evaluated Claimant, he reported he could walk 10 - 15 minutes and, when Dr.

Primack last evaluated the Claimant, he reported that he walks up to an hour and a half at a time. Also, computerized outcome analysis reflected Claimant's self-perception of functionality increased despite his reported symptoms of pain. It stands to reason that the Claimant's self-perception of functionality would increase even more after the recovery period from surgery. Pain reduction may support surgery in some situations, and this is exactly such a situation. Dr. Ng noted that Claimant's symptoms were "mild" and that Claimant reported a pain level of only 3. According to Dr. Primack, mild symptoms do not support the need for surgery, pain will likely increase following surgery, and it is unlikely that surgery will reduce Claimant's pain level below a rating of 3, according to Dr. Primack. The ALJ finds that this opinion is speculative. It is just as probable that ankle surgery by a foot specialist could reduce the Claimant's pain even more.

Despite the fact that Dr. Ng is within the authorized chain of referrals, referred by virtue of his foot and ankle specialty as a podiatrist, Respondents ultimately argue that his recommended surgery is no reasonably necessary to cure and relieve the effects of the admitted injury of 2015. With all due respect to the Respondents, the ALJ does not accept this argument.

CONCLUSIONS OF LAW

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

Credibility

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

experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S. As found, although Dr. Primack made a convincing case that the Claimant's condition is now as good as it's going to get, the Claimant still experiences pain that he would like to alleviate, and a foot surgeon, Dr. Ng, is recommending a surgical procedure, juvenile allograft cartilage replacement with subchondraplasty calcium phosphate injection, which the Claimant desires to undergo. The opinions of other physicians are not as current as Dr. Primack's opinion and the ALJ infers that they do not take into account the Claimant's present weight loss and vigorous exercise program, or Dr. Primack's opinion to the effect that the Claimant's present condition is as good as it's going to get, which the ALJ finds to be speculative. Dr. Primack's opinion in this regard, which is speculative, tends to contraindicate Dr. Ng's surgical recommendation. Dr. Ng, an authorized and accredited podiatrist, has more specific expertise than the other physicians, including Dr. Primack, whose opinions are reflected in the evidence and Dr. Ng recommended ankle surgery, which consists of a different procedure than has been performed in the past. Indeed, the opinions of other physicians contained in the evidence support the appropriateness of ankle surgery, with the qualification that the Claimant's obesity is a factor and he should lose weight. These opinions do not take into account, as found, that the Claimant has lost 60 pounds and is engaged in a vigorous exercise regimen. As found, a reduction to a BMI of 35 or less may create an impossibly high bar for a portly individual such as the Claimant. An arbitrary distinction between portly and non-portly individuals should not be made for considerations of ankle surgery. For these reasons, as found, the ultimate opinion of Dr. Ng, supported by the Claimant's testimony, was more credible and persuasive than other opinions to the contrary.

b. Compensation can be awarded where there is competent evidence other than expert opinion. *Martin Marietta Corp. v. Faulk*, 158 Colo. 441, 407 P.2d 348 (1965). Such competent evidence includes lay testimony. *See Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Colorado Fuel & Iron Corp. v. Alitto*, 130 Colo. 130, 273 P.2d 725 (1954). *Also see Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997). As found, although the Claimant's testimony supports the expert opinion of foot surgeon, Alan Ng, D.P.M., the Claimant's testimony plays a significant role in the determination that Dr. Ng.'s recommended surgery is reasonably necessary.

Substantial Evidence

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

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

Reasonably Necessary Ankle Surgery by Alan Ng, D.P.M.

d. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, Claimant's medical treatment is causally related to his injuries of October 9, 2015. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment, including the ankle surgery recommended by Dr. Ng, specifically, the juvenile allograft cartilage replacement with subchondraplasty calcium phosphate injection, is reasonably necessary to cure and relieve the effects of the Claimant's admitted injury of October 9, 2015.

Burden of Proof

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

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents shall pay the costs of causally related and reasonably necessary medical care and treatment, including the juvenile allograft cartilage replacement with subchondraplasty calcium phosphate injection, recommended by Alan Ng, D.P.M, an authorized foot surgeon, subject to the Division of Workers Compensation Medical Fee Schedule.

B. The General Admission of Liability, dated April 7 2016, shall remain in full force and effect.

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

DATED this 14th day of March 2015.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-080-939-001

ISSUES

I. Has Claimant proven by a preponderance of the evidence that he sustained an injury arising out of and in the course and scope of his employment?

II. If compensable, did Claimant's conduct constitute a willful failure to follow the employer's reasonable safety rules, violating C.R.S. 8-42-112(1)(b)?

STIPULATIONS

A. The parties stipulated that Claimant's average weekly wage is $2,403.84

B. The parties stipulated that if this claim is compensable, the Claimant is entitled to TTD from July 1 – July 15, 2018.

C. If compensable, the parties agree that medical treatment at Good Samaritan Hospital and from Dr. Koldenhoven through October 3, 2018 is authorized, reasonable, and necessary.

FINDINGS OF FACT

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

1. Claimant's date of birth is January 18, 1958. He has worked as a Physician's Assistant ("PA") for 17 years. Claimant commenced employment for the Employer as a PA on April 23, 2018. Employer is an urgent care and family practice medical office. Claimant worked in the family practice office. The Claimant had previously worked with Dr. Veras for three years at a different clinic and considered him a friend. He and Dr. Veras joined the Employer at the same time. [p. 20-21]

2. Claimant's job description provides that as a PA, he is responsible for direct patient care and other administrative duties, as designed by the Medical Director in accordance with the Colorado Medical Practice Act. Claimant is required to use sound medical judgment, know limitations, seek and consult when advisable, and advise administration of any issues that may impact the practice. Claimant is required to communicate through appropriate channels. [RS 13-17]

3. The Claimant agreed that his primary duty as a physician's assistant was patient care. The Claimant was also responsible for answering questions and doing consultations with staff, planning and teaching in-services as directed, and following medical protocol handouts and clinical standards. The Claimant is required to use sound medical judgment. [p. 32]

4. On June 27, 2018, at the end of the workday, Dr. Veras' keys became locked in his office. Claimant had completed his patient care for the day. Claimant did not speak with Dr. Veras or know where he was, but testified that he was concerned that Dr. Veras would need his vehicle keys to get home. [p. 23, 33]

5. Unbeknownst to anyone, Claimant unilaterally determined that he would attempt to access Dr. Veras' office. Claimant decided that he would get a six-foot ladder and attempt to climb the ladder in the massage therapy room adjacent to Dr. Veras' office, remove a ceiling tile, climb through the ceiling crawlspace, drop into Dr. Veras' office and unlock the door.

6. Unbeknownst to anyone, Claimant did get a six-foot ladder and climbed up the ladder and removed various ceiling tiles before finding an area in the massage therapy room that provided access to Dr. Veras' office. Claimant climbed higher up the ladder and went up into the crawlspace in the ceiling. He then removed the ceiling tile that went into Dr. Veras' office. Once the ceiling tile in Dr. Veras' office was removed, Claimant then tried to lower himself into Dr. Veras' office.

7. While trying to lower himself into Dr. Veras' office, Claimant experienced difficulty. He lost his footing and fell awkwardly into Dr. Veras' office, sustaining the injuries that give rise to this claim, a Grade 3 distal tibia and fibula fracture. [p. 25-28] [RS 61]

8. Claimant did not know where Dr. Veras was and had not spoken to him before attempting to climb through the ceiling. Nobody asked Claimant to engage in this conduct, and he had not obtained permission or consent from his employer to engage in the activities that led to his injuries. Nobody at the clinic knew what Claimant was doing. [p. 33-34] He did not check with anyone at the office to see what steps were being taken to access Dr. Veras' office, such as looking for keys, calling a locksmith, or taking any other steps to get into the office. [p. 60]

9. Claimant agreed that there was nothing in his job description that was remotely close to climbing up ladders and climbing through crawlspaces in ceilings and then dropping into offices for any purpose – let alone to retrieve a co-employee's personal items. [p. 39]

10. Maggie Ward was employed as a radiology technician for the Employer on June 27, 2018. When Ms. Ward became aware that Dr. Veras' office was locked, she attempted to access the office by first looking for keys and then trying to pry the office door open with a credit card. [p. 46] These attempts were unsuccessful. Ms. Ward then obtained Employer authorization to contact a locksmith. She called a locksmith and advised other employees, including Claimant, that a locksmith was on the way. This occurred prior to Claimant's accident. [p. 47-48]

11. Claimant acknowledged Employer was and is safety-conscious, it checked all the boxes when it came to safety, and employees were required to report unsafe practices. Claimant acknowledged receipt of the Employee Handbook and agreed to abide by the policies and procedures set forth in the Handbook. [RS 61] The Employee Handbook provided, *inter alia,* that safety must come before all other concerns [RS 36] and that "under no circumstances are employees

allowed to place themselves at risk to fulfill business needs." [p. 36, 37] The Claimant acknowledged that safety enforcement had been explained to him, that he knew how to locate safety policies, and that he would abide by these policies. [RS 82,83]

CONCLUSIONS OF LAW

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

General Provisions

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

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

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

Compensability

For an injury to be compensable under the Act, it must "arise out of" and "occur within the course and scope" of employment. Section 8-41-301(1), C.R.S.; *Price v. Industrial Claim Appeals Office,* 919 P.2d 207, 210 (Colo. 1996); *Panera Bread, LLC v. Industrial Claim Appeals Office,* 141 P.3d 970 (Colo. App. 2006); *Orist v. G4S Solutions*, (ICAO, August 17, 2012) (W.C. 4-886-126). An injury occurs "in the course of" employment where Claimant demonstrates that the injury occurred within the time and place limits of his employment. *Popvich v. Irlando,* 811 P.2d 379 (Colo. 1991). The "arising out of" requirement is narrower and requires Claimant to show a causal connection between the employment and injury such that the injury has its origins in the Employer's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *Triad Paining Co. v. Blair,* 812 P.2d 638 (Colo. 1991). An employee's activities must be sufficiently incidental to the work itself as to be properly considered as arising out of and in the course and scope of employment. *City of Boulder v. Streeb,* 706 P.2d 786 (Colo. 1985). An activity arises out of and in the course and scope of employment when the activity is sufficiently related to the conditions and circumstances upon which the employee generally performs job functions such that the activity may reasonably be characterized as an incident of employment. *Price v. ICAO,* 919 P.2d 207 (Colo. 1996). There is no presumption that an injury which occurs in the course of employment, arises out of the employment. *Finn v. ICAO,* 165 Colo. 106, 437 P.2d 542 (Colo. 1968).

If an employee substantially deviates from the mandatory or incidental functions of his employment, however, then the injury is not compensable. *Kater v. Industrial Commission,* 728 P.2d 746 (Colo. App. 1986). When an employer asserts that employees should not be compensated because they have deviated from the conditions and circumstances of employment, the issue is whether the activities that caused the injuries deviated from employment in a manner that removed those activities from the employment relationship. *Phillips Contracting, Inc. v. Hirst,* 905 P.2d 9, 12 (Colo. App. 1995). As a general rule, substantial deviations curtail coverage, while minor deviations do not. *Kelly v. ICAO,* 214 P.3d 516, 518 (Colo. App. 2009).

In *Lori's Family Dining v. ICAO,* 901 P.2d 715 (Colo. App. 1995), the Colorado Court of Appeals announced a four-part test to be applied when applying whether horseplay constitutes a deviation: (1) the extent and seriousness of the deviation; (2) the completeness of the deviation, i.e., whether it was comingled with the performance of a duty or involved in an abandonment of duties; (3) the extent to which the practice of horseplay has become an accepted part of the employment; and (4) the extent to which the nature of the employment may be expected to include some horseplay. *See also*, §8-40-201(8), C.R.S.

No single factor is determinative, and the Claimant need not prove the existence of every factor in order to establish compensability. The first two factors have been held to be more critical than the third and fourth, which "may be viewed merely as specific methods of proving that a claimant's actions became part of the employment." *Panera Bread, LLC v. Industrial Claim Appeals Office, supra.* Resolution of the issue is one of fact determination by the ALJ. *See, Schrieber v. Brown & Root, Inc.,* 888 p.2d 274, 277 (Colo. App. 1993).

The Claimant has failed to prove by a preponderance of the evidence that the injuries he sustained which give rise to this claim, arose out of and in the course and scope of his employment. The Claimant is a physician's assistant. His job duties as testified to, and as described in the job description, show that the Claimant's primary duties include direct patient care, following medical protocols, and clinical standards in accordance with the Colorado Medical Practice Act. The Claimant is required to use sound medical judgment, know limitations, seek consult when advisable, and advise administration of any issues that impact the practice. It is undisputed that the Claimant's conduct constituted a substantial deviation from his job functions. The Claimant admits that the activity that he was engaged in, which led to his injury was not remotely close to his job requirements. The Claimant engaged in these activities without the knowledge or consent of his Employer or any of his co-employees at the clinic, and without regard to the fact that a locksmith had been called to access Dr. Veras' office. Even if Claimant had no knowledge that a locksmith had been called, he engaged in the conduct that gave rise to his injuries without checking to see if any alternative measures were being taken to access Dr. Veras' office. Moreover, no one asked Claimant to help unlock the door and no one specifically, or even tacitly, allowed him to undertake unlocking the door in any manner-let alone the extreme and dangerous manner undertaken by Claimant.

Here, there were no specific benefits which flowed to the Employer from Claimant's conduct. Claimant was attempting to do a personal favor for a co-worker and the favor was unsolicited and involved a substantial and complete deviation from his employment. Claimant's actions did not involve patient care and in no way reflected his job duties as a physician's assistant. Claimant was not responding to an emergency situation; he simply took it upon himself to risk his personal safety from which his employer derived no benefit. Claimant's actions were not a slight deviation from his job duties but a substantial and complete deviation. The consequences of Claimant's conduct, climbing up a ladder, removing ceiling tile, and then climbing through a ceiling crawlspace and attempting to drop into another office to try and obtain car keys for a co-employee, far outweigh any benefits to his employer as can be seen from the resulting accident and Claimant's injuries.

Therefore, Claimant has failed to establish by a preponderance of the evidence that the injuries he sustained which give rise to this claim, arose out of and in the course and scope of his employment.

ORDER

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

1. Claimant's claims for benefits are denied and dismissed.

2. Consequently, all other issues are moot.

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

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

DATED: March 14, 2019

/s/ Glen B. Goldman

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

ISSUES

1. Whether Claimant is entitled to temporary total disability (TTD) benefits from September 11, 2017 through October 11, 2017.

2. Whether Claimant has established by a preponderance of the evidence that a left elbow EMG and a left elbow MRI are reasonable, necessary, and causally related medical benefits for his October 27, 2016 work injury.

FINDINGS OF FACT

1. Claimant was employed by Employer as an electrician and sustained an electrocution injury on October 27, 2016.

2. Claimant was up on a ladder approximately 4 feet when someone walked in who could not see Claimant and hit a light switch while Claimant was working with 270 volts. The electrocution was significant and Claimant was able to move his feet off the ladder to fall, which disengaged him from the electricity. Before falling off the ladder, Claimant was pinned in place with a wicked titanic contraction of muscle. Claimant had significant entry and exit wounds from the electrocution.

3. As a result of the electrocution and fall from the ladder, Claimant injured multiple body parts. In his initial evaluations with Philip Findler, M.D., Robert Dixon, M.D., and John Woodward M.D. from November, 2016 through January, 2017, Claimant had multiple complaints but did not mention left elbow symptoms or left elbow deformity as one of his complaints. *See* Exhibits J, K, L.

4. On January 2, 2017, Douglas Scott, M.D. performed an independent medical examination. Dr. Scott noted that Claimant probably had injury to the tissues in his right arm, right shoulder, right upper chest quadrant, left upper chest quadrant, left shoulder, and left arm as was the probable course of the electrical current as it passed through Claimant's body. *See* Exhibit G.

5. On January 4, 2017, John Reister, M.D. evaluated Claimant. Dr. Reister recommended surgery to repair Claimant's right shoulder and recommended fixation of the near-complete subscapularis tear and subluxated biceps tendon with right shoulder arthroscopy. A request for surgery authorization was sent on January 11, 2017. *See* Exhibits 1, I, L.

6. On January 17, 2017, Dr. Scott performed a Rule 16 Utilization Medical Review to address whether the right shoulder surgery recommended by Dr. Reister was

reasonable, necessary, and related to the October 27, 2016 work injury. Dr. Scott concluded that it was and recommended the surgery. *See* Exhibit G.

7. The shoulder surgery was scheduled for February 17, 2017. On February 7, 2017 Claimant called and cancelled the surgery. Surgery was then rescheduled for April 17, 2017. Claimant again called and cancelled the surgery. Surgery was then rescheduled once again for May 5, 2017. Claimant cancelled the May 5, 2017 surgery.

8. During this period of time, Claimant moved several times. Claimant no longer resides in Colorado.

9. On September 11, 2017, ALJ Goldman issued an Order finding that Claimant's actions in moving so often and cancelling multiple scheduled surgeries was tantamount to a refusal to submit to the right shoulder surgery which was a reasonably essential surgery to promote Claimant's recovery. ALJ Goldman found an opinion from Dr. Scott that the delay in getting the surgery may be making Claimant's underlying shoulder condition worse credible. ALJ Goldman found that Claimant's refusal to undergo surgery was an injurious practice imperiling and retarding Claimant's recovery. *See* Exhibits 4, F.

10. ALJ Goldman's September 11, 2017 Order provided that Respondents may suspend Claimant's temporary total disability (TTD) benefits as of the date of the Order. It required Respondents to reinstate TTD benefits as of the date Claimant underwent the recommended right shoulder surgery. ALJ Goldman noted that benefits may be reduced or suspended if a Claimant persisted in injurious practice tending to imperil or retard recovery or refused to submit to surgical treatment reasonably essential to promote recovery. ALJ Goldman found that happened in this case and that suspension of TTD was appropriate per § 8-43-404(3), C.R.S. *See* Exhibits 4, F.

11. Consistent with ALJ Goldman's Order, Respondents suspended TTD benefits as of September 11, 2017. Claimant finally underwent the recommended right shoulder surgery on October 12, 2017 with Dr. Reister. Respondents reinstated TTD benefits on October 12, 2017. *See* Exhibit F.

12. On October 25, 2017, Dr. Reister evaluated Claimant. Dr. Reister noted that this was the first visit following the surgery for subscapular repair and biceps tenodesis. Dr. Reister noted that Claimant had a very easy to fix subscapular tendon but a terrible biceps. Dr. Reister noted physical therapy would not start until six weeks post surgery and provided Claimant with a physical therapy script to find a therapy center as Claimant was residing in Nevada. Dr. Reister noted Claimant was doing very well at the first post-op visit. *See* Exhibit 1.

13. On January 3, 2018, Dr. Reister evaluated Claimant. Dr. Reister noted that Claimant was around 10 weeks out from his surgery and that his right shoulder was improving. Overall, Dr. Reister found improved motion, strength, and forward progress and recommended Claimant continue his therapy. Dr. Reister noted that Claimant's other

injuries from the same accident included the left shoulder, which was not as symptomatic as the right shoulder but had been symptom producing all along and had been treated with physical therapy. Dr. Reister noted that an MRI showed low-grade partial tears in the left shoulder rotator cuff as well as mild bursal symptoms. Dr. Reister also noted that Claimant's exam had been classic for bursitis and impingement and that Claimant was now ready to deal with the left shoulder since his right shoulder was improving and the left shoulder was now becoming the more symptomatic shoulder. Dr. Reister noted that Claimant had failed conservative management for bursitis and partial cuff tear of the left shoulder and opined that the next step for the left shoulder would be to do an EUA arthroscopy with sub acromial decompression and thorough inspection. Dr. Reister noted the challenges in getting Claimant care in Denver while Claimant was living in Nevada. Dr. Reister noted that they would try to get Claimant into the operating room for the left shoulder. *See* Exhibits 1, H, L.

14. On January 4, 2018, Dr. Reister sent a request for authorization for the left shoulder surgery. On January 15, 2018, Dr. Scott issued a Rule 16 Utilization Medical Review report where he opined that the left shoulder surgery was not reasonable, necessary, or causally related to the October 27, 2016 work injury. Dr. Scott opined that the left shoulder symptoms were a result of congenital type II acromion, chronic degenerative tendinosis/bursitis, and bony osteoarthritis. *See* Exhibit H.

15. On May 30, 2018, Dr. Scott issued a medical records review report. Dr. Scott opined that left shoulder surgery recommended by Dr. Reister was not reasonable or necessary and that it was not indicated to treat the effects of Claimant's October 27, 2016 injury. *See* Exhibit G.

16. On August 30, 2018, Dr. Reister evaluated Claimant. Dr. Reister noted that it was the first time he had seen Claimant in seven months. Claimant reported that his right shoulder was significantly better than before. On examination, Dr. Reister found the subscapular tendon to be healed. Claimant reported that he had left shoulder pain and that he had numbness, tingling, odd sensation in his hands, and spasms in the hands. Claimant reported that he could only write for maybe 20 minutes before his hands went weak and numb and that he dropped things on a regular basis. Claimant reported that these symptoms were not present prior to the injury. Dr. Reister noted that an MRI had been done on the left shoulder a month after the injury that had some findings. Claimant reported difficulty in getting the left shoulder associated with the work comp injury so that Dr. Reister could try an arthroscopy evaluation, debridement, and decompression. *See* Exhibits 1, H, I.

17. Dr. Reister noted that Claimant brought to his attention for the first time a deformity at the left elbow. Dr. Reister opined that Claimant had classic stigmata of a distal bicep tendon tear and gross loss of supination strength in the left side. Dr. Reister opined that this would be 2 years out from the injury in 2 months' time and that it unfortunately was very unlikely to be repaired successfully with surgery. However, Dr. Reister noted it was appropriate to document the injury, the level of the tendon retraction, and would be worth seeing with a hand surgeon whether allograft reconstruction was

possible. Dr. Reister recommended an EMG/NCV of the bilateral upper extremities to see if Claimant had any stigmata of electrocution or permanent nerve injury. Dr. Reister also requested Claimant's left elbow be evaluated since Claimant would have a permanent deformity and permanent loss of some strength in supination. Dr. Reister continued to recommend left shoulder surgery with a scope decompression, debridement of the labrum and partial-thickness tears, and a good look at the subscapular. *See* Exhibits 1, H, I.

18. On the Physician's Report of Worker's Compensation Injury form, undated, but date stamped as received from Respondents on September 17, 2018, Dr. Reister noted the treatment plan included an MRI of the left elbow and an EMG/NCV of the bilateral upper extremities. *See* Exhibit 1.

19. On September 4, 2018, Dr. Reister requested authorization for an MRI of the left elbow as well as for bilateral EMG/NCV studies of the upper extremities. *See* Exhibits 1, H.

20. In the meantime, after the request was made for a left elbow MRI and bilateral EMG/NCV testing of the upper extremities, and on September 7, 2018, ALJ Spencer issued an Order requiring Respondents to cover the left shoulder arthroscopic surgery recommended by Dr. Reister. *See* Exhibit D.

21. On September 11, 2018, Respondents responded to the request from Dr. Reister for left elbow MRI and bilateral upper extremity EMG/NCV testing. Respondents denied the request for left elbow MRI but approved the authorization request for bilateral upper extremity EMG/NCV testing based on a Rule 16 Utilization Medical Review performed on September 11, 2018 by Dr. Scott. *See* Exhibit H.

22. Dr. Scott opined that considering the possible long-term sequelae of electrocution injuries with entry in the right hand and exit in the left hand, he recommended the EMG/NCV studies of the bilateral upper extremities to rule out mono versus poly neuropathy. Dr. Scott noted that Claimant had a history of type II diabetes and was on Metformin medication and that the testing should be done by a neurologist. Dr. Scott opined that given the lack of complaint in the medical record of left elbow pain, left elbow dysfunction, or left elbow deformity related to a possible distal biceps tendon tear, and considering that the deformity complaint was made 22 months after the electrocution accident, the request for left elbow MRI should be denied as not indicated and/or necessary to treat the October 27, 2016 accident. Dr. Scott opined that the left elbow issues should have manifested sooner than 22 months post-injury. Dr. Scott noted that Claimant, Dr. Reister, and the physical therapist did not make any mention of the left elbow issues before August of 2018. *See* Exhibit H.

23. On October 16, 2018, neurologist Marc Triehaft, M.D. evaluated Claimant and performed EMG testing. Claimant reported that he had sudden spasms in his hands 1-3 times per month where he suddenly loses strength and his hands open involuntarily causing him to drop objects. Claimant denied numbness and tingling in his hands.

Claimant reported that he had been followed for two years for diabetic peripheral neuropathy and had undergone several shoulder procedures for injuries sustained in the work related accident. Dr. Triehaft noted that the EMG studies had been approved by Insurer and that they revealed severe bilateral carpal tunnel syndrome and a left ulnar neuropathy at the elbow. Dr. Triehaft opined that the finding of left ulnar neuropathy at the elbow shown by EMG was compatible with mono neuropathy multiplex and was more likely related to diabetes than to the electroshock injury. Dr. Triehaft opined that disorders associated with electrocution injury were not identified in Claimant's upper extremities. He opined that the disorders associated with electrocution injury included peripheral neuropathies, sympathetic neuropathies, and CRPS. Dr. Triehaft opined that the episodic and fleeting hand spasms and weakness was of undetermined etiology but raised the question of spinal cord injury involving the cervical or thoracic regions from the electrocution. Dr. Triehaft recommended cervical and thoracic MRI studies and neurological follow up afterwards. *See* Exhibit N.

24. On October 18, 2018, Claimant underwent a left shoulder arthroscopy performed by Dr. Reister with labral debridement, bicipital tenotomy, subscapularis tendon debridement, open sub acromial decompression, repair of supraspinatus tendon, and bicipital tendon tenodesis. *See* Exhibits 1, I.

25. On October 30, 2018, Dr. Reister evaluated Claimant. Dr. Reister noted that Claimant's wounds looked great, that Claimant was doing very well, and that Claimant could begin therapy four weeks post surgery. Dr. Reister noted that claimant was living out of state and provided Claimant with his physical therapy script. On the October 30, 2018 Physician's Report of Worker's Compensation Injury form, signed by Dr. Reister, Dr. Reister noted that the treatment plan included physical therapy starting in 4 weeks and that Claimant had a current restriction of no use of left arm. Dr. Reister recommended a return appointment in 4 weeks and recommended follow up care of referral for evaluation of low back pain. Dr. Reister did not recommend an MRI or an EMG at this visit. *See* Exhibits 1, I.

26. Dr. Scott testified at hearing. Dr. Scott opined that Claimant had no deformity in his left elbow or left elbow complaints until August of 2018, almost two years following the October, 2016 injury. Dr. Scott opined that the left elbow problems were not work related. Dr. Scott opined that he believed the left upper extremity EMG testing should have been approved to check the nerves in Claimant's arms and the electrical activity in Claimant's muscles. Dr. Scott noted that the EMG was done on October 16, 2018 and showed that diabetes was the more likely cause than electrical shock. Dr. Scott opined that diabetes can lead to reduced blood flow to nerves which damages the nerves and leads to conduction/electrical problems with the nerves. He opined that the EMG showed that the problems Claimant was having in the left elbow were due to Claimant's diabetes. Dr. Scott opined that if the problems had been acutely caused by the work injury, the symptoms would have manifested earlier in treatment and he recommended denial of the left elbow MRI.

27. Claimant did not testify or appear at hearing. Claimant's counsel requests TTD benefits from September 11, 2018 through October 12, 2018 and requests authorization of a left elbow MRI and left upper extremity EMG.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

TTD Benefits

Claimant has failed to establish, by a preponderance of the evidence, an entitlement to temporary total disability (TTD) benefits from September 11, 2017 through October 11, 2017. Claimant's arguments are not found persuasive. Claimant's use of the *Sigala* case, 184 P.3d 40 (Colo. 2008) is misplaced and factually distinguishable from the facts in this matter.

In *Sigala v. Atencio's Market*, 184 P.3d 40 (Colo. 2008), a Claimant was found to be entitled to receive disability indemnity benefits withheld by her Employer during a period of suspension of benefits. The Claimant in that case missed an appointment with her attending physician and was notified that her TTD benefits could be suspended if she failed to attend a rescheduled appointment. *Id.* She failed to attend the rescheduled appointment and Respondents stopped payment of her benefits. *Id*. When she attended an appointment with her attending physician approximately 2 months later, Respondents reinstated her benefits. *Id.* The Claimant argued that the term suspend meant to withhold benefits temporarily such that the accrue and are paid once they attend the appointment under § 8-42-105(2)(c), C.R.S. *Id*. The Court noted that a different statute, § 8-43-404(3), C.R.S is in place and permits suspension of compensation to a Claimant who refuses to submit to treatment or evaluation as is reasonably essential to promote recovery. *Id.* The Court referred to language indicating that if the employee refuses to submit to such examination…or is any way obstructs the same, all right to weekly indemnity which accrues and becomes payable during the period of such refusal or obstruction shall be barred. *Id*. The Court continued to note that if any employee persisted in injurious practice which tended to imperil or retard recovery or refused to submit to such medical or surgical treatment as reasonably essential to promote recovery, the director had discretion to reduce or suspend the compensation of any such injured employee. *Id.* The Court, thus made a distinction between § 8-42-105(2)(c), C.R.S. and § 8-43-404(3), C.R.S.

The Court in *Sigala*, noted that a temporary suspension of benefits may be followed by a reinstatement and repayment of suspended benefits as long as there has been no order entered directing the claimant to submit to examination. *Id*. The Court pointed out that if the General Assembly had intended for the term suspend to mean a permanent withholding they would have used the term "barred" as they did in the penalties and enforcement provision. *Id*. The Court held that an ALJ lacked grounds to bar benefits unless a claimant's refusal to submit to a medical examination resulted in a continuing and detrimental effect on Claimant's condition. *Id*. The Court determined that provisions of the Workers' Compensation Act, such as the penalties and enforcement provision, provided stringent sanctions when Claimant's actions so demanded but differentiated the term suspend in the TTD benefits provision as applying to *Sigala* and found that the term suspend in the TTD benefits provision meant to stop temporarily and not bar or exclude. *Id*. Therefore, they ordered benefits paid to *Sigala* for the period of time in between her missed appointment when TTD had been stopped and the appointment she eventually attended. *Id*. The Court specifically noted that if the Respondent believed that *Sigala* had imperiled or retarded her recovery by refusing to submit to medical treatment, then Respondent could take action under the penalties and enforcement section of the Act where more stringent sanctions of barring or excluding benefits existed.

Here, Respondents sought action under the penalties and enforcement section of the Workers' Compensation Act when they appeared at hearing before ALJ Goldman. ALJ Goldman found, in fact, that Claimant had engaged in injurious practice and refused to submit to such medical or surgical treatment as reasonably essential to promote recovery. Claimant's argument that she should be paid benefits for the one month period

in between ALJ Goldman's Order and the surgery he eventually underwent is not persuasive. Claimant's benefits had been suspended during that time under the more stringent sanctions of the Act barring recovery as ALJ Goldman found injurious practice. Claimant has therefore failed to meet his burden to show any entitlement to TTD from September 11, 2017 through October 11, 2017 and the facts of Claimant's case are distinguishable from *Sigala*.

Medical Benefits – EMG and MRI

Claimant has failed to establish, by a preponderance of the evidence, that medical benefits of a left elbow MRI and left upper extremity EMG/NCV testing are reasonable, necessary, and causally related to his October 27, 2016 work injury.

As found above, Dr. Reister requested a left elbow MRI and EMG/NCV testing on August 30, 2018. Claimant underwent the EMG/NCV testing on October 16, 2018. Although Claimant represented that there had been an additional request for EMG/NCV testing, this is not found in the records. Rather, the EMG/NCV testing that was requested by Dr. Reister was approved by Respondents and Claimant underwent that testing on October 16, 2018. No new outstanding request for additional EMG/NCV testing exists. Therefore, Claimant's request for EMG/NCV testing of the left upper extremity is denied as he has already undergone that testing and Claimant has failed to establish that an additional EMG/NCV test is reasonable or necessary.

Further, the opinion of Dr. Scott is credible and persuasive that a left elbow MRI is not reasonable, necessary, or casually related to Claimant's October 27, 2016 injury. The ALJ finds persuasive the opinion that Claimant would have manifested symptoms much earlier if he sustained an injury to the left elbow on October 27, 2016. None of the treating providers noted any deformity in the left elbow during 22 months of treatment which is logically incredible given the opinion that by August of 2018 it was a noticeable deformity. Further, the opinion of neurologist Dr. Triehaft is persuasive that the evidence shows Claimant's problems in the left elbow are more likely due to his diabetes than his electrocution injury. Claimant has failed to establish, by a preponderance of the evidence, that a left elbow MRI is reasonable, necessary, and causally related to his October 27, 2016 work injury.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish an entitlement to TTD benefits from September 11, 2017 through October 11, 2017.

2. Claimant has failed to establish by a preponderance of the evidence an entitlement to medical benefits of a left elbow MRI and EMG/NCV testing of his left upper extremity. EMG/NCV testing was already authorized and performed and there is no new request for such testing. The MRI of the left elbow is not causally related to Claimant's October 27, 2016 work injury.

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

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

DATED: March 14, 2019

/s/ Michelle E. Jones

_____

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

ISSUES

- Did Claimant overcome the DIME's impairment rating by clear and convincing evidence? If so, what is the proper rating?
- Did Claimant prove entitlement to a general award of medical benefits after MMI?
- Disfigurement.

FINDINGS OF FACT

1. Claimant suffered an admitted injury to his lumbar spine on July 12, 2016 in a work-related motor vehicle accident.

2. Claimant has a lengthy history of low back issues, including four surgeries. Dr. Richard Lazar performed an L4-5 microdiscectomy in April 2008 and a revision left L4-5 microdiscectomy in February 2011. Dr. Sung performed a right L5-S1 microdiscectomy on November 29, 2011, and a revision L4-5 microdiscectomy on October 29, 2013. Claimant had seven physical therapy visits after the October 2013 surgery, and the final report dated December 16, 2013 indicated Claimant had made significant gains with mobility and strength.

3. The last time Claimant saw Dr. Sung before the July 12, 2016 motor vehicle accident was on February 4, 2014. At that visit, Claimant was "doing well" overall. Dr. Sung noted he had "no consistent leg pain. On occasion, he will get a twinge in the left calf. His back feels pretty good. He has no real complaints at this time." Dr. Sung released Claimant from care to follow-up "as needed."

4. After the July 12, 2016 accident motor vehicle accident, Employer referred Claimant to Dr. Robi Baptist at Colorado Springs Health Partners (CSHP). At the initial visit on July 14, 2016, Claimant reported low back pain radiating down his right leg to the calf, and tingling in his 2nd-4th toes. Dr. Baptist ordered a lumbar MRI and referred Claimant back to Dr. Sung.

5. The MRI was done on July 27, 2016. It showed an acute left-sided disc herniation at L4-5 impinging on the left L4 nerve root, and a bulging disc at L5-S1 contacting the S1 nerves and causing moderate bilateral lateral recess narrowing.

6. Claimant saw Dr. Sung on August 16, 2016. He reported low back pain and pain into his legs, worse on the left. Dr. Sung referred Claimant to Dr. Finn for injections and to physical therapy.

7. Dr. Finn administered two ESIs, neither of which were helpful.

8. The claimant followed up with Dr. Sung on October 26, 2016. Dr. Sung noted Claimant had already had four back surgeries and concluded,

> [H]e did not do well with the injections and I am recommending an L4-S1 anterior-posterior fusion. Anteriorly, I would like to go into the disc space at 4-5 and pullout that recurrent fragment and then fuse. He has had too many surgeries and I think ***he is just unstable at this point***. Both of these segments are involved and I believe that at the time of surgery, both need to be included. (Emphasis added).

9. On December 13, 2016, Dr. Sung performed an L4-S1 anterior lumbar decompression and interbody fusion. The final postoperative diagnoses included recurrent stenosis at L4-S1, and recurrent left L4-5 herniated nucleus pulposus.

10. The surgery was successful, and Claimant's symptoms slowly but steadily improved over the ensuing several months.

11. Dr. Lund took over for Dr. Baptist in November 2016. On March 1, 2017, Dr. Lund noted Claimant was "improving, [but] not 100% yet though." He was still having weakness in his left leg and foot. Physical examination showed EHL weakness on the left, mild atrophy of the left thigh, and decreased sensation in the left lower leg and foot.

12. On May 25, 2017, Dr. Lund documented continued left leg weakness, including ankle dorsiflexion and a "very weak" EHL.

13. Claimant followed up with Dr. Sung on June 15, 2017, and stated he felt "very good." His back pain and leg symptoms were significantly improved, but he still had some weakness on the left. On examination, Dr. Sung noted, "a little weakness in his EHL on the left compared to the right, and just a touch of weakness in dorsiflexion on the left compared to the right." Flexion-extension x-rays showed no motion, and the fusion appeared to be consolidating as expected. Dr. Sung released Claimant to follow-up "as needed."

14. Dr. Baptist resumed Claimant's care on August 24, 2017 and documented residual motor deficits in the left leg. Dr. Baptist noted, "the patient's pain is much improved but is still having tingling in his foot and difficulty raising his toes off the ground." Claimant was scheduled to see Dr. Sung later that day, although the last report from Dr. Sung in the record is dated 15, 2017.

15. ALJ Edie conducted a hearing on September 14, 2017 regarding Respondents' liability for the December 2016 surgery. Everyone agreed the surgery was reasonably necessary, but the parties disagreed about causation. One of ALJ Edie's findings of fact indicates Respondent's expert had opined the surgery was reasonably necessary to address spinal "instability." ALJ Edie resolved the causation issue in Claimant's favor and ordered Respondents to cover the surgery.

16. Dr. Baptist placed Claimant at MMI on February 15, 2018, with a 31% whole person rating. Dr. Baptist opined apportionment was not appropriate because Claimant

was “essentially asymptomatic prior to the work injury.” Dr. Baptist assigned a 13% Specific Disorder rating under Table 53(IV)(B) and (C), which applies to “Spinal stenosis, segmental instability, or spondylolisthesis, operated.” She assigned 19% for lumbar range of motion deficits, using valid measurements obtained during an FCE completed on January 25, 2018. Finally, Dr. Baptist included 2% whole person under Table 51 for weakness in plantar flexion.

17. Regarding maintenance care, Dr. Baptist recommended ongoing pain management with Dr. Finn or another physiatrist/pain specialist, follow up with Dr. Sung as directed by Dr. Sung, and home exercises. Dr. Baptist further opined, “there is a strong possibility this patient’s condition will deteriorate in the near or distant future and provision should be made for further care.”

18. Respondents challenged Dr. Baptist’s rating and Claimant underwent a DIME with Dr. Michael Janssen on July 24, 2018. Claimant credibly testified Dr. Janssen appeared irritated and complained the DIME fee was inadequate based on the size of the records packet. Dr. Janssen’s report corroborates Claimant’s perception because Dr. Janssen stated, “I only allocated the hours they agreed to compensate me for this. I stopped exactly 4.0 hours in attempting to read all this. I am a speed reader, but there was [sic] more than 165 pages and I could not read any faster, so I made all my assessments only based upon the information in the time that was allocated.” Claimant perceived the evaluation as “very rushed” and cursory.

19. The physical examination documented in Dr. Janssen’s report appears largely benign, with almost no significant clinical findings aside from minimal range of motion reduction. He stated Claimant demonstrated “non-physiological” weakness in his lower extremities and opined the strength in all muscle groups was normal. Dr. Janssen’s examination is an outlier and inconsistent with other examinations documented in the record.

20. Dr. Janssen assigned 11% for Specific Disorders under Table 53(II)(E) and (F), which applies to “intervertebral disc or other soft-tissue lesions.” Dr. Jensen did not explain why he used § (II)(E) instead of § (IV)(B). He also added 5% for lumbar range of motion, for a total rating of 16% whole person. [1] Finally, he opined, “there is no indication for maintenance management currently.”

21. Claimant saw Dr. Jack Rook for an IME at his counsel’s request on December 3, 2018. Claimant reported a good outcome with the surgery, but still had some “soreness” in his back at the end of a long workday, weakness in his left foot and ankle, and paresthesias in the left big toe. Claimant stated he was prone to stumbling on stairs because of the left leg weakness and had fallen on more than one occasion. Dr. Rook observed atrophy of the left extensor digitorum brevis compared to the right side muscle. Pinprick sensation was diminished in the left big toe compared to the right. Dr. Rook noted

[1] Although not mentioned by either party, Dr. Janssen clearly erred by *adding* the two components of the rating instead of *combining* them as required by the *AMA Guides*. See § 3.3a, p.81, and the Spine Impairment Summary form. According to the Combined Values Chart, Dr. Janssen’s final rating should have been 15%.

"obvious" weakness in the left lower extremity including 4/5 big toe extension and ankle dorsiflexion and 5-/5 plantar flexion. Claimant could walk short distances on his toes and heels but developed progressive fatigue of his left ankle dorsiflexors as he did so.

22. Dr. Rook opined Dr. Janssen committed two significant errors regarding Claimant's impairment rating. First, Dr. Janssen erred by using Table 53(II)(E) and (F), because the appropriate section is Table 53(IV)(B) and (C). He explained,

> [Dr. Janssen] gave this patient a spinal impairment for a surgically treated disc lesion per (II.E). This category refers to those patients who undergo a laminectomy and discectomy procedures, and not a spinal fusion procedure which is rated under section IV, which is for "spinal stenosis, segmental instability, or spondylolisthesis." This patient's surgical procedure was performed because of spinal stenosis with nerve root entrapment. At his October 2016 preoperative visit, Dr. Sung's assessment concluded: "Large recurrent left L4-5 herniated disc, with L5-S1 severe degenerative disc disease, collapse and stenosis." Additionally, the patient underwent a procedure whereby the discs at L4-5 and L5-S1 were removed as part of the L4 through S1 anterior and posterior fusion. Removal of these disks creates segmental instability at these two levels. Therefore, this patient was appropriately placed into this specific diagnosis category by Dr. Baptist who provided the patient with a 12% lumbar impairment (IV.B) plus the additional one % for the second level involved in the fusion (IV.C). Dr. Baptist performed her impairment rating correctly. Dr. Janssen performed his rating incorrectly, as he relied upon an erroneous specific diagnosis/Table 53 impairment.

23. Additionally, Dr. Rook opined Dr. Janssen should have assigned a rating for residual lower extremity neurological deficits,

> [T]his patient continues to have weakness at his left ankle and left foot in the L5 distribution and there is muscle atrophy of the extensor digitorum brevis muscle which is innervated by the L5 nerve root. Therefore, it was appropriate for Dr. Baptist to provide this patient with an L5 motor impairment . . . .

24. Dr. Rook testified at hearing consistent with his report. He reiterated the rating Dr. Janssen gave would be appropriate for a disc herniation treated with a laminectomy, but not a fusion. He explained that, although Claimant had a herniated disc, the surgery was done for stenosis and instability, not simply the herniated disc. He emphasized it is important to rate "the actual anatomy and pathology that exists in this case." When asked whether his disagreements with Dr. Janssen's methodology were merely differences of opinion, Dr. Rook replied, "well, it's my opinion to use the proper category and not use the wrong category."

25. Regarding post-MMI treatment, Dr. Rook did not believe Claimant required any active interventional pain management, but opined annual follow-up visits with Dr. Sung would be reasonable:

> I think it's reasonable that he follow-up with his surgeon at regular intervals, maybe once a year. I think that's not unreasonable because there could be changes. When you have a fusion, you can develop transitional problems above the fusion. I think it's pretty routine to have annual visits at least for several years with your surgeon to see how you're doing and to determine the integrity of the fusion and the — the hardware. Whether he needs, you know, active every three months interventional injections, that was not my impression when I saw him.

26. Claimant was a credible witness.

27. Dr. Rook's opinions regarding Claimant's impairment rating and errors committed by the DIME are credible and persuasive.

28. Claimant overcame the DIME's impairment rating by clear and convincing evidence.

29. Claimant proved by a preponderance of the evidence Dr. Baptist's 31% whole person rating is the most appropriate rating.

30. Claimant proved by a preponderance of the evidence he is entitled to a general award of medical benefits after MMI.

31. Claimant has injury-related disfigurement consisting of: (1) a 5 ½ inch long by 1 inch wide curved, irregularly-shaped, discolored, partially indented, partially raised, surgical scar on the abdomen ending at the belt line; (2) two 5 inch long by ¼ inch wide irregular, discolored, partially indented, partially raised, surgical scars on either side of his spine; and (3) each scar on the back scar is flanked along its length by many pairs of staple scars, substantially enhancing the overall noticeability of the scarring. The ALJ finds Claimant should be awarded $3,000 for disfigurement.

CONCLUSIONS OF LAW

A. Claimant overcame the DIME regarding impairment.

A DIME's determination regarding whole person impairment is binding unless overcome by "clear and convincing evidence." Section 8-42-107(8)(C). Clear and convincing evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). The party challenging a DIME's conclusions must demonstrate it is "highly probable" that the impairment rating is incorrect. *Qual-Med*, 961 P.2d at 592; *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A "mere difference of medical opinion" does not constitute clear and convincing evidence that the DIME is incorrect. *E.g., Gutierrez v. Startek USA, Inc*., W.C. No. 4-842-550-01 (March 18, 2016).

As found, Claimant overcame the DIME rating by clear and convincing evidence. The ALJ sees three clear errors in Dr. Janssen's rating: (1) he applied the incorrect section under Table 53, (2) he failed to assign a rating for lower extremity neurological impairment, and (3) he added the spinal impairments instead of combining them.

The ALJ is persuaded by Dr. Rook's discussion and explanation regarding the application of Table 53 § (IV) instead of § (II) to rate Claimant's impairment. Dr. Baptist also used § (IV), which corroborates and bolster's Dr. Rook's opinions. Respondents' IME at the hearing before ALJ Edie agreed the fusion was necessary to remedy "instability." The ALJ does not consider this a mere difference of opinion and is persuaded by Dr. Rook's testimony that his and Dr. Baptist's approach is "right," and Dr. Janssen's approach is "wrong."

The ALJ also concludes Dr. Janssen should have included a lower extremity neurological rating. Multiple providers have documented residual weakness in the left ankle and foot, and the ALJ has no substantial doubt Claimant still suffers from some neurological sequelae of his injury. Dr. Janssen's physical examination documenting no neurological deficits is an outlier and not credible.

Finally, Dr. Janssen erred by adding the components of Claimant's spinal rating rather than combining them.

Any of these errors could be sufficient to overcome the DIME. Taken together, they leave the ALJ free from serious or substantial doubt that Dr. Janssen's rating was incorrect.

B. Claimant has 31% whole person impairment as determined by Dr. Baptist

Once the DIME's rating has been overcome "in any respect," the proper rating becomes a factual issue for the ALJ based on a preponderance of the evidence. *Newsome v. King Soopers*, W.C. No. 4-941-297-02 (October 14, 2016).

As found, Claimant proved Dr. Baptist's rating is the most reliable and accurate. Dr. Baptist correctly applied Table 53, and the range of motion measurements were obtained during an FCE conducted by a neutral evaluator. The FCE measurements were internally consistent, and within the ranges one would expect after a spinal fusion. Dr. Janssen's range of motion measurements are suspect; it is unlikely Claimant would have full extension, near full rotation and minimal limitations on flexion after a two-level lumbar fusion. Dr. Janssen's implausible numbers lend credence to Claimant's testimony that Dr. Janssen assisted his motion, contrary to the requirement to use "passive" range of motion only. Moreover, Dr. Baptist's decision to include a neurological rating is supported by and consistent with the evidence and the *AMA Guides*. The ALJ does not find Dr. Janssen's physical examination credible, because it is inconsistent with the examinations of multiple other providers. As Claimant credibly explained, Dr. Janssen hurried through the appointment, which probably explains why he missed the residual left leg weakness documented by multiple other examining and treating providers. It appears Dr. Janssen was more focused on minimizing his time expenditure than conducting a thorough

examination and report. The ALJ considers Dr. Janssen's evaluation sloppy and unreliable, and declines to give his opinions significant weight.

C. Claimant is entitled to a general award of medical benefits after MMI

The respondents are liable for medical treatment from authorized providers reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101(1)(a); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Medical benefits may extend beyond MMI if the claimant requires maintenance care to relieve symptoms or prevent deterioration of their condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). If the claimant establishes the probability of a need for future treatment, he is entitled to a general award of medical benefits after MMI, subject to the respondents' right to dispute compensability, reasonableness, or necessity of any particular treatment. *Hanna v. Print Expediters, Inc.*, 77 P.3d 863 (Colo. App. 2003). A claimant need not be receiving treatment at the time of MMI nor prove that a particular course of treatment has been prescribed to obtain a general award of *Grover*-type medical benefits. *Miller v. Saint Thomas Moore Hospital*, W.C. No. 4-218-075 (September 1, 2000).

A claimant must prove entitlement to medical benefits after MMI by a preponderance of the evidence, and the mere occurrence of a compensable injury does not compel the ALJ to find that all subsequent medical treatment was caused by the industrial injury. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997); *McIntyre v. KI, LLC*, W.C. No. 4-805-040 (ICAO, Jul. 2, 2010). The DIME's opinion regarding medical treatment after MMI is not entitled to any special weight but is simply another medical opinion for the ALJ to consider when evaluating the preponderance of the evidence. *See Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Story v. Industrial Claim Appeals Office*, 910 P.2d 80 (Colo. App. 1995).

As found, Claimant proved he is entitled to a general award of medical benefits after MMI. Claimant underwent a major surgical procedure, and the ALJ credits Dr. Rook's opinion he should retain access to periodic follow-up with Dr. Sung to monitor the stability of the fusion. Although Claimant had a good outcome from surgery, he remains symptomatic, and the ALJ is also persuaded by Dr. Baptist's opinion he should have access to further treatment for the symptom relief. Although Claimant has had no formal treatment since February 2018, he credibly testified he has "a call in to Dr. Finn" to discuss further treatment options.

D. Disfigurement

Section 8-42-108(1) provides that a claimant is entitled to additional compensation if he is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view." As found, Claimant has sustained noticeable disfigurement as a direct and proximate result of the July 12, 2016 injury. As found, Claimant should be awarded $3,000 for disfigurement.

ORDER

It is therefore ordered that:

1. Claimant's request to set aside the DIME's impairment rating is granted.

2. Insurer shall pay Claimant PPD benefits based on Dr. Baptist's 31% whole person rating. Insurer may take credit for any PPD previously paid in connection with this claim.

3. Insurer shall pay Claimant statutory interest of 8% per annum on all benefits not paid when due.

4. Insurer shall cover reasonably necessary "*Grover*" medical treatment after MMI from authorized providers causally related to the July 12, 2016 admitted injury.

5. Insurer shall pay Claimant $3,000 for disfigurement. Insurer may take credit for any disfigurement benefits previously paid in connection with this claim.

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

DATED: March 14, 2019

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

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that the second bilateral L3, L4, L5 radiofrequency neurotomy ("RFN") as recommended by Dr. Malinky, is reasonable, necessary, and related to her work injury of November 12, 2016?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Claimant is a 68-year-old personal care provider who has been employed by Employer since October 2015. (Ex. C, p. 12). On November 12, 2016, a special-needs patient assaulted Claimant while at work, causing injuries to her left shoulder, right hip, abdomen, chest, neck, and back. Employer was notified of a work injury, paramedics were called, and Claimant was transported to Memorial Hospital Emergency Room.

2. Upon examination and imaging in the ER, Claimant was diagnosed with an L-1 compression fracture, generalized abdominal pain, left shoulder pain, and myalgias. (Ex. S). She initially complained of pain primarily in her left hip with lesser pain in her back. Claimant was noted to have diabetes, pre-existing severe left glenohumeral joint osteoarthrosis, and severe left C4-5 facet osteoarthritis with related grade 1 anterolisthesis. Claimant told providers in the ER that her assailant kicked her in the chest, abdomen, shoulder, and hip. *Id.* at 249. Physical examination did not reveal evidence of contusions to claimant's spine.

3. On November 16, 2016, Claimant returned Memorial ER complaining of 10/10 pain with urinary incontinence since her work injury (4 days prior). (Ex. S, p. 261) Claimant indicated that she had had incontinence while in the ER on November 12, 2016, but thought it had been due to the pain she was experiencing. Claimant was deemed non-surgical, as her compression fracture did not result in cord compromise or cauda equina syndrome. Her providers were unsure as to the source of her incontinence. Physical examination of Claimant's spine revealed minimal tenderness to palpation and "no evidence of contusion, edema, or erythema." Claimant was admitted to inpatient care for continued observation. She was discharged on November 22, 2016, referred to undergo physical therapy, and recommended to follow up with her neurosurgeon in 3 to 4 weeks.

4. On November 22, 2016, Claimant presented to Dr. Cynthia Lund with complaints, in part, of severe mid-back pain and urinary incontinence. Because of the compression fracture along with complaints of urinary incontinence, Claimant was immediately admitted to Memorial Hospital for further evaluation (Ex. 3, pp. 18-19). Claimant was

discharged from Memorial Hospital on November 28, 2018 with diagnoses of L1 compression fracture, L5-S1 neuroforaminal narrowing, bowel and bladder incontinence of uncertain etiology, diabetes mellitus, rheumatoid arthritis, and recent emotional trauma. Upon discharge Claimant was advised to follow up with a neurosurgeon and to consult with a social worker for the emotional trauma

5. Claimant was transferred from Memorial Hospital to Health South Rehabilitation where she was treated up through December 14, 2016. According to the records, Claimant was experiencing low back pain for which she received Fentanyl along with Meloxicam. Upon discharge from Health South Claimant was ambulating over 300 feet with a quad cane and was able to ascend and descend multiple stairs. Claimant was discharged home with home healthcare services and a prescription for Fentanyl patch and Oxycodone/Oxy-IR 5 mg per 6 hours (Ex. O, pp. 163-170).

6. Claimant was seen on December 16, 2016 by Dr. Lund with complaints of severe mid back pain and severe left shoulder pain. Claimant advised Dr. Lund she was unable to walk unassisted, had incontinence of urine, had generalized pain, and was lightheaded. Dr. Lund advised Claimant to continue using a back brace, continue the Fentanyl patch and Oxycodone. Dr. Lund also referred Claimant to a psychologist and a urologist (Ex. 3, p. 24).

7. Claimant returned to Dr. Lund on January 7, 2017 with ongoing complaints of mid back pain at a 9/10 level. On this date, Claimant was still wearing a back brace. Dr. Lund recommended Claimant should walk and try to move about more. Dr. Lund indicated that Claimant was to wean down off Norco and Valium and that there will be no further refill of Fentanyl patches (Ex. 3, p.30).

8. Claimant was re-evaluated on January 20, 2017 by Dr. Lund. It was noted that Claimant was still experiencing severe mid-back pain and severe left shoulder pain at a 10/10 level. Dr. Lund prescribed Norco, and referred Claimant to physical therapy (Ex. 3, pp. 36-37).

9. Claimant was seen by Dr. Lund on February 3, 2017 with continued back pain at a 10/10 level. Dr. Lund noted that Claimant was off the Fentanyl patch and was only taking Norco twice daily. Dr. Lund noted that Claimant was wearing her back brace and therefore no range of motion testing was done. Dr. Lund diagnosed Claimant with multiple injuries due to the assault including an L1 vertebral fracture and situational depression. Dr. Lund recommended Claimant continue her home exercises and to continue treating with Dr. Beaver and Staudenmayer for depression (Ex. 3, p. 39).

10. On January 24, 2017, Dr. Steven Hake reviewed Claimant's lumbar films and concluded that her L1 compression fracture was stable. He was unable to explain Claimant's urinary incontinence from a spinal perspective despite "extensive work-up." (Ex. BB, p. 661).

11. Claimant was seen by Dr. Lund on February 3, 2017 with continued back pain at a 10/10 level. Dr. Lund noted that Claimant was off the Fentanyl patch and was only taking Norco twice daily. Dr. Lund noted that Claimant was wearing her back brace and therefore no range of motion testing was done. Dr. Lund diagnosed Claimant with multiple injuries due to the assault including an L1 vertebral fracture and situational depression. Dr. Lund recommended Claimant continue her home exercises and to continue treating with Dr. Beaver and Staudenmayer for depression. (Ex. 3, p. 39)

12. On February 21, 2017, Claimant returned to her rheumatologist, Dr. Michael Sayers, DO, for evaluation of her RA. Her work injuries were discussed at this time. *(Ex. 6, Ex. L).* Claimant's medications included: amitriptyline HCL 50 MG tablet 1 tablet orally once a day, levothyroxine sodium 75 MCG capsule 1 capsule on an empty stomach in the morning orally once a day, meloxicam 15 MG tablet 1 tablet orally once a day, paroxetine HCL ER 12.5 MG Tablet extended release 24 hour 1 tablet in the morning orally once a day, myrbetriq 50 MB tablet extended release 24 hour tablet orally once a day, prednisone 1 mg 1 MG tablet delayed release 2 tablets orally once a day, vitamin D-3 1- unit capsule 1 capsule orally twice a week, methotrexate sodium 50 MG/2ML solution .8 ml injection once a week, Enbrel sureclick 1 ml 50 MG/ML solution auto0injector 1 ml subcutaneous once a week, and voltaren 1% gel transdermal. *Id*., at p 122.

13. Claimant was seen by Dr. Vernon Maas at UC Health for follow-up on March 23, 2018. At this time Claimant was experiencing low back, right hip, and right sided pain at an 8/10 level. Claimant indicated that she is no better than how she felt at her last examination. Dr. Maas noted that Claimant was tender to palpation over bilateral lower thoracic and lumbar region with spasms present. Dr. Maas diagnosed multiple injuries due to assault including L1 vertebral fracture and situational depression. Dr. Maas recommended continued use of the walker as needed, continued us of Paxil and Norco, and to follow up with Dr. Lund (Claimant's Submissions- Bate #s 0047-0049).

14. Dr. Lund's office notes of April 14, 2017 indicated that Claimant lost her balance on April 12 and fell down some steps on April 9. As a result, Claimant's left side was hurting. On this date Claimant's pain was worse at a 9/10 level. Dr. Lund noted that a recent MRI showed that Claimant's L1 fracture was stable at 25 percent. Dr. Lund continued Claimant's same medication and made multiple referrals to a variety of physicians including Dr. Willman for pain management. (Claimant's Submissions, Bate #s 0050-0052).

15. During Claimant's April 18, 2017 neurosurgical examination, Dr. Thompson noted claimant's L1 compression fracture to be almost completely healed. Claimant was noted to have "spondylolysis at L5 with grade 1 spondylolisthesis at this level with bilateral lateral recess and neural foraminal stenosis. There is also a disk bulging at L4-5 with lateral recess stenosis. Unfortunately, **she continues to have low back pain *and* right radicular leg pain**" (Ex.BB, p. 668) (emphasis added).

16. Claimant reported for initial examination at Interventional Pain Management on May 3, 2017, where she was examined by Dr. Bertram Willman. (Ex. P, p. 175). Claimant complained of pain in her face, bilateral cervical spine, bilateral shoulders, thoracic spine, lower back, SI joint, bilateral hands, and bilateral feet. She had tenderness over her old L1 compression fracture and lower lumbar pain over her L5. Claimant's Norco was replaced with tramadol 50 3 times a day, she was continued on Robaxin 500 4 times a day, and Neurontin 300 3 times a day was initiated to help with her neuropathic pain. Dr. Willman believed Claimant's pain might have been emanating from her L5 foraminal stenosis, or from her L1 compression fracture. He believed she might benefit from L5-S1 transforaminal injection and a medical branch block *at the L1 level*, and bilateral SI joint injections. (Ex.8 pp. 319-320).

17. On May 4, 2017, Claimant received a L5-S1 caudal epidural steroid injection ("ESI") from Dr. Martin Verhey. It was noted that she complained of lumbar radiculopathy. (Ex. N, p. 161). On May 5, 2017, Claimant returned to Dr. Lund. According to the notes of this date, Claimant had received an L5 ESI and was still experiencing 9/10 low back pain. This same note indicates that Claimant was now using a cane at home and a walker out of the home. Dr. Lund also noted that Claimant was seeing Dr. Staudenmayer with good results. Under "Treatment Plan", Dr. Lund wrote that Claimant was improving but continues to have low back pain. Furthermore, Dr. Lund wrote that Claimant was to follow up with Dr. Thompson in a month regarding her back brace and Dr. Verhey for a possible second ESI (Ex. 3, pp. 53-55).

18. On May 17, 2017 Claimant returned for psychological counseling with Dr. Staudenmayer. Claimant described the incident to Dr. Staudenmayer and reported an increase in her back pain after visualizing the assault. (Ex. Z, p. 605).

19. Claimant was seen by Dr. Willman on May 30, 2017. Dr. Willman's note of this date indicates that Claimant's recent injection under Dr. Verhey provided some benefit for 6 days. Claimant's main complaints on this date were low back and bilateral hip pain. Dr. Willman noted that by history and exam Claimant had not only spinal stenosis at L4-5 and L5-S1 but also bilateral SI joint irritation with inflammation. Dr. Willman deferred any procedures until Claimant was seen by her neurosurgeon Dr. Thompson (Ex. 8, pp. 319-321).

20. An office note from Dr. Lund dated July 14, 2017 indicated that Claimant had fallen in the bathtub due to lack of a handrail for support. Dr. Lund recommended that Claimant continue in her back brace, and follow up with her specialists. (Ex. 3, pp. 59-61).

21. During her July 28, 2017 follow up appointment with Dr. Willman, Claimant indicated that her tramadol prescription was not strong enough. (Ex. P, p. 179). Dr. Willman replaced her tramadol with a prescription for Norco. Claimant was referred to undergo L3-5 medial branch blocks.

22. On August 7, 2017, Claimant returned to see Dr. Willman at Interventional Pain Management for examination, with continued complaints of chronic low back pain. (Ex.

P. p. 181). After speaking with Claimant, Dr. Willman performed medial branch blocks ("MBB") on Claimant's L2-L3, L3-L4, L4-L5 bilaterally. No pre-VAS scores were identified. No post-VAS scores were notated. Claimant was not given a pain diary. She was recommended to follow up in a few weeks for post-MBB evaluation.

23. Claimant returned for physical therapy on August 9, 2017 (2 days after her MMB) where she complained of pain of 8.5-9. (Ex. W, p. 500). No significant reduction in her pain was reported. Claimant was discharged from care as she no longer wished to participate in physical therapy.

24. MRI results obtained on August 22, 2017 revealed no significant change of Claimant's L1 compression deformity of persistent bone marrow edema, no significant change of anterolisthesis of her L5 on S1, no significant change of lumbar spondylosis with mild to moderate L4-5 and L5-S1 spinal canal stenosis, and no significant change of her severe bilateral L5-S1 foraminal stenosis. (Ex. DD, p. 98).

25. On October 16, 2017 Claimant reported for physical therapy at Amazing Care. (Ex. K, p.113). Claimant reported 9/10 pain. However, her therapist noted that despite her high reported pain level, she moved and functioned like someone with a lower pain level. Claimant did not make any facial grimaces and picked up her granddaughter without issue. (Ex. K, p.114).

26. On October 18, 2017 Claimant returned for examination with her occupational therapist. Claimant reported that she "is more fearful and that she did not know how to report it, so she feels that it is severe pain." Her therapist noted claimant's current report of 9-10/10 pain, "although facial expressions do not correlate with such levels." She reported a minimum Pain of 8/10 with a maximum of 10/10. (Ex. K, p. 118).

27. On October 23, 2017, Claimant returned to Interventional Pain Management for post L3-L5 MBB examination. Dr. Willman had left the practice, and Dr. Malinky took over her care. Dr. Malinky noted "pt here for f/u L3-5 MBB, 60-70% relief, pt would like to discuss another injection pt has been in a full body brace up until 2 weeks ago, denies fever/chills s/s infection pain level 8-9/10" (Ex. P, p. 184). She was given a refill on her narcotic medications, gabapentin, and muscle relaxer and referred to undergo L3-L5 RFTCs. Under Review of Systems, he noted: Psychiatric: depression and anxiety. (Ex. P, p. 184)

28. On November 27, 2017, Claimant returned to Dr. Malinky for examination. (Ex. P, p.187). Dr. Malinky now reported that Claimant had experienced greater than 70% reduction in pain from the single set of bilateral medial branch blocks, and that **she had no history of any radicular symptoms** (despite her prior complaints of right leg radiculopathy during her April 18, 2017 neurosurgical evaluation). Dr. Malinky opined the MRI and physical exam suggested facet related pain. Dr. Malinky, without obtaining prior authorization, administered L3-S1 radiofrequency nerve ablations. (Ex. P, p. 188). No Visual Analog Scale ("VAS") pain scores were identified. No post-VAS scores were notated. Claimant was not given a pain diary. *Id.*

29. On December 20, 2017, Claimant returned to UC Health Physical Therapy with current complaints of 8/10 pain. (Ex. W, p. 501). Claimant noted 8/10 was the minimum amount of pain she felt at the time.

30. On January 3, 2018 Claimant returned to physical therapy noting 6/10 for current pain complaints but noted she had been in 9/10 pain within the last 24 hours. (Ex. W, p. 507). Claimant's physical therapist made a note of Claimant's "high subjective pain levels."

31. Claimant returned to her physical therapist at UC Health on January 10, 2018. She complained of 8/10 pain currently with a minimum of 7/10 and maximum of 10/10. (Ex. W. p. 509*)*

32. On January 12, 2018 Claimant reported her current pain level as 7/10 with a maximum of 10/10 pain in the last 24 hours. Her therapist continued to note Claimant's 'high levels of subjective pain'. (Ex. W, p. 511).

33. On January 17, 2018 Claimant reported for physical therapy at UC Health. (Ex. W, p. 512). She noted that she had seen her pain management physician yesterday, and was concerned with the lowering of her Norco medication. She was encouraged to address her concern at her next pain management appointment on March 7, 2018. She reported 8/10 pain currently with a minimum of 8/10 and maximum of 10/10.

34. On January 19, 2018 Claimant complained of 8-9/10 pain in the past 24 hours. (Ex. W, p. 517). Claimant was noted to have lower left leg weakness which was presenting claimant with difficulties ascending stairs. Likewise, on January 26, 2018 Claimant reported minimum pain levels as 8/10. *Id* at 522.

35. Claimant attended additional physical therapy appointments on January 31, February 7, and February 21, 2018 with no mention of any pain complaints at the level of 2-3/10. (Ex. W, pp. 523-529).

36. On March 7, 2018 (3 months and 8 days after the 1st RFN procedure) Claimant returned to Dr. Malinky with complaints of 8/10 pain and requests to increase her narcotic pain medications after they had been decreased less than a month prior. (Ex. P, p.193). Dr. Malinky requested repeat medial branch blocks (not repeat RFN) and increased her pain medications. (Ex. G, p. 61).

37. On March 13, 2018, Dr. Joseph Fillmore completed a physician advisor review regarding the request for repeat medal branch blocks. (Ex. J, p. 109). He did not believe there was any medical indication for repeat medial branch blocks at the same level as previously performed as Claimant's complaints remained the same and records did not show functional improvement.

38. Dr. Malinky wrote a letter on March 21, 2018, now requesting Respondents grant the request for bilateral L3-5 radiofrequency nerve ablation. (Ex. P, p. 196). He acknowledged his failure to follow the guidelines regarding the requirement for 2 diagnostic medical branch blocks prior to proceeding to radiofrequency nerve ablation, but argued for a second RFN due to claimant's reported "70% relief for five months", and increased physical activity and quality of life after the first RFN. There is no evidence in the records suggesting that Dr. Malinky had actually reviewed any of Claimant's other medical records at this time.

39. On March 22, 2018, Dr. Fillmore conducted his second physician advisor review based the appeal received from Dr. Malinky. (Ex. J, p. 110). It was noted that Dr. Malinky was now requesting a repeat radiofrequency neurotomy, as Claimant had "70% improvement with both medial branch blocks and prior radiofrequency neurotomy." Dr. Fillmore could not find indications or documentation of functional improvement, and recommended denying the procedure.

40. Claimant's ATP care was transferred to Dr. Autumn Dean on or about April 13, 2018. (Ex. BB, p. 708). During her appointment on that date, Claimant noted that she was nearly complete with physical therapy and had 9 sessions of massage therapy left. Claimant's PTSD was stable at the time. MMI was pending her upcoming IME.

41. On April 16, 2018, Dr. Eric Ridings completed his IME of claimant. It was his opinion that there were no anatomical findings which would support her claim of urinary incontinence. Instead, he believed the cause to be emanating from Claimant's severe somatic and psychological distress and recommended a complete review of claimant's prior medical and psychological history. He also believed claimant's facet arthritis and spondylolisthesis were not related to this claim. and that the previously administered diagnostic tests were not within the medical treatment guidelines. Dr. Ridings believed Claimant had attained MMI for her physical conditions, but recommended the she undergo a psychiatric evaluation to determine what, if any, psychiatric diagnosis should be included as part of her work-injury.

42. After receiving Dr. Ridings IME report, Dr. Dean wrote a letter on May 18, 2018, stating that she agreed with Dr. Ridings assessment, and recommended Claimant undergo a psychiatric assessment. (Ex. BB, p. 712). She deferred determination of MMI until psychiatric evaluation was completed.

43. Dr. Stephan Moe conducted a psychiatric IME of Claimant on July 16, 2018. (Ex. H). Dr. Moe opined that the Claimant's "physical symptoms have been influenced by psychological factors," and that her subjective reports of pain were not in alignment with objective data. Dr. Moe opined that emotional distress, that which follows a traumatic incident in particular, is associated with greater and more severe physical symptoms, a process called somatic amplification. He concluded that psychological factors undoubtedly had a very significant influence on her post-injury medical history, and that Claimant was likely suffering from conversion disorder as she had many medically unexplained symptoms. *Id.* He recommended tending to Claimant's psychological

conditions in order for her to reach MMI.

44. Dr. Moe testified at hearing that Claimant had significant somatic overlay to her physical conditions. Claimant scored the highest possible score on the GAD-7, to measure her symptoms of anxiety disorders, scored 8/9 symptoms on her PHQ-9, indicating a significant level of depression, and had 16/20 symptoms on the PCL-5, indicating severe PTSD symptoms. Dr. Moe agreed that Claimant had severe psychological overlay in her symptoms that significantly influenced her descriptions of pain. He cautioned against proceeding with invasive treatment techniques without first thoroughly reviewing her psychiatric conditions. He also cautioned against undue reliance on claimant's subjective description of pain and recommended objective confirmation.

45. Dr. Moe testified that as a rule, individuals with high amounts of psychological overlay are not good candidates for invasive procedures. He opined that an individual's psychological condition should first be addressed prior to any invasive procedures, including RRN nerve ablation, and that all safeguards should have absolutely been taken in this instance. Dr. Moe believed any 'dismissive attitudes' toward Claimant's psychological condition and its effects should be reconsidered. He was very concerned that Dr. Malinky was giving excessive weight to Claimant's subjective descriptions of pain.

46. Dr. Ridings testified via deposition on January 23, 2019. It was his opinion that the repeat L3-L5 RFN procedure was not reasonable, necessary, or related to her November 12, 2016 injury. Dr. Ridings reviewed Claimant's medical records from her work injury in addition to records from before the injury. He testified that there was no objective evidence showing an injury to Claimant's L3-L5, and that her L1 compression fracture had healed, having no effect on her L3-L5. It was his opinion that the medical treatment guidelines where used to rule out false positives - "the placebo effect"- and that the Guidelines should have been followed in Claimant's case due to a multitude of red flags.

47. Based on his review of the records, he believed Claimant had a negative diagnostic response to the medial branch blocks and a negative diagnostic response to the RFN procedure. According to Dr. Ridings, those negative diagnostic responses provided evidence which showed Claimant's pain generator to be coming from somewhere other than her L3-L5 facet joints. He believed there was substantial literature showing that if there is psychological overlay to the severity of the patient's pain complaints, that unless that was effectively treated, the results of interventional procedures would be much worse. He strongly believed Claimant needed no further physical intervention and instead, suggested that her psychological issues be addressed.

48. Christopher Malinky, M.D. testified by deposition as an expert in anesthesia and pain management. Dr. Malinky testified that the majority of his practice involves treating patients who suffer from chronic and acute low back issues Dr. Malinky testified that he first evaluated Claimant on October 23, 2017 as a transfer patient from Dr. Willman who had recently left the practice. Dr. Malinky testified that he was seeing Claimant for

reevaluation following a diagnostic medial branch block done on August 7, 2017.

49. Dr. Malinky reported that Claimant had a 60 to 70 percent relief from that medial branch block which tells him, as a pain management doctor, that the L3-L5 levels are the pain generators. Dr. Malinky testified that based on the results of the August 7, 2017 diagnostic block he recommended a radiofrequency neurotomy to achieve the same amount of relief but lasting for six to eight months to avoid ongoing/escalating narcotics and to increase function. He testified that on November 27, 2017 (the date of the RFN procedure), he spent "a couple minutes" with Claimant face-to-face about her existing pain complaints, since he had already seen her at the October 23, 2017 consult.

50. According to Dr. Malinky, after the November 27, 2017 neurotomy was done Claimant reported a 75 to 80 percent reduction in low back pain and that her pain level in the low back was a 2-3/10 and a 9/10 for other parts of her body. Dr. Malinky opined that a 75 to 80 percent pain relief and a concomitant reduction in narcotic usage, as well as the ability to participate in physical therapy would be a good result.

51. Dr. Malinky testified that at Claimant's next visit with him, she was complaining of more pain in her low back with a corresponding decrease in her ability to perform her activities of daily living, both of which indicated that the effects of the radiofrequency neurotomy was wearing off. Dr. Malinky testified that Claimant received only four to five months of pain relief as opposed to the preferred six to eight months. However, Dr. Malinky went on to explain that everyone's nerves regenerate at a different rate and the nerve may not have been completely ablated, so as to achieve a more lasting result. Ultimately, Dr. Malinky opined that a four to five-month duration in pain relief was meaningful improvement and a repeat neurotomy can last even longer.

52. Dr. Malinky testified that as of March 7, 2018, Claimant would benefit from a repeat radiofrequency neurotomy. Dr. Malinky testified that he was aware that the D.O.W.C. Treatment Guidelines (Guidelines) for the low back require that two MBBs be done with good results before the radiofrequency neurotomy is performed and that Claimant had only had one medial branch block before. However, Dr. Malinky went on to explain that since Claimant already had a medial branch block followed by a successful neurotomy that the chances of having a false positive are low. Therefore, Dr. Malinky felt that this was justification for deviating from the Guidelines. Dr. Malinky further testified that he uses psychological screenings with some patients who will be undergoing radiofrequency neurotomies. However, in Claimant's case, he did not feel it was necessary.

53. Dr. Malinky also testified concerning the discrepancies in the pain levels noted in the physical therapy records and his own treatment notes. He stated that when he asks a patient concerning pain levels that he gets really specific about what exactly hurts and how much it hurts. Dr. Malinky further testified that in many instances the patient is going to concentrate on what hurts the most. In addition, Dr. Malinky said it also depends on how and when the question is asked regarding pain levels e.g. before or after therapy. On cross examination, Dr. Malinky was queried concerning pain scales

and the psychological status of a patient who is a potential candidate for a neurotomy. Dr. Malinky testified that pain is subjective and you can't rely on it alone for determining whether or not a neurotomy is appropriate. Rather, a physician has to look at the whole picture which includes talking to the patient, examining them, looking at their imaging, and how they respond to treatment.

54. Dr. Malinky testified that he had not reviewed any of Claimant's prior medical records upon examining her for the first time. He testified that a Rhizotomy procedure should give a patient 75%-80% pain relieve for 6-9 months. Dr. Malinky believed that Claimant had pain relief for 4 months from her initial RFN. He testified that he believed the rhizomoty had 'worked', because Claimant was now able to engage in physical therapy and reduced her Norco prescription.

55. He further acknowledged that there was no evidence of any acute injury to Claimant's L3-L5 region, but there was evidence of degenerative changes. He had not read any of Claimant's medical records, either from within his own office, or from outside. He had not read any of Dr. Staudenmeyer's records.

56. He further admitted that he cannot recall if he ever gave Claimant a pain diary, nor if he ever used any VAS pain charts. Instead, he relied exclusively upon Claimant's self-reported characterization of a 60-70% improvement in pain from the date of service (August 7, 2017), until her follow up appointment on 10/23/2017. Based upon this one appointment, he then determined to perform the RFA, which occurred on 11/27/2017.

57. Dr. Malinky further acknowledged that the Guidelines required him to perform two MBBs, but he went straight to the first RFA after one MBB. When asked why this occurred, Dr. Malinky replied: "I don't know. I think, probably is was a mistake and miscommunication."

58. Claimant testified at hearing on October 30, 2018. Claimant alleged that all treatment modalities gave her benefit. She confirmed her pre-existing diagnosis of fibromyalgia and rheumatoid arthritis, which presented her with whole body aching pains.

59. Claimant remembered receiving some benefit from the ESI she received in early May 2017. Claimant alleged she had 3 months of relief from the first Rhizotomy. Claimant testified that she could feel the difference when the injections were wearing off; however, she reported pain levels which mirrored those prior to the medial branch block or RFN procedure. She confirmed she had not had a pain free day since the incident, and denied that she ever reported a 2-3/10 pain to any provider. She confirmed the pain levels had never been lower than a 6-6.5/10 since her injury, and that improvement in her pain from the injections only ever reduced her pain to a 6-6.5/10.

CONCLUSIONS OF LAW

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

Generally

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

2. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, supra. The claimant in a workers' compensation claim bears the burden of establishing entitlement to medical treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990).

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

Medical Benefits, Generally

4. Respondents are liable for authorized medical treatment that is reasonably necessary to cure and/or relieve an injured worker from the effects of the industrial injury. § 8-42-101(1)(a), C.R.S. An admission of liability does not amount to an admission that all subsequent medical treatment is causally related to the industrial injury or that all subsequent treatment is reasonably necessary. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Respondent retains the right to challenge the cause of the need for continuing treatment and the reasonable necessity of specific treatment. *Hanna v. Print Expediters, Inc*., 77 P.3d 863 (Colo. App. 2003).

5. The Claimant must prove a causal nexus between the claimed disability and need for medical treatment and the work related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998).

Medical Treatment Guidelines, Generally

6. The Director of the Division of Workers' Compensation (Division)

promulgated the "medical treatment guidelines and utilization standards." *City of Manassa v. Ruff 235 P.3d 1051 (Colo. 2010)*. The Division's medical treatment guidelines were established by the Director pursuant to an express grant of statutory authority. Section 8-42-101(3.5)(a)(II), C.R.S. The Division's medical treatment guidelines are regarded as the accepted professional standards for care under the Workers' Compensation Act (Act). *Rook v. Industrial Claim Appeals Office 111 P.3d 549 (Colo. App. 2005)*. The guidelines are to be used by health care practitioners when furnishing medical aid under the Act. Section 8-42-101(3)(b), C.R.S.; *Hall v. Industrial Claim Appeals Office 74 P.3d 459 (Colo. App. 2003)*.

7. An ALJ should consider the Guidelines in deciding whether a certain medical treatment is reasonable and necessary for the Claimant's condition. *Deets v. Multimedia Audio Visual*, W. C. No. 4-327-591 (March 18, 2005), *aff'd Deets v. Industrial Claim Appeals Office No. 05CA0719* (Colo. App. May 17, 2007) (not selected for publication); See *Eldi v. Montgomery Ward* W. C. No. 3-757-021 (October 30, 1998) (medical treatment guidelines are a reasonable source for identifying the diagnostic criteria).

8. While it is appropriate for an ALJ to consider the Guidelines in deciding whether a certain medical treatment is reasonable and necessary for the claimant's condition, *See Deets v. Multimedia Audio Visual,* W. C. No.4-327-591 (March 18, 2005) (medical treatment guidelines are a reasonable source for identifying the diagnostic criteria), the ALJ's consideration of the Guidelines may include deviations from them where there is evidence justifying the deviations. *Logiudice v. Siemans Westinghouse,* W.C. No. 4-665-873 (January 25, 2011).

Medical Treatment Guidelines, Rule 17, Exhibit 1, (E) (2) (b) (vi) B)

B) Medial Branch Blocks: These are generally accepted diagnostic injections, used to determine whether a patient is a candidate for radiofrequency medial branch neurotomy (also known as facet rhizotomy).

It is obligatory that sufficient data be accumulated by the examiner performing this procedure such that the diagnostic value of the procedure is evident to other reviewers. This entails documentation of patient response regarding the degree and type of response to specific symptoms. As recommended by the ISIS guidelines, the **examiner should identify three or four measurable physical functions, which are currently impaired and *can be objectively reassessed 30 minutes or more after the injection***. A successful block requires documentation of positive functional changes **by trained medical personnel experienced in measuring range of motion or assessing activity performance.** *The evaluator should be acquainted with the patient, in order to determine pre and post values, and preferably unaffiliated with the injectionist's office.* Qualified evaluators include nurses, physician assistants, medical assistants, therapists, or noninjectionist physicians. To be successful the results should occur within the expected time frame and there

should be pain relief of *approximately 80% demonstrated by pre and post Visual Analog Scale (VAS) scores.* Examples of functional changes may include sitting, walking, and lifting. *Additionally, a prospective patient* ***completed pain diary must be recorded*** *as part of the medical record that documents response hourly for a minimum requirement of the first 8 hours post injection or until the block has clearly worn off and preferably for the week following an injection.* The diary results should be compared to the expected duration of the local anesthetic phase of the procedure. Responses must be identified as to specific body part (e.g., low back, leg pain). The practitioner must identify the local anesthetic used and the expected duration of response for diagnostic purposes. The success rate of radiofrequency neurotomy is likely to decrease with lesser percentages of pain relief from a branch block.

A separate comparative block on a different date should be performed to confirm the level of involvement. A comparative block uses anesthetics of varying lengths of activity. Medial Branch blocks are probably not helpful to determine the likelihood of success for spinal fusion.

It is essential that only light sedation be used for diagnostic trials in order to avoid having the sedation interfere with the patient's ability to interpret pain relief from the injection itself. Many patients may not need any medication. For those requiring anxiolytics, short acting agents, such as midazolam, may be used. As with all patients, the pain diary and functional testing post injection must be rigorously adhered to in order to correctly interpret the results of the diagnostic injection.

Needle Placement: Multi-planar fluoroscopic imaging is required for all medial branch blocks injections. Injection of contrast dye to assure correct needle placement is required to verify the flow of medication. Permanent images are required to verify needle placement.

Indications: All injections should be preceded by an MRI or a CT scan. Individuals should have met all of the following indications:

• Physical exam findings consistent with facet origin pain, and

• At least 3 months of pain, unresponsive to 6-8 weeks of conservative therapies, including manual therapy, and

• *A psychosocial screening (e.g., thorough psychosocial history, screening questionnaire) with treatment as appropriate.*

> ϖ Frequency and Maximum Duration: May be repeated once for comparative blocks. Limited to 2 anatomic facet levels or 3 medial branch levels. (emphasis added).

e. Radio Frequency (RF) Denervation - Medial Branch Neurotomy/Facet Rhizotomy:

i. Description -- A procedure designed to denervate the facet joint by ablating the corresponding sensory medial branches. Continuous percutaneous radiofrequency is the method generally used. Pulsed radiofrequency should not be used as it may result in incomplete denervation. Cooled radiofrequency is generally not recommended due to current lack of evidence.

There is good evidence in the lumbar spine that *carefully selected patients* who had 80% relief with medial branch controlled blinded blocks and then had RF neurotomy will have improved pain relief over 6 months and decreased impairment compared to those than those who had sham procedures. *Generally pain relief lasts 7-9 months and repeat radiofrequency neurotomy can be successful and last longer*. RF neurotomy is the procedure of choice over alcohol, phenol, or cryoablation. Precise positioning of the probe using fluoroscopic guidance is required because the maximum effective diameter of the device is a 5x8 millimeter oval. Permanent images should be recorded to verify placement of the device.

ii. Needle Placement: Multi-planar fluoroscopic imaging is required for all injections. Injection of contrast dye to assure correct needle placement is required to verify the flow of medication. Permanent images are required to verify needle placement.

iii. Indications -- *Those patients with proven, significant, facetogenic pain. A* ***minority*** *of low back patients would be expected to qualify for this procedure.* (emphasis added). This procedure is **not recommended** (emphasis suppled) for patients with *multiple pain generators* or involvement of more than 3 levels of medial branch nerves.

Individuals should have met **all** of the following indications:

• Physical exam findings consistent with facet origin pain, **and**

• Positive response to controlled medial branch blocks, **and**

• At least 3 months of pain, unresponsive to 6-8 weeks of conservative therapies, including manual therapy, **and** (emphasis supplied)

• *A psychosocial screening* (e.g., thorough psychosocial history, screening questionnaire) with treatment as appropriate *has been undergone.*

All patients should continue **appropriate exercise with functionally directed rehabilitation.** Active treatment, which patients will have had prior to the procedure, will frequently require a repeat of the sessions previously ordered (Refer to F.13. Therapy-Active). (emphasis added).

*It is **obligatory** that sufficient data be accumulated by the examiner performing this procedure such that the value of the medial branch block is evident to other reviewers*. This entails documentation of patient response regarding the degree and type of response to specific symptoms. As recommended by the ISIS guidelines, the examiner should identify three or four measurable physical functions, which are currently impaired and can be objectively reassessed 30 minutes or more after the injection. *A successful block requires documentation of positive functional changes by trained medical personnel experienced in measuring range of motion or assessing activity performance. The evaluator should be acquainted with the patient, in order to determine pre and post values, and preferably unaffiliated with the injectionist's office.* Qualified evaluators include nurses, physician assistants, medical assistants, therapists, or non-injectionist physicians. To be successful the results should occur within the expected time frame and there should be pain relief of approximately 80% demonstrated by pre and post *Visual Analog Scale (VAS) scores.* Examples of functional changes may include sitting, walking, and lifting. Additionally, *a prospective patient completed pain diary must be recorded as part of the medical record that documents response hourly for a minimum requirement of the first 8 hours post injection or until the block has clearly worn off and preferably for the week following an injection.* The diary results should be compared to the expected duration of the local anesthetic phase of the procedure. Responses must be identified as to specific body part (e.g., low back, leg pain). The practitioner must identify the local anesthetic used and the expected duration of response for assessment purposes.

In almost all cases*, this will mean a reduction of pain to 1 or 2 on the 10-point Visual Analog Scale (VAS)* correlated with functional improvement. The patient should also identify activities of daily living (ADLs) (which may include measurements of ROM) that are impeded by their pain and can be observed to document objective functional improvement in the clinical setting. Ideally, these activities should be assessed throughout the observation period for function. The observer should not be the physician who performed the procedure. It is suggested that this be recorded on a form similar to ISIS recommendations.

A separate comparative block on a different date should be performed to confirm the level of involvement prior to the rhizotomy. A comparative block uses anesthetics with varying lengths of activity. Medial Branch blocks are probably not helpful to determine the likelihood of success for spinal fusion. (emphasis added).

The success rate of radiofrequency neurotomy is likely to decrease with lower percentages of pain relief from a medial branch block.

Informed decision making should also be documented for injections and all invasive procedures. This must include a thorough discussion of the pros and cons of the procedure and the possible complications as well as the natural history of the identified diagnosis. The purpose of spinal injections, as well as surgery, is to facilitate active therapy by providing short-term relief through reduction of pain. Patients should be encouraged to express their personal goals, outcome expectations and desires from treatment as well as any personal habits or traits that may be impacted by procedures or their possible side effects. *All patients must commit to continuing appropriate exercise with functionally directed rehabilitation usually beginning within 7 days, at the injectionist's discretion.* Since most patients with these conditions will improve significantly over time, without invasive interventions, patients must be able to make well-informed decisions regarding their treatment. *All injections must be accompanied by active therapy.*

iv. Complications-- Bleeding, infection, or neural injury. The clinician must be aware of the risk of developing a localized neuritis, or rarely, a deafferentation centralized pain syndrome as a complication of this and other neuroablative procedures. Spinal musculature atrophy is likely to occur especially with repeat procedures as a rhizotomy denervates the multifidus-muscle in patients. For this reason, repeated rhizotomies and multiple level rhizotomies can be harmful by decreasing supportive spinal musculature. This is especially problematic for younger patients who may engage in athletic activities or workers with strenuous job requirements as the atrophy could result in increased injuries or pain, although this has not been documented.

v. Post-Procedure Therapy -- Active therapy. Implementation of a gentle aerobic reconditioning program (e.g., walking) and back education within the first post-procedure week, barring complications. Instruction and participation in a long-term home-based program of ROM, core strengthening, postural or neuromuscular re-education, endurance, and stability exercises should be accomplished over a period of four to ten visits post-procedure. *Patients who are unwilling to engage in this therapy should not receive this procedure.*

vi. Requirements for Repeat Radiofrequency Medial Branch Neurotomy: In some cases pain may recur. *Successful RF Neurotomy usually provides from* ***six to eighteen months*** *of relief.* Due to denervation of spinal musculature repeated rhizotomies should be limited. Refer to the Division's Chronic Pain Disorder Treatment Guidelines. Before a repeat RF Neurotomy is done, a confirmatory medial branch injection should be performed if the patient's pain pattern presents differently than the initial evaluation. In occasional patients, additional levels of RF neurotomy may be necessary. The same indications and limitations apply.

Substantial Deviations from the Medical Treatment Guidelines

9. Using the treatment Guidelines in the current case shows that the request for a repeat L-3-L5 RFN procedure is not reasonable or necessary as the first RFN procedure was negative diagnostically. The Guidelines state that for a positive response claimant have 3-4 measureable improvements in physical function. The medical records fail to show any *measureable* improvement in her function due to the RFN procedure. Claimant's statement of improvement is not supported by the records.

10. Medical records confirm Claimant failed to receive the 80% relief in pain complaints that the Guidelines require. Medical records and Claimant's own testimony prove claimant had at best 6-6.5/10 at any point during her treatment. Dr. Malinky's single report of functional improvement and 2-3/10 pain is not supported by any of the records. Claimant herself has denied ever having told him of 2-3/10 pain. Claimant failed to complete a pain diary. Available medical records during the period of time where she should have felt the most relief, indicate she actually received little to no relief from the injections.

11. The Guidelines state that the procedure and subsequent reduction in pain should last anywhere from 6-18 months. Records show that any pain relief achieved by Claimant was lost within one to two months after she received the injection on November 27, 2017. By December 20, 2017 she had pain complaints of 8/10. The guidelines suggest that in almost all cases, Claimant will have a reduction of pain to 1 or 2 on the 10-point VAS. At no point in her claim, did Claimant ever report reduction in her pain to a 1 or 2 on the 10-point VAS. Likewise, physical examination of Claimant substantiates a correlation between her continually high complaints of pain and severe functional limitation, as she never functioned in an objective manner that would indicate she was at a 1 or 2 on the 10-point scale.

12. Claimant had an insufficiently diagnostic response to the medial branch blocks and therefore no further MBBs were then warranted. However, because Dr. Malinky apparently did not know about the Guidelines, he bypassed the requirements and safeguards and moved directly to administering an *unauthorized* RFN procedure. The evidence shows that he did not follow the Guidelines to determine if Claimant had genuine lower back pain. Claimant's circumstances called for much closer adherence to the Guidelines to ensure she was receiving appropriate and authorized care.

13. After the medial branch blocks and RFN procedures, Dr. Malinky failed in the Guidelines' requirement to collect data such that the diagnostic value of the procedure is evident to other reviewers. Dr. Ridings testified that there was a lack of data indicating a positive diagnostic response. The ALJ concurs. Dr. Malinky did not identify three or four measurable physical functions, which were then impaired and could be objectively reassessed in 30 minutes of more after the injection. He also failed to follow the recommendation that he become acquainted with the patient such that he could determine pre and post VAS values, as he spent only a few minutes getting acquainted with the patient.

14. The Guidelines recommend that the evaluator be someone other than the injectionist. Dr. Malinky himself injected Claimant and then indicated that he evaluated her. The Guidelines recommend rigorous adherence to a pain diary and objective functional testing post-injection to correctly interpret the results. Claimant was given no pain diary and no pre- or post- VAS scores were taken by Dr. Malinky.

15. The Guidelines recommend a second set of medial branch blocks to rule out the possibility of a false positive and a psychosocial evaluation. Dr. Malinky acknowledged that he might have significant concern with an individual who reported anxiety as pain. He admitted he would have concern with an individual who presented with symptom magnification. He did not have the expertise to comment on psychological issues and had only had a face-to-face conversation with claimant for no more than 5 minutes; however, at intake he noted Psychiatric issues of Depression and Anxiety.

16. Dr. Moe's assessment of Claimant's severe psychological overlay essentially mandates that a second set of injections should have been given to claimant to rule out a false positive. Dr. Malinky acknowledged that the guidelines require a second set of injections to rule out a false positive, or placebo effect, but again relied on his "couple-minute" conversation with Claimant to justify his deviation from the Guidelines. The justification given by Dr. Malinky for all of his deviations is that he did not know that the Guidelines required two injections and he had a brief face-to-face conversation with Claimant. The ALJ finds such deviation in this instance is not supportable.

17. Although Claimant testified to functional improvement, the Guidelines recommend obtaining objectively measurable functional improvements. No objectively measureable functional improvement can be found within the medical records surrounding the administration of medial branch blocks or the RFN procedure.

18. Dr. Malinky agreed that pain was subjective. A physician should look at other, more objective, data to confirm a patient's subjective description of pain. Dr. Malinky did not document or confirm Claimant's subjective description of pain with objective data. Claimant's medical providers noted their concerns with her unusually high levels of pain compared to objective data and observable function. No evidence exists within the record to support functional gains attained by Claimant from any treatment she received.

19. The Guidelines' direction in eliminating false positives is especially applicable in the current instance. Four months prior to Claimant's work-injury she complained of near whole body pain complaints. Likewise, Claimant had undergone extensive work-up of her spine due to her complaints of urinary incontinence, yet no physician could explain her symptoms. Imaging of Claimant's lumbar spine showed a fully healed L1 compression fracture, with no acute pathology in her L3-L5. Claimant's providers agreed that Claimant's L1 fracture had properly healed and that it had no

effect on her L3-L-5. All objective data has failed to show any work-related pathology in claimant's L2-L5 and diagnostic tests have failed to confirm claimant's L2-L5 facet joints as the pain generator.

20. Claimant's significant and diagnosed somatic amplification of her physical feelings of pain did not justify deviating from the guidelines. While her psychological complaints do not disqualify her from receiving injections, her psychological presentation should give any provider concern when moving forward with invasive treatments and all precautions should be undertaken. Dr. Malinky himself noted "Depression and Anxiety" on Claimant's initial consult with him. Dr. Moe has opined that Claimant was a poor candidate for the RFN procedure as numerous studies evidenced poor outcomes for individuals with severe psychological overlay, such as Claimant.

21. The Guidelines indicate that RFA is **not recommended** for patients with multiple pain generators. Claimant apparently had many. They go on to state that "a *minority* of low back patients would be expected to quality for this procedure."

In Conclusion

22. The ALJ concludes that Dr. Malinky is sincere in his testimony, and felt it was in best interests of Claimant when he recommended the second MBB, then the second RFN. However, the ALJ concludes that that is simply insufficient to justify the numerous, substantial, deviations he would ask the Workers Compensation system to accept. While the Guidelines may be deviated from, sufficient documentation and rationale for so doing must be supplied by the treating physician in support. Otherwise, the Guidelines would mean very little. They exist for a reason-to assure appropriate, proven, and uniform care of injured workers. The ALJ finds the expert testimony of Dr. Ridings and Dr. Moe to be persuasive, in that Dr. Malinky has failed to justify why the proposed second RFA procedure is reasonable and necessary to treat Claimant's work injuries.

ORDER

It is therefore Ordered that:

1. Claimant's request for the second L3, L4, L5 bilateral radiofrequency neurotomy as requested by Dr. Malinky is denied and dismissed.

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

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

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

DATED: March 14, 2019

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-058-572-01

ISSUE

- Whether Claimant met his B_____en of proving by a preponderance of the evidence that he requires the use of a wheelchair accessible vehicle.

FINDINGS OF FACT

1. Claimant is a 36-year-old male who sustained an occupational injury when he fell over twenty feet from a roof while working as an installer for Employer. Claimant sustained severe injuries and has undergone extensive medical treatment.

2. Respondents admitted liability by filing a general admission of liability on October 10, 2017.

3. Claimant's diagnoses include but are not limited to catastrophic traumatic brain injury, quadriplegia, spastic hemiplegia affecting his right dominant side, hypertonicity of muscles throughout his trunk and extremities, and aphasia.[1]

4. Because of his injuries, Claimant is permanently paralyzed, non-ambulatory, and has lost function in his arms and legs.

5. On April 19, 2018, Claimant's treating neurologist, Dr. Michael Makley, prescribed a wheelchair accessible vehicle.

- Dr. Makley opined that Claimant's paralysis was a life-long mobility limitation for which he needs specialized equipment to perform mobility related activities of daily living.

- Dr. Makley opined that without such a vehicle, Claimant's "safety and health will be negatively impacted."

- Dr. Makley explained that rather than being transferred out of his wheelchair and into a regular vehicle, Claimant needs to remain seated in his wheelchair to "maintain positioning, skin protection, and due to the inability to transfer into a standard vehicle."

- Dr. Makley outlined that "[i]ndependence in community mobility can be essential for [Claimant's] autonomy, community mobility, personal care and daily living needs."

[1] Aphasia is the loss of ability to understand or express speech, caused by brain damage.

Claimant's specially trained and certified therapist, Sarah Davidson, co-wrote the prescription.

6. Claimant receives physical and occupational therapy from Monday through Friday at Learning Services Neurobehavioral Institute ("Learning Services"), a day center specialized in brain injury care.

7. On August 22, 2018, Jill Castro, MD, the medical director of Learning Services, also prescribed Claimant a wheelchair accessible vehicle. She noted that Claimant requires a specialized wheelchair to accommodate his spasticity and limited motion in his extremities. She noted that the vehicle Claimant used did not accommodate his wheelchair, which limited his ability to be more independent in the community. She prescribed a wheelchair accessible van as "medically necessary to allow [Claimant] access to the community, for frequent needs in therapy, physician visits, and other community integration."

8. On August 14, 2018, Claimant received occupational therapy. His therapist, Becky Cady, noted, "[Claimant] is much more oppositional, often does the opposite of what you are asking him to do. His is more verbal but he also has increased frustration when he can't communicate clearly. He often refuses assist when completing tasks, becoming a safety risk." Linda Morgan, and Rich Morgan, further noted under Physical Therapy, "[Claimant] is definitely overestimating his own abilities and has poor safety awareness. This is now a safety issue. He has unbuckled his wheelchair safety belt and has attempted to stand on his own."

9. Claimant's wife, Jessica B_____, testified that she has been married to Claimant for three years and together as a couple for five years. Although Claimant has round the clock care, she provides and assists in providing care for many of Claimant's needs. These include feeding him meals, attending to his restroom needs, taking him to appointments, taking him to Outward Bound programs, and being involved with his treatment.

10. Mrs. B_____ testified that Claimant is unable to care for himself. Claimant is unable to stand on his own, and his injury hinders his motor skills. Claimant poses a danger to himself if left alone, and is at risk of re-injury if he attempts to stand on his own.

11. Mrs. B_____ testified that the following complications occur when she attempts to transfer Claimant to her current vehicle.

- Claimant is at a risk of falling and injuring himself and his caregivers.
- Claimant fights and argues when she attempts to transfer him into her vehicle.
- She must use a "gap" belt to transfer Claimant into the vehicle. Doing so risks damaging Claimant's skin, which poses a risk of infection.

- Transferring Claimant overstimulates him and can cause him to experience seizures.

- Transfers are so difficult that Claimant often chooses not to participate in activities that would allow him to integrate more fully in his community.

12. When Mrs. B_____ manages to transfer Claimant into their vehicle, the following problems remain:

- Claimant is unable to maintain proper posture when restrained in his seat, which limits the distance they can travel.

- Claimant is able to unfasten the car's restraints.

- Claimant becomes aggressive in the car which and has pushed her while driving.

- Claimant "plays" with controls on the dashboard and attempts to shift gears while she is driving.

13. On November 14, 2018, Claimant's wife and physicians met to evaluate Claimant's current status and management plan. Meeting notes show that Mrs. B_____ remained unable to integrate the Claimant into the community.

14. Use of Claimant's current vehicle exposes Claimant to increased risks of skin damage, infection, and seizures. At the same time, it decreases his ability to participate in therapeutic activities and integration into his community. It exposes Claimant and his caregivers to heightened risks of harm from falling, straining, and unsafe driving.

15. Providing Claimant a wheelchair accessible vehicle would reduce these risks to Claimant's health and safety.

16. A wheelchair accessible vehicle would provide Claimant with numerous medical and therapeutic benefits, including the ability to integrate into his community. Claimant could leave his room to go out for haircuts, shopping, and social activities.

17. Claimant participated in several outdoor activities prior to his injury. Dr. Jim Schraa, one of Claimant's neuropsychologists, has recommended "fishing and other recreational activities," as therapeutic treatment. Having a wheelchair accessible van would allow CLaimant to participate in accessible outdoor activities such as visiting a paved park in Baily, Colorado, and participating in accessible programs through Outward Bound including modified skiing.

18. Since his injury, Claimant has participated in two Outward Bound modified skiing therapy programs. Once, Claimant's wife transported him in their own vehicle. Mrs. B_____ testified that Claimant smiles and "comes to life" after participating in adaptive skiing. Persuasive evidence supports a finding that Claimant would participate

more frequently in such activities if she had a wheelchair accessible vehicle because it would reduce Claimant's risk of harm.

19. Mrs. B_____ testified that the primary reason Claimant is unable to engage in additional therapeutic outdoor activities is the lack of a wheelchair accessible vehicle. Using her current vehicle involves a great production, and causes too much frustration for Claimant and his family. She testified that she would travel to the mountains and an adaptive park if she had a proper mode of transportation.

20. Learning Services provides adequate transportation if Claimant needs to be transported during his day programing.

21. Mrs. B_____ testified that she attends Claimants doctor's appointments and that she has had to take Claimant to doctor appointments that fall outside the scope of Claimant's Workers' Compensation injuries. On at least two occasions, Mrs. B_____ has had to use an ambulance for non-emergent trips to doctors or hospitals, because she was unable to transport Claimant in her own car. She credibly testified that she would have transported Claimant on those occasions if she had a wheelchair accessible vehicle.

22. Dr. Makley testified by telephone as an expert in neurology. He was Claimant's physician during his inpatient rehabilitation, and remains involved with Claimant's care. Dr. Makley testified that Claimant suffers from spastic tetraparesis, and has cognitive deficits. He further testified that the Claimant is dependent for care for the remainder of his life.

23. Dr. Makley testified that (1) Claimant requires a structured day program like that provided by Learning Services that engages him and keeps him moving; and (2) Claimant requires integration into the community. Dr. Makley recommended a wheelchair accessible vehicle in part to integrate Claimant into the community. *Dr. Makley testified that integrating Claimant into the community is vital to Claimant's medical treatment.* Specifically, the ability for Claimant to be back in his world is a medical benefit. Dr. Makley testified that it is important for all rehabilitation patients to return to their community, and that Claimant remaining in his room is inadequate.

24. Dr. Makley testified that proper usage of a wheelchair is vitally important, as positioning during transport poses risk of skin breakdown, as well as risk of re-injury. He testified that skin breakdown can be lethal, and proper seating is crucial to protecting his skin. He testified that transferring into a standard vehicle poses threats of falling, and could injure his caregivers.

25. On cross-examination, Claimant's wife agreed with Respondents' counsel that a wheelchair accessible van would make things easier for her, would provide peace of mind, and that it would make Claimant more independent. However, from context is clear to the ALJ that the primary purpose of a wheelchair accessible van is to provide Claimant with medical and therapeutic benefit.

26. The ALJ finds that Claimant established by a preponderance of the evidence that he requires the use of a wheelchair accessible vehicle is necessary for the treatment of Claimant's injuries and provides therapeutic relief from the effects of his injuries.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8- 40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). The claimant shoulders the B_____en of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. Respondent bears the B_____en of establishing any affirmative defenses. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201 (2008).

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

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

Medical Benefits – Reasonably Necessary

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). Although Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury, Respondents may, nevertheless, challenge the reasonableness and necessity of current or newly requested treatment notwithstanding its position regarding previous medical care in a case. See *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002) (upholding employer's refusal to pay for third arthroscopic procedure after having paid for multiple surgical procedures). The question of whether a particular medical treatment or modality is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial*

Claim Appeals Office, supra; *Wal-Mart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo. App. 1999).

Employers are required to provide services that are either medically necessary for the treatment of a claimant's injuries or incidental to obtaining such treatment. See *Bellone v. Indus. Claim Appeals Office*, 940 P.2d 1116, 1117-18 (Colo. App. 1997) (upholding child care services as medical in nature because they relieved the symptoms and effects of the injury and were directly associated with claimant's physical needs). However, in interpreting the scope of C.R.S. 8-42-101(1)(a), the Colorado Court of Appeals has narrowly construed the Act by stating that an apparatus must be necessary for the treatment of the injury **or** it must provide therapeutic relief from the effects of the injury. *Cheyenne Cnty. Nursing Home v. Indus. Claim Appeals Office*, 892 P.2d 443, 446 (Colo. App. 1995) (upholding employer's refusal to pay for a stair glider as being a medical apparatus because it did not provide a therapeutic benefit to the disabling injury although it provided peace of mind and access to lower levels of a home in a tornado prone area).

Respondents focus on the first clause, that if an apparatus is not medically necessary for the treatment of a claimant's injuries or incidental to obtaining such treatment then the employer will not be liable to pay for it. See *ABC Disposal Servs. v. Fortier*, 809 P.2d 1071, 1073 (Colo. App. 1990) (upholding employer's refusal to pay for a snow blower because it was not prescribed as a medical aid to cure or relieve claimant from the symptoms of his injury but rather provided an easier way to accomplish a household chore). In other recent cases, the courts have likewise denied an "apparatus" or a service where it was not found to be medically necessary, but was rather prescribed as a means to achieve an independent lifestyle or provided peace of mind in emergencies. *Bogue v. SDI Corporation, Inc.*, 931 P. 2d. 477 (Colo. App. 1996) (holding that a wheelchair accessible van was not medically necessary and therefore beyond the intent of C.R.S. 8-42-101(1)(a)); *Hillen v. Tool King*, 851 P.2d 289 (Colo. App. 1993) (Although lawn care services necessitated by Claimant's work-related condition, they are unrelated to physical condition and the lawn care was not prescribed to cure or relieve Claimant of symptoms of the injury, but simply to relieve the Claimant of the rigors of yard work).

In the Colorado cases where an apparatus or services were authorized, the courts found that the apparatus or service was medically necessary. *Bellone*, supra; *Atencio v. Quality Care*, 791 P.2d 7 (Colo. App. 1990) (housekeeping services allowed where Claimant had severely restricted use of hands and could not perform activities of daily living or chores without assistance); *City and County of Denver, School District 1 v. Indus. Claims Appeals Office*, 682 P.2d 513 (Colo. App. 1984) (Hot tub installed in home found medically necessary where Claimant's work hours prevented use of health club and hot tub was prescribed to cure and relieve the Claimant from the effects of his work injury).

For a particular medical benefit to be compensable, even if not curative, the benefit must provide "therapeutic relief" from the effect of the injury. Courts have defined "therapeutic relief" very narrowly. See *Cheyenne County Nursing Home, v. Indus. Claim Appeals Office*, 892 P.2d 443 (Colo. App. 1995). Despite the narrow reading of "therapeutic relief" in benefit jurisprudence, the case law referenced below supports the

proposition that Claimant's Employer is obligated to provide him with a wheelchair accessible van.

A wheelchair accessible van will provide therapeutic relief. For example, in *Theresa Carlson v. Applebee's R.C.I*., W.C. No. 4-210-386 (ICAO, March 17, 2000), the claimant suffered injuries to her knees and hips when a 200-pound keg fell on her while at work. Afterwards, she experienced significant difficulty walking and eventually had to use crutches. Evidence presented at hearing showed that the claimant was still unsteady when walking, even while on crutches, and had fallen on occasion. Testimony was elicited that her unsteadiness and history of falling put her at risk of further injury. At hearing, the claimant testified that using crutches caused her to experience pain in her arms, knees and hips" and that "her pain was lessened by using a wheelchair." The ALJ determined that because her wheelchair relieved the symptoms of her industrial injury, it was a medical benefit her employer was obligated to provide pursuant to section 8-42-101(1) (a), C.R.S. Additionally, the ALJ found that the employer was obligated to pay for wheelchair ramps at her home because the ramps were deemed "necessary components" of a manual wheelchair. ICAO reviewed the decision of the ALJ, and acknowledged the narrow reading of the term "therapeutic relief" as defined in *Cheyenne County Nursing Home, v. Industrial Claim Appeals Office*, supra. Nevertheless, the panel ultimately distinguished the claimant's case determining that "the ALJ reasonably inferred that the wheelchair provides therapeutic relief from the symptoms of the injury", namely pain, and that the "prescribed apparatus [was] designed to prevent further deterioration of the claimant's condition which may result from additional falling injuries." See *Carlson*, W.C. No. 4-210-386 at 2, see also *Bellone v. Indus. Claim Appeals Office*, supra. ICAO also upheld the ALJ's decision regarding the wheelchair ramps finding that "instillation of wheelchair accessible ramps is a necessary component of the claimant's use of a wheelchair. Consequently, [they perceived] no basis to interfere with the ALJ's award of wheelchair accessible ramps." *Id*. In so holding, ICAO cited to *Kuziel v. Pet Fair, Inc.*, 931 P.2d 521 (Colo. App. 1996); *Cheyenne County Nursing Home, v. Indus. Claim Appeals Office*, supra, *Stockton v. Fountain Valley Plumbing & Heating*, W.C. No. 3-953-094 (ICAO, November 19,1992) (where the employer was liable for expenses related to operation of medically prescribed hot tub).

The facts in the present case are congruous to those in *Carlson*. Claimant remains unsteady on his feet, and is unable to ambulate, and because he has a standard vehicle, he is forced to transfer from his wheelchair to his spouse's passenger seat whenever he leaves the confines of his home for certain medical and therapeutic reasons. His spasticity limits his overall mobility and ambulation, and he faces the potential for skin tears, infection, and seizures.

Similar to the Claimant in *Carlson,* substantial evidence indicates that Claimant faces an increased risk of falling and further injury. Evidence at hearing establishes that Claimant's spouse has been injured by helping lift Claimant. Claimant is further at risk of injury while seated in the passenger seat, as he is unable to situate himself in a safe position, and risks distracting his spouse while she drives. Claimant's spouse testified that Claimant attempts to unbuckle himself, and plays with knobs and handles while seated, putting all occupants at risk.

The record further supports that Claimant would suffer additional harm if he remains confined to his home. Dr. Makley testified that it is necessary to re-integrate with the community for this type of injury. Medical records establish that Dr. Jim Schraa believes Claimant will benefit from recreational activities. Claimant's spouse testified that on the two occasions she has taken the Claimant skiing, she has seen him change in demeanor, and experience considerable pleasure. This is consistent with the lifestyle Claimant enjoyed prior to his injuries, and would likely benefit from. The records also support Claimant's improvement when he engages with family activities, and fostering interactions with his two-year-old daughter. Such activities require the use of a wheelchair accessible vehicle. The facts of this case, when compared to those of *Carlson*, constitute substantial evidence that a wheelchair accessible van is necessary to relieve the Claimant's pain and symptoms as well as prevent further injury. Substantial evidence supports a finding that a wheelchair accessible van is a "necessary component" of the Claimant's use of his wheelchair; that a wheelchair accessible van would prevent further injury or falls; and that a wheelchair accessible van would relieve the fatigue Claimant experiences when transferring in-and-out of his vehicle. Finally, a wheelchair accessible van would prevent further deterioration of Claimant's condition.

Claimant's entitlement to a wheelchair accessible van finds additional support in *Gregory Harrison v. Advanced Component Systems*, W.C. No. 4-192-027 (ICAO, November 3, 2006). In *Harrison*, the employer was required to purchase for claimant, who had incomplete paraplegia, a wheelchair accessible van in order to relieve him of the symptoms of his paraplegia. In *Harrison*, the claimant had a power wheelchair but could not use it because he did not have a means to transport it. The claimant in *Harrison*, reverted back to an inadequate method of ambulation in order to engage in everyday activities. The claimant in *Harrison* would use his manual wheelchair to reach his Ford Explorer and, upon reaching his vehicle, would transfer into the vehicle on his own. Once inside, he would then have to lift his manual wheelchair inside the vehicle. At hearing, expert testimony confirmed this placed the claimant at risk of further injury to his shoulders, injuries to his back, and skin shearing. The panel in *Harrison*, similar to the panel in *Carlson*, held that the claimant was entitled to the benefit of a wheelchair accessible van because, in part, "the wheelchair accessible van is a necessary component of the claimant's use of a power wheelchair." ICAO further held that "there is substantial evidence in the record from which the ALJ reasonably inferred that the van provides therapeutic relief from the symptoms of the injury. The ALJ also found that the prescribed apparatus is designed to prevent further deterioration of the claimant's condition."

In this case, Claimant would face a worsening condition if confined to his home, and the wheelchair accessible van is an extension of his use of a manual wheelchair. Claimant requires a specialized vehicle to participate in activities outside the home, and faces injury should he utilize a standard vehicle. The record also suggests that Claimant may suffer damage to his skin if he is required to use a standard vehicle, and video evidence suggests that Claimant is at a high risk of injury if he attempts to enter or exit a vehicle on his own. Even with assistance, there is risk of injury to both the Claimant, as well as his caretakers when using a standard vehicle.

At the hearing in *Harrison*, the employer argued that the holding in *Bogue v. SDI Corporation, Inc.*, 931 P.2d 477 (Colo. App. 1996), should apply to the claimant's case. In *Bogue v. SDI Corporation, Inc.*, the court denied a conversion van for a wheelchair bound claimant where the van would only have kept claimant safe from inclement weather rather than provide him "therapeutic relief" from the symptoms of his injuries or provide him greater access to medical treatment. In response to this argument, ICAO accurately distinguished the *Harrison* claimant's case from *Bogue* by noting that the wheelchair-accessible van was "a medical aid to relieve him of the medical symptoms of his quadriplegia" not merely a benefit designed to give the claimant peace-of-mind. The facts in the present case are similar to those in *Harrison*.

As found, in order to access medical care, reintegrate into the community, pick up prescriptions, purchase groceries, or engage in any long-range activity, Claimant requires the use of a specialized vehicle. If Claimant attempts to engage in such activities, then he must use his spouse's standard vehicle. Claimant's spouse must lock the wheelchair in place, and then she must detach Claimant's wheelchair restraint, guide the Claimant into grabbing the vehicle so that he may assist her while she attempts to lift him out of his chair. Claimant's spouse must then direct Claimant's torso into the vehicle, and guide him into a sitting position into the passenger seat. Claimant's spouse must then remove the wheelchair, and place Claimant in a safe position inside the vehicle. All the while, Claimant remains unable to control parts of his body, is unable to comprehend instruction, will often resist assistance, risks damage to his skin, and injury to both himself and his spouse. These facts, in comparison to *Harrison*, represent substantial evidence that Claimant needs a wheelchair accessible van as a medically necessary component of his manual wheelchair, for relief of his industrial injury, to avoid further injury, and for greater access to medical treatment.

A wheelchair accessible van will prevent further deterioration of Claimant's condition. When comparing the ICAO decisions in *Richard Trigg v. Acoustical & Constructional Supply,* W.C. No. 3-766-426 (ICAO, September 7, 1994) and *Bellone v. Indus. Claim Appeals Office*, supra, with the facts of this case, there is additional support for the proposition that Claimant is entitled to a wheelchair accessible van. In *Trigg*, ICAO upheld the ALJ's determination that a quadriplegic needed a modified van to get "to and from medical appointments and to do his own grocery shopping in order to control his diet." ICAO upheld the ALJ's decision on the basis that it allowed the claimant greater access to treatment and prevented further degradation of claimant's condition. ICAO held that treatment designed to maintain the claimant's condition or prevent a further deterioration is considered treatment that "relieves" the effects of the injury. In this case, as in *Trigg* and *Bellone*, providing Claimant with a wheelchair accessible van will prevent deterioration of his condition. As noted at hearing, Respondents only provide Claimant with transportation for medical appointments associated with his Workers' Compensation claim. However, the medical records, as well as testimony from Dr. Makley, indicate that Claimant will benefit from engaging in recreational activities, integrating into the community, and involvement with his family. Claimant is expected to engage in everyday activities that a family unit may have, and restricting him to his home is punitive to Claimant. These facts constitute substantial evidence that if Claimant uses a standard vehicle, it will hasten the deterioration of his condition.

ORDER

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

1. Respondents shall pay the costs of a wheelchair accessible van capable of transporting Claimant's manual wheelchair in order that he might experience relief from his industrial injury and experience greater access to medical care, subject to the Division of Workers Compensation medical fee Schedule.

Dated March 15, 2019

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

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

ISSUES

I. Whether Claimant proved by a preponderance of the evidence he is permanently and totally disabled.

FINDINGS OF FACT

1. Claimant is a 71 year old native of Macedonia. Claimant earned a law degree from the University of Macedonia in 1973 and worked as a government attorney in Macedonia from 1974 until 1981. Claimant moved to the United States in 1981 and did not obtain employment in the United States until 2001. During such time period, Claimant was a stay at home father and volunteered for approximately 10 years assisting refugees with obtaining driver's licenses and housing.

2. Claimant has a pre-existing history of poorly controlled diabetes and severe hearing loss.

3. Claimant began working for Employer in 2001. Claimant worked for Employer as a custodian for approximately 16 years performing cleaning duties.

4. On January 8, 2016, Claimant sustained an admitted industrial injury to his right lower extremity when he tripped and fell while wearing a backpack vacuum. Claimant was initially diagnosed with a right ankle strain. He subsequently underwent a right ankle MRI that revealed a rupture of the anterior tibialis tendon.

5. On February 5, 2016, authorized treating physician ("ATP") Paul T. Raford, M.D. recommended surgical repair for the ruptured tendon, advising that Claimant would likely end up with a flat foot if he did not have the surgery. Claimant declined the surgery due to concerns of diabetes complications. Claimant was instructed to wear a walker boot.

6. Claimant's primary ATP, Christian U. Updike, M.D. agreed with Claimant's decision to not proceed with surgery, noting there was high "potential for medical misadventures and negative outcomes" considering Claimant's age, poorly controlled diabetes and limited English. In a February 29, 2016 medical record, Dr. Updike noted there was a paucity of research regarding the anterior tibialis, but referenced one journal article that found non-operative treatment was a reasonable option for elderly nonathletic patients. Dr. Updike recommended Claimant continue wearing the walker boot and released Claimant to perform sitting work only.

7. Claimant underwent conservative treatment, which included pain medication, Lidoderm patches, custom ankle braces and physical therapy. Claimant did not experience any significant improvement and continued to report 9.5/10 pain.

8. On June 1, 2016, Claimant presented to Yusuke Wakeshima, M.D. for a pain consultation per the referral of Dr. Updike. Dr. Wakeshima discussed the possibility of using an electrical stimulation device to treat Claimant. He noted Claimant was reluctant. Dr. Wakeshima prescribed Claimant Cymbalta for ongoing pain and explained to Claimant the medication would be utilized for neuropathic pain and chronic musculoskeletal pain and not depression. Claimant nonetheless declined to take Cymbalta due to concerns about the medication being an anti-depressant. On June 28, 2016, Claimant reported to Dr. Wakeshima that he did not feel he needed to be on any anti-depressant medication, and wanted his medical record to reflect he was not taking the medication and did not have any depression issues.

9. On August 4, 2016, Dr. Updike noted Claimant was approaching maximum medical improvement ("MMI"). Dr. Updike wanted Claimant to have an opportunity to try a second custom ankle brace. He remarked,

> I think it is reasonable that he get a 2nd change at the 2nd custom ankle brace because I think that is his only chance of possibly having gainful employment. Otherwise, he will be on permanent sitting type restrictions where he will undoubtedly lose his job and likely be in financial distress given his age, demographic, and lack of transferrable skills and language barrier.

10. Dr. Updike placed Claimant at MMI on October 6, 2016. At the time, Claimant's second custom ankle brace was in the process of being made. Claimant continued to report 9.5/10 pain. Dr. Updike provided a 21% lower extremity impairment and assigned permanent restrictions of performing sitting work only and no lifting over 10 pounds. As maintenance treatment, Dr. Updike recommended Claimant wear the ankle brace as desired and follow-up with Dr. Wakeshima.

11. Respondents filed a Final Admission of Liability ("FAL") on November 2, 2016, admitting to Dr. Updike's MMI date and impairment rating, as well as reasonable, necessary and related post-MMI treatment.

12. On November 28, 2016, Claimant filed an Application for Hearing endorsing compensability and permanent total disability.[1]

13. Claimant subsequently received his second custom ankle brace and continued to treat with Dr. Wakeshima, reporting that the new brace was not helpful and caused more pain. Claimant expressed frustration with the company that made the brace, and declined to have the brace adjusted. Claimant also declined to be on any non-steroidal anti-inflammatory medications due to concerns of diabetes complications. Dr. Wakeshima subsequently prescribed Claimant a TENS unit, which Claimant tried and reported caused increased pain.

[1] The ALJ took judicial notice of the OAC electronic records associated with W.C. No. 5-006-031-04 pursuant to C.R.E. 201.

14. On April 14, 2017, Claimant continued to report 9.5/10 pain to Dr. Wakeshima. Dr. Wakeshima noted that since his last evaluation, Claimant's primary care physician had prescribed Claimant lorazepam for anxiety/panic attacks. He noted Claimant had been seen in the emergency department at St. Joseph's Hospital for panic attacks as related to his ankle pain. Claimant reported to Dr. Wakeshima that his anxiety and panic attacks had been improving and that he did not want to see a psychologist at that juncture.

15. Dr. Wakeshima reexamined Claimant on May 11, 2017. Claimant's wife reported Claimant's overall condition was deteriorating. She reported Claimant had lost all motivation and was no longer taking his medications, performing self-hygiene or feeding himself. Claimant's wife reported Claimant was barely eating and had lost 50 pounds over the last two months. Dr. Wakeshima noted Claimant presented with a flat affect and was "not his usual argumentative self." Dr. Wakeshima questioned whether Claimant's failure to thrive was related to severe depression. Dr. Wakeshima referred Claimant to a psychologist for evaluation. At a follow up evaluation on June 15, 2017, Dr. Wakeshima continued to note progressive weight loss and an unrevealing medical workup. He referred Claimant for a psychiatric evaluation to determine whether Claimant's symptoms and depression were related to the work injury.

16. On June 27, 2017, Claimant was found by the police wandering the street and admitted to the emergency department at Lutheran Medical Center with worsening confusion, signs of dementia, decreased appetite and failure to thrive. It was noted that the behavioral health team and overnight team evaluated Claimant and "highly suspect[ed] dementia as the cause of [Claimant's] symptoms." The behavioral health team concluded Claimant was not an appropriate candidate for psychiatric placement and recommended Claimant be placed in an assisted living facility, which Claimant's family refused.

17. Claimant returned to Dr. Wakeshima on June 30, 2017. Dr. Wakeshima referred to Claimant's recent hospital visit, noting the behavioral team at Lutheran Medical Center suspected possible dementia. Dr. Wakeshima remarked that Claimant did not have a history of dementia. Dr. Wakeshima noted that, even after multiple hospitalizations and a CT scan of the brain, no etiology for Claimant's failure to thrive and weight loss had been identified. He opined that there was a strong possibility Claimant's failure to thrive was related to severe depression. He referred Claimant for a psychological and psychiatric evaluation to assess Claimant's condition and the relatedness to the work injury.

18. Claimant underwent a psychological evaluation with John Mark Disorbio, Ed.D. on July 10, 2017. Claimant's wife reported that she now spoon feeds Claimant, and once came home to discover Claimant had stuffed tissues in his mouth to the degree it became difficult to remove them. Dr. Disorbio noted that during his evaluation Claimant had difficulty responding to questions and remembering what happened, and was unaware of the day, where he was, and the name of the President. Dr. Disorbio noted it was "quite clear" Claimant was suffering with significant psychological effects, was very thought disturbed, and had some definite psychotic features and difficulties. He

assessed Claimant with major clinical depression with psychotic features, and opined Claimant was "extraordinarily emotionally and physically disabled. Dr. Disorbio recommended Claimant undergo a psychiatric evaluation to become stabilized with his psychotic condition. Dr. Disorbio did not address the cause of Claimant's condition or the relatedness of Claimant's condition to the work injury.

19. On July 24, 2017, Gary S. Gutterman, M.D. performed a psychiatric evaluation of Claimant. Dr. Gutterman issued a report dated August 7, 2017. Dr. Gutterman noted Claimant appeared somewhat catatonic and did not speak during the entire evaluation. Claimant's wife provided Claimant's history, reporting that Claimant was unable to return to work after being injured and had become increasingly depressed, with anxiety attacks beginning in in February 2017. Dr. Gutterman noted that during his evaluation, Claimant was unresponsive and lost control of his bladder, urinating in a chair. Dr. Gutterman opined that he was unable to make a diagnosis after the brief meeting and could not offer further assistance to Claimant at the time due to Claimant's state and level of function. He noted, if anything, Claimant had a severe depressive condition with an almost catatonic presentation. Dr. Gutterman opined Claimant required intensive outpatient treatment or, more likely, hospitalization to treat his psychiatric status. Dr. Gutterman did not offer an opinion on the cause of Claimant's condition or relatedness to the work injury.

20. Claimant returned to Dr. Wakeshima on August 17, 2017 with severe depression issues. Claimant remained noncommunicative with a flat affect. Claimant's spouse reported that she had made two attempts to have Claimant undergo an audiology exam, but due to Claimant being nonresponsive he was being arranged to take a hearing test utilized for infants. Dr. Wakeshima noted Claimant's clinical presentation was most suggestive of worsening major depression and opined Claimant's condition was related to the work injury. He stated that psychiatric evaluation of Claimant should be covered under workers' compensation "…as depression is part of his Workers' Compensation diagnosis." Dr. Wakeshima noted he had spoken with both Dr. DiSorbio and Dr. Gutterman who deemed Claimant severely depressed and found Claimant warranted inpatient psychiatric admission at Porter Hospital. Dr. Wakeshima referred Claimant for inpatient psychiatric hospitalization. Claimant's wife indicated to Dr. Wakeshima she wished to try intensive outpatient treatment if possible. Dr. Wakeshima noted there was no concern Claimant was a danger to himself at that time, and delayed further action until a follow-up evaluation.

21. Claimant was admitted to Denver Health on August 31, 2017 after being found wandering in the street. Claimant's wife reported Claimant began an abrupt decline six months prior when he became more depressed and anxious about his job, and had significantly worsened since. She reported Claimant had no prior history of depression, mania or psychosis. The following factors were noted as indications for Claimant's hospital admission: "[G]ravely disabled and unable to perform basic self-care activity and maintain safety, severe problem with cognition, memory, judgment or impulse control and management at a lower level of care not feasible until acute intervention is initiated." Claimant was hospitalized for one week and underwent workup for dementia; however, it was noted that "normal laboratory studies and normal neuro imaging

suggest[ed] a primary psychiatric etiology." Claimant was discharged on September 6, 2017 with a diagnosis of a severe single current episode of major depressive disorder with psychotic features. He was prescribed medications for depression, catatonia and paranoia, and referred for follow up with his primary care provider and an outpatient psychiatrist.

22. Cynthia Bartmann, CCM, CDMS, performed an employability evaluation at request of Claimant. Ms. Bartmann met with Claimant on March 17, 2017. She issued an initial employability evaluation report on April 5, 2017. Claimant's wife served as his interpreter during the evaluation. Claimant's wife reported to Ms. Bartmann that, on occasion, Employer would call her on the telephone with instructions to translate for Claimant. Claimant reported that, even with hearing aids, it is difficult for him to hear normal conversations. Claimant reported to Ms. Bartmann that he did not obtain employment upon relocating to the United States due to language difficulties and his education not being recognized. Claimant reported continued severe pain and an inability to drive, manage stairs, stand for more than a few minutes at a time, walk more than one block, and sit for periods of time without elevating his leg. Claimant reported no limitations with his upper extremities. Ms. Bartmann noted Claimant has held only one job since living in the United States, a janitor, which she opined falls in the unskilled category. She further noted that Claimant's permanent work restrictions of no lifting over 10 pounds and sitting work only limited him to sedentary work and precluded him from working in a janitorial position. Ms. Bartmann opined Claimant's restrictions placed him in a sedentary work category, and noted certain jobs in the sedentary work category require a good command of the English language, which Claimant did not possess. She noted that other sedentary jobs would likely involve some amount of walking, and that potential employers would likely not be willing to train someone Claimant's age. Ms. Bartmann further noted Claimant's hearing loss makes it difficult for Claimant to understand directions. Ms. Bartmann opined that, based on Claimant's age, limited work history, physical limitations, language limitations and work restrictions, Claimant is precluded from employment and unable to earn any wages.

23. Patricia A. Anctil, CRC, CDMS, CCM performed a vocational assessment at the request of Respondents. She met with Claimant on March 10, 2017 and issued a vocational report dated July 10, 2017. A professional interpreter was used during the assessment. Ms. Anctil noted Claimant presented as fluent in English. Claimant's wife reported Claimant can speak, read, and write in English. Claimant reported being able to speak approximately 10 languages, including Macedonian, Turkish and Albanian. Ms. Anctil noted Claimant's employment application indicated Claimant can also read, write and speak French, Italian and Swedish. Claimant reported continuing 9.5/10 pain. Claimant did not specify how long he can stand at one time. He reported an inability to walk more than 50 feet at a time and sit for extended periods of time. Claimant reported he sometimes elevates his foot when seated. Claimant reported he cannot kneel, bend, stoop or lift, but had no issues with his upper extremities.

24. Ms. Anctil noted Claimant reported he did not seek employment until 2000 because he was a stay at home dad after relocating to the United States. Claimant volunteered with Lutheran Services from 1990 until 1999 assisting refugees with

obtaining identification, passing driving tests, informal translation, computer skills, and purchasing food. She further noted Claimant is computer literate. Using the Dictionary of Occupational Titles, Ms. Anctil opined that Claimant's prior employment and volunteer work was classified in unskilled, semi-skilled and skilled categories. She acknowledged Claimant had not been released to work in a janitorial position, and his physical restrictions placed him in sedentary occupation category. Ms. Anctil identified some possible sedentary occupations for Claimant, including translator and assembler. Ms. Anctil contacted some translation agencies, noting requirements varied, but that certification was not always required. Regarding Claimant's hearing loss, Ms. Anctil noted reasonable accommodations could be made. With respect to Claimant's age, Ms. Anctil referred to a newspaper article noting expected increase in labor force participation of older workers due to the slowing growth of the labor force, and a second newspaper article noting the value of older workers in bringing expertise to the workplace.

25. On December 11, 2017, Ms. Bartmann issued an updated employability evaluation. Ms. Bartmann noted Claimant remained in the sedentary work category; however, per her review of additional medical records, Claimant now appeared to be non-communicative and unable to follow directions, having problems with cognition, memory and judgment. Ms. Bartmann noted that, although Claimant was able to speak English, language difficulties were documented throughout the medical records and an interpreter was used for the majority of his medical appointments. Ms. Bartmann opined that Claimant's hearing loss would present safety concerns working in a manufacturing environment. She stated she was unaware how Claimant could perform the jobs suggested by Ms. Anctil at 70 years of age with no related work experience in the United States, severe hearing loss, work restrictions, English as his second language, an inability to drive, and an inability to respond to questions in an employment interview.

26. Ms. Bartmann testified at hearing as an expert in vocational rehabilitation. Ms. Bartmann testified consistent with her reports and continued to opine that, based on Claimant's age, restrictions, work experience, hearing issues and language issues, Claimant is unable to earn a wage. Ms. Bartmann testified Claimant's education is not recognized in the United States, and the only job Claimant has had while living in the United States has been as a custodian. Ms. Bartmann stated she considered Claimant's vocational skills from the last 15 years, as skills beyond 15 years become obsolete. Ms. Bartmann testified that Claimant's hearing and language issues present difficulties with training and communication. Regarding age, Ms. Bartmann acknowledged that there can be a niche for highly skilled older workers in certain jobs, but that this was not the case for an unskilled worker such as Claimant. Ms. Bartmann testified that, solely considering Claimant's physical restrictions and other human factors such as age, language limitations and hearing loss, Claimant is unable to earn a wage. She further testified that, considering Claimant's psychiatric issues alone, Claimant is unable to earn any wages.

27. Dr. Updike testified at hearing as an expert in occupational medicine. Dr. Updike testified that communication with Claimant was difficult due to Claimant's hard-of-hearing behaviors, even when Claimant was wearing his hearing aids. He testified he

first saw Claimant with no interpreter, but subsequently requested and used an interpreter. Dr. Updike testified that poor hearing can lead to decreased mood and depression, but that he was unaware of how common a factor hearing loss is in dementia. Dr. Updike stated that depression was not a concern when he was seeing Claimant. Dr. Updike testified that Claimant's conservative treatment consisted of medications, physical therapy, custom ankle braces, splints, walker boots, and opined that nothing else could have been done for Claimant. He reiterated his opinion that surgery would not have made a significant difference in Claimant's functional outcome considering Claimant's age and other factors. Dr. Updike testified that, but for Claimant's workers' compensation injury, Claimant would most likely still be working.

28. Claimant's former supervisor, David Nelson, testified at hearing that he communicated with Claimant in English. He testified that Claimant reviewed and submitted written documents in English. Mr. Nelson further testified that Claimant is hard of hearing and he was unable to communicate with Claimant if Claimant was not wearing his hearing aids. Mr. Nelson confirmed Claimant was unable to continue performing his job as a custodian due to his permanent work restrictions.

29. On March 1, 2018, Ms. Anctil testified in a post-hearing deposition as a vocational rehabilitation expert. Ms. Anctil testified consistent with her report and continued to opine Claimant is capable of obtaining employment. Ms. Anctil testified she considered Claimant's restrictions, age, hearing issues and transferrable skills in reaching her conclusions. She stated Claimant's education and volunteer work fall within the skilled category. Ms. Anctil noted several points of disagreement with Ms. Bartmann's reports and testimony. She testified that Ms. Bartmann failed to conduct a transferrable skills analysis, which is standard methodology in the field. She further testified that the Dictionary of Occupational Titles is widely used. Ms. Anctil opined Claimant's age does not exclude him from employment, nor does his severe hearing loss. Ms. Anctil continued to opine Claimant is proficient in the English language. She acknowledged that, prior to issuing her report, she had not reviewed additional medical records regarding Claimant's mental state. She testified that she had since reviewed the reports of Drs. Wakeshima and Gutterman, but did not conduct updated labor market research, because it had not been determined Claimant's mental condition was related to the work injury. Ms. Anctil testified that Claimant would not be able to obtain or maintain work in his current psychiatric state.

30. Ms. Bartmann provided rebuttal testimony in a deposition on April 11, 2018. Ms. Bartmann testified she had no reason to complete a transferrable skills analysis as Claimant's work history consisted of janitorial work, which falls in the unskilled category with no transferrable skills. Ms. Bartmann testified that she contacted the translation agencies listed in Ms. Anctil's report, and was informed generally certification was required to be a translator, with some exceptions, and that formal training, and in some circumstances, higher education or paid experience as a translator is required.

31. Ms. Anctil offered surrebuttal deposition testimony on December 11, 2018. She testified that a transferrable skills analysis should include not only prior work experience but education, volunteer work and hobbies. She acknowledged that the standard period

of time to consider when performing a vocational assessment is 15 years, but that a 15-year period is not a set rule. Ms. Anctil testified that Claimant's skills go beyond janitorial duties due to Claimant's prior vocational experience. Ms. Anctil testified she re-contacted some of the listed translator services, and was informed by some services that certification was not needed, Claimant's volunteer service could be considered, and that his hearing issues and physical restrictions would not disqualify him from employment.

32. The opinion and testimony of Ms. Bartmann is found more credible and persuasive than the conflicting opinion of Ms. Anctil.

33. The ALJ finds the opinions of Drs. Wakeshima, Gutterman and DiSorbio credible and persuasive.

34. Claimant proved it is more probable than not he is unable to earn any wages in any employment and that the work injury was a significant causative factor in Claimant's inability to earn any wages.

35. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

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

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

testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

Permanent Total Disability

To prove his claim that he is permanently and totally disabled, the claimant shoulders the burden of proving by a preponderance of the evidence that he is unable to earn any wages in the same or other employment. Sections 8-40-201(16.5)(a) and 8-43-201, C.R.S. (2003); *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The claimant must also prove the industrial injury was a significant causative factor in the PTD by demonstrating a direct causal relationship between the injury and the PTD. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001). The term "any wages" means more than zero wages. *See Lobb v. Industrial Claim Appeals Office,* 948 P.2d 115 (Colo. App. 1997); *McKinney v. Industrial Claim Appeals Office,* 894 P.2d 42 (Colo. App. 1995). In weighing whether claimant is able to earn any wages, the ALJ may consider various human factors, including the claimant's physical condition, mental ability, age, employment history, education, and availability of work that the claimant could perform. *Weld County School Dist. Re-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). The ALJ may also consider the claimant’s ability to handle pain and the perception of pain. *Darnall v. Weld County,* W.C. No. 4-164-380 (I.C.A.O. April 10, 1998). The critical test is whether employment exists that is reasonably available to claimant under his or her particular circumstances. *Weld County School Dist. Re-12 v. Bymer*, *supra*. The question of whether the claimant proved inability to earn wages in the same or other employment presents a question of fact for resolution by the ALJ. *Best-Way Concrete Co. v. Baumgartner,* 908 P.2d 1194 (Colo. App. 1995).

As found, Claimant has proven it is more probable than not he is unable to earn any wages in the same or other employment. As a direct result of his work injury, Claimant is subject to permanent physical restrictions of performing only sitting work and lifting no more than 10 pounds, precluding him from continuing employment in the same or similar employment. In addition to Claimant’s permanent restrictions, Claimant has consistently reported continuing functional limitations, including an inability to drive, manage stairs, and sit for extended periods of time without elevating his leg. Respondents argue, in part, that they should not be liable for permanent total disability benefits because Claimant has refused reasonable medical treatment that would alleviate or mitigate his condition. The ALJ disagrees. Claimant attempted the majority of treatment recommended by his treating providers, including taking various medications and wearing a TENS units and two custom ankle braces, none of which

provided significant sustained relief. Claimant declined to undergo surgery or take certain medications due to concerns of diabetes complications. Dr. Updike agreed with Claimant's decision to not proceed with surgery. He later credibly testified nothing more could be done for Claimant. The ALJ is persuaded Claimant's refusal of certain treatment was reasonable under the circumstances.

In addition to Claimant's physical condition and restrictions, multiple human factors contribute to Claimant's inability to earn wages. The only employment Claimant has held in the last 37 years is janitorial work, which he performed for 16-17 years prior to sustaining the work injury. It is undisputed janitorial work falls in the unskilled category. Although Claimant earned a law degree in Macedonia in 1973 and worked as an attorney for seven years, Claimant's education was not recognized upon his relocation to the United States, and such legal experience was obtained in a different jurisdiction over 30 years ago. Claimant's volunteer service took place over 15 years ago. Ms. Bartmann credibly opined that skills beyond 15 years are considered obsolete. Moreover, while Claimant assisted refugees with various tasks while volunteering, including some translation, there is insufficient credible and persuasive evidence regarding the extent of the translation services he provided.

English is not Claimant's first language. Despite a few records indicating Claimant speaks fluent English and did not wish to use an interpreter, either a professional interpreter or Claimant's wife was utilized at almost all of Claimant's medical appointments and the vocational assessments. While it is reported Claimant can speak, read and write multiple other languages, the level of proficiency in each language is unknown. Additionally, Claimant is severely hard of hearing, which Ms. Bartmann credibly opined affects Claimant's employability. Claimant is also 71 years old, which presents additional challenges to obtaining and maintaining employment. While older workers who are highly skilled may have access to certain employment opportunities, Ms. Bartmann credibly and persuasively testified that Claimant does not fall in such category, having solely performed unskilled work in the last 16-17 years.

The ALJ is persuaded the physical restrictions resulting from Claimant's work injury, along with the human factors of Claimant's age, limited work history in an unskilled position, language issues, and severe hearing loss render Claimant unable to earn any wages. As Claimant's physical restrictions and functional limitations are a direct result of the work injury, the ALJ concludes the work injury was a significant causative factor in Claimant's permanent total disability.

Beyond the aforementioned factors, Claimant's mental state further contributes to his inability to earn any wages. Claimant has been diagnosed with depression with psychotic features, and has been noted to be unresponsive and near catatonic in his presentation. Such presentation clearly precludes Claimant from obtaining and maintaining employment. Dr. Wakeshima opined that Claimant's mental state is a result of the work injury, thus further establishing the work injury as a significant causative factor in Claimant's inability to earn any wages.

Although Ms. Anctil opined there are certain jobs Claimant can perform, the ALJ is not persuaded these jobs are reasonably available to Claimant under his particular circumstances. Based on the totality of the credible and persuasive evidence, Claimant has met his burden of proof to establish he is permanently and totally disabled.

ORDER

It is therefore ordered that:

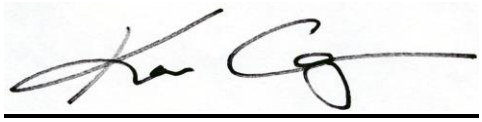
1. Respondents shall pay Claimant permanent total disability benefits commencing on October 6, 2016, subject to any applicable credits and offsets.

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

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

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

DATED: March 15, 2019



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that her incisional hernia is causally related to her work injury which occurred on 5/16/2018?

STIPULATIONS

The parties stipulated that a work injury occurred on the above date which injured Claimant's neck and shoulder; the sole issue before the ALJ is causation of this admitted work injury for Claimant's incisional hernia. While other issues were deferred for this hearing, the ALJ finds that implicit in this issue is the awarding of any reasonable, necessary, and related medical expenses for the incisional hernia.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Claimant suffered an injury on May 16, 2018 while working for Employer. According to the "Associate Incident Report Form" of Employer, Claimant was "preventing a resident from falling went to grab resident while on the toilet, felt tightness to left lower portion of neck and shoulder." (Ex. D, p. 44) (*note-all page numbers for Respondents' Exhibits are referenced from bottom center bates numbers of said Exhibits). Claimant signed this report.

2. The report identifies the left shoulder and lower neck as the body parts injured in the incident. At hearing, Claimant testified that she "felt like she ran a marathon" and referred to her whole body being injured, although such description is not reflected in this initial report.

3. Claimant was initially evaluated by Dr. Jessica Fisher with UC Health on 5/17/2018. The reason for visit was noted as "trying to stop pt from falling, she injured her left shoulder, neck pain." Claimant stated to Dr. Fisher that she "used her left arm at the front of the resident" and "noted subsequent s/s neck pain (L>R), left shoulder pain." The initial diagnosis of Dr. Fisher was "cervical strain, left shoulder pain." (Ex. B, p, 8). These initial reports do not reference hernia pain or lower body pain at this visit to Dr. Fisher.

4. Claimant returned to visit Dr. Fisher on May 24, 2018. Diagnosis continued as "cervical strain, left shoulder strain." (Ex. B, p. 16).

5. Hernia pain or lower body pain at the May 24, 2018 visit to Dr. Fisher are not referenced in the reports. Claimant was restricted from overhead reaching, and

limited use of left shoulder, and no crawling or climbing. MMI was anticipated to occur on 6/14/2018. (Exhibit B, p. 16). In her medical history, Claimant was noted to have had two cesarean sections, along with a cholecystectomy. *Id*

6. Claimant returned to see Dr. Fisher on 6/7/2018. At this visit, Claimant was noted to have been evaluated "via "PCP" for upper abdominal "bulge" *just noted last week."* Dr. Fisher opined that it was "<50% probability for causation (re: incisional hernia)." Further, Dr. Fisher noted that "Findings consistent with incisional hernia as reviewed with IW. Work-related mechanism . . . unlikely as discussed." Claimant was to resume follow up with her "PCP." (Ex. B, p. 25) (emphasis added).
   At no point in this visit does Dr. Fisher note that Claimant was in any *pain* from this bulge; she merely noted its presence, and marked its location on a diagram. *Id* at p. 28. The ALJ notes further than *pain* was not mentioned by Claimant until her IME with Dr. Hall in December, 2018.

7. Claimant returned to Dr. Fisher on 6/21/2018. It was noted that she was improving but the incisional hernia noted on 6/7/2018 was again noted in this report. MMI was now anticipated to occur on 7/19/2018. (Ex. B, p.32).

8. The next visit to Dr. Fisher in the available records is referenced on August 22, 2018. The incisional hernia noted on June 7, 2018 is not noted in this report. (Ex. B, p. 38). It was noted that before her termination from employment that she was tolerating work well without complaint/concern. MMI was now anticipated for 9/12/2018).

9. Claimant's medical records were reviewed by Dr. Carlos Cebrian at Respondents' request. Dr. Cebrian produced a report dated November 6, 2018. Dr. Cebrian noted that Dr. Fisher's June 7, 2018 report noted a small reducible incisional hernia, related to remote laparoscopy site. (Ex. A, p. 2).

10. Dr. Cebrian also noted that Dr. Fisher had expressed her concern that the hernia "symptoms were not present at the initial visits and were only noted on her acute visit with her primary care physician when she was seen for upper respiratory infection and believed the hernia was related to her old laparoscopy site." Dr. Cebrian also noted that Dr. Fisher also believed Claimant's "body habitus" was a factor. (Ex. A, p.4) (*note-This note from Dr. Cebrian references Dr. Fisher's report dated 7/23/2018. Dr. Cebrian also references reports from Dr. Fisher from 7/12/18, 7/31/18, 8/8/18, and 9/5/18-none of which were presented as exhibits at hearing).

11. Dr. Cebrian opined that Claimant was diagnosed with an incisional abdominal hernia, which develops at a site where a surgery had previously been performed. He further indicated that there "was a temporal delay in the development of the incisional hernia" and that Claimant was evaluated 'multiple' times before there were complaints. He further explained that Claimant would have had

"immediate pain" and tearing of the muscles which would have "resulted in acute pain." (Exhibit A, p.7).

12. Dr. Cebrian concluded, "Ms. Sotelo is obese and the constant increased intra-abdominal pressure is a risk factor for the development of an incisional hernia." *Id.*

13. Claimant was also evaluated by Dr. Timothy Hall at Claimant's request, and a report was issued on 12/17/2018. (Ex. 5). Dr. Hall only referenced visits with Dr. Fisher from 5/24/18, 6/7/18, and 6/21/18. No subsequent visits to Dr. Fisher are noted. Dr. Hall does note in the history of the incident that Claimant told him:

> She hurt primarily, the left shoulder, upper back and neck, but reports she was hurting all over for a time following this event. She, a week later or so, noticed this deformity in her upper abdomen and went to Peak Vista. The Peak Vista provider told her she should go tell Work Comp about it. She did that and reports that Dr. Fisher told her it was not related. (Ex. 5, p. 18).

14. Dr. Hall further noted:

> I went over the medical history. ***She had a gallbladder surgery involving that area in 2003 due to stones. She has had no problems since.*** She had a back injury in 2012. She had a car accident in 2011. In 2013, she was diagnosed with diverticulosis and had an upper and lower GI done. (Ex. 5, p. 18) (emphasis added).

15. Dr. Hall concluded his report:

> …..At issue here is causation. ***The question is whether it is more likely that this hernia occurred spontaneously with no particular precipitating event or if it is the consequence of this straining maneuver while catching the patient.*** It is my opinion within a reasonable degree of medical probability it is the latter. It is clear from the patient's history that she was bent over trying to hold the patient up and then lowered her to the ground. This would create a lot of muscle activity through the rectus abdominis, which is the area of the tear, probably through the previous surgical scar. This would represent a weak section of the abdominal wall/muscle, which simply could not carry the load of this event. ***I find it extremely unlikely that it would be simply a coincidence*** that she had this event at work and then the development of this rather obvious finding on her abdomen, which she would not have missed if it existed previously. I disagree with Dr. Fisher's causation opinion. (Ex. 5, pp. 18-19). (emphasis added).

16. Claimant testified at hearing. She testified that while she "hurt all over" as a result of this work incident, her primary focus at the time was her neck and shoulder. She believes she noticed the hernia bulge 'about a week' after the incident, and may have told Dr. Fisher about it on the 5/24/2018 visit, but was told it was not work-related. Claimant testified that she had not noticed this bulge before, and had not engaged in any strenuous activity after the work injury which might have precipitated this injury. Claimant also recounted that since Dr. Fisher dismissed the work-relatedness of the bulge, there was little time spent on it after that.

CONCLUSIONS OF LAW

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

Generally

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

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as the fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990) Moreover, the ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion). In this case, the ALJ finds that Claimant, while an imperfect historian, has testified in good faith, and provided her medical providers the best information she could, in an effort to be medically assisted.

C. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals*

Office, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

When the Incisional Hernia was first Reported

D. Claimant has indicated that she first noticed this hernia "about a week" after the work incident. The lack of reference to this in Dr. Fisher's 5/24/2018 report suggests that Claimant did not *report* the hernia until she saw her PCP the week following this 5/24/2018 visit. While Claimant's PCP's report is not in evidence, Dr. Fisher did note in her 6/7/2018 report that Claimant had reported it to her own PCP "just last week" - which would place this PCP visit the week of May 28-June 1. The ALJ does conclude that this is the most likely time that Claimant *reported* this symptom to any medical provider – a period of approximately two weeks from the injury date. It is less clear when Claimant first began to *notice* the bulge herself, but the ALJ credits her testimony that she was primarily focused on the shoulder and neck *pain* at the beginning. Regardless of her causation analysis, Dr. Fisher felt that Claimant's neck and shoulder injuries were serious enough to eventually move her MMI date back to at least 9/22/2018 – two months past the original MMI date.

E. Dr. Cebrian has opined, and not entirely without reason, that Claimant 'should have' felt pain immediately after this work incident, and not at some later point in time. However, delayed pain appears to be what occurred. Even at the 6/7/2018 visit, when it was first brought to Dr. Fisher's attention, *pain* was not mentioned- just the bulge. Claimant detailed at hearing that Dr. Fisher was not interested in this hernia, and referred her back to her PCP. *Pain* was never documented until Claimant's IME with Dr. Hall in December. The inference the ALJ draws from this evidence is that *this untreated incisional hernia has gotten worse with time,* now manifesting itself painfully, and is no longer a mere bulge.

Claimant Aggravated a Pre-Existing Condition due to this Work Injury

F. The mere fact that a Claimant suffers from a pre-existing condition does not disqualify a claim for compensation or medical benefits if the work-related activities aggravated, accelerated, or combined with the pre-existing condition to produce disability or a need for medical treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Pain is a typical symptom from the aggravation of a pre-existing condition, and the claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment-related activities and not the underlying pre-existing condition. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949). The Claimant must prove by a preponderance of the evidence that her symptoms were proximately caused by an industrial aggravation of a pre-existing condition rather than simply the natural progression of the condition. *Melendez v. Weld County School District #6*, W.C. No. 4-775-869 (ICAO, October 2, 2009). The ALJ finds that Claimant's gallbladder incision site was, in effect, a preexisting condition which

rendered her more susceptible to a re-aggravation, and possible herniation, if sufficient force were applied.

G. While the onset of *pain* was apparently delayed, the above analysis does not change. Claimant first *reported* this bulge about two weeks after her work injury. She apparently *noticed* it sometime between 5/24/18 and her PCP visit. She is adamant that there was not a separate incident, away from work and after 5/16/2018, which caused her to strain. Given the pain Claimant was already in from the shoulder and neck injuries, it is easy enough to conclude that she was not engaging in *extra-employment* strenuous activities, post 5/16/2018.

H. The ALJ simply cannot accept Dr. Cebrian's analysis - and apparently that of Dr. Fisher – that Claimant's weight was the likely cause of this hernia manifesting itself. Claimant had her gallbladder removed **15 years** prior – apparently without incident, despite, presumably being overweight to some degree that whole time. She even had some sort of back injury in 2012, and a car accident in 2011, without herniating either time. This was no mere natural progression of an underlying pathology. It was an *event.*

I. The ALJ is more persuaded by Dr. Hall's position that Claimant's abdominal wall –weakened by her prior surgery - could not carry the strain of this work incident. It was not a mere coincidence that her symptoms coincided with the work incident; there was a cause-and-effect relationship, and the ALJ so finds, by a preponderance of the evidence.

Medical Benefits

J. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. § 8-42-101, C.R.S. Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Indus. Comm'n*, 491 P.2d 106 (Colo. App. 1971); *Indus. Comm'n v. Royal Indemnity Co.,* 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Indus. Comm'n v. Jones*, 688 P.2d 1116 (Colo. 1984); *Indus. Comm'n v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

K. In this case, Claimant has shown that the incisional hernia proximately flowed from her admitted work injury which occurred on May 16, 2018. While the onset of *pain* did not occur until later, a sufficient nexus has been established between her

work injury and her need for treatment. Respondents are responsible for all medical care that is reasonable, necessary, and related to her work injury, and this includes the incisional hernia repair.

ORDER

It is therefore Ordered that:

1. Respondents shall pay for all reasonable and necessary medical costs for the repair of Claimant's incisional hernia.

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

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

DATED: February 15, 2019

/s/ William G. Edie

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

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that the total left knee arthroplasty proposed by David Beard M.D. is reasonable, necessary and related to his May 15, 2017 admitted left knee injury.

FINDINGS OF FACT

1. Claimant is a 65 year old man with a pre-existing history of gout. Claimant has worked for Employer for 30 years repairing vending machines. Claimant's regular work duties involved standing and walking at least 8-10 hours per shift, and required kneeling, squatting, and crawling.

2. On May 15, 2017, Claimant suffered an admitted industrial injury to his left knee when he fell off the back of a truck while unloading vending equipment. Claimant immediately reported the injury to Employer and was taken to UC Health Urgent Care. Claimant underwent a left knee x-ray that revealed mild degenerative change without acute bony finding. He was initially diagnosed with a left knee sprain.

3. Claimant subsequently began treatment with authorized provider UC Health Occupational Medicine. On May 22, 2017, Michael Deltz, PA-C assessed Claimant with the following: left knee strain with history of gout differential diagnosis gouty attack peripatellar tendon. Claimant reported he had experienced three major gout attacks in the last 15 years. The body parts that were not specified. Claimant was placed on restrictions of no lifting over 20 pounds and no walking or standing more than one hour per day.

4. On May 25, 2017, Claimant underwent a left knee MRI that revealed a complete rupture of the anterior cruciate ligament (ACL) with posterior tibial bone contusions and intermediate-sized joint effusion and a left knee medial meniscus bucket-handle tear.

5. Authorized treating physician (ATP) John D. Charbonneau, M.D. referred Claimant to orthopedic surgeon David A. Beard, M.D., who first evaluated Claimant on June 30, 2017. Dr. Beard reviewed the MRI, diagnosed Claimant with a work-related ACL tear and bucket handle tear of the medial meniscus, and recommended Claimant undergo an ACL reconstruction, allograft and partial medial meniscectomy.

6. On July 8, 2017, Mark Failinger, M.D. performed a Rule 16 record review at the request of Respondents. Dr. Failinger also performed an independent medical examination (IME) on July 31, 2017. Dr. Failinger reviewed, *inter alia*, Claimant's x-rays and MRI and physically examined Claimant. His impression was as follows: acute ACL tear, displaced bucket-handle medial meniscus tear, mild chondromalacia of the medial femoral condyle, and mild chondromalacia of the proximal pole of the patella. Dr.

Failinger concluded that Claimant was a candidate for the proposed ACL reconstruction and partial medial meniscectomy. He opined that Claimant's need for surgery was related to his May 15, 2017 work injury, stating, "[t]here does not appear to be anything in the records that I have been supplied or in his history that indicate there was prior injury or preexisting conditions other than some mild chondromalacia which does not appear to be causing problems at this point." Dr. Failinger noted that the surgery should be performed as soon as possible to avoid permanent loss of full extension.

7. On October 18, 2017, Dr. Beard performed a left knee ACL reconstruction and partial medial and lateral meniscectomies. Dr. Beard's operative report notes areas of grade 3 and grade 4 chondral changes along the medial femoral condyle and some grade 2A chondral changes on the lateral tibial plateau. There were no operative complications.

8. Claimant subsequently treated with medication and physical therapy and was released to full-time work light office or shop work with restrictions of lifting no more than 15 pounds, no walking or standing more than one hour per day, and no crawling, kneeling, squatting or climbing. Claimant was unable to take oral anti-inflammatory medication due to kidney issues.

9. Claimant's condition did not improve as expected. Due to the continued pain and swelling in the left knee, Dr. Beard performed an aspiration of the left knee on November 9, 2017 and a second aspiration and steroid injection on November 30, 2017. Dr. Beard opined Claimant's symptoms were likely secondary to Claimant's primary osteoarthritis.

10. During a follow-up evaluation with Dr. Charbonneau on December 11, 2017, Claimant continued to complain of constant left knee pain and swelling. Claimant reported having a gout flare-up in his right ankle the previous week. Dr. Charbonneau opined that infection, gout or other potential causes of Claimant's symptoms needed to be ruled out.

11. On December 14, 2017, Dr. Beard noted Claimant underwent laboratory studies that showed no evidence of infection. He continued to opine Claimant's ongoing knee inflammation was likely secondary to osteoarthritis. Dr. Beard recommended Claimant continue conservative management. He further noted that Claimant's final option would be a total knee arthroplasty, but specified that such surgery would be due to Claimant's osteoarthritis, which he opined was not work-related.

12. On January 12, 2018, Claimant presented to his personal care physician, Richard Budensiek, M.D., reporting a gout flare-up of his right ankle. Claimant was ordered to take prednisone for five days.

13. Dr. Beard reevaluated Claimant on January 25, 2018. He noted Claimant continued to have persistent problems with pain and swelling due to pre-existing, non-work-related osteoarthritis. Dr. Beard opined Claimant was not having difficulties with the reconstruction itself. He requested authorization for a total left knee arthroplasty,

noting, “It is quite possible that this might be denied through his Worker’s Compensation claim as this was preexisting…If his total knee arthroplasty is denied by his Workers’ Compensation claim, it would then have to fall back on his commercial insurance.”

14. On February 1, 2018 Respondents denied authorization of the total knee arthroplasty as not related to the admitted work injury.

15. Dr. Failinger performed an additional medical records review on February 3, 2018 and opined that the recommended total knee replacement was not related to the May 15, 2017 work injury, nor was it reasonable or necessary at that time, as Claimant was only a few months post-surgery. Dr. Failinger questioned whether Claimant’s continued symptoms were actually the result of infection, a gouty flare-up, or arthritis. He recommended further testing and re-aspiration of Claimant’s knee. He opined that if Claimant chose to proceed with the knee replacement, it should be performed under Claimant’s private health insurance, as his arthritis was pre-existing.

16. Claimant underwent additional x-rays of the left knee on March 3, 2018 that revealed joint effusion and marked joint space effacement medially.

17. Claimant continued to see Dr. Budensiek, reporting continued left knee pain and worsened gout pain on March 16, 2018. The area of gout pain was not specified. Dr. Budensiek performed another left knee aspiration and steroid injection.

18. On March 22, 2018, Dr. Charbonneau reevaluated Claimant, noting the March 3, 2018 x-rays showed medial compartment degenerative joint disease. Claimant reported improvement in his left knee after his most recent aspiration and injection, but remained limited in kneeling, climbing, stairs and crawling. Dr. Charbonneau recommended Claimant return to Dr. Beard to determine if surgery was still indicated.

19. Claimant returned to Dr. Beard on March 29, 2018, who opined Claimant had reached maximum medical improvement (MMI) for his work-related injury. Dr. Beard opined Claimant ongoing symptoms were related to his primary osteoarthritis, which was not work-related. He recommended Claimant return to his primary ATP for placement at MMI and assignment of an impairment rating, and that Claimant pursue the total knee arthroplasty through his personal health insurance.

20. On April 2, 2018, Claimant returned to Dr. Budensiek’s office reporting a second degree burn on his right foot and an acute gout flare-up in the right foot. By April 4, 2018 Claimant’s right ankle and foot pain had improved.

21. Dr. Charbonneau reevaluated Claimant on April 17, 2018. Referring to the MTG, he that Claimant suffered a work-related aggravation of his underlying osteoarthritis and that the proposed surgery should be covered under workers’ compensation. In support of his opinion, Dr. Charbonneau noted Claimant had no previous left knee injuries or symptomatic episodes of left knee osteoarthritis or left knee gouty arthritis. He further noted Claimant’s had a five-month delay between the injury and the authorization for surgical repair of his ACL and medial meniscus, and that

since the surgery, Claimant had experienced constant left knee pain, recurrent effusions and, more recently, left knee weakness. He continued Claimant on work restrictions.

22. Claimant continued to see Dr. Beard, who performed left knee aspirations on June 8 and June 19, 2018. Cultures from the knee aspirate were tested and found negative for infection. Dr. Beard again opined Claimant's chronic knee effusion was secondary to osteoarthritis.

23. On September 18, 2018, Jeffrey A. Wunder, M.D. performed an IME at the request of Claimant. He noted Claimant had a history of gout primarily in his ankles, with a few episodes of gout in his great toes and right elbow, but never affecting his knees. Dr. Wunder performed a records review and physically examined Claimant. He noted Claimant had evidence of longstanding but mild underlying osteoarthritis in his knee, and Claimant reported having no history of left knee problems prior to the work injury. Dr. Wunder opined that Claimant's work injury "clearly" affected his osteoarthritis, noting that the May 2017 and March 2018 x-rays showed progression of osteoarthritic change far beyond the rate that would commonly be expected of normal degenerative changes. Dr. Wunder further noted that testing for infection was negative, as was testing for the presence of any uric acid crystals that would indicate a gouty flare-up. Dr. Wunder opined that the May 15, 2017 work injury resulted in a significant aggravation of Claimant's underlying osteoarthritis. He thus concluded that the proposed total knee replacement surgery was reasonable, necessary and related to the May 15, 2017 work injury.

24. Dr. Failinger reviewed additional records and issued a report dated December 18, 2018. Dr. Failinger disagreed with Dr. Wunder's on multiple accounts. He noted that the lack of uric acid crystals found in Claimant's knee aspirate did not definitively establish there was not a gouty flare-up, as crystals would not be present on testing if the testing did not occur in the early stages of the flare-up. Dr. Failinger opined that there was a high probability Claimant's arthritis was preexisting and not directly affected by the work injury. He continued to opine Claimant required additional testing to definitively rule out infection. He noted that, if infection was ruled out, the need for a total knee replacement would be due to Claimant's preexisting arthritis and not the work injury. He opined that the knee replacement was medically necessary and appropriate, as significant time had passed. He recommended Claimant limit his weight bearing time to one to two hours a day, and only intermittently.

25. Dr. Failinger testified by pre-hearing deposition as an expert in orthopedic surgery. Dr. Failinger testified consistent with his reports and continued to opine Claimant had preexisting arthritis. He explained that, although bone contusions can cause arthritis and there was evidence of bone contusions on Claimant's MRI, those contusions were not in the same area as Claimant's arthritis. Dr. Failinger acknowledged that, when comparing the May 2017 and March 2018 x-rays there appears to be an advancement of arthritis, but explained that the comparison is insufficient because it is unknown if the x-rays were non-weight-bearing or weight-bearing. Dr. Failinger did state that the appearance of advanced degeneration on the imaging is more than what would by typically expected over a 10-month period.

26. Dr. Failinger testified that it is not unreasonable to proceed with a total knee replacement, as Claimant has had persistent pain despite undergoing a course of conservative treatment. He explained that the proposed surgery would be expected to significantly decrease Claimant's pain and increase his function. Dr. Failinger reiterated his opinion, however, that unless it is determined there is an infection, the proposed surgery is not related to Claimant's work injury. Dr. Failinger testified that he can acknowledge Claimant had no history of prior knee pain or functional limitations, but that he did not agree the advanced degeneration of Claimant's knee was thrown into motion by the work injury.

27. Dr. Beard testified by pre-hearing deposition as an expert in orthopedic surgery. He testified that he noted evidence of some osteoarthritis primarily in the medial compartment of Claimant's left knee during the surgery he performed in October 2017. Regarding potential infection, Dr. Beard testified that he was comfortable ruling out infection as a possible cause for Claimant's symptoms, as multiple cultures had been obtained and tested negative. Dr. Beard acknowledged that the delay in Claimant's first surgery could have caused an aggravation or acceleration of the degenerative process, and also acknowledged that there are a number of studies that reflect people with ACL injuries and meniscal repairs are likely to develop osteoarthritis. He testified that there is no way of knowing when and if Claimant would have ever had a recommendation for a total knee replacement without the events of May 15, 2017 placing everything in motion. Dr. Beard further testified that he agreed Claimant's pre-existing arthritis was substantially aggravated by the work injury, stating:

> Q: Do you - - what is the cause of claimant's injury that requires the total knee replacement?
>
> A: He was asymptomatic with regards to the osteoarthritis up until this work-related injury, which is not unusual. Oftentimes we will see people who have some preexisting arthritis and then they get an injury on top of that, that really sets in motion this chain of events of persistent pain and swelling and the arthritic changes just becoming more symptomatic.
>
> Q: But you can't say to a reasonable degree of medical probability that this injury is the cause of that, can you?
>
> A: I cannot say, and as I've stated in my notes, that the injury caused the osteoarthritis. It's my professional opinion that it preexists.
>
> Q: Okay.
>
> A: It's just that he wasn't symptomatic prior to that.

28. Dr. Beard stated the proposed surgery would be expected to improve Claimant's function significantly and significantly decrease his pain.

29. Claimant testified at hearing that, prior to the May 15, 2017 work injury, he had no prior left knee injuries, symptoms or limitations. Claimant testified that he did not have any gout symptoms in his left knee prior to the work injury. Claimant was not subject to any work restrictions prior to the work injury or had any need to modify or decline work due to any left knee issues. Claimant has been on work restrictions since sustaining the work injury and since undergoing surgery. Claimant has returned to work performing light duty, as he is physically restricted from performing his regular tasks.

30. Claimant's testimony is found credible and persuasive.

31. The ALJ finds the testimony and opinions of Drs. Charbonneau, Wunder and Beard, as supported by the medical records, more credible and persuasive than the conflicting opinion of Dr. Failinger.

32. Claimant has proven it is more probable than not that the proposed total left knee replacement is reasonable, necessary and related to the May 15, 2017 work injury.

33. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

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

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

testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

Medical Treatment

A respondent is liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. *See generally Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company*, W. C. No. 4-445-060 (February 22, 2002).

Claimant completed a course of conservative treatment and underwent an ACL reconstruction and medial meniscectomy, all with no substantial improvement. Claimant's continued pain, swelling and functional limitations are documented throughout the records. Claimant's treating physicians, as well as Claimant's IME physician and Respondents' IME physician all agree that, at this point, the proposed total left knee arthroplasty is reasonable, necessary and medically appropriate.

Accordingly, the crux of the dispute before the ALJ is whether the proposed surgery is related to Claimant's work injury. Dr. Failinger opined that Claimant's current need for surgery could be the result of gout, infection or pre-existing arthritis. Although Dr. Failinger is of the opinion additional testing for infection should be completed, Claimant underwent testing for infection on multiple occasions, the results of which Dr. Wunder and Dr. Beard credibly opined were negative and sufficient. Although Claimant has pre-existing arthritis and gout, Claimant has credibly and consistently reported that he did not have prior symptoms, treatment or limitations with respect to his left knee. The record is devoid of any evidence to the contrary. While there is reference in the record to gouty flare-ups, the references are limited to Claimant's ankles, toes, and elbow. While Dr. Beard has discussed the possibility of arthritis as the cause of Claimant's symptoms, he has never opined that Claimant's condition is the result of pre-existing gout. Additionally, Claimant's knee aspirate was negative for uric acid crystals which, when considered in light of the other evidence, offers persuasive support that gout is not the cause of Claimant's continuing left knee symptoms and need for surgery.

As mentioned, Claimant has not experienced any significant improvement since suffering the work injury. Claimant, who formerly had no prior left knee issues or functional limitations, has since experienced constant pain and swelling and been subject to continuing work restrictions. ATP Charbonneau and Dr. Wunder credibly opined that the work injury substantially aggravated Claimant's underlying osteoarthritis, causing the need for the proposed surgery. Dr. Beard's opinion that Claimant's osteoarthritis was pre-existing does not preclude a conclusion that the pre-existing osteoarthritis was substantially aggravated by the work injury. Dr. Beard acknowledges this in his deposition testimony, agreeing that the work injury caused Claimant's asymptomatic condition to become symptomatic. Based on the totality of the credible and persuasive evidence, Claimant has by a preponderance of the evidence the total left knee arthroplasty recommended by Dr. Beard is reasonable, necessary and related to his May 15, 2017 work injury.

ORDER

It is therefore ordered that:

1. Respondents shall authorize and pay for the total left knee arthroplasty recommended by Dr. Beard.

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

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

DATED: March 18, 2019

Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Has Claimant proven, by a preponderance of the evidence, that he sustained compensable injuries arising out of and in the course of his employment?

2. If the claim is compensable, is Claimant entitled to medical benefits that are reasonable and necessary to cure and relieve the effects of his injuries?

3. Did the Employer provide a list of medical providers/physicians in compliance with section 8-43-404(5) to Claimant after he reported his injuries? And if not, did the right of selection pass to Claimant?

ADMISSIBILITY OF RESPONDENTS' EXHIBIT V

Two prehearing conferences contesting this Exhibit were held: October 3, 2018, and December 28, 2018. This ALJ has reviewed the subsequent Orders in their entirety. In summary, Claimant objects to the admission of said exhibit, arguing that it is so highly prejudicial that the ALJ should not even view it. Respondents argue that it is a medical report relevant to one theory of their case, and that the ALJ must view it in this context. Respondents at least wanted to allow the ALJ to view this report to issue an evidentiary ruling on the merits. The 12/28/2018 prehearing ALJ concurred.

Exhibit V is a *Psychiatric Independent Medical Examination for Fitness-for-Duty,* prepared by Robert E. Kleinmann, MD. The IME was conducted on 2/5/2015, and the report was issued on 2/17/2015. Portions have been redacted. At issue in this IME is Claimant's fitness to return to duty with the Colorado Springs Fire Department, based upon certain concerns for his mental health.

After reviewing this report this ALJ concludes that, at best, it has tangential value to one of Respondents' theories of the case, to wit: Claimant is maladapted to his work environment, thus prone to an unduly adversarial mindset. The evidence received at this hearing, taken as a whole, does not justify this report's admission. The ALJ concludes that its admission would be unduly prejudicial, and this report's usage should have been limited to the proceedings for which was originally prepared.

Further, as noted below, this matter can be decided on the medical evidence alone, without resort to divining Claimant's psychological condition. Exhibit V will not be admitted or considered by the ALJ, but the tendered copy will remain as part of the record.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Claimant is employed as a Firefighter with the City of Colorado Springs. From 2007 to 2014 he was a member of Employer's Heavy Rescue Program, ("HRP"). During this time, he was assigned to Station 17, the station at which HRP is based. In addition to typical firefighter duties, those in the HRP were required to be proficient in other disciplines, disciplines, including dive rescue, swift water, high-angle rescue, confined space, heavy machinery entrapments, auto extrication, building collapse, ice rescue, and rapid intervention. Scuba proficiency was necessary in order to conduct rescues and recoveries. For scuba diving, the heavy rescue goal is for all of the members to be rescue diver-certified, which is an advanced scuba diving certification. Claimant dived only in connection with his employment and has never dived recreationally.

2. In 2015 Claimant was reassigned to a different fire station where he did not participate in the HRP. In 2017 Claimant successfully bid to re-join the HRP at Station 17. Claimant was required to participate in scuba training dives for re-familiarization purposes since he had not dived recently.

3. On July 29, 2017, he had his first re-familiarization check-out dive with diving instructor Curt Crumb. The dive took place at Gold Camp Reservoir, and the plan was to go to the "Grizzly," the outlet structure at the bottom, which is usually between 40 and 50 feet from the surface. Claimant only got down to 12 feet, after 10 minutes in the water, due to ear-clearing issues and difficulties equalizing. Claimant told Mr. Crumb he had troubles clearing before and was generally slower going down because of clearing issues. Mr. Crumb testified this was not a successful dive, and Claimant did not perform another dive on that date. Claimant filled out a dive log and it was signed by Crumb. The log indicates the depth of the dive was 12 feet. (Ex. 7, p. 91). In his own log notes Claimant wrote, "…Re-familiarization dive. Ears/sinus wouldn't equalize…" (Ex. 7, p. 90.1) Claimant did not request an accident or injury report be completed or claim a work injury after the July 29, 2017 dive.

4. Claimant's next dive was September 21, 2017. That dive was determined to be 'successful', down 47 feet to the Grizzly with Mr. Crumb and Lt. Leach. He dove with fellow firefighter Lt. Jason Leach at Gold Camp Reservoir. Claimant completed a dive log for this dive. (Ex. 7, p. 90). In the log Claimant noted, "Confidence / ear exercising dive…No hood to assist with equalizing…slow descent / ears." The log reflects the depth of the dive was 43 feet and it lasted 14 minutes. Lt. Leach also completed a dive log for this dive. In his log he noted, "…Langmaid – worked on buoyancy / clearing. Slow descent from platform to Grizzly." (Ex. 7, p. 89.2).

5. The second dive planned for September 21, 2017 was not attempted due to Claimant's report of ear pain at the surface. Claimant did not request an accident report be completed or indicate he sustained a work injury after the September 21, 2017 dive. At hearing, Lt. Leach testified that the purpose of these dives was to re-familiarize Claimant and get him to dive to the level of his certification, which is rescue diver level.

6. At hearing, Claimant testified that attempted to participate in a dive with Curt Crumb on September 30, 2017 but was unable to equalize his ears and Crumb cancelled the dive. He testified that he was unable to descend more than around 10 feet, but did not log

this attempted dive. After this dive Claimant testified that he began experiencing additional symptoms including headaches, sinus pressure, and sinus discharge.

7. On October 1, 2017 Claimant sent a text message to Lt. Dave Barron that said, "I have a possible partial solution for my equalizing problem. However, I'd like your permission to experiment with a piece of equipment before I do it. I'd like to try modifying my hood with small holes (similar to vent on top) alongside my ears. This would allow water pressure and equalizing to be easier. However, it may not work because the cold water could potentially cause other problems like vertigo. Only one way to find out. I figured I'd start with a very small hole and perhaps extend to a slice if need be. Let me know your thoughts." (Ex. 10). Lt. Barron gave permission for the hood modification. *Id*

8. Claimant discussed his ear problems with Lt. Barron in September or October of 2017. At hearing, Lt. Barron testified that he, too, occasionally has difficulty clearing his ears when diving. He recommended some techniques he found useful, including use of Neo-Synephrine spray. Lt. Barron testified that approximately one-quarter of all divers experience ear problems when diving

9. Claimant did not participate as a diver in the water during any of the dive training sessions between September 21, 2017, and April 27, 2018. Claimant did not tell Mr. Crumb why he was not actively diving. Lt. McConnellogue testified he did not know the reason Claimant did not dive during that period, other than Claimant's expressed interest in trying to focus on a couple other things regarding the dive. Lt. Leach testified it was not clear why Claimant did not participate as an active, actual in-the-water diver.

10. Lt. Leach testified about a meeting he had with Claimant on February 14, 2018. Claimant stated he was having difficulty scuba diving and getting under the water. He also stated that he thought he had a brain tumor or other related issues going on, and sometimes he had clear liquid coming out of his nose that he thought was cerebral spinal fluid. Claimant did not indicate he had a work injury at that time. On February 20, Claimant sent Lt. Leach a text stating he had made an appointment for his 'brain leak'.

11. Lt. McConnellogue testified that he and Lt. Leach had brought up with Claimant the lapse of time in his diving and advised him it was critical that every single person on the team was a diver. Lt. McConnellogue recalled a conversation with Claimant in which Claimant expressed concern about his ear problems and requested to be assigned to more of a supporting role. Lt. McConnellogue testified that he and Lt. Leach expressed that everyone on the team had to be able to perform all diving activities. If someone is in the program, the expectation is he has to perform all of the skills within the program. Lt. McConnellogue testified Claimant had expressed some concerns with nasal drainage, and in February said he was going to schedule an appointment to get medical clearance and make sure everything was okay.

12. On March 13, 2018, Lt. Leach and Lt. McConnellogue had a meeting with Claimant to follow up on his March 12 medical appointment, and whether he had been cleared to dive. They expressed concerns for Claimant's health and reiterated the importance of making sure everybody was a qualified, certified diver because they needed everybody

to be able to perform every discipline with the program. They told Claimant they didn't want him to do anything to jeopardize his health and asked about his medical appointment. Claimant informed them he had canceled the appointment due to financial constraints.

13. Claimant did not provide a clear answer on why he wasn't diving. He thought, possibly, something medically was going on with him. Lt. McConnellogue believed Claimant, at one point in this meeting, talked about some cerebral spinal fluid had been leaking, and his wife wanted him to get that checked out. Lt. McConnellogue asked whether there was some kind of mental block, maybe some anxiety coming back. Claimant said he wasn't qualified to answer whether it was a mental block, but indicated it could be something physiological, or a little bit of a mental block, or because of the things that happened with him in the department over the course of time.

14. Lt. McConnellogue testified he was really not privy to the prior interactions to which Claimant referred, because most of those were when he was on another shift. The events to which Claimant was apparently referring were events that resulted in his being transferred out of the Station 17 heavy rescue station and reassigned to a different station in February 2015.

15. Claimant underwent a physical examination on March 13, 2018. This was a required part of his participation in the HRP. In the written "medical history statement" Claimant referenced sinusitis, and earaches "post diving (intermittent)." (Ex. 4)

16. On March 20, 2018, a memorandum, prepared by Angela Hines with HR, was tendered to Claimant by his chain of command, advising him of Employer's ADA program. It was sent to him because he had indicated he had a physical or mental issue impacting his ability to participate in the diving requirements of the Heavy Rescue program. (Ex. O, p. 41). The Memo concluded; "…Please know that I am not considering you to be disabled; I am simply providing information that may be beneficial to you based on information you have shared with your supervisors." Lt. Leach testified this was the result of his conversation with human resources about the liquid coming from Claimant's nose and his statement about a brain tumor.

17. On April 16, 2018, Claimant sent an email to Paula Homberger, PA-C, of Employer's Occupational Health Clinic, and stated, "…I am concerned that a symptom that I included in the history form was not discussed during the Heavy Rescue evaluation and that it may actually be causing difficulties with diving. Please contact me Wednesday at Station 17 if you can so that we can discuss the best course of action to determine the cause of these symptoms." Ms. Homberger responded, "No problem, PJ, I'll call Wednesday morning to discuss further. I am happy to discuss further and see if your medical symptom is a problem with diving. I apologize for not discussing it further at the time of your physical." (Ex.4 p. 40).

18. On April 23, 2018, Claimant was given a memorandum outlining a dive training plan intended to provide him with time to practice and demonstrate proficiency with the dive skills required by his level of certification. (Ex. P, pp. 42–43) Lt. McConnellogue explained the reason for the memorandum was to help Claimant become re-familiarized

with the diving equipment, get comfortable with the dive operation, and make sure he was able to perform the skills for which he was certified. Lt. McConnellogue thought the plan was fair, noting they were very basic skills Claimant was being asked to perform. He testified they had full support of Battalion Chief Wheeler to alter their training schedule and were given latitude to pull their company out of service within reason in order to complete the training. They discussed with Claimant that if there were significant events that would not allow them to train, they would be able to extend the time frame for completion.

19. The April 23 Memo stated, in pertinent part: "…On March 13, 2018, your officers discussed with you a general dive training plan intended to provide you with time to practice and demonstrate proficiency with the dive skills required by your level of certification. This memorandum outlines the dive training plan." (Ex. 7. pg. 87) (emphasis supplied). The Memo went on to describe four "Phases" of training dives in which Claimant was to participate, and concluded, "…By July 31, 2018 you must have completed all phases of this dive training plan. Failure to meet the requirements herein may result in your removal from the Heavy Rescue Program." (Ex7, p. 88) (emphasis suppled).

20. Lt. Leach testified he did not feel the dive training plan was too aggressive. These were basic dives to get through in order to perform at Claimant's level of certification as a rescue diver. He also testified that assuming reasonable progress were made by Claimant towards this goal, that the compliance deadline could even be extended.

21. Battalion Chief Wheeler explained that the Fire Department needed Claimant to demonstrate he could perform to the level of his certification as a diver. It was essentially a remedial plan of dive skills which Claimant had previously accomplished, and for which he had been previously certified, to get him back to the level he was expected to dive. He also explained how the calendar could have been adjusted to accommodate the training plan. When Chief Wheeler delivered the dive training plan memorandum to Claimant, Claimant did not request an accident or injury report be completed for his ears, nor did he ask that a workers' compensation claim be completed concerning an injury to his ears.

22. Mr. Crumb was familiar with the dive training plan memorandum of April 23, 2018, which he had helped put together. In his opinion, the dive plan was not overly ambitious, because it only required Claimant to demonstrate skills for which he'd already been certified, and there was no extra class time. Mr. Crumb testified the dive training plan was appropriate from a time perspective. He discussed with Claimant that if they were finding success with the dive training plan but there were scheduling issues, there would be some leeway for the timeline for completion.

23. On April 27, 2018, a dive training session took place in the pool at Underwater Connection. It was the beginning of the 'confined water' dives (pool sessions, as opposed to 'open water' dives (lakes and oceans). This component was expected to require between two and four dive sessions to complete. Lt. McConnellogue was also present at this session. Mr. Crumb testified they planned to do five skill sets per dive, and it would have been ideal to get a couple dives in that day. Claimant only completed

one dive that day, electing to end on a positive note. Although he was noted to be apprehensive with water around his nose, it was a 'successful' dive to 15 feet. (Ex. P, p. 42). Claimant reported his ears were sore or tender and he was having a little problem clearing. Mr. Crumb noted all divers eventually have ear tenderness at some point. Claimant did not request an injury or accident report be completed or indicate he sustained a work-related injury after the April 27, 2018 dive.

24. The May 6, 2018 'confined water' dive training session took place at the Colorado College pool. Claimant and Mr. Crumb completed dives 2 and 3, the first to the bottom of the 13-foot deep end and the second to 6 feet. Claimant completed almost all the skills to mastery except mask removal and mask flooding skills, which were noted to not be comfortable to Claimant. Claimant verbally mentioned his ears were sore at the end of the session, but he did not request an injury or accident report be filed and did not complain of a work-related injury.

25. The May 20, 2018 dive training session was back at Underwater Connection. The plan was to do dive #4 and then, hopefully, dive #5 of the confined water portion of Claimant's plan. They did not successfully complete the first dive that day, because Claimant, when asked to demonstrate his oral inflate and hover skill, overinflated and had a rapid ascent to the surface. (Mr. Crumb did characterize this incident as a 'common mistake'). Claimant told Mr. Crumb that the ascent had hurt his ears. At that time, since every dive had "some sort of ear component to it," Mr. Crumb aborted the dive and requested Claimant get checked out. Claimant did not request an accident report be completed or indicate that he sustained a work injury to his ear or ears.

26. On June 11, 2018, Claimant was given a memorandum regarding *Suspension of the Dive Training Plan, Station 17.* The memorandum gave Claimant options: obtain a medical release from his healthcare provider allowing him to continue with the Dive Training Plan, or initiate a request for FMLA leave or ADA accommodation, if appropriate. He was to complete one of the options within 10 calendar days, but no later than June 21, 2018. Failure to exercise one of the two options would result in his removal from the program. (Ex. Q, pp. 44–45) Based on his expertise as a diving instructor, Mr. Crumb agreed there was no reason to push forward with the Dive Training Plan until they could figure out what was going on with Claimant's ears.

27. Lt. McConnellogue and Chief Wheeler explained that the reason for the memorandum was Mr. Crumb's recommendation that the training plan be suspended. Mr. Crumb had become uncomfortable with Claimant expressing concern about his ears and inability to clear them. He didn't want to take the chance of Claimant getting injured. Lt. McConnellogue testified that at no point prior to the June 11, 2018 memorandum had Claimant requested an accident or injury report be filed or filed a workers' compensation claim with respect to his ears.

28. Claimant sought treatment for his ear problems at the City Employee Medical Clinic on June 18, 2018. Nurse Practitioner Lorada Shrawder reported, "He is employed by CSFD and on the underwater diving unit. He is having left ear pain during diving and is having difficulty 'equalizing' during his dives. He also notes an increase of Post Nasal Drainage after dives. He wants a full evaluation to determine if diving is safe for him to

continue." (Ex. 3, p. 35). NP Shrawder diagnosed "Otalgia, left ear." She referred Claimant to Colorado ENT & Allergy. (Ex. 3, p. 37).

29. NP Shrawder issued a letter "To Whom It May Concern" on the same date, stating; "PJ Langmaid was seen in this clinic today with concern of ear pain and post nasal drainage after diving. I have referred him to Otolaryngology. I recommend he abstain from diving until he is evaluated by the specialist and receives medical clearance to resume underwater diving." (Ex. 3, p. 34). Claimant testified at hearing that as a result of seeing this information, he believed his ear problems were not the product of routine discomfort while diving, but rather that they rose to the level of an injury.

30. On June 21, 2018, (the deadline date imposed by the 6/11/18 memorandum) Claimant sent an email to Chief Wheeler, Lt. McConnellogue and Lt. Leach objecting to the June 11, 2018 memorandum and informing them he had seen a medical provider at the City Employee Medical Clinic on June 18 and initiated a request for an ADA accommodation "as prescribed in your memo to me." (Ex. R, p. 46) Later on June 21, 2018, Claimant sent another email to Lt. Leach asserting that the time he spent at the clinic on June 18 was on duty because "the department specifically told me to see a medical provider for something job related." He concluded by stating, "I want an injury report and workers comp claim filed. There is enough documentation in the form of memos and training notes to demonstrate that the injuries I am dealing with are as a direct result of the dive training and that I notified both my supervisors and the instructor of the initial injury and continued aggravation of injury due to the training plan imposed upon me." (Ex. S, p. 48)

31. Lt. Leach, Lt. McConnellogue and Chief Wheeler all testified that prior to the June 21, 2018 email from Claimant, Claimant had never requested an accident or injury report be completed or a workers' compensation claim be filed on his behalf. Chief Wheeler testified, at no point had they been made aware of an 'injury'. Up until the June 21 email from Claimant, they had no knowledge or information Claimant was alleging a work-related injury to his ears as a result of the scuba diving training program.

32. Claimant testified he knew how to submit a Workers' Compensation claim and that Workers' Compensation has always been "you go to occupational health." He testified he had not seen any medical provider between September 2017 and April 2018.

33. On June 29, 2018, a memorandum was sent to Claimant responding to his June 21 emails, and contradicting his assertions he had been directed or ordered to see a healthcare provider. The June 29 memorandum also noted that Claimant had not previously objected or expressed concern that the dive plan would cause or exacerbate any injury, and he had never previously communicated he believed he had suffered a job related injury. The memorandum also advised him of the correct processes for filing an injury report and filing a Workers' Compensation claim. (Ex. T, pp. 50–51).

34. Claimant filed his Worker's Claim for Compensation on July 6, 2018. (Ex. 9, pp. 101-102). Employer denied Claimant's claim on July 10, 2018.

35. Employer did not provide Claimant with a list of authorized medical providers for him to choose from to treat his work injuries. Claimant chose the City Employee Medical Clinic to be his authorized medical provider.

36. Claimant saw Daniel Smith, M.D., at Colorado ENT & Allergy on July 12, 2018. Dr. Smith reported, "…Patient is city diver with left otalgia during/after dive in September of 2017. He avoided diving and left otalgia resolved although he restarted diving in April with decongestant and nasal steroids. Pain recurred when he restarted diving though. PND [post-nasal drip?] resolving and no sinus issues although he has had sinus surgery in past. **Exam clear today.** Audiogram testing in view of history ordered today and reviewed with *mild hearing gloss [sic].* Type A tympanogram. **Etiology unclear** although suspect ETD [eustachian tube dysfunction] exacerbated by diving…" Dr. Smith diagnosed: Otalgia, left ear. Other specified disorders of Eustachian tube, left ear. Sensorineural hearing loss, unilateral, left ear, with unrestricted hearing on the contralateral side." Dr. Smith recommended a MRI "…in view of unilateral hearing gloss [sic] and otalgia." (Ex. B, p. 30) (emphasis added).

37. On July 17, 2018, Chief Wheeler sent Claimant a memorandum about his temporary reassignment to another station until a determination was made concerning whether his dive responsibilities could be reasonably accommodated under the ADA. (Ex. U, p. 52) Chief Wheeler acknowledged Claimant was never provided with a list of medical providers to choose from to treat his condition, explaining that Employer doesn't do that with persons who have non-job-related injuries.

38. Violet Heath, Employer's Human Resources Manager, wrote to Dr. Smith on July 31, 2018 and asked him questions about Claimant's condition. (Ex. 2, pp. 18-26). Dr. Smith responded on August 10, 2018 and explained; "I was asked to comment on difficulties that he has been experiencing with his ears. He initially noted difficulties in October following a dive during work. This did cause pain and irritation within his left ear at the time. This occurred during the dive itself. He did allow for resting of the ear and avoid diving to allow this difficulty to resolve, although he was instructed to dive again for the fire department in April. In doing so, during the dive he again experienced pain and irritation within the left ear similar to what he experienced in October. He has been seen by me, and examination including otologic examination, nasopharyngoscopy, audiologic testing, and MRI imaging have been done. **They have not demonstrated any fixed lesion;** although with his history and the difficulty during diving and the symptom he notes, this is suggestive of eustachian tube dysfunction related to his dives…" (Ex. 2, p. 17). Dr. Smith discussed treatment options for eustachian tube dysfunction, and referred Claimant to Dr. Hegarty ("a neurootologist") for such treatment. (emphasis added).

39. Claimant saw Joseph Hegarty, M.D., on August 21, 2018. Dr. Hegarty noted, "…This 45 year old patient reports that, in early October, he went scuba diving and was not able to equalize his pressure. In subsequent attempts to dive, he was also unable to equalize his pressure. He has been a diver for about ten years and, prior to this incident, did not experience issues equalizing. His last attempt was in April 2018. He reports that, in the last month, he has had several spells of dizziness and light-headedness when he has successfully popped his ears. He reports that he has taken

prednisone and other anti-inflammatory medications prior to his dives. He reports that, recently, he has become increasingly sensitive to noise. He reports that his symptoms generally occur in his left ear, but occasionally impact the right ear as well. He reports that the pain, which has previously been consistent for several months, has begun to recede in the past few days…He comes in to consider Eustachian tube dilation procedures…" (Ex. 1 p. 11).

40. On examination, Dr. Hegarty reported, "…DIAGNOSTIC BINOCULAR MICROSCOPY shows chronic ETD (eustachian tube dysfunction) with some chronic eczema AU [both ears]. No fluid or infection seen in the middle ear. Minimal tympanosclerosis is seen." His diagnoses included bilateral sound sensitivity; left ear pressure and symptoms suggestive of atypical hydrops, and bilateral eustachian tube dysfunction. (Id. at 12).

41. Hearing tests were performed on September 6, 2018 and the results were normal. (Ex. 1, p. 4). Dr. Hegarty met with Claimant on that date and noted, "…He reports that diving is important to him and is interested in a treatment plan that would allow him to continue to dive. He has been using a nasal steroid spray as prescribed…" The doctor reported that microscopy again showed "mild chronic ETD and chronic EAC eczema AU." Dr. Hegarty's diagnoses again included bilateral eustachian tube dysfunction. He recommended Claimant "…Dive once without prednisone. Dive once with taking prednisone as prescribed…If persistent fluctuant symptoms consider diuretic treatment." (Ex. 1, p. 3).

42. On October 15, 2018, Seth A. Reiner, M.D., performed an Independent medical examination and records review. Dr. Reiner did not see any permanent impairment of Claimant's ears. Even if Claimant had some eustachian tube dysfunction, (which Dr. Reiner noted is common, especially with patients who have sinus troubles), Dr. Reiner did not think this caused any significant hearing loss. Dr. Reiner stated that, with normal testing, he did not think Claimant had hydrops *caused by* the diving he had done for work, or any significant cochlear damage from diving.

43. Dr. Reiner opined that barotrauma, if any occurred during the dives, did not seem to have damaged the eardrum or middle ear structures. None of the typical findings of ruptured eardrum, retracted eardrum, or conductive hearing loss were described or documented on examinations. Dr. Reiner noted the hearing loss determined by the most recent audiogram was very mild and in higher frequencies, and he did not think it was due to any diving activities. (Ex. M, p. 39)

44. Dr. Reiner testified by deposition on November 8, 2018. He opined, "with a great deal of medical certainty," that a diving incident did not cause any damage to Claimant's ears. He was confident to a medical degree of certainty that Claimant has no significant hearing problems. He didn't think the diving incident Claimant described caused any significant damage to his ears. He didn't think there was anything during diving that caused any injury to Claimant's ears. He opined Claimant did not have any impairment because applying the formula used by the American Academy of Otolaryngology to Claimant's audiogram numbers gives zero disability. He opined, if Claimant sustained a work-related injury, he was at MMI at the time of his evaluation.

45. Dr. Reiner further testified that, when there is damage from diving, it is usually in both ears, rather than in one ear. Both ears are subjected to the same pressure changes, so it would be hard to damage just one ear. If there was damage to an ear from a diving incident, the most common damage one would expect would be a perforated eardrum, with blood or extreme hearing loss. That hearing loss would show as a conductive hearing loss, or if it was really severe, it would be a dramatic drop rather than flat across like Claimant has now. This was shown on Dr. Hegarty's September 6, 2018 audiogram.

46. Dr. Reiner opined that if there was damage to the ear from a barometric change or a dive, it would be a sloping curve, usually downward sloping, pretty severe hearing loss, not a notch like Claimant has. The hearing loss Claimant has is very typical of most middle-aged or older males with noise-induced hearing loss. The most common injury from barometric pressure changes is a ruptured eardrum, with acute dizziness, usually drainage, sometimes blood in the ear. Such injury drives people to the emergency room right away.

47. Dr. Reiner opined that Claimant has mild eustachian tube dysfunction, which could be caused by allergies, irritants, dust, swelling in the eustachian tube, or chronic sinus problems. Sometimes a cause for it is never identified. If a person had mild eustachian tube dysfunction and went diving, they would feel pressure in the ear. The dive would provide symptoms of a problem that the person already had.

48. On February 21, 2019, a follow-up evidentiary deposition was taken of Dr. Reiner. Dr. Reiner testified it was highly unlikely-and not probable at all-that Claimant sustained an occupational disease or injury from repeated dives. He added that for shallow dives, such as the dives Claimant made in 2017 and 2018, it was extremely unlikely there was any occupational disease or work-related injury from repeated dives. Dr. Reiner's opinion was based on the fact he couldn't find in the records any objective finding of eustachian tube dysfunction or damage. He opined that chronic eustachian tube dysfunction or damage from repeated injury would show what's called a conductive hearing loss, not a sensory hearing loss. Claimant shows no evidence of that.

49. Dr. Reiner also explained that, if there was a significant repeated eustachian tube problem from diving, they might see negative tympanometry or pressure in the ears. Claimant's were essentially normal. Dr. Reiner noted Claimant's eardrums looked completely normal upon physical examination. In all of the examination, especially in the nasopharynx and the MRI scan, there was no objective finding that would substantiate any occupational damage.

50. Dr. Reiner testified he didn't think he had ever heard of eustachian tube problems or damage at depths of 10 to 12 feet. Even with a dive to a depth of approximately 45 feet, if Claimant had sustained eustachian tube disorder, there would have been objective findings such as conductive hearing loss, retracted eardrums, or fluid in the middle ears. It would usually affect both ears, because the water pressure is applied to both sides of the head. Dr. Reiner himself has been a recreational diver for over 40 years. He is certified through NAUI and PADI, and has made dives down to 85 feet.

CONCLUSIONS OF LAW

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

Generally

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

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

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

D. The ALJ finds the testimony of Lt. Leach, Lt. McConnellogue, Chief Wheeler, Lt. Barron, and Engineer Crumb to be sincere, reliable, and credible. At all times, the Fire Department showed appropriate concern for Claimant's well-being, but with appropriate attention to assuring a proper state of readiness for the Heavy Rescue Program as a whole. While not necessarily dispositive of the compensability issue, the ALJ finds that the terms of the April 23, 2018 Dive Training Memorandum were

reasonable, appropriate, and not overly ambitious, especially with the ability to extend the completion date as needed.

E. The ALJ further finds Claimant to be sincere in his own perception of events, but an analysis of Claimant's psychological state is not necessary for a determination of the compensability issue. There is ample evidence in the record to analyze this matter from a purely medical perspective, regardless of Claimant's unusual timing in filing a Workers Compensation claim.

F. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

G. Further, courts are to be "mindful that the Workmen's Compensation Act is to be liberally construed to effectuate its humanitarian purpose of assisting injured workers." *James v. Irrigation Motor and Pump Co.*, 503 P.2d 1025 (Colo 1972).

Compensability, Generally

H. A pre-existing disease or susceptibility to an injury does not disqualify a claim if the employment aggravates, accelerates, or combines with a pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999 (Colo. App. 2004). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of a natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Renta*, 717 P.2d 965 (Colo. App. 1995).

I. The mere fact that a claimant experiences pain at work does not necessarily require a finding of a compensable injury. In *Miranda v. Best Western Rio Grande Inn*, W.C. No. 4-663-169 (ICAO April 11, 2007), the panel stated "[p]ain is a typical symptom caused by the aggravation of pre-existing condition. However, an incident which merely elicits pain symptoms caused by a pre-existing condition does not compel a finding that the claimant sustained a compensable injury."

Claimant's Diving Activities, Causing an "Injury"

J. Claimant had trouble clearing his ears in shallow water on July 29, 2017 while attempting to rejoin to Station 17. Because of this trouble, he naturally experienced pain while diving. He had been away from diving since his departure in 2015. He wisely avoided diving and stayed on the shore providing dive support after his September 21, 2017 dive. When his supervisor met with him about his difficulty scuba diving and getting under the water, he complained of symptoms he said he thought

could be a brain tumor or a leak of cerebral spinal fluid. Nevertheless, he did not seek medical treatment during this time-period, and he cancelled the medical appointment he had scheduled for his "brain leak" due to financial constraints. Regardless of any alleged 'mental block' Claimant may have concurrently been experiencing, he had apparent trouble with clearing his ears on each subsequent dive, even in shallow, confined water. It can happen to even experienced divers who maintain their skills.

K. While not dispositive of the causation issue, it is duly noted that Claimant did not allege his ongoing complaints were the result of a work injury or occupational disease until his dive training plan was suspended and he was given the options of obtaining a medical release from his healthcare provider allowing him to continue with the dive training plan or initiating a request for FMLA leave or ADA accommodation, if appropriate.

L. Dr. Reiner credibly opined that Claimant has mild eustachian tube dysfunction, which could be caused by allergies, irritants, dust, swelling in the eustachian tube, or chronic sinus problems. Sometimes they never find a cause for it. Dr. Reiner explained that if a person had mild eustachian tube dysfunction and went diving, they would feel pressure in the ear. The dive would provide symptoms of a problem that the person already had (pre-existing disease). Dr. Reiner has opined that a diving incident or incidents did not cause any damage to Claimant's ears, and that Claimant did not sustain an occupational disease or injury from repeated dives.

M. Dr. Reiner also opined that Claimant had no significant hearing problems, and that the hearing loss Claimant does have is very typical of most middle-aged or older males or noise-induced hearing loss. Dr. Reiner's opinion was based on the fact that he couldn't find in the records any objective finding of eustachian tube dysfunction or damage. Dr. Reiner testified he didn't think he had ever heard of eustachian tube problems or damage at depths of 10 to 12 feet. Even with a single dive to a depth of approximately 45 feet, if Claimant had sustained eustachian tube disorder there would have been objective findings like conductive hearing loss, retracted eardrums, or fluid in the middle ears. Also, it would usually affect both ears because the pressure is exposed equally to both sides of the head.

N. Most notably, there is nothing inconsistent with Dr. Reiner's findings and those of Dr. Hegarty and Dr. Smith-as well as the Nurse Practitioners Claimant also encountered. While Dr. Hegarty noted some *mild chronic* eustachian tube dysfunction, at no point did he even suggest that it was *caused by* Claimant's diving activities. Nor did Dr. Smith ever attempt to make a *causal* link. He merely noted his observations, and how to possibly move forward. In fact, the evidence in the record suggests this ETD problem is not uncommon in divers. If you cannot successfully address it medically, you cannot dive. It does not have to be someone's fault. It does not have to be connected to a specific cause; often it is not. Unfortunate for the diver, but true.

O. Of course Claimant felt some discomfort since he could not properly clear his ears. He then did the correct thing by aborting the dives he attempted-and with the full support at every turn of his co-workers. In so doing, he incurred no damage or injuries to his ears, either in an acute event, or cumulatively, and the ALJ so finds. His

symptoms were temporary, not resulting in any aggravation requiring treatment. Stated another way, if a firefighter is standing too close to the fire, he might feel some discomfort. Before the discomfort morphs into an actual 'injury', he merely takes a few steps back. Problem solved. Similarly, Claimant has failed to show, by a preponderance of the evidence, that he suffered a compensable work injury, either acutely, or as a result of any occupational disease caused by scuba diving.

Medical Benefits/Authorized Treating Provider

P. Claimant has not suffered a compensable work injury. There is no need to further address Medical Benefits or Authorized Treating Provider.

ORDER

It is therefore Ordered that:

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

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

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

DATED: March 19, 2019

/s/ William G. Edie

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

ISSUES

Whether the claimant has demonstrated by a preponderance of the evidence that her scheduled impairment rating should be converted to a whole person impairment rating.

FINDINGS OF FACT

1. The claimant suffered an admitted injury to her left shoulder on November 18, 2015. The injury occurred when the claimant was reaching overhead for a box, and a box on top of that box slipped and fell. The claimant testified that she attempted to catch the falling box with her left hand. However, as the box fell the claimant's left hand also moved downward, resulting in pain in the claimant's left shoulder.

2. During her claim, the claimant's authorized treating provider (ATP) has been Work Partners where she primarily treated with Erica Herrera, PA, but was also seen by Dr. Lori Fay.

3. Ultimately, the claimant was diagnosed with a left torn rotator cuff. On March 10, 2016, Dr. Mark Luker performed a rotator cuff repair.

4. The claimant testified that following her March 10, 2016 surgery she experienced low back pain while in physical therapy. The claimant also testified that she reported this low back pain to her chiropractor as well as to Dr. Fay and Ms. Herrera.

5. On January 27, 2017 Dr. Peter Millett performed a reverse shoulder arthroplasty. Thereafter, the claimant began a course of physical therapy. When she first began physical therapy, the claimant reported low back pain. However, on February 8, 2017, the claimant reported to Dr. Fay that her low back pain had resolved.

6. Thereafter, the claimant was seen by Dr. Millet on May 4, 2017. At that time, the claimant reported a "clunking" sensation in her left shoulder. Dr. Millett indicated this would improve with strengthening. On that date, Dr. Millet discharged the claimant from his care and instructed her to follow-up in one year.

7. On August 10, 2017, the claimant returned to Dr. Millett and reported continued popping and clunking in her left shoulder. Based upon these complaints, Dr. Millett referred Claimant for computerized tomography (CT) scan of her left shoulder.

8. On September 18, 2017, the CT scan showed an "uncomplicated left shoulder reverse arthroplasty." On November 9, 2017, Dr. Millet informed the claimant that she could return to normal activities.

9. On January 12, 2018, Dr. Fay placed the claimant at maximum medical improvement (MMI). At that time Dr. Fay assessed a permanent impairment rating of 44% for the claimant's left upper extremity (which equates to a 26% whole person impairment). At that time, Dr. Fay assessed permanent work restrictions including no lifting, repetitive lifting, carrying, pushing, or pulling over 20 pounds. In addition, no reaching overhead with her left upper extremity or reaching away from her body with her left upper extremity.

10. On February 15, 2018, the respondent filed a Final Admission of Liability (FAL) admitting for the MMI date and permanent impairment rating as assessed by Dr. Fay. The claimant objected to the FAL and proceeded to the Division sponsored independent medical examination (DIME) process.

11. On July 9, 2018, the claimant attended a DIME with Dr. Douglas Scott. As part of the DIME process, Dr. Scott reviewed the claimant's medical records, obtained a history from the claimant and completed a physical examination. Dr. Scott agreed that the claimant was properly placed at MMI on January 12, 2018. Dr. Scott assessed a permanent impairment rating of 41% for the claimant's left upper extremity. Dr. Scott also agreed with the permanent work restrictions assigned by Dr. Fay.

12. Following the DIME, the Division asked Dr. Scott to review the issue of apportionment given the claimant's **prior** injury to her left shoulder.

13. The claimant suffered a prior work related injury to her left shoulder on February 27, 2006. Dr. Scott performed a DIME for that injury on August 27, 2010. At that time, Dr. Scott assessed a permanent impairment rating of 15% for the claimant's left upper extremity.

14. On August 29, 2018, Dr. Scott issued an addendum to his July 9, 2018 DIME report with consideration of apportionment of the claimant's 2006 injury and related impairment. Dr. Scott subtracted 15% from the 44% assessment for the 2010 impairment rating. This resulted in a permanent impairment rating of 29% for the claimant's left upper extremity (which would equate to a 17% whole person impairment) for the November 18, 2015 work injury.

15. On September 18, 2018, the respondent filed a FAL admitting for the 29% permanent impairment rating for the claimant's left upper extremity.

16. On November 14, 2018, the claimant attended an independent medical examination (IME) with Dr. Allison Fall. In connection with the IME, Dr. Fall reviewed the claimant's medical records, obtained a history from the claimant and completed a physical examination. In her IME report, Dr. Fall opined that the claimant's injury was to her left shoulder. Dr. Fall specifically diagnosed the claimant with a left shoulder rotator cuff tear "acute on chronic", status post rotator cuff repair with subsequent re-tear and a reverse total shoulder arthroplasty. Dr. Fall agreed that the claimant reached MMI on January 12, 2018 and opined that the claimant's permanent impairment was appropriately determined to be a left upper extremity impairment. Dr. Fall's testimony at hearing was consistent with her written report. Dr. Fall credibly testified that the claimant's loss of function is only to her left shoulder. Dr. Fall also testified that the

claimant's complaints of pain throughout her body are likely related to the claimant's inflammatory arthritis, and not related to the claimant's left shoulder injury.

17. The claimant testified that as a result of her left shoulder injury, she has pain into her left trapezius and into her neck. The claimant also testified that the pain travels down into her ribcage and is particularly painful when she coughs. The claimant further testified that she has pain into her low back, hip, and knees. The claimant testified that she leans to the left when she walks. It is the claimant's belief that these symptoms are related to her left shoulder injury.

18. The ALJ credits the medical records and the opinions of Dr. Fall and finds that the permanent impairment rating was appropriately assessed for the claimant's left upper extremity, and there is no functional impairment beyond the claimant's left shoulder. Therefore, the ALJ finds that the claimant has failed to demonstrate that it is more likely than not that she has suffered any functional impairment that is not contained on the schedule. Therefore, the ALJ declines to convert the claimant's scheduled left upper extremity impairment rating to a full person impairment.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

3. The question of whether the claimant has sustained an "injury" which is on or off the schedule of impairment depends on whether the claimant has sustained a "functional impairment" to a part of the body that is not contained on the schedule. *Strauch v. PSL Swedish Health Care System*, 917 P.2d 366 (Colo. App. 1996). Functional impairment need not take any particular impairment. Discomfort which interferes with the claimant's ability to use a portion of his body may be considered

"impairment." *Mader v. Popejoy Construction Company, Inc.*, W.C. No. 4-198-489, (ICAO August 9, 1996). Pain and discomfort which limits a claimant's ability to use a portion of his body may be considered a "functional impairment" for determining whether an injury is on or off the schedule. *See, e.g., Beck v. Mile Hi Express Inc.*, W.C. No. 4-238-483 (ICAO February 11, 1997).

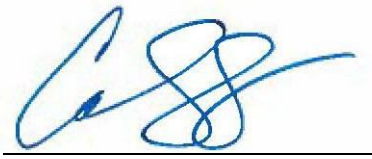
4. It is the claimant's burden of proof by a preponderance of the evidence to establish both that he suffered a permanent impairment and that the permanent impairment is either contained on the schedule set forth at subsection (2) or not on the schedule specified in subsection (2). Further, it is the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

5. As found, the claimant has failed to demonstrate by a preponderance of the evidence that she has suffered any functional impairment that is not contained on the schedule. Therefore, claimant's request to convert her scheduled impairment rating to a whole person impairment is denied. As found, the medical records and the opinions of Dr. Fall are credible and persuasive.

ORDER

It is therefore ordered that the claimant's request to convert her scheduled impairment to a whole person impairment is denied and dismissed.

Dated March 12, 2018



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

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-004-352-002 & 5-025-676

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on March 5, 2019, in Denver, Colorado. The hearing was digitally recorded (reference: 3/5/19, Courtroom 3, beginning at 8:30 AM, and ending at 12:15 PM).

Claimant's Exhibits 1 through 13 and 15 were admitted into evidence, without objection. Respondents' Exhibits A through N and Q were admitted into evidence, without objection.

W.C. No. 5-004-252-002 concerns an admitted injury of January 14, 2016. W.C. No 5-025-676 concerns a fully contested injury of August 25, 2016.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, which was filed, electronically, on March 11, 2019. Respondents were given two working days within which to file objections. No timely objections were filed. After a consideration of the proposed decision, the ALJ has it and hereby issues the following decision.

ISSUES

For W.C. No. 5-004-252, the sole issue for decision concerns post maximum medical improvement (MMI) medical maintenance benefits, specifically, completion of acupuncture recommended by authorized treating physician (ATP) Franklin Shih, M.D; and, counseling by Ron Carbaugh, Psy.D., a licensed clinical psychologist.

For W.C. No. 5-025-676, the issues for decision concern compensability and, if compensable, medical benefits, specifically, evaluation of the Claimant by a neurologist pursuant to the recommendation of Neha N. Patel, M.D. The parties stipulated that if W.C. 5-025-676 was found compensable, Dr. Patel was an ATP.

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

FINDINGS OF FACT

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

W.C. No. 5-004-352-002 –Admitted January 14, 2016 Injury

Preliminary Findings

1. The Claimant worked as a material handler for the Employer. On January 14, 2016, he injured his back when he turned his body to reach for a handle while exiting a trailer (Claimant's Exhibit 1). Respondents accepted the claim and medical treatment was provided.

2. ATP Dr. Michael Ladwig, M.D. originally placed the Claimant at MMI on May 26, 2016. Claimant objected and requested a Division Independent Medical Examination (DIME), which was performed by Michael Striplin., M.D. In his DIME report Dr. Striplin determined that the Claimant reached MMI on May 26, 2016.

3. Respondents filed a Final Admission of Liability ((FAL), dated November 22, 2016 consistent with Dr. Striplin's DIME report. The FAL admitted for medical maintenance benefits (Claimant's Exhibit 2). At the time he placed the Claimant at MMI, Dr. Ladwig recommended medical maintenance in the form of 3 acupuncture sessions with Dr. Shih and 3 counseling sessions with Dr. Carbaugh (Claimant's Exhibit 5, p. 99). Dr. Striplin also adopted Dr. Ladwig's medical maintenance recommendations in his DIME report (Claimant's Exhibit 2, pp. 13). Respondents subsequently denied the

medical maintenance recommendations. F. Mark Paz, M.D., Respondent's retained expert, disagrees that the treatment recommended by the ATP and DIME physician is reasonably necessary. The ALJ accepts the opinions of the ATP and the DIME and rejects the opinion of IME Dr. Paz in this regard.

Dr. Ladwig – Claimant's Authorized Treating Physician (ATP)

4. In his MMI report of May 26, 2016, Dr. Ladwig states "MMI with maintenance: allowed to see Dr. Shih for acupuncture times 3 sessions for 6 months also allowed to see Dr. Carbaugh times 3 sessions for 6 months if needed" (Claimant's Exhibit 5, p. 99).

Dr. Carbaugh, Psy.D. – Psychological and Pain Management Services

5. In his report of May 13, 2016, Dr. Carbaugh states, "At this point, [Claimant] has completed three of the initial authorized six treatment sessions through this practice. If Dr. Shih has placed him at MMI, the remaining three sessions would appropriately be considered part of his maintenance care plan" (Claimant's Exhibit 6, p. 107).

Dr. Striplin – Division Independent Medical Examiner (DIME)

6. Regarding Claimant's maintenance treatment, Dr. Striplin states in his DIME report of November 1, 2016 that "The patient should be offered up to three follow-up visits with Dr. Shih, for acupuncture treatments if needed, and two additional counseling sessions with Dr. Carbaugh if needed, to be completed by May 31, 2017" (Claimant's Exhibit 2, p. 13). At the time of the DIME appointment, the Claimant had completed one of the three recommended counseling sessions with Dr. Carbaugh--under maintenance care.

Dr. Paz – Respondents' Independent Medical Examiner (IME)

7. Dr. Paz performed a records review as the basis of his report and findings, as he did not perform a physical evaluation of the Claimant. Regarding the recommended medical maintenance Dr. Paz's IME report only highlights that "Dr. Striplin, the DIME physician, recommended no additional treatment medical maintenance would be required beyond May 31, 2017, for the low back pain which was attributable to the January 14, 2016, incident" (Respondent's Exhibit G, p. 21).

8. At the hearing, Dr. Paz testified consistently with his report. He stated that the Claimant is beyond the six-month window for completion of his medical maintenance recommendations, therefore; the recommendations are no longer reasonably necessary. Because Respondents would not pay to complete the

implementation of the recommendations of the ATP and the DIME, Dr. Paz's opinion in this regard is based on a conundrum involving the expiration of 6-months. Carried to its logical conclusion, a carrier could simply delay the implementation of recommended treatment for six months and then take the position "tume's up.". Such a proposition, in part, undermines Dr. Paz's opinion. The ALJ finds Dr. Paz's opinion regarding the reasonableness and necessity of the recommended medical maintenance neither credible nor persuasive.

The Claimant

9. The Claimant credibly testified at hearing that following being placed at MMI, he was informed by his medical providers that his case was closed and they were unable to schedule completion of the recommended medical maintenance treatment. The Claimant contacted the adjuster who confirmed that his case was closed and that the additional treatment recommendations were denied. Following the denial, the Claimant attempted, unsuccessfully, to seek treatment at an urgent care facility. According to the Claimant, he was symptomatic at the time he was placed at MMI and he continues to have ongoing symptoms. He has not sustained any subsequent injury to his low back. He wishes to proceed with the medical maintenance recommendations for follow up treatment with Dr. Shih and Dr. Carbaugh. The ALJ finds that the Claimant's testimony concerning being denied the recommended medical treatment, his ongoing symptoms, and desire for treatment is credible, convincing and unrefuted by any other evidence.

Ultimate Findings

10. The ALJ finds the opinions of Dr. Ladwig, Dr. Carbaugh, and Dr. Striplin highly credible and persuasive. On the other hand, the ALJ finds the opinions of Dr. Paz inadequately based, contrary to the weight of medical opinions in evidence, and lacking in credibility for the reasons herein above stated. Further, the ALJ finds the Claimant's testimony to be consistent with the weight of the medical evidence and therefore, credible and persuasive.

11. Between conflicting testimonies and opinions, the ALJ makes a rational choice, based on substantial evidence, to accept the Claimant's testimony and the opinions of Dr. Ladwig, Dr. Carbaugh, and Dr. Striplin and to reject opinions to the contrary.

12. The ALJ finds that the Claimant has proven by a preponderance of the evidence that his need for the medical maintenance, including completion of 3 sessions of acupuncture and 3 counseling sessions is reasonably necessary to treat the effects of the compensable injury of January 14, 2016.

13. Dr. Ladwig was an authorized treating physician and Dr. Carbaugh was within the chain of authorized referrals.

W.C. No. 5-025-676 –August 25, 2016 Injury

Preliminary Findings

14. The Claimant continued to work as a material handler for Employer. On August 25, 2016, he responded to a chemical overflow that occurred while unloading a tanker truck. As a result, he was exposed to Caustic Soda, a hazardous chemical. The Caustic Soda overflow resulted in the chemical coming from a pipe below the tanker and also from the manhole on the top of the tanker. This resulted in a mist like rain that came down on top of the Claimant, resulting in exposure to his eyes, head, and neck. The Claimant immediately reported the injury and flushed his eyes followed by a shower at the job site. Later that day, the Claimant was driven to the Emergency Room (ER) at Rose Medical Center by his supervisor, William Bell. The Claimant filled out a formal First Report of Injury on September 15, 2016 (Claimant's Exhibit 8, p. 143). He sought medical treatment from Neha N. Patel, M.D., following his date of the exposure incident, based on the referral from the ER physicians. Respondents filed a Notice of Contest on October 12, 2016 (Claimant's Exhibit 9, p. 144).

15. On October 31, 2016, Dr. Patel referred the Claimant for evaluation by a neurologist (Claimant's Exhibit 8, p. 218). Following this referral, Respondents invoked their Notice of Contest and refused approval of future medical treatment. Dr. Paz, Respondent's retained expert witness, is of the opinion that Dr. Patel's referral to a neurologist is not reasonably necessary and the Claimant reached MMI on January 9, 2017. For the reasons specified herein below, the ALJ rejects Dr. Paz's opinion in this regard.

Rose Medical Center – Emergency Room

16. On the day of his toxic exposure incident, the Claimant sought treatment at the ER of Rose Medical Center. The ER record states "39yoM with no pertinent pmh presents to the ED c/o eye pain, photophobia, and skin irritation being sprayed on by a "20% caustic/corrosive" chemical at 1730 today while at work at [Employer] chemical plant. Pt reports that the truck overflowed and was sprayed in his face/neck by the wind" (Claimant's Exhibit 10, p. 147). The report further outlines "Pt states he was exposed indirectly to misted solution after it spilled over" (Claimant's Exhibit 10, p.149).

17. The ER report states "Pt was able to call his boss and he was able to identify substance he was exposed to: caustic soda 20%" (Claimant's Exhibit 10, p. 150). The Claimant was released from the ER with "close f/u through work comp. Pt also given ophthalmology referral. Encouraged to return to ER for any change or worsening in condition" (Claimant's Exhibit 10, p. 150).

Dr. Patel – Oculoplastics & Ophthalmology

18. On August 26, 2016, the Claimant sought follow up treatment with Dr. Patel, an oculoplastic specialist. Dr. Patel diagnosed the Claimant with a "Chemical injury to conjunctiva" (Claimant's Exhibit 13, p. 208).

19. In her report of September 26, 2016, Dr. Patel diagnosed the Claimant with a chemical injury to conjunctiva and notes that the Claimant has intermittent episodes of blurred vision. At that evaluation, Dr. Patel contemplated a "neuro op" referral (Claimant's Exhibit 13, p. 212).

20. On October 31, 2016 Dr. Patel noted that Claimant is reporting "headaches that begins around eye and radiates out toward temple." (Claimant's Ex 13, pp. 217). Dr. Patel concludes that she "will refer to neurology." (Claimant's Ex 13, pp. 218).

Joel H. Goldstein, M.D. - UC Health Urgent Care

21. Due to the denial of his claim and medical treatment, Claimant sought treatment at UC Health Urgent care due to an increase of eye symptoms. The medical record states "2 day history of FB sensation and redness and blurry vision RE. Previous history of chemical keratitis RE." (Claimant's Ex 11, pp. 147). Claimant was provided artificial tears, medications, and lubricating gel. (Claimant's Ex 11, pp. 147).

David Reinhard, M.D. – Colorado Rehabilitation & Occupational Medicine

22. ATP Dr. Patel referred the Claimant to David L. Reinhard, M.D. Dr. Reinhard diagnosed THE Claimant with "1. Work-related chemical exposure to face, eyes, and skin with resultant chemical conjunctivitis. 2. Ongoing visual complaints including reduced visual acuity, photophobia and dry eyes secondary to chemical exposure. 3. Migraine headaches secondary to #1" (Claimant's Exhibit 12, p. 204).

Material Safety Data Sheet (MSDS)

23. The Material Safety Data Sheet (MSDS) classifies Caustic Soda as a hazardous material. The MSDS outlines that exposure "causes severe skin burns and eye damage." (Claimant's Ex 15). The MSDS further warns that Caustic Soda is "corrosive to eyes. Contact with the eyes rapidly causes severe damage to the tissues. may cause redness, pain, blurred vision. May cause severe, deep burns and permanent impairment to, or total loss of, sight" (Claimant's Exhibit 15, p. 229).

Dr. Paz – Respondent's Independent Medical Examiner (IME)

24. Dr. Paz performed a records review as the basis of his report and findings, as he did not perform a physical evaluation of the Claimant. Dr. Paz outlines in his report that Claimant reached maximum medical improvement for his August 25, 2016 injury on January 9, 2017. As a result, Dr. Paz concludes that Claimant's headaches and visual disturbances are not causally related to his industrial injury.

25, At THE hearing, Dr. Paz testified consistently with his report. Dr. Paz stated that Dr. Patel's referral to a neurologist for further evaluation is not reasonably necessary as related to the Claimant's industrial injury. The ALJ finds Dr. Paz's opinion regarding the reasonableness of the referral to a nuerologist neither credible nor persuasive. Any opinion by Dr. Paz that Claimant did not sustain a compensable injury on August 25, 2016 is also found to be neither credible nor persuasive. Dr. Paz opined in his report and at hearing that Claimant reached MMI on January 9, 2017, which indicates by his own admission that Claimant sustained a compensable injury.

The Claimant

26. The records from the ER corroborate Claimant's testimony regarding the industrial exposure. Claimant's account of the exposure is uncontested. Claimant's testimony regarding his symptoms is also consistent with the medical reports from the Rose Hospital emergency room, Dr. Patel, Dr. Goldstein, and Dr. Reinhard. Claimant testified that he currently has ongoing symptoms consistent with those reported to his treating doctors. The ALJ finds that the Claimant's testimony concerning the injurious event and ongoing symptoms is credible and persuasive.

Ultimate Findings

27. The ALJ finds the opinions of the Rose Medical ER physicians, Dr. Patel, Dr. Goldstein, and Dr. Reinhard highly credible and persuasive regarding their diagnosis of a work related injury. On the other hand, the ALJ finds the opinions of Dr. Paz inadequately based, contrary to the weight of medical opinions in evidence, and lacking in credibility for the reasons herein above stated. Further, the ALJ finds the Claimant's testimony to have been consistent with the weight of the medical evidence and, therefore, credible and persuasive.

28. Between conflicting testimonies and opinions, the ALJ made a rational choice, based on substantial evidence, to accept the Claimant's testimony and the opinions of Dr. Patel, Dr. Goldstein, Dr. Reinhard, and the Rose Medical ER physicians and reject opinions to the contrary.

29. The ALJ finds that the Claimant has proven by a preponderance of the evidence that he sustained a compensable injury on August 25, 2016. The Claimant has proven, by preponderant evidence, that Dr. Patel's neurological referral is causally related to the August 25, 2016 industrial injury and reasonably necessary to cure and relieve the effects thereof. Further, the treatment that Claimant has received to date is causally related to his August 25, 2016 injury.

30. The Rose Center ER was an authorized medical provider. Its referral to Dr. Patel was within the authorized chain of referrals; and, referrals by Dr. Patel, or within the unbroken chain, to Dr. Goldstein and Dr. Reinhard were within the authorized chain of referrals.

CONCLUSIONS OF LAW

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

Credibility

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

knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the opinions of Dr. Ladwig, Dr. Striplin and Dr. Carbaugh with respect to W.C. No. 5-004-352-002 were high credible and persuasive. With respect to W.C. No. 5-025-676, the opinions of the Rose Medical ER physicians, Dr. Patel, Dr. Goldstein, and Dr. Reinhard were highly credible and persuasive regarding their diagnosis of a work related injury. On the other hand, as found, the opinions of Dr. Paz, in both cases, were inadequately based, contrary to the weight of medical opinions in evidence, and lacking in credibility for the reasons herein above stated. Further, as found, the Claimant's testimony, as related to both cases, was consistent with the weight of the medical evidence and, therefore, credible and persuasive.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting testimonies and opinionsin W.C. No. 5-004-352-002, the ALJ made a rational choice, based on substantial evidence, to accept the Claimant's testimony and the opinions of Dr. Ladwig, Dr. Carbaugh, and Dr. Striplin and to reject opinions to the contrary.With respect to W.C. No. 5-025-676, between conflicting testimonies and opinions, the ALJ made a rational choice, based on substantial evidence, to accept the Claimant's testimony and the opinions of Dr. Patel, Dr. Goldstein, Dr. Reinhard, and the Rose Medical ER physicians and reject opinions to the contrary.

Medical

c. An employee is entitled to continuing medical benefits after MMI if reasonably necessary to relieve the employee from the effects of an industrial injury. *See Grover v. Indus. Comm'n of Colorado*, 759 P.2d 705 (Colo. 1988). The record must contain substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve a claimant from the effects of an injury or to prevent further deterioration of his condition. *Stollmeyer v. Indus. Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995); *Grover v. Indus. Comm'n, supra*. Such evidence may take the form of a prescription or recommendation for a course of medical treatment necessary to relieve a claimant from the effects of the injury or to prevent further deterioration. *Stollmeyer v. Indus. Claim Appeals Office, supra*. An injured worker is ordinarily entitled to a general award of future medical benefits, subject to an employer's right to contest causal relatedness and reasonable necessity. *See Hanna v. Print Expediters,* 77 P.3d 863 (Colo. App. 2003). Treatment to **improve** a claimant's condition does **not** fall under the purview of *Grover* benefits. *Shalinbarger v. Colorado Kenworth, Inc.,* W.C. No. 4-364-466 [Indus. Claim Appeals Office (ICAO), March 12, 2001]. As found, Claimant is entitled to maintenance medical care, which is reasonably necessary to address the injury in W.C. No. 5-004-352-002. Dr. Ladwig was an ATP and his referral to Dr. Carbaugh was within the chain of authorized referrals.

d. An employer must provide an injured employee with reasonably necessary medical treatment to "cure and relieve the employee from the effects of the injury." § 8-42-101(1) (a), C.R.S. The employee must prove a causal relationship between the injury and the medical treatment for which the worker is seeking benefits. *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. Ct. App. 1997). Treatments for a condition not caused by employment are not compensable. *Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187, 1189 (Colo. Ct. App. 2002). An industrial accident is the proximate cause of a claimant's disability if it is the necessary precondition or trigger of the need for medical treatment. *Subsequent Injury Fund v. State Compensation Insurance Authority,* 768 P.2d 751 (Colo. App. 1988). In order to prove that an industrial injury was the proximate cause of the need for medical treatment, an injured worker must prove a causal nexus between the need for treatment and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). It is for the ALJ, as the fact-finder, to determine whether a need for medical treatment is caused by the industrial injury, or some other intervening injury. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). Respondents are liable for the "direct and natural consequences" of a work-related injury, including consequential injuries caused by the original compensable injury. *See Travelers Ins. Co. v. Savio*, 806 P.2d 1258 (Colo. 1985). The chain of causation, however, can be broken by the occurrence of an independent intervening injury. *See* 1 A. *Larson, Workers' Compensation Law,* section 13.00 (1997). As found, the medical care and treatment for the Claimant's toxic exposure was causally related thereto and reasonably necessary to cure and relieve the effects thereof. As found, with respect to W.C. No. 5-004-352-002,

e. To be authorized, all referrals must remain within the chain of authorized referrals in the normal progression of authorized treatment. *See Mason Jar Restaurant v. Indus. Claim Appeals Office,* 862 P. 2d 1026 (Colo. App. 1993); *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P. 2d 501 (Colo. App. 1995); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). When an ATP refers an injured worker to his personal physician, under the mistaken belief that the claim was not compensable, the referral was nonetheless within the chain of authorized referrals and, thus, subsequent treatment was authorized. *See Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277 (Colo. App. 2008). As found, all of the referrals in both cases were within the chain of authorized referrals.

Burden of Proof

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

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents shall pay all the costs of competing the recommended acupuncture treatment by Dr. Shih and the counseling recommended by Dr. Carbaugh as maintenance medical care (W.C. No. 5-004-352-002); and, the costs of medical treatment for the Claimant's compensable toxic exposure of August 25, 2016 (W.C. No. 5-025-676), subject to the Division of Workers' Compensation Medical Fee Schedule.

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

DATED this19th day of March 2019.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of March 2019, electronically in PDF format, addressed to:

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

_____
Court Clerk

Wc..ord

ISSUES

1. Whether Respondent has produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of David W. Yamamoto, M.D. that Claimant has not reached Maximum Medical Improvement (MMI) as a result of his February 2, 2017 admitted industrial injuries.

2. Whether Claimant is entitled to a disfigurement award pursuant to §8-42-108, C.R.S.

FINDINGS OF FACT

1. Claimant worked for Employer as a Security Facilitator. On February 2, 2017 he suffered admitted industrial injuries during the course and scope of his employment. Claimant specifically slipped and fell on black ice and suffered a right femur fracture. He was transported by ambulance to the Good Samaritan Medical Center Emergency Room.

2. On February 3, 2017 Claimant underwent surgery with George Chaus, M.D. Dr. Chaus characterized the fracture as "significantly more difficult for fixation and reduction than a standard intertrochanteric or subtrochanteric hip fracture with significant deforming forces requiring an open reduction, cerclage cable wiring and advanced trauma techniques." He prescribed postoperative antibiotics and DVT prophylaxis.

3. On February 6, 2017 Claimant was transferred to a rehabilitation facility. He remained at the location and received treatment for approximately one month. When he returned home in early March, 2017 he utilized a hospital bed on the main floor for sleeping and required a wheelchair to move around the house.

4. On March 10, 2017 Claimant visited Authorized Treating Physician (ATP) Dean L. Prock, M.D. He reported right upper and lateral right leg pain. Dr. Prock diagnosed Claimant with right hip pain, right knee pain and acute intractable tension-type headaches.

5. On April 11, 2017 Claimant returned to light duty work with Employer. He had restrictions of no lifting or carrying more than two pounds, and no walking, crawling, kneeling, squatting, climbing or driving. Claimant was directed to use the wheelchair for movement a maximum of two to four minutes per hour.

6. On May 19, 2017 Claimant returned to Dr. Prok for an examination. Claimant did not report any lower back pain. He utilized a walker instead of a wheelchair. Claimant advised Dr. Prok that he would be leaving soon for a one month-long vacation in the Philippians. Dr. Prok referred Claimant to Nicholas K. Olsen, D.O.

for an examination. However, Claimant noted that he would not be able to undergo an evaluation until after he returned from vacation.

7. On June 29, 2017 Claimant visited Dr. Olsen for an evaluation. Claimant mentioned a recent trip to the Philippines with his family. While in the water he was able to walk with a normal gait and significantly reduced pain. Claimant noted a marked increase of pain with a single-legged stance on the right lower extremity, difficulty walking upstairs and relief when sitting in a recliner or propping his leg up with pillows in bed. Dr. Olsen noted mild forward flexed posture and moderate range of motion deficits in both flexion and extension. He prescribed land-based physical therapy and pool therapy because of Claimant's good experience with water walking while in the Philippines.

8. Claimant underwent land-based physical therapy from July 10, 2017 through August 31, 2017 with CACC Physical Therapy. He received pool therapy with SCLP Broomfield Rehab from June 28, 2017 through September 13, 2017. Claimant did not report any lumbar spine complaints.

9. On August 24, 2017 Claimant visited Dr. Olsen for an examination. Claimant was using a straight cane mostly at work but less at home. He reported anterior right groin pain when weight-bearing as well as pain in his right knee and hip. Claimant did not mention pain in his lumbar spine or SI joint. Dr. Olsen noted "neutral mechanics" in the lumbar spine and full range of motion.

10. Claimant continued to visit Dr. Prok from September 22, 2017 through March 5, 2018. Claimant reported right knee pain and Dr. Prok included "acute pain of right knee" in his diagnoses.

11. On February 5, 2018 Dr. Olsen added, "acute deep vein thrombosis (DVT) of distal vein of right lower extremity" to his diagnoses. He noted that Claimant's personal physician was managing the DVT with blood thinners.

12. On March 5, 2018 Claimant visited Dr. Prok for an evaluation. After performing a physical examination Dr. Prok determined that Claimant had reached Maximum Medical Improvement (MMI). He assigned a 21% right lower extremity impairment rating for loss of range of motion of the hip. Dr. Prok also assigned a 20% right lower extremity impairment rating pursuant to Table 45 of the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised) (AMA Guides*). Combining the ratings yielded a 37% right lower extremity impairment. The 37% lower extremity impairment converts to a 15% whole person rating. Dr. Prok remarked that "[Claimant] reports having some swelling in the lower leg after the DVT event that was not considered occupational due to the duration from the surgical date was a very long time and this was discussed previously and that he should continue management of this issue to his personal physician separately from this claim." He authorized medical maintenance benefits.

13. On March 22, 2018 Respondent filed a Final Admission of Liability (FAL) consistent with Dr. Prok's date of MMI and 37% right lower extremity impairment rating. Respondent also agreed that Claimant was entitled to receive medical maintenance benefits. Claimant timely filed an objection to the FAL and sought a Division Independent Medical Examination (DIME).

14. On September 7, 2018 Claimant underwent a DIME with David W. Yamamoto, M.D. Dr. Yamamoto determined that Claimant had not reached MMI. After reviewing Claimant's medical records and conducting a physical examination Dr. Yamamoto diagnosed Claimant with the following: (1) right hip intertrochanteric fracture/subtrochanteric fracture with extension to the proximal right femur requiring an intramedullary implant; (2) antalgic gait requiring frequent use of a cane; (3) mechanical lower back pain secondary to the antalgic gait; and (4) DVT following the right hip fracture, lengthy immobilization and inactivity post-injury. He summarized that Claimant's continuing antalgic gait secondary to his industrial injury resulted in persistent lower back pain and dysfunction that had not been formally treated. Dr. Yamamoto recommended a trial of physical therapy. However, if Claimant did not respond, he suggested referral to a physiatrist for evaluation and treatment.

15. Dr. Yamamoto provided a provisional impairment rating of 33% for Claimant's right lower extremity. The rating included 25% for loss of range of motion and 10% for peripheral vascular system impairment. The right lower extremity 33% impairment rating converts to a 13% whole person impairment. Dr. Yamamoto also provided a provisional lumbar spine impairment rating of 12%. The rating included 5% pursuant to Table 53 of the *AMA Guides* and 7% for loss of range of motion. When combined with the lower extremity ratings the provisional whole person impairment rating was 23%.

16. Respondent filed an Application for Hearing seeking to overcome Dr. Yamamoto's opinion regarding MMI. In support, Respondent obtained an independent medical examination with Carlos Cebrian, M.D. Dr. Cebrian performed the examination on November 29, 2018 and issued a report dated December 18, 2018. He concluded that Dr. Yamamoto clearly erred in determining that Claimant had not reached MMI. Dr. Cebrian explained that the medical records did not contain documentation of any lumbar spine complaints. He specifically reviewed the medical records and noted the various dates of service where the treating physicians directly addressed the lumbar spine. Physicians did not record spinal complaints or symptoms in any of the reports. Instead, Dr. Cebrian noted that the first documentation of lumbar spine complaints occurred during Dr. Yamamoto's DIME over 18 months after Claimant's date of injury. Notably, Dr. Cebrian's examination of the lumbar spine was unremarkable.with no discomfort or positive findings. He summarized that there was simply no objective pathology to support a Table 53 diagnosis or permanent impairment rating for the lumbar spine pursuant to the *AMA Guides*. Finally, Dr. Cebrian explained that Dr. Yamamoto's recommendation for an evaluation with a physiatrist was incorrect because Claimant had already been examined by physiatrist Dr. Olsen.

17. Dr. Cebrian also explained that Dr. Yamamoto clearly erred in attributing Claimant's DVT to his February 2, 2017 industrial injuries because of the significant temporal delay in the onset of symptoms. Claimant specifically did not mention symptoms of a DVT until approximately June 29, 2017. The symptoms occurred after Claimant returned from a long plane ride and vacation in the Philippians.

18. Claimant testified at the hearing in this matter. He explained that he was initially confined to a wheelchair but transitioned to a walker by early May 2017 and no longer used a wheelchair by June 2017. He subsequently began using a cane. Claimant explained that he reported lower back pain to Dr. Prok sometime after he started occasionally walking with a cane. He had not suffered any lower back pain while using a wheelchair. However, Dr. Prok told him that he could not place the lower back complaints in his report because he did not report lower back pain after his initial injury on February 7, 2017. Claimant maintained that his lower back pain has not changed and he has never been evaluated for lumbosacral problems.

19. Claimant underwent a disfigurement evaluation at the hearing. As a result of Claimant's February 2, 2017 industrial injuries, he sustained permanent disfigurement to his right hip area. The disfigurement consists of an approximately four inch long scar on his right thigh and an approximately one inch long scar on his abdomen. Claimant also exhibited a noticeable limp. The disfigurement is serious, permanent and normally exposed to public view. Claimant is thus entitled to a disfigurement award in the amount of $2,000.00.

20. Dr. Cebrian testified at the hearing in this matter. He maintained that Dr. Yamamoto erroneously concluded that Claimant had not reached MMI. Instead, Dr. Cebrian agreed with Dr. Prok that Claimant reached MMI on March 5, 2018 and warranted an 18% right lower extremity impairment rating. He emphasized that Claimant's medical records revealed normal lumbar spine examinations and no lumbar spine complaints. Moreover, Dr. Yamamoto incorrectly attributed Claimant's lumbar spine complaints to an altered gait based on the use of a cane. Dr. Cebrian noted that the medical literature reflects that the use of a cane lessens the stress associated with an altered gait on the lumbar spine. Furthermore, Dr. Yamamoto's referral to a physiatrist was erroneous because physiatrist Dr. Olsen had completed a thorough examination of Claimant's lumbar spine. Finally, Claimant's DVT was unrelated to his February 2, 2017 industrial injuries because Claimant was never completely immobile and the symptoms did not arise until several months after his February 3, 2017 surgery.

21. Respondent has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Yamamoto that Claimant has not reached MMI as a result of his February 2, 2017 industrial injuries. Initially, on February 2, 2017 Claimant suffered a right femur fracture when he slipped and fell while performing his job duties for Employer. He underwent surgery on February 3, 2017 and subsequently spent approximately one month in a rehabilitation facility. Claimant also underwent evaluations with Dr. Olsen and received physical therapy. He developed a DVT in approximately June 2017 that was treated through his personal medical providers. On

March 5, 2018 ATP Dr. Prok determined that Claimant had reached MMI and assigned a 37% right lower extremity impairment rating.

22. On September 7, 2018 Claimant underwent a DIME with Dr. Yamamoto. Dr. Yamamoto determined that Claimant had not reached MMI. After reviewing Claimant's medical records and conducting a physical examination Dr. Yamamoto diagnosed Claimant with the following: (1) a right hip fracture; (2) antalgic gait requiring frequent use of a cane; (3) mechanical lower back pain secondary to the antalgic gait; and (4) a DVT following the right hip fracture because of lengthy immobilization and inactivity. He summarized that Claimant's continuing antalgic gait secondary to his industrial injury resulted in persistent lower back pain and dysfunction that had not been formally treated. Dr. Yamamoto recommended a trial of physical therapy. However, if Claimant did not respond, he suggested referral to a physiatrist for evaluation and treatment.

23. Respondent challenged Dr. Yamamoto's DIME determination based on an independent medical examination with Dr. Cebrian. Dr. Cebrian concluded that Dr. Yamamoto clearly erred in determining that Claimant had not reached MMI. He reasoned that the medical records did not contain documentation of any lumbar spine complaints. Dr. Cebrian noted that the first documentation of lumbar spine complaints did not occur until Dr. Yamamoto's DIME over 18 months after Claimant's injury. Dr. Yamamoto also incorrectly attributed Claimant's lumbar spine complaints to an altered gait based on the use of a cane. Dr. Cebrian further commented that Dr. Yamamoto's recommendation for an evaluation with a physiatrist was incorrect because Claimant had already been examined by physiatrist Dr. Olsen. Finally, Claimant's DVT was unrelated to his February 2, 2017 industrial injuries because he was never completely immobilized and the symptoms did not arise until several months after his February 3, 2017 surgery.

24. Respondent has failed to demonstrate that Dr. Yamamoto improperly applied the *AMA Guides* or otherwise erred in concluding that Claimant had not reached MMI. Although Dr. Cebrian disagreed with Dr. Yamamoto's determination that Claimant has not reached MMI, the conclusion was not clearly erroneous. The medical records and credible testimony reflect that Claimant was initially confined to a wheelchair after his industrial injuries, transitioned to a walker and then began using a cane. Claimant explained that he reported lower back pain to Dr. Prok sometime after he started occasionally walking with a cane. He had not suffered any lower back pain while using a wheelchair. Dr. Yamamoto reasoned that Claimant suffered an antalgic gait requiring frequent use of a cane that caused him to develop lower back pain. Dr. Cebrian's disagreement regarding Claimant's development of lower back pain does not undermine Dr. Yamamoto's reasonable reliance on Claimant's clinical history and credible reports. Moreover, although Claimant had been evaluated by physiatrist Dr. Olsen, Dr. Yamamoto sought a more complete examination of Claimant's lower back dysfunction if physical therapy failed. Finally, Dr. Yamamoto's determination that Claimant's DVT was related to his February 2, 2017 industrial injury based on immobilization constituted a reasonable inference from the medical records despite the temporal delay in the development of symptoms. Accordingly, Respondent has failed to produce

unmistakable evidence free from serious or substantial doubt that Dr. Yamamoto's determination that Claimant has not reached MMI is incorrect.

CONCLUSIONS OF LAW

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

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

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

Overcoming the DIME

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

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

applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAP, Apr. 16, 2008).

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

7. As found, Respondent has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Yamamoto that Claimant has not reached MMI as a result of his February 2, 2017 industrial injuries. Initially, on February 2, 2017 Claimant suffered a right femur fracture when he slipped and fell while performing his job duties for Employer. He underwent surgery on February 3, 2017 and subsequently spent approximately one month in a rehabilitation facility. Claimant also underwent evaluations with Dr. Olsen and received physical therapy. He developed a DVT in approximately June 2017 that was treated through his personal medical providers. On March 5, 2018 ATP Dr. Prok determined that Claimant had reached MMI and assigned a 37% right lower extremity impairment rating.

8. As found, on September 7, 2018 Claimant underwent a DIME with Dr. Yamamoto. Dr. Yamamoto determined that Claimant had not reached MMI. After reviewing Claimant's medical records and conducting a physical examination Dr. Yamamoto diagnosed Claimant with the following: (1) a right hip fracture; (2) antalgic gait requiring frequent use of a cane; (3) mechanical lower back pain secondary to the antalgic gait; and (4) a DVT following the right hip fracture because of lengthy immobilization and inactivity. He summarized that Claimant's continuing antalgic gait secondary to his industrial injury resulted in persistent lower back pain and dysfunction that had not been formally treated. Dr. Yamamoto recommended a trial of physical therapy. However, if Claimant did not respond, he suggested referral to a physiatrist for evaluation and treatment.

9. As found, Respondent challenged Dr. Yamamoto's DIME determination based on an independent medical examination with Dr. Cebrian. Dr. Cebrian concluded that Dr. Yamamoto clearly erred in determining that Claimant had not reached MMI. He reasoned that the medical records did not contain documentation of any lumbar spine complaints. Dr. Cebian noted that the first documentation of lumbar spine complaints did not occur until Dr. Yamamoto's DIME over 18 months after Claimant's injury. Dr. Yamamoto also incorrectly attributed Claimant's lumbar spine complaints to an altered

gait based on the use of a cane. Dr. Cebrian further commented that Dr. Yamamoto's recommendation for an evaluation with a physiatrist was incorrect because Claimant had already been examined by physiatrist Dr. Olsen. Finally, Claimant's DVT was unrelated to his February 2, 2017 industrial injuries because he was never completely immobilized and the symptoms did not arise until several months after his February 3, 2017 surgery.

10. As found, Respondent has failed to demonstrate that Dr. Yamamoto improperly applied the *AMA Guides* or otherwise erred in concluding that Claimant had not reached MMI. Although Dr. Cebrian disagreed with Dr. Yamamoto's determination that Claimant has not reached MMI, the conclusion was not clearly erroneous. The medical records and credible testimony reflect that Claimant was initially confined to a wheelchair after his industrial injuries, transitioned to a walker and then began using a cane. Claimant explained that he reported lower back pain to Dr. Prok sometime after he started occasionally walking with a cane. He had not suffered any lower back pain while using a wheelchair. Dr. Yamamoto reasoned that Claimant suffered an antalgic gait requiring frequent use of a cane that caused him to develop lower back pain. Dr. Cebrian's disagreement regarding Claimant's development of lower back pain does not undermine Dr. Yamamoto's reasonable reliance on Claimant's clinical history and credible reports. Moreover, although Claimant had been evaluated by physiatrist Dr. Olsen, Dr. Yamamoto sought a more complete examination of Claimant's lower back dysfunction if physical therapy failed. Finally, Dr. Yamamoto's determination that Claimant's DVT was related to his February 2, 2017 industrial injury based on immobilization constituted a reasonable inference from the medical records despite the temporal delay in the development of symptoms. Accordingly, Respondent has failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Yamamoto's determination that Claimant has not reached MMI is incorrect.

Disfigurement

11. Section 8-42-108, C.R.S. provides that a claimant may obtain additional compensation if he is seriously disfigured as the result of an industrial injury. As found, as a result of Claimant's February 2, 2017 industrial injuries, he sustained permanent disfigurement to his right hip area. The disfigurement consists of an approximately four inch long scar on his right thigh and an approximately one inch long scar on his abdomen. Claimant also exhibited a noticeable limp. The disfigurement is serious, permanent and normally exposed to public view. Claimant is thus entitled to a disfigurement award in the amount of $2,000.00.

ORDER

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

1. Respondent has failed to overcome Dr. Yamamoto's DIME opinion. Claimant has not reached MMI for his February 2, 2017 industrial injuries.

2. Claimant is entitled to receive disfigurement benefits in the amount of $2,000.00 for his February 2, 2017 industrial injuries.

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

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

DATED: March 19, 2019.

DIGITAL SIGNATURE:
Peter J. Cannici

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

STATE OF COLORADO
OFFICE OF ADMINISTRATIVE COURTS
W.C. NO. 5-079-980

I ISSUES TO BE DETERMINED

- Whether Decedent proved by a preponderance of the evidence that the injury and death are compensable.

- Whether Respondents proved by a preponderance evidence that Decedent deviated from the course and scope of his employment thereby removing himself from travel status.

- Whether Decedent proved by a preponderance of the evidence that Decedent returned to the scope of his employment.

- If compensable, whether Respondents have proved by a preponderance of the evidence that they are entitled to a 50% reduction in benefits for intoxication.

II STIPULATED FACTS

1. Decedent was a pilot for Employer since 2007, and resided in the State of California.

2. At the time of his death, Decedent was married to Alayna O_____. Wife and two minor children are dependents of Decedent.

3. Decedent traveled to Denver, Colorado to participate in Employer's flight training to become a captain flying the E175 aircraft. The flight training began mid-January 2018, and took place at the Flight Safety Denver Learning Center located at 6755 Yampa Street, Denver, Colorado 80249. The training center is located west of North Tower Road between East 68th Avenue and East 67th Avenue.

4. During his training, Decedent stayed at the SpringHill Suites by Marriott Denver Airport, located at 18350 East 68th Avenue, Denver, Colorado 80249. This hotel is located on the west side of North Tower Road.

5. Baylee L_____ is a pilot for SkyWest Airlines, Inc. Mr. L_____'s flight training for Employer overlapped in part with Decedent's. Mr. L_____ and Decedent partnered during flight simulator training.

6. During his training, Mr. L_____ stayed at the Fairfield Inn & Suites by Marriott Denver Airport located at 6851 Tower Road, Denver, Colorado 80249. This hotel also is located on the west side of North Tower Road.

7. On February 14, 2018, at 10:00 p.m., Decedent and Mr. L_____ completed the Initial Maneuvers Validation (IMV) testing halfway through their training. Both Decedent and Mr. L_____ passed the testing.

8. Decedent and Mr. L_____ were off from work on February 15, 2018 and were to return to their training on February 16, 2018.

9. That evening, at approximately 10:27 p.m., Decedent and Mr. L_____ ate dinner and drank beer at Ruby Tuesday. Decedent and Mr. L_____ left Ruby Tuesday and went downtown to one or more bars to continue celebrating having passed the IMV test.

10. At approximately 2 a.m. on February 15, 2018, Decedent and Mr. L_____ returned to the Fairfield Inn & Suites where Mr. L_____ was staying.

11. Around 6 a.m. on February 15, 2018, a car heading southbound on North Tower Road struck Decedent, just south of Tower Road and 69th Avenue. Emergency services transported Decedent to the University of Colorado Hospital.

12. Decedent died at University of Colorado Hospital at approximately 9 a.m. the same day.

13. A blood sample was taken while Decedent was receiving treatment at University of Colorado Hospital. No second sample of the blood was preserved.

14. Decedent was a max wage earner at the time of the accident. Upon finding of compensability, the TTD rate for calculation of death benefits is $948.15.

III FINDING OF FACTS

15. Decedent and Mr. L_____ spent time together rehearsing, testing and studying, and had a friendly relationship.

16. Mrs. O_____ testified that Decedent left California for training in Denver on January 12 or 13, and was to be gone for one-and-half to two months for training. Ms. O_____ testified that he remained in Denver training until his death.

17. The night auditor for the Fairfield Inn & Suites, Melissa A_____, testified that at approximately 2:00 a.m. on February 15, 2018, Decedent came to the front desk asking to have a new room key made as his was not working. Ms. A_____ noted that the logo on his room key was for Springhill Suites, not Fairfield Inn & Suites. Ms. A_____ explained to Decedent that he was at the wrong hotel. Mr. L_____ convinced Decedent to go up to his room as he was staying at the Fairfield Inn & Suites.

18. Ms. A_____ observed Decedent at 2:00 a.m. walking as if he was intoxicated. She testified that Decedent smelled of alcohol. As a night auditor, she had observed this type of activity before.

19. At approximately 5:30 a.m. on February 15, 2018, Ms. A_____ interacted with Decedent when he again asked for a room key. Ms. A_____ again informed him that he was staying at the Springhill Suites, not the Fairfield Inn & Suites. Her written statement provides, "He was drunk and he spent about twenty minutes talking to me about how he couldn't put a lid on the coffee cup." She informed him that the Springhill Suites was approximately two buildings away and pointed in the direction of Springhill Suites.

20. Ms. A_____ testified that Decedent still appeared very intoxicated and she worried he might burn himself on the hot coffee. Ms. A_____ observed Decedent struggling with his coffee, unable to put the lid on his cup. She observed Decedent for approximately 10 minutes, and then became distracted helping other hotel guests. Ms. A_____ testified that she was not sure whether Decedent was trying to get to his hotel or not.

21. Ms. A_____ testified that Decedent's attempt to cross Tower Rd. from the Fairfield Inn was in the opposite direction from the Springhill Inn and Suites. Ms. A_____ testified that she was not aware of where the Decedent was going.

22. The police report contains Ms. A_____'s handwritten statement on the day of the accident. Her testimony at hearing was very similar to her written statement. Neither her written statement nor her testimony provide information about where Decedent was heading at the time of the accident.

23. The ALJ finds Ms. A_____ to be credible and her testimony to be persuasive.

24. Mr. L_____ testified that he and Decedent went to Ruby Tuesday to have dinner, and that he and Decedent consumed two beers each. After Ruby Tuesday, they went to a bar for approximately two hours and returned via Uber to the Fairfield Inn. Mr. L_____ could not remember how many drinks they had, but that they ordered an Uber to return to his hotel, the Fairfield Inn and Suites. Mr. L_____ testified after he and Decedent made it up to his room, he fell asleep in hotel room. He did not awaken until shortly before noon. He also testified that as they had the following day off from work, so it was no big deal to go out and drink.

25. The ALJ finds Mr. L_____ to be credible and his testimony to be persuasive.

26. Morgan Simmons, who is a captain, a fleet training manager, and a chief instructor, confirmed that Decedent's training before his death was on February 14, 2018 and he did not have to return to training until February 16, 2018. He explained where the training facility was, and that at the time of the accident, Decedent was heading in the opposite direction of the facility when the vehicle struck him. Mr. Simmons testified that new-hire pilots, such as Mr. L_____ start training three to four weeks earlier, which is why Decedent and Mr. L_____ were staying in different hotels.

27. The Denver Police Department report indicates that Decedent was crossing Tower Road in the 6800 block from the west side to the east side of the street when tragically he was struck by a motor vehicle. The collision occurred while it was still dark at approximately 6:09 a.m.

28. A bystander provided CPR until first responders arrived approximately three minutes later. First responders provided emergency care and transported Decedent to University Hospital, which admitted Decedent at approximately 6:39 a.m. Claimant sustained numerous serious traumatic injuries.

29. During attempts to stabilize Decedent's condition, a critical care doctor initiated a massive transfusion protocol. Decedent received five units of blood at 7:39 a.m. and began receiving his sixth unit of blood at 7:40 a.m.

30. A blood sample was taken at the hospital at approximately 7:47 a.m. Hospital records show Decedent had a blood alcohol concentration of .209 g/100ml.

31. A urine sample was collected from Decedent's catheter at 7:51 a.m. Hospital records show that Decedent tested positive for Ethanol in his Urine, his results being above the 10mg/dL triggering level.

32. Decedent died from his injuries at approximately 9:00 a.m.

33. The Denver Police Department report includes three witness statements from the drivers at or near the accident – two from nearby drivers and one from the driver whose vehicle struck the Decedent. Tina Gresley was driving southbound on Tower Rd. "when she saw a person running across Tower Rd." Larry Hurst was driving southbound on Tower Rd. and as he was passing the Fairfield Inn, he saw a man "come out of nowhere trying to cross Tower Rd." Thomas Poliwka, the driver of the vehicle that struck Decedent stated, "I was southbound Tower Rd. at 40 mph when a pedestrian suddenly jumped in front of my vehicle." Mr. Poliwka confirmed that Decedent "was crossing from the west side of Tower Rd. to the east side."

34. The police report categorized Decedent's attempted crossing as a violation, "Prohibited Crossing of Roadways." Mr. Poliwka received no citation for any moving violation and was absolved of any other criminal charges.

35. Matthew Garrow, one of the first officers arriving at University Hospital for investigation purposes, issued a statement contained in the police report. He noted that while the hospital staff was going through Decedent's personal items, "[t]here were numerous receipts from businesses in the area of 6900 N Tower Rd, Denver Colorado."

36. The police report diagram on page 59 of Respondents' exhibits shows that Decedent was crossing Tower Road away from the training facility and away from his hotel.

IV CONCLUSIONS OF LAW

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

GENERAL LEGAL PRINCIPLES

The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102 (1), C.R.S. A Decedent in a workers' compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier of fact, after considering all of the evidence, to find that a fact is probably more true than not. *Page v. Clark,* 197 Colo. 306, 591 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S.

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

In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. See *Prudential Insurance Co. v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936). *Colorado Jury Instructions, Civil*, 3:16.

COMPENSABILITY

For a claim to be compensable, an injury must occur in the "course and scope" of employment and "arise out of the employment." *See* Section 8-41-301(1)(b), C.R.S. The "arising out of" test is one of causation. It requires that the injury have its origin in an employee's work-related functions and be sufficiently related thereto to be considered part of the employee's service to the employer. Additionally, it is the decedent's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. Section 8-43-201, C.R.S.; *Ramsdell v, Horn*, 781 P.2d 150 (Colo. App. 1989). Whether there is a sufficient causal relationship between the Decedent's employment and the injury is generally a question of fact, which the ALJ must determine based on the totality of the circumstances. Section 8-43-301(8), C.R.S. *In Re Question Submitted by the United States Court of Appeals*, 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle*, 934 P.2d 861 (Colo. App. 1996).

DEVIATION FROM EMPLOYMENT AND TRAVEL STATUS

An employee required to travel away from the employer's premises is considered to be in travel status, and is covered for workers' compensation during the entire trip. *Phillips Contracting , Inc. v. Hirst,* 905 P.2d 9 (Colo. App. 1995). However, an exception to this rule exists where the employee engages in a personal errand unrelated to the employer's business and other matters incident to the travel.

If the employee makes a distinct departure on a personal errand, coverage will cease and will not be restored until the errand has been completed. *Pat's Power Tongs, Inc. v. Miller*, 474 P.2d 613 (Colo. 1970); *Wild West Radio, Inc. v. Industrial Claim Appeals Office*, 905 P.2d 6 (Colo. App. 1995). Whether an employee has returned to the scope of employment after a personal excursion is an issue of fact, with the burden of proof placed on the Decedent. *Wild West Radio, supra*.

The Court of Appeals held in *Pacesetter Corp. v. Collet*, 33 P.3d 1230 (Colo. App. 2001), that "in some circumstances the act of consuming alcohol, by itself, can constitute a personal deviation sufficient to remove the Decedent from the scope of employment." *Id.* at 1234.

Determining when an errand has been completed is a factual determination for the court. *Wild West Radio supra*. Colorado courts have held that a personal errand ends and the claimant returns to the scope of employment the "moment he commences his return to his home or his lodging." *Pat's Power Tongs, Inc., supra*.

In the case of *Nathan Bunn v. Woody's Paint*, W.C. No. 4-370-167 (May 17, 1999) the Industrial Claim Appeals Office upheld an ALJ's order which determined that even though the claimant had returned to and passed his hotel after an evening of drinking, his deviation had not ended when he was injured while heading away from the hotel. The ALJ found a deviation due to the claimant having a "night on the town" of substantial amounts of drinking over several hours after work. The ICAO affirmed the ALJ's holding and concurred that *Pat's Power Tongs* did not require a finding that the deviation had concluded because the ALJ specifically determined that the claimant was heading away from his hotel and rather than on a direct path.

The parties stipulate that Decedent traveled to Colorado to undergo flight training at the Flight Safety Denver Learning Center. Thus, pursuant to the general rule, Decedent was in travel status while in Colorado.

However, the issue is whether Decedent deviated from his employment and said travel status, and if so, whether he returned to the scope of employment after this deviation. Based on the totality of the circumstances, the ALJ finds and concludes Decedent engaged in a deviation and had not returned to the course and scope of his employment at the time of his injury.

As found, Decedent and Mr. L_____ set out at approximately 10:27 p.m. to celebrate their success in completing IMV training. They started with dinner at Ruby Tuesday where they consumed beers. After leaving Ruby Tuesday, they traveled to a bar where they spent an additional couple of hours drinking.

After they finished drinking at approximately 2:00 a.m. on February 15, 2018, Decedent and Mr. L_____ returned to Mr. L_____'s hotel, which was two buildings from Decedent's hotel. The night auditor, Melissa A_____, testified that Decedent and Mr. L_____ stopped by the front desk. Decedent requested a new key as his did not work. Ms. A_____ noticed that the Decedent's key card was for the Springhill Suites and told him he was at the wrong hotel. Decedent and Mr. L_____ left to go upstairs. Decedent appeared intoxicated, as he was not steady when handing her his card key and she smelled alcohol. She had observed these behaviors before with intoxicated guests.

At approximately between 5:30 a.m., Decedent again asked Ms. A_____ for a room key. She informed Decedent that his hotel was two buildings over. She watched Decedent get coffee and became concerned because it was very hot and Decedent appeared intoxicated. He was unable to put a lid on his coffee cup.

When Decedent left the Fairfield Inn, he travelled east and attempted to cross Tower Road at an unsafe crossing point. Decedent headed in the opposite direction of the training facility and his hotel.

Although Decedent's counsel argued that Decedent was returning to his hotel and was lost, Decedent offered no persuasive evidence to support that argument. Although Decedent attempted to cross Tower Road sometime after Ms. A_____ pointed in the direction of his hotel, the ALJ cannot infer that Decedent intended to return to his hotel. Although Decedent had spent approximately one month in the immediate area, evidenced by receipts he possessed, he was travelling away from his hotel.

Neither can the ALJ infer that Decedent was returning to Employer's Training Center, because the uncontradicted testimony of Mr. L_____ and Mr. Simmons established Decedent was not working the day of his injuries.

Persuasive evidence supports a finding and conclusion that Decedent was intoxicated when he sustained his injuries.

- Claimant's blood sample taken at approximately 7:47 a.m. showed Decedent had a blood alcohol concentration of .209 g/100ml. When the sample was taken, Decedent had already received six units of blood that likely would have diluted the alcohol content of the sample.

- Claimant's urine sample taken at approximately 7:51 a.m. showed that Decedent tested positive for Ethanol, his results being above the 10mg/dL triggering level.

- Ms. A_____ observed Decedent shortly before he sustained his injuries and observed that he was confused about which hotel he was staying at, was unable to put a lid on his coffee cup, and smelled like alcohol.

- Decedent exercised poor judgment in trying to cross a road with a fifty-five mile per hour speed limit in the middle of the block wearing dark clothes in the dark.

The Judge finds and concludes Decedent was in a personal deviation at the time of the accident, due to hours of consuming alcohol. The ongoing consumption and resulting intoxication amounted to a continuous deviation that began starting at Ruby Tuesday with the consumption of two beers and continued up until the time of the accident. The consumption of alcohol and high level of intoxication provides no benefit to Employer and is of such a personal nature that one cannot conclude it to be within the course and scope or arise from Decedent's position as a commercial airline pilot.

Decedent bears the burden of showing the return to employment. *Wild West Radio, Inc. v. Industrial Claim Appeals Office of State of Colo.*, 905 P.2d 6 (Colo. App. 1995). While *Pat's Power Tongs, Inc.* held that a worker's personal deviation ends the moment he begins to return to his lodging, the facts here do not support a finding that Decedent began to return to his lodging. Decedent was not heading toward the Springhill Inn and Suites, but rather was heading in the opposite direction. Our facts are more similar to those in *Wild West Radio* and *Bunn.* While Decedent did return to his co-worker's hotel, he never returned to his own hotel. When the motor vehicle struck him, Claimant undisputedly was heading not towards the Springhill Inn and Suites or Employer's training facility. Both are located on the west side of Tower Road and neither location would require Decedent to cross Tower Road. Even if the Judge were to infer that Decedent was trying to return to his hotel by asking for a replacement room key, the facts show he decided not to head in the direction of the Springhill Inn and Suites. These facts are similar to *Dunn*, where an intention eventually to return to a hotel room is not sufficient to end the deviation and specific travel away from the hotel continues the personal deviation.

While Decedent argues he was heading in the wrong direction because he was confused, the Judge finds no persuasive evidence to support it. Persuasive evidence shows that Decedent had been in the location of the hotels and accident since January 12 or 13, 2018, he had been staying at the Springhill Inn and Suites through the date of his death, and hospital staff found "numerous" receipts of restaurants around the area.

Based on a totality of the circumstances, the Judge finds and concludes that Decedent has not met its burden of proving that, more likely than not, Decedent had returned to his employment. Decedent remained on a continuous personal deviation and was not in the course and scope of his employment at the time of the accident. Consequently, this claim is not compensable.

Based on this conclusion, the Judge declines to address other issues.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the ALJ hereby Orders:

1. Decedent's claim is denied and dismissed.

DONE AND ENTERED this 20th day of March 2019.

BY THE COURT:

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman, #400
Denver, CO 80203

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, Denver, Colorado, 80202. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.*

ISSUES

- Did Claimant prove injuries she suffered on October 15, 2017, including a fractured left wrist, arose out of and occurred within the course and scope of her employment?

FINDINGS OF FACT

1. Claimant worked for Employer as a manager and bartender. On October 15, 2017, she fractured her left wrist after being pushed to the ground by a bar patron engaged in a fight. Neither party disputes Claimant was injured at work. The disagreement involves how Claimant came to be involved in the altercation and whether the injury "arose out of" her employment.

2. During the shift, Claimant received a call from the bar owner (Joel N[Redacted]) on her cell phone regarding various work issues. It was very loud inside the bar, so she stepped outside to hear better. While she was on the call, she saw two individuals in the street fighting. The men were down past a few vehicles parked diagonally along the street in front of the bar. She recognized at least one combatant as a customer who had been drinking in the bar that evening. She exclaimed to the bar owner "there are two guys from the bar tonight out in the street beating the crap out of each other."

3. At this point, the parties' versions of events diverge. Respondents believe Claimant physically intervened between the two men. Respondents reason that, "claimant took herself outside the scope of her employment at the moment she approached the individuals and physically intervened in a fight happening a half-block away in the middle of the street."

4. Claimant testified "in no way, shape or form" did she physically insert herself into the fight. She testified she moved toward the men yelled something to the effect of, "Knock it off you guys!" Claimant testified she never left the sidewalk and did not go out in the street. She then turned away and continued her phone conversation. A moment later, she turned back and saw one of the combatants ("J[Redacted]") running toward her. She was standing near a parked Ford pickup truck and put her phone on the hood just before the man pushed her to the ground. She hit her head on a "2-hour parking" sign embedded in the sidewalk and broke her wrist when she hit the ground. [1]

5. After being knocked down, Claimant got up and looked for her phone but could not find it. She went into the bar and put her wrist into a bucket of ice. She then

[1] Based on the bodycam video, the 2-hour parking sign was approximately two diagonally-oriented parking spaces away from the front door of the bar, in front of Rockee's Restaurant. The Ford pickup was in the adjacent parking space.

called her daughter about deactivating the phone from their shared plan. Claimant's daughter is a dispatcher for the Pueblo Police Department, and she dispatched police to the scene.

6. J[Redacted] went back into the bar to speak with Claimant and see if she was okay. J[Redacted] remained in the bar and was served another beer.

7. Multiple police units arrived at the bar a few minutes later.[2] One of the officers ("Officer 1") entered the bar and asked what was going on. Claimant was standing behind the bar with her wrist in a bucket of ice. J[Redacted] was sitting at the bar drinking a beer, and the other bartender, Lisa Q[Redacted], was standing with them.

8. Officer 1 asked what happened, and Claimant replied, "There was an altercation outside, I intervened, and I got pushed and somebody took my cellphone." Ms. Q[Redacted] said, "And that guy that's out[side], he's . . . ." She gestured with her arm, but did not finish the thought. The individual outside to whom Ms. Q[Redacted] was referring was named "M[Redacted]." Another man sitting at the bar indicated J[Redacted] was fighting with M[Redacted]. Ms. Q[Redacted] seemed to think M[Redacted] was the instigator and J[Redacted] "had nothing to do with it." Shortly thereafter, Ms. Q[Redacted] can be seen patting J[Redacted] on the arm and stating, "you're alright, you're alright."

9. J[Redacted] and M[Redacted] were semi-regular customers of the bar and known to Claimant before the accident. Both men had been drinking in the bar that evening before the accident.

10. Claimant went outside and discussed the incident with another officer ("Officer 2"). Claimant stated,

> I was over here talking on the phone and two different people were out here fighting. And all I said was, "dudes, you guys have to — you have to move it." Plain and simple. Before you know it, somebody pushed me. My head hit right there, you know, and I bit it pretty bad.

11. Officer 2 asked Claimant if she knew who was involved. Claimant identified M[Redacted] but said she was not sure who else was involved.

12. A few moments later, Officer 2 asked,

> Q: So you're talking on the phone, two people approached you —
>
> Claimant: No. I approached them.
>
> Officer 2: And why was that? Because they had to move what?
>
> Claimant: They were fighting. I mean, there was gonna be a physical altercation, it was like an instinct I guess. Told 'em to knock it off. And that's

[2] Multiple officers responded because the call had been mistakenly coded as an armed robbery.

> all I said was "Knock it off guys, you know, come on." And I don't even know who pushed me. But I got pushed, and then before you know it I hit the back of my head and landed on my left wrist and left side.

13. Officer 1 interved J[Redacted] separately while Claimant was speaking with Officer 2. J[Redacted] was obviously very intoxicated.[3] J[Redacted] said he gave M[Redacted] a cigarette, and while they were talking, M[Redacted] "got all loudmouthy" and made what J[Redacted] perceived as a homophobic comment. The argument escalated and J[Redacted] punched M[Redacted]. J[Redacted] said M[Redacted] then "ran away." Officer 1 asked, "How did her wrist get broken," and J[Redacted] replied, "because she came up to me when I was approaching [M[Redacted]], and I pushed her aside."

14. Officer 1 then went to discuss the matter with Officer 2, who was still speaking with Claimant. Officer 1 relayed what J[Redacted] had said. Officer 2 said, "Did we establish that he [J[Redacted]] was the one that pushed her out of the way?" Officer 2 replied, "Yeah, he's telling me that he pushed her out of the way to get towards him [M[Redacted]]." Claimant interjected,

> I don't know though. . . . He [J[Redacted]] is really pretty cool. It's the bald guy [M[Redacted]] . . . .
>
> Officer 1: But [J[Redacted]'s] telling me basically he's the instigator because of comments that guy [M[Redacted]] made. . . . He told me you were trying to separate them[4] and he pushed you to the side to get towards him.
>
> Claimant: Okay.

15. Claimant declined to press charges against J[Redacted] because, "regardless, I don't know if it was him, so I can't say for sure."

16. One officer accompanied M[Redacted] back into the bar to retrieve his jacket. Ms. Q[Redacted] yelled at M[Redacted] about the incident. Most of what she said was drowned out by loud music playing in the background, but she clearly told him, "don't ever come back here again." After M[Redacted] walked out, the officer asked, "what about the other one [J[Redacted]], is he [banned too]?" Ms. Q[Redacted] replied, "No he's good. . . . That guy [M[Redacted]] gets really belligerent and we usually keep an eye on him, every time he comes in here we're like 'keep an eye on that guy, don't serve him too much.'"

17. Ms. Q[Redacted] testified at hearing for Respondents. She admitted she saw none of the events outside and her knowledge was primarily based on hearsay from

[3] Officer 1 colorfully (and correctly) described J[Redacted] as "fucked up," "freakin' hammered," and "trashed."

[4] This is not an accurate summary of J[Redacted]'s statement; he did not say Claimant was "trying to separate" M[Redacted] and himself.

other patrons. Ms. Q[Redacted] asked Claimant about the incident and testified, “She said she got in the way of the fight and broke her arm.”

18. Claimant’s testimony and statements on the video are largely, but not entirely, credible. Specifically, her testimony that J[Redacted] knocked her down and then looked her in the eye contradicts her statements to the police she did not know who pushed her. The ALJ suspects Claimant did not want to identify J[Redacted] to police because she knew he was drunk and he appears to have been popular with the bar staff. Nevertheless, she provided two irreconcilable accounts on that point. But the fact that part of a witness’ testimony is unreliable does not necessarily mean their testimony should be disregarded in its entirety. The ALJ has relied on Claimant’s testimony to the extent it is reasonably consistent with the Body Cam video.

19. The ALJ disagrees with Respondents’ argument the accident occurred “in the middle of the street.” The persuasive evidence shows the accident occurred on the sidewalk in front of Rockee’s Restaurant next door, where Claimant was standing and talking on the phone. She put her phone on the hood of Ford pickup truck, which the video shows was parked in front of Rockee’s. She hit her head on the signpost shown in the video to the left of the truck. The ALJ interprets Claimant’s statement that “I approached them” to mean she moved in their direction on the sidewalk and yelled for them to “knock it off.” There is no persuasive evidence Claimant ever left the sidewalk. It is not likely Claimant went out into the street and physically intervened between J[Redacted] and M[Redacted].

20. After reviewing all the available evidence, the ALJ finds the following scenario probably occurred: Claimant was speaking on the phone with her boss when she heard J[Redacted] and M[Redacted] arguing/fighting out in the street. She moved toward them and shouted, “Knock it off!” She resumed her telephone conversation while the men continued arguing/fighting. One or more punches were thrown and M[Redacted] eventually tried to get away from J[Redacted], heading back toward the bar. J[Redacted] was on the sidewalk and moving quickly to get at M[Redacted]. Claimant saw J[Redacted] coming toward her and threw her phone on the hood of the pickup truck. At that point, Claimant was probably between the two men, which is consistent with her statement to Ms. Q[Redacted] “she got in the way of the fight.” J[Redacted] pushed her aside to get at M[Redacted]. The ALJ finds Claimant was not attempting to physically separate the two men.

21. Claimant proved by a preponderance of the evidence her injuries arose out of and occurred in the course and scope of her employment.

22. Claimant’s injuries proximately caused a need for medical treatment.

CONCLUSIONS OF LAW

A. Claimant proved a compensable injury

To receive compensation or medical benefits, a claimant must prove she suffered an injury “arising out of” and “in the course of employment.” Section 8-41-301(1). The

course of employment requirement is satisfied where the injury occurred within the time and place limits of the employment and during an activity that had some connection with the employee's job-related functions. *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991).

Respondents do not dispute Claimant's injuries occurred "in the course of employment." Rather, the dispute centers on whether the injuries "arose out of" Claimant's employment. Respondents argue, "the fight and her intervention had absolutely nothing to do with her job responsibilities or the bar." Respondents argue Claimant stepped out of her employment and "inserted herself into a purely personal dispute, for purely personal reasons, and was injured as a result."

An injury "arises out of" employment when it "has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered a part of the employee's employment contract." *Horodysyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). The claimant need not actually be performing work duties at the time of the injury, nor must the activity be a strict employment requirement or confer an express benefit on the employer. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). Rather, the question is whether the activity "is sufficiently interrelated to the conditions and circumstances under which the employee generally performs the job functions that the activity may reasonably be characterized as an incident of employment." *Id*. at 210; *see also Panera Bread LLC v. Industrial Claim Appeals Office*, 141 P.3d 970 (Colo. App. 2006). Whether an injury arises out of and in the course of employment are questions of fact for the ALJ, based on the totality of circumstances. *Dover Elevator Co. v. Industrial Claim Appeals Office*, 961 P.2d 1141 (Colo. App. 1998).

An employee can step outside the scope of employment by engaging in a purely personal deviation. When a personal deviation is asserted, the question is "whether the claimant's conduct constituted such a deviation from the circumstances and conditions of the employment that the claimant stepped aside from his job and was performing an activity for his sole benefit." *Panera Bread, LLC v. Industrial Claim Appeals Office*, 141 P.3d 970, 972 (Colo. App. 2006). The deviation must be "substantial" to remove the claimant from the course and scope of employment. *Kelly v. Industrial Claim Appeals Office*, 214 P.3d 516 (Colo. App. 2009).

As found, Claimant proved her injuries arose out of her employment. She was on the phone with her boss immediately before the accident occurred. The man who caused her injuries was a drunken bar patron attempting to "get at" another patron. The fight had nothing to do with Claimant personally. She only became involved because she was the manager of the establishment where the men had been drinking. Admittedly, Claimant's comments that she "intervened" in the fight and "approached" the men are ambiguous. But the ALJ accepts Claimant's explanation she "intervened" *verbally* rather than physically. Claimant "approached" the men in the sense of moving toward them and yelling, "Knock it off." She did not go out into the street and try to break up the fight. The ALJ gives no weight to J[Redacted]'s statement Claimant "came up to him." Perhaps that was his perception because she moved toward the hood of the truck to toss her phone. Regardless, given his level of intoxication, the ALJ does not find J[Redacted] a reliable

source of specific details regarding the event, other than the fact that he knocked Claimant down.

B. Treatment for the fractured wrist was reasonably necessary

A compensable injury is one that causes disability or a need for medical treatment. *Montgomery v. HSS, Inc*., W.C. No. 4-989-682-01 (August 17, 2016). The persuasive evidence shows Claimant fractured her left wrist because of the industrial accident and required treatment.

ORDER

It is therefore ordered that:

1. Claimant's claim for injuries sustained on October 15, 2017 is compensable.

2. Insurer shall cover medical treatment from authorized providers reasonably needed to cure and relieve the effects of Claimant's compensable injury.

3. All issues not decided herein are reserved for future determination.

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

DATED: March 20, 2019

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-065-402-001

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

[Redacted],

Claimant,

v.

[Redacted],

Employer,

and

[Redacted]
Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on March 7, 2019, in Denver, Colorado. The hearing was digitally recorded (reference: 3/7/19, Courtroom 1, beginning at 1:30 PM, and ending at 3:45 PM).

The Claimant was present in person and represented by [Redacted], Esq. The Respondent WAS represented by [Redacted], Esq.

Hereinafter [Redacted] shall be referred to as the “Claimant." [Redacted] shall be referred to as the “Employer.” All other parties shall be referred to by name.

Claimant’s Exhibits 1 through 11 were admitted into evidence, without objection. Respondent’s Exhibits A through G were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ established a post-hearing briefing schedule. Claimant’s opening brief was filed on March 14, 2019. Respondent’s answer brief was filed on March 21, 2019. No timely reply brief was filed and the matter was deemed submitted for decision on March 26, 2019.

ISSUES

The issues to be determined by this decision concern compensability of an episode of atrial fibrillation (hereinafter "a-fib") on December 10, 2017. If the claim is found to be compensable, medical benefits and average weekly wage (AWW) are additionally designated issues.

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

FINDINGS OF FACT

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

The Incident

1. The Claimant is a 34-year employee of the Employer. On December 10, 2017, he had completed a workout routine at the fire station during one of his shifts. He had performed an exercise routine consisting of stretching, yoga, walking up and down stairs while wearing a weighted vest, as well as sets of push-ups, dips, and pull ups in between flights of stairs. The Claimant took a shower and shortly afterwards noticed that his heart was racing. This occurred approximately 30-minutes after the exercise. The Claimant hooked himself up to the EKG machine at the fire station and found that his heart was experiencing an episode of a-fib. Respondent argues, in its answer brief, that the time interval between the vigorous exercise and the episode of a-fib severs the causal link between the a-fib and the exercise. Respondent's Independent Medical Examiner (IME), Mary R. Olsovsky, M.D., a cardiologist, rendered a more global opinion that exercise does not cause a-fib. She implies that the Claimant's sleep apnea and waking with his heart racing could be a more likely cause. For the reasons specified herein below, the ALJ rejects this argument and Dr. Oslovsky's opinion in this regard.

2. Upon the onset of the a-fib, the Claimant notified his supervisor of the situation and was taken to the hospital for treatment. The ALJ finds that Claimant reported his injury to an authorized Employer representative on December 10, 2017.

3. The incident cited as the cause of injury occurred in the course and scope of the Claimant's employment. The Claimant was at work, during working hours, and had just finished a vigorous work-related workout routine when he realized something was wrong with his heart. The injury arose out of employment because the Claimant is expected to maintain a requisite level of fitness to perform his duties as a fire fighter. The fire department expects employees to exercise while they are on shift and provides them equipment to do so. The Claimant's injury also satisfies the positional risk doctrine, because the conditions and obligations of his employment—training related to

maintaining the requisite level of fitness to perform the duties expected of a firefighter—placed him in the position in which the injury occurred. Respondent argues that their IME's (Dr. Oslovsky) opinions do not support the arising out of" test. This opinion is in conflict with the opinion of William Chloe. M.D., a treating cardiologist, as supported by the opinion of the authorized treating physician (ATP), Hiep Leloudes Ritzer, M.D. and the Claimant's testimony. The ALJ resolves this conflict in favor of the opinions of Dr. Chloe, Dr. Ritzer, the testimony of the Claimant and against the opinions of Dr. Oslovsky for the reasons stated herein below.

4. The Claimant has not suffered an episode of a-fib prior to the incident of December 10, and it is more likely than not that this incident at work aggravated and accelerated any underlying heart problem, thus, making it dangerous for the Claimant to fulfill his duties as a firefighter without running the risk of experiencing another episode of a-fib, which could lead to even more serious consequences, as supported by the Claimant's medical restrictions as a result of the December 10 episode of a-fib.

Medical

5. The Claimant was first seen on December 10, 2017, when he was taken to Littleton Adventist Hospital. When he was released from the hospital he was told to see a cardiologist as soon as possible. The Claimant had an appointment with cardiologist, William Choe M.D. on December 11. Dr. Choe diagnosed the patient with paroxysmal a-fib/ flutter. He prescribed a blood thinner and a beta blocker for the Claimant and scheduled him for further testing. Dr. Choe, the Claimant's authorized treating cardiologist, also took the Claimant off line as a firefighter, meaning Claimant could not work as a line firefighter and he was restricted to light duty. Dr. Choe did not conduct a "causation analysis" as to the origin of the Claimant's injuries, however, Dr. Hiep did, taking Dr. Chloe's assessment into account.

6. On December 12, 2017, the Employer referred the Claimant to Dr. Ritzer, who became his authorized treating physician (ATP). Dr. Ritzer is not a cardiologist; she practices family medicine. Dr. Ritzer diagnosed the Claimant with recurrent supraventricular or atrial tachycardia, flutter, or fibrillation. Dr. Ritzer accepted Dr. Choe's findings related to the Claimant's condition and then conducted a "causation analysis" as to the origin of the Claimant's injuries and determined that the Claimant's symptoms were consistent with a work injury. Dr. Ritzer advised the Claimant that he should continue treatment with Dr. Choe. At this point, Dr. Choe became an ATP because he was within the chain of authorized referrals.

7. The Claimant has suffered from sleep apnea, which he was diagnosed with by a Dr. Smith in 2015. He was given a mouth piece to help with the condition. At the time of the incident on December 10, 2017, the Claimant's mouthpiece had a crack in it. Respondents argue that the sleep apnea, or the crack in the mouth piece **could** be an alternative cause of the Claimant's a-fib, but the ALJ does not find this explanation persuasive and rejects it.

8. The Claimant was released to perform regular duty by Dr. Ritzer, in consultation with Dr. Choe, on January 18, 2018.

Mary R. Olsovsky, M.D., Respondents' Independent Medical Examiner (IME)

9. Dr. Olsovsky, engaged by the Respondents to perform a medical records review, reviewed the Claimant's medical records. She did not examine the Claimant in person. Dr. Oslovsky disagreed with Dr. Ritzer's' conclusion that the Claimant's a-fib was a result of work activities aggravating or accelerating an underlying problem. She listed risk factors such as age, physical condition, preexisting sleep apnea as factors that could have caused Claimant's a-fib. The ALJ infers and finds that anything is possible, but Dr. Oslovsky's opinion in this regard is speculative and is not proof of the causation of the Claimant's a-fib. She also explained that an episode of a-fib could be triggered by exercise. The ALJ finds Dr. Oslovsky's opinions and testimony insufficient to outweigh the opinion of Dr. Ritzer, supported and augmented by the findings of Dr. Choe, a cardiologist. Dr. Oslovsky's testimony does not convince the ALJ that the Claimant's a-fib was **not** aggravated and accelerated by his at work exercise routine on December 10, 2017. Stated in the affirmative, the ALJ finds that it is more likely than not that the incident of December 10, 2017, aggravated and accelerated the Claimant's underlying cardiac condition and caused the a-fib.

Ultimate Findings

10. The ALJ finds that the Claimant presented in straight-forward and credible manner. He was not impeached in any way. The ALJ finds his testimony convincing, credible and supporting the vigorous exercise as the precipitating cause of the a-fib on December 10, 2017.

11. The a-fib incident of December 10 was not just a temporary symptom-manifestation. It had consequences that necessitated medical treatment and physical restrictions that temporarily would not permit the Claimant to work as a firefighter.

12. The ALJ finds that ATP Ritzer's determination (supported and augmented by Dr. Chloe's opinion concerning the Claimant's medical condition) that the Claimant's a-fib constitutes a work injury is credible, persuasive, and outweighs the opinion of IME Dr. Oslovsky. Further, the ALJ finds that the Claimant's testimony is credible, persuasive and consistent with the fact that the cardiac episode on December 10, 2017 constituted a compensable injury.

13. Despite the fact that Dr. Oslovsky gave articulate and convincing testimony, the ALJ finds that the conclusion of Dr. Oslovsky is less credible than that of Dr. Ritzer. This is mainly due to the fact that Dr. Oslovsky never examined the Claimant in person, whereas Dr. Choe and Dr. Ritzer spent a substantial amount of time with the Claimant. Dr. Olsovsky was also unable to give a satisfactory explanation as to why she

believed that the Claimant's episode of a-fib on December 10 was not caused by exercise and was instead caused by age, physical condition (the Claimant was physically fit prior to the December 10 incident) or sleep apnea. The ALJ further finds the generalized statements concern age, physical condition and sleep apnea as potential causes unpersuasive for the specific circumstances of this case. She made the statement that exercise is often recommended for individuals with cardiac problems. This statement is disassociated from a cause-and-effect analysis. Dr. Oslovsky also failed to convincingly explain why she thought the temporal connection (30-minutes) between exercise and the onset of the a-fib episode was not relevant to her conclusion. Under the circumstances, such an observation would be more convincing if the time gap was one or two weeks. The ALJ finds Dr. Oslovsky's opinions and testimony insufficient to outweigh the opinion of ATP Dr. Ritzer, supplemented with the findings of Dr. Choe and the testimony of the Claimant.Despite the fact that Dr. Oslovsky gave articulate testimony, the ALJ finds that the conclusion of Dr. Oslovsky is less credible than that of Dr. Ritzer as supported by Dr. Chloe's diagnosis. Despite the fact that Dr. Oslovsky gave articulate testimony, the ALJ finds that her conclusion is less credible than that of Dr. Ritzer as supported by the diagnosis of Dr. Chloe. This is mainly due to the fact that Dr. Oslovsky never examined the Claimant in person, whereas Dr. Choe and Dr. Ritzer spent a substantial amount of time with the Claimant.

14. It is not necessary for the Respondent to come up with a credible alternative explanation for the cause of the Claimant's a-fib. The Respondent may merely put the Claimant on his proof. Dr. Oslsovsky was also unable to give a satisfactory explanation as to why she believed that the Claimant's immediate episode of a-fib on December 10 was not caused by exercise and was instead caused by age, physical condition, or sleep apnea. Underlying this alternative explanation is the proposition that the a-fib was an episode on its way to happen—as a result of the Claimant's dormant predisposition. She also failed to persuasively explain why she thought the temporal connection between exercise and the onset of the a-fib episode was relevant to her conclusion. Dr. Oslovsky's opinion may ultimately be summarized as the cause of the a-fib on December 10 was unexplained. The ALJ finds Dr. Oslovsky's opinions and testimony insufficient to outweigh the opinion of Dr. Ritzer, supplemented with the findings of Dr. Choe and the Claimant's lay testimony.

15. Between conflicting testimonies and opinions, the ALJ makes a rational choice, based on substantial evidence, to accept the Claimant's testimony as a whole, and the supporting opinions of Dr. Ritzer and Dr. Choe, and to reject all opinions and testimony to the contrary.

16. The ALJ finds that the Claimant has proven by a preponderance of the evidence that he sustained a sufficient compensable injury, or aggravation and acceleration of his underlying and incipient cardiac condition that caused the a-fib on December 10, 2017.

17. The parties stipulated that the medical treatment of Dr. Ritzer and Dr. Choe was reasonably necessary and causally related if this claim was determined to be

compensable, which it has been so determined. Therefore, the ALJ finds that the medical care and treatment that Claimant received for his a-fib, was authorized, causally related to the December 10 incident, and reasonably necessary to cure and relieve the effects of that injury.

18. The parties stipulated as follows if the claim was deemed compensable: the average weekly wage (AWW) is $1,646.88, which yields a maximum temporary total disability (TTD) rate of $948.15. Therefore, the ALJ finds that the Claimant's AWW is $1,646.88 and his TTD rate is $948.15.

CONCLUSIONS OF LAW

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

Credibility

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

Ritzer to conclude that there was a causal, work-related relation to the December 10, 2017 incident, which the ALJ also found to be credible and persuasive. Despite the fact that Dr. Oslovsky gave articulate testimony, the ALJ found that the conclusion of Dr. Oslovsky was less credible than that of Dr. Ritzer, as supported by Cardiologist Dr. Chloe's findings. This was due, in significant part, to the fact that Dr. Oslovsky never examined the Claimant in person whereas Dr. Choe and Dr. Ritzer spent a substantial amount of time with the Claimant. Dr. Olsovsky was also unable to give a satisfactory explanation as to why she believed that the Claimant's episode of a-fib on December 10 was not caused by vigorous exercise and was instead caused by age, physical condition, or sleep apnea. She also failed to persuasively explain why she thought the temporal connection between exercise and the onset of the a-fib episode was relevant to her conclusion. The ALJ finds Dr. Oslovsky's opinions and testimony insufficient to outweigh the opinion of Dr. Ritzer, supplemented with the findings of Dr. Choe and the Claimant's credible testimony.

b. Compensation can be awarded where there is competent evidence other than expert opinion. *Martin Marietta Corp. v. Faulk*, 158 Colo. 441, 407 P.2d 348 (1965). Such competent evidence includes lay testimony. *See Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Colorado Fuel & Iron Corp. v. Alitto*, 130 Colo. 130, 273 P.2d 725 (1954). *Also see Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997). As found, although Dr. Ritzer's opinion as supported by Dr. Chloe's assessment was an important factor in the credibility determination, the Claimant's testimony also played a significant role.

Substantial Evidence

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

Compensability

d. An "injury" referred to in § 8-41-301, C.R.S., contemplates a **disabling** injury to a claimant's person, not merely a coincidental and non-disabling insult to the body. *See Henderson v. RSI, Inc.,* 824 P.2d 91 (Colo. App. 1991). *Also see Gaudett v. Stationers Distributing Comp*any, W.C. No. 4-135-027 [Indus. Claim Appeals Office (ICAO), April 5, 1993]. A priori, the consequences of a work-related incident must require medical treatment or be disabling in order to be sufficient to constitute a compensable event. If an incident is not a significant event resulting in an injury, claimant is not entitled to benefits. *Wherry v. City and County of Denver*, W.C. No. 4-475-818 (ICAO, March 7, 2002). As found, the a-fib incident of December 10 required medical treatment for the Claimant and physical restrictions that would not permit him to work, temporarily, as a firefighter.

e. A compensable injury is one that arises out of and in the course of employment. § 8-41-301(1) (b), C.R.S. The "arising out of" test is one of causation. This is the crucial question. If an industrial injury aggravates or accelerates a preexisting condition, the resulting disability and need for treatment is a compensable consequence of the industrial injury. Thus, a claimant's personal susceptibility or predisposition to injury does not disqualify the claimant from receiving benefits. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). An injured worker has a compensable new injury **if the employment-related activities aggravate, accelerate, or combine with the pre-existing condition to cause a need for medical treatment or produce the disability for which benefits are sought.** § 8-41-301(1) (c), C.R.S. *See Merriman v. Indus. Comm'n,* 120 Colo. 400, 210 P.2d 448 (1949); *Anderson v. Brinkoff,* 859 P.2d 819 (Colo. 1993); *National Health Laboratories v. Indus. Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992); *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). An injury resulting from the concurrence of a preexisting condition and a hazard of employment is compensable. *H & H Warehouse v. Vicory*, *supra*. *Duncan v. Indus. Claims App. Office*, 107 P.3d 999 (Colo. App. 2004). Even where the direct cause of an accident is the employee's preexisting disease or condition, the resulting disability is compensable where the conditions or circumstances of employment have contributed to the injuries sustained by the employee. *Ramsdell v. Horn*, 781 P.2d 150 (Colo.App. 1989). *Also see* § 8-41-301(1) (c), C.R.S; *Parra v. Ideal Concrete,* W.C. No. 4-179-455 [Indus. Claim Appeals Office (ICAO), April 8, 1998]. As found, the Claimant established an acceleration and aggravation of his underling condition which caused the episode of a-fib on December 10, 2017.

Medical

f. To be authorized, all referrals must remain within the chain of authorized referrals in the normal progression of authorized treatment. *See Mason Jar Restaurant v. Indus. Claim Appeals Office,* 862 P. 2d 1026 (Colo. App. 1993); *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P. 2d 501 (Colo. App. 1995); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). As stipulated by the parties and found by the ALJ, the Claimant's medical treatment for his a-fib incident of December 10 was the

result of a referral by the Employer and thereafter further treatment remained in the authorized chain of referrals.

g. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, Claimant's medical treatment for his a-fib is causally related to the incident of December 10, 2017. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment was reasonably necessary to cure and relieve the effects of the a-fib.

Average Weekly Wage

h. An AWW calculation is designed to compensate for **total** temporary wage loss. *Pizza Hut v Indus. Claim Appeals Office,* 18 P. 3d 867 (Colo. App. 2001). *See* § 8-42-102, C.R.S. As stipulated by the parties, the ALJ finds that the Claimant's AWW is $1,646.88.

Burden of Proof

i. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained his burden with respect to compensability; the authorization for medical treatment of the Claimant's a-fib; and, for all causally related and reasonably necessary medical care and treatment therefore to cure and relieve the effects of the compensable a-fib of December 10, 2017..

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant experienced a compensable episode of a-fib on December 10, 2017.

B. Respondent shall pay the costs of all authorized, causally related and reasonably necessary medical care and treatment for the Claimant's compensable episode of atrial fibrillation on December 10, 2017, including the costs of treatment by Hiep Lelourdes Ritzer, M.D. and William Chloe, M.D., subject to the Division of Workers Compensation Medical Fee Schedule.

C. The Claimant's average weekly wage is hereby established at $1,646.88.

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

DATED this 25th day of March 2019.

EDWIN L. FELTER, JR.
Administrative Law Judge

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

ISSUES

Whether the claimant had demonstrated, by a preponderance of the evidence, that the L5-S1 anterior lumbar interbody fusion surgery, as recommended by Dr. Douglas Orndorff, is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted August 17, 2017 work injury.

FINDINGS OF FACT

1. The claimant worked for the employer at a gravel pit. The claimant's job duties included using a front end loader to load gravel into trucks. He would then "weigh out" the customer trucks and repeat the process. The claimant suffered an injury while performing these job duties on August 17, 2017. The claimant testified that the loader he operated on that date had a faulty air seat. The air in the seat would empty, resulting in little to no support in the seat. On August 17, 2017, the air seat was deflated while the claimant was driving over a rut. The claimant testified that this caused the seat to hit metal on metal resulting in immediate pain in his low back and up into his neck.

2. Prior to his 2017 injury, the claimant treated for low back issues in 2012 and 2013. On May 20, 2013, Dr. Douglas Orndorff performed a L4-5 laminectomy with decompression, medial facetectomy, and foraminal decompression. The claimant testified that following that 2013 surgery he fully recovered and was "pain free".

3. Following the August 17, 2017 incident, the claimant first received medical treatment at Lightning Bolt Chiropractic on August 22, 2017. The claimant testified that he sought treatment at Lightning Bolt Chiropractic at the direction of the employer.

4. Thereafter, the claimant was seen on September 6, 2017 by Dr. Larry Welling with Reliance Medical Group. At that time, Dr. Welling ordered an MRI and discussed a possible referral to Dr. Orndorff given the claimant's prior back surgery.

5. On September 19, 2017, a magnetic resonance image (MRI) of the claimant's lumbar spine showed evidence of the prior L4-5 decompression. In addition, there was evidence of mild reduced disc height and disc desiccation at both the L4-5 and L5-S1 levels; mild bulging the L4-5 and L5-S1 levels; and minimal lateral recess narrowing at the L4-5 level. The MRI also showed that the S1 nerve roots were close to contacting the L5-S1 disc bulge.

6. Thereafter, the claimant's authorized treating provider (ATP) became Animas Occupational Medicine. At that practice, the claimant has primarily treated with Robert Hill, PA-C. The claimant's treatment has included physical therapy, chiropractic treatment, massage, use of an inversion table, and a TENS unit.

7. The claimant first treated with Mr. Hall on October 23, 2017. At that time, Mr. Hall diagnosed a thoracic strain with radiculopathy and a lumbar strain with radiculopathy. Mr. Hall assigned work restrictions of no lifting, pushing, or pulling over 10 pounds and no crawling, kneeling, squatting, or climbing. Dr. Hall recommended the claimant undergo physical therapy. In the October 23, 2017 medical record, Mr. Hall noted that the claimant was scheduled to see Dr. Cyril Bohachevsky. Mr. Hall agreed with that consultation and made the referral to Dr. Bohachevsky.

8. On October 26, 2017, the claimant was seen at Spine Colorado by Dr. Bohachevsky. At that time, the claimant reported aching pain in his low back with tingling into his posterior legs and into his feet. He also reported an occasional sharp pain in this left calf muscle. Dr. Bohachevsky opined that although the claimant had undergone prior surgical treatment of his lumbar spine, the claimant's current symptoms were new and directly related to the August 17, 2017 work injury. Dr. Bohachevsky recommended that the claimant continue with physical therapy.

9. Subsequently, on February 23, 2018, Dr. Bohachevsky administered a L5-S1 epidural steroid injection (ESI). The claimant testified that following the injection he had pain relief for 10 to 13 days. However, the pain returned when he bent over and felt a "shock" in his back. The claimant returned to Dr. Bohachevsky on March 12, 2018 and they discussed additional treatment options, including a second ESI. However, that requested ESI was denied by the respondents at that time. Ultimately, Dr. Bohachevsky referred the claimant to Dr. Orndorff for a surgical consultation.

10. The claimant was seen by Dr. Orndorff for this current claim on April 17, 2018. On that date, Dr. Orndorff noted that the claimant had recovered well after his 2013 surgery. Dr. Orndorff opined that the claimant's work injury exacerbated his low back condition. Dr. Orndorff recommended the claimant undergo an L4-5 and L5-S1 anterior lumbar interbody fusion. Dr. Orndorff indicated that the surgery would help restore lumbar lordosis and address the instability at those levels.

11. On May 15, 2018, the claimant attended an independent medical examination (IME) with Dr. Robert Messenbaugh. In connection with the IME, Dr. Messenbaugh reviewed the claimant's medical records, obtained a history from the claimant, and completed a physical examination. In his IME report, Dr. Messenbaugh opined that the claimant suffered a myofascial strain/sprain of his low back at the time of the August 17, 2017 work injury. Dr. Messenbaugh further opined that the pathology found on the claimant's MRIs predated the work injury. Following the IME report, Dr. Messenbaugh responded to an email from respondents' counsel on June 8, 2018. In his reply, Dr. Messenbaugh clarified that it is his opinion that the need for fusion surgery is not related to the August 17, 2017 work injury. Dr. Messenbaugh further clarified that it is his opinion the fusion surgery is not reasonable and necessary medical treatment for the claimant. Based upon Dr. Messenbaugh's opinions, the respondents denied the recommended L4-5 and L5-S1 anterior lumbar interbody fusion.

12. Thereafter, the respondents authorized a second ESI. On June 19, 2018, Dr. Bohachevsky administered a left S1 transforaminal ESI.

13. On June 27, 2018, Dr. Bohachevsky administered electromyography (EMG) testing of the claimant's bilateral lower extremities. The EMG showed no evidence of active left S1 radiculopathy, and no evidence of sensorimotor peripheral neuropathy or compressive neuropathy.

14. On July 16, 2018, an MRI of the claimant's lumbar spine showed no significant changes from the prior September 18, 2017 MRI. It was noted that the degenerative disc disease appeared stable without central canal stenosis at any level. The MRI also showed diffuse moderate facet arthrosis with areas of mild to moderate foraminal narrowing.

15. The claimant returned to Dr. Orndorff of July 24, 2018 to discuss the results of the EMG testing and the most recent MRI. At that time, Dr. Orndorff opined that the claimant had exhausted all conservative treatment for his symptoms. Dr. Orndorff recommended an L4-5 and L5-S1 discography to confirm that the claimant's issues were arising from the L5-S1 level.

16. On August 21, 2018, Dr. Bohachevsky performed a left sided L4-5 and L5-S1 discography. Dr. Bohachevsky noted "provocation positive" at the L5-S1 level, but not at the L4-L5 level.

17. The claimant was seen by Dr. Orndorff on August 21, 2018. At that time, Dr. Orndorff noted that the discography showed "clear concordant pain at the L5-S1 level". Dr. Orndorff amended his prior surgical recommendation and has now requested authorization for an L5-S1 interbody fusion.

18. On October 3, 2018, the claimant attended an IME with Dr. Brian Reiss. In connection with the IME, Dr. Reiss reviewed the claimant's medical records, obtained a history from the claimant, and completed a physical examination. In his IME report, Dr. Reiss opined that the claimant's current symptoms and need for treatment are not related to the August 17, 2017 work injury. It is the opinion of Dr. Reiss that the claimant's symptoms are related to his preexisting condition. In support of his opinions Dr. Reiss noted that the claimant reported pain levels of 1 out of 10 following the work injury. Dr. Reiss opined that the claimant reached maximum medical improvement (MMI) in December 2017. With regard to the recommended fusion surgery, Dr. Reiss opined that the surgery would likely not decrease the claimant's pain, nor increase his function. Dr. Reiss's testimony by deposition was consistent with his written report.

19. In his testimony, Dr. Reiss reiterated his opinion that the claimant's current symptoms are not related to the work injury. Dr. Reiss also testified that in his opinion the August 17, 2017 work injury caused a temporary aggravation of the claimant's preexisting condition, but that aggravation resolved when his pain returned to baseline. With regard to the specific surgery recommended, Dr. Reiss testified that the claimant's symptoms would not be resolved by a fusion at the L5-S1 level. Dr. Reiss opined that

the claimant might benefit from a L4-5 decompression, but such a procedure would also be unrelated to the claimant's work injury.

20. Dr. Orndorff testified by deposition in this matter. Dr. Orndorff testified that following the claimant's 2013 L4-5 laminectomy and decompression surgery, the claimant had resolution of both his back pain and his leg pain. Dr. Orndorff also testified that it is his opinion that the claimant's need for surgery is both reasonable and related to the August 17, 2017 work injury. In support of his opinion, Dr. Orndorff noted that the claimant had close to four years without symptoms between recovering from his 2013 surgery and the 2017 work injury. Dr. Orndorff also reiterated his opinion that the claimant has exhausted all conservative treatment.

21. The claimant testified that currently his average pain is 6 out of 10. The claimant also testified that that his current symptoms include low back pain, pain into his left calf muscle, with tingling into his left foot. The claimant testified that he wants to undergo the recommended lumbar surgery so he had return to work.

22. The claimant's spouse also testified at hearing. Specifically, she noted that within two weeks of the claimant's 2013 surgery, the claimant was "up and around" and "better every day". The claimant's spouse also testified that after recovering from the 2013 surgery the claimant had no back issues until the work incident in 2017. Since the claimant's injury, his spouse has observed that he is unable to do various activities he could prior to the injury. These activities include yard work, fixing fences, repairing the roof, hiking, camping, and skiing.

23. The ALJ credits the claimant's testimony, the medical records, and the opinions of Drs. Orndorff and Bohachevsky over the contrary opinion of Dr. Reiss. Therefore, the ALJ finds that the claimant has demonstrated that it is more likely than not that the claimant's August 17, 2017 aggravated and/or accelerated the claimant's preexisting low back condition, resulting in the need for medical treatment.

24. The ALJ further credits the claimant's testimony, the medical records, and the opinions of Dr. Orndorff over the contrary opinion of Dr. Reiss and finds that the claimant has demonstrated that it is more likely than not that the recommended L5-S1 anterior lumbar interbody fusion surgery is reasonable and necessary to cure and relieve the claimant from the effects of the August 17, 2017 work injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation

case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2017).

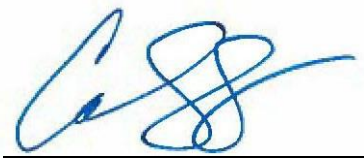
3. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

4. As found, the claimant has demonstrated by a preponderance of the evidence that the need for surgical intervention of his low back is related to the August 17, 2017 work injury. Specifically, the claimant's preexisting long back issues were aggravated and/or accelerated by the work injury. As found, the claimant has demonstrated by a preponderance of the evidence that the recommended L5-S1 anterior lumbar interbody fusion surgery is reasonable and necessary to cure and relieve the claimant from the effects of the August 17, 2017 work injury. As found, the claimant's testimony, the medical records, and the opinions of Drs. Orndorff and Bohachevsky are credible and persuasive.

ORDER

It is therefore ordered that the respondents shall pay for the recommended L5-S1 anterior lumbar interbody fusion surgery, pursuant to the Colorado Medical Fee Schedule.

Dated March 27, 2019



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

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 222 S. 6th Street, Suite 414, Grand Junction, Colorado 81501	
In the Matter of the Workers' Compensation Claim of: **DEBORAH WIEKER,** Claimant, vs. **GRAND MESA LANDSCAPE MAINTENANCE, L.L.C.,** Employer, and **PINNACOL ASSURANCE,** Insurer, Respondents.	▲ **COURT USE ONLY** ▲ **CASE NUMBER:** **WC 5-040-083-001**

SUMMARY ORDER

Hearing was set before Keith E. Mottram, Administrative Law Judge (ALJ), on February 14, 2109, in Grand Junction, Colorado. Claimant's Exhibits 1-16 were entered into evidence at hearing. Respondents' Exhibits A-H were entered into evidence at hearing.

STATEMENT OF FACTS

1. Claimant sustained a compensable work related injury on January 9, 2017 when she slipped and fell on a handicap ramp while performing ice removal. Claimant is the owner-operator of employer. Respondents admitted liability for the work injury.

2. Claimant initially sought treatment with Dr. Stagg on January 10, 2017. Dr. Stagg noted claimant reported right shoulder pain which radiated into the neck area and had bruising on her right hip. Claimant was diagnosed with a cervical strain, right shoulder strain and contusions to the right hip and elbow.

3. Claimant continued to treat with Dr. Stagg and it was noted on February 14, 2017 that the right hip contusion had resolved. Claimant continued to complain of pain in her right shoulder, right arm and neck in her follow up visits. Claimant complained of increased pain in her right trapezius on March 28, 2017 after performing some raking. Dr. Stagg provided claimant with a prescription and continued her work restrictions. Claimant's initial treatment focused on her shoulder and neck complaints.

4. Following her work injury, claimant was referred to Body Therapeutics for massage therapy beginning on June 20, 2017. Claimant reported to the massage therapist pain in the right sacroiliac ("SI") joint and glut. Claimant testified that when getting off the massage table on her first treatment, her low back went into spasm. This testimony is corroborated by the massage therapy records. Claimant continued to complain of pain in her hip and SI region through July, August, September, and October of 2017.

5. Claimant was referred to Dr. Clifford for evaluation on July 12, 2017. Dr. Clifford noted claimant's primary complaint involved the neck and right sided shoulder pain. Dr. Clifford focused his initial treatment in this area.

6. Claimant was released to return to work full duty on November 3, 2017 by Dr. Stagg. Claimant testified that following her release to return to work full duty, she was doing more physical work including leaf removal and fall clean up.

7. Claimant returned to the massage therapist on December 16, 2017 and reported that she was raking leaves the past week and overdid it. Claimant reported she had been sore in her low back and shoulder ever since and wants to get an MRI done on her sacral region.

8. Claimant returned to Dr. Clifford on January 17, 2018 and was evaluated by his physicians' assistant, Mr. Ousley. Mr. Ousley noted that claimant had complained of pain in the right side of her low back radiating into the right thigh. Claimant reported that the pain is located near the lumbosacral junction on the right and will occasionally go into the posterior lateral thigh.

9. Mr. Ousley noted that claimant had undergone an MRI of the lumbar spine that demonstrated moderate degenerative changes in the facet joints of the K4-L5 and L5-S1 levels. Mild edema was present on the Left L5 pedicle.

10. Claimant underwent a right SI joint injection on March 5, 2018 with Dr. Clifford. Claimant testified at hearing that her first injection was very helpful. According the medical records, the injection provided claimant with 100% relief of her right sided low back and right posterior thigh pain for about three weeks.

11. Claimant underwent a repeat SI joint injection on May 14, 2018 with Dr. Clifford. According to the medical records, post injection, claimant's leg pain was improved. Claimant testified at hearing that the relief of symptoms with the 2nd injection was not as good as the first injection.

12. Claimant returned to Dr. Clifford on July 2, 2018. Dr. Clifford noted that claimant reported 80% relief for 2 days following the 2nd injection. Dr. Clifford diagnosed claimant with sacroiliitis and recommended claimant undergo a right SI joint fusion.

13. Respondents referred claimant to Dr. Lesnak for an independent medical evaluation ("IME"). Dr. Lesnak reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME. Dr. Lesnak noted that claimant reported only 3 days of relief following her second injection prior to symptom recurrence. Dr. Lesnak noted in his report that claimant frequently "self limited" the evaluation because of her complaints of pain or fear of pain.

14. Dr. Lesnak opined in his report that claimant's recommended SI joint fusion was not recommended per the Colorado Medical Treatment Guidelines. Dr. Lesnak further noted that claimant's repeat right SI joint injection on May 14, 2017 ws non diagnostic and non-therapeutic. Dr. Lesnak opined that there was no medical

evidence to suggest that claimant sustained any type of injury whatsoever to her right SI joint as a result of the occupational incident of January 9, 2017. Dr. Lesnak further opined that claimant was at MMI for her work injury.

15. Dr. Clifford testified by deposition in this matter. Dr. Clifford testified that it was his opinion that the recommended surgery was reasonable based on his experience performing the surgery and that the surgery was related to the injury. Dr. Clifford testified it was his opinion that claimant had a sacroiliitis that was related to the fall and that an SI fusion was reasonable treatment. Dr. Clifford testified he disagreed with Dr. Lesnak's opinion that claimant did not injure her SI joint in the fall based on claimant's reports of pain following the injury. Dr. Clifford further opined that based on his experience, claimant's report of 2 days of pain relief following the second SI joint injection was sufficient for his belief that the recommended SI fusion would provide claimant with relief from the sacroiliitis.

16. Dr. Lesnak testified at hearing in this matter. Dr. Lesnak testified consistent with his IME report. Dr. Lesnak testified that during his examination, he did not see any findings consistent with SI joint dysfunction. Dr. Lesnak testified that the Colorado Medical Treatment Guidelines advise that SI joint fusion is only recommended for fractures of joints, not for minor trauma. Dr. Lesnak testified that following the second SI joint injection, Dr. Clifford did not get documentation of claimant's pain response and the lack of pain relief reported by claimant shows that the pain was not coming from the SI joint.

17. Dr. Lesnak testified that it was his opinion that the surgery recommended by Dr. Clifford involving an SI joint fusion was not reasonable or necessary and was not related to claimant's January 9, 2017 work injury.

18. The ALJ credits claimant's testimony at hearing along with the opinions expressed by Dr. Clifford in his deposition and finds that claimant has established that it is more likely true than not that the SI joint fusion surgery recommended by Dr. Clifford is reasonable medical treatment necessary to cure and relieve claimant from the effects of the work injury.

19. The ALJ notes that claimant's testimony at hearing regarding her symptoms following the injury were consistent with the medical records, including the massage therapy records and finds claimant's testimony to be credible.

20. The ALJ acknowledges that contrary opinions expressed by Dr. Lesnak in his report and testimony, but finds that opinions expressed by Dr. Clifford to be more credible and persuasive with regard to the issue before the court.

21. The ALJ therefore Orders respondents to pay for the SI joint fusion surgery recommended by Dr. Clifford pursuant to Colorado Medical Fee Schedule.

DATED: March 27, 2019

Keith E. Mottram

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

This decision is final and not subject to appeal unless a Request for Specific Findings of Fact and Conclusions of Law is filed at the Office of Administrative Courts, 222 S. 6th Street, Suite 414, Grand Junction, Colorado 81501 within ten working days of the date of service of this Summary Order. Section 8-43-215 (1), C.R.S. (as amended, SB07-258). Such a Request is a prerequisite to review under Section 8-43-301, C.R.S.

If a Request for Specific Findings of Fact and Conclusions of Law is filed, both parties shall submit proposed Specific Findings of Fact, Conclusions of Law, and Order within five working days from the date of the Request. The proposed order must be submitted by e-mail in Word or Rich Text format to oac-gjt@state.co.us. The proposed order shall also be submitted to opposing counsel and unrepresented parties by e-mail, facsimile, or same day or next day delivery.

STIPULATION

At the outset of the hearing, the parties stipulated that Respondent is presently liable for maintenance medical treatment benefits in the claims which are the subject of this hearing.

ISSUES

The issue raised at hearing involves Claimant's entitlement to additional medical benefits. The questions answered by this decision are:

I. Whether Claimant established, by a preponderance of the evidence, that her need for continued maintenance medical care, including bilateral SI joint injections, chiropractic treatment, and massage therapy is reasonable, necessary and related to any of the above numbered claims.

II. Whether Respondent is estopped from challenging the reasonableness, necessity or relatedness of additional epidural steroid injections (ESIs) based a 2015 order, finding that Claimant had proven entitlement to maintenance ESIs at that time.

III. Whether Respondent established by a preponderance of the evidence that they are entitled to withdraw either their December 2, 2011 and/or September 18, 2013 final admissions for maintenance medical treatment.

FINDINGS OF FACT

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

Background

1. The record evidence in this matter is voluminous involving multiple work-related accidents wherein Claimant suffered injuries while working as a State Trooper for Respondent-Employer. Treatment for claimant's industrial injuries has spanned years and has been complicated by the occurrence of several non-industrial accidents. Moreover, these claims have been the subject of a prior hearing held February 11, 2015 on the issue of Claimant's entitlement maintenance medical benefits, specifically whether additional lumbar epidural steroid injections were reasonable, necessary, and related to her 2000 and 2001 work injuries. After a full evidentiary hearing which included testimony from Claimant, Claimant's treating physician, Dr. Jenks, and Dr. Albert Hattem, the undersigned ALJ ordered Respondents to pay for all reasonably, necessary, and related maintenance treatment, including but not limited to the additional injection therapy requested by Dr. Jenks.

2. Claimant's first work-related injury, a slip and fall, occurred on November 14, 2000. Claimant injured her low back in this incident and was treated with physical therapy and medication.

3. A second industrial accident occurring January 4, 2001, caused additional injuries to her back, neck, ribs and head (concussion). On this date, Claimant was involved in a motor vehicle accident (MVA), wherein she was broadsided by a pickup truck traveling 35-40 miles per hour. Chiropractic care and injection therapy were added to Claimant's treatment regimen following this accident. According to Claimant, injections administered into the neck and low back reduced her pain and improved her function sufficiently to allow her to return to full duty work for Respondent-Employer.

4. On September 8, 2001, Claimant aggravated the above referenced injuries to her low back/neck after her patrol car was rear-ended by a drunk driver traveling 35-40 miles per hour. Claimant testified that she was still treating for the injuries sustained in the previous incidents when this accident occurred. According to Claimant, the treatment directed to the injuries caused by the aforementioned accidents had resulted in approximately 70 percent improvement in her symptoms before the September 8, 2001 incident occurred.

5. Claimant was involved in yet another work-related accident on December 22, 2001, when she slipped and fell on ice landing on her elbow. Claimant testified she jammed her shoulder. She also reported an increase in the number of migraine headaches she was experiencing in addition to worsening low back and neck symptoms. Nonetheless, with treatment Claimant testified that she was able to return to her regular duties as a State Trooper.

6. Claimant was placed at maximum medical improvement (MMI) for all injuries arising from these accidents on February 22, 2002. Although she was placed at MMI, Claimant testified that her back and neck remained symptomatic and she was experiencing almost daily migraine headaches, which she reported caused visual disturbances and nausea.

7. Claimant was examined by Division Independent Medical Examiner (DIME) physician Dr. Kenneth Finn on October 9, 2002. During this appointment, she reported left greater than right sided neck pain, ongoing headaches which had decreased since trigger point injections and which were alleviated with Maxalt and Imitrex, central to slightly left-sided low back pain without radiation, bilateral wrist pain, and right rib/chest pain. Claimant's diagnoses included "questionable underlying SI joint dysfunction"; however, Dr. Finn made no recommendation for SI joint treatment and/or injections. Dr. Finn found Claimant to be at MMI as of December 21, 2001 for all her work injuries.

8. Claimant has continued to receive treatment in the form of medications, chiropractic care and injection therapy since being placed at MMI on February 22, 2002. Over the years, maintenance care has been provided by Drs. Morgan, Roberts, Schwender and Jenks. More recently, Claimant's maintenance medical treatment has been managed by Dr. Miguel Castrejon.

Post MMI Events and Medical Treatment

9. In a letter dated October 1, 2003, Dr. Morgan opined that Claimant had post traumatic headaches as a result of her January 4, 2001 work related MVA.

10. On October 11, 2003, Claimant was involved in another on-the-job MVA when her police cruiser was again rear-ended. Claimant experienced a temporary aggravation of her low back and neck symptoms; however, returned to her usual baseline condition soon thereafter. She did not see Dr. Morgan again for her low back until June 10, 2004. On this date, Dr. Morgan noted that Claimant had fallen over her right foot on a couple of occasions in the weeks preceding her June 10, 2004 appointment. Dr. Morgan expressed concern that Claimant's pre-existing disc herniation had increased in size and may be affecting her right L5 nerve root. An EMG completed by Dr. Morgan on June 24, 2004 revealed an active, acute, mild L5 right sided radiculopathy. Dr. Morgan recommended a repeat MRI.

11. A letter authored by Dr. Morgan on December 10, 2003, reflected that Claimant was improving but was still having pain in her low back which seems to be isolated in the SI joint region.

12. On February 25, 2004, Dr. Schwender placed Claimant at MMI without restrictions. Claimant was released to regular duty and advised her to continue her Percocet, Ultram, Zantac, Topomax, Keppra, Phenergan**,** Metoclopramide, Effexor, and Wellbutrin.

13. On August 5, 2004, a repeat MRI was done which, when compared to the May 8, 2003 MRI, revealed a "stable, small right paracentral disc herniation L4-5 and left paracentral disc herniation L5-S1 with associated disc degeneration and dehydration." The interpreting radiologist specifically noted that no new disc herniation or protrusion had developed.

14. On October 28, 2004, Claimant was seen by Dr. Morgan for "intense headaches" along with recurrence of her low back pain radiating down her right leg in the L5 distribution.

15. The medical records support a finding that between December 10, 2003 and November 1, 2004, Claimant received care from Dr. Morgan consisting of the facet injections which provided Claimant some relief.

16. On November 1, 2004, Claimant was involved in another work-related MVA when her car slid on ice and hit a curb. While she was waiting for a tow truck her vehicle was hit on the side by another driver. Claimant experienced low back pain in the area of the left SI joint along with left shoulder pain. There was no "additional" discomfort in Claimant's neck and upper back. Dr. Peterson's physician assistant, Al Schultz, diagnosed Claimant with, among other things, a right shoulder strain and left SI joint strain.

17. On December 9, 2004, Claimant was evaluated by Robert Kiernan, MD, who noted that Claimant continued to have aching about the right side of the neck, the low back, and the midback from the region of the scapula on the right. Dr. Kiernan noted that Claimant had prior accidents and opined that Claimant's ongoing problems are a combination of this accident and "difficulty from before." Dr. Kiernan diagnoses were acute sprain of the sternocleidomastoid and scalene on the right, "old sacroiliac joint sprain", and prior AC joint or shoulder sprain.

18. On January 7, 2005 and February 4, 2005, Claimant saw Dr. Schwender for recheck of her cervical strain, right SI joint dysfunction, and left AC joint strain. Physical examination revealed good cervical range of motion with some limitation. Examination of the back revealed full flexion, extension of 5 degrees, and tenderness bilaterally over the right SI joint. Dr. Schwender diagnosed cervical strain, bilateral SI joint dysfunction, and left AC joint strain.

19. Claimant received care from Dr. Morgan from February 3, 2005 through September 16, 2005. During this timeframe, Claimant's condition continued to improve to about 80%, yet she continued to experience occasional headaches. Most of the care between these dates consisted of facet injections, occipital nerve blocks, and a rhizotomy.

20. On October 26, 2005, Dr. Schwender placed Claimant at MMI for the November 1, 2004 work injury without impairment, restrictions or need for future care. Dr. Schwender found Claimant's cervical strain, SI joint dysfunction, and left AC joint all stable at that time.

21. On July 13, 2006, Claimant was involved in a non-work related car accident in which another car backing out from a driveway hit her vehicle on the passenger side door causing injury to her upper back and further, aggravating her pre-existing right-side low back and SI joint conditions and what she would later report to Dr. Ridings was an injury to her left SI joint causing pain and dysfunction.

22. On July 21, 2006, Claimant presented herself to Dr. Schwender at which time she informed him that she had been in another accident on July 13, 2006. Dr. Schwender indicated that this event "increased Claimant's low back pain (which she has chronically from multiple work-related motor vehicle accidents)." Dr. Schwender diagnosed right sacroiliitis and sacrococcygeal joint strain secondary to a non-work-related accident. Dr. Schwender opined that Claimant had experienced an exacerbation

and flare up of her preexisting sacroiliitis and sacrococcygeal joint strain. Dr. Schwender referred Claimant to Dr. Morgan for treatment.

23. On January 31, 2007, Claimant presented herself to Dr. Eric Ridings with complaints of low back pain. Claimant told Dr. Ridings she had been involved in a MVA on July 13, 2006 and that since that time she had noticed increased low back and mid thoracic spine pain. Claimant told Dr. Ridings about her prior work-related injuries and that she had not had any active treatment for her prior injuries since 2004 other than continuing to take a "significant" number of medications for maintenance care. Additionally, Claimant reported new left SI issues. Dr. Ridings diagnosed Claimant with thoracic and lumbar strain with possible "mild" left SI joint dysfunction. Dr. Ridings wrote in his January 11, 2007 record that Claimant had a significant history of low back pain but based upon the history given during this appointment, the character of the discomfort is "somewhat different" than what she had previously experienced. Claimant told Dr. Ridings that her low back pain prior to July 13, 2006 accident was right sided and as of her January 31, 2017 appointment it was left sided. Dr. Ridings treated Claimant for the July 13, 2006 non-work related MVA through December 11, 2007. At the time Dr. Ridings released Claimant from care on December 11, 2007, she continued to have discomfort with palpation over the left SI joint and slightly along the gluteal musculature.

24. Claimant sustained a work-related injury to her right ankle while engaged in a training exercise and later while chasing suspects on February 28, 2007. Claimant treated with Dr. George Schwender for this injury. After instruction in a home exercise program and being provided with a support brace, Dr. Schwender released Claimant to unrestricted duty without impairment on March 1, 2007.

25. On March 11, 2007 Claimant sustained an eversion injury to her left ankle when she stepped off a curb while walking to her patrol car. Claimant received substantial treatment for this injury under the direction of Dr. Schwender while receiving concurrent treatment with Dr. Ridings for the injuries/aggravation of symptoms to her low back and SI joints caused by her July 13, 2006 non-work related MVA.

26. Dr. Ridings placed Claimant at MMI for the effects of her July 13, 2006 non-work related MVA on October 12, 2007. He recommended maintenance medical care in the form of left trochanteric bursa/lateral piriformis injections and/or left iliotibial band trigger point injections if Claimant's pain flared. He determined that Claimant required no work restrictions and sustained no impairment. Claimant testified that after completing her care with Dr. Ridings she was back to her baseline status of where she was prior to the July 13, 2006 accident.

27. Claimant underwent surgery for her March 11, 2007 left ankle injury on November 2, 2007 with Dr. Shaw. Thereafter, Claimant was referred for post-surgical rehabilitation which exacerbated her mid back condition as well as her chronic work-related low back and SI joint symptoms. Consequently, on November 27, 2007, Claimant retuned to Dr. Ridings for additional treatment. Claimant was provided

additional trigger point injections at T8-T9 as well as an additional physical therapy focusing on her mid back and SI joint region. By December 11, 2007, Claimant's thoracic, lumbar and left SI joint symptoms had resolved. Accordingly, Dr. Ridings placed Claimant at MMI again and released her from his care.

28. On June 24, 2008, Claimant presented herself to Memorial Urgent Care complaining of low back pain and neck pain. The record reflects that Claimant was involved in an automobile accident on June 16, 2008. The intake form from this date of visit indicates that Claimant was the restrained driver of a car hit from behind while moving from a stop. Her airbags did not deploy and she had no loss of consciousness. Claimant testified that she does recall being in this MVA in June 2008, and if she was, she reported any injuries were minor. No medical records were submitted to substantiate that Claimant sought further treatment related to a June 16, 2008 automobile accident.

29. Claimant was seen by Dr. Roberts for ongoing headaches on October 15, 2007, June 25, 2008, November 4, 2008, March 10, 2010, and September 15, 2010. In an office note dated November 4, 2008, Dr. Roberts wrote that Claimant "had been having a number of migraines lately, and these constitute recurrence of her post traumatic migraines which was first caused and originated in a MVA while she was on duty for the highway patrol. Dr. Roberts further noted that Claimant had consistently had a diagnosis of post traumatic migraine. Dr. Roberts administered bilateral occipital nerve blocks.

30. On March 10, 2010, Claimant returned to Dr. Schwender with complaints of severe right sided low back pain. Dr. Schwender referred Claimant to Dr. Jenks to take over chronic pain management and to perform further injections as needed.

31. As part of a prior hearing which commenced February 11, 2015, Dr. Jenks testified via deposition taken January 28, 2014. Dr. Jenks noted that he first evaluated Claimant on April 22, 2010 at which time Claimant gave a history of having been involved in a number of work-related accidents resulting in chronic neck and low back pain. Dr. Jenks performed a physical examination and diagnosed Claimant as having chronic lumbar discogenic pain with possible facet and SI joint involvement. Dr. Jenks based his diagnoses, in part, on the fact that Claimant had epidural injections at L5 which helped in the past in addition to having tenderness over the facet and SI joints. On May 24, 2010, Dr. Jenks administered a right L4-5 epidural steroid injection.

32. Claimant has not worked for Respondent-Employer since 2008. She began a new job with the El Paso County Department of Motor Vehicles in 2010 and has worked exclusively for them since.

33. Claimant returned to Dr. Jenks on February 24, 2011 with complaints of increasing right low back pain sometimes involving the buttocks. Claimant told Dr. Jenks she would like to have another lumbar epidural injection since the one done in May

2010 was very helpful. Dr. Jenks diagnosed discogenic pain and recommended a right L4-5 epidural injection which was done March 18, 2011.

34. Approximately one year later on March 22, 2012, Claimant returned to Dr. Jenks' office stating that she was once again having low back pain involving the entire lumbar area radiating to the left posterior and lateral thigh. Upon physical examination, Claimant reported discomfort to palpation in both sacroiliac areas and near both ischial tuberosities. SI provocation testing was positive bilaterally. Mr. Hacker's impressions were lumbar discogenic pain, history of cervical discogenic pain, likely ischial bursitis, and bilateral sacroiliitis.

35. On April 11, 2012, Claimant underwent a right L4-5 epidural injection. In a note from Dr. Jenks dated April 24, 2012, he documented that Claimant reported 50-60% improvement from the injection but was still having some low back symptoms, Dr. Jenks recommended an additional epidural injection which was done on May 23, 2012.

36. Claimant retuned to Dr. Jenks on June 6, 2012. She advised Dr. Jenks that her low back pain and leg pain had significantly improved following the injection. Dr. Jenks refilled Claimant's Percocet and told her to call in the future if she wished to repeat the injection. Six months later, Claimant returned back to Dr. Jenks at which time, he noted that Claimant's low back pain was well controlled with medication.

37. On May 9, 2013, Claimant underwent an Independent Medical Examination (IME) at Respondents' request with Dr. Albert Hattem. The purpose of the IME was to determine whether Claimant's ongoing maintenance medical care, including additional injection therapy for her lumbar spine remained reasonable, necessary and related to her numerous work injuries. Dr. Hattem reviewed Claimant's medical treatment records ranging in date from 2001 through April 2012. He also completed a physical examination, which he concluded was normal. During this IME, Claimant reported having fluctuating low back and bilateral leg pain, which was similar to that Claimant depicted on her December 13, 2007 pain diagram. Claimant also told Dr. Hattem that the injections administered previously provided temporary relief. Dr. Hattem noted since Claimant's work injuries, she continued working without restriction and that she had remained exceptionally functional, even during those times when she had not received any epidural steroid injections. Based upon his review of Claimant's medical records, the history provided by Claimant and his physical examination, Dr. Hattem concluded that Claimant's ongoing maintenance care for her lumbar spine was no longer reasonable, necessary or related to her prior work injuries. He questioned why such prolonged treatment had been provided. He also opined that Claimant's migraine headaches were not related to her work injuries occurring almost 14 years previously, noting further that she likely would have had ongoing headaches in the absence of her work-related injuries in light of her pre-existing history of migraines.

38. On August 20, 2013, Claimant was seen in follow up with Dr. Jenks. On this date, Claimant told Dr. Jenks that her back pain was staring to return. Dr. Jenks recommended that Claimant have a repeat L4-5 epidural steroid injection.

39. Claimant saw Dr. Jenks' physician assistant on February 25, 2014 with complaints of increased low back pain. Again, it was recommended she have an L4-5 epidural steroid injection.

40. Claimant was seen in follow up by Dr. Sandell on April 2, 2014 for low back pain that was progressively worsening. In his note from this date of visit, Dr. Sandell indicated that he was asked by Respondents' counsel to review Dr. Hattem's reports, evaluate Claimant, and render an opinion regarding Claimant's care. Dr. Sandell noted that upon physical examination, Claimant had sciatic notch tenderness on the left and right along with tenderness in the bilateral paraspinal muscles, as well as over the SI joints. Dr. Sandell opined that Claimant had received relief from past epidural injections and that she is a good candidate for epidural injections and possibly SI joint injections. Consequently, Dr. Sandell requested authorization for a repeat epidural steroid injection.

41. Claimant was seen by Dr. Jenks on August 21, 2014 and January 15, 2015. On both of these dates, Claimant reported ongoing left low back and left leg pain. Dr. Jenks noted that Claimant reported to him that she realized the extent of the benefit she experienced from the previous epidurals as she was now having significant pain which was "much worse" than it was when she was receiving periodic injections. Physical examination revealed tenderness over the left sacroiliac joint and a positive straight leg raise test bilaterally. Dr. Jenks' impression was ongoing lumbar discogenic pain with probable additional left sacroiliitis. Dr. Jenks recommended an MRI and depending on the results raised consideration of proceeding with both an epidural injection and a left sacroiliac joint injection.

42. On February 3, 2011, Claimant was seen by Dr. Scott Ross for ongoing management of her headaches. Claimant told Dr. Ross that her neck pain was variable and her headaches were periodic. Claimant described her headaches as right-sided and occipitally based with some aura and nausea prior to onset. Dr. Ross felt the medication regimen that Dr. Roberts had been providing should not be changed.

43. According to the medical records Claimant was seen by Dr. Ross on multiple occasions between February 3, 2011 through April 21, 2016 for her headaches. Dr. Ross provided Claimant with Imitrex, Zomig and prophylactically, Timolol, and Topomax. At the time Dr. Ross was treating Claimant, she was experiencing headaches anywhere from five to six times per month and upwards to two to three per week. In a letter to Russell Hendrix, a claims adjuster at Broadspire, dated March 1, 2012, Dr. Ross wrote that regardless of whether the migraines were pre-existing, the muscle spasm and post concussive syndrome related to the September 10, 2001 work related accident would likely exacerbate the frequency of her migraines. Dr. Ross's records reveal the medication he was providing Claimant helped control her headaches.

44. On February 12, 2015 and April 14, 2016, Claimant was seen by Dr. Jenks for low back pain with radiation into her buttocks and occasionally into her left leg.

On both visits, Dr. Jenks' impression was persistent lumbar discogenic pain and left sacroiliitis.

45. Claimant was evaluated by neurologist Dr. Alexander Zimmer on June 11, 2015. Dr. Zimmer reviewed medical records predating Claimant's 2000 and 2001 work accidents, noting that Claimant had a pre-existing history of migraine headaches. Following his medical records review and after obtaining a history from Claimant, Dr. Zimmer opined that she had a history of occasional migraine headaches beginning in her teens or early twenties which became more frequent after the accident. Dr. Zimmer further opined that it is probable that Claimant's pre-existing migraines were playing a part in the vascular component of her headaches but the majority of her current headache problem would be best classified as a multifactorial posttraumatic headache.

46. On July 2, 2015 Claimant underwent a left L4-5 ESI. In follow up on July 22, 2015, Dr. Jenks noted that Claimant's symptoms had improved by about 75% following the July 2, 2015 injection. Physical examination revealed minimal tenderness to palpation of the left paraspinal area at about the L5 level and there was SI tenderness on the left, none on the right, SI provocation test is positive on the left and negative on the right. Dr. Jenks impression was lumbar discogenic pain and left sacroiliitis.

47. Dr. Jenks' office note of September 10, 2015 reveals that Claimant was experiencing increasing pain over her left SI joint. Claimant requested an SI joint injection which was subsequently administered in the office during her visit. A follow up visit on November 10, 2015 reflects that Claimant's left SI joint pain was moderately improved following the SI joint injection. A repeat injection was performed on this date.

48. On April 14, 2016, Claimant was seen by Dr. Jenks for persistent SI joint pain. Physical examination revealed tenderness over the left sacroiliac joints. Dr. Jenks administered a repeat SI joint injection. In follow up with Dr. Jenks on July 12, 2016, Claimant was complaining of low back pain. Dr. Jenks found little or no SI joint tenderness upon examination. Dr. Jenks' impression was lumbar discogenic pain and history of sacroiliitis. Dr. Jenks proposed repeating the lumbar epidural lumbar injection at the L2-3 level.

49. Claimant's ongoing chronic pain management was transferred to Dr. Miguel Castrejon. Dr. Castrejon evaluated Claimant on April 25, 2017. As part of his evaluation, Dr. Castrejon reviewed medical records dating back to April 16, 2003. Dr. Castrejon's physical examination revealed decreased range of motion in the cervical and lumbar spine. There was noted tenderness in the musculature of the cervical spine. Examination of the lumbar spine revealed midline tenderness at L4-S1 involving the paraspinals, as well as left greater than right sacroiliac joints with evidence of pelvic obliquity. SI joint stressing was more positive on the left than on the right. Dr. Castrejon's diagnoses were chronic neck and low back pain with elements of myofascial pain syndrome, cervicogenic headaches, chronic left sacroiliitis, and left lower limb radiculitis previously responsive to spinal injection. Dr. Castrejon felt that Claimant's

condition was stable and recommended continued medication management to include Neurontin, Nortriptyline, and Tramadol.

50. Claimant has been treating with Dr. Castrejon on a regular basis since her April 25, 2017 evaluation. Care has included massage therapy, chiropractic care, SI joint injections, and the provision of prescription medication, including Nortriptyline, Tramadol, and Percocet.

51. On August 21, 2017, Claimant underwent bilateral SI joint injections followed by a series of chiropractic treatments. According to an office note dated September 13, 2017, this treatment provided 65-70% relief of Claimant's persistent low back/SI joint symptoms.

52. On March 7, 2018, Claimant returned to Dr. Castrejon with worsening low back pain. Dr. Castrejon opined that Claimant's physical examination was consistent with bilateral SI joint mediated pain. He recommended bilateral SI joint injections. Dr. Castrejon also dispensed Tramadol, Nortriptyline and refilled Claimant's Metoclopramide and Percocet. On April 9, 2018, Claimant followed up with Dr. Castrejon who noted that Claimant has improved and is stable following her repeat SI joint injections in combination with chiropractic. It was also noted that the medication allowed Claimant to continue to work and participate in her daily home program.

53. On June 23, 2018, Claimant was seen by Dr. Castrejon with a flare up of low back symptoms. Physical examination revealed moderate tenderness of the lumbar paraspinals and both SI joints. In addition, there was tenderness and trigger points scattered throughout the cervical musculature. Dr. Castrejon recommended repeat SI joint injections in combination with chiropractic treatment.

54. On August 27, 2018, Claimant was evaluated by Dr. Tashof Bernton. Similar to other evaluators, Dr. Bernton reviewed Claimant's medical records. His review included records dating back to December 22, 2001. Dr. Bernton also obtained a history from Claimant, noting that she had sustained occupational injuries as a consequence of being involved in several incidents beginning with the accident in November 2000. Dr. Bernton's report indicates that on the date of his evaluation Claimant was having pain in the trapezius bilaterally, in the cervical spine, in the lumbar spine, and in the gluteal area predominately on the left. Physical examination revealed reported tenderness over occipital nerves and diffuse tenderness in the cervical region. It was noted that Claimant had asymmetry of SI motion with forward bending with tenderness over the SI joint. Dr. Bernton opined that Claimant's headaches and low back issues, specifically her SI joint complaints, are unrelated to any of her work injuries which occurred in 2000 and 2001. Regarding the headaches, Dr. Bernton felt that Claimant's migraines pre-existed her occupational injuries. He concluded that Claimant's migraines and her need for headache treatment were unrelated to the work-related accidents occurring in 2000 and 2001.

Dr. Castrejon's Deposition Testimony

55. Dr. Castrejon testified by deposition taken November 28, 2018. He testified as an expert in physical medicine and rehabilitation (PM&R). Dr. Castrejon opined that Claimant's present SI joint problems and treatment are related to the 2000 and 2001 work injuries. Dr. Castrejon's reasons were that dating back to September 8, 2001, Claimant has been experiencing pain in her SI joint. Dr. Castrejon went on to testify that Claimant's low back pain is probably multifactorial when one considers that the total benefit from ESI injections was only in the 65-70% range, meaning something else, i.e. SI joint dysfunction was likely contributing to her pain complex. Because SI joint issues can mimic pain in an L5 pain distribution or an SI distribution, Dr. Castrejon opined that Claimant's SI joint has probably been a pain generator dating back to the 2001 work injury. Furthermore, Dr. Castrejon testified that Claimant had no back pain prior to the 2000 and 2001 work injuries and that she had multiple work-related incidents within a short period of time such that she was never fully recovered from each incident, which ultimately created a chronic low back and SI joint condition. Nonetheless, during cross examination, Dr. Castrejon admitted that as of June 28, 2018, Claimant was reporting increased low back pain that was affecting her work and non-work activities which he recognized was caused by long training sessions and prolonged sitting as part of Claimant's current employment. In his June 28, 2018 report, Dr. Castrejon opined that Claimant had been fairly stable but was now reporting a "flare-up of similar symptoms affecting her daily activities" which Claimant attributed to three days of training involving prolonged sitting at a computer desk on wooden chairs causing an increase in her low back pain.

56. During his deposition, Dr. Castrejon opined the prolonged sitting in the training sessions was an exacerbating activity from which Claimant was unable to return to baseline. Dr. Castrejon testified that this exacerbating activity formed the basis for his recommendation to proceed with bilateral SI joint injections followed by chiropractic and massage therapy to augment the effects of the injection. According to Dr. Castrejon, this treatment was reasonable and necessary to treat Claimant's persistent SI joint problems. Dr. Castrejon reasoned the SI joint injections given under his and Dr. Jenks' direction provided 65% pain relief and, even more importantly, allowed Claimant to function better and reduce the use of medication. Claimant disputed that the recent SI injections provided 65% improvement in her symptoms, testifying that they decrease her pain by 50%.

57. Dr. Castrejon testified that Claimant's ongoing headaches are related to the 2000 and 2001 work injuries and similar to Dr. Zimmer's conclusion, are multifactorial in origin. He felt that the rear end motor vehicle accident and the broadside collision resulting in whiplash and side to side movement likely impacted the occipital nerves leading to cervicogenic headaches. Dr. Castrejon went on to state that the reason Claimant's headaches have persisted so long is that she developed a chronic muscle tension and spasms which cause stress and tension on the occipital nerves which in turn cause headaches. Dr. Castrejon also felt that Claimant's facet joint pain contributed to her headaches. He testified that Claimant's headaches are not true migraines like she suffered from prior to the 2000 and 2001 work injuries because there

is a musculoskeletal component to them. Dr. Castrejon testified that cervical muscle tightness and spasticity along with occipital nerve involvement are consistent with causing muscle tension headaches which usually end up with some sort of vascular contraction leading to a headache which is different from a classical migraine headache with auras, photophobia**,** and nausea. The ALJ infers from Dr. Castrejon's testimony that he does not believe Claimant suffers from true migraine headaches but rather from cervicogenic headaches caused by persistent muscle tension and spasticity in the neck.

58. Regarding care for her headaches, Dr. Castrejon opined that her present medication regimen is reasonable and necessary based on the fact that her headaches are under control and she has not required any injection therapy, including occipital injections to ameliorate the effects of her headaches while under his care. At the time of his deposition, he stated he last prescribed Topamax for her headaches in early 2018, last refilled Imitrex on June 27, 2018, and that Claimant only used these medications as needed.

59. Claimant admitted during her testimony that she had a history of migraine headaches for which she was taking medication at the time of her first work injury in November 2000. She testified that prior to her first work accident she had migraine headaches "three times a year at the most". Claimant testified she took Imitrex for her headaches prior to November 14, 2000, but stated she did not take it very often, only as needed, and at one point had a Demerol shot. She denied taking any other medication, including Maxalt or Amerge for migraines prior to her work injuries. She also testified that these medications were only prescribed by Dr. Roberts, for headaches following her work-related accidents.

60. The medical records submitted into evidence contradict Claimant's representation of her prior migraine history and treatment as follows:

- Medical records from Claimant's primary care provider, Center Pointe Family Medicine, indicate Claimant has been prescribed Imitrex for migraines since 1997;
- On December 17, 1997, Claimant requested a refill of Imitrex;
- On May 30, 1998, Claimant was provided an 18 tablet refill of 50 mg Imitrex;
- On July 20, 1998, less than two months later, Claimant received another 18 tablet refill of 50 mg Imitrex;
- On November 20, 1998, Claimant requested another Imitrex refill;
- A medical note from December 22, 1998 shows Claimant's migraine medication to be both Imitrex and Amerge, and a diagnosis of migraine headaches;

- In what appears to be January 1, 1999, Claimant called in reporting a migraine occurring all day. A prescription was called in for her for Imitrex, both tabs and nasal spray, Maxalt 10 mg and Vicodin;

- In October 1999, her medication was noted to include "Imitrex, Maxalt, Amerge sometimes";

- Claimant requested a refill of Imitrex on October 29, 1999 for a box of 6 pills;

- Claimant requested a refill of 9 Amerge pills, on December 30, 1999, two months later;

- Claimant requested another refill of 9 Amerge pills on March 27, 2000;

- Less than two months later, on May 16, 2000, Claimant requested a 6 tablet refill of Maxalt;

- A month later, on June 26, 2000, Claimant requested another 6 tablet refill of Maxalt;

- Less than a month later, on July 11, 2000, Claimant requested another 6 tablet refill of Maxalt;

- Claimant requested a refill of Imitrex nasal spray on November 27, 2000;
- On February 6, 2001, Claimant requested another refill of Imitrex nasal spray;

- Medical reports indicate Claimant's medications in November 2000, the time of her first work injury, included Imitrex, Maxalt and Amerge. (*See* Exhibit 15, p. 303).

Dr. Bernton's Testimony

61. Dr. Tashof Brenton testified at hearing as an expert in internal and occupational medicine. Dr. Bernton opined, consistent with his report of August 27, 2018, that Claimant's present SI joint problem is not related to her 2000 and 2001 work injuries. Dr. Bernton explained that there were no medical records reflecting that Claimant had any SI joint problems prior to the 2006 non-work related auto accident. Dr. Bernton opined that the SI joint only became a significant problem after the 2006 accident. He explained that prior to the 2006 MVA, medical records showed no significant tenderness to palpation in the paravertebral muscles or over the SI joints. He noted that Dr. Schwender, who treated Claimant both before and after the 2006 MVA,

specifically opined that her exacerbation and flare-up of right sacroiliitis and sacroiliac residual joint strain were not work-related. Dr. Bernton also testified that subsequent to the 2006 accident, Claimant has aged another 12 years and has degenerative changes in the spine which, when coupled with having to sit for prolonged periods of time at her current job, severs the casual relationship between the 2000 and 2001 work injuries. Specifically, he opined that it is not medically supportable to ascribe Claimant's current need for treatment, including the Butrans pain patches, on work accidents that occurred almost two decades ago given the intervening factors, including two non-work MVAs and the effects of degenerative disease in the spine, at play in this case. Accordingly, Dr. Bernton testified that Claimant's need for additional SI joint injections, as recommended by Dr. Castrejon, are not casually related to the 2000 and 2001 injuries.

62. Dr. Bernton testified that Dr. Castrejon appears to have relied upon his mention of a November 10, 2005 SI injection as referenced in his report to support his conclusion that Claimant's SI treatment needs preceded the 2006 non-work MVA. Dr. Bernton clarified, however, that Dr. Castrejon's reference to a November 10, 2005 injection was probably a typo because there is no record to support an injection having been administered on this date. On the other hand, there is record evidence to support that an SI joint injection was performed on November 10, 2015.

63. Dr. Bernton also testified that further epidural steroid injections are not reasonable, necessary and related to the 2000 and 2001 work related injury. Dr. Bernton reasoned that Claimant has not had epidural steroid injections since 2016 and there is no indication of any nerve compression which is why an ESI is given to a patient. There is currently no request for additional ESI's pending. Nevertheless, Dr. Bernton opined that if Claimant needs ESI's in the future it was because something new had happened to cause nerve root impingement or radiculopathy.

64. Finally, Dr. Bernton testified that Claimant reported a 50 to 60% improvement after the injections which does not meet the 80% improvement the Colorado Division of Workers' Compensation Treatment Guidelines (hereinafter the "Guidelines") requires for continued injection therapy. Dr. Bernton explained that the 80% threshold was established to balance the benefits of the injection, which are short-term, against the risks associated with administering additional injections containing steroids.

65. On cross examination concerning the SI injections, Dr. Bernton agreed that the 2000 and 2001 incidents are of the type that can injure the SI joint and that various providers including Dr. Finn had raised the possibility of an SI joint problem. Dr. Bernton testified that SI joint pain can wax and wane and that degenerative changes do not necessarily correlate with pain. Dr. Bernton also testified that while it is important that there be approximately 80% improvement in pain from the injections, he agreed that functional enhancement is important as well. Finally, Dr. Bernton agreed that in terms of documenting pain intensity, it can be difficult for patients in light of it being subjective.

66. The ALJ credits the opinions of Dr. Bernton, Dr. Schwender and Dr. Ridings to find that Claimant's left SI joint dysfunction/condition arose after she was placed at MMI for her work-related injuries on February 22, 2002. Indeed, the evidence presented persuades the ALJ that Claimant's left SI joint dysfunction is the direct and proximate result of her July 13, 2006 non-work related MVA rather than her 2000 or 2001 work related accidents. Moreover, to the extent that Claimant actually suffered from an SI condition, either right or left-sided prior to February 22, 2002, the ALJ is convinced that intervening events. i.e. the July 13, 2006 MVA and more recently her need to sit for prolonged periods of time on a wooden chair while training for her new job with the Department of Motor Vehicles exacerbated her underlying condition giving rise to her current need for treatment. The ALJ agrees with Dr. Bernton that these intervening events are sufficient to sever the causal connection between Claimant's 2000/2001 and her current need for treatment. Because the ALJ finds that Claimant's SI joint condition was likely caused and subsequently aggravated by factors unrelated to her 2000/2001 industrial accidents, the ALJ finds that Respondent-Employer is not obligated to provide or pay for continued SI joint treatment, including SI joint injections, chiropractic care and/or massage therapy.

67. Dr. Bernton testified that the medical records are inconsistent with Claimant's testimony that she only had three migraine headaches per year prior to her work injuries. He testified that the medical records indicate that Claimant had migraine headaches prior to the occupational injuries she suffered in 2000 and 2001 and they were treated with the same medication, Imitrex. He explained Imitrex was in a class of medications called triptans and was taken either one or two at a time at the occurrence of a headache. He opined the doses of medication that the Claimant received prior to her work injuries was not consistent with Claimant's report of only three migraines per year. He explained that Claimant's medical records prior to the first work accident reveal that she was getting refills of triptans sometimes 9 pills or 18 pills monthly, or every other month. He opined that, based upon the frequency at one or two tablets per headache, Claimant likely suffered about four headaches per month, which was not particularly different from what she is currently experiencing. Dr. Bernton further noted that the medical records historically demonstrate that Claimant was on more than one type of triptan at once, including Imitrex and Amerge. According to Dr. Bernton, this indicates that Claimant's migraines were intransigent and difficult to treat even before the first work accident.

68. Dr. Bernton testified that migraines vary over time, particularly in women with hormonal changes, including those going through menopause, and that those factors can have a dramatic influence on migraine frequency. He also noted medical records indicate that Claimant suffers from sinusitis, which frequently causes headaches and can trigger migraines. Accordingly, he opined it was not medically reasonable to say Claimant's current migraines are causally related to the work accidents, which occurred nearly two decades ago.

69. Dr. Bernton explained that occipital nerve blocks are used to treat acute muscle strain in the back of the head. He opined if Claimant needs them again, it would

not be related to the work accidents and would instead be needed because Claimant likely suffered a subsequent acute muscle strain during her post MMI MVA's.

70. Dr. Bernton testified that while he agrees that Dr. Zimmer is capable of diagnosing and treating headaches, he disagrees with Dr. Zimmer's opinion that Ms. Shipley's headaches are post traumatic in origin. In addition, he disagrees with Dr. Roberts and Dr. Castrejon's opinions that Claimant's headaches are related to the 2000 and 2001 work injuries. Finally, Dr. Bernton agreed that reasonable doctors can have reasonable differences of opinions as to diagnoses, treatment plans, and causation.

71. The ALJ finds the opinions of Dr. Bernton that ongoing treatment of Claimant's headaches is no longer reasonable, necessary or causally related to the work accidents, credible and persuasive. The presence of an aura, including visual disturbances and nausea coupled with the fact that Claimant has not required additional occipital blocks to treat muscle tension/spasm for an extended period of time convince the ALJ that Claimant is experiencing migraine headaches rather than cervicogenic headaches as suggested by Dr. Castrejon. The ALJ credits Dr. Bernton's opinion that Claimant's pre-injury migraine condition appears similar to her current migraines in frequency and characteristic. The ALJ also credits the opinion of Dr. Bernton that Claimant's pre-injury migraine complex was difficult to treat given the prescription of multiple migraine medications in the past. More probably than not, Claimant's current headaches represent a natural progression in the incidence of migraines likely due to non-industrial triggers including sinusitis and/or hormonal changes. Accordingly, the ALJ finds Claimant's current need for headache treatment unrelated to her 2000/2001 industrial injuries. Because the need for treatment to ameliorate Claimant from the effects of her migraine headaches is unrelated to her 2000/2001 work-related injuries, Respondent is not obligated to provide or pay for it.

CONCLUSIONS OF LAW

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

Generally

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

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every

item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Assessing weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the ALJ. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo.App. 2008). To the extent, expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); see also, *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo.App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary opinion). When considered in its totality, the ALJ concludes that the evidence in this case supports a reasonable inference/conclusion that Claimant suffers from both SI joint dysfunction and migraine headaches. While Claimant probably requires treatment for these conditions, the evidence presented, including the medical opinions of Dr. Bernton persuade the ALJ that Claimant's need for such treatment is unrelated to her 2000/2001 work-related injuries. Based upon the evidence presented, the ALJ concludes that Dr. Bernton's opinions concerning the relatedness of Claimant's need for SI and headaches treatment are credible and more persuasive than both the contrary opinions of Dr. Castrejon and Claimant's testimony.

Claimant's Entitlement to Additional SI Joint Injections, Chiropractic Treatment and Massage Therapy

D. A claimant's need for medical treatment may extend beyond the point of maximum medical improvement where he/she requires periodic maintenance care to relieve the effects of the work related injury or prevent further deterioration of his/her condition. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988). It is well settled that where respondents file a final admission admitting for maintenance medical benefits pursuant to *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988), they are not precluded from later contesting liability for a particular treatment. *Snyder v. Industrial Claim Appeals Office, supra*; *Rizo v. Monfort, Inc*., W.C. No. 4-310-241 (ICAO June 16, 1999). Moreover, when respondents contest liability for a particular

medical benefit, the claimant must prove that such contested treatment is reasonably necessary to treat the industrial injury and is related to that injury. *Grover v. Industrial Commission*, *supra; Snyder v. Industrial Claim Appeals Office*, *supra.*

E. It is also well settled that the natural development of an intervening, nonindustrial injury, which is separate from and uninfluenced by an earlier industrial injury, is not compensated as part of the original industrial injury. *Post Printing & Publishing Co. v. Erickson,* 94 Colo. 382, 30 P.2d 327 (1934). Respondents contend that such an injury occurred in this case when Claimant aggravated her low back and right SI condition in addition to injuring her mid back and left SI joint on July 13, 2006 when another driver struck her passenger side door as she was passing by the driveway he/she was exiting. Based upon the evidence presented, including the expansion of Claimant's complaints and treatment for body parts and conditions previously untreated, prior to her placement at MMI, the ALJ agrees. Here, the evidence presented persuades the ALJ that Claimant's complaints concerning her SI joints have changed over time since her July 13, 2006 MVA. While Claimant treated primarily for pain in her right low back prior to July 13, 2006, the treatment focus shifted to her SI joints thereafter. Moreover, Claimant has not worked for the Employer since 2008. According to the medical records, Claimant's low back/SI symptoms increased again in June 2018, due to what Claimant testified was prolonged sitting during training sessions with her current employer. Dr. Castrejon opined that this prolonged sitting constituted an exacerbating event, which formed the basis for his recommendation for additional bilateral SI joint injections, chiropractic and massage therapy to return Claimant to baseline.

F. In *Milco Construction v. Cowan,* 860 P.2d 539 (Colo. App. 1992), the Court of Appeals established a two-step procedure for awarding ongoing medical benefits under *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988). The Court stated "before an order for future medical benefits may be entered there must be substantial evidence in the record to support a determination that future medical treatment will be reasonably necessary to relieve the injured worker from the effects of the work-related injury or occupational disease." Thus, while a claimant does not have to prove the need for a specific medical benefit, he/she must prove the probable need for some treatment after MMI related to the work injury. The question of whether specific medical treatment is related to and reasonably necessary to cure and relieve a claimant from the effects of a work-related injury is a question of fact for resolution by the ALJ. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). Based on the evidence presented and as articulated above, the ALJ is persuaded that while additional SI joint injections, chiropractic treatment and massage therapy is probably reasonable; the need for this treatment is unrelated to any of Claimant's 2000/2001 work-related accidents. Claimant's suggestion, as buttressed by the opinions of Dr. Castrejon, that Dr. Finn identified the SI joint(s) as a work injury related pain generator in 2002 is unpersuasive. Although Dr. Finn questioned whether Claimant may have underlying SI joint dysfunction, he did not request diagnostic testing nor did he recommend treatment for the SI joint. Indeed, treatment for the SI joints was initiated many months after Claimant was declared to

be at MMI and after several intervening accidents had occurred. As found, the ALJ credits the opinions of Dr. Bernton to conclude that Claimant's ongoing symptoms are, more probably than not, associated with an intervening injury to the back and SI joint(s) sustained in multiple MVA's and more recently after having to sit for a prolonged period of time during training sessions for her current job. Consequently, while Claimant would likely benefit from continued SI joint injections, chiropractic treatment and massage therapy, these treatment modalities are not necessary to treat the effects caused by Claimant's industrial injury. Rather, the evidence presented supports a conclusion that this treatment is necessary to address the ongoing symptoms caused primarily by Claimant's July 13, 2006 intervening MVA.

G. The Medical Treatment Guidelines (Guides) are regarded as the accepted professional standards for care under the Workers' Compensation Act. *Hernandez v. University of Colorado Hospital*, W.C. No. 4-714-372 (January 11, 2008); see also *Rook V. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo.App. 2005). The Medical Treatment Guidelines, Rule 17-2(A), W.C.R.P. provide: All health care providers shall use the Medical Treatment Guidelines adopted by the Division. In spite of this direction, it is generally acknowledged that the Guidelines are not sacrosanct and may be deviated from under appropriate circumstances. *See*, Section 8-43-201(3) (C.R.S. 2014); *Nunn v. United Airlines,* W.C. 4-785-790 (ICAO September 9, 2011). Nonetheless, they carry substantial weight. Moreover, the MTGs have been accepted in the assessment and treatment of low back pain and SI joint pain/dysfunction.

H. In Rule 17, Exhibit 9 of the Guidelines titled "Chronic Pain Disorder Medical Treatment Guidelines" under the section entitled "Maintenance Management" there are listed multiple modalities for post MMI care including ESIs and SI joint injections. Under section G (7), "Injections-Spinal Therapeutic" (The Guidelines, Rule 17, Exhibit 9-Page 46) it is specifically stated that for post MMI injections the doctor is to refer to "Section I.8, "Injection Therapy Maintenance Management." Pursuant to Section I.8(b) (The Guidelines-Pages 170-171), patients may require injections for exacerbations of their conditions if they have experienced functional benefits from these injections in the past. In addition, for chronic radiculopathy, injections may be repeated only when a "functional documented response" lasts for three months. A positive result would include a return to baseline function as established at MMI, return to increased work duties, and measurable improvement in physical activity goals including a return to baseline after an exacerbation. In addition, this same section also allows for repeat SI joint injections if the same criteria used for repeat epidural steroid injections is met. The criteria as to whether or not a repeat epidural steroid injection or SI joint injection should be done for maintenance care does not mention the 80% pain reduction noted in other areas of the Guidelines for treatment of low back pain with injections. Nonetheless, the Court is not bound by the MTGs in deciding individual cases on the guidelines or the principles contained therein alone. Indeed, § 8-43-201(3) specifically provides:

> It is appropriate for the director or an administrative law judge to consider the medical treatment guidelines adopted under section 8-42-101(3) in determining whether certain medical treatment is reasonable,

necessary, and related to an industrial injury or occupational disease. The director or administrative law judge is not required to utilize the medical treatment guidelines as the sole basis for such determinations.

I. As resolved here, the ALJ is convinced that the evidence presented supports a conclusion that additional SI joint injections are reasonable. Moreover, the ALJ is convinced that Dr. Castrejon contemplated their use within the context of expected functional outcomes rather than for purposes of pain relief alone. Nevertheless, the evidence presented persuades the ALJ that the need for additional injections is not causally related to Claimant's 2000/2001 industrial injuries. Consequently, the ALJ finds Claimant reliance on the Guides in an effort to establish that the recommended SI joint injections are reasonable and necessary is of limited evidentiary value. Because Claimant has failed to prove by a preponderance of the evidence that her current need for additional SI joint injections, chiropractic treatment and massage therapy are causally related to his June 16, 2013 industrial injury, Respondents' are not obligated to provide or pay for it.

Collateral Estopple

J. Although developed in the context of judicial proceedings, issue preclusion, frequently referred to as collateral estopple may be applied to administrative proceedings in Workers Compensation Claims. *Sunny Acre Villa Inc. v. Cooper*, 25P3d 44 (Colo. App.). Issue preclusion works to preclude the relitigation of matters that have already been decided. *Argus Real Estate, Inc. v. E-470 Pub Highway Auth.,* 109 P3d 604, 608 (Colo. 2005). The doctrine is intended to promote judicial economy and to confirm the finality of judgments by preventing inconsistent decisions. *Argus,* 109 P3d at 608, 611. Collateral estopple bars re-litigation of an issue if all of the following elements are satisfied: (1) The issue sought to be precluded is identical to an issue actually determined in the prior proceeding; (2) The party against whom estoppel is asserted has been a party to or in privity with a party to the prior proceeding; (3) There is a final judgment on the merits in a prior proceeding; and (4) The party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in a prior proceeding: *Sunny Acre Village, Inc.,* 25 P3d at 47, and *Bebo Construction Co. v. Mattox & O' Brien, P.C.*, 990 P2d 78, 84 (Colo. 1999). In this case, Claimant alleges that Respondent is barred from challenging epidural steroid joint injections (ESIs) due to an order issued by the undersigned following a hearing convened February 11, 2015. Based upon the issues endorsed for hearing along with the evidence presented, the ALJ is not convinced.

K. The ALJ finds/concludes that the issue from the prior 2015 hearing and the issue in the present hearing are not identical. In the present hearing, the issue is whether Respondents have produced sufficient evidence to entitle them to withdraw admissions for ongoing maintenance care, including ESI joint injections whereas the question, i.e. the "issue" presented at the 2015 hearing was whether Claimant established her entitlement to additional recommended ESI's on the grounds that they were reasonable, necessary and related to her 2000/2001 industrial injuries. Thus, the

ALJ agrees with Respondents that the present hearing issue is not the same as the issue litigated at the February 11, 2015 hearing. Insofar as Claimant has failed to meet an element required to be established for the doctrine of issue preclusion to apply, the ALJ concludes that Respondents are not collaterally estopped from litigating the issue of whether they are entitled to withdraw their December 2, 2011 and/or September 18, 2013 admissions for maintenance care.

Respondent's Request to Withdraw the December 2, 2011 & September 18, 2013 Admissions for Maintenance Care

L. A claimant is only entitled to medical treatment under the Act when the need for such treatment is proximately caused by the work injury. *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. App. 1997). It is well settled that where respondents file a final admission admitting for maintenance medical benefits pursuant to *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988), they are not precluded from later contesting liability for a particular treatment. *Id.* Moreover, when respondents contest liability for a particular medical benefit, the claimant must prove that such contested treatment is reasonably necessary to treat the industrial injury and is related to that injury. *See Grover v. Industrial Commission*, *supra; Snyder v. Industrial Claim Appeals Office*, *supra.* Where, however, respondents attempt to modify an issue that previously has been determined by an admission of liability, they bear the burden of proof for such modification. *Section 8-43-201(1), C.R.S.*; *Dunn v. St. Mary Corwin Hospital*, W.C. No. 4-754-838 (Oct. 1, 2013); *see also Salisbury v. Prowers County School District*, W.C. No. 4-702-144 (June 5, 2012); *Barker v. Poudre School District*, W.C. No. 4-750-735 (July 8, 2011). Section 8-43-201(1), C.R.S. was added to the statute in 2009 and provides, in pertinent part:

> …a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification. (2) The amendments made to subsection (1) of this section by Senate Bill 09-168, enacted in 2009, are declared to be procedural and were intended to and shall apply to all workers' compensation claims, regardless of the date the claim was filed.

M. The principal aim of the 2009 amendment to § 8-43-201(1), C.R.S. was to reverse the effect of *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001). That decision held that while the respondents could move to withdraw a previously filed admission of liability, the respondents were not actually assessed the burden of proof to justify that withdrawal. The amendment to § 8-43-201(1), C.R.S. placed that burden on the respondents and made such a withdrawal the procedural equivalent of a reopening. The statute serves the same function in regard to maintenance medical benefits. The Supreme Court in *Grover v. Industrial Commission*, 759 P.2d 705, 712 (Colo. 1988), provided that after the respondents had admitted for maintenance medical benefits "the employer retains the right to file a petition to reopen, … for the purpose of either

terminating the claimant's right to receive medical benefits or reducing the amount of benefits available to the claimant." The amendments to § 8-43-201(1), C.R.S., then, require that when respondents seek a ruling at hearing that would serve as "terminating the claimant's right to receive medical benefits," they are seen as seeking to reopen that admission and the burden is theirs. In *Salisbury v. Prowers County School District*, *supra,* the Industrial Claims Panel held that where the effect of the respondents' argument is to terminate previously admitted maintenance medical treatment, the respondents have the burden, pursuant §8-43-201(1), C.R.S., to prove that such treatment is not reasonable, necessary or related to the claimant's industrial injury.

N. In this case, Respondent is seeking to withdraw their admissions for ongoing maintenance care, including treatment for Claimant's headaches, SI joint dysfunction and low back based upon Dr. Bernton's opinions that this care is no longer reasonable, necessary or related to Claimant's 2000/2001 industrial injuries. As found above, Claimant's migraine headaches have improved and returned to her pre-injury baseline in terms of frequency and character. As found, the ALJ credits and finds persuasive Dr. Bernton's opinions that Claimant's headaches would not be materially different even if she not suffered the work accidents. Moreover, the ALJ attributes Claimant's current need for SI joint treatment to subsequent intervening causes, including two non-work related MVAs, particularly the July 13, 2006 MVA. As such, the ALJ determines that Respondents have proven that ongoing treatment for these conditions is no longer causally related to the work injuries associated with these claims. Nonetheless, the ALJ finds/concludes that Respondents have failed to establish that Claimant's need for future ESI's to the low back would not necessarily be reasonable, necessary and related to Claimant's 2000/2001 industrial injuries. In an effort to prove that Claimant's need for future ESI's no longer reasonable, necessary or related to her 2000/2001 industrial injuries, Respondent's rely heavily on Dr. Bernton's testimony that future steroid injections would not be reasonable, necessary or related to 2000/2001 work related injuries because there is no current indication of nerve compression and Claimant has not had ESI's since 2016, leading him to surmise that if Claimant needs ESI's in the future, that need will be related to "something" new, i.e. an intervening event causing nerve root impingement and radiculopathy. In this case, the persuasive evidence demonstrates that Claimant probably suffered a right L4-5 paracentral disc herniation and left L5-S1 paracentral disc herniation as a consequence of her 2000/2001 industrial accidents. Moreover, the evidence presented persuades the ALJ that Claimant's low back has never been completely pain free since her 2000/2001 injuries. Indeed, the record evidence supports a finding/conclusion that Claimant would periodically require the administration of ESI's to cure and relieve her of ongoing low back pain associated with her 2000/2001 industrial injuries in the absence of intervening events. While these ESI's have been effective in holding Claimant's work-related low back pain at bay for extended periods of time, the record evidence establishes that they eventually would wear off requiring repeat injections for ongoing pain relief. Although, Claimant appears to have enjoyed a particularly long period of low back pain relief since her last ESI injections administered in 2015/2016, the ALJ questions whether Claimant received an unintended benefit from her SI joint injections in the form of a respite from low back pain. Based upon the evidence presented, the ALJ is not convinced that the

efficacy of the current injections, including the fortuitous effects that the SI joint injections have probably had on Claimant's low back symptoms, might not wear off giving rise to increased low back pain in the absence of an intervening event. Accordingly, the ALJ finds and concludes that Dr. Bernton's testimony regarding the relatedness of the need for future ESI's to the 2000/2001 industrial accidents speculative and unpersuasive. As Respondent has failed to prove that Claimant's need for ongoing low back treatment, including additional ESI's is no longer reasonable, necessary and related to her 2000/2001 work-related injuries or that the December 2, 2011 or September 18, 2013 admissions for maintenance care were filed improvidently, the ALJ concludes that the request to withdraw these admissions must be denied and dismissed.

ORDER

It is therefore ordered that:

1. Claimant's request for additional medical benefits in the form of bilateral SI joint injections, chiropractic and massage therapy is denied and dismissed as she has failed to establish that need for this treatment is causally related to her 2000/2001 industrial accidents.

2. To the extent that Claimant seeks the same, her request for additional treatment to cure and relieve her of the effects of her ongoing headaches is denied and dismissed as she failed to establish that this treatment is causally related to her 2000/2001 industrial accidents.

3. Respondents are not estopped from challenging the reasonableness, necessity or relatedness of Claimant's need for additional epidural steroid injections to her 2000/2001 industrial injuries based on the issuance of a 2015 order, finding that Claimant had proven entitlement to maintenance ESIs at that time.

4. Respondent's request to withdraw either the December 2, 2011 or September 18, 2013 admissions for maintenance medical treatment is denied and dismissed as they failed to establish that Claimant's need for ongoing low back treatment, including additional ESIs is no longer related to her 2000/2001 industrial injuries or that the aforementioned admissions were filed by mistaken or otherwise in error.

5. Respondent shall provide all reasonable, necessary and related treatment, including additional ESIs, to relieve and otherwise prevent deterioration of Claimant's low back condition subject to Respondents right to challenge any future request for treatment on the grounds that it is not reasonable, necessary or related to Claimant's 2000/2001 industrial injuries.

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

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

DATED: March 27, 2019

/s/ Richard M. Lamphere

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

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that the right ankle surgery recommended by Dr. Waqqar Khan-Farooqi (specifically a right lateral ankle reconstruction with arthroscopic debridement, and a peroneal tendon synovecotomy) is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted October 16, 2017 work injury.

FINDINGS OF FACT

1. The claimant is employed by the employer as a checker. On October 16, 2017, the claimant was working in the self-checkout area when she stepped on a dip in the floor and rolled her right ankle. The claimant testified that she immediately felt pain in her right ankle.

2. After the claimant reported the incident to the employer, she was referred to Dr. Craig Stagg for treatment. Dr. Stagg has been the claimant's authorized threating physician (ATP) for this claim.

3. The claimant was first seen by Dr. Stagg on October 17, 2017. On that date, an x-ray of the claimant's right ankle showed no acute fracture. Dr. Stagg diagnosed an ankle sprain. In addition, Dr. Stagg placed the claimant in a splint and instructed her to use crutches.

4. The claimant returned to Dr. Stagg on October 20, 2017. Dr. Stagg instructed the claimant to use a controlled ankle motion (CAM) boot and referred her to physical therapy. The claimant testified that physical therapy treatment made her symptoms worse.

5. On November 3, 2017, the claimant was seen by Dr. Stagg. At that time, the claimant continued to have swelling and bruising on her right ankle. Dr. Stagg ordered an x-ray of the claimant's right foot and a magnetic resonance image (MRI) of the claimant's right ankle. In addition, he referred the claimant to Dr. Christopher Copeland for consultation.

6. On November 3, 2017, an x-ray of the claimant's right foot showed no fracture or dislocation. It was read as a "normal study of the right foot".

7. The claimant was first seen by Dr. Copeland on November 9, 2017. At that time, Dr. Copeland noted that the claimant's symptoms included, bruising, swelling, weakness, and decreased range of motion in her right ankle. Dr. Copeland diagnosed a right ankle sprain and recommended that the claimant continue using the CAM boot. Dr. Copeland agreed that an MRI was appropriate.

8. On November 16, 2017, an MRI of the claimant's right ankle showed grade 2 sprains of the anterior talofibular and calcaneofibular ligaments with mild periligamentous and soft tissue edema.

9. Thereafter, the claimant's symptoms continued. On January 23, 2018, the claimant returned to Dr. Copeland who diagnosed a right ankle sprain with probable anterolateral impingement and possible peroneal tendinitis. On that date, Dr. Copeland recommended and administered a diagnostic therapeutic injection. Dr. Copeland opined that if the claimant continued to have symptoms, she could require surgery, including ankle arthroscopy, lateral ligament repair, and possible peroneal tendon exploration.

10. On January 29, 2018, the claimant returned to Dr. Stagg and reported that the injection administered by Dr. Copeland did not provide any immediate relief. On that same date, Dr. Stagg noted that the claimant should wean from her use of the CAM boot.

11. On February 20, 2018, the claimant was seen by Dr. Copeland and reported that the injection caused more pain for ten days after the January 23, 2018 injection. On that date, Dr. Copeland recommended and administered a second injection.

12. On February 21, 2018, the claimant attended an independent medical examination (IME) with Dr. Lawrence Lesnak. In connection with the IME, Dr. Lesnak reviewed the claimant's medical records, obtained a history from the claimant, and completed a physical examination. At the IME, the claimant described the most recent injection administered by Dr. Copeland as a numbing shot that provided no relief from that injection. In his IME report, Dr. Lesnak noted that the claimant continued to use her CAM boot. Dr. Lesnak opined that the claimant suffered an acute right lateral ankle sprain as a result of the October 16, 2017 work injury. Dr. Lesnak opined that the claimant did not need further injections and was not a surgical candidate. Dr. Lesnak recommended that the claimant undergo electromyography (EMG) testing of her right lower extremity to evaluate her right distal peroneal nerve. Dr. Lesnak also opined that the claimant had an underlying somatic disorder/somatoform disorder.

13. On February 28, 2018, the claimant returned to Dr. Stagg. At that time, the claimant requested a referral to another orthopedic surgeon. The claimant testified that she no longer wished to treat with Dr. Copeland because she had lost confidence in him. At that time, Dr. Stagg made a referral to Dr. Cota.

14. On March 16, 2018, Dr. Lesnak was asked to review additional medical records and opine regarding whether a second opinion from Dr. Cota would be reasonable and necessary to address the claimant's injury. Dr. Lesnak opined that a second opinion was not necessary. In that same report, Dr. Lesnak opined that the claimant should be placed at maximum medical improvement (MMI). Based upon Dr. Lesnak's opinion, the respondents denied the referral to Dr. Cota.

15. The claimant returned to Dr. Stagg on March 20, 2018. Dr. Stagg referred the claimant to Dr. Michael Burnbaum for EMG studies, as recommended by Dr. Lesnak in his IME. On that date, Dr. Stagg again encouraged the claimant to stop using her CAM boot.

16. On April 2, 2018, Dr. Burnbaum completed an EMG study of the claimant's right lower extremity. Dr. Burnbaum recorded that it was a normal EMG study. In addition, he found no significant nerve injury in the claimant's right leg.

17. Following the EMG, Dr. Stagg referred the claimant to Dr. Ellen Price for a determination regarding whether the claimant had complex regional pain syndrome (CRPS). The claimant was first seen by Dr. Price on May 11, 2018. At that time, Dr. Price did a bone scan to rule out an occult fracture. In addition, Dr. Price opined that the claimant did not have CRPS.

18. On May 8, 2018, the claimant was seen by Dr. Waqqar Khan-Farooqi regarding her right ankle. The claimant was not initially referred to Dr. Khan-Farooqi by her ATP. The claimant testified that she sought treatment with Dr. Khan-Farooqi independently. On exam, Dr. Khan-Farooqi noted "clinical evidence of chronic laxity" and opined that the claimant had insufficient anterolateral ankle ligaments. He recommended that the claimant undergo a lateral ankle reconstruction "of the Brostrom Gould variety".

19. On May 24, 2018, Dr. Stagg noted that two surgeons had recommended surgery for the claimant's right ankle. At that time, Dr. Stagg made a referral for the claimant to be seen by Dr. Khan-Farooqi.

20. Subsequently, Dr. Stagg referred the claimant for further testing for CRPS, specifically thermography and QSART testing. On July 6, 2018 a phase 3 bone scan was performed and showed no findings related to CRPS.

21. On August 22, 2018, the claimant returned to Dr. Lesnak for an additional IME. In his IME report, Dr. Lesnak reiterated his opinion that the claimant was at MMI. He specifically noted an MMI date of April 2, 2018 as this was the date Dr. Burnbaum found no neurologic abnormalities. Dr. Lesnak further opined the claimant did not have permanent impairment of her right lower extremity.

22. On August 28, 2018, Dr. David Reinhard noted that claimant's QSART results were negative for CRPS. In that same medical record, Dr. Reinhard opined that a CRPS diagnosis could be ruled out.

23. On October 18, 2018, the claimant returned to Dr. Khan-Farooqi. At that time, Dr. Khan-Farooqi noted that the claimant had "pretty significant laxity of the ankle and varus hindfoot." He again recommended lateral ankle reconstruction. Dr. Khan-Farooqi also recommended the claimant undergo arthroscopic debridement of soft tissue impingement lesion and a peroneal tendon synovecotomy.

24. On January 2, 2019, Dr. Stagg noted that the claimant has "laxity on stress testing".

25. On January 8, 2019, the claimant was seen by Dr. James Lindberg for an IME. Dr. Lindberg reviewed the claimant's medical records, obtained a history, and performed a physical examination. In his IME report, Dr. Lindberg noted on his exam that the claimant had more instability in her left ankle than in her right ankle. Based upon his exam and his review of the imaging and testing (including x-rays, MRI findings, bone scan, and EMG testing), Dr. Lindberg found no evidence of ligament laxity. Dr. Lindberg opined that the surgery recommended by Dr. Khan-Farooqi is not reasonable or necessary medical treatment of the claimant's symptoms. Dr. Lindberg's testimony was consistent with his written report.

26. Dr. Lindberg testified that the only reason to perform the recommended surgery would be evidence of laxity. Dr. Lindberg reiterated that he could find no evidence of laxity on exam, or upon review of the various imaging studies.

27. The claimant testified that she wishes to pursue the surgery recommended by Dr. Khan-Farooqi.

28. The ALJ credits the medical records and the opinions of Drs. Lesnak and Lindberg over the contrary opinions of Drs. Stagg and Khan-Farooqi. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that the recommended ankle surgery is reasonable and necessary to cure and relieve the claimant from the effects of the work injury. The ALJ is persuaded by the opinion of Dr. Lindberg that the claimant's right ankle does not have the necessary laxity to warrant the recommended surgery. The ALJ finds as persuasive Dr. Lindberg's findings on exam that the claimant had more instability in her left ankle than in her right ankle.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider,

among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2017).

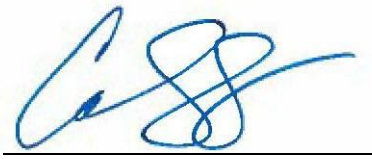
3. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

4. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that the recommended right ankle surgery is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the October 16, 2017 work injury. As found, the medical records and the opinions of Drs. Lesnak and Lindberg are credible and persuasive.

ORDER

It is therefore ordered that the claimant's request for a right lateral ankle reconstruction with arthroscopic debridement, and a peroneal tendon synovecotomy is denied and dismissed.

Dated March 28, 2019



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

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-077-006

ISSUES

- Whether Claimant established by a preponderance of the evidence that he suffered a compensable work injury on May 8, 2018.

STIPULATIONS

1. The Parties agree that if the claim is compensable that Claimant's average weekly wage is $980.00.

2. The Parties agree that if the claim is compensable that Claimant is entitled to Temporary Total Disability benefits from May 8, 2018 to May 20, 2018.

FINDINGS OF FACT

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

1. Claimant worked as a long haul truck driver with Employer.

2. He was driving in the Midwest when his truck's air conditioning unit failed on or about May 3, 2018. It was repaired on or about May 6, 2018. During that three-day period, Claimant testified that temperatures reached as high as 103 degrees. Claimant testified that he sweat continuously because of the heat, including at night when he attempted to sleep in his truck. He eventually stopped sweating.

3. Claimant testified that between May 5 and May 8, 2018, he vomited after eating. Initially, the vomit was a normal color and did not have blood in it.

4. On May 8, 2018, Claimant began vomiting bright red blood and contacted emergency services. Flight for Life ultimately transported Claimant to Northern Colorado Medical Center where medical providers diagnosed him with a bleeding gastrojejunal anastomotic ulcer. Claimant remained hospitalized through May 12, 2018.

5. In the "History of Present Illness/ Injury" note from Northern Colorado Medical Evacuation, the attending provider stated that Claimant called 911 after feeling light headed and vomiting blood. "He states he hasn't been feeling well for 3-4 days. He has been vomiting fresh red blood and coffee ground like emesis for 3-4 days."

6. Claimant attributed his vomiting to the heat and his subsequent dehydration. However, medical records do not support a finding that Claimant was dehydrated. Rather, the Northern Colorado Medical Center notes provide that when Claimant arrived, emergency room doctors tested Claimant's creatinine levels, which can indicate dehydration. Claimant's results were within normal limits. The notes do not indicate that

Claimant complained of dehydration at admission or during his hospital treatment. While Claimant did receive blood and IV fluids during transport to and at the hospital, medical records provide that they were given because Claimant had severe hypotension and do not mention dehydration.

7. Under "Social History" Matthew Remakus, M.D., noted that Claimant smoked three to four cigars a day. Other records provide that Claimant smoked a half pack of cigarettes daily for forty years.

8. On May 9, 2018, Dr. Ahmed M. Sherif performed an upper endoscopy. Dr. Sherif found a gastric ulcer with a visible, actively bleeding vessel. He successfully placed a clip over the vessel and stopped the active bleed. The endoscopy also revealed a large fistula between the bypassed stomach and the native stomach. Fistulas contain gastric acid which can reenter the stomach.

9. Claimant experienced a similar incident in 2010 after he underwent a Roux-en-Y gastric bypass surgery with Dr. Richard Tillquist, M.D. on August 4, 2010.

10. After his surgery, Claimant continued taking a non-steroidal anti-inflammatory although the medication his bypass surgery contraindicated doing so. He also did not take his prescribed proton pump inhibitor.

11. On September 18, 2010, Claimant reported that he had been feeling nauseous and began vomiting blood. He treated at Medical Center of Aurora-South where providers diagnosed an upper gastrointestinal bleed. Providers discontinued Claimant's non-steroidal anti-inflammatory, noting the probability that Claimant's ulcer was NSAID induced. They prescribed the proton pump inhibitor Protonix, but only for a three-week course.

12. While Claimant testified that providers diagnosed a torn esophagus in 2010, an upper GI endoscopy performed on September 18, 2010 showed a normal esophagus. The endoscopy also showed anastomotic ulcers at the site of Claimant's anastomosis.

13. Claimant maintained behaviors that put him at risk of additional upper gastrointestinal bleeds. Medical records from September 2014, note:

- Claimant's medical history was remarkable for acid reflux,
- Claimant took 81 mg aspirin tablets daily,
- Claimant smoked four cigars per day, and
- Claimant's BMI was 37.4.

14. Medical records from October 2014, February 2015, May 2015, June 2015, August 2016, January 2017, March 2017, April 2017, March 2018, and May 14, 2018 show aspirin as one of Claimant's current medications. May 2015 and August 2016 records note, "Patient was encouraged to take daily baby aspirin." On March 16, 2017, Claimant's provider counseled him to "hold aspirin" until after cataract surgery. While

Claimant denied taking aspirin, the ALJ finds the numerous and specific records to the contrary to be more persuasive.

15. While Claimant reportedly stopped smoking in 2014, he resumed smoking three to four cigars a day by May 1, 2015.

16. Claimant alleges that his May 5 through May 8, 2018 vomiting caused his bleeding gastrojejunal anastomotic ulcer. While Dr. Tillquist provided some support for Claimant's position, the greater weight of the evidence supports a finding that Claimant's ulcer caused his vomiting.

17. Respondents retained Dr. Jonathan Fishman, M.D., to review records and literature regarding the medical causation of Claimant's ulcer. Dr. Fishman opined that Claimant's May 8, 2018 nausea and vomiting *resulted from* the anastomotic ulcer, identified in the 2010 upper gastrointestinal endoscopy.

18. Dr. Fishman explained that gastrointestinal ulcers tend to form at the gastrojejunal anastomosis following a Roux-en-Y gastric bypass surgery, the one Claimant underwent in 2010. Ulcers form at that site because acid from the native stomach can enter the new stomach pouch, particularly where a gastric fistula allows even more acid from the native stomach to enter the new stomach. The anastomotic site is a weak area because it is close to the surgical site.

19. Further, Dr. Fishman opined that Claimant's 2010 ulcer became asymptomatic, but that it did not actually heal. Claimant's elevated risk factors including tobacco use, aspirin use, and the gastric fistula noted in Dr. Sherif's endoscopy, caused it to became symptomatic again in 2018.

20. Dr. Fishman therefore concluded there was no connection between Claimant's employment or work environment and the formation or symptoms of the gastric ulcer.

21. On December 10, 2018, Dr. Tillquist responded to Dr. Fishman's report. Dr. Tillquist opined that:

- dehydration can cause vomiting,
- vomiting can cause a pre-existing ulcer to start bleeding, and
- Claimant's vomiting was a "contributing factor" for the pre-existing ulcer to begin bleeding on May 8, 2018.

Therefore, Dr. Tillquist opined that Claimant suffered a compensable work injury on May 8, 2018. Dr. Tillquist criticized Dr. Fishman for failing to address vomiting as a cause for bleeding and for opining that Claimant had a chronic ulcer.

22. The ALJ finds that Dr. Tillquist's opinions speak in terms of possibility, not medical probability. That ALJ also finds Dr. Tillquist's opinions less persuasive because that are premised on Claimant being dehydrated, a finding that the ALJ does not make.

23. Dr. Fishman testified at hearing on Respondents' behalf. While Dr. Fishman is not Level II Accredited with the Division of Workers' Compensation, and had not previously testified at a workers' compensation hearing, he is board certified in gastroenterology with decades of experience in that field, including the treatment of patients with gastric bypass surgery. The Judge accepted him as an expert in gastroenterology.

24. Dr. Fishman testified that Claimant's gastric ulcer, diagnosed in 2010, caused his 2018 gastric bleed. He explained that ulcers do not always heal after they bleed, but rather can become asymptomatic, as Claimant's did in 2010. Over time, the ulcer can become symptomatic again because of non-work factors such as smoking, use of aspirin or other over the counter pain relievers, and time. In this case, Claimant has a number of risk factors that would result in a non-healing ulcer becoming symptomatic, including smoking and taking aspirin.

25. Dr. Fishman explained that Claimant's ulcer was located near the anastomosis, the junction site between the old and new stomach. This ulcer was present in 2010 when a bleeding ulcer caused Claimant's hospitalization. Dr. Fishman explained that it was common for ulcers to become asymptomatic, but not actually "heal." Acid in the stomach typically prevents ulcers from healing completely, which is why doctors prescribe acid blockers for an extended time following a bleeding ulcer. Claimant's doctors did not prescribe a long-term acid blocker following his 2010 anastomotic ulcer bleed. Therefore, Dr. Fishman opined that Claimant had a non-healing gastric ulcer which was asymptomatic for approximately eight years following the 2010 bleed, and which never fully healed. Over time, the acid in Claimant's stomach, exacerbated by the gastric fistula, prevented the ulcer from healing. Claimant's routine smoking and use of aspirin further eroded the lining between the ulcer and the blood vessels underneath, until eventually, the ulcer began to bleed.

26. Dr. Fishman testified that dehydration does not typically cause vomiting; contrary to Dr. Tillquist's theory that Claimant's vomiting caused the ulcer to become symptomatic. Further, emergency room reports do not indicate that Claimant was dehydrated when admitted. Rather, Claimant's creatinine levels were normal, which suggests that he was not dehydrated when admitted.

27. Dr. Fishman opined that Claimant's vomiting resulted from the ulcer becoming symptomatic in the days prior to May 8, 2018. A symptomatic ulcer can cause nausea and vomiting, which is consistent with Claimant's reports that even after his air conditioner began working; he was still unable to eat without vomiting. Additionally, Dr. Fishman explained that a bleeding, symptomatic ulcer would not always immediately produce frank blood in the vomit.

28. Dr. Fishman conceded the possibility that Claimant's vomiting exacerbated the ulcer. However, he explained it was highly unlikely based on the ulcer's location, which was not in the "new" part of the stomach. Vomiting would not directly affect the ulcer site. Thus, Dr. Fishman concluded it was much more likely that Claimant's ulcer became symptomatic on or around May 4, 2018, which caused Claimant to become nauseous and vomit, which eventually resulted in Claimant's hospitalization due to the bleeding ulcer and its complications.

CONCLUSIONS OF LAW

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

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

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

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

A claimant's right to compensation initially hinges upon a determination that "at the time of the injury, the employee is performing service arising out of and in the course of the employee's employment." C.R.S. § 8-41-301(1)(b). The "arising out of" test is one of causation which requires that the injury have its origins in an employee's work-related functions. There is no presumption than an injury, which occurs in the course of employment, arises out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co.*, 124 Colo. 210, 236 P.2d 293 (1951).

Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. 2009). The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the proximate causal relationship between an incident/injury and the need for medical treatment, plus entitlement to benefits. §§ 8-43-201 and 8-43- 210, C.R.S. (2017). *See City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000).

The fact that a claimant experiences symptoms while performing work does not require the inference there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.*, W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the logical and recurrent consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985).

As found, Claimant's testimony that he suffered from dehydration and that dehydration caused his vomiting symptoms is neither persuasive nor consistent with the medical evidence. Claimant testified at hearing that he had not been vomiting up blood before the May 8, 2018 incident. However, contemporaneous Northern Colorado Medical Evacuation records state that Claimant had been vomiting blood and "coffee ground" like emesis for three days prior to the alleged work injury. Further, Claimant's creatinine levels were within the normal range on the date of the admission, which suggests that Claimant was not dehydrated as Dr. Fishman explained. Finally, hospital physicians did not note that Claimant was suffering from dehydration during his hospital stay, but rather noted that Claimant had severe hypotension. Therefore, Claimant's testimony at hearing regarding the cause of his vomiting and his alleged dehydration are not persuasive.

Dr. Fishman testified credibly at hearing regarding the most likely cause of Claimant's gastrointestinal bleed. He explained that it was far more likely that Claimant's nausea symptoms in the days prior to the accident were caused by a newly symptomatic anastomotic ulcer. Further, he explained that based on the location of the anastomotic ulcer, vomiting in and of itself, would not have exacerbated the anastomotic ulcer. While vomiting is a physiologically disruptive event, in Claimant's case the new stomach would contract, causing the vomit to move up the esophagus. This would not affect the

anastomosis and anastomotic ulcer. Therefore, from a physiological standpoint, vomiting in and of itself would not have caused a gastrointestinal bleed as Dr. Tillquist described.

Dr. Richard Tillquist, M.D.'s opinion regarding the work-relatedness of Claimant's ulcer is not persuasive. Dr. Tillquist opined that Claimant's ulcer was symptomatic because of vomiting. He provided little further explanation, except that dehydration can cause vomiting, and that vomiting can exacerbate an ulcer. Dr. Fishman, by contrast, provided a more nuanced view of the facts, taking into account the ulcer's location, Claimant's history of smoking, and his long-term use of aspirin. Further, Dr. Fishman's opinion takes into account the contemporaneous note from the medical evacuation provider that states that Claimant had been vomiting fresh and dried blood for days, which demonstrates that Claimant's newly symptomatic ulcer caused the vomiting.

As found, Dr. Fishman's opinions are more persuasive than Dr. Tillquist's, and presents the most likely medical explanation for Claimant's anastomotic ulcer bleed on May 8, 2018. Thus, Claimant has failed to prove by a preponderance of the evidence that he suffered a work-related injury and therefore his claim for workers' compensation benefits is denied and dismissed.

ORDER

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

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

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

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

DATED: March 28, 2019

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

STATE OF COLORADO **OFFICE OF ADMINISTRATIVE COURTS** 1525 Sherman Street, 4th Floor Denver, CO 80203	
In the Matter of the Workers' Compensation Claim of: **K,** Claimant, vs. **W.,** Employer, and **I,** Insurer, Respondents.	▲ **COURT USE ONLY** ▲ **CASE NUMBER:** **WC 5-075-671-001**

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Hearing in this matter was held on January 3, 2019, before Margot W. Jones, Administrative Law Judge. Claimant was present and was represented by Janet Frickey, Esq. Frank Cavanaugh, Esq. represented Respondents. This matter was digitally recorded in Courtroom 3 convening at 1:30 p.m. in Denver, CO. The parties' exhibits 1-7, A-G, H, I and J were admitted into evidence.

In this order, K is referred to as "Claimant," Respondent-Employer W.is referred to as "Employer," Respondent-Insurer I will be referred to as "Insurer" and Employer and Insurer collectively as "Respondents."

Also in this order, "ALJ" or "Judge" refers to the Administrative Law Judge, "C.R.S." refers to Colorado Revised Statutes, "OACRP" refers to the Office of Administrative Courts Rules of Procedure, 1 CCR 104-1, WCRP" refers to Workers' Compensation Rules of Procedure, 7 CCR 1101-3 and "the Act" refers to the Workers' Compensation Act of Colorado, Section 8-40-101, et seq., C.R.S.

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that she suffered a compensable occupational disease; and

2. Whether Claimant proved by a preponderance of the evidence that she is entitled to an award of authorized, reasonably necessary and related medical benefits, specifically, the surgery recommended by Dr. Sean Griggs, M.D.

FINDGINS OF FACT

1. Claimant has been employed by Employer since February 2012. Claimant was assigned to and worked in the Fresh Pack Department in 2012. Her job duties were to prepare, package, and stock all of the fresh food made and sold by Employer in the fresh pack area.

2. Prior to accepting the job position with Employer in 2012 Claimant was employed by a school district in Reno, Nevada as the kitchen manager. Prior to beginning her work with Employer Claimant never had any problems with either one of her extremities in particular her thumbs.

3. Claimant is left-hand dominant and considers herself ambidextrous. However, Claimant writes with her left hand.

4. About a year after working for Employer in the Fresh Pack Department Claimant began to notice problems with her left thumb. Claimant sought medical care and treatment for her left thumb condition which included a surgery. Claimant testified she did not report the condition as work-related because she did not realize that the work she was performing at the time was the potential cause of the problem at that time.

5. The medical records from Golden Ridge Surgery Center indicate on February 8, 2013, Claimant had surgery on her left hand and thumb which included a procedure for trigger finger of the index finger and a left thumb CMC interposition and suspension arthroplasty using flexor carpi radialis with complete excision of trapezium.

6. Following Claimant's left hand surgery she was released to and did return to her job with Employer full duty without restriction. Following Claimant's return-to-work in 2013 she worked for a brief time in the fresh pack department and then was transferred to the deli department. She worked two years as the front line Deli supervisor. Claimant's job duties in the deli were different and less strenuous than the job duties that she performed in fresh pack.

7. Claimant's hand usage as the deli supervisor did not require the forceful grip and pinch necessary to close containers in addition to the repetitive hand usage that was required to perform the fresh pack job position.

8. Claimant was transferred from the deli back to fresh pack in 2016. Following Claimant's return to Fresh Pack, she began to notice problems in her right hand and thumb area in late December 2017 during the Christmas rush which she described as an aching in the right thumb like she had experienced before with her left thumb. While Claimant was closing containers in early January of 2018, she felt a pinch and pain in her right thumb which she immediately reported to Employer's human resource office.

9. Claimant notified Employer on January 17, 2018, that she believed that the right hand and arm problems that she was experiencing were related to the work that she was performing in the fresh pack department particularly the snapping and closing of the food containers.

10. In November and December of 2017, Claimant was in charge of packaging and preparing the family meal packages for Thanksgiving and Christmas meals. This required her to work in the back hallway where it was very cold and get in and out of refrigerated trailers in the docking area which contained the frozen turkeys she needed in order to prepare the family meal packages. She did this work in addition to her normal job duties on the fresh pack wall.

11. Claimant was referred to and evaluated by Dr. Ritzer at Green Mountain Family Medicine on January 17, 2018, by Employer. Claimant advised Dr. Ritzer that she had started noticing pain in early January 2018. She advised that she performs a lot of repetitive motion at work, making upwards of 75 to 100 food products that she places into plastic containers and presses down with both thumbs to close the lid on the container. Claimant also makes sandwiches to go which require a lot of repetitive chopping. Claimant indicated that she noticed initial pain in her right thumb, right forearm and right elbow. Claimant had begun to notice right hand numbness which worsened at night and had started using a right wrist brace as well as a tennis elbow brace with some improvement in her symptoms.

12. Dr. Ritzer was of the opinion that based upon the history obtained, the review of available medical records, and her clinical examination that it was her opinion within a reasonable degree of medical probability and certainty that the symptoms are consistent with a work injury. It was her opinion that it was highly probable that the right thumb pain and right forearm pain and right elbow pain were causally related to her work. Claimant was referred to therapy, medications provided and work restrictions of no repetitive motion with the right arm and a continued use of right wrist brace and elbow tennis brace with no repetitive lifting of the right upper extremity of more than 5 pounds were provided.

13. Dr. Ritzer did complete an M164 initial medical evaluation form indicating that the determination of work relatedness was pending a job demand analysis.

14. A job demand analysis was performed by Genex on February 1, 2018. The Genex report indicates that Claimant's essential functions were to collect by hand or cart various foods and ingredients to be included in recipes. Claimant cleans, cuts, measures, weighs, and prepares various salads, sandwiches, wraps and other prepared foods for assembly. Claimant covers, wraps, labels then transports foods to the fresh pack wall for display. Claimant stocks additional prepared food in the walk-in refrigerator. Claimant removes food items that are past due dates, and restocks and fills the display case as needed. At the end of shift, Claimant sweeps floors, empties trash, sanitizes and squeegees the kitchen work surfaces and may assist in dishwashing activities. This consists of 85 to 90% of Claimant's job tasks.

15. A majority of Claimant's work (up to 90% of the day) was performed in refrigerated or cold areas, these are areas where the temperature was at least 32 degrees. This included the fresh-pack wall, walk in refrigerated coolers, and work assembly areas in a cool area and two other refrigerated areas (blast chiller and another walk in refrigerator).

16. Claimant was required to clock in and out for lunch and was not paid for the lunch break. There were times when Claimant was not able or did not take the allotted 15 minute break two times a day, especially during the busy season.

17. Claimant was referred for EMG testing which was negative for carpal tunnel and was eventually referred for an evaluation by a hand surgeon Dr. Griggs.

18. Claimant has been off work since March of 2018 for non-work related conditions including a foot surgery (March 2018) and a total knee replacement which occurred in December of 2018.

19. Claimant was re-evaluated by Dr. Ritzer on February 19, 2018. Dr. Ritzer was of the opinion that it was highly probable that the right thumb, right forearm, and right elbow pain were causally related to Claimant's work. Dr. Ritzer noted that the job demands analysis was completed on February 1, 2018, and Claimant had risk factors including awkward posture and repetitive duration as a primary risk factor. There were four hours of wrist flexion greater than 45 degrees extension or greater than 30 degrees or ulnar deviation greater than 20 degrees.

20. After review of the job site analysis, Dr. Ritzer confirmed in the subsequent reports and M164 reports that Claimant's condition was work related. Based upon the primary risk factors and her clinical findings Dr. Ritzer requested an EMG nerve conduction study of the right upper extremity with Dr. Wakeshima. She also referred Claimant to Dr. Griggs for further recommendations after the nerve studies were completed.

21. On March 19, 2018, Dr. Ritzer noted that Claimant had improvement from the CMC injection particularly with radiating pain up into the forearm and remained of the opinion that the current problems were consistent with the work injury and it

was highly probable that the right thumb pain and right forearm pain and elbow pain where causally related to her work.

22. Claimant was evaluated by Dr. Sean Griggs who recommended surgery at the CMC joint of the right hand and authorization was pending for the requested surgery. On March 5, 2018, Dr. Griggs diagnosed Claimant with right thumb CMC joint arthritis. Claimant was treated conservatively with splinting, therapy and injections. Since those treatment modalities had failed, he recommended surgical management and x-rays were taken that noted significant arthritic change to the right CMC joint. On April 12, 2018, Dr. Griggs opined Claimant was a candidate for a CMC arthroplasty. The parties have stipulated that if the claim is found to be compensable that the recommended surgery is reasonable and necessary.

23. A medical records review was performed by Dr. Carlos Cebrian on May 8, 2018. At the request of Respondents. As part of Dr. Cebrian's medical record review, he was provided with the first report of injury dated January 17, 2018, a job demands analysis and risk factor analysis from Genex dated February 2, 2018, and Dr. Griggs' request for surgery. Dr. Cebrian noted that Claimant worked five days a week from 2:30 p.m. to 10:30 p.m. with two 15-minute breaks and one 30-minute lunch break. He also noted that overtime was not typical.

24. Dr. Cebrian was of the opinion that the diagnosis of left CMC arthritis osteoarthritis CMC arthroplasty and right CMC osteoarthritis and right trigger thumb were not work related. Dr. Cebrian was of the opinion that the doctors (Dr. Griggs) had not performed a formal causation analysis as required by the Colorado Division of Workers' Compensation medical treatment guidelines (MTG) for cumulative trauma conditions in determining whether Claimant's complaints were causally related to her work.

25. Dr. Cebrian was of the opinion that Claimant's job duties did not require her to engage in forceful or repetitive activity for the amount of time needed to meet the minimum threshold required in the MTG. Dr. Cebrian noted that since Claimant worked a maximum of 7 hours of shift not 8 that the total exposure time was not four hours but three hours 46 minutes and 48 seconds and therefore did not meet the primary risk factors contained in the MTG.

26. Claimant was evaluated by Dr. John Hughes at the request of Claimant's attorney on October 23, 2018. He reviewed the risk factor analysis performed by Genex on February 1, 2018. Dr. Hughes described the risk factors and conclusions of the analysis noting that simple pinch grip was performed by Claimant on a "frequent" basis and that Claimant worked in an environment below 30 degrees in the refrigerated work areas performing cutting, chopping and other food preparation. The job demand analysis also noted fine manipulation/ pinch and grasp as "frequent" during the course of packaging. As a result, Genex concluded that there was a primary risk factor for wrist extension beyond 30 degrees in excess of 4 hours as outlined in her extrapolation of a one-hour study over an 8 hour work shift.

He noted that the job demand analysis did not take into account the combined one hour of breaks taken by Claimant in the course of her work performed 5 days a week.

27. Dr. Hughes credibly opined that Claimant's right thumb basal joint osteoarthritis is work-related. Dr. Hughes referred to the criteria outlined in the Colorado Division of Workers' Compensation cumulative trauma condition medical treatment guidelines, and noted that unlike Dr. Cebrian his conclusion was based on an analysis of all occupational and non-occupational factors that contribute to Claimant's right thumb basal joint osteoarthritis. Dr. Hughes indicated he agreed with Dr. Cebrian that her diagnosis is 'aggravated osteoarthritis'. Dr. Hughes also agreed with Dr. Cebrian that the second step in the causation analysis was to clearly define the job duties of the worker, and he used the job demands analysis for detailed information regarding Claimant's work duties.

28. Dr. Hughes indicated that unlike Dr. Cebrian he had been able to directly interview Claimant and handle the plastic containers that she was required to manually close using the thumb/ index pinch graft. Dr. Hughes noted that the medical treatment guidelines under causation analysis step four indicate that a "pre-existing condition may be aggravated by or contribute to exposures lower than those listed on the table." That same section of the medical treatment guidelines recommend that the clinician identify non-occupational diagnosis and risk factors. He noted that Claimant had additional risk factors of her female gender and age which were independent and non-occupational risk factors for the development of osteoarthritis of the thumb basal joint.

29. Dr. Hughes agreed that if Claimant worked 7 hours of an 8 hour work shift that she would be under the 4-hour recommended time frame by a little bit less than 14 minutes. However Dr. Hughes indicated by looking deeper into the actual tasks performed by Claimant that he was impressed by the combination of risk factors that included work in an environment below 30 degrees during food preparation in refrigerated work areas done in conjunction with cutting/chopping and food preparation that included a pinch grasp of the plastic containers at Employer. Dr. Hughes credibly opined that these multiple factors were quite similar to those referenced by the division of workers compensation in the MTG on page 9 where it is noted that in meat, fish, and poultry processing industries, workers are exposed to repetitive mono task jobs that involve forceful grip, awkward postures, vibration, and cold environments.

30. Dr. Hughes noted that in Claimant's case there was not a vibration exposure but there is a repetitive pinched grip performed in the refrigerated environment. And that overall she meets the division criteria for a secondary risk factor with respect to force and repetition/ duration of "3 hours of use of 2 pounds hinge force or 10 pounds of hand force three times or more per minute." He went on to indicate that taking this to the diagnosis specific risk table on page 34 "aggravated osteo-arthritis of the thumb CMC joint", there is reference to non-evidence-based studies

supporting repetitive thumb movement of 20 times per minute in women contributing to CMC arthritis as well as repetition affecting the thumb joint for 4 hours. He noted that while Claimant does not quite meet the criteria for the hour exposure by 14 minutes she does probably meet the repetitive thumb movement criteria outlined on page 30 of this guideline.

31. As a result of all these considerations and taking into account the non-work-related risk factors, it is found consistent with Dr. Hughes's opinion, that Claimant aggravated a previously occult right thumb basal joint osteoarthritis, making this a work-related medical condition.

32. Dr. Hughes credibly opined that Claimant was not at maximum medical improvement and that the surgical treatment recommended by Dr. Griggs, and endorsed by Dr. Ritzer, was reasonably necessary and related.

CONCLUSIONS OF LAW

The claimant was required to prove by a preponderance of the evidence that at the time of the injury she was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by § 8-40-201(14), C.R.S., as:

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

This section imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). However, the existence of a preexisting condition does not defeat a claim for an occupational disease. *Id.* A claimant is entitled to recovery if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is

sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

The claimant bears the burden to prove by a preponderance of the evidence that the hazards of the employment caused, intensified or aggravated the disease for which compensation is sought. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999). The question of whether the claimant has proven causation is one of fact for the ALJ. *Faulkner v. Industrial Claim Appeals Office, supra*. In this regard the mere occurrence of symptoms in the workplace does not require the conclusion that the conditions of the employment were the cause of the symptoms, or that such symptoms represent an aggravation of a preexisting condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (I.C.A.O. August 18, 2005). Once claimant makes such a showing, the burden shifts to respondents to establish both the existence of a non-industrial cause and the extent of its contribution to the occupational disease. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

Claimant contends that, if her alleged occupational disease is found compensable, she is seeking an award of medical benefits, specifically, the surgery recommended by Dr. Griggs. Claimant contends this medical treatment is reasonable and necessary.

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

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

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

It is concluded that greater weight is given to the medical opinions of Dr. Ritzer (ATP) and Dr. John Hughes that Claimant's right thumb osteo-arthirits is related to her work activities with Employer. Dr. Hughes and Dr. Ritzer performed a causation analysis as required by the MTG with all of the information required and based upon a consideration of all the factors determined that Claimant's current right thumb condition is work related.

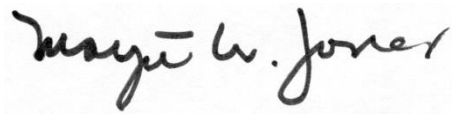
Further, it is concluded that Claimant's need for medical care are related to her work activities at Employer, and the surgery recommended by Dr. Griggs, is reasonable and necessary. Respondents shall be liable for this treatment.

ORDER

1. The right thumb surgery recommended by Dr. Griggs is reasonable necessary and related to work injury. Respondent shall authorize and pay for the same.

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

This 29th day of March, 2019.



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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-977-676-003

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on February 26, 2019, in Denver, Colorado. The hearing was digitally recorded (reference: 2/26/19, Courtroom 3, beginning at 8:30 AM, and ending at 9:30 AM). The official Spanish/English Interpreter was Jorge Espinosa.

Claimant's Exhibits 1 through 15 were admitted into evidence, without objection. Respondents' Exhibits A through C were admitted into evidence, without objection.

In lieu of his testimony at hearing, the post-hearing evidentiary deposition of Lon E. Noel, M.D., was taken on March 5, 2019, and a written transcript thereof was lodged on March 21, 2019

At the conclusion of the hearing, the ALJ established a deadline for the submission of the written transcript of the evidentiary deposition of Lon Noel, M.D., which was taken on March 5, 2019 and lodged with the ALJ on March 21, 2019. Also, the ALJ established a post-hearing briefing schedule: despite requesting briefs (position statements o written closing statements as described in OACRP, Rule 24), Claimant filed "Proposed Full Findings of Fact, Conclusions of Law and Order on March 25, 2019, indicating that Respondents were filing the same. As a matter of judicial protocol, the ALJ finds it to be inappropriate to entertain a presumed decision, as opposed to argument, which could create an appearance that the ALJ has abdicated his decision-making function. The ALJ will consider the Claimant's filing as an "opening

brief." In this instance, the ALJ gives counsel for the Claimant the benefit of the doubt and infers that counsel was confused concerning the establishment of a post-hearing briefing schedule, which provided for the filing of an "opening brief" within five (5) calendar days; an answer brief within five (5) calendar days of the opening brief; and, a reply brief within two (2) calendar days of the answer brief. Respondents' answer brief was filed on March 29, 2019. Because this decision is in the Claimant's favor in all respects, the ALJ determines that a reply brief is unnecessary sand the matter was deemed submitted for decision on March 29, 2019.

ISSUES

The issues to be determined by this decision involve whether Claimant's claim should be reopened based on a change/worsening of his condition. If the claim is reopened, the ALJ must decide whether Matthew Dhieux, M.D., Alexander Feldman, M.D., and Stephen J. Annest, M.D. are authorized providers (ATPs) because former ATPs refused to treat for non-medical reasons; and whether the medical treatment, including the September 11, 2018 surgery, Claimant received is reasonably necessary, and causally related to his admitted November 25, 2014 industrial injury.

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

FINDINGS OF FACT

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

Preliminary Findings

1. The parties stipulated that if the claim is reopened, the Claimant is entitled to temporary total disability (TTD) benefits from September 11, 2018, through December 12, 2018. Because the Claim is reopened, the ALJ accepts the Stipulation and so finds.

2. The Claimant has worked for the Employer for over 23 years. On November 25, 2014, he injured his neck and back while working for the Employer. The claim was admitted, and the Claimant underwent extensive medical treatment, including multiple surgeries, and missed time from work (Claimant's Exhibit 1, p. 1). Throughout the course of treatment, the Claimant reported left-sided radicular symptoms (Claimant's Exhibit 10, pp. 123-181). On March 9, 2015, the Claimant underwent an anterior cervical C6-7 discectomy and fusion with Douglas Wong, M.D. (Claimant's Exhibit 8, pp.117-119). Approximately three months later, on June 3, 2015, the Claimant underwent a left shoulder arthroscopic rotator cuff repair, subacromial decompression, and distal clavicle resection with Douglas Foulk, M.D. (Claimant's Exhibit 9, pp. 120-122). Following surgery, the Claimant underwent significant treatment. He worked light duty throughout his recovery.

3. Eventually, in March 2016, the Claimant was placed at maximum medical improvement (MMI) and given a permanent impairment rating. On March 6, 2016, Lawrence Lesnak, D.O.., gave the Claimant an impairment rating and assigned a 9% whole person impairment (Claimant's Exhibit 11, pp. 188-197). On March 9, 2016, Lon Noel, M.D., the Claimant's ATP, adopted Dr. Lesnak's impairment rating and placed the Claimant at MMI. Dr. Noel assigned permanent work restrictions for the Claimant, including occasionally lifting 10 pounds from floor to waist, no repetitive floor to waist lifting, occasionally lifting 10 pounds from waist to shoulder, no repetitive waist to shoulder lifting, no overhead lifting, limited overhead reaching, bilateral upper extremity lift of 10 pounds for 50 feet, 5 pounds lifting with his left upper extremity, 10 pounds lifting with his right upper extremity, bilateral push of 20 pounds, bilateral pull of 20 pounds, no repetitive torqueing maneuvers with his left upper extremity (LUE), no work at unprotected heights, and no use of vibrating machinery with his LUE, among other restrictions, and recommended maintenance treatment (Claimant's Exhibit 7, pp. 82-86).

4. The Claimant challenged Dr. Lesnak's impairment rating, Dr. Noel's adoption thereof and Dr. Noel's MMI determination. On September 9, 2016, the Claimant underwent a Division Independent Medical Evaluation (DIME) with Linda Mitchell, M.D. Dr. Mitchell determined that the Claimant reached MMI on April 6, 2016. Dr. Mitchell further determined that the Claimant had an 18% LUE rating and a 19% whole person cervical rating, combining these ratings, pursuant to the directions of the AMA Guides to the Evaluation of Permanent Impairment, 3rd Ed., Rev., for a 28% whole person rating. [1]Dr. Mitchell agreed with Claimant's work restrictions and maintenance treatment plan (Claimant's Exhibit 1, pp. 6-19.)

5. On October 18, 2016, Respondents filed a Final Admission of Liability (FAL) admitting for Dr. Mitchell's ratings and MMI date (Claimant's Exhibit 1, pp. 1-19).

6. On March 27, 2018, the Claimant filed a Petition to Reopen his claim based on a change/worsening of his condition (Claimant's Exhibit 2, pp. 20-40). On October 31, 2018, the Claimant applied for a hearing on the issues of reopening, reasonably necessary medical benefits, authorized provider, and temporary disability benefits (Claimant's Exhibit 3, pp. 41-43). On November 13, 2018, Respondents filed a Response to Claimant's Application for Hearing and endorsed the additional issue of applicable offsets (Claimant's Exhibit 4, pp. 44-46).

Midtown Occupational Health Services – Lon Noel, M.D., Claimant's Authorized Treating Physician (ATP)

7. On February 5, 2016, the Claimant underwent a Functional Capacities Evaluation (FCE). The examiner determined that the Claimant gave maximum effort. The Claimant was placed in the sedentary work category. The examiner determined

[1] Section 8-42-107 (7) (b) (II), C.R.S. provides that whole person and scheduled injuries must be rated separately.

that the Claimant's maximum lifting, pushing, and pulling capabilities were limited to: occasionally lifting 10 pounds from floor to waist, no repetitive floor to waist lifting, occasionally lifting 10 pounds from waist to shoulder, no repetitive waist to shoulder lifting, no overhead lifting, limited overhead reaching, bilateral upper extremity lift of 10 pounds for 50 feet, 5 pounds lifting with his left upper extremity, 10 pounds lifting with his right upper extremity, bilateral push of 20 pounds, bilateral pull of 20 pounds, no repetitive torqueing maneuvers with his left upper extremity, no work at unprotected heights, and no use of vibrating machinery with his left upper extremity, among other restrictions (Claimant's Exhibit 15, pp. 269-300.) On February 23, 2016, the Claimant treated with Dr. Noel, who assigned the Claimant permanent work restrictions pursuant to the FCE (Claimant's Exhibit 7, pp. 82-83). On March 9, 2016, Dr. Noel placed the Claimant at MMI, adopting Dr. Lesnak's impairment rating, and recommending medical maintenance treatment (Claimant's Exhibit 7, pp. 84-86).

8. On February 9, 2017, the Claimant returned to Dr. Noel for a post-MMI maintenance visit. The Claimant reported increased left shoulder, arm, and neck pain and other symptoms, including cramping. The Claimant reported that his work was making his condition worse. He denied any new injury. He reported that he had to use a pillow for comfort. He reported that his diabetes was well-controlled with medication. Dr. Noel recommended that the Claimant continue with his home exercise program, prescribed medication and a topical cream, and added new restrictions, including minimal forward reaching with the left arm/hand and to avoid painting water tanks (Claimant's Exhibit 7, pp. 87-90). On March 9 and March 14, 2017, Dr. Noel prescribed more physical and massage therapy for the Claimant (Claimant's Exhibit 7, pp. 91-93). On March 23, 2017, Dr. Noel recommended ongoing massage therapy (Claimant's Exhibit 7, pp. 94-96. On April 6, 2017, Dr. Noel stated that the Claimant would not require any additional visits (Claimant's Exhibit 7, pp. 97-101). From March 13, 2017, through April 6, 2017, the Claimant underwent 11 massage and physical therapy sessions through Midtown (Claimant's Exhibit 12, pp. 230-254).

9. On March 23, 2018, the Claimant treated with Dr. Noel, who noted that in October/November 2017 the Claimant attempted to follow-up with Midtown, but Respondents denied the Claimant from following up with him. The ALJ finds that this denial was a refusal to treat for non-medical reasons. Dr. Noel noted that the Claimant then sought treatment with his primary halthcare physician, who referred him to the Vascular Institute of the Rockies, Dr. Annest. Dr. Noel added that Dr. Feldman performed an EMG, which revealed left-sided thoracic outlet syndrome and brachial plexus entrapment. The Claimant reported ongoing left shoulder, upper back, neck, and left upper extremity symptoms, including pain, weakness, numbness, and tingling. Dr. Noel recommended reopening the Claimant's claim and referred the Claimant to Dr. Lesnak (Claimant's Exhibit 7, pp. 102-107). On May 10, 2018, the Claimant treated with Dr. Noel, who noted the Claimant's ongoing symptoms and that the Claimant was awaiting an EMG with Dr. Lesnak (Claimant's Exhibit 7, pp.107-110). On May 17, 2018, Dr. Noel noted that he had spoken with Dr. Lesnak, who did not think the Claimant was a surgical candidate and that the Claimant's ongoing issues were related to his diabetes and not his work injury (Claimant's Exhibit 7, pp. 111-113). On May 25, 2018, Dr. Noel

noted Dr. Lesnak's opinion regarding the Claimant's diagnosis and treatment plan, including that Dr. Lesnak did not think the Claimant had thoracic outlet syndrome and that Dr. Lesnak did not recommend surgery. Dr. Noel then was of the opinion that the Claimant was at MMI and did not require follow-up with him (Claimant's Exhibit 7, pp. 114-116). For the reasons specified herein below, the ALJ finds the opinions of Dr. Lesnak lacking in credibility. Based upon Dr. Noel's manifested deference to the opinions of Dr. Lesnak, the ALJ also finds his opinions lacking in credibility.

10. On March 5, 2019, Respondents took Dr. Noel's evidentiary deposition. Dr. Noel testified that in February 2017, the Claimant returned for treatment because he was having increased pain and symptoms without re-injury (Noel Depo. Tr. p. 10, lns. 23-25; p. 11, lns1-3). Dr. Noel testified that the Claimant requested to be seen in October or November 2017, but the insurance company did not approve for the Claimant to be treated (Noel Depo. Tr. p. 13, lns.11-13; p.24, lns. 21-25; p. 25, lns.1-4). Dr. Noel testified Claimant then treated with his primary care physician, who referred him to Dr. Feldman and to Dr. Annest (Noel Depo. Tr. p. 13, lns.14-19; p. 14, lns.7-11; p. 25, lns.5-13). Dr. Noel testified that he treated the Claimant in March 2018, because the insurance company authorized a one-time evaluation (Noel Depo. Tr. p. 13, lns.8-11). Dr. Noel testified that he agreed with Dr. Lesnak's opinions regarding the Claimant. Depo. Tr. p. 17, lns.15-21). Regarding the Claimant's September 11, 2018 thoracic outlet surgery, Dr. Noel testified, "It sounds like a good result" (Depo. Tr. pp. 27-31).

11. Ultimately deferring to Dr. Lesnak, Dr. Noel implied that no further medical intervention for the Claimant was necessary. Not only is this opinion internally inconsistent with Dr. Noel's continued treatment of the Claimant until he refused to further treat for non-medical reasons, *i.e.,* the insurance carrier's refusal to authorize, but it is contrary to the weight of the credible evidence, thus, the opinion is not credible.

Lawrence Lesnak, D.O.. – Colorado Rehabilitation and Occupational Medicine

12. On August 12, 2015, the Claimant first treated with Dr. Lesnak, who performed a left upper extremity EMG. Dr. Lesnak determined that the EMG revealed evidence of early distal sensory peripheral polyneuropathy, involving the distal median and sensory nerve branches without any motor involvement, and no evidence of any nerve entrapments (Claimant's Exhibit 11, pp. 182-187). On March 9, 2016, Dr. Lesnak next evaluated the Claimant to perform his initial impairment rating, as outlined above. Dr. Lesnak believed that the Claimant's range of motion (ROM) measurements were not valid, so he had Claimant follow-up for repeat ROM testing (Claimant's Exhibit 11, pp. 188-194). On April 6, 2016, the Claimant returned to Dr. Lesnak, who determined that the Claimant's ROM measurements were again invalid (Claimant's Exhibit 11, pp. 195-197). Dr. Lesnak did not give a satisfactory explanation as to why the ROM measurements were invalid. On May 25, 2016, the Claimant treated with Dr. Lesnak for a maintenance visit. Dr. Lesnak noted the Claimant's ongoing pain and other complaints. Dr. Lesnak stated that he believed that the Claimant had financial concerns and may be trying to reopen his case (Claimant's Exhibit 11, pp.198-201). In venturing into the parapsychological and psychological fields, Dr. Lesnak has not demonstrated

any expertise. Moreover, his speculation in this regard demonstrates a bias against an objective medical assessment and the ALJ finds that this substantially compromises Dr. Lesnak's overall credibility. On July 25, 2016, the Claimant again treated with Dr. Lesnak and reported his ongoing left-sided neck, suprascapular/scapular, shoulder, and left upper extremity symptoms. Dr. Lesnak recommended a repeat left upper extremity EMG due to Claimant's ongoing pain and other symptoms (Claimant's Exhibit 11, pp. 202-204). Dr. Lesnak, based on an EMG, formed the opinion that there was no evidence of thoracic outlet (TOS) syndrome. In this respect, Dr. Lesnak disagrees with Dr. Annest and Dr. Feldman, two physicians who diagnosed TOS and have more expertise concerning TOS than Dr. Lesnak. The ALJ does not find Dr. lesnak's opinion in this regard credible.

13. On May 10, 2018, almost two years later, the Claimant again treated with Dr. Lesnak and reported his ongoing symptoms and that he has been undergoing treatment with his PCPs, Dr. Feldman, and Dr. Annest. The Claimant reported these doctors' treatment recommendations and plan. The Claimant reported constant severe left posterolateral neck and suprascapular/scapular pain, numbness throughout his left arm, hand, and fingers, muscle twitching, and left-sided anterior-superior chest pains. Dr. Lesnak recommended repeat EMG testing. Dr. Lesnak stated he does not think that the Claimant has thoracic outlet syndrome. In this regard, the ALJ finds that Dr. Lesnak has not offered a satisfactory explanation for this opinion. In fact, the ALJ finds the opinion speculative. Dr. Lesnak stated that the Claimant has subjective complaints but no real objective findings (Claimant's Exhibit 11, pp. 205-211). On May 17, 2018, Dr. Lesnak evaluated the Claimant and determined that he was a poor surgical candidate, regardless of any EMG or other testing. Dr. Lesnak is not surgeon. Dr. Lesnak performed a left upper extremity EMG and determined the EMG revealed no evidence of thoracic outlet syndrome. Dr. Lesnak determined the EMG did reveal evidence of diffuse peripheral polyneuropathy and recommended that the Claimant undergo EMGs of his three other limbs to confirm the diagnosis. Dr. Lesnak suggested that the Claimant was embellishing his pain complaints and other symptoms (Claimant's Exhibit 11, pp. 212-218). On May 23, 2018, Dr. Lesnak performed the three other EMGs and determined the EMGs showed "evidence of what appears to be diffuse sensory greater than motor peripheral polyneuropathy involving the patient's right upper and lower extremities." Dr. Lesnak stated the opinion that the Claimant does not have thoracic outlet syndrome and does not need surgery (Claimant's Exhibit 11, pp.219-227). Dr. lesnak's opinion in this regard is in conflict with the opinions of other physicians who have more specific expertise than Dr. Lesnak.

14. After having augmented the ATP'S (Dr. Noel) treatment and originally rating the Claimant's permanent impairment. Dr. Lesnak performed a medical records review at Respondents' request concerning the re-opening issue at hand. Apparently, he saw no conflicting role. He reviewed Dr. Annest and Dr. Feldman's records. Dr. Lesnak disagreed with Dr. Annest's diagnosis and treatment plan. Dr. Lesnak was of the opinion that the September 11, 2018 surgery was not related to Claimant's work injury. Dr. Lesnak stated the opinion that the Claimant's mechanism of injury could not

have caused thoracic outlet syndrome (Claimant's Exhibit 11, pp. 228-229). Again, Dr. Lesnak offered no satisfactory underlying explanation for this opinion.

15. Dr. Lesnak rendered the ultimate opinion that no further medical intervention for the Claimant was necessary. The ALJ infers and finds that Dr. Lesnak's opinion in this regard was heavily based on Dr. Lesnak's opinion that Claimant's complaints were primarily "somatic," an opinion refuted by the totality of the evidence and by Dr. Lesnak's lack of sufficient expertise in the fields of psychiatry and parapsychology.

Alexander Feldman, M.D. – Advanced Neurological

16. On January 18, 2018, the Claimant treated with Dr. Feldman and reported a history of his industrial injury, including the nature of his injury and the treatment he received. Also, the Claimant reported that his workers' compensation claim was closed. He reported severe neck and left shoulder pain and increased pain with movement. Dr. Feldman noted that the Claimant had a significantly limited range of motion (ROM) in both his neck and left shoulder and shooting pain in his left hand. Dr. Feldman r. Lesnak's opinion to the contrary is significantly lacking in credibility. Dr. Feldman had an EMG of Claimant's LUE performed. He determined that the EMG **revealed evidence of left-sided thoracic outlet syndrome (primarily a neurological condition).** Dr. Feldman prescribed gabapentin for the Claimant and noted that he was going to obtain Claimant's medical records from his workers' compensation claim (Claimant's Exhibit 6, pp. 71-75). On January 25, 2018, the Claimant followed-up with Dr. Feldman, who confirmed the thoracic outlet syndrome diagnosis and related it to his trauma from three years ago (Claimant's Exhibit 6, p. 79) and referred the Claimant to the Vascular Institute of the Rockies (Claimant's Exhibit 6, pp. 76-77). On March 13, 2018, the Claimant treated with Dr. Feldman, who noted that the Claimant had seen Dr. Annest and been referred back to Dr. Feldman for a left scalene and pectoralis minor block. Dr. Feldman performed the block and noted Claimant had a "highly positive diagnostic left pectoralis minor and scalene muscles block indicating potential good response to the TOS surgery." Dr. Feldman diagnosed Claimant with mononeuropathy and brachial plexus (Claimant's Exhibit 6, pp. 78-81). This diagnosis outweighs any diagnoses made by Dr. Lesnak and Dr. Noel and it is more credible than their diagnoses.

Stephen J. Annest, M.D. – Vascular Institute of the Rockies

17. On February 23, 2018, the Claimant treated with Dr. Annest and reported the nature and history of his industrial injury. Claimant reported that he underwent left shoulder and neck surgery. Claimant reported 7-8/ out-of 10 pain. Dr. Annest noted that the Claimant was referred by Dr. Dhieux, Claimant's PCP. Dr. Annest reviewed Claimant's medical history and the treatment Claimant underwent in relation to his industrial injury. The Claimant reported LUE, shoulder, and neck pain, arm weakness, left shoulder numbness, radiating pain/numbness/tingling down his left arm, and limited ROM. Dr. Annest noted a positive pectoralis stretch, as well as positive upper extremity

tension test and positive ROOS test. Dr. Annest noted scalene tenderness and that the Claimant had an abnormal EMG. Dr. Annest added that he reviewed Dr. Feldman's records and agreed that these findings were consistent with brachial plexus entrapment at the scalene triangle and left pectoralis minor and **diagnosed Claimant with thoracic outlet syndrome**. Dr. Feldman noted that he did not find much irritation on the Claimant's right side. Dr. Feldman noted he reviewed the anatomy of thoracic outlet syndrome with Claimant and his daughter. Dr. Feldman advised Claimant regarding the pros and cons of surgery and that without the surgery, Claimant will likely continue to have the same symptoms. Dr. Annest recommended Claimant undergo a left scalene and pectoralis minor block (Claimant's Exhibit 5, pp. 47-52).

18. On July 2, 2018, the Claimant treated with Dr. Annest, who noted he reviewed the Claimant's treatment options, and the pros and cons of these options, with the Claimant and his daughter (who translated). Dr. Annest noted that he reviewed Claimant's medical records, including Dr. Lesnak's reports, related to his industrial injury. Dr. Annest noted that the Claimant has severe left arm, shoulder, and neck pain and that depending on Claimant's daily activities, the pain could make him nauseated. Dr. Annest noted that the Claimant had disabling shoulder and arm pain with physical and EMG evidence of brachial plexus entrapment, which was supported by the Claimant's positive response to both left pectoralis and scalene blocks. Dr. Annest added that "the above findings support the diagnosis of muscular impingement of his left brachial plexus at the scalene triangle and left pectoralis minor, **the above is in my opinion caused by his on the job work injury"** (emphasis supplied) (Claimant's Exhibit 5, pp. 53-57).

19. On September 11, 2018, the Claimant underwent **thoracic outlet surgery with Dr. Annest** (emphasis supplied). Dr. Lesnak, an osteopathic physical medicine doctor, by virtue of his opinion, projected that Dr. Annest, a vascular surgeon, performed an unnecessary surgery. Dr.Lesnak's opinion in this regard strains credibility to the limit. Dr. Annest performed a left transaxillary pectoralis minor tenotomy, neurolysis of the brachial plexus chest wall, first rib resection, supraclavicular neurolysis of C5, C6, C7, C8, and T1 nerve roots, neurolysis of upper, middle, and lower trunk of the brachial plexus, dissection and control of the subclavian artery, and amniotic membrane wrap of the brachial plexus. Dr. Annest noted that the Claimant had a deep large pectoralis minor muscle that overlaid the brachial plexus and that he was able to free the muscle completely. Dr. Annest noted Claimant's rib was wide, large, and high, adjacent to all the thoracic outlet structure. Dr. Annest added that the anterior scalene muscle was the major component of the compression as was the middle scalene muscle. Dr. Annest noted that the Claimant's muscles tested functional at the completion of the surgery and that the Claimant awoke with normal diaphragmatic function and good arm movement (Claimant's Exhibit 5, pp. 58-64)

20. On October 8, 2018, Claimant again treated with Dr. Annest and reported that he felt great and that he was getting better. The Claimant reported that he had decreased pain but still had some pain in his left shoulder and down his left arm. Claimant reported that overall everything was getting better. Dr. Annest kept the

Claimant off work (Claimant's Exhibit 5, pp. 65-66). On December 10, 2018, the Claimant again treated with Dr. Annest, who noted that the Claimant continues to improve since the surgery and released the Claimant back to work with restrictions of no lifting, pushing, or pulling greater than 15 pounds (Claimant's Exhibit 5, pp. 67-70). The ALJ finds Dr. Annest's opinions credible and highly persuasive.

The Claimant

21. At the hearing, according to the Claimant, after he was released at MMI, he returned to work for the Employer with permanent work restrictions. His light duty job duties included placing stickers and tags on products, gathering supplies, running errands, and overseeing the product. He testified that after MMI, he continued to have symptoms in his neck, shoulder, and chest, including pain, and numbness and he had restricted shoulder and neck ROM/flexibility. He used medications and hot/cold packs. After 2016 to 2017, the Claimant's symptoms changed for the worse. He followed-up with Dr. Noel, who recommended a muscle relaxer, some physical therapy, and a home exercise plan. The Claimant's symptoms did not improve, and he continued to work light duty with his permanent work restrictions and the additional restrictions from Dr. Noel. The Claimant's symptoms only worsened.

22. According to the Claimant, in October or November 2017, he attempted to return to Dr. Noel, but he was not authorized to see Dr. Noel anymore and was not able to see him because of non-medical reasons. He then went to his personal doctor, Dr. Sonia, at Clinica Salud. Dr. Sonia referred him to a neurologist, Dr. Feldman, and then to Dr. Annest.

23. According to the Claimant, prior to his September 11, 2018 surgery with Dr. Annest, he could not reach his left arm overhead or out to his side. Prior to the September 11, 2018 surgery, the Claimant could not work with his left arm. After the surgery, the Claimant is now able to raise his left arm above his head, out away from his body, and across his body, and he can now work with his left arm. The surgery improved the Claimant's condition a lot. According to the Claimant, he has diabetes but it is very well-controlled with medications and diet. His primary care physician told him that his diabetes is well controlled and that he may be able to stop the medications soon. Claimant testified his underlying diabetes did not prevent him from having his neck or shoulder surgery or his September 11, 2018 thoracic outlet syndrome surgery.

Ultimate Findings

24. The ALJ finds the Claimant's testimony to be straight-forward, consistent throughout, credible and highly persuasive. Although Dr. Lesnak attempted to cloud the Claimant's credibility with speculative opinions beyond his area of expertise (Psychology and Metaphysics), he failed to do so. The Claimant's testimony was consistent throughout and supported by the expert opinons of Dr. Annest and Dr. Feldman. Although Dr. Noel meant well in his continued treatment of the Claimant, his excessive deference to Dr. Lesnak's opinions compromises his own opinion. The ALJ

finds the ultimate opinions of Dr. Noel and especially Dr. Lesnak are lacking in persuasiveness and credibility as they relate to the Claimant's present condition and his Petition to Reopen. On the other hand, the ALJ finds the opinions of Dr. Annent and Dr. Feldman highly persuasive and credible because they dealt with the Claimant more on a recent basis, their medical analyses are thorough and well founded and they have more specific medical expertise that is relevant to the Claimant's present condition.

25. Between conflicting medical opinions, the ALJ makes a rational choice, based on substantial evidence, to accept the opinions of Dr. Annent and Dr. Feldman and to reject the opinions of Dr. Lesnak and Dr. Noel. Also, the ALJ makes a rational choice to accept the Claimant's credible testimony and to reject any evidence to the contrary.

26. The ALJ finds that the Claimant has proven by a preponderance of the evidence that the Claimant's condition changed/worsened since being placed at MMI on April 6, 2016. The ALJ finds Dr. Noel discharged the Claimant on April 6, 2017 for non-medical reasons, and Respondents refused to authorize any follow-up treatment, even after the Claimant requested to follow-up with Dr. Noel in October or November 2017. The ALJ finds that the Claimant has proven, by a preponderant evidence, that Drs. Dhieux, Feldman, and Annest are authorized providers. (ATPs) The ALJ further finds that the Claimant has proven, by a preponderant evidence, that the September 11, 2018 thoracic outlet syndrome surgery performed by Dr. Annest was reasonably necessary, and causally related to the Claimant's original industrial injury.

27. Based on the stipulation of the parties and the finding of the ALJ herein above, the Claimant is entitled to temporary total disability (TTD) benefits from September 11, 2018, through December 12, 2018. The ALJ finds that the previously admitted average weekly wage (AWW) is $674.25, which yields a TTD rate of $449.50 per week (Claimant's Exhibit 1).

RESPONDENTS' ARGUMENTS

The main thrust of Respondents' argument focuses on the opinions of Dr. Noel and Dr. Lesnak and their alleged credibility because they were ATPs. As found herein above, their opinions were **not** credible for the most part. Respondents' Answer Brief pays scant attention to the opinions of Dr.Annest and Dr. Feldman. In fact, Respondents' argue that "Dr. Lesnak noted that Dr. Annest ignored that Claimant had an extremely high level of somatic complaints." As found, the "somatic" opinions of Dr. Lesnak have been discredited by the totality of the evidence, including the objective opinions of two physicians (Dr. Feldman and Dr. Annest) with more specific, persuasive and credible opinions than Dr. Lesnak. Overall, the ALJ does not find Respondents' arguments persuasive.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant's testimony was straight-forward, consistent throughout, credible and highly persuasive. Although Dr. Lesnak attempted to cloud the Claimant's credibility with speculative opinions beyond his area of expertise (Psychology and Metaphysics), he failed to do so. The Claimant's testimony was consistent throughout and supported by the expert opinions of Dr. Annest and Dr. Feldman. Although Dr. Noel meant well in his continued treatment of the Claimant, his excessive deference to Dr. Lesnak's opinions compromises his own ultimate opinion. As found, the ultimate opinions of Dr. Noel and especially Dr. Lesnak lacked persuasiveness and credibility as they related to the Claimant's present condition and his Petition to Reopen. On the other hand, as found, the opinions of Dr. Annent and Dr. Feldman were highly persuasive and credible because they dealt with the Claimant more on a recent basis, their medical analyses were thorough and well founded and they had more specific medical expertise that is relevant to the Claimant's present condition.

Substantial Evidence

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

Reopening

c. Under § 8-43-303(1), C.R.S., after MMI and within six years of the date of injury, an ALJ may re-open a claim based on fraud, an overpayment, **an error, a mistake,** or a change in condition. See *El Paso County Department of Social Services v. Donn,* 865 P.2d 877 (Colo. App. 1993); *Burke v. Indus. Claim Appeals Office,* 905 P. 2d 1 (Colo. App. 1994); *Hanna v. Print Express, Inc.,* 77 P. 3d 863 (Colo. App. 2003); *Donohoe v. ENT Federal Credit Union,* W.C. No. 4-171-210 [Indus. Claim Appeals Office (ICAO) September 15, 1995]. This is so because MMI is the point in time when no further medical care is reasonably expected to improve the condition. § 8-40-101(11.5), C.R.S. (2009); *City of Colorado Springs v. Indus. Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Where a claimant seeks to re-open based on a worsened condition, he must demonstrate a change in condition that is "causally connected to the original compensable injury." *Chavez v. Indus. Comm'n,* 714 P.2d 1328 (Colo. App. 1985). As found, the Claimant's work-related condition became worse after MMI, within the six-year period of limitations and he is, thus, entitled to a re-opening of his case.

Medical Benefits

d. Respondents are liable for medical treatment that is reasonably necessary to cure or relieve the effects of an industrial injury. § 8-42-101(a), C.R.S.; *Snyder v. Indus. Claim. Apps. Office*, 942 P.2d 1337 (Colo. App. 1997). To be a compensable

benefit, medical care and treatment must be causally related to an industrial injury. *Dependable Cleaners v. Vasquez*, 883 P.2d 583 (Colo. App. 1994). As found, Claimant has proven that the medical treatment, including the September 11, 2018 surgery, he received through Dr. Annest and Dr. Feldman, was causally related to his original industrial injury. Additionally, medical treatment must be reasonably necessary to cure and relieve the effects of an industrial injury. § 8-42-101(1)(a), C.R.S.; *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P.2d 864 (1935); *Sims v. Indus. Claim Apps. Office*, 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical treatment, including September 11, 2018 surgery he received through Dr. Annest and Dr. Feldman, was reasonably necessary to cure and relieve the effects of his original industrial injury.

Refusal to Treat for Non-Medical Reasons/Medical Benefits

e. Under the provisions of § 8-43-404 (5) (a) (I) (A), C.R.S., an "employer or insurer shall provide a list of at least two physicians or two corporate medical providers or at least one physician and one corporate medical provider, where available, in the first instance, from which list an injured employee may select the physician who attends said injured employee." Rule 8-2 (A) (1) – (2) of the Workers' Compensation Rules of Procedure (WCRP), 7 CCR 1101-3, provides for the written list in compliance with Section 8-43-404 (5) (a) (I) (A). Rule 8-2 (D) provides that if an employer fails to comply with Rule 8-21, the injured worker may select an authorized treating physician (ATP) of the worker's choosing**. If the physician selected refuses to treat for non-medical reasons, and the insurer fails to appoint a willing ATP after notice of the refusal to treat, the right of selection passes to the injured worker.** *Weinmeister v. Cobe Cardiovascular, Inc.,* W.C. No. 4-657-812 [Industrial Claim Appeals Office (ICAO), July 10, 2006]. *Also see Lutz v. Indus.l Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000); *Ruybal v. University Health Sciences Center,* 768 P.2d 1259 (Colo. App. 1988). As found, Dr. Noel refused to further treat the Claimant as soon as he learned that the insurance carrier would not authorize further treatment. Thereafter, as found, the Claimant went to the Salud Clinic, which referred him to Drs. Dhieux, Feldman and Annent. The chain of authorized referrals was tightly intact. All referrals must remain within the chain of authorized referrals in the normal progression of authorized treatment. *See Mason Jar Restaurant v. Indus. Claim Appeals Office,* 862 P. 2d 1026 (Colo. App. 1993); *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P. 2d 501 (Colo. App. 1995); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). When an ATP refers an injured worker to his personal physician, under the mistaken belief that the claim was not compensable, the referral was nonetheless within the chain of authorized referrals and, thus, subsequent treatment was authorized. *See Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277 (Colo. App. 2008). As found, ATP Dr. Noel refused to further treat the Claimant upon learning that the insurance carrier would not authorize further treatment. This is a refusal to treat for non-medical reasons, whereupon the Claimant selected the Salud Clinic, which referred him to Dr. Dhieux, Feldman and Annest, who became the Claimant's authorized providers and all of their referrals were authorized an in the normal progression of authorized treatment. *See Mason Jar Restaurant v. Indus. Claim Appeals Office,* 862 P. 2d 1026 (Colo. App.

1993); *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P. 2d 501 (Colo. App. 1995); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997).

Temporary Disability After Re-Opening

f. The parties stipulated and the ALJ found that the Claimant is entitled to temporary total disability (TTD) benefits from September 11, 2018, through December 12, 2018. The ALJ finds that the previously admitted average weekly wage (AWW) is $674.25, which yields a TTD rate of $449.50 per week, of $64.214 per day (Claimant's Exhibit 1).

Burden of Proof

g. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to reopening and benefits thereafter. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has proven that his condition changed/worsened since being placed at MMI on April 6, 2016. As further found, Dr. Noel discharged the Claimant on April 6, 2017 for non-medical reasons, and Respondents refused to authorize any follow-up treatment, even after the Claimant requested follow-up with Dr. Noel in October or November 2017. As found, Drs. Dhieux, Feldman, and Annest were authorized providers (ATPs); and, the September 11, 2018 thoracic outlet syndrome surgery performed by Dr. Annest was reasonably necessary, and causally related to the Claimant's original industrial injury.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Claimant's claim in W.C. No. 4-977-676-001 is hereby reopened.

B. Respondents shall pay the costs of all causally-related and reasonably necessary medical care and treatment provided by Matthew Dhieux, M.D., Alexander Feldman, M.D., and Stephen J. Annest, M.D., including the surgery of September 11, 2018, performed by Dr. Annest, subject to the Division of Workers Compensation Medical Fee Schedule.

C. Respondents shall pay the Claimant temporary total disability benefits from September 11, 2018, through December 12, 2018, both dates inclusive, a total of 93 days at the rate of $449.50 per week, or $61.214 per day, in the aggregate amount of $5, 971.93, which is payable retroactively and forthwith.

D. Respondents shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

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

DATED this 1st day of April 2019.

EDWIN L. FELTER, JR.
Administrative Law Judge

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

ISSUES

- Did Claimant prove she suffered a compensable injury on June 5, 2018 and/or July 3, 2018?

- If compensable, is the left hip arthroscopic labral repair surgery recommended by Dr. Doner authorized, reasonably necessary, and related to the compensable injury?

- Does the ALJ have jurisdiction to address the surgery, given Dr. Centi's November 28, 2018 declaration of MMI?

- Is Claimant's request for TTD benefits commencing September 4, 2018 barred because she was responsible for termination of her employment?

STIPULATIONS

1. Claimant's average weekly wage is $265.

2. If compensable, Claimant is entitled to temporary partial disability benefits (TPD) from July 4, 2018 through September 3, 2018. The parties reserved the specific amount of TPD benefits pending receipt of wage records.

3. If compensable, Respondents are entitled to a statutory offset based on Claimant's SSDI benefits. The parties reserved the specific offset pending receipt of information regarding Claimant's initial entitlement.

FINDINGS OF FACT

1. Employer is an assisted living center for seniors. Claimant worked as a "plater" and server in an auxiliary kitchen and dining area, serving meals to approximately 25 residents. Her duties included bussing tables, changing linens, and occasionally cleaning the dining area and kitchen. From Claimant's description of job tasks, the ALJ infers it was a light-medium level job, with frequent lifting and carrying objects weighing 10-15 pounds, and occasional lifting up to 50 pounds.

2. Claimant alleges two separate incidents that have been merged into W.C. No. 5-086-228. She claims she injured her low back and left hip on June 5, 2018 while trying to empty a heavy garbage can into a dumpster. She alleges a second injury or aggravation on July 3, 2018 while pushing two dining room tables together.

3. Claimant has a significant history of pre-existing back problems, including an L4-5 fusion by Dr. James Bee in November 2014. The surgery was successful, particularly regarding pre-surgery radicular symptoms. Approximately seven months after

surgery, Dr. Bee released Claimant to "follow up as needed". Claimant testified her onging back symptoms were minimal and well-managed with oxycodone. There are minimal treatment notes between early 2015 and July 2018, which lends credence to Claimant's testimony.

4. The last pre-accident treatment record submitted into evidence was a September 12, 2016 note from Dr. Bee's PA, Nathan Carpenter. Claimant described "normal day to day back pain and achiness" with no leg symptoms or difficulty walking. She was taking 10 mg of oxycodone q.i.d., which was effectively managing her pain. She rated the severity of her typical back pain as "none at all to mild." She said her most painful episodes were generally associated with long car rides or prolonged sitting in uncomfortable chairs. She could "lift heavy objects," walk up to a mile, sit for an hour, and stand "as long as she wants." Her primary concern was an occasional, nonpainful "popping" in her back while twisting. The physical exam was largely unremarkable, with no pain to palpation of the lumbar spine in good range of motion. X-rays showed a solid fusion with no evidence of instability. Mr. Carpenter recommended no treatment because the popping was not causing any pain.

5. The oxycodone was apparently being prescribed by Claimant's PCP, Dr. Walker. At some unspecified time before June 5, 2018, Dr. Walker referred Claimant to Dr. Bert Willman for pain management. No records from Dr. Walker or Dr. Willman were entered into evidence, so the ALJ must rely on Claimant's testimony and sparse commentary in other medical records.

6. Dr. Willman referred Claimant for a lumbar MRI, which already scheduled before the trash incident occurred. The report shows Dr. Willman requested the MRI for "low back and left hip pain since surgery four years ago." The MRI was completed on June 6, 2018. Besides the prior fusion, the most significant finding was "advanced" degenerative disc disease at L5-S1. The paravertebral soft tissues were described as "normal."

7. Dr. Willman started Claimant on gabapentin in approximately mid-June 2018. In the absence of any records from Dr. Walker or Dr. Willman, the ALJ can make no definitive comparison of Claimant's preinjury and post-injury medical condition.

8. Claimant's job duties for Employer included taking the trash from the dining room area to the dumpster after each meal. The garbage was in a 30-gallon grey "BRUTE"-style container with a bag liner. The garbage was frequently heavy because it contained uneaten food, milk cartons, juice, and other liquids. Claimant typically dragged of the garbage cans of the dumpster and either lifted out the bag or dumped the entire can over the 4-foot dumpster lip.

9. On June 5, 2018, Claimant's last task of the day was taking out the trash. The garbage was quite heavy, so she lifted the can to the edge of the dumpster and tried to pivot the bottom up so the garbage would fall out. While she was lifting, she felt a pop and pain in her low back, buttocks and left hip. Claimant could not get the trash out of the can. She waited by the dumpster a few moments for the pain to subside, then she dragged

the garbage can back into the kitchen. No one else was in the kitchen or dining area, and she did not mention the incident to anyone. Instead, she went home, assuming she had just "pulled a muscle or something."

10. When she arrived at work the next day, she found a note from her supervisor, Mary L[Redacted]. The note reminded Claimant the trash had to be emptied at the end of every shift and to get help if she could not do it alone. During her testimony, Ms. L[Redacted] confirmed leaving the note for Claimant. The ALJ finds this corroborates the incident described by Claimant.

11. Claimant worked her regular schedule despite the pain in her back and buttocks for another month.

12. On June 18, 2018, Claimant attended a meeting with Cindy B[Redacted] (the HR manager) and the director of dining services about a conflict between Claimant and a co-worker. During the meeting, Claimant told Ms. B[Redacted] she was having trouble taking out the trash, but did not report a specific incident on June 5.

13. On July 3, 2018, Claimant was pushing two dining room tables together when she felt a pop and felt pain in her back and groin. In Claimant testified the pain made her nauseous and asked to go home. Ms. L[Redacted] testified Claimant told her she had vomited and felt nauseous and wanted to leave because she did not want the residents to get sick. She did not mention pushing the tables together. Ms. L[Redacted] noted Claimant "looked like she was in pain or not feeling well."

14. Claimant left work and went to the Penrose Community Urgent Care. The report does not mention any illness or nausea/vomiting. Claimant complained of low back pain with occasional radiation down the legs "that has been worsening over the last several weeks." She stated Dr. Willhelm had started her on gabapentin "2 weeks ago" and she recently had an MRI that showed "bulging discs." She already had an appointment scheduled with Dr. Bee for July 9. Claimant said her pain became worse due to heavy lifting at work, and asked for a work excuse. Examination of the low back demonstrated decreased range of motion, tenderness, pain, and muscle spasm. Claimant was diagnosed with chronic bilateral low back pain with sciatica. She was prescribed Flexeril for muscle spasms and lidocaine patches to apply to her back. She was taken off work until July 6 and instructed to follow up with her PCP.

15. Dr. Walker's office was in the same building, so Claimant went there and made an appointment for next morning (July 4). When she arrived for the appointment on July 4, she was turned away and told, "They couldn't see me because it was work-related." Claimant went home and called Ms. B[Redacted] to ask what to do next. Ms. B[Redacted] was out of the office for the holiday, so Claimant left a voice mail.

16. Ms. B[Redacted] retrieved Claimant's message when she returned to work on July 5. At hearing, she confirmed Claimant's voicemail said she hurt herself at work and needed medical treatment immediately due to severe pain.

17. Claimant went to work on July 6 and spoke with Ms. B[Redacted] about the injury. Claimant said she hurt herself on July 3. Ms. B[Redacted] referred Claimant to TriageNow, a contractor that handles injury reports for Employer.

18. Claimant spoke with TriageNow on the morning of July 6, 2018. She described the accident as:

> [Claimant] was at the dumpster throwing trash. She had to lift a 30-gallon bucket full of wet food. She had to lift it up and over the dumpster, lifting it up about four feet. Her left leg locked up. She was able to walk back into the building. The leg did feel weak. She did finish her shift. This week on Tuesday, July 3, she pushed a table and her left leg locked up. She did leave work due to the pain. She is having pain in her left hip that radiates to her left knee and she has groin pain.

The report also states:

> [Claimant] sought care prior to calling. She was examined and was given two days off work, prescriptions for lidocaine patch, and Flexeril. She was told to follow up with her family doctor. She had an appointment today and was not able to be seen because of it being a work injury.

19. Employer directed Claimant to CCOM for medical care. She was not given a list of providers.

20. Claimant's initial evaluation at CCOM was on July 10, 2018 with PA-C Steven Byrne. Claimant described "constant" pain in her low back and left hip, made worse by standing. She stated, "approximately one month ago she was at work throwing [a] trash bag when she felt immediate pain in her left hip." Mr. Byrne noted Claimant had regularly used oxycodone for chronic back pain since her back surgery. The physical examination showed tenderness to palpation of the central lumbar spine, the left lumbar paraspinal muscles, and iliac crest. Mr. Byrne diagnosed "strain of muscle, fascia and tendon of left hip," and opined, "this problem appears to be, in part, related to her work activities." He imposed a 20-pound lifting restriction, prescribed Flexeril and ordered physical therapy.

21. On July 24, 2018, Mr. Byrne authored a report addressing causation of Claimant's reported symptoms. Unfortunately, the text appears to have been garbled by dictation software or some other computer glitch. The ALJ interprets Mr. Byrne's report to reflect his belief that Claimant's pain is mostly chronic and related to degenerative disc disease, but it was exacerbated by recent activities at work. He ordered an MRI to help "determine what appears to be acute versus chronic in nature."

22. Dr. Thomas Centi took over Claimant's care on August 10, 2018. He ordered more physical therapy and eventually referred Claimant to Dr. Geoffrey Doner, an orthopedic surgeon.

23. Claimant had an MRI of the left hip on August 24, 2018. It showed a mild CAM deformity and acetabular over coverage, consistent with mixed-type femoral acetabular impingement. There was a nondisplaced tear of the anterior/superior labrum. The MRI also showed tendinosis of the common hamstring tendon origin and gluteus medius insertion.

24. Claimant saw Dr. Doner on September 18, 2018. He noted, "She did injure her left hip while working at Liberty Heights lifting a trash can into the dumpster [and] she felt a pop." She reported painful locking and catching of her hip, with no benefit from physical therapy. Dr. Doner did not think a corticosteroid injection would fix the problem, and recommended left hip arthroscopy with a labral repair or debridement, depending on the intraoperative findings.

25. Claimant saw Dr. Timothy O'Brien for an IME at Respondents' request on October 31, 2018. Dr. O'Brien concluded Claimant sustained no work-related injury on June 5 or July 3. He opined the alleged incident with the trash "in fact, did not occur," and Claimant's later description of the incident was a "historical revision." He opined Claimant's back and hip pain were solely due to pre-existing conditions. He agreed with Dr. Doner's diagnoses regarding the hip, but opined all the pathology is "attritional" as a result of "aging over the course of many years." He disagreed with the surgical recommendation because "surgery will categorically fail."

26. Dr. Centi placed Claimant at MMI on November 28, 2018, with no impairment or work restrictions. His report contains no detailed analysis to explain his determination, but the ALJ infers Dr. Centi was persuaded by the opinions expressed in Dr. O'Brien's IME report. Dr. Centi refilled Claimant's medications and advised her to "continue home exercise and F/U with PCP for further continued care for a non-work-related condition."

27. Dr. O'Brien testified in a post-hearing deposition for Respondents. The opinions expressed in his deposition testimony tracked those offered in his IME report. Dr. O'Brien reiterated that Claimant suffered no work-related injury, and all of her symptoms are due to non-work-related pre-existing conditions. He opined even if the trash and table pushing incidents happened, they would not cause a labral tear.

28. Employer has a strict policy that one "no call/no show" is considered job abandonment and will result in termination. This policy is clearly spelled out in the employee handbook. All new employees are given a copy of the handbook at the time of hire and must sign a form indicating they received, read, and understood it. The employee handbook is also available on the company intranet.

29. Claimant was terminated on September 4, 2018, for violating the no-call/no show policy. She was scheduled to start at 7:00 AM, but did not report to work and did not call in. She tried to call Ms. L[Redacted] at 5:00 PM that evening and sent a text message. Ms. L[Redacted] texted back and referred Claimant to Ms. B[Redacted]. Claimant called Ms. B[Redacted], who explained she was terminated effective

immediately for violating the no call/no show policy. Claimant offered no excuse for missing work and simply said, “I figured that.”

30. At hearing, Claimant offered an explanation for missing work on September 4. She testified she took Flexeril and oxycodone early in the morning and “I was just out of it, I guess, sleeping.”

31. Claimant proved by a preponderance of the evidence she suffered compensable injuries as a result of her work activities on June 5, 2018 and July 3, 2018. Claimant’s description of the incidents and the resulting development of symptoms was generally credible and supported by the persuasive evidence in the record. Dr. O’Brien’s nonmedical opinion that the June 5 incident “did not occur” is unpersuasive.

32. The treatment Claimant received under CCOM’s direction through November 28, 2018 was reasonably necessary to cure and relieve the effects of her compensable injuries.

33. Dr. Centi is an authorized treating physician notwithstanding Respondents’ failure to tender a designated provider list.

34. Dr. Centi’s November 28, 2018 declaration of MMI deprives the ALJ of jurisdiction to adjudicate medical benefits after that date, including the hip surgery recommended by Dr. Doner.

35. Respondents proved Claimant was responsible for termination of her employment on September 4, 2018.

CONCLUSIONS OF LAW

A. Claimant proved a compensable injury

To receive compensation or medical benefits, a claimant must prove she is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which she seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The claimant must prove entitlement to benefits by a preponderance of the evidence. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The claimant need not present expert opinion evidence regarding causation and may rely on lay testimony, medical records, or any other admissible evidence to sustain her burden of proof. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983). Each case is decided on its merits, and the facts in a workers’ compensation case are not interpreted liberally for either claimant or respondents. Section 8-43-201.

A pre-existing condition does not necessarily preclude a claim for compensation. If an industrial injury aggravates, accelerates, or combines with a pre-existing condition

to produce disability or a need for treatment, the claim is compensable. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). To prove an aggravation, a claimant need not show an injury objectively caused any identifiable structural change to their underlying anatomy. Rather, a purely symptomatic aggravation is a sufficient basis for an award of medical benefits if it caused the claimant to need treatment she would not otherwise have required but for the accident. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-921-616-03 (September 9, 2016). But the mere fact a claimant experiences symptoms at work does not necessarily mean the employment aggravated or accelerated the pre-existing condition. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005). The ALJ must determine whether the need for treatment was the proximate result of an industrial aggravation or merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

The Workers' Compensation Act recognizes a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence," whereas an "injury" is the physical trauma caused by the accident. Section 8-40-201(1). In other words, an "accident" is the cause, and an "injury" is the result. *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967). Workers' compensation benefits are only payable if an accident results in a compensable "injury." The mere fact that an incident occurred at work and caused symptoms does not automatically establish a compensable injury. Rather, a compensable injury is one that requires medical treatment or causes disability. *E.g., Montgomery v. HSS, Inc*., W.C. No. 4-989-682-01 (August 17, 2016).

Even a "minor strain" or a "temporary exacerbation" of a pre-existing condition can be a sufficient basis for a compensable claim if it was caused by a claimant's work activities and caused him to seek medical treatment*. Garcia v. Express Personnel*, W.C. No. 4-587-458 (August 24, 2004); *Conry v. City of Aurora*, W.C. No. 4-195-130 (April 17, 1996).

As found, Claimant proved she sustained compensable injuries on June 5 and July 3, 2018. The ALJ credits Claimant's description of the incidents and resulting onset of symptoms. Dr. O'Brien's non-medical opinion the June 5 incident did not occur is unpersuasive. Dr. O'Brien relied heavily on the July 3 urgent care note, which does not mention the trash incident. The urgent care report likely contains an incomplete summary of what Claimant said, although it does indicate Claimant's pain "became worse" because of heavy lifting at work. Claimant likely attributed her symptoms to an injury at work since Dr. Walker's office refused to see her the next day "because of it being a work injury." The ALJ considers the TriageNow report the most reliable recitation of what Claimant said caused her injury. Claimant's description to TriageNow was consistent with her hearing testimony and with the initial CCOM report. The totality of evidence persuades the ALJ the June 5 and July 3 incidents probably occurred and caused the symptoms she described.

The persuasive evidence shows Claimant suffered at least lumbar and left hip strains, which reasonably required evaluation and conservative care. Additionally, she

either tore her labrum or (more likely) aggravated a pre-existing but asymptomatic tear. Although Claimant had a history of low back problems, there is no persuasive evidence of significant pre-injury labral symptoms such as groin pain, catching or locking. And she worked a relatively demanding job with no apparent limitations despite her pre-existing issues before June 5, 2018.

B. Dr. Centi is an ATP

The employer has the right to select a claimant's treating physician "in the first instance." If the employer does not tender medical treatment forthwith upon learning of the injury, the right of selection passes to the claimant. *Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987). Section 8-43-404(5)(a)(I)(A) requires employers to give injured workers "a list of at least four physicians or four corporate medical providers or at least two physicians and two corporate medical providers or a combination thereof . . . ." WCRP 8-2 sets forth procedures employers must follow regarding the designated provider list, and if the employer does not comply with the Rule, "the injured worker may select an authorized treating physician or chiropractor of their choosing." If the employer refers a claimant to a provider but fails to provide the required list, the claimant may designate her own physician under WCRP 8-2(E). *Soledad-Orona v. Color Star Growers of Colorado*, W.C. No. 4-839-677 (February 24, 2012).

It is undisputed Employer referred Claimant to CCOM but did not give her a designated provider list. Claimant argues CCOM and Dr. Centi were not authorized because the right of selection passed to her. Under Claimants' theory, Dr. Centi's declaration of MMI was invalid because he was not an ATP.

The ALJ agrees the right of selection passed to Claimant because the verbal referral to CCOM did not satisfy the requirements of the Act or Rule 8-2. But the mere fact that Claimant gained the right to choose her doctor does not answer the question of whether Dr. Centi was an ATP.

In a purely definitional sense, Dr. Centi qualifies as an ATP. "Authorization" refers to a physician's legal right to treat a claimant at the respondents' expense. *Mason Jar Restaurant v. Industrial Claim Appeals Office*, 862 P.2d 1026 (Colo. App. 1993). Claimants can, and often do, have multiple ATPs. *Popke v. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997); *Portillo v. Shoco Oil-Samhill-Oil*, W.C. No. 4-942-783-01 (May 1, 2017). Aside from the initial "selection" as provided in § 8-43-404(5)(a), a physician may become authorized if the employer has "expressly or impliedly conveyed to the employee the impression" that the physician is authorized. *Bestway v. Industrial Claim Appeals Office*, 984 P.2d 680 (Colo. App. 1999). Here, Employer explicitly designated CCOM and Insurer paid for treatment provided under CCOM's direction. The ALJ concludes CCOM (and by extension Dr. Centi) was "authorized."

Moreover, Dr. Centi was a "treating physician" as defined in *Town of Ignacio v. Industrial Claim Appeals Office*, 70 P.3d 513 (Colo. App. 2002). In *Town of Ignacio*, the court determined a hand surgeon who evaluated the claimant once and did not recommend surgery was a "treating" physician for purposes of declaring MMI. The court

explained, “the specialist was a ‘treating’ physician because he examined claimant not in anticipation of litigation or simply for purposes of providing a disability rating, but to determine whether additional surgery was needed to alleviate claimant’s pain.” *Id*. at 515. In this case, Dr. Centi saw Claimant five times, wrote and refilled multiple prescriptions, ordered therapy and referred Claimant to Dr. Doner for a surgical evaluation. Dr. Centi had far more contact and involvement in Claimant’s care than the hand specialist in *Town of Ignacio*.

The ALJ acknowledges it would be inappropriate to rely solely on a definitional analysis where the initial treatment resulted from an improper designation. The claimant’s right to select a physician would be meaningless if an employer could direct her to one physician who provided minimal treatment such as writing a prescription and ordering x-rays before immediately declaring MMI. Therefore, the statute and the Rule necessarily imply some reasonable window for the claimant to exercise the right of selection if the employer does not follow the proper procedure.

Here, Claimant treated with CCOM for almost five months before Dr. Centi put her at MMI. A claimant “selects” a physician “when [s]he demonstrates by words or conduct that he has chosen a physician to treat the industrial injury.” *Tidwell v. Spencer Technologies*, W.C. No. 4-917-514-03 (March 2, 2015). The Panel has previously recognized that “appearing for subsequent appointments and participating in treatment recommended or prescribed by the designated ATP would indicate [the claimant’s] agreement to the services of the ATP.” *Portillo v. Shoco Oil-Samhill Oil, Inc*., W.C. No. 4-942-783-01 (May 1, 2017). The ALJ finds the Panel’s reasoning persuasive, and concludes Claimant selected CCOM as her ATP by receiving treatment there for many months, notwithstanding the initial improper designation.

C. Treatment Claimant received from CCOM was reasonably necessary to cure and relieve the effects of a compensable injury

The respondents are liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997). As found, the treatment Claimant received at the direction of CCOM through November 28, 2018 was reasonably necessary to cure and relieve the effects of her compensable injury.

D. The ALJ lacks jurisdiction to consider benefits after November 28, 2018

Dr. Centi’s November 28, 2018 declaration of MMI deprived the ALJ of jurisdiction to consider indemnity or medical benefits after that date, including the surgery recommended by Dr. Doner.

Sections 8-42-107(8)(b)(I)-(III) provide:

> ***An*** authorized treating physician shall make a determination as to when the injured employee reaches maximum medical improvement . . . . If either party disputes a determination by an authorized treating physician on the question of whether the injured worker has or has not reached maximum

> medical improvement, an independent medical examiner may be selected . . . . A hearing on this matter shall not take place until the finding of the independent medical examiner has been filed with the division. (Emphasis added).

The term "***an***" means any ATP has the authority to declare MMI.[1] If an ATP issues ambiguous or conflicting opinions regarding MMI, the ALJ can resolve the conflict without a DIME. *Blue Mesa Forest v. Lopez*, 928 P.2d 831 (Colo. App. 1996). But the ALJ does not have authority to reconcile conflicting opinions among multiple ATPs. *Town of Ignacio v. Industrial Claim Appeals Office*, 70 P.3d 513 (Colo. App. 2002). The fact that Dr. Doner may believe Claimant is not at MMI is irrelevant at this stage.

Once an ATP places a claimant at MMI, a DIME is a "mandatory, jurisdictional prerequisite" to a hearing on additional medical treatment. *Whiteside v. Smith*, 67 P.3d 1240, 1246 (Colo. 2003). Absent a completed DIME, the ALJ may not hear or decide any issue that constitutes an actual or constructive challenge to MMI. *Story v. Industrial Claim Appeals Office*, 910 P.2d 80 (Colo. App. 1995). The ICAO has repeatedly held that "after MMI [is] declared, the ALJ lack[s] jurisdiction to award or deny medical benefits to cure and relieve the claimant's condition." *McCormick v. Exempla Healthcare*, W.C. No. 4-594-683 (January 27, 2006); *see also Eby v. Wal-Mart Stores Inc*., W.C. No. 4-350-176 (February 14, 2001) ("once an authorized treating physician places the claimant at MMI, and ALJ lacks jurisdiction to award additional medical benefits for the purpose of curing the industrial injury and assisting a claimant to reach MMI unless the claimant undergoes a DIME."); *Anderson-Capranelli v. Republic Industries, Inc*., W.C. No. 4-416-649 (November 25, 2002); *Cass v. Mesa County Valley School District*, W.C. No. 4-69-69 (August 26, 2005) ("[i]f an ATP places the claimant at MMI, and ALJ lacks jurisdiction to award additional medical benefits to improve the claimant's condition unless a DIME has been conducted on the issue of MMI.").

Although a DIME is not a jurisdictional prerequisite to a hearing on a request for post-MMI medical treatment, Claimant has not characterized the surgery as a *Grover*-type benefit. The surgery is intended to *improve* Claimant's condition, rather than merely relieve the effects of the injury and prevent deterioration. The ALJ concludes that awarding the treatment requested by Claimant would constitute a constructive challenge to MMI in circumvention of the DIME process. *See Story v. Industrial Claim Appeals Office*, *supra*.

Claimant also argues the ALJ can ignore Dr. Centi's MMI determination under *Harman-Bergstedt v. Loofbourrow*, 320 P.3d 327 (Colo. 2014), which held that a determination of MMI has no legal significance if it occurs before the claimant suffers a compensable disability. The ALJ concludes *Loofbourrow* is not applicable here because the parties stipulated Claimant was temporarily partially disabled by the accident and is

[1] A previous version of the statute gave responsibility for determining MMI to "the authorized treating physician who has provided the primary care." But that section was amended to its current form in 1996.

entitled to TPD benefits. Thus, her claim is "compensable" as that term is used in *Loofbourrow*. The mere fact that no TPD benefits have been paid yet is immaterial.

D. Claimant was responsible for termination of her employment

Sections 8-42-103(1)(g) and 8-42-105(4) preclude an award of TTD benefits if a claimant was "responsible for termination" of her employment. Responsibility for termination is an affirmative defense Respondents must prove by a preponderance of the evidence. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). To establish that a claimant was responsible for termination, the respondents must show the claimant performed a volitional act or otherwise exercised "some degree of control over the circumstances which led to the termination." *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 5 P.3d 1061, 1062 (Colo. App. 2002); *Padilla v. Digital Equipment Corp*., 902 P.2d 414 (Colo. App. 1995); *Velo v. Employment Solutions Personnel*, 988 P.2d 1139 (Colo. App. 1988). The mere fact that the employer discharged the claimant in accordance with its personnel rules does not automatically establish that the claimant acted volitionally or exercised control over the circumstances of the termination. *Gonzales v. Industrial Commission,* 740 P.2d 999 (Colo. App. 1987). The ALJ must consider the totality of the circumstances to determine whether the claimant was responsible for his termination. *Knepfler v. Kenton Manor*, W.C. No. 4-557-781 (March 17, 2004)."

As found, Respondents proved Claimant was responsible for her termination because she did not report to work or call in before her shift on September 4, 2018. Employer has a strict written policy of termination after one no-call/no-show, and her termination was consistent with that policy. Typically, if the employer shows a claimant failed to report to work when scheduled, this amounts to a *prima facie* case satisfying the employer's burden to demonstrate the claimant was at fault for the job separation. *Coleman v. Wellbridge/Starmark Holdings*, W.C. No. 4-969-560-02 (January 13, 2017). The claimant must then introduce exculpatory evidence or evidence showing that her failure to show up for work when scheduled was non-volitional. *Id*.

Claimant offers three arguments why she should not be deemed responsible for termination. First, Claimant argues she was incapacitated by the effects of medication prescribed for her compensable injury and incapable of reporting to work or calling in. The ALJ finds this argument unpersuasive. Claimant has taken the same dose of oxycodone for several years and had been using Flexeril for almost two months by the time of her termination. The ALJ credits Dr. O'Brien's opinion that the combination of medications was not sufficient to so sevrely debilitate Claimant that she could not at least call in to work. The ALJ also notes Claimant did not offer this excuse when she spoke with Ms. B[Redacted] on September 4.

Claimant also suggests she did not know about the policy because she never received a copy of the employee handbook. The ALJ considers it highly unlikely Employer deviated from its standard procedure of giving all new employees a copy of the handbook and requiring them to sign a document acknowledging same. Moreover, the respondents need not prove the claimant knew or should have known her conduct violated the

employer's policy. *Coleman v. Wellbridge/Starmark Holdings*, W.C. No. 4-969-560-02 (January 13, 2017). The dispositive question is whether the claimant performed a volitional act or otherwise exercised some degree of control over the circumstances leading to the termination, and "an employer need not provide the claimant with a warning on whether the violation of a policy would result in termination." *Id*.

Finally, the ALJ finds no persuasive evidence that Claimant's termination was pretextual, or that other employees were allowed to "no-call/no-show" without being terminated. To the contrary, the ALJ is persuaded by Ms. B[Redacted]'s testimony Claimant was terminated for violating the no-call/no-show policy, a volitional act within her control.

ORDER

It is therefore ordered that:

1. Claimant's claim in W.C. No. 5-086-228 is compensable.

2. Insurer shall cover medical treatment from authorized providers reasonably necessary to cure and relieve the effects of Claimant's compensable injury, including but not limited to all treatment provided through CCOM and its referrals through November 28, 2018.

3. Claimant's average weekly wage is $265.

4. Insurer shall pay Claimant TPD benefits from July 4, 2018 through September 3, 2018, subject to the applicable SSDI offset, per the parties' stipulation.

5. Insurer shall pay Claimant statutory interest of 8% per annum on all compensation not paid when due.

6. Claimant's request for TTD benefits commencing September 4, 2018 is denied and dismissed.

7. All issues not decided herein are reserved for future determination.

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

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

DATED: April 1, 2019

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

ISSUES

I. Has Claimant proven, by a preponderance of the evidence, that he sustained compensable injuries arising out of and in the course of his employment?

II. Is the staph infection contracted by Claimant causally related to his employment with the City of Colorado Springs?

III. If the claim is compensable, which medical benefits that are reasonable and necessary to cure and relieve the effects of Claimant's work injuries?

IV. If the claim is compensable, is Claimant entitled to Temporary Total Disability benefits, and for what period of time?

STIPULATIONS

The parties reached the following stipulations:

1) Claimant's average weekly wage of $1,6795.75;

2) Claimant's withdraws the issue that the right of selection of the ATP passed to him;

3) Claimant's withdraws, without prejudice, his request for a change of physician.

The ALJ approves these stipulations.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Claimant was employed as an "Instrumentation & Electrical Control Specialist, Sr.," by the City of Colorado Springs' Utilities Department. His duties included maintaining instrumentation and telemetry for waste water collection, treatment and distribution for the City of Colorado Springs.

2. On March 20, 2018 at approximately 2:45 p.m., Claimant returned in his work truck to Employer's facility and parked the truck. He got out of the truck, walked behind it to the passenger side, and opened the door so he could access the equipment he needed to

remove and bring with him into Employer's facility. He reached in and got his "Druck" pressure transmitter calibrator from the truck's center console. This device weighed 20-25 pounds. He had the "Druck" in his left hand, then reached over and picked up his laptop computer bag from the floor of the truck with his right hand. He then backed away from the door and tried to shut the door with his hip. When he did that, he felt a pop in the lower right side of his back.

3. Claimant then put both pieces of equipment on the ground and closed the door. When he reached down to pick up the "Druck" he felt a pain in the middle of his back. He picked up and carried the "Druck" and the laptop inside the building. He placed the laptop in its docking station. He went through his laptop bag, found a single Aleve tablet and took it. At that time, Claimant testified he did not have much pain, but by approximately 4:30 p.m. he had severe pain in his back. Claimant reported his injury to a supervisor named Mike Kelly. (Ex. 11, pp. 98, 99.).

4. The next day Claimant's back pain was so bad he called in sick. On March 22 Claimant filled out an "Employee's Statement of Injury." (Ex. 9, p.84). In an "Employee Interview" the accident was described as follows; "…

> Was in the parking lot at the shop at 456 Fontanero St. Opened the passenger side door of his CSU [Colorado Springs Utilities] truck to get his computer and a piece of equipment for PM (Predictive Maintenance, like a hand-pump in a bag) that weighed approx. 20 lbs. Pulled the piece of equipment with his left hand and the computer with his right hand and felt a pop below his right shoulder blade between his ribs and spine. Set the equipment down to shut the door and when he picked it up felt the pain again, sharp pain. Pain increased over the next hour, was having spasms. Took off work the next day to rest, ice, Aleve, claimant advised when still and laying down no spasms…" (Id. at 85)

5. Claimant went to authorized treating physician Jay Neubauer, M.D., on March 26, 2018. Dr. Neubauer is Board certified in Aerospace Medicine, which he testified is the military equivalent to Occupational Medicine. He has practiced for approximately 30 years in the military and approximately 5 years as a civilian. He is Level II accredited. Dr. Neubauer reported, "…He states he was injured on 3/20/18 while lifting equipment out of the front seat of his truck. He states that one piece was 15 pounds and the other was 40 pounds. As he lifted the equipment and turned to set them down he felt a pop in his mid back located just below the right shoulder blade. He noted almost immediate pain. He is noted [sic] gradual increase in pain over the weekend with rest. He has been self treating with Aleve which did not help. He finds that Advil helps more and is currently taking 400 mg every 8 hours…He denies numbness tingling or weakness in the extremities…" (Ex. 2, p. 26).

6. On March 26, 2018, Claimant rated his pain level to be 9 on a scale of 0-10. (Ex. F, p. 45). Dr. Neubauer referred claimant to physical therapy, however, claimant did not attend any sessions before his next appointment with Dr. Neubauer on April 4, 2018.

7. On examination, Dr. Neubauer found "Range of motion to the knees with pain referred to the mid back, pain in all planes referred to the right mid back. No sensory deficit in the upper or lower extremities. Normal strength in the upper and lower extremities." (Ex. 2, p.

27). Dr. Neubauer diagnosed "strain of muscle and tendon of back wall of thorax, initial encounter." Regarding causation, he determined "The cause of this problem is related to work activities." He prescribed Ibuprofen, physical therapy, and imposed work restrictions. (*Id* at 27).

8. At hearing, Claimant testified that he told Dr. Neubauer that he'd had stomach trouble and liver issues and that he was not permitted to take NSAID ("Nonsteroidal anti-inflammatory drugs") medication. However, on the Patient Health and Injury Form that Claimant completed in Dr. Neubauer's office on March 26, 2018, (Ex. F, p. 45), Claimant specifically listed that he had been taking Advil as an over the counter medication. He also admitted on the Patient Health and Injury Form that he was continuing to drink, despite being told specifically by Dr. Van Os to avoid all alcohol.

9. Dr. Neubauer testified that Claimant admitted to having taken Aleve and Advil, and that Claimant had been self-treating with 400 mg of Advil every 8 hours following the March 20, 2018 incident. (Ex. F, p. 45). At hearing, Claimant initially testified that he had stopped taking all NSAID medications in 2016; he later admitted that he had continued to take NSAIDs, including Aleve and Advil.

10. Claimant returned to Dr. Neubauer on April 4, 2018 and the doctor reported, "…He complains of 4-5/10 aching/stabbing mid, mostly right sided, back pain which he states is intermittent. Pain continues to increase with motion…He has not started physical therapy yet. The patient has been returned to work with work restrictions but has taken several days off since last visit due to pain. He denies numbness tingling or weakness in the arms or legs…" (Ex. 2, p. 16). Dr. Neubauer again confirmed that, "The cause of this problem is related to work activities." He again prescribed Ibuprofen, and added Robaxin, a muscle relaxer. (*Id* at 17).

11. Dr. Neubauer testified that Advil is an NSAID. Similarly, Dr. Neubauer testified that the Aleve that claimant testified he took on the date of the alleged injury is also a NSAID medication.

12. Dr. Neubauer testified that Claimant never informed him on either March 26, 2018 or April 4, 2018 of his stomach and liver issues and that he had been directed to avoid NSAID medication. Dr. Neubauer testified that if Claimant had informed him of prior stomach and/or liver issues with the use of NSAID medications that he never would have prescribed NSAID medications to Claimant. He further testified that based on Claimant's own report that he had been self-treating with Advil, coupled with the information claimant provided on the Patient Health and Injury Form, that he was of the reasonable belief that Claimant was able to take NSAID medications.

13. Although Dr. Neubauer documented Claimant's pain complaints as consistent with a work related mechanism of injury, he conceded at hearing that bending over to put items down or pick items up from the ground, such as Claimant did in this instance, was an activity in which Claimant *could have* been engaged at any time and at any location, both on and off work.

14. Claimant participated in physical therapy on April 10, 2018. The therapist noted, "…Ted leaned over to pick up a 20# pressure tester on his console and his PC bag on the floor from the passenger side. As he cleared the door he felt a pop in his right mind back. He put everything down and as he bent over the pick things up again he noticed more pain. Pain increased as he continued working in a seated position. Low back sx started 3 days later. He gets spasm and sx are worse at the end of the day." (*Id* at 14).

15. Claimant was admitted to St. Francis Hospital on April 11, 2018 due to an upper gastrointestinal bleed. Raluca Cascaval, M.D., reported,

> This is a very pleasant 52-year-old male with a history of alcohol use and alcoholic steatohepatitis with also a history of gastritis in 2016 at which time an EGD was performed and showed no evidence of varices. The patient did not have any active bleeding at the time and was told to avoid NSAID's. He had done so for a while; however, he sustained a muscle low back strain injury at work recently for which he was prescribed again ibuprofen and a muscle relaxant. He has been taking that over the last few days along with beginning a course of physical therapy, in which the first session was yesterday. Apparently during physical therapy, he started to experience increased back discomfort and took a few more ibuprofen over the course of the day yesterday. This morning he woke up at about 6:30 feeling that he had something 'gurgling in his stomach.' He started getting up to go to the bathroom, and felt acutely nauseated and then started throwing up bright red blood, which continued as he went into the bathroom and then had subsequently a large dark black bowel movement. (Ex. 12, p. 107).

The doctor noted "No increased lower extremity edema or pain." *Id.* And, "No pitting edema but increased adipose tissue [fat] bilaterally." (*Id* at 108). The medical records reflect, and Claimant admitted at hearing, that he had continued to consume alcohol and take NSAID medications in the weeks prior to and up to April 11, 2018. (Ex. D, p. 28).

EGD testing was performed the day of admission. The examiner reported:

> "...Summary: large volume gastric lavage was performed to clear a large clot in the proximal stomach. A hiatus hernia was found in the esophagus. Multiple ulcers were found in the cardia and body of the stomach. The culprit lesion appeared to be an ulcer just below the GE junction. Clips were applied to control bleeding. Drug delivery was performed…" (Ex. 9, p. 117). Ultrasound of the lower extremities revealed "no evidence of acute deep vein thrombosis in the visualized venous segments of the bilateral lower extremities." (*Id* at 104). Claimant's primary diagnosis was "Brisk upper gastrointestinal bleed, likely secondary to peptic ulcer disease in the setting of resumption of alcohol intake, as well as NSAID use. Counseled again the patient carefully to avoid NSAIDs indefinitely, as well as quit alcohol indefinitely at this time to avoid, not only stomach irritation and peptic ulcer disease, but also worsening of liver dysfunction…" (*Id* at 109). It was documented on April 17, 2018 that Claimant had a fever; "…possibly atelectasis. Blood cultures neg so far. DC antibiotics

since **no obvious cause of sepsis or infection** noted." (*Id* at 105) (emphasis added).

16. Previously, Claimant had seen gastroenterologist Dr. Van Os on November 18, 2016 in follow up after his earlier hospitalization at St. Francis Medical Center in October, 2016 for an upper GI bleed. Dr. Van Os noted the GI bleed was "…related to multiple gastric ulcers, in the setting of heavy alcohol use and NSAIDs. He has stopped alcohol, will continue avoidance of all NSAIDs, including advil…" (Ex. 1, p. 6).

17. Upon his discharge following the hospitalization, Claimant and his family were specifically instructed must avoid alcohol. During this hospitalization, Claimant was also noted to have bilateral lower extremity venous stasis causing significant swelling in his lower extremities. Claimant was also noted to be gravely morbidly obese. Claimant was also diagnosed with cirrhosis of the liver, alcohol related, during this hospital stay. (Ex. C, p. 4) Claimant returned to Dr. Van Os on January 30, 2018, about a month and a half before the work injury. Dr. Van Os again confirmed "…He has stopped alcohol, will continue avoidance of all NSAID's, including advil." (*Id* at 2).

18. At hearing, however, Claimant admitted that he had not stopped drinking, testifying that he continued to drink "moderately," and that he continued to take NSAID medications, including Aleve and Advil.

19. On April 23, 2018 Claimant met with his personal physician, Dr. Dwight Robertson at Pikes Peak Internal Medicine. Dr. Robertson reported, "…He is here today primarily about his back pain. Sx began suddenly while lifting a heavy object and twisting to his L [left]. He heard a sudden pop and had sudden pain around his scapula and T-spine but can't really localize it to a specific area. He continues to c/o pain & stiffness to both sides of his T-spine…" (Ex.3, p. 32). Dr. Robertson summarized; "…1 mo. of severe thoracic back pain following a twisting injury. This sounds like the majority of his pain at this point is spasm, but he should have plain film x-ray. He would like to see a back specialist…" *Id.* Dr. Robertson referred Claimant to Dr. Sung at Colorado Springs Orthopedic Group. (*Id* at 33).

20. Claimant saw Dr. Sung's physician assistant, Phillip Falender, PA-C, on April 25, 2018. He reported Claimant's chief complaint was back pain, and "…these symptoms began on 03/20/2018 when he was moving things out of a truck. He heard a pop in his lower back and has had severe pain off-and-on since then. The majority of his pain is in his mid to lower back. It is more on the left than the right. It increases when he walks or moves…He rates his back pain as the worse pain ever. He describes it as sharp, stabbing, aching, and constant..." (Ex.4, p. 45). X-rays of the thoracic and lumbar spine were performed. PA Falendar noted they showed "…diffuse degenerative changes with osteophytes from the midthoracic to the upper lumbar spine…" PA Falendar diagnosed; "1. Acute left-sided low back pain and spasm. 2. Thoracic and lumbar spine multilevel degenerative disc disease. 3. L4-5 spondylolisthesis. 4. Thoracolumbar scoliosis." PA Falendar reported, "…We reviewed the x-rays and discussed treatment options. I think the majority of his symptoms are muscular. I would like to get him into physical therapy. I will set up this referral…" (*Id* at 46, 47).

21. Due to his unrelenting back pain, Claimant was admitted to the emergency room at Penrose Hospital on May 8, 2018 and it was reported:

> Patient is a 52-year-old male presenting with severe back pain and lower extremity swelling. Patient has a history of alcoholic liver disease, no history of soft gel varices, history of GI bleed related to peptic ulcer disease which was inflamed recently by NSAID use, admitted here for this problem April 11 and discharged April 17 on a proton pump inhibitor. During that admission, patient did experience hypotension and did receive IV fluid boluses. He also received 2 units of packed red blood cells. He began to have lower extreme a [sic] swelling at that time on top of chronic baseline mild lower extreme [sic] swelling, but is here today with severe excruciating swelling for the last 2-3 days, bilateral with left leg feeling more tight and weeping more than the right leg…He has severe midline mid back pain which is **progressively worsening**…" (Ex. 13, p. 397). "Patient c/o right lower back pain since mid-March. States he was moving things from his work and injured his back and was diagnosed with a thoracic strain…" (*Id* at 402) (emphasis added).

22. The doctor reviewed the history of Claimant's back injury at work on March 20, 2018 and the fact that previous x-rays "did not reveal any obvious abnormalities and they sent him to physical therapy. He was able to complete one physical therapy treatment only. After being admitted to the hospital on April 11 and discharged on April 17 for his upper GI bleed, patient states he was still having severe continued mid spine pain. Up until a few days ago he was able to ambulate fairly well. For the last few days he has noted increase midline mid back sharp and spasm pain radiating to bilateral paraspinal muscles…He has *no prior history of back problems* before this problem started on March 20 of this year..." (Ex. 13, p. 398) (emphasis added).

23. Claimant's Social History noted for the May 8, 2018 admission includes Claimant's self-report that he was typically drinking 21 cans of beer and 7 standard drinks or the equivalent per week immediately preceding this admission. (Ex. D, p. 38).

24. Infectious disease specialist Peter Brookmeyer, M.D., evaluated Claimant in the hospital on May 9, 2018. He took a similar history and also reported that, "…Of note, during the admission in April, during that admission, he developed some fever and was placed on ceftriaxone for several days…Since discharge, he has not had fevers or chills, but he has had worsening of his back pain. For that reason, he came to the emergency room at St. Francis yesterday and a CT scan was consistent with diskitis and osteomyelitis of the spine. He was subsequently transferred to this facility for a neurosurgical consultation…Currently, his main complaint is severe back pain. He does have strength in his lower extremities." (*Id* at 335). Dr. Brookmeyer noted blood cultures were "negative thus far." His impression was, "…Probable diskitis osteomyelitis T-spine: He has been partially pretreated with ceftriaxone prior to this admission, is already on antibiotics. I think a biopsy will need to be done to clarify #1 if this is infectious versus malignancy, and #2 to ensure that if this is infection, that we can do our best to come up with the organism." (Ex. 13, p. 336).

25. A CT of the chest to check for pulmonary embolism was performed 5/8/18. (Ex. 13, p. 143). This revealed the issue at T9-T10. A CT of the thoracic spine was performed

5/9/18. (*Id* at 142). Dr. Brookmeyer interpreted that CT to reveal "…destructive process at T11-12 disk with destruction fragmentation adjacent at implants of T9 and T10, adjacent soft tissue swelling favors diskitis osteomyelitis; however, malignant process is possible. (Ex. 13, p. 336).

26. A MRI of the thoracic and lumbar spine was performed on May 9, 2018. The radiologist reported: 1. Images of the thoracic and lumbar spine are severely degraded by patient motion. 2. T9-T10 discitis osteomyelitis with paraspinal abscess and small amount of epidural phlegmon or abscess. 3. Probable discitis osteomyelitis at L3-L4 with severe canal stenosis." (Ex. 13, p. 374).

27. Claimant had a neurosurgical evaluation with Andreas Tomac, M.D., on May 9, 2018. Dr. Tomac assessed; "52-year-old gentleman with an incidental finding at the T9/T10 level destructive in nature with extension. Nonfocal neurological exam. No history of cancer. No white count/no fevers." Dr. Tomas concluded "No acute NS [neurosurgical] intervention indicated at present time." (Ex. 13, pp. 337, 338).

28. On May 11, 2018 a blood culture, for the first time, revealed the presence of the bacteria called staphylococcus lugdunensis. (*Id* at 318).

29. On May 13, 2018 photographs of Claimant's right and left lower extremities revealed "no open wounds." (Id. at 299-301).

30. On May 16, 2018 Dr. Brookmeyer reported, "Assessment: 1. Discitis/osteo: could not do biopsy, pt not interested in rescheduling at this time, no surgery plans at this time. Discussed options – organism in blood is likely causative organism, pt not interested in biopsy to confirm, continue ancef. Inflam markers improving – good sign. 2. +BC: for CNS, S lugdunensis, this is likely the pathogen, repeat BC negative thus far, continue ancef. 3. Discussed importance of therapy, pain still a problem. Subjective: + back pain, no bowel or bladder incontinence, but feels better, and is mobilizing more." (Ex.13, p. 248).

31. On May 17, 2018 an attending physician noted, "…Still c/o very severe mid back pain with minimal improvement in bed with severe spasm." (Id. at 239). A physical therapist noted "…Impaired functional mobility secondary T9-10 discitis vs. abscess vs. neoplasm." (Ex. 13, p. 232).

32. Claimant was discharged on May 22, 2018. The discharge report summarizes:

> Following his GI bleed, he was stabilized and discharged home. He returned back to the emergency department with severe back pain. Initially had a CT scan performed to rule out pulmonary embolism. That showed an incidental finding of severe diskitis in the thoracic region with significant phlegmon. He was transferred to Penrose Hospital for spinal surgery evaluation and started on empiric antibiotic therapy. Ultimately, his cultures grew Staph lugdunensis, and antibiotics were tailored down to Ancef per instructions from Dr. Brookmeyer. He had MRI that showed significant destructive process with this paraspinal phlegmon, although spinal surgery did not feel comfortable operating on the patient given his underlying issue…Once the species was identified in his blood sample, it was felt that this was likely deemed his infectious culprit here as well. The source being his bilateral lower extremity venostasis ulcerations. They were

addressed by wound care. He was on diuresis. Initially pain was difficult to control…" (Ex. 13, p. 140).

It was noted Claimant would be discharged to "Terrace Gardens" for acute rehabilitation.

33. Claimant was admitted to Terrace Gardens on May 22, 2018 but found the level of care unacceptable. He was discharged and transferred to Healthcare Resort on May 24. (Ex. 6). Claimant stayed at Healthcare Resort until June 5, 2018.

34. Claimant was re-admitted emergently to Penrose Hospital on June 5, 2017. On June 7, Dr. John Serak noted, 52yo M with hx of thoracic and lumbar discitis s/p approx. 5wks of abx. Pt continues to have severe pain, and is losing function in LE. Significant weakness of BLE on exam. MRI reveal severe stenosis 2/2 epidural abscess T9-10 and L3-4. Plan for minimally invasive decompression of T9-10 and possibly L3-4 this evening if primary team agrees that pt healthy enough to undergo prone 2hr surgery…" (Ex. 14, p. 579).

35. Dr. Serak performed surgery on June 7, 2018. The procedure was "laminectomy and foraminotomy for decompression centrally to spinal cord, as well as nerve roots, T9-10 and L3-4." (Ex. 14, p. 604). Dr. Serak described; "…A 52-year-old male with a history of diskitis who was initially diagnosed approximately 5 weeks ago. Since then, the patient has been undergoing antibiotic treatment. Recently, while the patient was in rehab, he began to develop weakness in his lower extremities bilaterally, as well as worsening back pain. The patient was completely unable to mobilize or work with physical therapy. The patient was then transferred back to Penrose where MRI was performed, demonstrating worsening stenosis at T9-10 and L3-4, causing severe spinal cord compression at T9-10, as well as severe thecal sac compression at L3-4. Given this, the patient was taken for the above operation to decompress both the spinal cord, the thoracic sac, the thecal sac, and nerve roots in the lumbar spine." (*Id* at 604, 605).

36. Dr. Brookmeyer met with Claimant on June 8, 2018 and reported:

> In summary I initially saw him on May 9 after which [sic] he had an injury at work and he had back pain which dramatically worsened. At some point, he has saw a spine surgeon and was told that nothing could be done. He was subsequently admitted in April at which point he developed fevers and was placed on Rocephin. He subsequently developed increasing back pain and weakness. He came back to the emergency room and a CT scan showed changes consistent with diskitis and osteomyelitis. He was seen by neurosurgery at that point and they did not feel that surgery was indicated. The patient declined a biopsy because of pain, however, cultures grew Staph lugdunensis. He was treated with cefazolin and ultimately discharged to a nursing facility. When he left the hospital, his strength was intact in his lower extremities. In the interim, he became markedly weak. I was not notified of this. His wife tells me that they were told to call me. He said that the nursing home was supposed to call me but that did not apparently occur. I saw him back on Tuesday in my office and noted a markedly changed neurologic exam with significant weakness that was new. For that reason, I sent him to the emergency room to get a stat MRI. He was admitted to the obs unit. An MRI was ultimately done. I suggested neurosurgical

consultation. He was transferred to the medical unit. Neurosurgery saw him yesterday and he was taken to the OR last night…" (Id. at 588).

37. On June 9, 2018 an attending physician reported, "…Acute worsening/loss of LE [lower extremity] function today, now being treated as spinal cord injury patient." (Ex. 14, p. 574).

38. Also on June 9, Dr. Andreas Tomac performed surgery for "evacuation of hematoma" at L3-L4. (*Id* at 564). In the history section of the report, he noted that after the surgery on June 7, Claimant was left with "…complete inability to move lower extremities (0/5 hip/knee/feet)" and that a repeat MRI showed findings consistent with hematoma*. Id.*

39. On June 10, 2018 the attending physician reported: "…The reason the patient is critically ill and the nature of the treatment and management provided by the teaching physician (me) to manage the critically ill patient is: L3/L4 evacuation of hematoma with paraplegia, obesity with BMI of 50, chronic lower ext pain, encephalopathy likely related to pain…" (*Id* at 558).

40. On June 14, an attending physician noted, "…Loss of function: underwent evac of hematoma, found to have an arterial bleeder. Wife notes his toes move when he sleeps but he can't move them volitionally. He was able to correctly identify which foot was being touched per RN. I could not reproduce this. Plan is to go to Capron for rehab 6/18." (*Id* at 453).

41. On June 16 an attending physician noted, "Pt remains essentially numb from waist down. LE sensation to light touch is absent. Pt cannot move feet at all…" (Ex. 14, p. 424). On June 17 it was noted, "No changed in flaccid paralysis LE. Very weak grip bilat. No sensation below waist with pinching." (*Id* at 426).

42. On June 18 it was noted, "Patient has not had much movement in his feet. He does not feel much in the legs and below the waist. He is ready to transfer to Capron for ongoing rehab. Will also need speech rehab there."

43. (Id.) Claimant was discharged to Capron Rehabilitation on June 18, 2018. He stayed there until approximately September, 2018.

44. Dr. Brookmeyer, the treating infectious disease specialist, testified as an expert witness by deposition on October 29, 2018. Dr. Brookmeyer testified regarding the spinal infection:

Q. How does a person get an infection, and then that infection, as you seem to say, destroys vertebrae and a disk?

A. It does that. The infection gets in there and chews it away. Like rotten wood, similarly.

Q. How did he get the infection in the first place?

A That is a difficult question. My guess is he had a transient blood infection with this bacteria that landed or seeded in his back. It is a closed space –

Q. What is?

A. His back. He did not have penetrating trauma. How does someone get an infection in an internal area? Penetrating trauma. So if someone shot a nail gun into your back and it got infected, it is from the nail gun. So if you had surgery and it got infected, it is from surgery probably. We see a lot of cases where there is not obvious evidence. In cases like this we think that people probably get a transient blood infection – I think we probably all get transient blood infections during the day and our immune system eats it up. I don't know it to be a fact, but I think for reasons that are somewhat unclear sometimes it will land in sanctuary areas, a somewhat sanctuary area, and can set up shop and cause a severe infection.

Q. Do you know what caused the infection in this case to set up shop in the thoracic spine?

A. I see patients all the time that have spine infections, or infections in other areas. ***Our group has noted that there seems to be correlation between somebody getting injured and subsequently developing infection in that area. It has been our hypothesis, or our thoughts, that what happens is if you preinjure the area, that area becomes inflamed, increased blood flow, and probably increases the risk of it being subsequently infected.*** Make sense as a thought process? (emphasis added).

Q. It does. Do you think Mr. Martinez had any kind of spine infection before he was hurt at work on March 20, 2018?

A. With the caveat that I had not examined or seen the patient prior, and have only verbal reports of what the imaging at the time of the injury showed, it is my understanding, and correct me if I am wrong, that before he had the spine injury he had no pain, no fever, no chills. Staph aureus and **staph lugdunensis are aggressive bacteria that typically become symptomatic very early**, in my opinion. I will tell you that I have had patients, numerous patients with spine infection -- that have a blood infection. So what happens, they come in with staph aureus, or staph lugdunensis, complain of back pain, have MRI and it is negative. Repeat MRI a week later if they have pain and at that point it has blossomed. So I think these spine infections probably become symptomatic early. Cold abscesses, for example, where you don't get a lot of pus and are not particularly symptomatic, those are most common in patients with tuberculosis or other wimpy type bugs, it is substantially less likely to get them with aggressive bacteria like this. (emphasis added).

Q. When you say infection resulting from these kinds of bacteria come on quickly or aggressively, is that in terms of days?

A. I think that if you get a diskitis, with aggressive bacteria like staph aureus, or staph lugdunensis*, **I would say the progression is days to weeks,*** is my opinion. If you have other bacteria, like those skin staph infections, those can be more prolonged and possibly not as

symptomatic. You never know with 100 percent certainty when these things happen. But that is my best guess as to what the time course of this was. My best guess, when I think it started, ***I think it started in the days prior to the admission in April, and was <u>partially attenuated by the ceftriaxone</u> that he received during the hospitalization*.** (emphasis added).

Q. What about the ceftriaxone?

A. Partially treated it. If I remember correctly, if I can clarify, I think in the April admission he had negative blood cultures. And he did.

45. Respondents' retained expert witness, Dr. Daniel Mogyoros, prepared reports based on his review of medical records. Dr. Mogyoros propounds two theories regarding Claimant's spinal infection. He discussed them in his reports and testified consistently at hearing. The first is that:

> Most likely, the spine infection was present at the time of the work injury, and when Mr. Martinez bent down, the twisting motion caused the previously infected and inflamed muscle to spasm. ***Essentially, this unmasked the pre-existing infection, which in my experience is a common phenomenon. Even without any bending or twisting motion on Mr. Martinez's part, the spine infection would likely have progressed in the same way as it did. The work injury likely did not exacerbate the spine infection or cause it to progress more rapidly than it otherwise would have.*** The "pop" Mr. Martinez felt in his mid-back is anatomically consistent with the known site of infection in the lower thoracic spine, again suggesting that the area was already inflamed at the time of the injury. Additionally, the onset of low back spasms just a few days later, as well as the findings of right paraspinal muscle tenderness at the occupational health visit on April 4 suggest that the infection was already present early in the course. There is no evidence in the medical record of a skin infection or other disruption in the skin caused by the initial injury. Bacteria likely seeded the spine from a previous disruption in the skin due to minor trauma, edema, or infection. The prolonged period of symptoms until diagnosis is consistent with the clinical course of a spinal infection. ***The extensive destruction of the vertebral body may also suggest that the infection had been present for some time."*** (Ex. H, pp. 82, 83) (emphasis added).

46.. Dr. Mogyoros' alternative theory (which he describes as less likely than the first), is that:

> The spine was seeded after the work injury occurred and is not related to the events of March 20, 2018 or the subsequent GI bleed. When Mr. Martinez presented to St. Francis Hospital on May 8, his lower extremities were erythematous with open blisters, consistent with cellulitis. There is not mention of skin issues when he was admitted for the GI bleed. The onset of this cellulitis is not mentioned in the chart, but it would have been between April 11 and May

18. This certainly could have been a source of the Staphylococcus lugdunensis, which then would have seeded the spine and cause the spinal infection. ***There is nothing in the records that would suggest a connection between the lower extremity cellulitis and the prior work injury and subsequent GI bleed."*** (emphasis added).

47. Dr. Brookmeyer testified he agrees that the infection likely entered Claimant's body through the skin. He testified about that and about Dr. Mogyoros' opinions as follows;

Q. Look at the August 11 report from Dr. Mogyoros.

A. I have it.

Q. Third page of the report, third full paragraph at the bottom, Dr. Mogyoros opines there are two possible scenarios to explain Mr. Martinez's clinical course. Take a look at those and I would like your comments.

A. And into the fourth paragraph?

Q. Yes, sir.

A. My opinion is that it would be unlikely to have a pre-existing masked infection with this bacteria.

Q. Why is that?

A. ***This tends to be an aggressive, rapidly progressing infection. I would have a hard time believing he had a spine infection or muscle infection that was not symptomatic at that point.*** I think quite unlikely, in my opinion. I have on one occasion thought that something like that had happened. However, that was a patient previously proven to be infected after an automobile accident and infection became activated again. I believe, if I remember correctly, that patient had hardware in place, which increases the risk of this happening. In this case, patient did not have foreign bodies or hardware in the spine. Oftentimes we can see infections persist on hardware that if you have trauma, it becomes more active. In this case he had no pre-existing surgery, no hardware in place, and was asymptomatic. ***So I don't know what the evidence would be to support that he had a pre-existing infection on the day of the injury. He had no pain, no fever, no chills. That would tend to argue against active infection at that time.***

Two, staph lugdunensis, and staph aureus, are aggressive pathogens which, in my experience, tend to be more rapidly progressive. So I would have -- in my opinion, I think it is unlikely that he had a pre-existing infection at that point. I have basically no evidence to support that he had an infection at that point. (emphasis added).

Q At that point, are you referring to the date of the work injury?

A. Correct. No pain, no fever, no chill. He had an aggressive pathogen, which proceeds rapidly to become symptomatic.

Q. What about Dr. Mogyoros' opinion, at page 4, "The extensive destruction of the vertebral body may also suggest that the infection had been present for some time"?

A. ***I agree that this had been present for some time, but my definition of some time is weeks.*** (emphasis added).

Q. What about the next paragraph on Page 4, "The alternative scenario is that the spine was seeded after the work injury occurred and is not related to the events of March 20, 2018, or the subsequent GI bleed"?

A. I think actually the spine seeded after the work injury is more likely to have occurred.

Q. Why is that?

A. Because at the time of his injury he had no pain, no fevers, no chills. My suspicion is that the back was seeded after the work-related injury, as I commented earlier.

The hard part here is nobody can say what exactly happened. We are opining on what we think most likely to occur. I don't have any evidence that I can determine, with the caveat that I did not examine or see the patient in March, that ***I can find in retrospect -- that I cannot find evidence that he was infected at that point. Objective evidence.***

He had no complaint of back pain, which was generally the main symptom. And I guess I don't know that he didn't have fever and chill before, but no one has mentioned that to me in reports that I have read. With the caveat that I did not examine the patient on March 20, 2018. (emphasis added).

Q. Dr. Mogyoros, on Page 3, says the pathogen -- the source of the infection was the skin.

A. Probably right.

Q What else could it be?

A. Staph lugdunensis is typically a skin bacteria colonized on the skin. Whenever he got seeded, did he have an infection from some other undetermined source? Possible. But agree with Dr. Mogyoros that a skin source is most likely. I see patients all the time with staph in the blood; we can't figure out why. We assume it is the skin. I am probably seeding a couple bugs right now and my immune system gobbles them up.

Q. So the bottom line, Dr. Brookmeyer, we can't say one way or another how he got this infection, where it came from, what the source was, just that he got an infection?

A I think that the skin was the source, likely. *He developed a transient blood infection, and it landed in his back.* ***I think that the injury made it more likely that that area was seeded.*** (emphasis added).

Q. What types of injuries are you seeing that are developing into infections?

A. Developing into, I don't know that that is the correct term.

I have certainly seen ranging from bone and joint stuff. ***I have heard of back infections, where they have been – had some kind of injury, and four, six, eight weeks later that area is infected.*** (emphasis added).

Q. Just as we don't know for sure that on March 20, when Mr. Martinez bent to pick a piece of equipment off the floor, or twisted to retrieve something from the other side of the truck cab, we don't know if it happened, then either, do we?

A. ….It is my opinion, one, that he probably did not have a pre-existing infection that was activated by the injury. It is possible, but probably less likely, in my opinion. I think he probably seeded the spine later.

I think the injury, or alleged injury – I am not going there -- ***probably made the area more likely to have been seeded.*** That is sort of my opinion. (emphasis added).

48. Dr. Mogyoros testified at hearing. He testified that in his practice, he treats on average 2-3 patients per month for diskitis and osteomyelitis. He opined that the Staph lugdunensis would not have and did not enter claimant's body as a result of the upper GI procedure claimant underwent during the April 11, 2018 hospitalization.

49. Dr. Mogyoros explained that diskitis most commonly affects men aged 40 to 60 and that other health factors, including but not limited to liver disease and extreme body habitus, create a higher risk for infection. The infection typically seeds in one of three locations in the body: the heart valves, the spine, and the joints.

50. Dr. Mogyoros testified that Claimant's extreme body habitus in the range of 365 pounds to 380 pounds and the cirrhotic condition of claimant's liver contributed to a lowered immune system and increased claimant's risk of infection. Once the bacteria enters the body, Dr. Mogyoros testified that there is no rhyme or reason where it finally seeds.

51. Dr. Mogyoros discounted the hypothesis theorized by Dr. Brookmeyer that the bacteria seeded in Claimant's thoracic spine because that area had been pre-injured on March 20, 2018 and was, consequently, hyper vascularized. Dr. Mogyoros testified that Dr. Brookmeyer's hypothesis was simply that: a hypothesis without any evidentiary support in established literature or medical papers. Dr. Mogyoros further testified, the way that diskitis

typically forms is because there is a relative lack of blood flow. The bacteria is frequently seeded in the spine because without adequate blood flow to the disks, there is also a corresponding lack of white blood cells to fight and clean out the infection. If, as Dr. Brookmeyer postulates, the thoracic spine was seeded because it was inflamed and therefore receiving higher blood flow, logic would tell you, then, that there would also be increased white blood cells that would then clear out the infection. Dr. Mogyoros further testified that if Dr. Brookmeyer's hypothesis were correct, and that increased blood flow is what attracts the infection to a certain area of the body, then most, if not all, infections would seed in the heart valves, as there is no greater area of blood flow in the body.

52. Dr. Mogyoros testified 'with 100% certainty' that Claimant's movement of bending forward to place equipment on the ground on March 20, 2018 did not in any way cause the infection. Dr. Mogyoros also testified that the infection would have presented itself, because it was already there, even if Claimant had not bent forward on March 20, 2018.

53. When asked how an unmasking of the infection is different from an aggravation or an acceleration, Dr. Mogyoros explained: The bacteria come into the disk space and into the adjacent vertebral bodies. Because there is poor blood flow generally to disks, the infection seeds in the disks, then spreads to the bones, and then spreads to the muscle. The muscle gets inflamed and then spasms to protect the spine or the disk that is inflamed. The muscle spasm is merely a symptom of infection; the muscle spasm did not make the infection worse or cause it to develop any faster.

54. Dr. Mogyoros testified that the "pop" that Claimant heard is a very common clinical history and is consistent with the occurrence of a muscle spasm. He further testified that diskitis is often misdiagnosed as a muscular strain, and that diagnosis of the infection is often delayed because of this misdiagnosis.

55. Dr. Mogyoros opined that there is no certainty at what level of the thoracic spine Claimant alleges injury on March 20, 2018, as there was no imaging or other objective medical evidence. Dr. Mogyoros further testified that the bacteria had also seeded in Claimant's lumbar spine at L3-4, but that he had not complained of any injury to that part of the spine.

56. In the second scenario, Dr. Mogyoros testified that the bacteria could have entered claimant's body 'some time' after March 20, 2018. Dr. Mogyoros testified that he has seen the infection process caused by the Staph lugdunensis bacteria move slowly in some instances and very quickly in other instances. He does not disagree with Dr. Brookmeyer that Claimant's infection and destructive bone process could have happened quickly, over 3 to 4 weeks, but he does not rule out that it could have taken longer, such as in his Scenario 1.

57. Dr. Mogyoros testified (as did Dr. Brookmeyer) that there is nothing about the March 20, 2018 incident that caused swelling in Claimant's legs. Further, according to Dr. Mogyoros, there is nothing about the March 20, 2018 incident that caused the bacteria to enter through Claimant's skin. Dr. Mogyoros testified there is no way to know from one circumstance to another how the bacteria and infection are going to act; therefore there is nothing about the March 20, 2018 work incident that caused or contributed to in any way the infection that Claimant contracted.

58. Dr. Mogyoros explained whether he thought it was too much of a coincidence that Claimant preinjured his thoracic spine resulting in inflammation and then that it where the bacteria seeded, that is more of "a chicken and egg situation. It is just as possible that the tissue is inflamed because of the infection, not the other way around," and that the tissue in Claimant's thoracic spine was already inflamed prior to the March 20, 2018 work incident.

59. Dr. Mogyoros testified that even in the absence of any incident involving Claimant's spine on March 20, 2018, it would not have been possible for Claimant's immune system to fight off the infection because the immune system had already been unsuccessful at clearing out the bacteria from the disk space.

CONCLUSIONS OF LAW

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

Generally

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

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

C. Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability

or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

D. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968). In this instance, two very capable and credible experts in infectious diseases have reached some similar conclusions, and some differing ones. Taken as a whole, the ALJ must determine which opinions are more persuasive on the ultimate issue of causation.

E. Further, courts are to be "mindful that the Workmen's Compensation Act is to be liberally construed to effectuate its humanitarian purpose of assisting injured workers." *James v. Irrigation Motor and Pump Co.*, 503 P.2d 1025 (Colo 1972).

Compensability, Generally

F. A claimant is required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. C.R.S. §8-41-301(1)(b) & (c). The question of whether the Claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Moreover, a Claimant is not required to prove causation by medical certainty. Rather, it is sufficient if the Claimant presents evidence of circumstances indicating with reasonable probability that that the condition for which he seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and the need for treatment. *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

Aggravation of a Preexisting Condition, Rendering it Symptomatic

G. Claimant has proved he sustained a compensable back injury on March 20, 2018. The retrieval of the Druck and laptop from Employer's vehicle was connected to Claimant's occupation, and not merely a ubiquitous act of daily living. As was noted by the I.C.A.O. in *Weber v. Shiloh House*, W.C. 4-540-459 (2005); "…Few principles are

more fundamental to the Workers' Compensation Act of Colorado (Act) than the rule that "this state does not distinguish between disabilities that are the result of employment-related aggravation of pre-existing conditions and those that are not." Thus, where a "pre-existing condition is aggravated by an employee's work, the resulting disability is a compensable industrial disability." *Subsequent Injury Fund v. Thompson*, 793 P.2d 576, 579 (Colo. 1990). A similar expression of the same principle is that the "employer must take the employee as it finds him so that the employer is responsible for any increased disability resulting to an employee from a pre-existing weakened condition." See *Cowin and Co. v. Medina*, 860 P.2d 535, 538 (Colo. App. 1992). At other times our courts stated the rule that a pre-existing condition or disease "does not disqualify a claim if the employment aggravates, accelerates, or combines with the disease or infirmity to produce the disability for which workers' compensation is sought." *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990).

H. Even if one accepts Dr. Mogyoros' theory that Claimant had the infection prior to the work injury, and then the work injury "unmasked" the infection, the injury is compensable. Even if there was a pre-existing spine infection, there is insufficient evidence that it would have "progressed in the same way that it did" per Dr. Mogyoros. It is equally possible that Claimant's immune system would have eliminated the infection. In fact, the blood cultures did not show the presence of Staph lugdunensis until May 11, 2018. Alternatively, the infection may have lodged in a part of the body other than the spine. Moreover, if there was a pre-existing infection, it was completely asymptomatic until the work injury occurred and "unmasked" it (in Dr. Mogyoros' words). This would be a work-related aggravation of an underlying asymptomatic condition, and as such it would be a compensable injury. ("If an industrial injury aggravates or accelerates a pre-existing non-industrial condition so as to cause a need for treatment, the claimant has sustained a compensable injury and respondents are liable for treatment and disability caused by the aggravation." *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990)). An employer may not escape liability for consequences resulting from an injured worker's pre-injury frailty or weakened condition, nor may it escape liability when the effects of an otherwise minor injury escalate due to factors beyond the control of the injured worker.

Causation

I. Respondent's retained expert, Dr. Mogyoros, did not meet with or examine Claimant, but prepared reports based on his review of medical records. Dr. Mogyoros propounds two theories regarding Claimant's spinal infection. He discussed them in his reports and testified consistently at hearing.

J. The ALJ is not persuaded by Dr. Mogyoros' first theory. First, there is no evidence that Claimant had any sort of spine infection prior the date of injury on March 20, 2018. Claimant had no back pain, no fever and no chills. Dr. Brookmeyer testified that staph lugdunensis is an "aggressive bacteria that become symptomatic very early, in my opinion." Dr. Brookmeyer testified that pain from a spinal infection is most

commonly described by patients as “fairly severe.” If Claimant had muscle tissue which was “infected and inflamed” (per Dr. Mogyoros) prior to the work injury on March 20, he would have known about it. Claimant reported no such symptoms.

K. Dr. Mogyoros claims that “…the ‘pop’ Mr. Martinez felt in his mid-back is anatomically consistent with the known site of infection in the lower thoracic spine, again suggesting that the area was already inflamed at the time of the injury. Merely because Claimant felt a “pop” does not lead to the conclusion that “the area was already inflamed.” Claimant had no back pain prior to the injury. The more likely scenario, as described by Dr. Brookmeyer, is that the infection began within days of Claimant’s admission to the hospital on April 11, 2018 for the GI bleed.

L. Dr. Mogyoros opines that “…the onset of low back spasms just a few days later, as well as the findings of right paraspinal muscle tenderness at the occupational health visit on April 4 suggest that the infection was already present early in the course.” The ALJ finds insufficient evidence in support of this assertion. Muscle tenderness and back spasms are symptoms that appear to be completely consistent with Dr. Neubauer’s diagnosis on March 26 and April 4 of 2018; “strain of muscle and tendon of back wall of thorax.” In fact, on the latter date Dr. Neubauer prescribed Robaxin “…3 times a day as needed pain/spasm.” Dr. Neubauer certainly expressed no concerns about a possible spinal infection.

M. Dr. Mogyoros also opined that, “…The prolonged period of symptoms until diagnosis is consistent with the clinical course of a spinal infection. The extensive destruction of the vertebral body may also suggest that the infection had been present for some time.” A spinal x-ray at Colorado Springs Orthopedic Group on April 25, 2018 showed only “diffuse degenerative changes with osteophytes from the mid-thoracic to the upper lumbar spine…” It was only 14 days later, on May 8, 2018, that the CT at Penrose revealed the “destructive process within the thoracic spine, epicentered at the T9-T10 disc level…” The timing supports Dr. Brookmeyer’s explanation that Staph lugdunensis is “an aggressive bacteria that typically becomes symptomatic very early” and that Claimant did not have an infection on the date of his work injury.

N. Dr. Mogyoros’ alternative theory (which he describes as less likely than the first), is that:

> “…the spine was seeded after the work injury occurred and is not related to the events of March 20, 2018 or the subsequent GI bleed. When Mr. Martinez presented to St. Francis Hospital on May 8, his lower extremities were erythematous with open blisters, consistent with cellulitis. There is no mention of skin issues when Claimant was admitted for the GI bleed. The onset of this cellulitis is not mentioned in the chart, but it must have occurred between April 11 and May 18 (sic).[May 8]. . This is the likely source of the Staphylococcus lugdunensis, which then would have seeded the spine and cause the spinal infection. There is nothing in the records

that would suggest a connection between the lower extremity cellulitis and the prior work injury and subsequent GI bleed.

O. The ALJ finds Dr. Mogyoros' second theory at least partially persuasive. The onset of the cellulitis likely did indeed occur somewhere between April 11 (when it was not noted), and May 8 (when it was noted). It was indeed possible that during this period that this aggressive pathogen entered the body, seeded the spine and quickly began its path of destruction on Claimant's T9-10 and L3-4 regions. That process can take only days or weeks, once it gets fully underway.

P. However, the ALJ is not persuaded that there is *no connection* between the work injury and the infection in Claimant's spine. Dr. Mogyoros postulates that since Staph lugdunensis tends to concentrate in the spine, joints, and heart valves, and that if Claimant's theory of hyper vascularization is correct, then one would expect the heart valve to be an even more likely target due to high blood flow. The ALJ is not persuaded, since (presumably) one would not 'hyper vascularize' one's own heart valves through injury, whereas one could do so to one's joints or spine. The disc and vertebra, inflamed as they were by the work injury, were more receptive to allow the spread of the pathogens. Dr. Brookmeyer has noted this very phenomenon in his own practice, with timelines commensurate with what occurred here.

Q. In summary, the ALJ concludes, by a preponderance of the evidence, that Claimant inflamed his thoracic and lumbar regions by twisting his back in the course of his employment. No doubt this comparatively benign maneuver caused greater damage to Claimant's back than one might normally expect, due to his excessive weight, poor circulation, and other poor lifestyle choices along the way. Nonetheless, this injury created conditions conducive to the seeding of the inflamed areas by Staph lugdunensis, which then aggressively colonized these areas, causing the lasting damage to his spine. Both physicians believed that Claimant's blood likely became infected through his skin, and the most likely timeline for this to have occurred was when the skin lesions were first noticed by medical personnel-well after the work injury. Said injuries to his spine, and resultant infections, are thus compensable.

Medical Benefits

R. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. §8-42-101; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). Claimant must prove entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The ALJ concludes, based upon the credible evidence presented, that Claimant has proven by a preponderance of the evidence that he requires medical treatment to cure or relieve the effects of his work injury. Substantial

evidence supporting this conclusion includes Claimant's testimony and the opinions and reports of the treating healthcare providers. Respondent is liable for the Penrose Hospitalizations (5/8/18 – 5/22/18 and 6/5/18 – 6/18/18) because they were emergent in nature, and were reasonable, necessary, and related to Claimant's work injury of March 20, 2018.

S. However, Claimant's upper GI bleed, treated on April 11, 2018 was neither related to his work injury, nor was the likely cause of the entry of the Staph lugdunensis into his bloodstream. However, observations during this treatment did provide a reference point for what would be discovered later – blood cultures were negative, and no obvious sepsis or infection was noted as of 4/17/19. While the records were beneficial to the finder of fact, Claimant's treatment for his upper GI bleeding from April, 2018 are not related to his work injury, regardless of his ill-advised consumption of NSAIDs along the way.

T. No treating physician has opined Claimant has reached MMI. Respondent is liable under C.R.S. §8-42-101(1)(a) for medical treatment that is reasonably needed to cure and relieve Claimant of the effects of his injury.

Temporary Total Disability

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

V. Here, Claimant received temporary work restrictions when he met with Dr. Neubauer on March 26 and April 4, 2018. Employer provided work within the restrictions and Claimant performed modified work until April 11, 2018. It was on that date Claimant presented emergently to St. Francis Medical Center with a GI bleed. Claimant has established that he was not able to work again on or after April 11, 2018; however, it was not until his admission to Penrose on May 8, 2018 that he was unable to work *due to his original work injury.* This injury, and subsequent spinal infection which had manifested itself by this time, caused disability lasting more than three work shifts; Claimant left work as a result of the disability, and the disability was (and is) total

and resulted in actual wage loss. Thus TTD payments are owed from May 8, 2018, and ongoing.

ORDER

It is therefore Ordered that:

1. Claimant has suffered a compensable injury to his spine, including the resultant infection, as a result of a work injury occurring March 20, 2018.

2. Respondents shall pay for all reasonable and necessary medical treatment in connection therewith, but not to include treatment for Claimant's admission in April, 2018, for the upper GI bleed.

3. Respondents shall pay TTD benefits from May 8, 2018 and ongoing, until terminated by operation of law.

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

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

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

DATED: April 1, 2019

/s/ William G. Edie

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

ISSUES

1. Whether Respondents have successfully rebutted the presumption of compensability under §8-41-209, C.R.S. by showing that Claimant's basal cell carcinoma (BCC) cancer did not occur on the job and whether they have overcome the opinion of DIME physician Jonathan Bloch, M.D. on causation.

2. Whether Respondents have made the necessary showing to withdraw their medical only General Admission of Liability.

3. If the claim and BCC is deemed compensable, whether Respondents have overcome by clear and convincing evidence the permanent partial disability (PPD) impairment rating provided by DIME physician Dr. Bloch.

FINDINGS OF FACT

1. Claimant works for Employer as a firefighter. Employer hired Claimant in 1994.

2. Prior to his work as a firefighter for Employer, Claimant also worked as a volunteer firefighter, a wildland firefighter, and a firefighter for other employers/agencies. Claimant did this work between 1985 and 1993 before being hired full time by Employer in 1994.

3. Throughout his career, Claimant performed shift work and would regularly work scheduled 24-hour shifts.

4. During the course of his career, Claimant responded to the typical range of fires for career firefighters, including grass fires, dumpster fires, car fires, weed fires, wildland fires, some commercial fires, and house fires. Claimant sustained the known and typical exposures associated with the firefighting profession during his career.

5. As with most career firefighters, Claimant used protective equipment and bunker gear that was eventually improved and replaced over time. In his earlier career, self-contained breathing apparatus' (SCBA) were used only during the suppression phase of fighting fires and not during the overhaul or cleanup phases. Additionally, in the early part of his career, the SCBA masks were shared and not fitted properly. In his early career, the bunker gear was not effectively cleaned after each use nor was there backup bunker gear. Claimant also would take showers after a fire call, but not always immediately. The protective equipment did not provide complete protection and Claimant often had soot on his body.

6. Bunker gear, the SCBA masks, and the cleaning processes improved throughout the years of Claimant's employment. Extractors were eventually purchased by Employer to clean the bunker gear and an extra set of bunker gear was eventually purchased.

7. With the improvement in bunker gear and processes, Claimant's exposures that are more recent are less than those in his early career. However, from the start of his career though current, Claimant has undoubtedly had many years of exposure to the known and typical exposures associated with the firefighting profession and many years where his gear did not adequately protect him from exposure.

8. On June 1, 1995, dermatologist William Bowman, M.D. evaluated Claimant. Dr. Bowman noted that Claimant had a history of skin cancer, probably BCC from the right arm 2 years prior in Texas. Claimant reported that he was in for a regular re-check. Dr. Bowman noted 10-15 actinic keratosis of the face, dorsal forearms, and upper back. Dr. Bowman also found a well-healed scar of the right lateral arm. Dr. Bowman assessed: status post BCC, right arm; and actinic keratosis of the face, back, and forearms. Dr. Bowman discussed sun protection and skin cancer and suggested shade UVA or Durascreen. Dr. Bowman performed liquid nitrogen removal of 10-15 lesions of the face, upper back, and forearms. Dr. Bowman recommended an annual re-check. *See* Exhibits 7, H.

9. Dr. Bowman evaluated Claimant in April of 1996, June of 1997 and May of 1998. At each evaluation, Claimant was noted to have actinic keratosis and lesions and several lesions were removed. *See* Exhibit H.

10. On July 27, 1999, Dr. Bowman evaluated Claimant. Dr. Bowman noted a lesion of the right pre-articular cheek. Dr. Bowman assessed BCC of the right pre-auricular cheek. *See* Exhibit H.

11. Claimant continued to see Dr. Bowman annually for skin checks and continued to have lesions removed from his body.

12. On December 13, 2007, Dr. Bowman noted on a skin pathology report that Claimant had BCC of the left wrist. This was determined from a biopsy performed on December 10, 2007. The microscopic pathology showed a proliferation of basaloid tumor cells in the mid dermis with palisading and cystic necrosis. *See* Exhibit 7.

13. In December of 2008, at another skin check, a concerning spot on Claimant's nose was examined. The spot on the nose was determined to be BCC.

14. On December 16, 2008, Claimant underwent an excision of skin cancer from the dorsum of his nose just above the tip performed by David Charles, M.D. It was noted that he had a clinically obvious skin cancer and that the excision was done with pathology showing clear margins. *See* Exhibits 7, F, G.

15. Following his BCC of the right arm in 1993, the right cheek in 1999, the left wrist in 2007, and the nose in 2008, Claimant continued to be vigilant with skin checks.

16. In December of 2012, the spot on his nose and a spot of his left ear were noted to be concerning. On December 12, 2012, excision of lesions on Claimant's nose and left ear were performed. A biopsy dated the same day confirmed that Claimant again had BCC on the nose and that he also now had BCC on the left ear. *See* Exhibits 5, D.

17. On August 15, 2013, Dr. Bowman issued a letter to Claimant's attorney. Dr. Bowman stated that he had followed Claimant as a patient for the past 20 years and that Claimant had several BCCs over that period of time, all which had required surgical excision. Most recently, Dr. Bowman noted that Claimant had a difficult lesion of the nose that required two excisions with a plastic surgical repair. Dr. Bowman opined that Claimant was likely to have more of those type of lesions. Dr. Bowman noted that according to Colorado statutes, these were required to be covered by workers' compensation. *See* Exhibit 7.

18. On August 15, 2013, Claimant filed a Worker's Claim for Compensation noting the date of injury/disease was October 25, 2012 for cancer of the nose and left ear due to exposure at work to carcinogens and sun. *See* Exhibit M.

19. On August 30, 2013, Respondents filed a Medical Only General Admission of Liability noting an injury date of October 25, 2012 and no compensable wage loss. *See* Exhibits 1, 7, L.

20. On August 11, 2014, Dr. Bowman evaluated Claimant. Dr. Bowman noted that Claimant had actinic keratosis on the face, shoulder, and forearms. Dr. Bowman removed 14 lesions with liquid nitrogen. Dr. Bowman noted that Claimant was following up for his BCC from 2012, which was the first recurrence since Claimant's 2008 BCC. Dr. Bowman noted the continued lifetime risk of BCC. *See* Exhibits 7, H.

21. On July 31, 2015, William Miller, M.D. evaluated Claimant. Claimant reported that he had been diagnosed with BCC at the tip of his nose in approximately 2009 and that his symptoms returned in 2012. Claimant reported that he was followed every six months by dermatology and had frequent cryotherapy to his forearms for actinic keratosis. Claimant reported that he had filed a claim under the firefighters act but never had an initial evaluation or any measure for impairment. Dr. Miller noted that Claimant was there for an opening and closing evaluation and evaluation for impairment. Dr. Miller noted that Claimant had multiple risk factors for BCC including time spent in El Paso, lots of outdoor activity, and being fair skinned. Dr. Miller did not include family history. Dr. Miller opined that Claimant qualified for a class 1 skin impairment and rated Claimant at 2% whole person for the BCC of the nose. Dr. Miller noted that the injury was deemed work related per 8-41-209, that Claimant had reached maximum medical improvement as of the evaluation date, July 31, 2015, and that he was released to full duty with no work

restrictions. Dr. Miller recommended dermatology follow-ups every six months. *See* Exhibits 6, 7, E.

22. On May 6, 2016, Dr. Bowman evaluated Claimant. Claimant reported a significant family history of non-melanoma skin cancer and squamous cell skin cancer and reported skin lesions located on his body throughout. Dr. Bowman examined Claimant's scalp, head, lips, neck, chest, abdomen, back, right upper extremity, left supper extremity, right lower extremity, left lower extremity, buttocks, and digits/nails. Dr. Bowman provided the impression of: lentigines located on body throughout; benign nevi located on the body throughout; actinic keratosis distributed on the left forehead, right cheek, right forehead, left cheek, left temple, right hand, right forearm, right wrist, left hand, left forearm, left upper back, and right upper back; dermatoheliosis located on the body throughout; xerosis on the trunk; and history of BCC on the nose. Dr. Bowman advised Claimant that the actinic keratosis were precancerous proliferations occurring within sun-damaged skin. Dr. Bowman treated 22 lesions with liquid nitrogen. Dr. Bowman recommended continuing follow up. *See* Exhibit H.

23. On June 20, 2016, Jonathan Bloch, D.O. performed a Division Independent Medical Examination (DIME). Claimant reported that he was diagnosed with BCC in 2009, and had treatment and then had recurrence in 2012. Claimant reported that he continues to see his dermatologist 2-3 times per year for preventive screening and cryotherapy for up to 14 lesions at a time, mostly on his face. Dr. Bloch specifically noted in his DIME report that he reviewed dermatology records from November 2008 through July of 2015. Dr. Bloch noted past biopsy reports dated December 16, 2008 and December 17, 2012 that both showed BCC. Claimant reported working for 4 years on Employer's drill grounds over 10 years prior where he had no sun or chemical protection except his suit and no shade or hygienic means for de-toxifying. Claimant reported 100 exposures per year in the burn building where they would dump trash and old tires to blaze for training. Claimant reported the facilities had limited showers and it was common to wait until at home to shower. Claimant reported he was concerned for regular screening, ongoing dermatology visits, and daily self-care. Claimant reported that he washes his face every morning, applies sunscreen 4 times per day and is constantly rinsing his face to re-apply sunscreen. Claimant reported 26 years as a firefighter with Employer, 16 as a lieutenant, and that he continued to work full time. Dr. Bloch found on physical examination generally keratosis of the face. Dr. Bloch diagnosed BCC with nodular and infiltrative patterns and actinic keratosis. Dr. Bloch opined that Claimant's prognosis was good but required routine screening and preventive care. Dr. Bloch opined that Claimant reached maximum medical improvement on July 31, 2015. Dr. Bloch provided an impairment rating of 15% class 2 skin impairment because regular intermittent treatment was needed, and rated 15% whole person. Dr. Bloch opined that it was medically more probable that Claimant's cancer did not arise from sources outside the workplace. Dr. Bloch referred to the firefighter's act covering occupational diseases of skin cancer and noted that the act relieved Claimant from the burden of proving his cancer resulted from his employment as a firefighter. Dr. Bloch believed that Claimant's cancer was considered compensable unless the firefighter's employer was able to persuade and show that Claimant's cancer did not occur on the job. Dr. Bloch commented

that Claimant's Employer did not appear to be trying to persuade or show that Claimant's cancer did not occur on the job. Dr. Bloch recommended lifetime maintenance care and continued preventive screening with dermatology. *See* Exhibits 7, C.

24. On August 18, 2016, Sander Orent, M.D. issued a Samms Conference report. Dr. Orent opined that prior to 2008, it was obvious there had been ongoing sun exposure for the Claimant over the course of many years. Dr. Orent opined that as a firefighter and when working, Claimant would be outdoors at least six hours per day and noted that no sunscreen was provided until 2011. Dr. Orent also opined that when working for the forest service in 1989, no respiratory protection was provided to Claimant and that there was ongoing severe sun exposure and outgassing and smoke. Dr. Orent also opined that decontamination processes were marginal or absent with no bunker washing and that from 2001 to 2010 Claimant was working in training and was in and out of burn buildings hundreds of times without washing his bunker gear. Dr. Orent noted two surgical procedures on Claimant's nose, in 2008 and in 2012 showing BCC. Dr. Orent also noted that Claimant had many pre-cancerous lesions removed from the skin over the years. Dr. Orent noted that Claimant had significantly modified his recreational activity and no longer is able to run outdoors and now runs and swims indoors. Dr. Orent noted that Claimant's mother had skin cancer at the age of 61. *See* Exhibit 8.

25. Dr. Orent opined that it was quite clear that the sun exposure in the course and scope of Claimant's job far exceeded any other exposures he had in his personal life. Dr. Orent noted that Claimant denied ever having a severe sunburn as a child and that Claimant reported wearing sunscreen growing up. Dr. Orent opined that Claimant was not provided sunscreen during the time he worked as a firefighter. Dr. Orent opined that cancer is multifactorial. Dr. Orent opined that other factors likely contributed to Claimant's susceptibility to malignancy including occupationally related toxic exposures. Dr. Orent opined that a vast preponderance of evidence showed that Claimant's skin cancers were a direct result of Claimant's occupational exposure. Dr. Orent opined that even if Claimant had a significant pre-existing family history, this would not change his opinion because the solar radiation exposure was far greater in the course and scope of his work. Dr. Orent opined that Claimant had a class III impairment and a 20% whole person impairment. Dr. Orent opined that skin cancers take many years to develop from the initial cell that becomes malignant to clinical diagnosis and that the exposure history needed to be looked at from the beginning of his work as a firefighter. Dr. Orent opined that carcinogen exposure is cumulative in terms of damage it can cause in the skin and that all the exposures together had conspired to create the BCC disease Claimant is facing. *See* Exhibit 8.

26. On August 31, 2016, Henry Roth, M.D. performed an independent medical examination. Dr. Roth noted the chief complaints were BCC of the tip of the nose and actinic keratosis involving the arms and face. Dr. Roth opined that Claimant's skin condition was the result of remote sun damage and opined that the medically probable latency period between exposure and the appearance of the degree of Claimant's sun damage, actinic keratosis, and BCC was 20 to 50 years. Dr. Roth noted that Claimant was initially diagnosed with BCC at the tip of the nose in 2008 and had two surgical

procedures with a third procedure on the tip of the nose done in 2012. Claimant also reported near continuous primary care with liquid nitrogen treatment of actinic keratosis on the dorsal forearms, hands, and face. Dr. Roth noted in family history that Claimant's mother had a similar skin disorder. On skin examination, Dr. Roth found Claimant to be blue-eyed and fair skinned with substantial sun damage to the skin of the face, neck, shoulders, anterior chest wall, upper extremities, upper back, and mid back. Dr. Roth found remote sun damage evidenced by hyperemia, telangiectasia, and widespread inflammation with focal mini pustular lesions throughout. Dr. Roth opined that the skin disorder was not limited to work related exposed facial skin and forearms. *See* Exhibits 9, B.

27. Dr. Roth opined that Claimant's BCC was not work related. Dr. Roth opined that Claimant's risk factors included fair skin and heredity including lifetime sun exposure with a latency of 20 to 50 years. Dr. Roth opined that it was medically probable that the majority if not the entirety of Claimant's risk and advent of BCC was due to non-occupational factors/exposures. Dr. Roth pointed out that studies showed the estimated lifetime risk for BCC in the white population was at 33-39% for men and most often found in light-skinned individuals. Dr. Roth opined the epidemiology for BCC and Claimant's widespread face, neck, chest, shoulder, upper back, mid back, and upper extremity sun damaged skin and actinic keratosis were the result of sun exposure in the remote past. Dr. Roth opined that Claimant's work related sun exposure was not excessive or out of the ordinary and was not the cause of Claimant's skin conditions. Dr. Roth also opined that Claimant's chemical exposure was not a specific risk factor for BCC or a specific accelerant of sun-damaged skin. Dr. Roth finally noted that Claimant's skin condition uniformly covered areas of the skin not exposed to either sun or hydrocarbons in the course of his work duties. Dr. Roth opined that Claimant's condition would continue and need monitoring. Dr. Roth opined that BCC and actinic keratosis occur in 1/3 of the general population with increased incidence and prevalence in fair-skinned person with the damage caused by sun exposure and latency for the appearance of actinic keratosis and BCC of 20 to 50 years. Dr. Roth opined that Claimant was fair skinned with a substantial history of childhood skin sun exposure, which was medically probably the cause of his skin condition. *See* Exhibits 9, B.

28. On September 29, 2016, Annyce Mayer M.D. issued an occupational/environmental clinic summary report. Dr. Mayer noted that Claimant was a 51-year-old career firefighter working for Employer since 1994. Claimant reported that he first began to see a dermatologist for lesions on his skin in approximately 1998. Claimant reported initially that he was treated with liquid nitrogen to remove lesions from his arms and face primarily as well as a few off his back. Claimant estimated that before his diagnosis of BCC on his nose in 2008, he had approximately a dozen lesions removed at his bi-annual visits and that he had 120 to 180 removed from the face and arms and less than 10 off his back. Claimant reported that since his diagnosis of skin cancer, he routinely applies sunscreen 3-5 times per day and is extra careful to try to minimize being in the sun. Under past surgical history, Dr. Mayer noted two Mohs procedures of the nose and excision from the ear. Claimant reported that his mother had a lesion on the cheek in her 50s that he believed was skin cancer. Claimant reported that he grew up in Los

Angeles and was a “normal kid” spending time playing outside. Claimant reported that in the summertime he was often outside all day other than eating and wore pants and a t-shirt although sometimes would take the shirt off to play basketball. Claimant reported he worse sunscreen about 30% of the time and typically wore a ball cap. Claimant recalled one blistering sunburn on the left shoulder. Claimant reported that in the springtime he would tend to burn first when out in the sun and did not tan much but that he did not have problems with sunburn that made him limit or avoid being out in the sun. Claimant reported that he graduated high school in 1983 and attended college in east LA studying fire science.

29. Claimant reported that after his BCC on the nose, he started wearing sunscreen closer to five times per day. Claimant reported that in 2011, Employer started to provide sunscreen. Claimant reported he had been on the Kelly schedule working 24 hours on, 24 hours off, times three followed by 4 days off but that since 2010 he had been working 48 hours on/96 hours off. On examination, Dr. Mayer found Claimant to have blue eyes and dirty blonde hair. Claimant had multiple scattered freckles and had ruddy skin with solar elastosis on his face and neck in a distribution ending approximately at the t-shirt line. The changes due to sun exposure below the t-shirt level on Claimant’s back were noted to be a lesser degree. Dr. Mayer found an intermediate degree of chronic sun damage on the dorsal forearms beginning just above the elbow. Dr. Mayer noted several scars on the forearms, but Claimant reported those were from traumatic injuries rather than skin lesion removals.

30. Dr. Mayer assessed: BCC of the skin, actinic keratosis, and photo aging predominantly on the face and neck. She recommended continue monitoring with a dermatologist. In her discussion, Dr. Mayer noted that Claimant’s first BCC was diagnosed in 1999, 5 years after beginning work for Employer. Dr. Mayer opined that Claimant met the requirement under statue for firefighter cancer presumption. She opined that Claimant was at MMI with a 15% whole person impairment rating.

31. Dr. Mayer opined that a firefighter’s known or typical occupational exposures were capable of causing BCC. She noted that there had been industrial hygiene assessments of fire scenes and that the International Agency for Research on Cancer (IARC), part of the world health organization, had recognized numerous carcinogens as commonly found at fire scenes in the soot and smoke. Dr. Mayer opined that these included group 1 agents that were known human carcinogens, group 2A agents that were probable human carcinogens, and group 2B agents that were possible human carcinogens. She opined that unlike most other cancers, BCC had not been studied in the population of fire fighters because BCC is a non-melanoma cancer and rarely, if ever, results in death. She noted that the risk of BCC had not been studied in U.S. fire fighters to date. Despite the lack of studies, Dr. Mayer opined that within a reasonable degree of medical probability the medical literature supported the causal connection between firefighting and Claimant’s BCC. She noted a study where the application of polycyclic aromatic hydrogen containing elements were placed onto the skin of animals, and skin tumors formed with the largest number of tumors being papillomas, followed by squamous cell carcinoma, but noted that BCC was also observed. Dr. Mayer also opined that the

combination of UVA light exposure with benzopyrene and other PAHs had been found to induce production of reactive oxygen species, DNA damage, and epigenetic changes in cells with the mechanism believed to be due to PAH absorption of UV light, which increased the excited state properties. She also opined that sun exposure was the greatest risk factor and pointed out studies that had linked exposure at a young age to be the most important determinant. However, Dr. Mayer also noted studies that showed occupational exposure including outdoor works having a job in the sun for greater than 3 months of 10 years and farmers had an increased risk of BCC. Dr. Mayer opined that firefighting activities caused perspiration and a loss of sunscreen protection unless re-applied. *See* Exhibit 14.

32. Dr. Mayer also opined that Claimant had been exposed to substances known to cause BCC. Dr. Mayer noted that when Claimant began firefighting, it was not yet recognized that fire soot and smoke contained cancer-causing chemicals. She noted that firefighters could inhale smoke, get soot on their skin, swallow it, and that some chemicals were easily absorbed through the skin and could get into the bloodstream, including PAHs. She noted that the personal protective equipment had gotten better over the years but that the safety practices to reduce firefighter exposure to carcinogens were not in place during the full 32 years Claimant had worked as a firefighter. Dr. Mayer opined that Claimant had heavy exposure to sun and soot when working as a training division instruction in 2001 and from 2004-2005. She opined that Claimant spent considerable time outside in the sun during outdoor grass and brush fires, during training exercises, when washing equipment after a fire, when doing rehab during a fire, and during the fire academy. She opined that he had considerable soot on his skin while also being exposed to sun. She opined that Claimant had a high amount of occupational UV exposure from the sun that well exceeded the definition of greater than 3 months per year for at least 10 years, by an additional 22 years with the additional potentiating exposures to PAHs in soot, which are all exposures known to cause BCC. *See* Exhibit 14.

33. Dr. Mayer opined that Claimant's risk factors do not render it more probable that his BCC arose from a source outside the workplace. Dr. Mayer noted that Claimant had a number of risk factors for BCC including his light colored skin, his age of greater than 20 years, and his sun exposure in outdoor activities as a child and adult, that were not occupational exposures. She opined, however, that his sun exposure was not considered outside the range of normal activities. She opined that Claimant only had one blistering sunburn on his shoulder. Dr. Mayer opined that Claimant would be considered skin photo type II on the Fitzpatrick scale and that Claimant's photo type is more susceptible to the effects of UV radiation including photo aging and BCC. Dr. Mayer opined that Claimant with such a skin photo type, would demonstrate a greater amount of sun related changes at an earlier age and lesser degree of sun exposure than those with other photo types. She opined that Claimant had significantly sun-damaged skin on the neck above the t-shirt line and on the face. Dr. Mayer also opined that if Claimant's mother did actually have skin cancer, it would increase Claimant's risk but that Claimant did not know if she actually had skin cancer or what type of cancer. Dr. Mayer opined that having a prior BCC increases the risk of additional BCCs. She noted that in 1995 there was suspicion that Claimant had BCC 2 years prior but that the records don't show

any BCC diagnosis until 1999. Dr. Mayer opined that Claimant's sun exposure during the course of his career as a firefighter, often unprotected due to sweat causing sunscreen to come off, and the concurrent exposure to fire soot and sun together, meets the medical requirements that BCC was caused by his employment. She opined that Claimant's individual particular risk factors did not make it more probable that Claimant's BCC arose from a source outside the workplace. *See* Exhibit 14.

34. On June 19, 2017, Thomas Kurt, M.D. issued a medical toxicological report. Dr. Kurt reviewed medical records including but not limited to the reports of Dr. Mayer, Dr. Roth, Dr. Orent, and Dr. Bloch. Dr. Kurt noted that Claimant began seeing a dermatologist for skin lesions in 1998 when he was 33 years old. Dr. Kurt opined that was a young age for skin lesions to appear and was consistent with Claimant's heavy sun exposure and blistering sunburn in his teenage years and the 15 year latency period. Dr. Kurt noted Claimant's report to Dr. Mayer that he had approximately a dozen skin lesions removed at each of his bi-annual visits and had 120-180 skin lesions removed from his face and arms. Dr. Kurt also noted the records indicated Claimant was diagnosed with BCC on December 6, 2008 with a Mohs surgery to remove the lesion from the tip of his nose. Dr. Kurt further noted that Claimant was diagnosed with a second BCC on the tip of the nose in December of 2012 with another Mohs surgery on December 17, 2012. Dr. Kurt noted a positive family history of skin cancer in Claimant's mother who had a lesion in her cheek removed. Dr. Kurt also noted Claimant's childhood in Los Angeles where he was often outside all day other than eating and wore sunscreen only 30% of the time. Dr. Kurt pointed to a blistering sunburn and Claimant's report that he tended to burn first when out in the sun in the springtime. Dr. Kurt noted on skin examination, Claimant was found to have multiple scattered freckles, blue eyes, and dirty blonde hair. Claimant had a ruddy skin appearance with solar elastosis on his face and neck and an intermediate degree of chronic sun damage on his dorsal forearms. *See* Exhibit A.

35. Dr. Kurt opined that Claimant's first 1999 BCC that was removed was related to the extensive sun exposure with sunburn Claimant sustained as a teenager. Dr. Kurt also noted that sun exposure is the greatest risk factor for BCC with studies linking exposures at a young age as the most important determinant. Dr. Kurt opined that the Daniels study and the LeMasters study do not support that BCC is associated, causative, or risk related to firefighting as an occupation. Dr. Kurt opined that Claimant's BCC was related to Claimant's tremendous solar ultraviolet exposure in Claimant's childhood and teenage years in Los Angeles evidenced by multiple types of skin damage throughout Claimant's body that are changes not seen among firefighters under the covered designed clothing. Dr. Kurt noted Claimant's lentigenes, benign nevi, actinic keratosis, dermatoheliosis, and xerosis and the locations on Claimant's body in areas covered by a uniform shirt evidencing sun damage exposure in childhood and teenage years. Dr. Kurt again cited studies that ultraviolet radiation is the principal environmental cause of BCC and noted that BCC occurs almost exclusively on sun-exposed body sites among fair-skinned populations. *See* Exhibit A.

36. On July 10, 2017, Dr. Mayer issued a follow up evaluation report after a follow up evaluation on May 4, 2017. Dr. Mayer noted she had reviewed again Claimant's

past firefighter exposures and consideration of BCC and the medical requirements of the firefighter cancer presumption statute. Dr. Mayer reviewed photographs showing exposure to soot on Claimant's body during various times during his career. She also reviewed records from Employer concerning personal protective clothing and the history of the gear and decontamination procedures. Dr. Mayer opined that the photographs document the conditions Claimant had described with repeated sun exposure when Claimant's face, neck, and lower arms were covered with soot. She also opined that several photographs show Claimant to have a red and sweaty face. She opined that Claimant had particularly extended exposure to soot on his skin including when being out in the sun when he served as a training division instructor for 4-5 months in 2001 and for another 2 years from 2004-2005. Dr. Mayer reviewed Dr. Kurt's June 19 report and commented on it. *See* Exhibit 15.

37. Dr. Mayer opined that although Claimant had sun exposure in outdoor activities as a child and teenager, the exposures were not outside the range of normal activities. Dr. Mayer opined that there were many occasions when Claimant was out in the sun in short sleeve shirts while on duty. Dr. Mayer noted that adult sun exposures had been found to increase BCC risk. Dr. Mayer agreed that UV radiation is the principle risk factor for BCC but did not agree that it was the only risk factor. Dr. Mayer opined that evidence of an increased SCC risk and to a lesser extent BCC was found at the highest level of exposure to arsenic. Dr. Mayer agreed that IARC, the LeMasters meta-analysis, and the Daniels study provided no support that BCC is associated, causative, or risk related to firefighting as an occupation but opined that the studies did not include BCC and that BCC had rarely been studied because it rarely leads to death and is not a reportable cancer. Dr. Mayer opined that studies support that other carcinogens are linked to cancer of skin keratinocytes including BCC. Those carcinogens, she opined, include arsenic and PAHs and an enhanced risk of carcinogenic cell injury from the combination of UV radiation with the chemical exposures. Dr. Mayer opined that concurrent PAH and sun exposure occurs when firefighters are out in the sun with soot on their skin. She also opined that increased temperatures can significantly increase dermal absorption. Dr. Mayer opined that arsenic, an established exposure at fire scenes, can play a role as a co-carcinogen with UV and PAHs and can cause DNA damage with UV radiation. She opined that formaldehyde may play a similar role and has been found to induce DNA damage and delay DNA repair after UV irradiation in human keratinocytes. Dr. Mayer opined that Claimant had repeated opportunity for frequent and often unprotected sun exposure during his career even with the use of sunscreen. She opined that Claimants' particular risk factors did not render it more probable that the BCC arose from a source outside of the workplace including the risk from childhood sun exposure. *See* Exhibit 15.

38. A study referenced and relied upon by the experts found farmers to have a higher risk of BCC than the general population. The study noted that sun overdosing in childhood and adolescence and a positive family history of BCC were the strongest independent risk factors for BCC development. It also found the main risk factor for developing BCC was exposure to UV radiation, particularly high-dose exposure at a young age. *See* Exhibit 18.

39. A study referenced and relied upon by the experts found that arsenic can act a as co-carcinogen in the skin with an increased risk in skin cancer when exposed to both UV and arsenic in drinking water. It concluded that arsenic is a co-carcinogen with UV in skin carcinogenesis likely by adversely influencing DNA repair and or ROS mediated damage. *See* Exhibit 17.

40. Claimant testified at hearing. Claimant recalled that he had about 6 lifetime sunburns with blisters. Claimant testified that in a 24-hour shift, he would be exposed to the sun for about 6 hours and that he worked approximately 10 shifts per month. Claimant also testified to the range of both sun and fire exposures he had sustained during his long career as a firefighter. Claimant testified that the soot often permeated and covered his skin.

41. Dr. Kurt testified at hearing. Dr. Kurt noted Claimant's record of BCC in 1993 on the right upper posterior arm. Dr. Kurt opined that risk factors for BCC included sun and uv radiation, fair skin coloring, family history, and living in a sunny area. Dr. Kurt opined that soot exposure and soot combined with sun exposure was a risk factor for squamous cell carcinoma (SCC). Dr. Kurt opined that actinic keratosis are skin lesions caused by sun exposure and blistering sunburns and that they were pre-cancerous but it was not uncommon for BCC to develop in the same spot as an actinic keratosis. Dr. Kurt opined that sun exposure damages the basal cell of the skin. Dr. Kurt opined that immunity declines with age. Dr. Kurt opined that BCC takes time to occur and that there is an approximate 20-year latency period. Dr. Kurt opined that SCC with the exposure to soot could be concerning but that BCC has absolutely not been shown to be linked to firefighting.

42. Dr. Kurt testified that he had reviewed Dr. Mayer's report. He disagreed with her regarding polycyclic aromatic hydrocarbons and testified that they were not associated with BCC. He opined that they were linked to SCC but not BCC. Dr. Kurt testified that he reviewed the very heavy sun exposure as a youth that Claimant had with no effective sunscreen and noted that the FDA did not come out with SPF ratings until 1990. Dr. Kurt also testified that he reviewed Dr. Bowman's reports where there were multiple skin problems associated with excessive sun exposure documented. Dr. Kurt opined that Claimant had heavy sun exposure in his youth in a southern latitude, had a Fitzpatrick type II skin type, a family history of skin cancer, and noted the first BCC on the right upper arm was documented at a young age of 28. Dr. Kurt opined that the BCC from the right upper arm in 1993 couldn't be related to firefighting because it was in an area that would have been covered and protected from sun exposure and that it was more likely due to adolescent exposure given latency periods. Dr. Kurt testified that the 1993 BCC was more consistent with latency period due to youth exposure. Dr. Kurt opined that the first firefighting exposures would have been in 1985 and that 1985 to 1993 was not significant enough of a latency period. Dr. Kurt opined that if Claimant had no exposure after youth, i.e. worked in an office environment, Claimant still would have had BCC and the same lesions develop. Dr. Kurt opined that Claimant's firefighting job and exposures did not contribute to Claimant's BCC. Dr. Kurt also testified noting that the

firefighters cancer presumption statute did not break up the categories of skin cancer, including SCC, BCC, and general skin cancer.

43. Dr. Roth testified at hearing. Dr. Roth noted Claimant's body had extensive solar related skin damage all over including in areas not exposed to the sun at work as a firefighter. Dr. Roth noted that the level of Claimant's skin damage showed that Claimant had extensive and substantial sun exposure as a youth. Dr. Roth opined that Claimant's skin type afforded Claimant little protection from the sun and that the lesions Claimant has on his skin now demonstrate where in the past Claimant had exposure significant enough to damage his skin. Dr. Roth noted that Claimant had his first BCC in 1993 on the right upper arm that was due to sun exposure as a child. Dr. Roth opined that Claimant's sun exposure and damage was so sufficient that cell damage had risen to the level of cancer at the age of 28. Dr. Roth opined that in 1993, Claimant's likelihood to get BCC again and to have recurrence was 100%. Dr. Roth noted the records showed that in 1995 Claimant needed to be closely monitored. Dr. Roth testified that the studies performed had not demonstrated concern with BCC but most related to SCC. Dr. Roth testified that Claimant's BCC was not work related and not caused by work exposures. Dr. Roth opined that Claimant's BCC was due to his unique susceptibility, childhood sunburns, and the level of skin damage shown in Claimant's 20's with his first BCC skin cancer in his 20's. Dr. Roth opined that Claimant's BCC condition is the same as it would have been no matter what type of job he worked as an adult.

44. Dr. Mayer testified at hearing. She testified that in the course of his employment Claimant had sun and soot exposures as well as sunburns. She opined that it was more probable Claimant's BCC arose from sources inside work. Dr. Mayer opined that even after cancer initiation, and a damaged cell mutates, there still need to be promoters to drive the cancer forward. Dr. Mayer opined that childhood sun exposure could have been an initiating event but additional hits were required to drive the cancer forward. She opined that during his firefighting career, Claimant had exposure to sun, soot, and arsenic. Dr. Mayer testified that there is a synergistic mechanism and a combination of the sun exposures and chemical exposures. She testified that Claimant had concurrent exposures of sun and soot. She opined that it was not medically probable that the cause of Claimant's BCC was due to exposures outside of work and that the exposure as a child were not the cause because other promoters were needed. Dr. Mayer agreed that all white men had a 30-39% chance of getting BCC.

45. Dr. Orent also testified at hearing. Dr. Orent testified that Claimant's BCC was related to his work as a firefighter and that the primary contributor was the fire exposures over Claimant's 32-year career. Dr. Orent opined that although Claimant was born with susceptibility to skin cancer that did not create the disease. Dr. Orent opined that the solar exposure combined with the chemical exposures during his career were the reasons for Claimant's BCC. He opined that the known carcinogens that Claimant was exposure to and the sun and the interplay were more likely the cause of BCC than the childhood exposures. Dr. Orent opined that Claimant's work exposures were extensive as compared to his childhood exposures. Dr. Orent also pointed out that the immune system is affected by shift work.

46. The opinions of Dr. Kurt and Dr. Roth are found more persuasive than the opinions of Dr. Mayer and Dr. Orent. The opinions of Dr. Kurt and Dr. Roth are consistent with Claimant's significant history of sun exposure as a youth and the extensive and significant sun damage noted by Dr. Bowman in 1995, including to areas of the back that were not exposed to sun during Claimant's firefighting career.

47. Claimant had BCC of the right arm in 1993 at 28 years old, BCC of the right cheek in 1999 at 34 years old and BCC of the left wrist in 2007 at 42 years old. During his treatment from 1995-2007 he had numerous skin lesions removed and numerous actinic keratosis noted. Claimant had significant sun damage to areas of his skin that would be covered by a firefighting uniform. Not surprisingly, Claimant continued to have BCC lesions in 2008 and 2012 and will likely to continue to have BCCs in the future.

48. The ALJ finds by clear and convincing evidence based on the evidence and testimony as a whole that Claimant's BCC was not caused or contributed to by his firefighting work related chemical or sun exposures.

49. Claimant undoubtedly has been exposed to the sun during his career as a firefighter. He also undoubtedly has been concurrently exposed to soot and sun at the same time at different points in time during his career and to the gamut of known typical firefighter exposures. However, the strongest causative link to BCC is sun exposure. It is clear that Claimant had significant and extensive damaging exposure to his skin during his youth and adolescence. Claimant rarely wore sunscreen during that time, with his estimate being that 70% of the time he wore no sunscreen. Claimant has fair skin, type II on the Fitzpatrick scale. Claimant testified to 6 blistering sunburns. Claimant lived in California, a high sun exposure location. Claimant had significant extensive visible sun damage to his skin in 1995 when only approximately 30 years old. Claimant had BCC first in 1993 and again in 1999 at young ages where a latency period would put him back to early sun exposure.

50. The overwhelming evidence shows that Claimant unfortunately sustained significant sun damage in his youth before the prevalence of sunscreen with adequate protection. This is the greatest causative factor to his BCC with clear skin damage noted to Claimant's skin in his late 20s and early 30s.

51. Based on a review of the evidence as a whole, the ALJ finds that the Respondents have established by clear and convincing evidence that Claimant's BCC is due to his childhood/adolescent sun exposure and not due to his occupational exposures as a firefighter, such that the presumption of compensability is rebutted with regard to specific causation.

CONCLUSIONS OF LAW

Generally

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

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

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

Overcoming the DIME physician opinion and Firefighter Presumption Under § 8-41-209, C.R.S.

For an injury to be compensable under the Act, it must "arise out of" and "occur within the course and scope" of employment. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). Ordinarily, the claimant has the burden of establishing his or her entitlement to benefits by a preponderance of the evidence. *City of Boulder v. Streeb*, 706 P.2d 786, 789 (Colo. 1985). The question of causation is generally one of fact for determination by the ALJ. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000).

Section 8-41-209, C.R.S., enacted by Colorado's legislature in 2007, reverses the burden of proof for firefighters who have developed certain types of cancers and who have satisfied the threshold criteria set forth in the statute. The statute provides:

> (1) Death, disability, or impairment of health of a firefighter of any political subdivision who has completed five or more years of employment as a firefighter, caused by cancer of the brain, skin, digestive system hematological system or genitourinary system and resulting from his or her employment as a firefighter, shall be considered an occupational disease.
>
> (2) Any condition or impairment of health described in subsection (1) of this section:
>
> (a) Shall be presumed to result from a firefighter's employment if, at the time of becoming a firefighter or thereafter, the firefighter underwent a physical examination that failed to reveal substantial evidence of such condition or impairment of health that preexisted his or her employment as a firefighter; and
>
> (b) Shall **not** be deemed to result from the firefighter's employment if the firefighter's employer or insurer shows **by a preponderance of the medical evidence** that **such condition or impairment did not occur on the job**.
>
> **. .**
>
> § 8-41-209, C.R.S. (emphasis added).

In *City of Littleton v. Industrial Claim Appeals Office*, 370 P.3d 157, 165 (Colo. 2016), the Colorado Supreme Court determined that the statutory presumption embodied in §8-41-209(2), C.R.S. "is substantive in that it remains in the case as a substitute for evidence." *Id.* at 165. However, the court emphasized that the statutory presumption "is not conclusive, or irrebuttable." *Id*. at 168. The employer can overcome the presumption by producing a preponderance of the medical evidence that the firefighter's cancer "did not occur on the job." *Id*. at 165, 169. While the court stated that the employer faces a "formidable" burden "because the employer is tasked with proving a negative," *Id*. at 172, the court also noted that the employer's burden does not require an especially high degree of proof. Rather, in order to meet its burden under §8-41-209(2)(b), the employer or insurer must show that it is "more probable than not" that the firefighter's condition or impairment "did not occur on job." *Id.* at 169. The *City of Littleton* court clarified the types of evidence that employers can use to rebut the statutory presumption and prove that a firefighter's cancer is not work-related. The employer may rebut the presumption with evidence establishing the absence of either general or specific causation. *Id.* at 172. Specifically an employer may prove by a preponderance of the medical evidence either: "(1) that a firefighter's known or typical occupational exposures are not capable of causing the type of cancer at issue; or (2) that the firefighter's employment did not cause the firefighter's particular cancer, where, for example, the claimant firefighter was not exposed to the cancer-causing agent, or where the medical evidence renders it more

probable that the cause of the claimant's cancer was not job-related." *Id*. Notably, §8-41-209(2), C.R.S. does not require the employer "to disprove causation from every conceivable substance." *Id.* at 171. In fact, if a firefighter's exposure is "speculative, remote or illogical, then it is not typical of the occupation." *Id.*

With regard to general causation, the *City of Littleton* court noted that epidemiological evidence is "'highly probative because it considers human physiology and the likelihood that a potential environmental factor is capable of entering the body, traveling to a particular organ, and interacting with that organ in a way that can cause a particular cancer.'" *Id.* at 170. The court cited a 10th Circuit opinion for the proposition that, "[w]hile the presence of epidemiology does not necessarily end the inquiry, where epidemiology is available, it cannot be ignored. As the best evidence of general causation, it must be addressed." *Id.* (citing *Norris v. Baxter Healthcare Corp.,* 397 F.3d 878, 882 (10th Cir. 2005)). The *City of Littleton* court expressly concluded that employers may rely on epidemiological evidence to show the lack of an association or general causal relationship between known or typical substances to which the firefighter is likely to be exposed on the job and the firefighter's particular condition or impairment. The ALJ may then determine whether that medical evidence shows, by a preponderance, that the claimant firefighter's cancer "did not occur on the job." *Id.* at 171.

In the companion case of *Industrial Claim Appeals Office v. Town of Castle Rock*, 370 P.3d 151, 157 (Colo. 2016), the Supreme Court further determined that to meet its burden of proof under §8-41-209(2)(a), the employer is not required to establish a specific alternate cause of the firefighter's cancer. The court addressed the employer's ability to rebut the presumption of compensability by showing a lack of specific causation and noted that the employer may meet its burden to show that the firefighter's condition did not occur on the job by presenting risk-factor evidence demonstrating that it is more probable than not that a particular firefighter's cancer was caused by something other than the firefighter's employment. *Id.* at 156-157.

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

It is not disputed that firefighters are exposed to sun during their employment or that sun exposure is the greatest causative factor for the development of BCC.

Respondents in this case are not attacking the possible existence of general causation or that BCC could possibly be caused by sun exposure as a firefighter. Rather, they are arguing the specific causation in this case. Here, Respondents argue that Claimant's extensive skin damage, BCC in 1993, and extensive exposure as a child are the specific cause of his current BCC as opposed to any sun and/or sun/soot exposure as a firefighter.

Respondents have met their burden on specific causation and have shown that Claimant's BCC is not a result of his firefighting duties. Respondents successfully rebutted the presumption of compensability pursuant to § 8-41-209, C.R.S. based on a lack of specific causation. As found above, Claimant's greatest risk factor for developing BCC was his childhood exposure and he had significant and extensive exposure as a child. At the young age of 28, Claimant's damage included his first BCC on his right upper arm. At approximately the age 30, Dr. Bowman noted Claimant's significant level of sun damage to various body areas. Dr. Bowman and Dr. Miller noted in their reports that Claimant's current 2012 BCC was deemed work related per § 8-41-209, C.R.S. Dr. Bowman specifically noted that according to statute, Claimant's BCC was required to be covered by workers' compensation. Neither Dr. Bowman nor Dr. Miller performed a causation analysis nor did they review or reference the studies surrounding BCC, firefighting, exposures, and risk correlation of BCC. Their opinions incorrectly assumed that the BCC was required to be covered. Although the statute creates a presumption, there is no requirement of coverage since the presumption is rebuttable. Dr. Bloch, the DIME physician, also took a similar position. In his report, Dr. Bloch noted that § 8-41-209, C.R.S. covers skin cancer. Dr. Bloch opined that the BCC was considered compensable under § 8-41-209, C.R.S. unless Employer persuaded or showed that it did not occur on the job. Dr. Bloch noted that Employer did not appear to be trying to show Claimant's BCC was not work related. Dr. Bloch opined that it was more probably work related.

Claimant argues that Respondents must overcome DIME physician Dr. Bloch's opinion that Claimant's BCC is work related by clear and convincing evidence. Respondents argue that Claimant, in the first instance, must establish compensability by a preponderance of the evidence and given the presumption statute, Respondents argue that it is their burden to show the BCC is not work related but by a preponderance of the evidence. Respondents argue that only once compensability is determined, would the burden be clear and convincing to overcome the permanent partial disability (PPD) rating provided by the DIME physician.

Assuming Claimant is correct that the burden of proof is clear and convincing, Respondents have still met this standard. The evidence is overwhelmingly clear and convincing that Claimant's BCC is not work related. Dr. Bloch's opinion above is found to be in error. Dr. Bloch incorrectly believed that Employer was not attempting to rebut the presumption of compensability. Similar to Dr. Bowman and Dr. Miller, Dr. Bloch referred to the presumption statute covering skin cancer. Dr. Bloch erred by failing to do a casual analysis of whether or not the Claimant's specific BCC is work related by looking at Claimant's specific exposures both work and personal and comparing these exposures to the known scientific and medical literature. Rather, Dr. Bloch relied on his assumption

that Employer was not contesting the casual relatedness and thus opined under § 8-41-209, C.R.S. that Claimant's BCC was work related. Dr. Bloch failed to mention various studies and medical literature and failed to analyze the firefighting exposures at work versus the childhood exposures and family history before providing his opinion. As found above, Dr. Bloch did not review relevant medical records. His review noted specifically that he had reviewed dermatology records from 2008 to 2015 before providing his DIME opinion. The records from Dr. Bowman dated back to 1995 and showed several prior instances and diagnoses of BCC that Dr. Bloch was not provided. Further, it is clear that even before 1995, Claimant had been not only evaluated but treated for a prior BCC of the right upper arm. By not having the records, Dr. Bloch was unable to complete a full causal analysis or provide an opinion that carries significant weight. Respondents have established that Dr. Bloch erred in finding a casual connection.

Respondents have established both by preponderant and by clear and convincing evidence that Claimant's BCC is not causally related to his employment as a firefighter. When reviewing the medical evidence, scientific literature, and Claimant's exposures as a whole, it is clear and convincing that Claimant's BCC was due to his significant childhood exposures and significant skin sun damage at a young age. As found above, Claimant had an extreme level of skin damage noted at a very young age including to areas of his back that were not exposed during his firefighting work. Claimant had BCC in 1993 and in 1999, both occurrences when he was under the age of 35. These cancers, before the age of 35, and the skin examination notes show the extreme level of damage to his skin at a very young age. The known latency periods and a 20-year development would date the exposures causing those BCCs back to Claimant's youth, when he was approximately 8 and 14 years old. This is consistent with his described significant youth sun exposures with multiple blistering sunburns, his skin type that tends to burn first, and his history of being outside during the summer almost constantly with very little sunscreen use. Dr. Orent opined that Claimant's work sun exposure far exceeded Claimant's personal sun exposure. This is not persuasive. Claimant testified that his work related sun exposure was approximately 6 hours out of every 24-hour shift. Claimant also testified he worked approximately 10 shifts per month, and had a total of 60 hours per month of work related sun exposure. However, he also testified and reported to medical providers that after being diagnosed with BCC, he regularly used sunscreen and tried to cover up. Assuming this all to be fairly accurate, Claimant was first diagnosed with BCC in the early 1990s, wore sunscreen since, and was exposed approximately 60 hours per month to the sun. This exposure is far less than his childhood exposure where he reported being outside almost constantly (coming in only to eat) during summers in California and wearing sunscreen only 30% of the time (when his mom could catch him). He reported approximately 6 blistering sunburns as a child and none during his employment as a firefighter. As found above, Claimant inaccurately reported to Dr. Orent that he never had a severe sunburn as a child and that he wore sunscreen as a child. His more accurate testimony admitted approximately 6 blistering sunburns as a child and that he wore sunscreen approximately 30% of the time, when his mom could catch him.

Similarly, Claimant's reports to Dr. Mayer were not entirely accurate or consistent with the documented medical history. Dr. Mayer believed Claimant to have had one

blistering sunburn in youth. Claimant reported to her that he first began to see a dermatologist for lesions in approximately 1998, when he had BCC in 1993 and started seeing Dr. Bowman in 1995 for continued routine skin checks. Claimant was treating well before 1998 for his multiple significant skin lesions and skin damage.

It is clear from the records that, unfortunately, Claimant sustained significant sun related skin damage in his youth and adolescence that showed visibly and obviously by his late 20s and early 30s. Claimant had BCC in 1993 and 1999. These BCCs and his subsequent 2012 BCC (at issue in this case) are the expected course for someone who has so significantly damaged his skin in his youth. The opinions of Dr. Kurt and Dr. Roth are credible, persuasive, and overwhelmingly consistent with the weight of the medical evidence. The opinions of Dr. Kurt and Dr. Roth show both by preponderant and by clear and convincing evidence that the DIME physician was incorrect and erred by making a causal connection between Claimant's BCC and his firefighting employment. Claimant's BCC is not work related. It is due to his significant skin damage he sustained in his youth and adolescence while spending a significant amount of time outside without sunscreen. This skin damage showed up very early in his late 20s and early 30s, consistent with the medical literature and expected latency periods. Claimant had skin cancer in his late 20s and early 30s consistent with his youth exposures and latency periods. Respondents have met their burden to overcome the DIME opinion, to overcome the statutory presumption of compensability (which only mentions skin cancer and does not break down the different types of skin cancer), and to withdraw their admission of liability.

Withdrawing an Admission of Liability

The Court of Appeals has previously concluded that the burden of proof to establish compensability remained on the claimant even when an employer was attempting to withdraw an admission of liability. However, the Colorado Workers' Compensation Act has since been amended to change the burden of proof when respondents are attempting to withdraw admissions of liability. Specifically, respondents must now prove by a preponderance of the evidence that the claimant did not suffer a compensable injury as defined under Colorado law. §8-43-201(1), C.R.S.

Because Respondents filed a medical only General Admission of Liability on April 24, 2013, they bear the burden of proof to establish by a preponderance of the evidence that Claimant did not sustain a compensable injury. As found, Respondents have not only rebutted the presumption of compensability under §8-41-209 C.R.S. by a preponderance of the evidence, but they also have overcome the DIME physician's causal relatedness opinion by clear and convincing evidence. Consequently, Respondents have satisfied their burden under §8-43-201(1), C.R.S. and are permitted to withdraw their admission of liability in this claim.

ORDER

IT IS HEREBY ORDERED that:

1. Respondents have overcome DIME physician Dr. Bloch's opinion. Respondents have established by clear and convincing evidence that Claimant's BCC is not causally related to firefighting.

2. Respondents have successfully rebutted the presumption of compensability under § 8-41-209, C.R.S.

3. Respondents have thus made the necessary showing to withdraw the medical only General Admission of Liability filed on August 30, 2013.

4. As the claim is not compensable, the issue of the PPD impairment rating is not addressed.

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

DATED: April 2, 2019

/s/ Michelle E. Jones

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

STATE OF COLORADO **OFFICE OF ADMINISTRATIVE COURTS** 1525 Sherman Street, 4th Floor Denver, CO 80203	
In the Matter of the Workers' Compensation Claim of: **R,** Claimant, vs. **U,** Employer, and **A,** Insurer, Respondents.	▲ **COURT USE ONLY** ▲ **CASE NUMBER:** **WC 5-071-593-001**

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Hearing in this matter was held on February 21, 2019, before Margot W. Jones, Administrative Law Judge. Claimant was present and was represented by William R. Finn, Esq. Linda Newbold, Esq. represented Respondents. This matter was digitally recorded in Courtroom 2 convening at 1:30 p.m. in Denver, CO. The parties' exhibits 1, 3-6 and A-J were admitted into evidence.

In this order, R is referred to as "Claimant," Respondent-Employer U is referred to as "Employer," Respondent-Insurer A will be referred to as "Insurer" and Employer and Insurer collectively as "Respondents."

Also in this order, "ALJ" or "Judge" refers to the Administrative Law Judge, "C.R.S." refers to Colorado Revised Statutes, "OACRP" refers to the Office of Administrative Courts Rules of Procedure, 1 CCR 104-1, WCRP" refers to Workers' Compensation Rules of Procedure, 7 CCR 1101-3 and "the Act" refers to the Workers' Compensation Act of Colorado, Section 8-40-101, et seq., C.R.S.

ISSUES

1) Whether Claimant proved by a preponderance of the evidence that she was disabled from her usual employment and therefore is entitled to an order awarding temporary total disability benefits (TTD) from April 12, 2018, and ongoing,

2) Whether Respondents proved by a preponderance of the evidence that Claimant engaged in a volitional act causing her wage loss and therefore is not entitled to an order awarding indemnity benefits, and

3) Whether Respondents proved by a preponderance of the evidence entitlement to an offset for unemployment benefits received against an award of TTD.

STIPULATION OF FACT

The parties reached the following stipulation: 1) Claimant's average weekly wage for this claim is $1103 per week, which includes the COBRA benefit increase. This stipulation was approved and accepted by the ALJ.

FINDINGS OF FACT

1. Claimant is a 49 year old female. She was hired by Employer on February 16, 2015, as an Environmental Health and Safety Specialist. Claimant's position is an overtime exempt position with Employer. Claimant did not work in the field of environmental health and safety prior to her employment with Employer. She previously worked as a parole officer. Her job duties for Employer included operations, inspection and management of the hazardous waste on campus, as well as compliance with Universal Waste and Recycling regulations such as proper disposal of light bulbs, batteries, etc. Claimant also performed duties of mold management, storage tank compliance and emergency response to situations such as fire alarms, water leaks and resident complaints. Claimant also performed some training and was responsible for lab safety.

2. On February 8, 2018, Claimant was lifting an empty steel drum into a truck bed and sustained an injury to her back. Claimant was seen for urgent care, then elected to treat with Workwell. Claimant was given a ten pound lifting restriction at her initial visit and Workwell continued those restrictions. Employer accommodated her restrictions and Claimant returned to modified duty. There was no lost time from work.

3. During the course of her employment, Claimant was supervised by Glenn A_____, Employer's Director of Environmental Health and Safety. Mr. A_____ was employed by Employer for thirteen years.

4. While on restrictions, Employer accommodated Claimant's restrictions. Claimant was able to continue to perform the majority of her job duties. Claimant had "moderate restrictions" post-injury and she was not doing any lifting. Claimant testified she could not "move fast" while working and could not stoop or bend. Claimant further testified that she "has to be fast" in her job and that she "could not keep up."

5. Mr. A_____ testified the majority of Claimant's job consisted of office and computer work as well as attending inspections and other meetings which would not involve exceeding her ten pound lifting restriction. He denied that Claimant's job required her to "move fast" or that he had complaints about the speed of the performance of Claimant's job duties. Claimant's coworkers were available to help her with any duties that did not meet her restrictions. Mr. A_____' testimony was found to be more credible and persuasive than Claimant's testimony.

6. Claimant testified that she was never formally written up regarding her job performance issues. However, she admitted there were discussions regarding her job performance with her supervisor, including one that occurred in January 2018. Claimant recalled that her supervisors discussed her lack of initiative, organizational skills, compliance documentation, her hours and her coming in to work late, among other things. Claimant felt that her restrictions lowered her value to Employer, though she did not provide an explanation of specifically why this was true.

7. During Claimant's employment for Employer, she underwent additional on-the-job training as well as formal training for her job. Mr. A_____ testified that he performed Claimant's training along with others trainers. Mr. A_____ maintained an open door policy with his staff members and encouraged them to come to him for assistance if needed. Claimant exhibited problems with her job performance within a year and a half of starting work for Employer. Mr. A_____ observed significant issues with Claimant's job performance. Over time, these issues did not improve. Although Mr. A_____ hoped that she would improve, that never occurred.

8. Mr. A_____ held one on one meetings with Claimant, a minimum of once a month, during the course of her employment. During these meetings, they would sit down together and discuss Claimant's projects that needed to be completed, goals that were not being met and any issues with her performance such as missing excessive time and organizational issues.

9. In June 2017, Mr. A_____ observed that Claimant was disorganized, repeated mistakes about which she had previously been counseled, produced diminished quality work and continued to lack initiative. As an example, Mr. A_____ credibly testified that, on June 27, 2017, Claimant sent him an email asking whether the School of Nursing could dispose of biohazard waste in the trash. Mr. A_____ replied to Claimant's email citing multiple regulatory requirements and asked her to review the campus Biological Safety Manual. At the point of Claimant's question, she had been in charge of biohazard waste removal since her hire two years earlier, in February 2015. She had been trained multiple times and should have known the Employer's procedures in this regard. Mr. A_____ found it "completely unacceptable" that Claimant would be asking such a rudimentary question and responding incorrectly to this situation after two years and three months of employment being in charge of this issue from the beginning.

10. Claimant exhibited a pattern of repeatedly asking very basic questions that should already be known after going through training and performing the job for several years. Between

June 2017 and January 2018, Claimant exhibited multiple other failures to comply with regulations and to perform her job in an acceptable and organized manner. Clamant failed to maintain the hazardous waste manifest booklet in an accurate and organized manner. Mr. A_____ explained that these types of violations can result in a notice of violation if Employer was inspected by a government agency.

11. In January 2018, Mr. A_____ met with Claimant and reviewed her stated goals for 2017-2018. He informed her that her goals had not been started and/or lacked initiative. He counseled her regarding her failure to prioritize projects and assignments. Mr. A_____ frequently found her disorganized and unprepared for their regularly scheduled monthly meetings. Claimant also continued to ask Mr. A_____ to walk her through her projects and assignments step-by-step rather than using her knowledge, training and her own research to perform her job duties. She continued to be disorganized and unprepared for meetings with other department heads and outside parties. Though no written warning was given, Mr. A_____ testified Claimant was told she needed to "stop doing this as it could hurt us," meaning Employer. These comments were made to Claimant as far back as August 2017.

12. Mr. A_____ approached Employer's Director of Human Resources, Marshall P_____, (DHR) in December 2018 to discuss his concerns and recommended that Claimant be terminated. The DHR has been employed by Employer for nineteen years.

13. Despite Mr. A_____' discussion with the DHR, Mr. A_____ continued to work with Claimant on her issues. He confirmed that he had a meeting with Claimant and another supervisor Betty Rutt on January 11, 2018, and discussed Claimant's performance issues specifically. Mr. A_____ testified that he advised Claimant if the issues were not corrected in a month it could result in her termination.

14. For a few days after that meeting, Claimant exhibited initiative and Mr. A_____ hoped that this would represent a permanent change. Therefore, Claimant was not terminated over incidents that occurred in February shortly after the meeting occurred. However, within a week or two, her performance again fell back to her usual disorganized and unprepared conduct. Ultimately, Mr. A_____ felt that Claimant could no longer remain employed and needed to be terminated.

15. As her supervisor, Mr. A_____ has the delegated authority to terminate Claimant's employment, though the Director of Human Resources serves in an advisory role in those decisions. Notably, Employer does not have any formal disciplinary procedure as it relates to exempt status employees such as Claimant, only for classified staff.

16. On March 16, 2018, Mr. A_____ went to the DHR and advised him that he wanted Claimant terminated from employment. Claimant was placed on administrative leave while Employer's HR department performed additional investigation. While on leave, Claimant did not perform any job duties and was paid her full salary.

17. As part of this investigation, Mr. A_____ was asked to prepare a memorandum outlining the performance issues and the reasons he felt that Claimant should be fired. This was

prepared on March 22, 2018. Mr. A_____ listed in a memo his bases for Claimant's termination. Claimant was formally separated as of April 12, 2018.

18. Claimant received unemployment benefits from September 23, 2018, forward. Claimant receives unemployment benefits at the rate of $520.00 per week.

19. The DHR placed Claimant on administrative leave as of March 16, 2018. Administrative leave allows the employee to be paid while employment issues are investigated.

20. The DHR met with Claimant in person on March 16, 2018, and explained there were issues with her performance. He explained that the decision to place Claimant on administrative leave did not immediately impact her employment status or pay. During this meeting Claimant did not mention her workers' compensation claim.

21. Mr. P_____ reviewed Claimant's personnel file and also discussed the issues further with Mr. A_____. Following his investigation, the DHR supported the decision to terminate Claimant. In this case, because Claimant had some FMLA time and was traveling to see her ill mother, Mr. P_____ was unable to meet with her in person as he would normally do. Since the leave had lasted for almost a month already, he talked to her over the phone on April 12, 2018, advising her that her employment was terminated.

22. Based on the totality of the credible evidence, Respondents sustain their burden of proof by a preponderance of the evidence to establish that Claimant engaged in a volitional act that brought about her wage lost, the termination of her employment. Mr. A_____ was found to be more credible than Claimant in regards to his testimony about unsuccessfully coaching and counseling Claimant about her job performance and about the basis for Claimant's termination.

23. Claimant has not established a subsequent causal connection between her wage loss and her industrial injury as opposed to her termination from employment. The medical records reflect only miniscule changes in the work restrictions, and claimant's subjective complaints changed only slightly after her termination. Claimant's diagnoses did not change and her treatment was not significantly altered post-termination. Claimant testified that she had the lifting issues all along after her injury. The medical records document pain complaints both before and after the termination. Claimant did not offer any additional testimony to establish an actual worsening of her condition post-termination sufficient to warrant an award of temporary total disability benefits.

24. Based on a totality of the evidence presented, Claimant has failed to establish a worsening of her condition sufficient to prove that the causal connection between Claimant's wage loss and her termination from employment had ended. This is especially true since Claimant's direct supervisor's uncontroverted testimony was that even her subsequent five pound restriction would have been accommodated with modified duty if not for her termination for cause.

CONCLUSIONS OF LAW

General Legal Principles

1. The purpose of the Act is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-201, C.R.S. The claimant shoulders the burden of proving by a preponderance of the evidence that he is a covered employee who suffered an "injury" arising out of and in the course of employment. Section 8-43-301(1), C.R.S.

2. The claimant must prove by a preponderance of the evidence that his injury was proximately caused by an injury arising out of and in the course of his employment with the employer. Section 8-41-301(1)(b) and (c), C.R.S.*; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

3. An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The arising out of element is narrower and requires the Claimant to show a causal connection between the employment and the injury such that the injury had its origins in the employee's work related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Triad Painting Co. v. Blair, supra.*

4. In rendering a decision, the ALJ must make credibility determinations, draw plausible inferences from the record, and resolve essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office,* 84 P.3d 1023 (Colo. 2004). In determining credibility, the ALJ considers the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. Colorado Jury Instructions, Civil, 3:16.

Indemnity benefits/Termination for cause

5. Claimant alleges entitlement to indemnity benefits. Respondents respond initially that Claimant never suffered a wage loss since she was offered modified duty employment. Respondents further assert that Claimant's separation from employment was caused by her poor job performance, a volitional act, and therefore Claimant's wage loss was not caused by the work injury and recovery of indemnity benefits is not warranted.

6. Sections 8-42-105(4), C.R.S. and 8-42-103(1)(g), C.R.S. (referred to as the termination statutes), contain identical language stating that in cases "where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061, 1064 (Colo.App. 2002), the Colorado Court of Appeals held that the term "responsible" reintroduced into the Workers' Compensation Act the concept of "fault." Hence, the concept of "fault" as it is used in the unemployment insurance context is instructive for purposes of the termination statutes. In that context, "fault" requires that the claimant must have performed some volitional act or exercised a degree of control over the circumstances resulting in the termination. *See Gonzales v. Industrial Commission,* 740 P.2d 999 (Colo. 1987). Whether the claimant is responsible for the termination of his employment must be based upon an examination of the totality of circumstances. *Id*. As the ALJ correctly recognized, the burden to show that the claimant was responsible for his discharge is on the respondents. *See Gilmore v. Indus. Claim Appeals Office,* 187 P.3d 1129 (Colo.App. 2008).

7. The question of whether the claimant acted volitionally or exercised a degree of control over the circumstances of the termination is ordinarily one of fact for the ALJ. *Knepfler v. Kenton Manor*, W.C. No. 4-557-781 (March 17, 2004). The relevant consideration is whether the totality of the circumstances establishes that the claimant was at fault for the termination of his employment. As stated by the Colorado Supreme Court in *Gonzales*, at a minimum, the claimant must have performed some volitional act or have exercised some control or choice over the circumstances leading to the discharge such that he can be said to be responsible for the separation. *Gonzales v. Industrial Commission*, 740 P.2d at 1003; *Richards v. Winter Park Recreational Assoc*., 919 P.2d 933 (Colo.App. 1996).

8. Because Claimant in this case was not receiving temporary total disability benefits at the time of her termination due to her performance of modified duty, respondents are not required to prove the existence of one of the elements of Section 8-42-105(3)(a)-(d), C.R.S. Rather, the ALJ is required to resolve the case under Section 8-42-105(4), C.R.S. by deciding whether the claimant's wage loss was caused by the physical limitations or restrictions to earning capacity existing at the time of claimant's termination from employment or, instead, was related to the claimant being responsible for her termination from employment. *Fantin v. King Soopers*, W.C. No. 4-465-221 (ICAO February 15, 2007.)

9. If an injured worker is responsible for his termination from employment, the injured worker is not entitled to receive benefits compensating him for the wage loss after the date of termination. Sections 8-42-105(4) and 8-42-103(1)(g), C.R.S., contain identical language stating that "[i]n cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury."

10. For an employee to be responsible for termination, the employee must perform a volitional act that leads to the termination. *Gutierrez v. Exempla Healthcare*, W.C. No. 4-495-227 (ICAO June 24, 2002). Negligent or inadvertent acts qualify as

volitional acts for the purposes of determining whether a claimant is responsible for termination. *Gleason v. Southland Corp*., W.C. No. 4-149-631 (ICAO June 13, 1994). A claimant does not act "volitionally" or exercise control over the circumstances leading to his/her termination if the effects of the injury prevent him/her from performing his/her assigned duties and cause the termination. *In re of Eskridge,* W.C. No. 4-651-260 (ICAO April 21, 2006). An employee is thus "responsible" if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* W.C. No. 4432-301 (ICAO September 27, 2001).

11. The concept of a worsening of condition necessarily being proven merely because of a change in work restrictions or an increase in impairment has been rejected by multiple ICAP decisions. In *Hammack v. Falcon School District 49*, W.C. No. 4-637-865 (ICAO October 23, 2006) (aff'd *Hammack v. Indus. Claim Appeals Office* (Colo. App. No. 06CA2344, 2007WL4260343, December 6 2007)(unpublished), the ICAP determined that even if claimant's physical restrictions had changed, the ALJ is still required under *Anderson v. Longmont Toyota, Inc., supra*, to determine whether the claimant's condition had worsened and the causal connection between the claimant's wage loss and termination from employment had ended. The facts in *Hammack* are strikingly similar to those at issue here. In that case, claimant had documented performance issues at work and had been counseled that her performance must improve or her job would be in jeopardy. Claimant's injury followed, she was given a 30 pound restriction, and she returned to work at modified duty. Claimant then separated from employment under circumstances for which the ALJ determined claimant to be responsible. Following a DIME, claimant was determined to be not at MMI and her treating physician assigned a 10 pound lifting restriction. The ALJ concluded that claimant failed to prove by a preponderance of the evidence that she suffered a worsened condition following her termination from employment or that any worsened condition, instead of her "for cause" separation, had caused her wage loss. The ICAP affirmed the decision, emphasizing that the claimant must establish an actual worsening of condition in order to obtain temporary total disability benefits after being terminated for cause under the termination statute. The ICAP stated: "[a]nd, as noted, the mere imposition of changed restrictions does not, by itself, compel the conclusion that the claimant is entitled to TTD. Although increased restrictions certainly could support such a conclusion, they do not require it. Even though the claimant's physical restrictions had changed, the ALJ was still required under *Anderson* to determine whether the claimant's condition had worsened and the causal connection between the claimant's wage loss and termination from employment had ended." *See also, Martinez v. Denver Health*, W.C. 4-527-415 (ICAO August 8, 2005.)

12. Respondents have proven by a preponderance of the evidence that claimant was responsible for her termination from employment. Respondents' witnesses presented compelling and persuasive testimony that Claimant's job performance was below an acceptable standard for her position. Claimant admits she was counseled regarding her job performance. The ALJ finds that claimant was given ample opportunity

to improve her job performance and that she failed to do so. Respondents' delay in terminating Claimant does not validate Claimant's continued poor performance.

13. The ALJ further finds that the testimony of Mr. A_____ and the DHR is credible and persuasive as to the fact that Claimant's work related restrictions did not cause or contribute to the performance issues they considered when determining whether to terminate her employment.

14. Therefore, Respondents have established by a totality of the evidence that Claimant was responsible for her termination and is therefore not entitled to temporary total disability benefits as of the termination date, April 12, 2018.

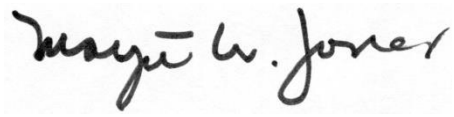
15. Claimant has not established a subsequent causal connection between her wage loss and her industrial injury as opposed to her termination from employment. The medical records reflect only miniscule changes in the work restrictions, and claimant's subjective complaints changed only slightly after her termination. Claimant's diagnoses did not change and her treatment was not significantly altered post-termination. Claimant testified that she had the lifting issues all along after her injury. The medical records document pain complaints both before and after the termination. Claimant did not offer any additional testimony to establish an actual worsening of her condition post-termination sufficient to warrant an award of temporary total disability benefits pursuant to *Anderson v. Longmont Toyota, Inc., Supra.*

16. Based on a totality of the evidence presented, claimant has failed to establish a worsening of her condition sufficient to prove that the causal connection between the claimant's wage loss and her termination from employment had ended. This is especially true since claimant's direct supervisor's uncontroverted testimony was that even her subsequent five pound restriction would have been accommodated with modified duty if not for her termination for cause.

ORDER

Claimant's request for temporary total disability benefits from April 12, 2018 and ongoing is denied.

This 2nd day of April, 2019.



Margot W. Jones

Administrative Law Judge

Office of Administrative Court

1525 Sherman Street, 4th Floor

Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-083-370

ISSUES

- Issues raised by Claimant were compensability of an alleged May 2, 2018 injury, and, if found compensable, entitlement to medical benefits authorized and reasonably necessary and related, and temporary disability benefits.

- The issues raised by Respondents were penalties for late reporting of the injury under 8-43-102(1)(a), C.R.S., responsibility for termination of employment set forth in section 8-42-103(1)(g) and 8-42-105(4), C.R.S.; termination of temporary disability benefits pursuant to section 8-42-105(3)(a-c); and all applicable offsets and overpayments.

FINDINGS OF FACT

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

1. Claimant was born on September 16, 1965, and was 52 years of age at the time of the hearing.

2. Claimant testified he was injured at work on May 2, 2018, while working for Employer, a day labor placement agency.

3. Respondents contend Claimant did not notify Employer of his alleged injury until July 27, 2018, when Ashley T_____, Employer's Branch Manager, received a letter from Claimant's Counsel stating Claimant's allegation that he was injured at work on May 2, 2018.

4. Respondents filed a Notice of Contest on August 3, 2018.

5. Claimant's Worker's Claim for Compensation form was dated June 8, 2018. The form does not show the date it was filed with, or received by, the DWC.

6. Claimant testified he injured his lower back inside a roll off dumpster when he attempted to dump out a fifty-five gallon trash barrel which was one-third filled with concrete chunks. The barrel that was lying on its side and Claimant tried unsuccessfully to lift the bottom edge of the barrel. Claimant testified that after he was unable to dump the barrel, he went to Mr. S_____ and Mr. S_____ dumped the barrel for Claimant. Mr. S_____ testified he did not remember dumping a barrel of concrete for Claimant.

7. Claimant testified that "after trying to pick that up, I just pulled on my back and I couldn't move." Claimant testified after he injured his back on May 2, he "couldn't lift anymore", "couldn't even hardly walk after that," and "could not work anymore, so I asked them to send me home."

8. Claimant testified that he told Travis S_____, Employer's Assistant Superintendent that he injured his back and needed to leave work for that reason. However, Mr. S_____ contradicted Claimant's testimony. Mr. S_____ testified there was "no time that I was told by Mr. M_____ that he was injured." Rather, Claimant said he was tired and wanted to go home. Mr. S_____ did not witness any accident nor did Claimant report or mention an injury to Mr. S_____ before leaving the job site.

9. Mr. S_____ testified that if Claimant had reported an injury to him, Mr. S_____ would have reported it to Ms. T_____ and Joseph Cahill, lead superintendent, called for medical attention if necessary, documented the incident in his daily log, and filled out an incident report.

10. Claimant identified his co-worker Brian L_____ as someone Claimant told about injuring his back at work. Mr. L_____ performed the same job duties as Claimant on May 2, 2018. Mr. L_____ testified he saw Claimant sweep and pick up trash May 2, 2018. He testified he "thought that [he and Claimant] shared the duties of throwing trash away. Like he would grab one side of the can and I would grab the other." "And I thought we were handling – sharing the duties of throwing the trash away together."

11. Mr. L_____ testified he did not see Claimant move or lift a 50-gallon barrel with cement by himself. Mr. L_____ testified Claimant said "he hurt himself, but he didn't describe nothing to me." Mr. L_____ testified "[i]t didn't seem that serious," and that he did not mention it to Mr. S_____ or Ms. T_____.

12. Claimant left the job site travelling via bicycle and bus, and went to Employer's office to turn in his time sheet for his partial day of work. Claimant testified, "I put my bike on the bus and it takes me down and I ride around the corner to the job site." Claimant testified that after leaving work, he caught the bus with his bike in the same manner to go home. Claimant's testimony is inconsistent with his testimony that after he attempted to lift the trash barrel he could not move.

13. Claimant testified that he reported his injury to Employer by telling Marissa J_____, the woman who took his time card, that he had hurt his back. However, Ms. T_____, Employer's Branch Manager, testified Claimant did not report J_____ that he hurt his back on the job.

14. Ms. T_____, testified that her duties included overseeing workers' compensation claims and her administrators, including Marissa J_____, and that Claimant did not report a work injury to Ms. J_____ on May 2, 2018. Ms. T_____ testified that if an employee reported an injury to Ms. J_____, Ms. T_____ would process the claim if she was in the office, which she was. If Ms. T_____ was not in the office, Ms. J_____ would immediately call Ms. T_____ to walk her through the paperwork. Ms. T_____ would then contact the employee and ensure the employee obtained medical attention.

15. Ms. T_____ testified that on May 2, 2018, and at all times prior to that, Employer posted instructions that employees were to report on the job injuries within four days.

16. After returning to the office in the morning and collecting his check, Claimant did not return to work with Employer until December 7, 2018.

17. On May 3, 2018, at approximately 12:00 p.m., Claimant first sought medical treatment when he visited Denver Health. There, Claimant reported he was lifting a "trash pail" full of cement when he became injured. Claimant reported he had been riding his bike around without difficulty. Claimant chose Denver Health because they accepted his personal insurance. Claimant's providers diagnosed Claimant with a muscular strain in the area of his lumbar spine and provided Claimant with a Toradol intramuscular injection into his low back.

18. Claimant returned to Denver Health on May 14, 2018, and reported to Amy M. Quinones, NP, that his low back and right leg symptoms resolved the prior week. However, Claimant told Dr. Ridings, Respondents' retained medical expert, that the Toradol injection was of no benefit whatsoever.

19. On May 14, 2018, Claimant first reported experiencing pain in his right hip. An MRI performed on June 16, 2018, confirmed the diagnosis of right hip avascular necrosis.

20. No persuasive evidence suggests that Claimant's medical providers took Claimant off work or imposed work restrictions between May 2, 2018 and May 13, 2018.

21. Dr. Ridings testified for Respondents as an expert in Physical Medicine and Rehabilitation. Dr. Ridings testified that Claimant's Toradol injection would last less than twelve hours and would provide only pain relief. It would not cure an injury.

22. Dr. Ridings issued a report on January 3, 2019. He opined that Claimant's reported recurrence of right low back pain more than a week after it had resolved, could not be attributed to the incident at work May 2, 2018, within a reasonable degree of medical probability.

23. Dr. Ridings testified that Claimant's right hip avascular necrosis can cause pain to the right hip, buttock, groin, proximal thigh and extend down to the anterior and posterior lower right leg. Dr. Ridings testified the avascular necrosis and labral tearing at the right hip are not direct and proximate results of the alleged May 2, 2018 incident.

24. Dr. Ridings testified that if Claimant had an injury from the May 2, 2018 incident, it was a lumbar strain which resolved within a couple days, and Claimant was at MMI at his second visit to Denver Health on May 14, 2018. Dr. Ridings testified that because the Toradol injection resolved Claimant's pain, in all likelihood the pain would have resolved spontaneously. Dr. Ridings testified all additional medical treatment was related to Claimant's preexisting right hip avascular necrosis and labral tearing -- not the work incident.

25. Claimant eventually treated with Dr. De La Torre.

- On June 6, 2018, Dr. De La Torre took Claimant off work until June 28, 2018.

- On June 13, 2018, Dr. De La Torre noted Claimant appeared inebriated and inattentive, and referred Claimant to CHS Substance Use Disorder Counseling Services to address Claimant's alcohol use disorder. Notations of Claimant's alcohol abuse appear throughout his medical records.

- Upon physical examination on June 13, 2018, Dr. De La Torre noted "Negative SI and sciatic notch pain bilaterally." Right hip x-rays found mild sclerotic changes at the right acetabulum and femoral head likely due to degenerative changes. The impression was mild right hip osteoarthrosis. Dr. De La Torre noted normal lumbar back range of motion, no bony tenderness, no swelling, no edema, and no deformity. He noted tenderness and bony tenderness at the lateral right hip joint.

- Dr. De La Torre's June 13, 2018, assessment included "refractory to Lidoderm patches, movement, and Flexeril" and "concern for secondary gain vs EtOH [alcohol related] Neuropathy vs DDD [degenerative disc disease]".

26. On June 21, 2018, Claimant returned to Denver Health, where Julianne Puckett, NP, treated him.

- Claimant reporting to hat he had chronic back stiffness, but this was the first time he started to have daily back pain. He also reported that his right hip pain was constant requiring the use of a walking staff.
- Upon physical examination, Ms. Puckett noted "palpation of the SI joint does not induce sciatic pain" and there was no low back midline tenderness to palpation. She noted Claimant had "decreased [right] hip flexion due to pain" and Claimant's "back ROM limited by hip pain."
- Ms. Puckett assessed "Pain of right hip joint due to bilateral vascular necrosis and RIGHT tear of the labrum as evidenced by MRI 05/14/18."
- She also assessed right-sided low back pain with right-side sciatica 2/2 [secondary to] arthritis;" and "[n]erve impingement, foot drop, or surgical emergency unlikely based on exam."

27. On July 11, 2018, Claimant treated with Dr. Wood, reporting continued lower back pain and bilateral hip pain. Claimant did not complain of right lower extremity pain. Dr. Wood noted "hip avascular necrosis, which could be [secondary to] etoh."

28. Claimant continued to treat.

- On August 9, 2018, his physical therapist noted there was "[n]o indication of nerve involvement exam today, symptoms appear more related to musculature."

- On August 17, 2018, Claimant presented to Dr. Iams "with bilateral right greater than left pain involving the hip." "He has had problems with his bilateral hip over the past 6 months …" "Pain has progressed significantly over three months to the point where the patient has 7 out of 10 hip pain with activity. The pain in the hips is mostly located in the groin area with some radiation to the lateral hip."

- Upon physical examination, Dr. Iams found Claimant's spine was "[n]ontender to palpation," noted tenderness to palpation over the right and left lateral hips," and noted bilateral hip x-rays and MRI showed avascular necrosis without collapse. He noted Claimant "has a history of ETOH abuse possible relationship to AVN."

29. Claimant voluntarily left his position with Employer by leaving the jobsite on May 2, 2018 and not returning until December 2018. Claimant's wage loss, if any, is due to his voluntarily not returning to work, not to his alleged industrial injury.

30. After Ms. T_____ received Claimant's Counsel's letter on July 27, 2018, she mailed a designated provider list, what she referred to as "medical panels," to Claimant by certified mail. Although he had no memory of doing so, Claimant signed for the certified mail containing the designated provider list.

31. At Dr. Ridings' IME, Claimant reported he then was working for an acquaintance as a laborer and lifting up to 50 pounds. Dr. Ridings understood that Claimant did not find his work difficult at the time. At hearing, Claimant denied he worked for an acquaintance or that he reported this to Dr. Ridings.

32. The ALJ finds Claimant did not meet his burden of proving compensability. While the ALJ finds that Claimant may have sustained a lumbar strain on May 2, 2018, the preponderance of credible and persuasive evidence establishes that such a strain would have resolved within a few days and did not require medical treatment beyond May 14, 2018.

33. The ALJ finds Dr. Ridings' opinions to be credible, persuasive, and consistent with Claimant's medical records.

34. The ALJ finds Claimant to be a poor historian. He could not remember several events whose occurrence Respondents objectively demonstrated. The ALJ also discredits Claimant's credibility because he denied any problem with alcohol despite his medical records containing numerous references to alcohol abuse and dependency, and his medical providers attributing the avascular necrosis of his femoral head to alcohol abuse.

35. The ALJ finds the testimony of Travis S_____, Brian L_____, and Ashley T_____ credible and persuasive.

36. The ALJ finds that the alleged incident on May 2, 2018, if it occurred, did not disable Claimant from performing his regular job duties.

37. The ALJ finds the medical treatment provided by Denver Health and Dr. Scott was not authorized. Claimant failed to report his allegations of a May 2, 2018 work injury to Employer until Claimant's Counsel sent a letter to Employer in July 2018. Allegedly reporting an injury to a co-worker is not notification to the Employer. After receiving the designated provider list, Claimant did not select and treat with a designated provider. Respondents are not liable for the medical treatment provided by Denver Health and Dr. Scott.

38. The ALJ finds Respondents have proven by a preponderance of the evidence that Claimant failed to timely report a work injury pursuant to 8-43-102(1)(a), C.R.S.

CONCLUSIONS OF LAW

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

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

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

In deciding whether a party has met its burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the

consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

The ALJ finds and concludes Claimant failed to prove he sustained a compensable industrial injury, and thus failed to meet his burden of proof regarding compensability. Therefore, Claimant is not entitled to benefits under the Workers' Compensation Act for this claim.

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. § 8-42-101. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. C.R.S. § 8-41-301(1)(c); *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. C.R.S. § 8-41-301(1)(c); *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo.App.2000).

Authorized treating providers include those medical providers to whom the claimant is directly referred by the employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office*, 70 P.3d 513 (Colo. App. 2002).

The ALJ concludes that Denver Health and Dr. Scott_ are not authorized treating physicians/providers. Healthcare provided by Denver Health and Dr. Scott, or their referrals, was not authorized. Respondents are not liable for the healthcare provided by Denver Health and Dr. Scott, or their referrals.

The ALJ concludes that Claimant did not prove he required healthcare treatment as a direct and proximate result of an industrial injury. Pursuant to §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S., a claimant who is responsible for his/her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and the wage loss. *In re of George,* W.C. No. 4-690-400 (ICAP July 20, 2006). The termination statutes provide that, in cases where an employee is responsible for his/her termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAP Apr. 24, 2006). An employee is "responsible" if he/she precipitated the employment termination by a volitional act that he/she would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* W.C. No. 4432-301 (ICAP, Sept. 27, 2001). Claimant voluntarily left the job site on May 2, 2018 and did not contact

Employer or return to work for Employer until December 2018. Neither the Denver Health records, nor any other objective medical evidence, contain evidence of Claimant being taken off work or given work restrictions by a medical provider, authorized or not, for May 2, 2018 through May 13, 2018. Claimant did not prove that any work injury prevented him from performing his regular job duties with Employer.

Under §8-43-102(1)(a), "Every employee who sustains an injury resulting from an accident shall notify said employee's employer in writing of the injury within 4-days of the occurrence of the injury… If said employee fails to report said injury in writing, said employee may lose up to one day's compensation for each day's failure to report." The ALJ finds and concludes that Claimant did not comply or substantially comply with this statute.

The ALJ concludes that Claimant did not meet his burden of proof with regard to temporary disability benefits, regardless of whether the claim was compensable.

ORDER

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

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

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

DATED: April 3, 2019

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

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 2864 South Circle Drive, Suite 810, Colorado Springs, CO 80906	
In the Matter of the Workers' Compensation Claim of: , Claimant, vs. , Employer, and Insurer, Respondents.	▲ **COURT USE ONLY** ▲ **CASE NUMBER:** **WC 5-023-461-001**

ORDER GRANTING RESPONDENTS' OPPOSED MOTION FOR SUMMARY JUDGMENT

The matter comes before the Administrative Law Judge (ALJ) upon Respondents' Motion for Summary Judgment. The ALJ has received and reviewed Respondents' Exhibits A through I, and refers to said Exhibits herein. Upon review and consideration of Respondents' *Motion for Summary Judgment* (filed 2/25/2019), and Claimant's *Response to Respondent's Motion for Summary Judgment* (filed 3/26/2019, after an *Extension of Time* was granted to file said Response), the ALJ finds as follows:

FINDINGS OF FACT

1. This matter arises out of an alleged work-related occupational disease injury that was reported on or about February 26, 2016.

2. Respondents denied liability and compensability of the claim and filed and served a *Notice of Contest* (Ex. A) with Colorado Division of Workers' Compensation ("Division") on September 9, 2016.

3. On June 28, 2017, Respondents filed and served a *Motion to Close Claim for Failure to Prosecute*, (Ex. B) pursuant to Colorado Workers' Compensation Rules of Procedure (WCRP) Rule 7-1(C), 7 Code Colo. Reg. 1101-03.

4. On July 14, 2017, the Director of the Colorado Division of Workers' Compensation ("Director") entered an *Order to Show Cause* (Ex. C) requiring the Claimant to tell the Division what recent effort had been made to pursue his workers' compensation claim. This *Order to Show Cause* was served on Claimant, and notified him that a Response was required to be filed within 30 days of the date of the certificate of mailing or the claim would be automatically closed. The *Order to Show Cause* also indicated that *"if your case is closed after 30 days, you have the right to petition to reopen your case as set for [sic] in § 8-43-303, C.R.S*."

5. On July 20, 2017, Claimant responded to the *Show Cause Order* by filing *Claimant's Response to Order to Show Cause* (Ex. D), by simply requesting a hearing to be set before July 29, 2017.

6. An *Extension of Time to Show Cause* (Ex. E) was entered by the Director on August 11, 2017, giving Claimant an additional 100 days to respond to the original *Show Cause Order*.

7. Claimant never responded to the August 11, 2017 *Extension of Time to Show Cause* entered by the Director. Therefore, pursuant to the terms of the Order by the Director, and by operation of law, Claimant's claim was deemed automatically closed.

8. No activity on the claim occurred for over one year. Then, on August 20, 2018. Claimant then filed his *Petition to Reopen* (Ex. F) on August 20, 2018, alleging a *change in medical condition.*

9. Claimant then filed his *Application for Hearing* (Ex. G) on September 13, 2018. Issues endorsed in this *Application for Hearing* included: *medical benefits, petition to reopen claim, reopen on worsening condition.*

10. Respondents filed their *Response to the 9.13.18 Application for Hearing* (Ex. H) on September 24, 2018, alleging that this *Claim is Closed pursuant to the court order*, and *Statute of Limitations.*

11. The parties then appeared in Pueblo, Colorado, for Hearing on this matter on February 7, 2019. Claimant attempted to call Alex Romero, M.D. as a witness. Respondents filed a written *Motion In Limine,* as Dr. Romero was not listed in Claimant's Application for Hearing, nor in his discovery responses, nor had any *Motion to Add Dr. Romero as a Witness* been filed with the OAC. Respondents had no medical records from Dr. Romero pertaining to Claimant. At that time, counsel for Claimant indicated that Dr. Romero had performed a surgery on Claimant in December, 2018; however, he had also been unable to obtain any medical records, but would attempt to do so. The nature of this surgery, or how it might pertain to Claimant's claim, was not discussed.

12. Respondents then further argued that the claim was closed by Statute of Limitations, and that Claimant's claim has never been found compensable, therefore, it cannot be re-opened as there is no worsening condition to re-open.

13. This ALJ concluded that the hearing could not go forward as scheduled, since there was evidence potentially pertinent to the issues which still needed to be exchanged by the parties. No Hearing Exhibits were exchanged or tendered at this 2/7/19 hearing.

14. The ALJ then issued a *Procedural Order* (Ex. I) on February 11, 2019. In that Order, if Claimant wished to endorse Dr. Romero, he must do so by *Motion* within 10 days, so an *Order* might issue in this matter. Any medical records were to be

obtained and tendered forthwith. Further, Respondents' issues of *Claim Closure* and *Statute of Limitations* were to be filed via written *Motion for Summary Judgment,* and filed well in advance of any reset hearing date.

15. In his *Response to Respondents' Motion for Summary Judgment,* Claimant does not dispute the facts or procedural history as outlined by Respondents. In essence, Claimant argues that any errors or omissions in failing to timely respond to events in this case were not the personal fault of the client; therefore, the relief sought by Respondents should be denied.

16. This case has now been reset for hearing in Pueblo on April 16, 2019 at 9:00 a.m. The issue of adding Dr. Romero is being held in abeyance, pending this *Summary Judgment* issue.

CONCLUSIONS OF LAW

Summary Judgment, Generally

1. Pursuant to the Office of Administrative Courts Rules of Procedure (OACP) Rule 17, 1 CCR 1101-3, "any party may file a motion for summary judgment seeking resolution of any endorsed issue for hearing." Summary judgment may be sought in workers' compensation proceeding. *Fera v. Indus. Claim Appeals Office*, 169 P.3d 231, 232 (Colo. App. 2007). The OAC Rule allows a party to support its Motion for affidavits, transcripts of testimony, medical reports, or employer records. A motion for summary judgment may be supported by pleadings, depositions, answers to interrogatories, and admissions on file. C.R.C.P. 56; *Nova v. Indus. Claim Appeals Office*, 754 P.2 800 (Colo. App. 1988) [C.R.C.P. and C.R.E. apply insofar as they are inconsistent with the procedural or statutory provisions of the Act].

2. Summary judgment is appropriate when the pleadings show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c); *Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (Colo. 1988). This rule allows the parties to pierce the formal allegations of the pleadings and save the time and expense connected with trial when, as a matter of law, based on undisputed facts, one party could not prevail. *Drake v. Tyner*, 914 P.2d 519 (Colo. Ct. App. 1996).

3. Once the moving party shows specific facts probative of a right to judgment, it becomes necessary for the non-moving party to set forth facts showing that there is a genuine issue for hearing. *Miller v. Van Newkirk*, 628 P.2d 143 (Colo. App. 1980). No such genuine issue has been put forth or alleged by Claimant. Claimant has not alleged sufficient evidence to constitute excusable neglect.

Petition to Reopen

4. Section 8-43-303(1), C.R.S. provides that, "At any time within six years after the date of injury, the director of an administrative law judge may, after notice to all parties, review and reopen any award on the grounds of fraud, an overpayment, and

error, a mistake, or a change in condition…§ 8-43-303(1), C.R.S.; *Heinicke v. Industrial Claim Appeals Office*, 197 P.3d. 186, 189 (Colo. App. 2002).

5. The purpose of the "change of condition" ground for reopening is to allow for equitable adjustments to awards of benefits if conditions change over time. *Ward v. Ward*, 928 P.2d 739 (Colo. App. 1996)(*citing to Mascitelli v. Giuliano & Sons Coal Co.*, 402 P.2d 192 (1965)).

6. A change in condition refers to a "change in the condition of the original compensable injury or to a change in claimant's physical or mental condition which can be causally connected to the original compensable injury." *Jarosinski v. Industrial Claim Appeals Office*, 62 P.3d 1082, 1083 (Colo. App. 2002). The "change in condition" ground, therefore, refers to "a change in the condition of the original compensable injury or to a change in the claimant's physical or mental condition which *can be causally connected to the original compensable injury* [emphasis added]." *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186, 189 (Colo. App. 2002); *Chavez v. Indus. Comm'n*, 714 P.2d 1328, 1338 (Colo. App. 1985).

7. Adopting the position taken in *Larson's Workers' Compensation Law* treatise, see 8 Larson's Workers' Compensation Law § 131.03(2)(a)(2001), the Colorado Court of Appeals has held that the original finding of causation cannot be challenged in reopening or post-reopening proceedings. *City and County of Denver, Industrial Claim Appeals Office*, 58 P.3d 1162, 1164 (Colo. App. 2002). In fact, the court in *City and County of Denver* specifically quoted Larson's indicating "reopening based on a change of condition does not permit re-litigation of every potential issue…neither party can raise original issues such as work-connection, employee or employer status, *occurrence of a compensable accident*, and degree of disability at the time of the first awarded [emphasis added]. *Id*.

8. In the claim of *Amin v. Schneider National Carriers*, W.C. No. 4-881-225-06 (November 9, 2017), the Industrial Claim Appeals Office (ICAO) addressed a nearly identical issue as the one herein. In *Amin*, the claim was closed, pursuant to a Director's *Order to Show Cause.* Claimant then attempted to reopen the claim, pursuant to 8-43-303, C.R.S. on the grounds of a worsening of condition. The ICAO affirmed the order of the ALJ who had granted *Respondents Motion for Summary Judgment* to deny and dismiss the petition to reopen. The original claim had never been admitted or found compensable; it was a denied claim. A similar issue exists here.

9. Here, on August 20, 2018, Claimant filed a *Petition to Reopen* a denied claim, based on a change of medical condition. Claimant attached a medical report from Dwight K. Caughfield, M.D., which purportedly supports this *Petition to Reopen* alleging a change of medical condition. This previously denied claim was previously closed by the Director, since Claimant failed to timely respond to the Director's *Extension of Time to Show Cause* dated August 11, 2017. Claimant is now attempting to obtain an Order reopening a closed claim, which has never been found or admitted to be compensable in the first place.

10. In order for Claimant to reopen his claim pursuant to C.R.S. 8-43-303, based on a change of condition, it must first be established that Claimant sustained a compensable injury. Respondents have never been held liable for benefits, nor have they filed an *Admission of Liability.* Instead, a *Notice of Contest* was timely filed. The underlying compensability of the claim has always been denied by Respondents, and compensability has never been found by a court of competent jurisdiction.

11. Because there is no compensable injury by which a worsening or change of medical condition can be established or evaluated, Claimant's *Petition to Reopen* based on a change of condition must be denied as a matter of law.

ORDER

Based on the foregoing **Findings of Fact and Conclusions of Law**, the Court **GRANTS** Respondents' Motion for Summary Judgment. Claimant's August 20, 2018 Petition to Reopen is denied and dismissed. Claimant's claim remains closed pursuant to the Order of the Director dated August 11, 2017. The hearing currently set in Pueblo for April 16, 2019 is vacated.

April 3, 2019

/s/ William G. Edie
William G. Edie
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-024-099-001

ISSUES

I. Whether Respondents have overcome the DIME opinion of Dr. Mason that Claimant was not at MMI on June 19, 2017.

II. If Claimant is not at MMI as of June 19, 2017:

- Is Claimant not at MMI because he needs additional diagnostic testing and evaluations to determine whether his neurological problems were caused by either his industrial accident or an underlying motor neuron disease such as primary lateral sclerosis; or
- Is Claimant not at MMI because he needs additional treatment to cure and relieve him from the effects of his neurological problems which were caused by his industrial accident?

III. Whether Claimant's need for medical treatment, including the medical treatment caused by a subsequent fall which occurred on August 15, 2017, is causally related to Claimant's work injury of June 28, 2016.

FINDINGS OF FACT

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

1. Claimant was employed as a pressman.
2. On June 28, 2016, Claimant was repairing a printing press. While making repairs, Claimant fell off the press. Although the exact distance he fell is not entirely clear, it appears Claimant fell approximately 2 feet and hit a portion of the press and travelled an additional two feet and landed on the floor. As a result of his fall, Claimant hit his head on the floor.
3. Claimant was taken by Employer to Sky Ridge Medical Center and arrived at approximately 2:30 p.m. The medical report from that visit provides the following description of the accident and history which was provided by Claimant:

> 53-year-old male w/h/o protein S deficiency takes **COUMADIN** had a mechanical fall while dismantling a cat walk. He fell 2 feet, then hit another cat walk, and fell down another 2 feet onto the right side of his head on the

> concrete just prior to arrival. No LOC. Since then, he had right sided head pain, right clavicle pain, and feeling dizzy. [1]

Under the Review of Symptoms (ROS), it was noted that Claimant's neurological complaints consisted of dizziness, headache, and (no loss of consciousness). Claimant also complained of right shoulder and right knee pain.

Claimant underwent a neurological examination. The findings at that time demonstrated Claimant was "awake, alert and oriented x3, moves all 4 extremities equally, strength 5/5, CN II-XII intact, normal gait, normal speech."

A CT scan of his head was taken and was interpreted as normal.

The record further indicates the physician reviewed the imaging with Claimant, as well as treatment, follow-up, and return precautions. It was specifically noted in the medical report that Claimant understood the treatment, plan, findings, and follow up procedures.

The medical decision making was described as follows:

> This is a 53-year-old male who fell 2 feet and landed on a structure and then fell two more feet. He does take Coumadin and he struck his head. There was no loss of consciousness. He did have a hematoma in the right side of his head. His neck was without any signs of trauma. He also had pain in the right shoulder region. His x-ray of his shoulder was negative for fracture of the clavicle and elsewhere. His CT head was negative. He is coagulopathic but his INR is within normal limits. Overall, he has a closed head injury but no evidence of a bleed. I feel his is stable for discharge.

The final primary diagnosis or impression due to the fall was a "hematoma" and the secondary diagnosis or impression was a "contusion." Claimant was

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[1] Although Claimant said he felt dizzy, there was no indication that Claimant had any alteration of mental status at that time such as feeling dazed, disoriented, or confused as observed by any witnesses or a medical provider. Moreover, under the neurological examination, it was found that Claimant was awake, alert, and oriented x3.

The Medical Treatment Guidelines define a mild Traumatic Brain Injury (mTBI). In order to be diagnosed with a mTBI, pursuant to the Guidelines, there must be at least one of the following documented within 24 – 72 hours of the injury:

- any loss of consciousness,
- any loss of memory for events immediately before or after the injury,
- any alteration of mental status at the time of the injury (feeling dazed, disoriented, or confused)
- focal neurological deficit(s) that may or may not be transient but where the severity of the injury does not exceed the following:
    - loss of consciousness for approximately 30 minutes or less,
    - at 30 minutes, a Glasgow Coma Scale (GCS) of 13-15, and
    - post-traumatic amnesia (PTA) not greater than 24 hours.

See 7 C.C.R. § 1101-3:17, Exhibit 10, Traumatic Brain Injury, Medical Treatment Guidelines.

discharged the same day at approximately 4:35 p.m. (Ex. A and 3.) Claimant was not diagnosed with a mild traumatic brain injury (mTBI) and the lack of such a diagnosis appears to be consistent with the Colorado Medical Treatment Guidelines.

4. On July 12, 2016, Claimant was seen by Robert Broghammer, MD,[2] at Healthone Occupational Medicine and Rehabilitation for an initial evaluation. This was his first medical appointment after being seen and discharged from the Sky Ridge Emergency Room. The written report restates the mechanism of injury and is fairly consistent with the Sky Ridge report. The report notes Claimant fell and hit his head, right shoulder, and right knee. The report notes that most of Claimant's symptoms at that time revolved around his bilateral upper back region, as well as his neck. His musculoskeletal examination revealed normal gait, station, and posture. Dr. Broghammer's assessment at that time was

    a. Cervical pain,

    b. Right shoulder pain, and

    c. Right knee pain.

    It is not clear if Claimant discussed with Dr. Broghammer any issues relating to hitting his head at this appointment. However, Claimant did complete a Review of Systems checklist and indicated he had suffered from various symptoms during the past 1-2 weeks which included, but were not limited to, the following:

    a. Blurry vision

    b. Change in vision,

    c. Ringing in ears,

    d. Hearing loss,

    e. Dizziness,

    f. Confusion or Cloudiness ("after"),

    g. Headaches,

    h. Balance issues, and

    i. Muscle weakness

    It should be noted that although Claimant checked off various symptoms, such as dizziness and balance issues, he only noted that "Confusion or Cloudiness" occurred "after" the incident. All of the other symptoms he identified, which include balance issues and muscle weakness, were not identified as occurring "after" the work accident. Claimant also completed a pain diagram and noted he was having headaches. In addition, Claimant completed a medical history questionnaire and noted that he suffered from a chronic muscle disease. This Review of Symptoms checklist is consistent with Dr. Broghammer's report of July

[2] Dr. Broghammer's specialty is not specified. His reports, however, have the following designations after his name: "MBA, MPH, and Rph."

28, 2016, and deposition testimony, in which he indicated Claimant specifically stated that he had increasing dizziness over the last couple of years.

5. On July 28, 2016, Claimant returned to Dr. Broghammer. At this visit, Claimant noted he had returned to work but that it was hard to get through a 13-hour day. He did, however, complain of right finger pain which he thought might have been caused by his fall. Dr. Broghammer also put in his report that Claimant indicated he had been getting "increasingly dizzy the last couple of years." Dr. Broghammer noted that he performed a neurologic assessment and that Claimant's gait, station, and posture were maintained. Claimant completed another Review of Systems symptom checklist. Claimant again noted:

    a. Dizziness,

    b. Headaches,

    c. Balance issues,

    d. Muscle weakness.

    And, although the subjective complaint portion of the report does not reference any headaches, the assessment includes:

    e. Cervical pain,

    f. Headache,

    g. Thoracic pain, and

    h. Right index finger pain.

    Therefore, it is not clear how Claimant articulated his various complaints and symptoms to Dr. Broghammer and why only certain complaints and symptoms made it into the body of the written report.

6. On August 11, 2016, Claimant returned to Dr. Broghammer. The medical report notes Claimant reported feeling 10-15% better and that most of his complaints still revolved around his right index finger, neck and shoulder. Dr. Broghammer did not note a neurological examination was performed at this visit. He did, however, note that Claimant had returned to working 12-13 hour shifts and was tolerating working and was occasionally exceeding his 25-30 pound weight lifting restriction. The assessment at that time remained the same and included headaches. Claimant also completed another Review of Systems and checked-off the same complaints, which included dizziness and balance issues. (Ex B, pg. 24.)

7. On August 25, 2016, Claimant returned to Dr. Broghammer. The report indicates Claimant reported that his additional physical therapy visits were beneficial and that his neck and upper back pain was improved. However, he noted that his right index finger was getting worse. Therefore, Claimant was referred to Dr. Craig Davis for his right finger complaints. Claimant also noted that he was continuing to work, with restrictions. (Ex. B, pg. 25.) Claimant completed a pain diagram. He did not indicate he was having any head pain. (Ex. B, pg. 28.) He

also completed a Review of Systems and noted that he continued to feel dizzy, but that his muscle weakness and balance issues were better. (Ex. B, pg. 29.)

8. On September 15, 2016, Claimant presented to Dr. Broghammer with new complaints. At this visit, Claimant reported new symptoms of left arm dexterity problems as well as feeling off balance at times. He reported that the left arm problems had been going on for about 2 months and that he ignored them. Dr. Broghammer indicated these symptoms could represent central nervous system pathology and recommended Claimant follow up with his family physician. In his treatment plan, Dr. Broghammer noted that Claimant will see his family doctor for what sounds like potential central nervous pathology. (Ex. B., pg. 30-31.) On the Review of Systems, Claimant also noted he was having difficulty walking and had a possible tremor. (Ex. B, pg. 33.) Therefore, by September 15, 2016, Claimant was reporting additional symptoms which included:

    a. Left handed dexterity problems,

    b. Difficulty walking, and

    c. Possible tremor.

9. On October 6, 2016, Claimant went to his family physician, Dr. O'Sullivan, at Kaiser. The report indicates Claimant presented for evaluation due to balance concerns. Claimant reported falls, difficulty with balance when trying to put on his pants while standing on one foot, and that he would topple over if bending over to put a leash on his dog. Claimant also reported decreased dexterity with his left hand. This report also contains the following statement: "not sure if the balance is worse since the fall." However, the context of this statement is not clear from this medical record. And, it is not clear whether this statement was from Claimant because Dr. O'Sullivan subsequently wrote in the plan section of his report:

> [S]uspected concussion with recent fall, not clear as to if the imbalance was present prior to the fall, no clear neurological deficits on exam, no clear movement disorder today, encouraged exercise, will monitor pattern.

Dr. O'Sullivan's report is not precise regarding the extent of Claimant's symptoms that preexisted the fall at work and the extent of any neurological symptoms he observed during the appointment. He indicates in his report that "it's not clear if the imbalance was present prior to the fall." He also indicates there were "no clear neurological deficits on exam and no clear movement disorder."

10. On October 20, 2016, Claimant returned to Dr. Broghammer. The report from that visit provides that Claimant saw his personal physician for his balance issues, which were still problematic. It is noted that his personal physician told him that it was because he had a concussion. Dr. Broghammer stated that according to conversations with Dr. Van Dorsten, and the literature provided by him, without loss of consciousness, the medical literature universally supports that symptoms are pretty much 100% resolved within three months, which had

passed. Dr. Broghammer noted that the etiology of Claimant's balance and dizziness issues were unclear and that a consultation, possibly with Dr. Van Dorsten, would be obtained to address relatedness of his ongoing central nervous system-type issues. It was also noted that a wobble board had been recommended to help his balance issues. (Ex. B, pg. 35; Ex. 4, pg. 77-78.) It is found that Dr. Broghammer's lack of expertise to assess head injuries and/or central nervous system issues is evident by his need to confer and consider referring Claimant to a specialist for these issues.

11. On December 30, 2016, based on a referral from Dr. Broghammer, Claimant was evaluated by Samuel Chan, MD., who is also a physical medicine doctor and has a specialty in electrodiagnostics. Based on his assessment, he determined Claimant still had possible postconcussive symptoms and recommended a neuropsychological evaluation as well as testing by Dr. Lipkin for inner ear issues to determine the cause of his ongoing symptoms.

12. On January 3, 2017, Claimant came under the care of Paul Rafard, M.D., MPH., at Health One because Dr. Broghammer moved to a different position. Therefore, Dr. Raford took over the management of Claimant's care. It is noted that Claimant stated his headaches had resolved. He also stated that he felt more of a disequilibrium – compared to a dizziness. He also stated that although he used to be a master guitar player, he could barely move his left hand to place his fingers on the guitar frets. He also indicated that he had several falls, the most recent one requiring care in the ER. Dr. Raford indicated that upon physical examination, he found some slowness and hesitation with alternate finger and alternate hand patting. The symptoms noted by Dr. Raford demonstrated a progressive worsening of Claimant's neurological symptoms. Based on what appeared to be worsening neurological symptoms, Dr. Raford ordered a cranial MRI and referred Claimant to Alan Lipkin, M.D., an otolaryngologist, for vestibulonystagmogram and evoked potential testing. (Ex. C., pg. 46-49.)

13. On January 10, 2017, Claimant returned to Dr. Raford and he noted the results from the cranial MRI revealed only "a few scattered subcentimeter white-matter abnormalities" and that there were none at the surfaces consistent with axonal shearing or a demyelinating process. However, he also stated that the MRI report indicated that "a contribution by diffuse axonal shear injury cannot be excluded." His assessment at that time was postconcussive symptoms and his plan was to determine whether the disequilibrium and cognitive issues were caused by the work injury. (Ex. C., pg. 52-55.)

14. On January 17, 2017, Claimant was again seen by Dr. Raford. At this visit, Dr. Raford noted under his neurological assessment that Claimant had a "**nonantalgic but rather wide-based gait**."(Emphasis added.) (Ex. C., pg. 58.) The emergence of Claimant's wide-based gait demonstrates a progression of Claimant's neurological symptoms compared to when he first fell at work. Even when Claimant was evaluated on October 6, 2016, by Dr. O'Sullivan at Kaiser, it was noted that his gait was normal. (Ex. 8, pg. 192.)

15. On January 19, 2017, Claimant underwent oculomotor testing by Meghan Safko, M.A., F-AAA, Clinical Audiologist. Her January 19, 2017 report indicates Claimant's OPK test results were abnormal. However, she qualified the findings by stating that the findings "***could*** be indicative of ***possible*** CNS (central nervous system) involvement ***or be task related***." (Emphasis added.) (Ex F, pg. 141.) Therefore, she did not conclude the findings were due to a central nervous problem. As noted, the results could have been an immaterial finding based on the task Claimant was performing. Moreover, she did not indicate the sensitivity of the test, the accuracy of the test, or the percentage of the general population that might have this finding – without sustaining head trauma.

16. On January 25, 2017, Claimant was evaluated by Kevin Reilly, Psy.D, a neuropsychologist. Dr. Riley evaluated Claimant and administered an extensive battery of testing in to assist with a diagnoses and treatment planning. As part of his evaluation, Dr. Reilly noted Claimant spoke at an average rate of speed with normal speech volume. Dr. Reilly concluded that his examination and testing indicated Claimant had "intact neurocognitive capacities." (Ex. G, pg. 154.) He noted that symptom validity testing suggested only mild symptom magnification. He also noted that the psychometric testing suggests symptoms of anxiety, depression and somatization and that some of Claimant's current symptoms were being magnified by the significant emotional distress in the form of depression and anxiety.

17. Dr. Reilly also concluded that Claimant's description of his injury is consistent with the diagnosis of a mild traumatic brain injury (mTBI)/post concussional (PCS). This is based on Claimant hitting his head; no loss of consciousness; no identified anterograde or retrograde amnesia; only self-report of confusion or disorientation at the scene of the accident; a Glasgow Coma Scale associated with the injury of a 13-15; and brain imaging studies which were negative. (Ex. G, pg. 154.) It is not, however, clear where Dr. Reilly obtained the Glasgow Coma Scale rating of 13-15.

    Dr. Reilly also stated that:

> The natural history of a mTBI/PCS is one of steadily resolving symptoms in the hours/days/weeks/ post-injury. The neurocognitive symptoms are at their worst immediately after the injury. mTBI symptoms generally rapidly improve spontaneously without any formal treatment interventions. It appears that the patient's recovery has been complicated by significant psychosocial stressors and emotional distress. … Reductions in the patient's emotional distress would likely result in a concomitant reduction in somatic/cognitive symptoms. (Ex. G, pg. 154.)

    Dr. Reilly's post assessment diagnosis was "Adjustment Disorder with Mixed Anxious and Depressed Mood." Under recommendations, Dr. Reilly further concluded:

> [Claimant] presents with intact neuropsychological capacities. The patient demonstrated average performance across all the neuropsychological domains sampled in this assessment. The patient's mechanism of injury would not predict any long-term neuropsychological sequela. (Ex. G, pg. 155.)

Dr. Reilly's report also contains the following Addendum regarding the normal course of mTBI:

> Current research in mild traumatic brain injury documents improving symptoms and spontaneous recovery within the time frame of one month. Concussed athletes have full symptom resolution within 2-10 days (the majority by day 6). At that time here is no detectable cognitive or balance difficulties documented.
>
> . . .
>
> The research indicates that persistent cognitive symptoms associated with concussions (>3 months) are associated with premorbid/comorbid psychosocial factors.
>
> Psychosocial factors include depression, somatization and secondary gain factors. Persistent mTBI symptoms (extending beyond 6 months) are strongly correlated with the presence of litigation. (Ex. G, pg. 156.)

18. On January 26, 2017, Dr. Lipkin wrote to Dr. Raford after he reviewed the various testing he ordered to asses Claimant's balance and hearing issues. He stated that the videonystagmogram showed tracking abnormalities "suggesting" a central issue. He also concluded that overall, the picture is more "suggestive" of central rather than a peripheral vestibular injury. However, he did not recommend any treatment or additional testing. He also did not provide a causation assessment regarding the cause of the possible tracking abnormalities and how the findings tied into Claimant's complaints of dizziness and/or vertigo.

19. On January 25, 2017, Claimant returned to Dr. Raford. He noted Claimant's testing with Dr. Lipkin was all normal except for the oculomotor OPK read as "*asymmetrical… which could be indicative of possible CNS involvement or task related*." At this visit, and pursuant to Dr. Raford's request, Claimant went into significant detail about his continued symptoms. It is noted that Claimant stated that he felt like his muscles on his left side are slowed and that his thought process and speech is also "slowed down…dull." It is also noted that Claimant feels like he cannot get on the treadmill. Dr. Raford also noted at this visit that not only did Claimant have a wide based gait, **but that he was also shuffling.** (Emphasis added) (Ex. C, pg. 63-65.) The addition of "shuffling" shows progression of Claimant's neurological symptoms. Claimant completed another pain - symptom - diagram and noted that he continued having problems with balance and dexterity. (Ex. C, pg. 69.)

20. On January 25, 2017, Dr. Raford also noted that Claimant's care would be transferred to yet another primary care physician, Dr. Christian Updike, who is with Injury Care Associates & Occupational Medicine, to manage his care. However, at this appointment, Dr. Raford indicated that "somatosensory evoked potentials for the left upper extremity coordination issues, and/or electrodiagnostic studies are warranted prior to completion of this final phase of workup." (Ex. C, pg. 65-66.)

21. On February 2, 2017, Claimant was evaluated by Dr. Updike, his new primary care physician. At his very first appointment with Mr. Adamson, Dr. Updike discussed maximum medical improvement. As noted in his report, Dr. Updike indicated that he discussed the meaning of MMI and case closure even if Claimant's symptoms persisted, after appropriate medical workup, which was nearly complete, and that Claimant was advised that he anticipated case closure by July 2017. (Ex. 11, pg. 239.)

    At this visit, Claimant's primary complaint was "wobbliness." Dr. Updike noted that Claimant reported a number of physical problems which included:

    a. Inability to go to the bathroom standing up without missing toilette bowl and inability to wipe himself,
    b. Unable to put on pants while standing up,
    c. Unable to write a normal speed,
    d. Unable to climb stairs and ladders with confidence,
    e. Unable to play guitar
    f. Unable to tie fly fishing knots or fly fish without falling over,
    g. Could partially squat without wobbling, and
    h. Unable to walk backwards/forwards and was not safe standing at the top of stairs.

    Dr. Updike also completed a neurological exam and found the following:

    a. Claimant was unable to walk on his heels forward or backward,
    b. He could stand on his right foot for only 10 seconds and his left foot for only 3 seconds, and
    c. He wobbled with his eyes closed.

    (Ex. 11, pg. 239-240.)

    Dr. Updike also noted that while Claimant was waiting to be evaluated that day, he found out his father passed away. Despite Claimant being extremely upset, he went forward with his appointment that day. Dr. Updike reviewed some of Claimant's prior medical records and noted that Claimant's neurological examination was abnormal, as noted by the problems with balance outlined above.

22. On February 7, 2017, Claimant again saw Dr. Chan. At that time, Dr. Chan thought Claimant's symptoms were mostly post-concussive based on the test results from Dr. Lipkin. (Ex. 11, pg. 179-180.) However, Dr. Chan did not provide any detailed causation analysis and link together Claimant's complicated medical and symptom history with his conclusory statement that Claimant's symptoms were post-concussive.

23. On February 12, 2017, Claimant fell and suffered an injury to his face.

24. On February 13, 2017, Claimant returned to Dr. Updike. At this time, Claimant was no longer working. Claimant advised Dr. Update about his fall on February 12, 2017, which Claimant attributed to his initial work accident. Dr. Updike noted the findings of the January 2017 MRI of Claimant's brain in which the radiologist noted that a "diffuse axonal injury cannot be excluded."

25. On February 27, 2017, Claimant returned to Dr. Updike. At this appointment, Claimant complained of "wobbliness" and was adamant that the word dizziness was not appropriate to describe his symptoms. At this visit, Claimant demonstrated his lack of coordination when clapping his hands. The doctor also noted that the "shin rub test" he administered was abnormal. Dr. Updike concluded that based on these new neurological symptoms, he was going to refer Claimant to a specialist, Dr. Treihaft, a neurologist. The referral to a specialist – neurologist - was to get the expertise necessary to determine whether there was a work related component to Claimant's neurological symptoms or a non-work related component such as the early onset of an organic neurologic process such as a movement disorder, motor neuron disease, or possibly a substance abuse issue. (Ex. 11, pg. 245)

    Dr. Updike also noted at this appointment that he received a letter from the insurance company regarding trying to get the Claimant to MMI. He indicated that he may consider cervical imaging, because it was unclear if such had previously been done. Despite the uncertainty of a diagnosis regarding Claimant's neurological symptoms, Dr. Updike noted that a remaining issue was to "bring the case to MMI." (Ex. 11, pg., 245)

26. On March 1, 2017, Claimant returned to Dr. Chan. Dr. Chan indicated that based on the history provided by Claimant, he does fit the diagnosis of a mTBI. (Ex. H, pg., 158.)

27. On March 1, 2017, Dr. Updike added an addendum to his prior report after speaking with Dr. Chan. He noted that he spoke with Dr. Chan and Dr. Chan said the ENT findings of central origin are reassuring and that no vestibular training was needed. He also noted that Dr. Chan addressed concerns about a possible axonal shear injury, and said that even if present, Claimant should recover.

28. On April 12, 2017, Claimant was evaluated by neurologist Marc Treihaft, M.D. Dr. Treihaft obtained a detailed history, reviewed many of Claimant's medical records, and physically examined Claimant. On his neuromuscular evaluation, he noted:

a. Reflexes were 3+ in the upper extremities and 2+ slightly hyperactive at the knee jerks and ankle jerks.

b. Tone was increased in the upper extremities greater than the lower extremities without cogwheeling.

c. Toes were downgrading.

d. Gait was slightly wide-based and spastic.

e. Hoffman's testing was positive bilaterally.

f. Claimant did not blink with glabellar tap.

g. Snout test was negative.

Dr. Treihaft's initial impression was that Claimant's presentation suggested an extrapyramidal disorder with parkinsonian signs and increased rigidity. He also stated that disorders such as cortical basal ganglion degeneration may be considered as well as primary lateral sclerosis. He concluded that "A relationship to his head trauma has not been established, ***but may not be excluded***." (Emphasis added.)

Dr. Treihaft noted that additional information was still required in order to fully evaluate the case and determine whether Claimant's neurological symptoms and complaints were work related. He indicated that he still needed to:

a. Review brain MRI,

b. Obtain enhanced brain and cervical MRI studies,

c. Obtain and review additional laboratory tests,

d. Review Claimant's neuropsychological batteries for cognitive dysfunction,

e. Consider a lumbar puncture, and

f. Clarify Claimant's alcohol and narcotic usage.

29. On April 17, 2017, Dr. Updike commented about Dr. Treihaft's report. According to Dr. Updike, he quotes Dr. Treihaft as stating: "The relationship to his head trauma has not been established but may not be excluded" and "Work relatedness to be determined." Despite Dr. Treihaft stating that work relatedness may not be excluded, Dr. Updike concluded that it was unlikely Claimant's dexterity and balance problems are work related. (Ex. 11, pg. 274.)

30. On April 24, 2017, Claimant's physical therapist noted Claimant was also suffering from a loss of left sided lower extremity dexterity and control. (Ex. 11, pg. 276.) This could be an indication of a worsening of neurological symptoms since these symptoms have not been noted in prior physical therapy records.

31. On May 3, 2017, Dr. Treihaft wrote a letter/report to Dr. Updike. Dr. Treihaft indicated Claimant was being seen for a neurological disorder which was marked by spasticity, hyperflexia, gait disorder, and cognitive difficulties. He noted that Claimant's symptoms might be due to primary lateral sclerosis or an extrapyramidal disorder such as cortical basal ganglia degeneration with

parkinsonian signs, cognitive dysfunction, and increased rigidity. He was, however, still waiting to receive Claimant's neuropsychological batteries, some laboratory results, and the contrast enhanced brain MRI. On physical examination, Dr. Treihaft noted the following:

a. Claimant's cranial nerves examination revealed slow lateral and vertical saccades with full movements.

b. Claimant's tone was diffusely increased,

c. Claimant's reflexes were 3+ in the upper extremities and knee jerks had 5-6 beats of clonus bilaterally, and

d. Claimant had a severely spastic gait.

Despite his findings on physical examination, Dr. Treihaft stated that "***Work relatedness remains a question***." (Emphasis added.) He also concluded his letter/report by stating "I indicated that I would speak with you over the next several days to review his neurological problems in the work relatedness. Please contact me if we have not spoken in the interim."

Based on the record presented to the ALJ, Dr. Treihaft never completed his assessment and evaluation of Claimant's neurological condition. There is not a subsequent report which indicates he received and reviewed the lab results, contrast enhanced MRI, neuropsychological test results, and finished his analysis of the matter and rendered an opinion regarding the work relatedness of Claimant's neurological symptoms.

32. On May 18, 2017, Dr. Updike saw Claimant. Dr. Updike's report from that day indicates that had not been able to speak with Dr.Treihaft. He goes on to explain that he tried calling him that same day, but he was unable to speak with Dr. Treihaft because he was out of the country. He also noted in his report that Dr. Treihaft indicated that Claimant's problems "might be due to primary lateral sclerosis or an extrapyramidal disorder such as cortical basal ganglia degeneration with parkinsonian signs, cognitive dysfunction and increased rigidity." Despite the fact that Dr. Updike was unable to discuss Dr. Treihaft's opinions or conclusions that day because Dr. Treihaft was out of the country, Dr. Updike concluded and stated in his report that Dr. Treihaft has determined Claimant's problems are not related to his work injury. Dr. Updike specifically indicated:

> Board Certified neurologist Marc Treihaft has opined that Claimant's neurological problems are due to an extrapyramidal movement disorder or primary lateral sclerosis. (See Ex. 11, pg. 291-293.)

Dr. Updike also indicated in his report that notes from Dr.Treihaft indicate that no further neurological workup is necessary. (Ex. 11, pg. 293.)

33. The finding by Dr. Updike that Dr. Treihaft finished evaluating Claimant and rendered an opinion on causation regarding Claimant's neurological symptoms

as of May 18, 2017, and found that they were not work related, is not found to be reliable, credible, or supported by the record currently before the ALJ.

34. As of June 19, 2017, Claimant had not undergone all of the testing suggested by Claimant's authorized treating physician, Dr. Raford, to assess Claimant's left upper extremity coordination issues. The testing included:

    a. Somatosensory evoked potentials testing, and/or

    b. Electrodiagnostic studies.

    In addition, as of June 19, 2017, Dr. Treihaft had not finished evaluating Claimant's neurological condition so he could render an opinion as to the work relatedness of Claimant's neurological symptoms. As noted by Dr. Treihaft, he was waiting to see various test results before rendering an opinion on causation. According to Dr. Treihaft, he still had to review, and have Claimant undergo such tests if they had not been performed, the following diagnostic testing:

    a. Enhanced brain MRI,

    b. Enhanced cervical MRI, and possibly,

    c. A lumbar puncture.

Claimant Placed at MMI by Dr. Updike

35. On June 19, 2017, and before Dr. Treihaft completed his evaluation of Claimant's complicated neurological presentation, Dr. Updike prematurely placed Claimant at MMI.[3] There is no indication in Dr. Updike's report that he ever communicated with Dr. Treihaft after Dr. Treihaft's May 3, 2017, report in which Dr. Treihaft indicated that he could not rule out a work related cause of Claimant's neurological symptoms. Moreover, Dr. Updike stated in his report that Claimant "challenges Dr. Marc Treihaft's thought of a Lewy body disease or dementia." Based upon the evidence presented to the ALJ, it does not appear that Dr. Treihaft ever opined Claimant had Lewy body disease or dementia. Dr. Updike also indicated in his report that Dr. Treihaft opined and concluded Claimant had an extrapyramidal movement disorder or primary lateral sclerosis. However, Dr. Treihaft did not complete his evaluation and analysis and did not conclude Claimant had an extrapyramidal movement disorder or primary lateral sclerosis. Dr. Treihaft merely set forth his thinking of what Claimant might have based on his partial review of the relevant data, but that he still had more work to do before he could rule out a work related cause.

36. Dr. Treihaft never rendered a final opinion regarding the work relatedness of Claimant's neurological symptoms. Therefore, Dr. Updike placed Claimant at MMI before Dr. Treihaft, the specialist to whom Claimant was referred to determine the neurological effects of his work related accident, completed his workup and analysis.

[3] This is consistent with Dr. Updike's February 2, 2017, report when he first evaluated Claimant and set a target date to place Claimant at MMI by July of 2017.

37. Upon placing Claimant at MMI, Dr. Updike provided Claimant a 6% upper extremity impairment, which he converted to a 4% whole person rating, for Claimant's right index finger, and a 12% whole person impairment rating for his cervical spine. (Ex. 11, pg. 295-303.)

38. On July 21, 2017, Respondents filed a Final Admission of Liability and admitted liability for the impairment rating provided by Dr. Updike. They also admitted for reasonable, necessary, and related maintenance medical treatment. (Ex. O, pg. 224.)

39. On July 27, 2017, and based upon a referral from Dr. Updike, Claimant underwent an additional evaluation by another specialist, Dr. Castro, an orthopedic surgeon at Cornerstone Orthopedics. The purpose of the evaluation was to assist in determining whether Claimant's neurological problems might be due to compression of his spinal cord in his neck and related to his work injury. It is important to note that this evaluation and assessment to determine the extent of Claimant's work injuries occurred after Dr. Updike placed Claimant at MMI on June 19, 2017. Dr. Castro documented Claimant's attempt to walk in a straight line with heel-to-toe gait did produce very significant balance problems. (Ex. 13, pg. 324.) Dr. Castro concluded that Claimant's symptoms were not coming from any myelopathy in his cervical spine and therefore he could not offer a surgical solution. He did, however, opine that Claimant's problems appeared to be more of an intracranial problem. (Ex. 13, pg. 324.) In light of Dr. Castro's opinion, the issue of causation was put back into the neurologist's arena, i.e., Dr. Treihaft.

Second Fall – After Claimant was Placed at MMI by Dr. Updike

40. On August 15, 2017, Claimant fell after getting out of his Jeep and hit his head. Claimant was taken to Denver Health where he was admitted and was hospitalized for approximately 10 days.

41. On August 21, 2017, while at Denver Health, Claimant underwent a Physical Medicine and Rehabilitation consultation with Dr. Gale. Although she did not have any of Claimant's prior medical records, Dr. Gale indicated Claimant had poor recovery from his 2016 mTBI with increasing falls. But, she also opined that Claimant's presentation was suspicious for a neurologic illness such as Parkinson's or progressive supranuclear palsy and requested a neurological consult.

42. On August 24, 2017, an MRI of the cervical spine was performed and was noted to be unremarkable. They did, however, note hyperreflexia and that they had a concern for an upper motor neuron condition. (Ex 1, pg. 12.)

43. On August 24, 2017, Claimant underwent a neurology consult at Denver Health which was performed by Dr. Brandon Pope, a Resident. The neurology consult was requested due to Claimant's upper extremity stiffness and less than expected recovery. His main complaint was slowed speech which they noted was non-specific. They also noted that given the report of a mild traumatic brain injury (mTBI), his symptoms seemed out of proportion to that injury. However, Dr. Pope also noted that something might be missing from his history. They noted

Claimant had frontal release signs with concern for more significant diffuse axonal injury from the original insult, but yet Dr. Pope did not have Claimant's prior medical records to assist in determining the extent of Claimant's work accident and his symptoms leading up to his second accident for which he was being treated at Denver Health. Dr. Pope noted Claimant had a very non-focal exam overall. (Ex. 1, pg. 12.) It was also noted that Claimant had spasticity in the upper and lower extremities and a possible positive jaw jerk. Dr. Pope also noted that he did not find any Parkinsonian features or evidence of a neurodegenerative process or dementia. But, it is not clear what specific conditions he was considering when he indicated that he did not observe evidence of a neurodegenerative process at that time. Dr. Pope also indicated that in addition to Claimant's symmetric spasticity, he had significant hyperreflexia and those were concerning for an upper motor neuron injury in the cervical spine or potentially a brainstem injury, however, they might be related to an axonal injury. Dr. Pope wanted an MRI of the brain and C-spine. He thought Claimant's psychomotor slowing might be due to a postconcussive syndrome. He indicated that C-spine imaging was reassuring. He also thought Claimant might have cortical disinhibition from a diffuse axonal injury. Claimant told him that all of his old concussion symptoms had returned and seemed worse than before but they noted no new concerning symptoms specifically. Despite Dr. Pope's listing of possible diagnoses, it does not appear he made a final and reliable diagnosis. Moreover, Dr. Pope, who was a Resident, did not have Claimant's prior medical records in order to assist in his assessment. (Ex. 1, pg. 13.)

44. On September 21, 2017, after being released from Denver Health, Claimant was evaluated by Dr. Updike. At this appointment, Dr. Updike noted Claimant demonstrated "the classic pattern of a parkinsonian patient. I suspect an early 3-6 hertz tremor in both hands. (Ex. D, pg. 123.)

45. On May 10, 2018, Dr. Kristen Mason performed a Division IME. As set forth in her report, Dr. Mason is board certified in Physical Medicine and Rehabilitation as well as Electrodiagnostic Medicine. There is no indication Dr. Mason specializes in brain injuries, and/or neurological disorders, and/or motor neuron disorders.

46. According to her report, Dr. Mason performed a physical examination and reviewed numerous medical records. Consistent with the finding of this ALJ, Dr. Mason noted that despite Claimant being evaluated by Dr. Treihaft, a neurologist, Dr. Treihaft never finished his workup and evaluation of Claimant because he did not have a complete dataset which included the results of various tests, nor the opportunity to request additional tests, if necessary. Therefore, Dr. Mason concluded that Claimant was placed at MMI before his treating neurologist could assess the consequences of Claimant's work accident, via a proper workup and causation analysis, and provide a final diagnosis.

47. Dr. Mason noted that Claimant felt like he had some slowing of motor function on the left side. Dr. Mason also indicated that Dr. Raford discussed with Claimant, when care was being transferred to Dr. Updike, the possibility of somatosensory

evoked potentials testing of the right upper extremity. (Ex. 1, pg. 7.) However, this testing was never done.

48. Therefore, not only did Dr. Treihaft not have a complete dataset to render an opinion on causation, neither did Dr. Mason. Dr. Mason is not a neurologist and does not specialize in motor neuron disorders or head injuries. In order to make a determination of MMI in this case, she needed the expertise and completed analysis of Dr. Treihaft, a neurologist.

49. Despite not having a complete data set, and the assistance of a neurologist with the proper training and specialization to assess this complicated case, Dr. Mason's assessment was as follows:

    a. Mild TBI with postconcussive syndrome, mainly marked by complaints of balance difficulties with objective findings of central vestibular abnormality on testing.

    b. Cervical sprain/strain with the first MRI showing a C5-6 disc osteophyte complex and some central stenosis; second MRI was noted to be unremarkable.

    c. Fall, apparently out of a vehicle striking his head and leading to a large left subdural hematoma requiring craniotomy with complications of late skull osteomyelitis with need for revision craniotomy and cranioplasty and probably flap rotation. His second head injury was much more severe than the first.

    d. Longstanding hearing loss and tinnitus likely non-claim related.

    e. Right index finger injury with some residual stiffness.

    f. No cognitive deficits on neuropsychological testing done post the original injury. This would make most of the debate relevant to whether or not the patient has a neurodegenerative disorder somewhat moot as one would not expect normal neuropsychologic testing in that context.[4] There have been many conflicting opinions regarding preexisting but the medical records do not really reflect a high likelihood that this patient had a preexisting neurodegenerative disorder based on the fact that he did not have any documented neurologic issues prior to this, at least according to the information supplied to me, and had hobbies that would preclude him having significant balance issues if he was indeed participating in them just prior to this original accident.

[4] Due to her lack of specialization regarding motor neuron diseases, Dr. Mason made a critical error in her attempt to assess causation in this case. Both Dr. Hammerberg, who the ALJ finds credible and persuasive, and the specific portion of Dr. Machanic's testimony regarding this point, testified that cognitive deficits are not seen in certain motor neuron diseases such as primary lateral sclerosis. Therefore, Claimant's neuropsychological test results do not make the debate regarding causation "moot" as indicated by Dr. Mason.

50. Dr. Mason also noted that:

> I am informed that the patient has seen two neurology doctors, originally Dr. Marc Treihaft and later Dr. Eric Hammerberg. I have the report of Dr. Treihaft which will be discussed further below. I do not possess the report of Dr. Hammerberg as the visit occurred one and a half months ago. I am informed by the patient and his daughter that they are both totally in disagreement with the two neurologists and apparently a diagnosis of Lewy body dementia and other types of degenerative neuronal diseases were made and the patient was told that the diagnosis could only be confirmed by autopsy. Apparently, the patient did not undergo imaging studies of any kind to prove or disprove these conjectures and indeed denies previous SPECT scan, PET scan, or other dynamic imaging which might or might not rule out such a contention.
>
> Of interest is the fact that his father died of a degenerative dementia and there was a thought this may have been a Lewy body dementia.

51. In her discussion section, Dr. Mason concluded and stated the following:

    a. The patient is not at MMI.

    b. I am not able to give a provisional impairment rating because he is still actively treating for brain-related issues. Unfortunately, I do feel that the second injury resulted from the first injury apart from any other explanation. All of the alternative explanations appeared to have been speculative in nature. *Certainly, if he is ultimately diagnosed with something else, I would certainly take that into consideration but the evidence seemed fairly flimsy.* (Emphasis added.) I have seen other patients whose primary issue was vestibular dysfunction of central origin who had multiple falls and repetitive injuries. Unfortunately, that is a fairly common sequelae of a mild brain injury. Because I feel the patient is not at MMI, he is continuing to treat really more for this second more devastating head injury which was caused by a combination of his balance issues and the fact that he requires anticoagulation for his protein-S deficiency. ***He needs to be under the care of a physiatrist specializing in brain injury or a neurologist specializing in brain injury.*** (Emphasis added.) He likely needs to have another cervical MRI or at least a comparison of the two he has already had. It may be that advanced imaging, such as a SPECT scan, could be helpful in delineating any metabolic abnormalities he may still be experiencing though certainly the symptoms from the original fall have been eclipsed severely by the second injury and complication therefrom. It is possible that somatosensory evoked potentials from the upper extremities might delineate whether there is any central delay. He did have some potential myelopathy on the

previous MRI though it does not sound like most examiners felt he had a clinical myelopathy. He certainly has quite a bit of spasticity at this point and the question is whether that is emanating from the brain or from the cervical cord or from some combination of the two. This is one of the more complicated neurologic pictures that I have seen in the last five years.

c. Due to his current neurologic deficits, he is not in a position to be working.

d. I am not aware of a preexisting apportionable condition. There has been speculation regarding that but no first diagnosis of any other condition which may be impacting his situation, at least not according to the material that I have received. [Report ends.]

52. Dr. Mason did not provide any testimony in this matter. Therefore, other than her report, there is no additional evidence from Dr. Mason as to the precise information required, i.e., diagnostics and opinion(s) from appropriate treating specialists, which is necessary for her to make a final assessment regarding the cause of Claimant's neurological problems and MMI.

53. Dr. Mason concluded that before a finding of MMI can be made, Claimant needs to be evaluated by a physiatrist and/or neurologist who specializes in assessing and treating patients with brain injuries. The ALJ finds that this is not because Claimant's neurological problems are due to his work accident instead of a motor neuron disease such as primary lateral sclerosis, but because a properly qualified specialist will have the expertise to evaluate Claimant and analyze all of the data that has been collected, request additional diagnostic testing if necessary, and determine the extent of Claimant's neurological injuries which flow from his work accident, if any.

54. As noted by Dr. Mason, Claimant might need another cervical MRI or at least comparison of the two he has already had. In addition, Dr. Mason also recommended advanced imaging, such as a SPECT scan and/or somatosensory evoked potentials testing. It is with the additional information in the form of diagnostic testing and evaluations that Dr. Mason will be able to render a reliable opinion regarding the cause of Claimant's underlying symptoms and address the issue of MMI. In other words, the need for additional diagnostic testing and the fully completed evaluation(s) by a proper specialist(s), is to provide her the information necessary for her to render a reliable opinion regarding the full range of pathology resulting from the work accident.

55. Respondents' retained expert neurologist Dr. Eric Hammerberg to examine Claimant and opine on his neurological condition and his diagnosis. Dr. Hammerberg issued a report dated August 16, 2018, and testified at hearing. Dr. Hammerberg concluded that the evidence did not establish Claimant suffered a traumatic brain injury due to his work accident. He stated that although Claimant complained of dizziness, this was later determined to be problems with motor coordination and not true vertigo. He noted Claimant had developed progressive worsening of motor control, with increased muscle tone, but no problems with

cognition. Specifically, he opined that Dr. Mason was correct in identifying the diagnostic distinction related to the absence of significant findings on neuropsychological testing in the presence of impaired motor control, however, she failed to recognize that the absence of impaired cognition rules out the possibility of traumatic brain injury. He felt that if Claimant's severe spasticity and loss of motor control was due to a traumatic brain injury, imaging studies would have shown cerebral contusions and neuropsychological testing would have documented significant problems with cognition. However, imaging was negative and there was no evidence of shear injury. He also indicated that with shear injuries, the lesions that are seen are at the great white junction and are associated with petechial hemorrhaging, which was absent in this case.

56. Dr. Hammerberg pointed out that Dr. Mason failed to note that there are other motor neuron diseases that typically exhibit progressive loss of motor control with increased muscle tone and no problems with cognition. And, he testified that was the exact case here. He found Claimant exhibited a clinical picture consistent with a type of motor nerve disease known as primary lateral sclerosis (PLS). HE also found that the diagnosis related to the original fall on June 28, 2016, was posttraumatic headache with a cervical strain, right shoulder sprain, and sprain/strain of the right index finger. He concluded that the second fall of August 15, 2017, was more likely caused by the dexterity issues associated with PLS and/or a mechanical fall caused by the condition of the concrete, the lighting conditions, and the presence of a puddle in that area. (Ex. K, pg. 188.)

57. The ALJ finds Dr. Hammerberg's opinions and conclusions to be highly credible and highly persuasive. However, whether his opinions and conclusions, when combined with the remainder of the record, provide clear and convincing evidence that Claimant was at MMI on June 19, 2017, or at any other time, cannot be determined without the final assessment and causation analysis of Claimant's authorized treating neurologist, Dr. Treihaft.

58. Claimant retained expert neurologist Dr. Bennett Machanic to examine Claimant and opine on his neurological condition and his diagnosis. Dr. Machanic issued his report on September 27, 2018, and testified via deposition on January 28, 2019.

59. Dr. Mechanic performed a cursory review of the case and relied on inaccurate information and, therefore, he reached inaccurate and unreliable conclusions. He admitted that he did not have an accurate history from Claimant. (Dep., pg. 62.) He admitted that the records available for review regarding Claimant's pre-existing condition were limited. He specifically did not have the records of Claimant's neurological evaluations at Kaiser Permanente with Dr. Schabbing when he formed his initial opinion. (Dep., pg. 63.) He was unaware Claimant had previously undergone a muscle biopsy. (Dep., pg. 63:LL17-20.) He was incorrectly led to believe Claimant's prior muscle problems had been alleviated after discontinuing statin drugs. (Dep., pg. 64:LL11-15.) As such, he steadfastly held that Claimant's pre-existing condition was 100% caused by statin drugs. Even claimant's neurologists at that time did not believe this, and noted that he had a myopathy of yet undefined cause. Dr. Machanic also discounted

observations made by ATPs in the claim, and went as far as suggesting that they were “liars.” Specifically, and without reasonable explanation, he alleged Dr. Broghammer was a liar when he documented that Claimant had a worsening dizziness problems for the two years preceding his fall on June 28, 2016. (Dep., pg. 73-75.) He maintained this position even when presented with confirmation that during his evaluation Claimant omitted some information and was not a reliable historian regarding certain matters. He admitted Claimant’s statements regarding the August 15, 2017, mechanism of injury were inconsistent with other medical records. He noted Claimant reported he had lost balance and did not indicate that he had tripped and had fallen on raised concrete covered by water as set forth in the contemporaneous medical records regarding the second fall on August 115, 2017. (Dep., pg. 81-82.)

60. Dr. Machanic’s cursory, and imprecise review led to inaccurate and unreliable conclusions that cannot be reconciled. During direct testimony, Dr. Machanic specifically concluded that the spasticity seen by himself, Dr. Hammerberg, Dr. Treihaft, and DIME physician Dr. Mason, did not exist until after the second fall on August 15, 2017. (Dep., pg. 43:LL1-11.) He said that he did not see any evidence or discussion of spasticity prior to the second fall of August 15, 2017. (Dep., pg. 43:LL56-24; pg. P47:LL21-24; pg. 48:LL1-4.) This led him to believe that the spasticity seen on examination was caused by a brainstem injury from the second fall and surgery because he determined the initial fall was not significant enough to cause the spasticity. His inaccurate analysis and conclusion was addressed on cross-examination:

Dr. Machanic’s Deposition P87:

2 Q. Indeed, when you looked at Dr. Treihaft's

3 note in this matter, he talks about spastic maneuvers of

4 sorts; rigidity, of course, and Parkinsonian-type

5 findings. Correct?

6 A. Yes.

7 Q. You said in your direct examination that

8 you didn't believe the spasticity or these problems

9 existed until after the second fall. Now looking at

10 Dr. Treihaft's note, you would have to agree he was

11 seeing something similar to rigidity, spasticity,

12 something different than dizziness. Correct?

13 A. Well, Dr. Treihaft saw the patient

14 April 17th, 2017.

15 Q. Yeah.

16 A. That is after all of this.

17 Q. After all of what?

18 A. The events we are talking about.

19 Q. And what is the date of the second fall?

20 A. The date of the second fall is --

21 Q. Because I may be wrong here.

22 A. -- August 15, 2017.

23 Q. Okay.

24 A. And Treihaft sees him before.

25 Q. Oh, so he sees him before?

Dr. Machanic's Deposition P88

1 A. And he sees him April 12th, '17. So that

2 is after the first injury.

3 Q. Okay. So now that we have the timeline

4 correct, do you agree that Dr. Treihaft recognized

5 spasticity, rigidity, Parkinsonian-type symptoms or

6 findings, whatever he is calling that, does that give

7 you some more information that is different than what

8 you said in your direct testimony, that is that

9 spasticity existed only after the second fall?

A. Well, if Treihaft sees it, then it is genuine. But it doesn't occur before the first injury because it is not in the Kaiser notes.

Q. Right. But your testimony was that you felt that the second fall led to a hematoma of sorts that caused an injury to the brain stem, thus leading to the spasticity that did not exist before that. This record would seem to refute that, that the spasticity and rigidity identified by a separate neurologist in your field of practice was before that.

A. Well, I think we have to say something was going on before that, yeah.

Q. Okay. Let's pause there for a second and talk about that. Your theory is that the hematoma or

Dr. Machanic's Deposition P89

whatever it was that happened in the second injury caused brain stem injury leading to spasticity. Now that we see it existing with Dr. Treihaft, on his examination months before the second fall, what would be your theory of the cause of that?

A. So -- well, it can be several things.

7 One, it could be the original head injury was much more

8 significant; number two, could be that there is a

9 comorbidity developing at the same time; and three being

10 that Dr. Treihaft is the first neurologist after

11 Schabbing that saw this man. All I can say is that none

12 of this was evident before the first fall.

61. The revelation that Claimant had spasticity prior to the second injury was perplexing and new information to Dr. Machanic, and caused him to have to postulate two new theories; either that the initial head trauma was much more significant (something he and other physicians in this matter had already discredited through imaging and testing) or that there could be a comorbidity developing at the same time. Therefore, the ALJ finds that Dr. Machanic's opinions and conclusions are not credible, reliable, or persuasive based on the record before the court.

62. As previously found above, on July 28, 2016, approximately four weeks after the work accident, Claimant allegedly represented what he identified as an advancing dizziness to Dr. Broghammer, which according to Dr. Broghammer's medical records and his deposition testimony, was worsening during the two years before the work-related fall. Although Dr. Broghammer was deposed and confirmed Claimant told him he had advancing dizziness during the two years leading up to his work accident, Claimant denies telling Dr. Broghammer such and the medical records from Kaiser which predate the work accident do not document and use the term "dizziness" when describing Claimant's prior problems leading up to his work accident. The ALJ does not think Dr. Broghammer is lying, as indicated by Dr. Machanic. At the time Dr. Broghammer wrote his report, the relevancy of the statement and description of Claimant's symptoms before his work accident was unknown. There is a possibility that Dr. Broghammer wrote "2 years before the accident" instead of "for approximately 2 weeks since the accident." However, at this point, the ALJ is not finding one way or the other that Claimant did or did tell Dr. Broghammer that he had advancing dizziness during the two years before the work accident. But, there is additional evidence in the record which supports Dr. Broghammer's testimony and the information contained in his medical reports that Claimant had dizziness before the work accident.

Preexisting and Undiagnosed Condition

63. Medical records from Denver Health dated September 6, 2017, show Claimant's walking had been affected previously after he had DVTs. (Ex. V.)

64. Before his work related accident, Claimant treated with Kaiser for a preexisting, undiagnosed, condition that Claimant described as affecting his muscles.

65. The medical records from Kaiser Permanente, which predate his work accident, do, however, establish that Claimant's medical providers and his neurologists were attempting for years to diagnose Claimant's preexisting condition without success. It is clear that Dr. Mason and Dr. Machanic were not provided this information by Claimant. They were unaware of this preexisting condition, as confirmed by Claimant at hearing.

66. The Kaiser records indicate that in 2009, Claimant, based on the recommendations of his medical providers, considered undergoing an MRI or muscle biopsy, but did not proceed with either at that time. However, he did undergo electrodiagnostic studies on July 19, 2010, which were normal.

67. Medical records from Kaiser Permanente dated January 13, 2011, indicate Claimant was being assessed for a muscle biopsy after complaining of muscle pain and weakness. Claimant specifically described taking ibuprofen for years to address the problem.

68. Due to ongoing muscle symptoms, Claimant ultimately underwent muscle biopsies on February 25, 2011, which were normal. (Ex. V, pg. 209.) The cause of Claimant's muscle pain and weakness was undetermined as of March 15, 2011. (Ex. W, pg. 205.) Another possible neurological symptom Claimant complained of, which predated his work accident, was that he was also having difficulty with swallowing. *Id.* Although he never followed up and underwent the testing recommended to address his swallowing problems, this symptom could also be evidence and early signs, or emergence, of a motor neuron disorder.

69. Because his symptoms appeared to be neurologically based, Claimant was referred to, and evaluated by, a neurologist, Dr. Robert Schabbing on April 11, 2011. Claimant reported a history of myalgias and muscle tenderness beginning in late 2008. Claimant had been placed on statin drugs which were subsequently stopped in October 2008 due to a complaint of muscle aching. By May 2009, all statin drugs had been discontinued. However, Claimant continued with significant symptoms.

70. In addition, in 2011, it was suggested that Claimant be sent to the University [of Colorado] to be evaluated by a neurologist with more expertise than Dr. Schabbing, the neurologist at Kaiser. (*See* Ex. W, pg. 205.)

71. Claimant felt that his muscle aching was gradually getting worse over time and reported experiencing cramps daily. Claimant also complained of some tingling in his hands, arms, and back which tended to occur with the fatigue. Claimant also indicated his hands would sometimes turn white after periods of inactivity. Claimant also reported some redness or ruddiness to his facial color without associated sun exposure. Although Claimant related this condition to the use of statin drugs, his lack of improvement after the drugs were discontinued led Dr. Schabbing to conclude that Claimant had an undiagnosed myopathy associated with cramps. His providers at that time specifically discussed the lack of a clear

clinical diagnosis beyond a nonspecific myopathy which may have been uncovered by treatment with statins. However, there was no specific relationship to the statin drug. Claimant was advised to follow-up with neurology and rheumatology approximately one year after Dr. Schabbing's evaluations to reassess the exam. (Ex. W, pg. 210-214.) However, despite persisting symptoms, it does not appear Claimant followed-up.

72. On February 25, 2016, Claimant reported to Dr. O'Sullivan at Kaiser Permanente. The report indicates that Claimant had been diagnosed with a myopathy and that they were unsure of the cause. It is specifically noted that his condition did not improve after discontinuing the statin drugs. Claimant also indicated that he was taking hydrocodone 2-4 times a day to address the myopathy, muscle pain, and fatigue. (Ex. W.)

73. The evidence of Claimant's preexisting myopathy, muscle pain, fatigue, and problems swallowing, combined with worsening neurological symptoms after the work accident, are consistent with Claimant's neurological problems being caused by a slowly progressing neurological disorder and unrelated to his work accident. However, whether Claimant suffers from a neurological disorder such as primary lateral sclerosis or a neurological injury from hitting his head at work on June 28, 2016, was unable to be assessed as of June 19, 2017, when Claimant was placed at MMI by Dr. Updike, because Dr. Treihaft had not completed his workup and assessment of Claimant's neurological symptoms.

74. Additional diagnostic procedures and medical evaluations offer a reasonable prospect for defining the extent of Claimant's work injury and need for additional medical treatment, if any.

75. Because Claimant was not provided sufficient medical treatment before being placed at MMI on June 19, 2017, to assist in determining whether his neurological symptoms were caused by his work accident, there is insufficient evidence in the record for the ALJ to determine causation at this time.

CONCLUSIONS OF LAW

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

General Provisions

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

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence

contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

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

I. Whether Respondents have overcome the DIME opinion of Dr. Mason that Claimant was not at MMI on June 19, 2017.

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S.

A DIME physician's finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). And, any ambiguities in the DIME physician's report regarding MMI can be resolved by the ALJ. *See MGM Supply Co. v. Industrial Claim Appeals Office*, 62 P.3d 1001 (Colo. App. 2002).

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

Under the statute MMI is primarily a medical determination involving the diagnosis of Claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d

270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of Claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007).

However, it is inconsistent with a finding of MMI that additional diagnostic procedures and/or medical evaluations offer a reasonable prospect for defining the extent of Claimant's work injury and need for additional medical treatment. *See Patterson v. Comfort Dental East Aurora,* WC 4-874-745-01 (ICAO February 14, 2014); *Hatch v. John H. Garland Co.,* W.C. No. 4-638-712 (ICAO August 11, 2000).

Therefore, the ALJ finds and concludes that Respondents have failed to overcome Dr. Mason's opinion that Claimant was not at MMI on June 19, 2017, by clear and convincing evidence. The ALJ finds and concludes that Claimant is entitled to additional medical treatment in the form of a completed evaluation with Dr. Treihaft, a neurologist, to assist in determining the cause of Claimant's neurological symptoms and to determine when Claimant reached MMI, if at all, due to his work accident.

The ALJ also finds and concludes that the diagnostic testing recommended by Claimant's authorized treating physicians, which has not been performed, is deemed reasonable and necessary, if Dr. Treihaft or another authorized treating physician indicates the testing is still reasonable and necessary to assist in determining whether Claimant's neurological symptoms are related to his work accident. The diagnostic testing includes, but is not limited to, the "somatosensory evoked potentials for the left upper extremity coordination issues, and/or electrodiagnostic studies" recommended by Dr. Raford.

If an authorized treating physician, such as Dr. Treihaft, believes the additional diagnostic testing or evaluations recommended by Dr. Mason, the DIME, are reasonable and necessary, it will be up to an authorized treating physician to prescribe the diagnostic testing and/or evaluations. The ALJ does not have the authority to order Respondents to provide certain diagnostic testing and/or evaluations which have not been prescribed by an authorized treating physician. *See* WCRP 11*; Potter v. Grounds Service Co.,* W.C. No. 4-935-523-04 (August 15, 2018); *Torres v. City and County of Denver*, W.C. No. 4-917-329-03 (May 15, 2018.)

After Claimant was placed at MMI, Respondents had Claimant undergo an IME with Dr. Hammerberg, a neurologist. The ALJ found Dr. Hammerberg's opinions and testimony to be credible and highly persuasive. However, based on the facts and circumstances of this case, the Respondents' IME with Dr. Hammerberg cannot be used as a substitute for Dr. Treihaft's complete assessment.

It is only after Claimant has been provided reasonable and necessary medical treatment, which includes Dr. Treihaft's completed assessment, that the issue of MMI and whether Claimant's neurological problems were caused by the work accident can be evaluated by the DIME physician and then by an ALJ if a disagreement still exists.

Due to the numerous unanswered questions which have been raised by Dr. Mason and the various neurologists who evaluated Claimant before and after he was

placed at MMI, and opined about the possible cause of Claimant's neurological problems, the ALJ considered ordering an IME pursuant to Section 8-43-502, C.R.S. and/or C.R.C.P. 706, with a neurologist specializing in head injuries and/or motor neuron disorders to assist in assessing causation and to provide supporting literature in support of their opinion. However, the fact that the ALJ considered ordering an IME to assist in completing the analysis of Dr. Treihaft drove home the point that Claimant was placed at MMI prematurely and that a determination regarding causation cannot be made until Dr. Treihaft completes his assessment and evaluation of Claimant and renders an opinion.

The ALJ finds and concludes that there is insufficient evidence in the record to determine whether Claimant's neurological problems were caused by his work accident.

II. If Claimant is not at MMI as of June 19, 2017:

- Is Claimant not at MMI because he needs additional diagnostic testing and evaluations to determine whether his neurological problems were caused by either his industrial accident or an underlying motor neuron disease such as primary lateral sclerosis; or
- Is Claimant not at MMI because he needs additional treatment to cure and relieve him from the effects of his neurological problems which were caused by his industrial accident?

As found and concluded above, Claimant is not at MMI because he needs additional diagnostic testing and evaluations to determine whether his neurological problems were caused by either his industrial accident or are the result of something else such as an underlying motor neuron disease like primary lateral sclerosis.

III. Whether Claimant's need for medical treatment, including the medical treatment caused by a subsequent fall which occurred on August 15, 2017, is causally related to Claimant's work injury of June 28, 2016.

Each party has requested the ALJ to address the cause of Claimant's subsequent fall which occurred on August 15, 2018, and the need for medical treatment after such fall. However, addressing such issue is premature because Claimant has not been provided the requisite medical treatment to determine whether his neurological symptoms were caused by his work accident.

ORDER

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

1. Respondents have failed to overcome Dr. Mason's opinion by clear and convincing evidence that Claimant was not at MMI on June 19, 2017.

2. There is insufficient evidence in the record to determine whether Claimant's neurological symptoms were caused by his compensable work accident.

3. Claimant was not at MMI on June 19, 2017, because he needs additional medical treatment to determine whether his neurological symptoms were caused by his compensable work accident. This treatment includes Dr. Treihaft's complete assessment.

4. Respondents shall pay for Claimant to return to Dr. Treihaft and for Dr. Treihaft to complete his assessment and render an opinion as to whether Claimant's neurological symptoms were caused by his work accident and also address MMI.

5. The parties shall work together to facilitate getting Dr. Treihaft the relevant information necessary for him to perform and complete his assessment and render an opinion regarding causation and MMI.

Any issues not expressly decided herein are reserved to the parties for future determination.

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

DATED: April 4, 2019.

/s/ Glen Goldman

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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that prescriptions for Cialis and Stendra are reasonable, necessary, and causally related to his September 7, 2016 work injury.

2. If found reasonable, necessary, and causally related to his injury Claimant seeks reimbursement in the amount of $2,857.86 for his out of pocket costs for those prescriptions.

FINDINGS OF FACT

1. Claimant is employed by Employer as an Assistant Fire Chief.

2. In 2016, Claimant was diagnosed with prostate cancer. Respondent ultimately admitted liability for Claimant's prostate cancer, conceding that the cancer was work related.

3. Claimant underwent treatment for his prostate cancer that included biopsy, surgery, and 5 rounds of CyberKnife treatment.

4. On December 14, 2016, Stanley Galansky, M.D. performed a transurethral resection of prostate (TURP) procedure. *See* Exhibits 6, G.

5. On March 27, 2017, Dr. Galansky evaluated Claimant. Claimant reported he was bothered by retrograde ejaculation but was pleased with his voiding pattern and strength of stream following the TURP procedure. *See* Exhibit G.

6. On April 27, 2017, Dr. Galansky had Claimant fill out a Sexual Health Inventory for Men (SHIM) form. Claimant rated his confidence that he could keep an erection at 3. In the four other categories, Claimant rated a 4. His total score was noted to be 19/25 on the SHIM. See Exhibit G.

7. On June 16, 2017, Annyce Mayer, M.D. performed an Occupational/Environmental Clinic Examination and she issued a report on August 30, 2017. Dr. Mayer met with Claimant and obtained a history of present illness from Claimant. Dr. Mayer also reviewed Claimant's past medical history, surgical history, social history, family history, environmental history, and occupational history. Dr. Mayer also reviewed medical records. Dr. Mayer assessed prostate cancer and noted Claimant was to begin CyberKnife treatment. Dr. Mayer also assessed benign prostatic hypertrophy for which Claimant recently underwent a TURP procedure in advance of CyberKnife treatments that resolved his urinary symptoms. Dr. Mayer assessed erectile dysfunction, mild with excellent response to Cialis. Claimant reported some ejaculatory

dysfunction since the TURP procedure. Dr. Mayer noted that Claimant would begin CyberKnife treatment the next week with Dr. Galansky and Dr. McNeeley. Dr. Mayer opined the prostate cancer was work related. *See* Exhibits 7, G.

8. Claimant reported to Dr. Mayer that his PSA prostate screening was elevated in September of 2016 and repeat testing was also high. Claimant reported that he was referred to urologist Stanley Galansky, M.D. who performed a biopsy in October of 2016 and diagnosed prostate cancer. Claimant reported that he had increased urinary symptoms in the last few years and was also diagnosed with an enlarged prostate. Claimant reported it was recommended he undergo a TURP procedure in advance of CyberKnife treatment. Claimant reported he was healing and was scheduled to have a diode placed on June 23, 2017 in preparation for CyberKnife treatment. Claimant reported that for his erectile dysfunction he had taken Cialis on and off basis for the last couple of years, he believed since about 2014. Claimant reported that he had no recent worsening of symptoms, was able to achieve an erection, but that his erection was improved on Cialis. Claimant reported that since the TURP procedure he had variable ejaculation but that his urinary symptoms were much improved with no decreased force of stream, hesitancy, or incontinence. Claimant's medications were listed as Cialis 5 mg as needed. *See* Exhibits 7, G.

9. On June 5, 2018, Clinton Merrill, M.D. issued a report titled Independent Review of Medical Records. Dr. Merrill noted that Claimant had been diagnosed with prostate cancer, underwent a TURP procedure on December 14, 2016 and then received adjuvant therapy by CyberKnife in June of 2017. Dr. Merrill reviewed medical records. Dr. Merrill opined that Claimant's only significant risk factors for prostate cancer were his age and race and that Claimant's exposure to various carcinogens over the years as a firefighter was a primary contributing factor to development of prostate cancer. Dr. Merrill did not review or discuss erectile dysfunction. *See* Exhibit 8.

10. On July 16, 2018, Counsel for Claimant submitted a letter to Respondent requesting Claimant be reimbursed for out of pocket pharmacy expenditures in the amount of $2,877.86. *See* Exhibits 4, B.

11. On October 16, 2018, Counsel for Claimant submitted another letter to Respondent requesting Claimant be reimbursed for out of pocket expenditures in the amount of $2,877.86. *See* Exhibits 4, C.

12. On October 26, 2018, Counsel for Respondent submitted a letter to Counsel for Claimant noting the receipt of Claimant's reimbursement request. Respondent indicated they could not tell from redaction what two listed items for $10 each were and thus could not determine the relatedness of those items. [1] Respondent also indicated that the remaining items on the list had insufficient documentation to support they were related. Respondent noted that the remaining items were for prescriptions of Cialis and Stendra, both erectile dysfunction drugs. Respondent indicated that the medical records showed Claimant had been taking Cialis since as early as February of 2013, several years

[1] Claimant withdrew his request for reimbursement for the two separate redacted $10 items at hearing. Therefore, the amount requested for reimbursement at hearing is reduced by $20 and is $2,857.86.

prior to his prostate cancer diagnosis. Respondent also noted that other records indicate that Claimant reported no worsening of erectile dysfunction symptoms following his surgery. Respondent rejected the request for reimbursement noting that the records did not suggest that the prostate cancer or treatment aggravated Claimant's erectile dysfunction. *See* Exhibit 4, D.

13. On February 19, 2019, Gregory Reichhardt, M.D. performed a Division Independent Medical Evaluation (DIME). Claimant reported that he had an elevated PSA in 2016, underwent a biopsy, and was diagnosed with prostate cancer. Claimant reported he went through the legal process and was accepted as a having a work related cancer. Claimant reported he underwent a TURP procedure and after healing from that, had retrograde ejaculation which had not existed prior to the surgery. Claimant reported that he underwent CyberKnife for five to six treatments and that he had been since discharged to full duty but gets a PSA every three months between follow-ups with providers. *See* Exhibit 1.

14. Claimant reported to Dr. Reichhardt that he had retrograde ejaculation since his TURP. Claimant also reported erectile dysfunction. Claimant reported that he did have prior erectile dysfunction, but felt that the Cialis worked better than it does now and that the Cialis was not as effective at maintaining erection. Claimant reported that he now had difficulty maintaining his erection about one quarter to one half of the time. Claimant's medications were noted to be Cialis, 20 mg, as needed. Dr. Reichhardt noted in the discussion portion of his DIME report that Claimant had erectile dysfunction prior to the injury successfully treated by Cialis and that Claimant reported Cialis was not as effective as a treatment at this time and that he now had difficulty maintaining an erection one quarter to one half of the time. Dr. Reichhardt provided an impairment for sexual dysfunction under Section 11.4(a), impairment of the penis, Class 1 impairment with varying degrees of difficulty erection, ejaculation, and/or sensation. Dr. Reichhardt noted Claimant's reports of increased difficulty maintaining an erection and the retrograde ejaculation since Claimant's TURP procedure. Based on that, Dr. Reichhardt provided a 5% whole person impairment. Dr. Reichhardt opined that Claimant was at maximum medical improvement as of August 3, 2018 and that for maintenance medical treatment required indefinite medical follow up with the urologist and radiation therapy specialist. *See* Exhibit 1.

15. On March 12, 2019, Respondents filed a Final Admission of Liability noting that Claimant had reached maximum medical improvement on August 3, 2018. Respondents admitted to a 5% whole person impairment rating, consistent with the report of DIME physician Dr. Reichhardt. *See* Exhibit A.

16. Records prior to Claimant's prostate cancer diagnosis confirm that he had erectile dysfunction prior to his prostate cancer.

17. On July 9, 2013, Jean Greos, M.D. evaluated Claimant. Dr. Greos assessed as one of Claimant's problems, erectile dysfunction and noted an onset date of February 5, 2013. Under current medications, Dr. Greos listed: Cialis 20 mg tablet, 1

tablet PO PRN, 10 days, 6 refills, for a total of 10, start on February 5, 2013, end on September 21, 2014, maintenance drug. *See* Exhibit E.

18. On September 22, 2014, Dr. Greos evaluated Claimant. Claimant reported that he was sexually active but did not experience sexual satisfaction. Claimant reported that he used Cialis as needed with good results. Dr. Greos noted continued diagnosis of erectile dysfunction and noted under Rx: Cialis 20 mg tablet, 1 tablet PO PRN, 10 days, 6 refills, for a total of 10, start on September 22, 2014, maintenance drug. *See* Exhibit F.

19. Claimant was the only witness that testified at hearing. Claimant testified that after his prostate cancer diagnosis, he had biopsy, surgery, and 5 CyberKnife treatments. Claimant testified that before his prostate cancer he took Cialis for erectile dysfunction to help with sexual performance. Claimant testified that he took Cialis from a "manhood" point of view to provide him longevity during sex.

20. Claimant testified that after his prostate cancer and treatment, his use of Cialis changed. Claimant testified now that he is prescribed Cialis ongoing to help with erectile dysfunction and that now without the use of Cialis, he cannot get or maintain an erection. Claimant testified that he used to take Cialis as needed for longevity in performance but now takes it for daily use to get and maintain an erection.

21. Claimant testified that he had spent $2,857.86 out of pocket for the Cialis prescriptions following his prostate cancer treatment, as he wanted to continue to take Cialis on a continuous daily basis. Claimant asked for reimbursement.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57

P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

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

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990).

Respondent argues that Claimant reported no worsening of his erectile dysfunction symptoms to Dr. Mayer approximately 6 months following his TURP surgery. Respondent also argues that Clamant was on Cialis several years prior to his prostate cancer diagnosis and that his dose for Cialis is the same dose he now takes. Respondent argues that the medical records show no worsening of the erectile dysfunction condition and the same medications. Thus, Respondent argues that the prostate cancer did not cause the need for Cialis or increase the need for Cialis. Claimant argues that before prostate cancer he needed Cialis for performance longevity and took it as needed whereas now he needs it for daily use to get and maintain an erection. Claimant argues his situation now is worse and different from his situation before his prostate cancer treatment.

Claimant had pre-existing issues with erectile dysfunction and longevity in his sexual performance that dated back to February of 2013, several years before his prostate cancer diagnosis. However, his pre-existing erectile dysfunction issues were helped with Cialis, taken as needed, and were longevity issues versus erection issues. Claimant is credible in his testimony that following his prostate cancer treatment, he now has issues with getting and maintaining an erection and now requires daily use of Cialis. Although Respondents point to a medical record where Claimant reported no significant change in his erectile dysfunction, this record was completed after Claimant's TURP procedure but prior to his 5 rounds of Cyberknife. Claimant is credible and persuasive that his erectile dysfunction condition now, and following prostate cancer treatment, is

worse. Claimant has established, more likely than not, that his prostate cancer treatment aggravated and accelerated his erectile dysfunction leading him to have greater disability and greater need for prescription medications. Additionally, it is noted that part of the 5% whole person impairment provided by DIME physician Dr. Reichhardt includes impairment for sexual dysfunction, and varying degrees of difficulty with erection, ejaculation, and/or sensation. Dr. Reichhardt specifically noted in his impairment rating Claimant's reports of increased difficulty maintaining an erection following his prostate cancer treatment. Dr. Reichhardt's opinion and rating included permanent impairment for this problem and is found consistent with Claimant's credible testimony that his erectile dysfunction is worse now than it was prior to his prostate cancer treatment.

ORDER

It is therefore ordered that:

1. Claimant's has established by a preponderance of the evidence that erectile dysfunction medications are reasonable, necessary, and related to his work injury.

2. Respondents shall reimburse Claimant $2,857.86 for Claimant's out of pocket expenses.

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

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

DATED: April 4, 2019

/s/ Michelle E. Jones

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

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that she suffered an occupational disease in the form of upper back and shoulder pain that began on September 4, 2017 during the course and scope of her employment with Employer.

2. Whether Claimant has proven by a preponderance of the evidence that she is entitled to receive Temporary Partial Disability (TPD) benefits for the period December 11, 2017 through April 8, 2018.

3. A determination of Claimant's Average Weekly Wage (AWW).

4. Whether Claimant has established by a preponderance of the evidence that she is entitled to receive reasonable, necessary and related medical maintenance benefits that are designed to relieve the effects of her September 4, 2017 occupational disease or prevent further deterioration of her condition.

FINDINGS OF FACT

1. In 2007 Claimant began working for Employer as a Quality Control Inspector. She inspected tiles that weighed either three or five and one-half pounds. Claimant earned $41,883.33 over a 54-week period in 2016 and 2017 for an Average Weekly Wage (AWW) of $775.62. She did not experience any physical symptoms while performing her job duties.

2. Claimant subsequently began inspecting larger items that required more lifting. She noted that the pace of her work also increased. Claimant developed some upper back and shoulder symptoms on about September 4, 2017 but did not seek medical treatment.

3. Claimant specifically explained that her job duties involved inspecting 5.5-pound tiles under a light by extending her arms slightly higher than chest level. She remarked that, if she discovered a defect during the inspection, she placed the tile on a table and removed any imperfections with a sanding tool. She then placed the tile on a cart. After Claimant completed five tiles, she packaged them in a cardboard box by layering them in packaging cushions and then taping the box. Each box of packaged tiles thus weighed 27.5 pounds. After the cart was full of boxes Claimant pushed the cart and unloaded the boxes onto a pallet. Claimant then returned to her work area to count irreparable, defective tiles and input the information into a computer for tracking purposes.

4. On December 5, 2017 Claimant visited Clarence V. Ellis, M.D. for medical treatment. Claimant reported that in September 2017 she began developing pain across her upper back and shoulders in the absence of a specific injury. She explained that her

job duties consist of lifting 5.5-pound tiles from a table or the floor, holding them in front of her at about eye level and inspecting them. After she completed each inspection she placed five tiles in a box and carried the box a short distance to a palate. Claimant noted that she inspects approximately 300 tiles in a 10-hour day. She remarked that the table from which she lifts the tiles is high for her stature. After conducting a physical examination Dr. Ellis diagnosed Claimant with bilateral trapezius muscle strains that were more than 50% likely related to her job duties for Employer. He prescribed medications and physical therapy but did not assign any work restrictions.

5. On December 11, 2017 Claimant visited Hiep Lelourdes Ritzer, M.D. for an evaluation. Claimant reported that she developed pain in her upper back and shoulders in September 2017 while inspecting tiles for Employer. She did not suffer a specific injury but her symptoms continued to worsen. After reviewing her medical history and conducting a physical examination, Dr. Ritzer diagnosed Claimant with the following: (1) trapezius muscle strain; (2) myofascial pain; (3) right arm numbness; and (4) bilateral shoulder pain. He determined that Claimant's symptoms were consistent with a work-related injury. Dr. Ritzer prescribed physical therapy and medications. He also requested an ergonomic job site evaluation because Claimant is only five feet one-inch tall and performs significant, repetitive lifting throughout each workday. Dr. Ritzer assigned work restrictions including no repetitive lifting, no lifting in excess of five pounds and no overhead reaching.

6. On January 5, 2018 Howard Fallik completed a Job Demands Analysis and Risk Factor Analysis for the position of Quality Control Inspector at Employer's facility. He issued a report on January 11, 2018. Relying on the Colorado Division of Workers' Compensation *Medical Treatment Guidelines* (*Guidelines*), Mr. Fallik did not find evidence of any Primary or Secondary Risk Factors involved in Claimant's job duties. After conducting time studies of Claimant's work activities Mr. Fallik specifically determined that inspecting and lifting tiles did not fit within the Primary or Secondary Risk Factors regarding pinch force or lifting.

7. On April 5, 2018 Genex performed an ergonomic evaluation that considered Claimant's work area and job duties. The report included several recommendations to improve Claimant's work environment. Genex recommended lowering Claimant's examining light and moving it closer to her body. Recommendations also included providing Claimant with an adjustable work surface and chair. Finally, the report suggested improved lifting position and shifting Claimant's job responsibilities every two to three hours to provide variety and decrease repetition.

8. On April 17, 2018 Carlos Cebrian, M.D. performed a records review of Claimant's claim. After reviewing Claimant's medical records and considering the Job Demands Analysis, Dr. Cebrian performed a causation analysis pursuant to the *Guidelines*. He remarked that Claimant attributed her upper back and upper extremity symptoms to her work activities for Employer. Dr. Cebrian explained that, in order to perform a medical causation analysis for a cumulative trauma condition pursuant to the *Guidelines*, the first step is to make a diagnosis, the next step is to clearly define the job duties and the final step is to compare the job duties with the delineated primary risk

factors. However, because of the location of Claimant's symptoms in her upper back and upper extremities, the *Guidelines* did not specifically contemplate Claimant's diagnosis. He thus performed a causation analysis utilizing the scientific methodology of a general causation analysis, the cumulative trauma guidelines and shoulder guidelines. Notably, Claimant's medical providers had failed to conduct a causation analysis pursuant to the *Guidelines*.

9. In considering Claimant's diagnosis or differential diagnosis, Dr. Cebrian noted that she suffered upper back pain with intermittent upper extremity symptoms. The differential diagnoses included cervicothoracic myofascial pain, thoracic strain, shoulder impingement and thoracic outlet syndrome.

10. In delineating Claimant's job duties Dr. Cebrian relied on the Job Demands Analysis prepared by Mr. Fallik. Notably, the Job Demands Analysis specified that Claimant spent about 20-30% of her workday inspecting products and determining whether they met quality control standards. She also spent about 20-30% of her day using tools or sandpaper to correct product deficiencies. Claimant also spent about 5-10% of her day using cleaning solution to remove substances from products and 5-10% of her day to document the results of her inspections on a computer. Claimant placed products in boxes and moved the boxes for another 5-10% of her day. Finally, she cleaned her work area 3-5% of the time. Dr. Cebrian summarized that Claimant's job duties included lifting 5.5 pound floor tiles from a table or the floor, holding them at about eye level and then inspecting the tiles. After examining the tiles Claimant packed five in a box and moved the box to a pallet located a short distance away. Claimant reported that she inspected about 300 tiles each 10-hour day.

11. Dr. Cebrian compared Claimant's job duties with the delineated Primary Risk Factors in the *Guidelines*. He reviewed the Primary Risk Factor Definition Table for Force and Repetition/Duration. Dr. Cebrian noted that the Table requires six hours of the use of two pounds of pinch force or 10 pounds of hand force for three times or more per minute. Additional risk factors include six hours of lifting 10 pounds greater than 60 times per hour or six hours of using hand held tools weighing two pounds or more.

12. Dr. Cebrian noted that an additional Primary Risk Factor category is Awkward Posture and Repetition/Duration. The factor requires four hours of wrist flexion greater than 45 degrees, extension greater than 30 degrees, or ulnar deviation greater than 20 degrees, six hours of elbow flexion greater than 90 degrees, six hours of supination/pronation with task cycles 30 seconds or less or awkward posture for at least 50% of a task cycle. Additional Primary Risk Factors include computer work for more than seven hours per day or at a non-ergonomically correct work station, continuous mouse use of greater than four hours or use of a handheld vibratory power tool for six hours or more. Dr. Cebrian determined that Claimant's job duties did not meet any of the Primary Risk Factors to meet the minimum thresholds in the *Guidelines.* After outlining the Secondary Risk Factors enumerated in the *Guidelines*, Dr. Cebrian determined that Claimant did not meet the criteria for developing a cumulative trauma disorder.

13. Dr. Cebrian also considered the *Guidelines* in evaluating Claimant's upper thoracic spine complaints that radiated into her shoulders. The *Guidelines* specifically include factors for the development of shoulder pathology. They include the following: (1) overhead work of 30 minutes per day for a minimum of five years; (2) shoulder movement at the rate of 15-36 repetitions per minute and no two second pauses for 80% of the work cycle; and (3) shoulder movement with force greater than 10% of maximum with no two second pauses for 80% of the work cycle. Dr. Cebrian concluded that Claimant's upper back and bilateral upper extremity symptoms were not directly or indirectly related to her work activities for Employer.

14. During the period December 2017 until April 2018 Claimant continued to receive medical treatment from Drs. Ellis and Ritzer. She also underwent physical therapy and chiropractic treatment. On April 23, 2017 Claimant visited Yusuke Wakeshima, M.D. after a referral by Dr. Ritzer for a comprehensive physiatric consultation. Claimant reported neck pain, upper back pain, bilateral shoulder pain and bilateral upper extremity pain that began on September 4, 2017. She attributed her symptoms to cumulative trauma from her work activities as a Quality Control Inspector for Employer. After performing a physical examination Dr. Wakeshima diagnosed Claimant with myofascial pain, neck pain, upper back pain, bilateral arm pain and bilateral hand numbness. He recommended electrodiagnostic testing of her right upper extremity.

15. On April 27, 2018 Claimant returned to Dr. Wakeshima for electrodiagnostic testing. The studies were negative and did not reveal any electrophysiologic evidence of injuries to the right upper extremity.

16. On May 2, 2018 Claimant returned to Dr. Ritzer for an evaluation. Dr. Ritzer recounted that in September 2017 Claimant began to develop symptoms in her upper back and shoulders because of her repetitive job duties for Employer. He noted that Claimant specifically reported bilateral trapezius pain, bilateral shoulder pain, right arm numbness and myofascial pain. After reviewing Claimant's medical records and performing a physical examination Dr. Ritzer diagnosed Claimant with a strain of the trapezius muscle, myofascial pain and right arm numbness. He concluded that Claimant had reached Maximum Medical Improvement (MMI) with no impairment or restrictions. Dr. Ritzer noted that, after reviewing the Job Demands Analysis, Claimant did not have any Primary or Secondary Risk Factors for a cumulative trauma injury. However, he remarked that the ergonomic evaluation revealed risk factors that suggested her symptoms were likely work-related. Finally, Dr. Pitzer recommended medical maintenance treatment in the form of pain management with Dr. Wakeshima.

17. On September 27, 2018 Claimant underwent an independent medical examination with John S. Hughes, M.D. Dr. Hughes conducted a physical examination and reviewed Claimant's medical history. He also summarized the Job Demands Analysis prepared by Mr. Fallik. Dr. Hughes noted that Claimant's job involved occasional lifting of boxes weighing from 20-40 pounds, frequent handling and carrying of pieces weighing 5-10 pounds and occasional manipulation of tools weighing 2-6 pounds. Claimant also pushed and pulled a cart with 15-30 pounds of force, frequently gripped products using 2-8 pounds of force and pulled empty carts with 1-10 pounds of force. Dr.

Hughes diagnosed Claimant with myofascial pain syndrome and myogenic right thoracic outlet syndrome. He agreed with Drs. Ritzer and Wakeshima that Claimant reached MMI on May 2, 2018. Relying on the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised) (AMA Guides*), Dr. Hughes assigned a 4% whole person rating pursuant to Table 53 and a 4% rating for range of motion deficits for a total 8% whole person impairment.

18. Claimant testified at the hearing in this matter. She explained that she began to develop pain in her neck, shoulders and arms on September 4, 2017 while performing her job duties for Employer. She specifically detailed that she repetitively inspects 5.5-pound ceramic tiles, performs necessary repairs and places groups of five tiles in boxes. After Claimant reported her symptoms to Employer, she obtained conservative medical treatment in the form of massage therapy, physical therapy, dry needling and medications. Claimant also performed modified job duties in which she inspected smaller tiles. She remarked that all of the treatment improved her condition but her symptoms returned when she resumed her regular job duties.

19. On February 11, 2019 the parties conducted the post-hearing evidentiary deposition of Dr. Cebrian. Dr. Cebrian maintained that Claimant did not suffer a work-related exposure that constituted a cumulative trauma condition under either a general causation assessment, cumulative trauma analysis or shoulder causation analysis pursuant to the *Guidelines*. He explained that he utilized multiple causation analyses because the cumulative trauma analysis did not completely encompass Claimant's diagnoses but allowed him to use a scientific approach to causation. Considering the Job Demands Analysis, Dr. Cebrian testified that the combination of repetition, force and cycle time in Claimant's duties as a Quality Control Inspector failed to meet the causation requirements for a cumulative disorder. Dr. Cebrian specifically remarked that Claimant lifted tiles weighing 5.5 pounds while performing her job duties. She inspected a total of 280-300 tiles during each 10-hour work shift or about one tile every two minutes. The exposure did not constitute a highly repetitive activity under the *Guidelines*. Dr. Cebrian addressed the Genex ergonomic evaluation and noted that none of the suggested modifications correlated with any risk factors or level of exposure that would meet a minimum threshold for a work-related condition under the *Guidelines*. He commented that, although an individual may experience symptoms at work, a sufficient exposure is required to constitute a work-related condition. Dr. Cebrian summarized that Claimant did not engage in forceful and repetitive activity for an amount of time that meets the minimum threshold in the *Guidelines*.

20. On February 22, 2019 the parties conducted the post-hearing evidentiary deposition of Dr. Hughes. Dr. Hughes agreed with other physicians that Claimant suffered a soft tissue injury to her upper back and lower neck area. In assessing whether Claimant's work activities caused her symptoms, Dr. Hughes explained that the cumulative trauma section of the *Guidelines* was not designed or developed to apply to Claimant's condition. He remarked that, in evaluating the causes of conditions such as Carpal Tunnel Syndrome (CTS), the cumulative trauma criteria are useful because factors including repetition, force and vibration have been scientifically well-established contributors to the diagnosis. However, the cumulative trauma section of the *Guidelines*

is not useful in assessing Claimant's case because of the lack of scientific evidence connecting her symptoms to work activities. Dr. Hughes summarized that Claimant simply does not have a condition that is amenable to a scientific assessment. Instead, employing a general causation analysis, Dr. Hughes reasoned that Claimant's repetitive lifting of 5.5 pound tiles at work caused her upper back and shoulder symptoms.

21. Claimant has failed to demonstrate that it is more probably true than not that she suffered an occupational disease in the form of upper back and shoulder pain that began on September 4, 2017 during the course and scope of her employment with Employer. Although Claimant attributed her upper back and shoulder symptoms to her work activities, a review of her job duties reflects that they lacked the requisite force or repetition to cause a cumulative trauma disorder. Furthermore, Claimant engaged in a variety of activities throughout each shift. The record reflects that Claimant's tasks as a Quality Control Inspector included inspecting 5.5-pound tiles, removing any imperfections with a sanding tool, placing the tiles on a cart, packaging five tiles in a box, pushing the cart and unloading the 27.5 pound boxes onto a pallet. Claimant then returned to her work area to count irreparable, defective tiles and input the information into a computer for tracking purposes.

22. Relying on the *Guidelines* in conducting a Job Demands Analysis, Mr. Fallik did not find evidence of any Primary or Secondary Risk Factors in Claimant's job duties. After conducting time studies of Claimant's work activities Mr. Fallik specifically determined that inspecting and lifting tiles did not fit within the Primary or Secondary Risk Factors regarding pinch force or lifting. Claimant spent about 20-30% of her workday inspecting tiles and another 20-30% of her day using tools or sandpaper to correct product deficiencies. She also spent about 5-10% of her day cleaning the tiles and 5-10% of her day documenting the results of her inspections on a computer. Claimant boxed tiles and moved them for another 5-10% of her day and cleaned her work area 3-5% of the time. Claimant thus engaged in a variety of tasks throughout her 10-hour workday.

23. Dr. Cebrian persuasively maintained that Claimant did not suffer a work-related exposure that constituted a cumulative trauma condition under either a general causation assessment, cumulative trauma analysis or shoulder causation analysis pursuant to the *Guidelines*. He explained that he utilized multiple causation analyses because the cumulative trauma analysis did not completely encompass Claimant's diagnoses but allowed him to use a scientific approach to causation. Considering the Job Demands Analysis, Dr. Cebrian explained that the combination of repetition, force and cycle time in Claimant's duties as a Quality Control Inspector failed to meet the causation requirements for a cumulative disorder. Dr. Cebrian compared Claimant's job duties with the delineated Primary Risk Factors in the *Guidelines*. He reviewed the Primary Risk Factor Definition Table for Force and Repetition/Duration. Dr. Cebrian noted that the Table requires six hours of the use of two pounds of pinch force or 10 pounds of hand force for three times or more per minute. He specifically remarked that Claimant lifted tiles weighing 5.5 pounds while performing her job duties. She inspected a total of 280-300 tiles during each 10-hour work shift or about one tile every two minutes. The exposure did not constitute a highly repetitive activity under the *Guidelines*. Dr. Cebrian also considered the *Guidelines* in evaluating Claimant's upper thoracic spine complaints

that radiated into her shoulders. The *Guidelines* specifically include factors for the development of shoulder pathology. He concluded that Claimant's upper back and bilateral upper extremity symptoms were not directly or indirectly related to her work activities for Employer. Finally, in addressing the Genex ergonomic evaluation Dr. Cebrian noted that none of the suggested modifications correlated with any risk factors or level of exposure that would meet a minimum threshold for a work-related condition under the *Guidelines*. Dr. Cebrian thus summarized that Claimant did not engage in forceful and repetitive activity for an amount of time that meets the minimum threshold in the *Guidelines*.

24. In contrast, Dr. Hughes explained that the cumulative trauma section of the *Guidelines* was not designed or developed to apply to Claimant's condition. He remarked that, in evaluating some conditions the cumulative trauma criteria are useful because factors including repetition, force and vibration have been scientifically well-established contributors to the diagnosis. However, the cumulative trauma section of the *Guidelines* is not useful in assessing Claimant's case because of the lack of scientific evidence connecting her symptoms to work activities. Dr. Hughes summarized that Claimant simply does not have a condition that is amenable to a scientific assessment. Instead, employing a general causation analysis, he reasoned that Claimant's repetitive lifting of 5.5-pound tiles at work caused her upper back and shoulder symptoms.

25. Despite Dr. Hughes' analysis, Dr. Cebrian maintained that he utilized multiple causation analyses because the cumulative trauma analysis did not completely encompass Claimant's diagnoses but allowed him to use a scientific approach to causation. Moreover, the *Guidelines* provide that cumulative trauma conditions of the upper extremity constitute a heterogeneous group of diagnoses that include numerous specific clinical entities. Notably, the *Guidelines* specify that less common cumulative trauma conditions not enumerated are still subject to medical causation assessment. The *Guidelines* thus provide a scientific method for evaluating cumulative trauma conditions that may not be specifically delineated. Accordingly, based on the Job Demands Analysis, a review of the medical records and the persuasive opinion of Dr. Cebrian, Claimant did not engage in forceful and repetitive activity for an amount of time that meets the threshold for a cumulative trauma condition. Claimant's employment activities did not cause, intensify, or, to a reasonable degree, aggravate her condition to produce a need for medical treatment. Claimant's claim is thus denied and dismissed.

CONCLUSIONS OF LAW

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

rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

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

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

4. The test for distinguishing between an accidental injury and an occupational disease is whether the injury can be traced to a particular time, place and cause. *Campbell v. IBM Corp.*, 867 P.2d 77, 81 (Colo. App. 1993). "Occupational disease" is defined by §8-40-201(14), C.R.S. as:

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

5. A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, §8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

6. Rule 17, Exhibit 5 provides an algorithm for evaluating Cumulative Trauma Conditions (CTC) pursuant to the *Guidelines*. In addressing applicability, the *Guidelines* note that "CTC's of the upper extremity comprise a heterogeneous group of diagnoses which include numerous specific clinical entities including disorders of the muscles,

tendons and tendon sheaths, nerves, joints and neurovascular structures." W.C.R.P. Rule 17, Exhibit 5, p. 6. In determining a diagnosis when performing a cumulative trauma analysis the *Guidelines* delineate specific musculoskeletal conditions and peripheral nerve disorders. Nevertheless, the Guidelines provide that "[l]ess common cumulative trauma conditions not listed specifically in these Guidelines are still subject to medical causation assessment." W.C.R.P. Rule 17, Exhibit 5, p. 21.

7. The *Guidelines* provide, in relevant part:

> Indirect evidence from a number of studies supports the conclusion that task repetition up to 6 hours per day unaccompanied by other risk factors is not causally associated with cumulative trauma conditions. Risk factors that are likely to be associated with specific CTC diagnostic categories include extreme wrist or elbow postures, force including regular work with hand tools greater than 1 kg or tasks requiring greater than 50% of an individual's voluntary maximal strength, work with vibratory tools at least 2 hours per day; or cold environments.

W.C.R.P. Rule 17, Exhibit 5, p. 20.

8. The *Guidelines* include a Primary Risk Factor Definition Table for Force and Repetition/Duration. The Table requires six hours of two pounds pinch force or 10 pounds of hand force three or more times per minute. Other Primary Risk Factors involving Force and Repetition/Duration include six hours of lifting 10 pounds in excess of 60 times per hour and six hours of using hand tools weighing two pounds or more. An additional Primary Risk Factor category is Awkward Posture and Repetition/Duration. The factor requires four hours of wrist flexion greater than 45 degrees, extension greater than 30 degrees or ulnar deviation greater than 20 degrees, six hours of elbow flexion greater than 90 degrees, four hours of supination/pronation with task cycles 30 seconds or less or awkward posture for at least 50% of a task cycle. Secondary Risk Factors require three hours of two pounds pinch force or 10 pounds of hand force three or more times per minute. Other Secondary Risk Factors involving Force and Repetition/Duration include three hours of lifting 10 pounds greater than 60 times per hour and three hours of using hand tools weighing two pounds or more. Finally, Secondary Risk Factors for Awkward Posture and Repetition/Duration include three hours of elbow flexion greater than 90 degrees and three hours of supination/pronation with a power grip or lifting. If neither Primary nor Secondary Risk Factors are present, the *Guidelines* provide that "the case is probably not job related." W.C.R.P. Rule 17, Exhibit 5, p. 24.

9. The *Guidelines* also specifically delineate factors for the development of shoulder pathology. They include the following: (1) overhead work of 30 minutes per day for a minimum of five years; (2) shoulder movement at the rate of 15-36 repetitions per minute and no two second pauses for 80% of the work cycle; and (3) shoulder movement with force greater than 10% of maximum with no two second pauses for 80% of the work cycle. Moreover, jobs requiring heavy lifting in excess of 10 times per day over the years may contribute to shoulder disorders. Notably, the *Guidelines* provide that, because of the lack of multiple, high quality studies, each case must be evaluated individually when

addressing the likelihood of cumulative trauma contributing to shoulder pathology. W.C.R.P. Rule 17, Exhibit 4, p. 16.

10. As found, Claimant has failed to demonstrate by a preponderance of the evidence that she suffered an occupational disease in the form of upper back and shoulder pain that began on September 4, 2017 during the course and scope of her employment with Employer. Although Claimant attributed her upper back and shoulder symptoms to her work activities, a review of her job duties reflects that they lacked the requisite force or repetition to cause a cumulative trauma disorder. Furthermore, Claimant engaged in a variety of activities throughout each shift. The record reflects that Claimant's tasks as a Quality Control Inspector included inspecting 5.5-pound tiles, removing any imperfections with a sanding tool, placing the tiles on a cart, packaging five tiles in a box, pushing the cart and unloading the 27.5 pound boxes onto a pallet. Claimant then returned to her work area to count irreparable, defective tiles and input the information into a computer for tracking purposes.

11. As found, relying on the *Guidelines* in conducting a Job Demands Analysis, Mr. Fallik did not find evidence of any Primary or Secondary Risk Factors in Claimant's job duties. After conducting time studies of Claimant's work activities Mr. Fallik specifically determined that inspecting and lifting tiles did not fit within the Primary or Secondary Risk Factors regarding pinch force or lifting. Claimant spent about 20-30% of her workday inspecting tiles and another 20-30% of her day using tools or sandpaper to correct product deficiencies. She also spent about 5-10% of her day cleaning the tiles and 5-10% of her day documenting the results of her inspections on a computer. Claimant boxed tiles and moved them for another 5-10% of her day and cleaned her work area 3-5% of the time. Claimant thus engaged in a variety of tasks throughout her 10-hour workday.

12. As found, Dr. Cebrian persuasively maintained that Claimant did not suffer a work-related exposure that constituted a cumulative trauma condition under either a general causation assessment, cumulative trauma analysis or shoulder causation analysis pursuant to the *Guidelines*. He explained that he utilized multiple causation analyses because the cumulative trauma analysis did not completely encompass Claimant's diagnoses but allowed him to use a scientific approach to causation. Considering the Job Demands Analysis, Dr. Cebrian explained that the combination of repetition, force and cycle time in Claimant's duties as a Quality Control Inspector failed to meet the causation requirements for a cumulative disorder. Dr. Cebrian compared Claimant's job duties with the delineated Primary Risk Factors in the *Guidelines*. He reviewed the Primary Risk Factor Definition Table for Force and Repetition/Duration. Dr. Cebrian noted that the Table requires six hours of the use of two pounds of pinch force or 10 pounds of hand force for three times or more per minute. He specifically remarked that Claimant lifted tiles weighing 5.5 pounds while performing her job duties. She inspected a total of 280-300 tiles during each 10-hour work shift or about one tile every two minutes. The exposure did not constitute a highly repetitive activity under the *Guidelines*. Dr. Cebrian also considered the *Guidelines* in evaluating Claimant's upper thoracic spine complaints that radiated into her shoulders. The *Guidelines* specifically include factors for the development of shoulder pathology. He concluded that Claimant's

upper back and bilateral upper extremity symptoms were not directly or indirectly related to her work activities for Employer. Finally, in addressing the Genex ergonomic evaluation Dr. Cebrian noted that none of the suggested modifications correlated with any risk factors or level of exposure that would meet a minimum threshold for a work-related condition under the *Guidelines*. Dr. Cebrian thus summarized that Claimant did not engage in forceful and repetitive activity for an amount of time that meets the minimum threshold in the *Guidelines*.

13. As found, in contrast, Dr. Hughes explained that the cumulative trauma section of the *Guidelines* was not designed or developed to apply to Claimant's condition. He remarked that, in evaluating some conditions the cumulative trauma criteria are useful because factors including repetition, force and vibration have been scientifically well-established contributors to the diagnosis. However, the cumulative trauma section of the *Guidelines* is not useful in assessing Claimant's case because of the lack of scientific evidence connecting her symptoms to work activities. Dr. Hughes summarized that Claimant simply does not have a condition that is amenable to a scientific assessment. Instead, employing a general causation analysis, he reasoned that Claimant's repetitive lifting of 5.5-pound tiles at work caused her upper back and shoulder symptoms.

14. As found, despite Dr. Hughes' analysis, Dr. Cebrian maintained that he utilized multiple causation analyses because the cumulative trauma analysis did not completely encompass Claimant's diagnoses but allowed him to use a scientific approach to causation. Moreover, the *Guidelines* provide that cumulative trauma conditions of the upper extremity constitute a heterogeneous group of diagnoses that include numerous specific clinical entities. Notably, the *Guidelines* specify that less common cumulative trauma conditions not enumerated are still subject to medical causation assessment. The *Guidelines* thus provide a scientific method for evaluating cumulative trauma conditions that may not be specifically delineated. Accordingly, based on the Job Demands Analysis, a review of the medical records and the persuasive opinion of Dr. Cebrian, Claimant did not engage in forceful and repetitive activity for an amount of time that meets the threshold for a cumulative trauma condition. Claimant's employment activities did not cause, intensify, or, to a reasonable degree, aggravate her condition to produce a need for medical treatment. Claimant's claim is thus denied and dismissed.

ORDER

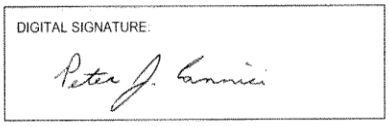
Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

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

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

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

DATED: April 4, 2019.



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

ISSUES

The issues to be determined by this decision involve Claimant's entitlement to medical and indemnity benefits. The questions answered are:

1) Whether Claimant established, by a preponderance of the evidence, that the C3-C5 laminectomy and posterior lateral fusion performed by Dr. John McVicker on June 10th, 2018, was reasonable, necessary, and causally related to his March 9, 2017 work injury; and,

2) Whether as a result of this surgery, Claimant is entitled to temporary total disability (TTD) benefits beginning June 10, 2018 and continuing.

Because the ALJ concludes that Claimant's need for a C3-C5 laminectomy and posterior lateral fusion procedure was causally unrelated to his March 9, 2017 slip and fall and because this condition gave rise to Claimant's disability, this order does not address his entitlement to TTD benefits.

FINDINGS OF FACT

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

1. Claimant was employed as a laundry worker for Employer. On March 9, 2017, he injured his low back after pulling on a bed sheet that had become lodged in the chute leading to the laundry. As he was yanking on it, the sheet suddenly let loose causing Claimant to slip and fall backwards onto his buttocks and low back. Claimant experienced right mid back pain but did not feel the injury was significant enough to report at the time. Claimant's pain did not subside prompting him to report the injury four days later on March 13, 2017. Claimant testified he had no pain in his neck at the time he reported his March 9, 2017 accident/injury. Claimant he was referred to Concentra Medical Centers where he was evaluated by physician assistant (PA), Kenneth Ginsberg.

2. PA Ginsberg obtained a history and performed a physical examination of Claimant's entire spine. PA Ginsberg documented the following history: "Hotel laundry worker through a temp agency . . . was grabbing the laundry that comes down the chute, but the laundry had become stuck in the chute so he had to forcefully tug t (sic) it until it came lose (sic) and when it came loose he fell to the floor onto his buttocks causing sudden onset right mid low back pain that has persisted and is worse with movement. No radiation or paresthesia's tot (sic) he (sic) extremities." Claimant expressed no complaints concerning the cervical spine.

3. Physical examination revealed the following:

> Cervical Spine: Cervical spine with normal lordosis, no tenderness and full ROM.
> Thoracic Spine: Thoracic spine without kyphosis, no tenderness, full ROM.
> Lumbosacral Spine: Appearance with (sic) normal. Tenderness in the lumbar spine (muscular, paraspinal, L1, L2, L3, L4 and L5) ROM: Full except as noted:
>
> > Flexion: AROM of 45 degrees and painful.
> > Extension: AROM of 15 degrees and painful.
> > Left Thoracolumbar Sidebending: AROM of 10 degrees and painful.
> > Right Thoracolumbar Sidebending: AROM of 10 degrees and painful.

4. Claimant was referred to physical therapy. He was evaluated by Janie Rodriquez on March 17, 2017. Ms. Rodriquez completed a physical examination and made, among others, the following observations:

> Gait: Ambulation using cane full weight bearing. Moderate antalgia.
>
> Gait comment: Pt reporting he has hx (history) right knee pain x2 years at which time he started using a cane.[1] He states he has had no change in his gait pattern with onset of LBP (low back pain).
>
> Reflex testing: Biceps C5 reflexes are hyperactive on the left. Patellar L3-L4 reflexes are hyperactive on the left.
>
> Assessment Comment: . . . He has a hx of left knee surgery and states that his current abnormal gait is from the knee pain/subsequent surgery 2 years ago. He demonstrates UMN (upper motor neuron) signs-hyperreflexia, asymmetrical LE weakness, clonus L ankle, and positive Hoffman's RUE although he does not recall any injury which would have caused these

[1] Claimant testified that the pain in his knee caused him to limp prior to this injury. However, he denied having any treatment or surgery to his knee prior to this incident and denied being treated previously in Mexico for his knee. He also denied any surgical history. Claimant's recollection is inconsistent with the content of his medical records. Indeed, treatment records from Julie Sandoval, NP reflect a history of treatment for the left knee with pain complaints going back for two to four years prior to her initial evaluation on August 25, 2016 documenting a report that he was told in Mexico that he had "bone on bone in the left knee" and "had a piece of bone removed from outside the left knee in Mexico." His pain level was a reported six to eight out of ten. He was referred for physical therapy, but it does not appear that he ever received this treatment. He was given a prescription for Celebrex. In a return visit, Claimant presented requesting surgery though he admitted he had not participated in physical therapy despite having been contacted by the therapy office. (Resp. Exh. K, Bates 216-233.)

neurological deficits. He complaints of back pain 8/10. His balance is poor-uses a cane and demonstrates spastic type gait.

5. Claimant continued to seek medical care at Concentra for persistent complaints of right-sided mid and low back pain. He first saw Dr. Daniel Peterson on April 26, 2017, after completing approximately 10 sessions of physical therapy. In a report from this date of visit, Dr. Daniel Peterson documents that Claimant suffered what he characterized was an "axial loading injury."

6. As of July 21, 2017, Dr. Peterson noted that Claimant had had 12 sessions of chiropractic care with minimal improvement. Consequently, Claimant was referred to physiatrist Dr. Timothy Sandell who evaluated him on July 31, 2017. On this visit Dr. Sandell obtained a history from Claimant concerning the mechanism of injury documenting that Claimant reported he ". . . recalls falling on his right low back." Claimant denies giving this history to Dr. Sandell.

7. Claimant underwent a series of facet injections administered by Dr. Sandell on September 11, 2017. On December 11, 2017, Claimant had a repeat injection in his lumbar spine.

8. On January 9, 2018, approximately 10 months after his slip and fall, Claimant saw Dr. Paul Stanton for a surgical consultation for ongoing back pain. Dr. Stanton completed a physical examination which included "station and gait . . . sensation, reflexes, coordination, balance, . . ." He documented the same to be "within normal limits for this patient". He went on to document that Claimant had full strength in his lower extremities, normal sensation, no clonus, and normal reflexes. There is no mention of any neck complaints in Dr. Stanton's report. Following his examination, Dr. Stanton recommended an L3-L4 laminectomy. Respondents denied the request and sought an independent medical opinion from Dr. Brian Reiss.

9. Claimant was released from care by Dr. Sandell on January 18, 2018. There is no mention of neck pain, increasing gait disturbance or any specific examination testing that would address whether Claimant had symptoms consistent with a progressive myelopathy at the time of his discharge.

10. Claimant was seen in follow-up by Dr. Peterson on January 19, 2018. Dr. Peterson performed a perfunctory exam. Outside of noting that Claimant had a negative straight leg raise test, Dr. Peterson did not record the results of any reflex, gait, balance or neurological testing that would identify whether symptoms of myelopathy were present.

11. Dr. Brian Reiss performed the aforementioned independent medical examination (IME) on February 21, 2018. Dr. Reiss is a board certified orthopedic surgeon with thirty years of experience in the field. He was accepted as an expert in the field of orthopedic surgery with a subspecialty in disorders of the spine. Dr. Reiss took a history and completed a physical examination. In his report, Dr. Reiss reports that

Claimant told him he had fallen onto his back and right side. Claimant denies telling Dr. Reiss this. Dr. Reiss also records that Claimant told him he did not have any pain at the time he fell. Claimant admitted that that is in fact why he did not report the injury until four days later, and that his pain actually started several days later, not immediately. (The initial report from Concentra reflects a service date of March 13, 2017. It also indicates the injury occurred on March 13 and that the injury occurred "today" but this is clearly incorrect. Claimant was being evaluated on the day the injury was reported to the employer, four days after the occurrence.)

12. During the IME, Dr. Reiss noticed several troubling neurological signs/symptoms that had been overlooked by the providers at Concentra. Specifically, he noted signs of hyperreflexia in the upper and lower extremities in addition to a significant gait disturbance. Ultimately, Dr. Reiss opined that the requested lumbar surgery was not related to Claimant's March 9, 2017 industrial injury. He raised concern that Claimant had non-work related myelopathy and encouraged him to seek additional assessment and treatment for this on an urgent basis.

13. Claimant testified that the first time anyone evaluated his gait or his upper extremities was when Dr. Reiss completed his IME. While the documented results of the physical examinations performed by Dr. Peterson, are devoid of findings suggesting that Claimant's gait and/or reflexes were evaluated for signs of myelopathy, the March 17, 2017 report of Ms. Rodriquez makes it clear that she not only evaluated Claimant's gait and reflexes but also raised concern that Claimant had signs/symptoms consistent with upper motor neuron involvement, i.e. myelopathy.

14. Claimant testified that after his appointment with Dr. Reiss he underwent an MRI of his cervical spine on May 14, 2018. The MRI demonstrated "severe spinal stenosis at C3-4 and C4-C5 with cord compression, cord edema, and/or myelomalacia". The MRI report notes that Claimant's stenosis was secondary to an "extruded disc herniation."

15. On May 17, 2018, Dr. Peterson issued an addendum to his May 11, 2018 report after reviewing the results of Claimant's MRI. In that addendum, Dr. Peterson stated, "Now that the MRI of the C spine findings are available to me, it is my unequivocal opinion that Mr. Olivas [had] previously existing spinal stenosis present in both the L spine and C spine, and that the fall he suffered, as an axial loading injury, has initiated a progressive stenotic exacerbation of his underlying conditions to the point that he now has developed, rather dramatically over the last 4 months, myelopathic changes in his spinal cord at the cervical level leading to upper motor neuron signs and symptoms and is in need of surgical decompression in an urgent fashion to prevent progressive loss of use of both lower and upper limbs and become paraplegic or even quadriplegic."

16. Respondents denied the request for neck surgery as unrelated to Claimant's March 9, 2017 slip and fall. Claimant then presented to the emergency room (ER) at UC health on June 8, 2018. The ER report documents that Claimant suffered a

back injury “about one year” prior to his presentation in the emergency department and that he had been “seeing a workers’ comp provider monthly since”. Claimant reported increasing pain generally, weakness, spasticity and urinary incontinence. He was noted to be severely myelopathic. It was noted further that Claimant was using a walker for ambulation, that CT demonstrated “critical” cervical stenosis with cord compression and that Claimant had been evaluated by neurosurgical services who recommended that Claimant proceed with surgery.

17. On June 10th, 2018, Dr. John McVicker performed a C3-C5 laminectomy and posterior lateral fusion. Claimant testified that he believes the surgery was successful in halting the neurological symptoms he was experiencing, and his condition seems to have stabilized. Regardless, he testified that he has not regained the function that he had before his precipitous functional decline. Most notably, he still requires a walker to ambulate effectively.

18. Dr. Peterson testified by deposition taken on October 16, 2018. Dr. Peterson is a “family physician” by training but has been practicing occupational medicine for the past 17 years. He was qualified as an expert in occupational medicine. He is Level II accredited.

19. Dr. Peterson testified that Claimant’s myelopathy and the symptoms triggered thereby could have been caused by an acute injury with a delayed onset. (Deposition of Dr. Peterson, hereinafter Depo., p. 14, l. 25 and p. 15, l. 1-2) He reiterated his opinions that Claimant had pre-existing spinal stenosis in the lumbar and cervical spine and that the March 9, 2017 fall resulted in an axial-loading event transmitting forces through the lumbar spine up the back to the neck accelerating the degenerative changes present in Claimant’s cervical spine. (Depo. p. 16, l. 17-25 and p. 17, l. 1-17) Indeed, Dr. Peterson testified that this “axial-loading” injury caused Claimant’s pre-existing cervical stenosis to “progress more rapidly than it would have otherwise” (Id.) Accordingly, Dr. Peterson opined that Claimant’s need for cervical decompression surgery was causally related to the March 9, 2017 slip and fall event occurring in the hotel laundry. He also opined that given the possible complications created by delayed treatment, including the potential for permanent paralysis, the surgery performed by Dr. McVicker on an urgent basis was reasonable and necessary.

20. On cross examination, Dr. Peterson clarified his opinions regarding both the development of Claimant’s cervical stenosis and the manifestation of symptoms consistent with myelopathy over time. Dr. Peterson had participated in a prehearing Samms conference during which he emphasized how rapidly the signs consistent with myelopathy had progressed. (Depo. p. 20-21, l. 1-20). When asked to address whether the symptoms consistent with myelopathy manifested slowly, rapidly or slowly at some point and rapidly later, Dr. Peterson testified that this case has been “challenging” because at the beginning of the claim, Claimant did not complain of any neck symptoms. Rather, his complaints always centered on the lumbar and low thoracic area. Dr. Peterson admitted that “none of us picked up on any myelopathic findings” until after Claimant was evaluated by Dr. Reiss. He admitted that, given the level of

pathology present on MRI, that the development of Claimant's cervical stenosis was "more consistent with a slow degenerative process over time" rather than a sudden acute injury. (Depo. p. 24, l. 18-24) Dr. Peterson also agreed that as stenosis worsens the spinal canal is compromised slowly giving rise to myelopathy and that this is progressive and irreversible. (Depo. p. 24, l. 25 and p. 26, l. 1-10)

21. Based upon Dr. Peterson's testimony, the ALJ finds that while spinal stenosis can be caused by an acute injury, the evidence presented here is persuasive of the fact that Claimant's cervical stenosis was pre-existing and the consequence of a long standing naturally progressing degenerative process. This finding is supported by the radiologist's comment to Dr. Peterson after reading Claimant's MRI that the level of severity of cervical cord compression was inconsistent with it being caused by an acute event. According to Dr. Peterson, the radiologist informed him that if the stenosis were the result of an acute injury, Claimant would have been paralyzed and in the hospital long before he ultimately developed symptoms. (Depo. p. 20, l. 21-24)

22. Regarding the development of symptoms consistent with myelopathy, Dr. Peterson reiterated his opinion that while he could not be certain about how Claimant's stenosis was progressing, it "progressed more rapidly than it would have without the - - without the axial-loading injury". (Depo. p. 25, l. 11-21) Dr. Peterson went on to testify that "in the absence of another explanation for his myelopathic symptoms and the discovery of the severe spinal cord compression, that [he] would opine that this fall and the axial-loading injury hastened the development of his myelopathic findings." (Depo p. 21, l. 3-7) Dr. Peterson couched the central question to be addressed as whether Claimant's myelopathic symptoms had been "there all along" and were simply missed or whether they "[showed] up during that period of time from when he had last seen Dr. Stanton to when he saw Dr. Reiss". (Depo. p. 21, l. 12-20) Following additional questioning, Dr. Peterson agreed that Claimant's symptoms probably developed more slowly over time and did not represent a sudden manifestation between January 9th and February 21st, when he was evaluated by Dr. Reiss. (Id.) Regardless, the ALJ infers from Dr. Peterson's testimony that he believes Claimant's March 9, 2017 slip and fall accelerated the degenerative changes in the cervical spine which in turn hastened his myelopathic findings.

23. Claimant sought an IME with Dr. John Hughes on November 5, 2018. Dr. Hughes assessed: 1. Occult Cervical and lumbar spondylosis and spinal stenosis, with no documentation of spinal problems prior to March 9, 2017. 2. Work-related fall with progressive stenotic exacerbation and development of cervical myelopathy, necessitating C3, C4, and C5 laminectomy surgery as done by Dr. McVicker on June 10, 2018. 3. Postoperative deconditioning, meriting additional postoperative rehabilitative care. Dr. Hughes echoes the opinion of Dr. Peterson that Claimant's previously occult spinal stenosis was aggravated by his work-related injury which caused progressive stenotic exacerbation. Although Dr. Hughes states that the fall was the proximate cause of Claimant's need for a C3-C5 laminectomy and posterior lateral fusion, he offers no analysis of the medical record to support this opinion nor does he

address the other potential causes for Claimant's need for surgery such as the normal natural progression of spinal stenosis leading to myelopathy.

24. Dr. Reiss testified at hearing and confirmed that Claimant only spoke to him about back pain and leg pain, not any neck symptoms or loss of function in his hands or arms. According to Dr. Reiss, a visual inspection of Claimant revealed obvious signs of myelopathy at the time of the IME. Claimant had a prominent gait disturbance, was uncoordinated and had difficulty with balance. Physical examination revealed hyperreflexia in the upper and lower extremities, a positive Hoffman's sign bilaterally and a few beats of clonus at the ankle bilaterally. The physical examination confirmed Dr. Reiss' suspicion that Claimant had myelopathy. Dr. Reiss testified that even a targeted exam aimed at the lumbar spine would have identified sufficient pathologic findings to lead a competent surgeon to perform further examination of the upper extremities and cervical spine to investigate the findings he observed and uncovered during his IME.

25. According to Dr. Reiss, the spinal cord adapts to the lack of room caused by encroaching stenosis over time. Patients also adapt to the slow subtle signs of myelopathy and are frequently unaware that they are neurologically compromised. This worsening/adaption pattern continues until the spinal canal becomes so narrow that the spinal cord can no longer function properly, at which time the signs/symptoms associated with myelopathy become patently obvious. This testimony mirrors the deposition opinions of Dr. Peterson who testified that "the body has an amazing ability to - - to adjust and adapt as things progress slowly versus as a dramatic injury. . ." (Depo. p. 20, l. 24-25, p. 21, l.1)

26. Dr. Reiss was asked about the March 17, 2017 examination findings documented by Physical Therapist Rodriguez. Dr. Reiss explained that the findings associated with the prior reflex testing performed by Ms. Rodriquez were not the same as the pathological hyperreflexia he found on examination of Claimant. The ALJ notes that not only did Ms. Rodriquez document that Claimant had upper and lower extremity hyperreflexia, but also asymmetrical lower extremity weakness, a spastic gait, clonus in the left ankle, and a positive Hoffman's in Claimant's right upper extremity, the presence of which lead her to document that Claimant had signs consistent with an upper motor neuron disorder. The ALJ finds the results of Ms. Rodriquez' examination to be strikingly similar to the observations/findings noted by Dr. Reiss during his IME.

27. Because of the presence of other abnormal neurologic signs and because Dr. Reiss was not present at the March 17, 2017 PT examination and did not observe the "hyperreflexia" that Ms. Rodriquez documented, the ALJ finds his testimony that Claimant did not have "pathologic hyperreflexia" on March 17, 2017 speculative and unpersuasive. The ALJ also finds Dr. Reiss' suggestion that pathologic signs were not present as of March 17, 2017 because no provider took action following the March 17, 2017 PT appointment equally unconvincing as it assumes that Dr. Peterson actually saw and read the March 17, 2017 PT report. While the ALJ finds Dr. Reiss' testimony concerning the issues described above unpersuasive, this does not fully answer the

question of whether Claimant's slip and fall aggravated and/or accelerated Claimant's pre-existing spinal stenosis to cause his myelopathy.

28. As noted, Dr. Reiss believes Claimant's myelopathy is unrelated to the industrial injury, in part, because the medical records do not include physical findings to suggest the presence of a myelopathy post-injury. The ALJ is not persuaded. As noted above, the physical findings of Ms. Rodriquez persuade the ALJ that despite having no obvious complaints associated with myelopathy, Claimant probably had understated neurologic signs of the same eight (8) days following his slip and fall, begging the question of whether these signs were caused by an aggravation/acceleration of Claimant's underlying spinal stenosis or whether they represent the consequence of the natural progression of that degenerative process.

29. While the ALJ rejects, as unpersuasive, Dr. Reiss' testimony that the medical record fails to support findings consistent with myelopathy post-accident, he is nonetheless convinced that Claimant's severe spinal stenosis and subsequent myelopathy are unrelated to the March 9, 2017 slip and fall for the following reasons:

- In this case, the level of stenosis identified in the MRI and subsequent CT scan from May 2018 is severe at C3-C4 and C4-C5. The MRI revealed cord compression, cord edema, and/or myelomalacia in addition to spurring and end-plate ridging of the vertebral bodies. Moreover, the canal opening at C3-C4 had been reduced by extruded disc material to 3 millimeters. The presence of the above described changes supports a reasonable inference that Claimant's stenosis is the product of a long-standing, slowly progressing degenerative process. Indeed, both Dr. Reiss and Dr. Peterson agree that Claimant's spinal stenosis pre-existed his March 9, 2017 slip and fall. Consequently, the ALJ is convinced that Claimant's March 9, 2017 slip and fall did not cause the severe stenosis in his cervical spine.

- There is a lack of persuasive evidence to support a conclusion that Claimant sustained an injury to the neck severe enough to aggravate and/or accelerate his underlying spinal stenosis to cause symptoms consistent with myelopathy. Dr. Peterson's theory that Claimant suffered an "axial-loading" injury to the cervical spine sufficient to aggravate/accelerate his spinal stenosis and result in myelopathy is speculative and unpersuasive. Although it is theoretically possible that some degree of force was transmitted up the spine when Claimant fell on his buttocks, there is a death of convincing evidence to support a finding that the force was sufficient to result in an aggravation/acceleration of Claimant's spinal stenosis. Indeed, Dr. Peterson admitted that Claimant's stenosis could have been progressing along a normal degenerative path. Nonetheless, he surmises that the degenerative process progressed more rapidly than it would have if Claimant had not

fallen and suffered what he characterized was an "axial-loading" injury. The ALJ credits the opinions of Dr. Reiss to find that had Claimant suffered an acute injury sufficient to aggravate and/or accelerate the stenosis in his cervical spine to subsequently give rise to his myelopathy, he likely would have experienced some immediate neck symptoms at the time of the incident rather than months later. Here, Claimant never complained of neck pain nor did he demonstrate overt signs consistent with myelopathy for approximately a year following his industrial accident. Moreover, the medical record fails to document that Claimant specifically complained of neck pain[2] at the time he presented to the ER, lending support to Dr. Reiss's testimony that Claimant did not suffer an injury to his neck sufficient to change the natural course of his degenerative cervical stenosis in the year following his slip and fall. While Dr. Peterson is free to assert that Dr. Reiss is biased and his opinions "always favor the insurance company", it is Claimant's burden to produce sufficient evidence to establish a causal connection between his industrial accident that the medical benefits he seeks. Here, the reliable evidence supports a finding that need for a C3-C5 laminectomy and posterior lateral fusion is, more probably than not, causally related to the natural progression of his pre-existing degenerative cervical stenosis.

- While Claimant suggests that the March 17, 2017 PT report constitutes evidence that his underlying spinal stenosis was aggravated and/or accelerated by this March 9, 2017 slip and fall, there is an absence of evidence to support a finding that Claimant's condition rapidly deteriorated either by way of somatic complaint or functional decline in the weeks and months following the March 17, 2017 physical therapy evaluation. Indeed, following this PT evaluation, Claimant's subsequent neurological examinations were ostensibly within normal limits and no providers noticed any signs/symptoms consistent with myelopathy until Claimant was evaluated by Dr. Reiss on February 21, 2018, eleven months after Ms. Rodriquez completed her evaluation. Consequently, the ALJ finds another, more persuasive explanation for the findings described in the initial PT evaluation, namely that irrespective of Claimant's fall, his underlying degenerative spinal stenosis had progressed naturally to the point that he was demonstrating subtle signs consistent with myelopathy on March 17, 2017. Based upon the evidence presented, including the testimony of both Dr. Reiss and Dr. Peterson that the body has an "amazing" ability to adapt as underlying stenosis progresses, the ALJ finds it probable that as

[2] Indeed, the ER report indicates only that Claimant reported progressive pain- it does not provide a location for that pain. Moreover, the chief complaint on presentation to the ER was documented as: "My left hand and leg shake like people that have Parkinson's".

> Claimant's stenosis was progressing naturally, he was adapting until the compression on his spinal cord precluded normal function resulting in the overt signs of myelopathy recognized by Dr. Reiss during the February 21, 2018 IME. Indeed, according to both Drs. Reiss and Peterson, this is how myelopathy normally develops in the absence of an acute injury – slowly and over time. The evidence presented here persuades the ALJ that while Claimant probably fell on his buttocks, he likely did not suffer an acute cervical injury sufficient to cause, aggravate and/or accelerate his underlying stenosis to cause the appearance of his myelopathy. Indeed, there is a paucity of evidence to support that Claimant suffered any cervical symptoms contemporaneous with his March 9, 2017 slip and fall. Consequently, the ALJ finds the evidence presented insufficient to establish a causal connection between the fall and the progression of Claimant's underlying stenosis and the eventual manifestation of his myelopathy. More probably than not, Claimant's myelopathy and need for cervical spine surgery is related to the natural progression of his underlying degenerative disc disease/stenosis.

30. Based upon the evidence presented as a whole, the ALJ finds the opinions of Dr. Reiss regarding the cause of Claimant's myelopathy and need for cervical decompression surgery to be credible and more persuasive than the contrary opinions of Drs. Peterson, Hughes or McVicker.

31. While Claimant established that his neck surgery was reasonable and necessary, he failed establish that his spinal stenosis and need for C3-C5 decompression and fusion surgery was caused, aggravated or accelerated by his March 9, 2017 slip and fall. Consequently, his claim for additional medical benefits must be denied and dismissed.

CONCLUSIONS OF LAW

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

I. Generally

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

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ

has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Assessing the weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo.App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence presented. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002). In this case, Claimant's recollection of the events surrounding his injuries is flawed and imprecise. The medical record is replete with contradictory descriptions of the fall he sustained. In fact, Concentra is the only provider to whom he reported falling directly onto his buttocks. He told the chiropractor he fell flat on his back. He told Dr. Reiss he fell onto his back and right side. Claimant reported to Dr. Sandell he fell back and to the right, falling onto his right low back. Claimant told Dr. McVicker that fell on his back and that he had only started using a cane in January 2018. During all of these appointments, Claimant was accompanied by a Spanish interpreter. The disparate descriptions make it difficult to discern with any measure of confidence exactly how he fell. Nonetheless, the ALJ finds the activity in which Claimant was involved at the time of his accident, namely forcefully pulling on a sheet stuck in a laundry chute, likely to result in a fall onto the buttocks if that sheet suddenly let loose as Claimant described here. Consequently, the ALJ has little trouble concluding that the accident occurred substantially as Claimant described. To this extent, Claimant ALJ concludes that Claimant is a credible witness.

D. The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo.App. 2008). To the extent, expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); see also, *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo.App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary opinion). When considered in its totality, the ALJ concludes that the evidence in this case supports a reasonable inference/conclusion that Claimant's spinal stenosis is the consequence of a long standing degenerative process which continued, irrespective of Claimant's slip and

fall, to compromise the spinal canal giving rise to his myelopathy and need for treatment. While Claimant undeniably required surgical decompression and fusion treatment for this condition, the evidence presented, including the medical opinions of Dr. Reiss persuade the ALJ that Claimant's need for such treatment was unrelated to her March 9, 2017 slip and fall. Based upon the evidence presented, the ALJ concludes that Dr. Reiss' opinions concerning the relatedness of Claimant's need for cervical spine surgery are credible and more persuasive than the contrary opinions of Dr. Peterson, Dr. Hughes or Dr. McVicker.

II. Medical Benefits

E. The claimant in a workers' compensation claim bears the burden of establishing entitlement to medical treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). Once a claimant has established a compensable work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo.App. 1990). However, a claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of the his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949). Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970). As found here, Claimant has failed to establish, by a preponderance of the evidence, that his spinal stenosis is causally related to his March 9, 2017 slip and fall or that this fall aggravated the degenerative process in Claimant's cervical spine causing an acceleration of that spinal stenosis to give rise to his myelopathy and need for medical treatment, including the C3-C5 laminectomy and posterior lateral fusion.

F. A pre-existing condition "does not disqualify a claimant from receiving workers' compensation benefits." *Duncan v. Indus. Claims Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). However, an employer is not liable for the natural progression of pre-existing conditions if a claimant's employment duties do not aggravate, accelerate or combine with the pre-existing infirmity or disease to produce disability and/or the need for treatment. *See generally, H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990); *Roberts v. Industrial Commission*, 509 P.2d 1285 (Colo.App. 1973). The mere fact a claimant experiences symptoms in a body part at some point following a workers' compensation claim does not require the inference there has been an aggravation or acceleration of a preexisting condition. See *Cotts v.*

Exempla, Inc., W.C. No. 4-606-563 (ICAO August 18, 2005). The courts have long recognized that such symptoms could represent the "logical and recurrent consequence" of a preexisting condition. See *Chasteen v. King Soopers, Inc., W.C. No. 4-445-608 (ICAO April 10, 2008);*

G. As found in this case, the totality of the evidence presented persuades the ALJ that Claimant's symptoms and subsequent need for neck surgery were likely caused by the natural progression of his long standing pre-existing progressive disc/spinal disease. While the ALJ is convinced that Claimant's need for treatment was reasonable and necessary, the persuasive evidence establishes that it was not related to an industrial cause. Because Claimant failed to establish his employment aggravated, accelerated, or combined with a pre-existing infirmity or disease to produce the disability and/or need for treatment, he failed to prove that there the requisite causal connection between his March 9, 2017 industrial injury and the resulting condition for which he seeks medical treatment benefits. Accordingly, his request for coverage concerning his C3-C5 spinal surgery under this claim must be denied and dismissed.

ORDER

It is therefore ordered that:

1. Claimant's request for medical treatment, including surgery, for his cervical myelopathy condition is denied and dismissed.

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

DATED: April 5, 2019

/s/ Richard M. Lamphere

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-056-384-001

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

,

Claimant,

v.

,

Employer,

and

,

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on January 10, 2019 and concluded on March 18, 2019, in Denver, Colorado. The hearing was digitally recorded (reference: 1/10/19, Courtroom 3, beginning at 1:30 PM, and ending at 5:15 PM; and, 3/18/19, Courtroom 3,) beginning at 1:30 PM, and ending at 3:30 PM). The official Spanish/English Interpreter at the January 10 and March 18 concluding session of the hearing was Myrian Lewis. A written transcript of the January 10 session of the hearing was lodged with the ALJ on March 18, 2019.

The Claimant was present in person and represented by [Redacted], Esq. Respondents were represented by [Redacted], Esq.

Hereinafter [Redacted] shall be referred to as the “Claimant." [Redacted] shall be referred to as the “Employer.” All other parties shall be referred to by name.

Claimant’s Exhibits 1 through 11 were admitted into evidence, without objection. Respondents’ Exhibits A through K were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ established a post-hearing briefing schedule: Claimant's opening brief (mistakenly labeled as "Opening Findings of Fact) was filed on March 25, 2019. The ALJ had not made a decision as of the filing of Claimant's "Opening Findings of Fact" and would instruct counsel, in the future, to file an "opening brief" as ordered at the conclusion of the hearing. The ALJ will hereby consider the Claimant's filing as an opening brief. Respondents' answer brief was filed on March 29, 2019. Although the Claimant was giver two working days within which to file a reply brief, no timely reply brief was filed. The matter was deemed submitted for decision on April 4, 2019.

ISSUES

The issues to be determined by this decision concern compensability; if compensable, medical benefits [including whether David Yamamoto, M.D. became an authorized treating physician (ATP) by virtue of Respondents' refusal to authorize further treatment at the hands of the original ATPs and the original ATPs refusal to further treat on this basis]; and, temporary total disability (TTD) benefits from August 8, 2017 and continuing. Respondents raised the affirmative defense to TTD benefits of "responsibility for termination." The parties stipulated that if the claim is compensable, the average weekly wage (AWW) is $892.93 and the Claimant's unemployment insurance (UI) benefits were $520 per week from August 31, 2017 to March 26, 2018.

The Claimant bears the burden of proof by a preponderance of the evidence on all issues with the exception of "responsibility for termination," for which the Respondents bear the burden of proof by preponderant evidence.

FINDINGS OF FACT

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

Preliminary Findings

1. The parties stipulated, and the ALJ finds, that if the claim is compensable, the average weekly wage (AWW) is $892.93 and the Claimant's unemployment insurance (UI) benefits were $520 per seek from August 31, 2017 to March 26, 2018.

2. After the conclusion of the hearing, Claimant was permitted to file specific UI information, in addition to what was stipulated at hearing. Specifically, the Claimant received additional UI benefits of $429 per week from October 5, 2018 through January 23, 2019. Claimant represented as an officer of the tribunal that Respondents agreed to this addition, and the ALJ so finds.

3. The Claimant was employed by the Employer for 11 years and she performed payroll, bookkeeping, shipping and receiving, storage, and account/client contact functions (Tr. 22:3-23:6).

4. Respondents mailed a Notice of Contest to the Claimant on September 19, 2017.

The Incident/Compensability

5. The cause of the Claimant's back injury on August 9, 2017, is explained by the fact that she was in the course and scope of her employment while moving a desk, an activity required by her job at the time it occurred.

6. The Claimant suffered a back injury while moving a desk on the job she was required to perform for the Employer. It arose out of and in the scope of employment as there is no persuasive evidence that "it would not have occurred but for the fact that the conditions and obligation placed [the] Claimant in the position where he [or she] was injured." Her injury would not have occurred but for the fact that the work she was performing placed her in a position to be injured.

7. The Claimant suffered a back injury on August 9, 2017. On August 8, 2017 (later amended to August 7, 2017). The Claimant moved the heavy table and felt a pull in her back around 1:00 PM, and she experienced a strain in her back. She continued to work that day. She reported this injury to her Employer on August 15, 2017 and was sent by to the doctors at Concentra by her Employer.

8. Based on the totality of the evidence as herein above and below specified, the ALJ finds that the Claimant sustained a back strain, arising out of the course and scope of her employment with the Employer.

Medical at Concentra

9. The Claimant first obtained treatment on August 15, 2017 at Concentra. She was given restrictions (which were lift/push/pull up to 15 pounds, no sitting more than 50% of time and may use keyboard and mouse) and received physical therapy afterwards at Concentra (Respondents' Exhibit H, p. 1).

10. The Claimant first saw the doctors at Concentra on August 15, 2017. Francis A. Thompson, M.D., delineated the Claimant's pain complaints as follows:

> Was moving furniture which she reports as heavy. She started feeling pain in her lower back. States that while she was working, she was warm and so she did not feel the pain as much but after work she started feeling more pain. States she feels like a "tractor has run over her". Between last week and presentation today she was taking OTC analgesia

> but states that the pain has increased and radiates from her lower to upper back. she reports that she is unable to find a comfortable position when lying down.
>
> States she has pain in her upper back, shoulders, lower back and hips 7/10. Aggravated by sitting for prolonged periods at her computer. Reports some tingling in her fingers but states she has numbness in her 3rd, 4th and 5th toes. Denies any weakness in her LE s bilaterally. Denies any saddle anesthesia, bladder/bowel dysfunction. Denies any prior back injury

(Claimant's Exhibit 4, BS 42).

11. According to the Claimant, she gave Julie Weiss (co-owner of the Employer) her restrictions on August 16, 2017 and then was fired that day. She testified that her termination occurred during a meeting with Weiss and Marji Adelstein. At the meeting, she was told the reasons for her termination were not being on time and meeting with clients while on a trip to California (Tr at 29:9 – 30:15). Claimant denied receiving a severance agreement. Adelstein and. Weiss testified that they provided her with such an agreement which the Claimant never signed. The Employer did not produce a copy of the alleged severance agreement at the hearing.

12. The last day the Claimant treated at Concentra was September 8, 2017 due to the claim being denied (Tr. at 32:3-6). The ALJ finds that further medical treatment at Concentra was refused for non-medical reasons.

David Yamamoto, M.D.

13. The Claimant then sought treatment with Dr. Yamamoto starting on September 18, 2017. She did not tell her Employer that she was treating with Dr. Yamamoto. The ALJ finds that the Employer was not advised of the Claimant's alternative treatment with Dr. Yamamoto after Concentra's non-medical refusal to further treat the Claimant.

14. Dr. Yamamoto described the Claimant's pain complaints as follows:

> Low back strain: Pain is located midline, lumbar spine, radiates down into both buttocks. Describes pain as achy and sharp. Rest makes it better, sitting, standing and bending make it worse. Rates pain 6-7/10. Associated symptoms: She has tingling and numbness

> in both feet, toes 3,4, and 5. **2.** Midback pain: Not present all the time, but has burning sensation in the midback after she has been sitting or standing for a long period of time, > 45 minutes. Describes pain as "burning." Changing position makes it worse. Rest makes it better Rates pain 5/10. **3.** Paresthesias, bilateral hands: present in digits 3, 4, and 5, bilaterally. Comes and goes. Nothing makes it better or worse. No neck pain. **4.** Insomnia: Has never had an issue sleeping. Now, can fall asleep, but wakes up after a few hours in pain from her low back.

(Claimant's Exhibit 5, BS 133).

15. The Claimant last saw Dr. Yamamoto on August 21, 2018. Dr. Yamamoto requested authorization for an MRI (magnetic resonance imaging) on November 3, 2017, which was never completed. He also gave her restrictions of no lifting over 10 pounds, occasional lifting of 5 pounds, carrying 5 pounds, and push/pull of 10 pounds. He also restricted her walking/standing to 6 to 7 hours and sitting to 1 to 2 hours. (tr. at 34:11-17 and Exhibit 5).

(Claimant's Exhibit 5, BS 102).

16. The Claimant has not yet been placed at maximum medical improvement (MMI) by any authorized treating physician (ATP).

17. The ALJ finds that all of the Claimant's medical care and treatment for her back injury of August 7/8, 2017, at Concentra was authorized, causally related and reasonably necessary to cure and relieve the effects of that compensable injury.

18. The ALJ further finds that Dr. Yamamoto became authorized by default because Concentra refused to further treat the Claimant for non-medical reasons and the Respondents would not authorize further treatment because they were fully contesting the Claimant's claim. Under the circumstances, it would have been an exercise in futility to require the Respondents to re-consider their refusal to authorize further treatment and make a new referral.

19. All of the medical care and treatment by Dr. Yamamoto for the Claimant's compensable injury herein was causally related and reasonably necessary to cure and relieve the effects of that injury.

After the Injury

20. After the injury, she had worked for Steven Roberts Original Desserts and Quick Holdings, but she is currently not working. She was terminated from Quick Holdings for attendance issues on August 20, 2019. She received UI benefits after her termination.

21.. The Claimant denied working for her husband's company, Think 5 Graphics. There was an email regarding her designing tee shirts admitted into evidence. (Tr. at 56:15 – 57:20 and Respondents' Exhibit L). Beyond that there is no other evidence concerning Think 5 Graphics. The ALJ finds that there is insufficient circumstantial evidence to prove that the Claimant was actually working for Think 5 Graphics.

Average Weekly Wage (AWW) and Temporary Disability Benefits

22. As stipulated and found, the Claimant's AWW is $892.03, which is a baseline for temporary wage loss, and would yield a TTD rate of $594.68 per week, or $84.95 per day.

23. After her termination, the Claimant worked for Steven Roberts Original Desserts for an indeterminate duration and unspecified wages, however, she received UI benefits of $520 per week from September 5, 2017 through March 25, 2018, which means she was not working at all during this period. Also, she worked for Quick Holdings for an unspecified period at unspecified wages; and, she was terminated from Quick Holdings on August 29, 2018. She received additional UI benefits of $429 per week from October 5, 2018 through January 23, 2019, which means she was not working at all during this period of time.

24. The Claimant's physical restrictions have remained and not been modified to date. The Employer terminated her but claims to have offered her part-time work. The ALJ finds that this does not qualify as a bona fide offer of modified work since it was not made in writing and no ATP approved it. The Claimant has not reached MMI and she has been experiencing a 100% temporary wage loss during the following specified periods: September 5, 2017 through March 25, 2018; October 5, 2018 through January 23, 2019; and, August 30, 2018 through the present time. These are the periods of time when the Claimant received UI benefits, thus, permitting a plausible inference of TTD. Because the Claimant was employed for unspecified wages from August 9, 2017 through September 5, 2017; and, from March 26, 2018 through August 29, 2018, it is not possible to calculate a temporary wage loss for these periods of time.

25. The Claimant's physical restrictions remain and do not permit her to perform her pre-injury work. She has not reached MMI. During the periods during which she has been receiving UI benefits, she has been experiencing a 100% temporary wage loss. Consequently, the Claimant has established temporary total disability from September 5, 2017 through March 25, 2018, both dates inclusive, a total of 202 days; from October 5, 2018 through January 23, 2019, both dates inclusive, a total of 111 days; and, from January 24, 2019 through March 18, 2019, both dates

inclusive, a total of 54 days. As of the last session of the hearing on March 18, 2019, the Claimant had been temporarily and totally disabled for an aggregate of 367 days. After March 18, 2019, the Claimant continues to be temporarily and totally disabled until she is released to return to work at full duty; until she actually returns to work; or, until she reaches MMI.

"Responsibility for Termination" Affirmative Defense

26. The Respondents argue that the Claimant is at fault for termination based on her chronic tardiness. Their argument is based on the testimony of co-owner Julie Weiss. As found herein below, the other co-owner accommodated the Claimant's tardiness and flexible schedule and Weiss' testimony concerning Claimant's tardiness and absenteeism from work was conflicting, confusing and Weiss' actions vis a vis the Claimant were sometimes ambiguous. Because of this Respondents have failed to demonstrate that it is more likely than not that the Claimant engaged in willful behavior that she could have reasonably known would get her fired. Nonetheless, Weiss' ultimate dissatisfaction with the Claimant's later performance may well have been supportable by virtue of the fact that Claimant did not measure up to Weiss' requirements, which was not willful on the Claimant's part.

27. At the January 10, 2019 session of the hearing, the Respondents implied that the Claimant may have violated the company's non-compete regulations. At the hearing session on March 18, 2019, Weiss disavowed a non-compete allegation and unequivocally agreed that this was not a basis of termination.

28. According to Weiss, her relationship with the Claimant had been very positive until approximately March or June 2017 when the Claimant's work performance was erratic and she was showing up late. Weiss testified, however, that her co-owner had allowed the Claimant flexibility in work schedules, but was uncertain of the specifics, thus creating ambiguity in the allegations of "chronic tardiness." Indeed, based on Weiss' recounting of her co-owner's allowing the Claimant flexibility in her schedules, the ALJ infers and finds that the Claimant was confused about "tardiness," and could not know, as a reasonable person, that her tardiness would get her fired. Claimant received mixed signals from Weiss and Weiss' co-owner.

29. There are documents, which were not clear in the documentary evidence which allegedly establish that the Claimant had been warned that her attendance was unsatisfactory from March 2017 up to the date she was terminated on August 16, 2017 (Respondents' Answer Brief). Again, the Claimant was receiving mixed signals about her attendance.

30. Weiss agreed, however, that the Claimant was permitted to take leave without pay and would receive up to five (5) hours a month of paid time off. No documentary evidence was presented to show that the Claimant sought payment for dates she when she was off. Claimant was receiving mixed signals about time-off from work.

31. According to Weiss, she had a conversation with the Claimant on the day of the Claimant's termination. Weiss asserts that she and witness Marji Adelstein, an HR (human resources) professional, had spoken with the Claimant for several hours on August 17, 2017. Both Adelstein and Weiss claim that the Claimant was presented documentation concerning a voluntary resignation. No documentation supporting this assertion was presented at hearing. The Claimant testified that this information was never provided to her. On such a critical point concerning "termination," or voluntary resignation (which could nullify Claimant's right to TTD benefits), it makes no sense that Respondents would not present a copy of such a document in evidence, thus, the ALJ finds a failure of proof on this proposition.

32. According to Weiss, on August 16, 2017 the Claimant had told her in Spanish that she wanted to go on unemployment. The Claimant disputed this. Rather, according to the Claimant, she only had told Weiss and Adelstein that she was going to apply for unemployment and that she believed she was entitled to it. The ALJ resolves this conflict in favor of a failure of proof insofar as Weiss heard something other than what the Claimant said. Weiss stated that the last statement by the Claimant to her and to Adelstein was that the Claimant wanted unemployment and that she did not think it was fair that she should be terminated because she injured her back.

33. According to the Claimant, during this meeting Adelstein and Weiss attempted to conduct this meeting in Spanish. The Claimant stated that their Spanish was poor and the Claimant requested a translator. This request was denied.

34.. The Claimant denied telling either Weiss or Adelstein that she wanted to be fired. In context, Weiss testified that but for Claimant's termination, she could have accommodated Claimant's work restrictions. Weiss testified that she offered the Claimant part-time work at the meeting and the Claimant allegedly said she'd rather be fired. The ALJ infers and finds that Weiss took whatever the Claimant said out-of-context, in light of Weiss' lack of ability in the Spanish language. Based on the Claimant's credible demeanor at hearing and the fact that Weiss' Spanish-language abilities were "poor" according to the Claimant, and not refuted by Weiss, the ALJ resolves this conflict in favor of the Claimant never having said that she wanted to be fired. Further, Claimant testified that at the end of their conversation she asked Weiss and Adelstein why she was being fired because of her back injury. Consequently, the ALJ infers and finds that the Claimant did **not** voluntarily resign.

35. Although the Employer may have had every right to fire the Claimant because the Claimant did not measure up to Weiss' expectations, Colorado is in an "employment-at-will" jurisdiction and an employer may fire an employee without consequences as long as the employer does not discriminate against a protected class. The standard for terminating temporary disability benefits in workers' compensation is specific and higher. The employee must engage in willful conduct that a reasonable person could know would lead to a termination from employment. The ALJ finds that the mixed messages that Claimant received on her attendance, including ambiguous

documents (Respondents' Exhibits D, E and K), offered to attempt to establish documentation of the Claimant being warned about her "performance problems," which they do not, the ALJ infers and finds that Respondents have failed to establish that the Claimant, as a reasonable person, should have known that her attendance and other areas of performance would lead to her termination from employment. Thus, Respondents have failed to prove, by preponderant evidence, that the Claimant, through willful conduct, should have known that her conduct would cause her firing. There was a pattern of toleration by the Employer.

Ultimate Findings

36. The ALJ finds the Claimant's testimony to be credible. Although she may not have been a model employee and the Employer may have had a prerogative of firing her for inadequate performance, Weiss' testimony, as co-owner, implanted confusing signals in the Claimant's mind concerning Claimant's attendance. The ALJ infers and finds that a reasonable person, under the circumstances, would believe that their behavior is tolerated and would not lead to being fired. The ALJ resolves conflicts in the testimony in favor of the Claimant's testimony and against the critical portions of Weiss' and Adelstein's testimony.

37. Between conflicting evidence concerning compensability and "responsibility for termination," the ALJ makes a rational choice, based on substantial evidence, to accept the Claimant's testimony and to reject the critical parts of Weiss' and Adelstein's testimony.

38. Claimant has proven, by a preponderance of the evidence that she sustained a compensable back injury on August 7/8, 2017, arising out of the course and scope of her employment with the Employer herein.

39. The medical care and treatment at Concentra was and is authorized, causally related and reasonably necessary to cure and relieve the effects of Claimant's back injury of August 7/8, 2017.

40. The medical care and treatment of Dr. Yamamoto became authorized by virtue of Respondents' refusal to further treat for non-medical reasons. Concentra refused to further treat the Claimant for non-medical reasons and Respondents failed to designate a new provider, thus, Claimant had the right to select Dr. Yamamoto, whose treatment was and is causally related to the compensable injury and reasonably necessary to cure and relieve the effects thereof.

41. As found, the Claimant's AWW is $892.03, which is a baseline for temporary wage loss, and would yield a TTD rate of $594.68 per week, or $84.95 per day.

42. The Claimant's physical restrictions have remained and not been modified to date. The Claimant has not reached MMI and she has been experiencing a 100%

temporary wage loss during the following specified periods: September 5, 2017 through March 25, 2018; October 5, 2018 through January 23, 2019; and, August 30, 2018 through the present time. The Claimant, as found, has proven entitlement to TTD benefits for these periods.

43. Because the Claimant was employed for unspecified wages from August 9, 2017 through September 5, 2017; and, from March 26, 2018 through August 29, 2018, it is not possible to calculate a temporary wage loss for these periods of time, thus, she has failed to prove entitlement to temporary partial disability (TPD) benefits during these periods of time.

44. As found, the Claimant has proven, by preponderant evidence, that she is entitled to TTD benefits from September 5, 2017 through March 25, 2018, both dates inclusive, a total of 202 days; from October 5, 2018 through January 23, 2019, both dates inclusive, a total of 111 days; and, from January 24, 2019 through March 18, 2019, both dates inclusive, a total of 54 days. As of the last session of the hearing on March 18, 2019, the Claimant had been temporarily and totally disabled for an aggregate of 367 days. After March 18, 2019, the Claimant continues to be temporarily and totally disabled until she is released to return to work at full duty; until she actually returns to work; or, until she reaches MMI.

45. The Claimant has failed to prove, by preponderant evidence that he is entitled to TTD benefits from August 8, 2017 through September 4, 2017; and, from March 26, 2018 through October 4, 2018.

46. Respondents have failed to prove their affirmative defense of "responsibility for termination" because of a failure of proof concerning willful conduct that Claimant reasonably could have known would get her fired.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within

the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant's testimony was credible. Although she may not have been a model employee and the Employer may have had the prerogative of firing her for inadequate performance, Weiss' testimony, as co-owner, implanted confusing signals in the Claimant's mind concerning her attendance. The ALJ infers and finds that a reasonable person, under the circumstances, would believe that their behavior is tolerated and would not lead to being fired. The ALJ resolves the credibility conflicts in the testimony in favor of the Claimant's testimony and against the critical portions of Weiss' and Adelstein's testimony.

b. Compensation can be awarded where there is competent evidence other than expert opinion. *Martin Marietta Corp. v. Faulk*, 158 Colo. 441, 407 P.2d 348 (1965). Such competent evidence includes lay testimony. *See Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Colorado Fuel & Iron Corp. v. Alitto*, 130 Colo. 130, 273 P.2d 725 (1954). *Also see Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997). As found, the Claimant's lay testimony is corroborated by medical opinions.

Substantial Evidence

c. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985).

It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting evidence concerning compensability and "responsibility for termination," the ALJ made a rational choice, based on substantial evidence, to accept the Claimant's testimony and to reject the critical parts of Weiss' and Adelstein's testimony.

Compensability

d. An "injury" referred to in § 8-41-301, C.R.S., contemplates a **disabling** injury to a claimant's person, not merely a coincidental and non-disabling insult to the body. *See Henderson v. RSI, Inc.,* 824 P.2d 91 (Colo. App. 1991). *Also see Gaudett v. Stationers Distributing Comp*any, W.C. No. 4-135-027 [Indus. Claim Appeals Office (ICAO), April 5, 1993]. A priori, the consequences of a work-related incident must require medical treatment or be disabling in order to be sufficient to constitute a compensable event. If an incident is not a significant event resulting in an injury, claimant is not entitled to benefits. *Wherry v. City and County of Denver*, W.C. No. 4-475-818 (ICAO, March 7, 2002). As found, the Claimant's injury was both disabling and required medical attention.

e. In order for an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Office,* 919 P.2d 207, 210, 210 (Colo. 1996). An injury "arises out of' employment if it would not have occurred **but for** the fact that the conditions and obligations of employment placed the employee in a position that he or she was injured." *See City of Brighton v. Rodriguez,* 318 P.3d 496, **2014 CO 7** [presumption that an injury arises out of employment when an unexplained injury occurs during the course of employment]. Once shown to have happened at work, it is incumbent to show that non-work related factors caused the injury. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1) (c), C.R.S. *See Faulkner v. Indus. Claim Appeals Office,* 24 P.3d 844 (Colo. App. 2000)*; Eller v. Indus. Claim Appeals Office*, 224 P.3d 397, 399 (Colo. App. 2009); *Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277, 1279 (Colo. App. 2008). The question of causation is generally one of fact for determination by an ALJ. *Faulkner* at 846; *Eller* at 399-400. As found, the Claimant's back injury of August 7/8, 2017 occurred at work while the Claimant was performing work-related duties.

f. A compensable injury is one that arises out of and in the course of employment. § 8-41-301(1) (b), C.R.S. The "arising out of" test is one of causation. If an industrial injury aggravates or accelerates a preexisting condition, the resulting disability and need for treatment is a compensable consequence of the industrial injury. Thus, a claimant's personal susceptibility or predisposition to injury does not disqualify the claimant from receiving benefits. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo.

App. 1990). An injured worker has a compensable new injury **if the employment-related activities aggravate, accelerate, or combine with the pre-existing condition to cause a need for medical treatment or produce the disability for which benefits are sought.** § 8-41-301(1) (c), C.R.S. *See Merriman v. Indus. Comm'n,* 120 Colo. 400, 210 P.2d 448 (1949); *Anderson v. Brinkoff,* 859 P.2d 819 (Colo. 1993); *National Health Laboratories v. Indus. Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992); *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). An injury resulting from the concurrence of a preexisting condition and a hazard of employment is compensable. *H & H Warehouse v. Vicory*, *supra*. *Duncan v. Indus. Claims App. Office*, 107 P.3d 999 (Colo. App. 2004). Even where the direct cause of an accident is the employee's preexisting disease or condition, the resulting disability is compensable where the conditions or circumstances of employment have contributed to the injuries sustained by the employee. *Ramsdell v. Horn*, 781 P.2d 150 (Colo.App. 1989). *Also see* § 8-41-301(1) (c), C.R.S; *Parra v. Ideal Concrete,* W.C. No. 4-179-455 [Indus. Claim Appeals Office (ICAO), April 8, 1998]; *Witt v. James J. Keil Jr.,* W.C. No. 4-225-334 (ICAO, April 7, 1998). As found, the Claimant's back injury arose out of the course and scope of her employment and regardless of any pre-existing condition, her injury amounted to an aggravation and acceleration of a dormant condition and was, therefore, a compensable event.

Medical and Refusal of Treatment for Non-Medical Reasons

g. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, Claimant's medical treatment was and is causally related to her back condition on August 7/8, 2017. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment was and is reasonably necessary to cure and relieve the effects of her compensable injury.

h. The employer's initial right to select the treating physician is triggered once the employer has some knowledge of the facts concerning the injury or occupational disease with the employment and indicating "**to a reasonably conscientious manager**" that a **potential** workers' compensation claim may be involved. *Bunch v. Indus. Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006). As found, The Employer referred the Claimant to an authorized medical provider, Concentra (an Employer authorized medical provider). As found, the Employer first sent the Claimant to Concentra. Thereafter, Concentra refused to treat the Claimant for non-medical reasons.

i. Under the provisions of § 8-43-404 (5) (a) (I) (A), C.R.S., an "employer or insurer shall provide a list of at least two physicians or two corporate medical providers or at least one physician and one corporate medical provider, where available, in the first instance, from which list an injured employee may select the physician who attends said injured employee." If the physician selected refuses to treat for non-medical

reasons, and the insurer fails to appoint a willing ATP after notice of the refusal to treat, the right of selection passes to the injured worker. *Weinmeister v. Cobe Cardiovascular, Inc.,* W.C. No. 4-657-812 [Industrial Claim Appeals Office (ICAO), July 10, 2006]. *Also see Lutz v. Industrial Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000); *Ruybal v. University Health Sciences Center,* 768 P.2d 1259 (Colo. App. 1988). As found, the insurance carrier refused to approve further treatment by Concentra and Concentra refused to treat for non-medical reasons. Consequently, as found, the Claimant selected Dr. Yamamoto, who became the Claimant's ATP, and all of Dr. Yamamoto's treatment for the Claimant's back injury as authorized, causally related and reasonably necessary.

Average Weekly Wage (AWW)

j. An AWW calculation is designed to compensate for **total** temporary wage loss. *Pizza Hut v. Indus. Claim Appeals Office,* 18 P. 3d 867 (Colo. App. 2001). *See* § 8-42-102, C.R.S. The parties stipulated and the ALJ found that the Claimant's AWW is 892.03, which is a baseline for temporary wage loss, and would yield a TTD rate of $594.68 per week, or $84.95 per day.

Temporary Disability/Unemployment Benefit Offsets (UI)

k. To establish entitlement to temporary disability benefits, a claimant must prove that the industrial injury has caused a "disability," and that she has suffered a wage loss that, "to some degree," is the result of the industrial disability. § 8-42-103(1), C.R.S; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). When a temporarily disabled employee loses her employment for other reasons which are not her responsibility, the causal relationship between the industrial injury and the wage loss necessarily continues. Disability from employment is established when the injured employee is unable to perform the usual job effectively or properly. *Jefferson Co. Schools v. Headrick*, 734 P.2d 659 (Colo. App.1986). This is true because the employee's restrictions presumably impair her opportunity to obtain employment at pre-injury wage levels. *Kiernan v. Roadway Package System*, W.C. No. 4-443-973 (ICAO, December 18, 2000). Claimant's termination in this case was not her fault as herein below illustrated. There is no statutory requirement that a claimant must present medical opinion evidence from of an attending physician to establish her physical disability. See *Lymburn v. Symbois Logic*, 952 P.2d 831 (Colo. App. 1997). Rather, a claimant's testimony alone is sufficient to establish a temporary "disability." *Id*. As found, the Claimant's testimony concerning her back injury of August 7/8, 2017 is corroborated by medical opinion and restrictions that would not permit her to perform her pre-injury work.

l. Once the prerequisites for TPD and/or TTD are met (*e.g.,* no release to return to full duty, MMI has not been reached, a temporary wage loss is occurring in modified employment or modified employment is not made available, and there is no actual return to work), TPD and TTD benefits are designed to compensate for

temporary wage loss. TTD benefits are designed to compensate for a 100% temporary wage loss. *See Eastman Kodak Co. v. Industrial Commission,* 725 P. 2d 107 (Colo. App. 1986); *City of Aurora v. Dortch,* 799 P. 2d 461 (Colo. App. 1990). As found, the Claimant was experiencing a 100% temporary wage loss for the following periods of time: from September 5, 2017 through March 25, 2018, both dates inclusive, a total of 202 days, during which the Claimant received UI benefits of $520 per week; from October 5, 2018 through January 23, 2019, both dates inclusive, a total of 111 days, during which she received UI benefits of $429 per week; and, from January 24, 2019 through March 18, 2019, both dates inclusive, a total of 54 days. Also, as found, after March 18, 2019, the Claimant continues to be temporarily and totally disabled until she is released to return to work at full duty; until she actually returns to work; or, until she reaches MMI. As found, the TTD rate is $594.68 per week, or $84.95 per day.

Unemployment (UI) Benefit Offset

m. Section 8-42-103 (1) (f), C.R.S., provides for a 100% offset of UI benefits against temporary disability benefits. As found, from September 5, 2017 through March 25, 2018, a total of 202 days, the Claimant received $520 a week in UI benefits; and, from October 5, 2018 through January 23, 2019, a total of 111 days, the Claimant received $429 per week in UI benefits, all of which are 100% offsetable.

Temporary Partial Disability

n. As found, the Claimant failed to establish a temporary wage loss for the periods she worked after her termination by the Employer, which are: from August 9, 2017 through September 5, 2017; and, from March 26, 2018 through August 29, 2018, thus, she failed to prove entitlement to temporary partial disability (TPD) benefits during these periods of time.

Affirmative Defense of "Responsibility for Termination"

o. Section 8-42-105 (4), C.R.S., provides that an employee responsible for her own termination is not entitled to temporary disability benefits. This statutory provision has been interpreted to mean that "responsibility for termination" must be through a volitional act on the part of the terminated employee. *Colorado Springs Disposal v. Indus. Claim Appeals Office,* 58 P. 3d 1061 (Colo. App. 2002). A finding of fault requires a volitional act or the exercise of a degree of control by a claimant over the circumstances leading to termination. *Gilmore v. Indus. Claim Appeals Office,* 187 P.3d 1129, 1132 (Colo. App. 2008); *Apex Transport, Inc. v. Indus. Claim Appeals Office,* **2014 COA 25.** In determining whether a claimant is responsible for termination in the workers' compensation context, the ALJ may be required to evaluate competing factual theories concerning the actual reason or reasons for the termination. *See Rodriguez v. BMC West*, W.C. No. 4-538-788 [Indus. Claim Appeals Office (ICAO), June 25, 2003]. As found, Respondents failed to satisfy their burden of proof on the affirmative defense that Claimant was responsible for her termination through a volitional act on her part and/or that she exercised ad degree of control over the circumstances leading to

termination. Although the Employer may have had every right to fire the Claimant because the Claimant did not measure up to Weiss' expectations, Colorado is in an "employment-at-will" jurisdiction and an employer may fire an employee without consequences as long as the employer does not discriminate against a protected class. The standard for terminating temporary disability benefits in workers' compensation is specific and higher. The employee must engage in willful conduct that a reasonable person could know would lead to a termination from employment. As found, the mixed messages that Claimant received on her attendance, including ambiguous documents (Respondents' Exhibits D, E and K), offered to attempt to establish documentation of the Claimant being warned about her "performance problems," which they do not. Respondents failed to establish that the Claimant, as a reasonable person, should have known that her attendance and other areas of performance would lead to her termination from employment. Thus, Respondents failed to prove, by preponderant evidence, that the Claimant, through willful conduct, should have known that her conduct would cause her firing. There was a pattern of toleration by the Employer.

Burden of Proof

p. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained her burden with respect to compensability, medical benefits, including authorization of Dr. Yamamoto, AWW, and for TTD benefits for the periods specified herein above, The Claimant failed to sustain her burden with respect to TPD benefits for the periods specified herein above,

q. Respondents failed to sustain their burden with respect to their affirmative defense of "responsibility for termination."

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents affirmative defense of “Responsibility for Termination” is hereby denied and dismissed.

B. Respondents shall pay the costs of all authorized, causally related and reasonably necessary medical care and treatment for the compensable back injury of August 7/8, 2017, including treatment by David Yamamoto, M.D., subject to the Division of Workers Compensation Medical Fee Schedule.

C. The Claimant’s average weekly wage is $892.03.

D. Respondents shall pay the Claimant temporary total disability benefits in the amount of $594.68 per week for the period from September 5, 2017 through March 28, 2018, both dates inclusive, a subtotal of 202 days, less a $520 per week offset for UI benefits, in the net amount of $74.68 per week, or $10.68 per day, in the aggregate subtotal amount of $2,157.36; and, from October 5, 2018 through January 23, 2019, both dates inclusive, a subtotal of 111 days, the net amount of $165.68 per week, or $23.67 per day, in the aggregate subtotal amount of $2,627.37.

E. From march 18, 2019, the last session of the hearing, Respondents shall pay the Claimant $594.68 per week in temporary total disability benefits until termination thereof is warranted by law.

F. Any and all claims for temporary partial disability benefits for the periods the Claimant worked after her termination are hereby denied and dismissed.

G. Respondents shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

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

DATED this 8TH day of April 2019.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 2864 South Circle Drive, Suite 810, Colorado Springs, CO 80906	
In the Matter of the Workers' Compensation Claim of: **,** Claimant, vs. **,** Employer, and **Self Insured** Insurer, Respondents.	▲ **COURT USE ONLY** ▲ **CASE NUMBER:** **WC 3-606-711-001**

ORDER GRANTING RESPONDENTS' OPPOSED MOTION FOR PARTIAL SUMMARY JUDGMENT

The undersigned ALJ has reviewed Respondent's *Motion for Partial Summary Judgment,* dated 3/26/2019, and Claimant's *Response* thereto (*"Request for Dismissal or Modification of Court Ordered Judgement [sic] reached in Reference to Claim #3-606-711"),* dated 4/4/2019, and enters the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Claimant sustained a work related injury on May 8, 1980.

2. Claimant, with assistance of counsel, entered into a *Stipulation for Order Approving Compromise Settlement and Release of Claim* ("Stipulation") on October 20, 1983.

3. Paragraph #5 of the Stipulation reads, in its entirety:

> 5. The Claimant understands that this is a **final settlement** and that approval by the Division of Labor of this settlement and an Order by the Division of Labor approving this stipulation means that the Claimant **cannot receive ever again** any temporary or **permanent disability benefits** for the injury or disease which is the subject of this action after the Division of Labor issues an Order approving this settlement. (emphasis added).

4. Paragraph #6 of the Stipulation reads, in its entirely:

> 6. The Claimant understands that the terms of this settlement and its approval by the Division of Labor mean **he cannot reopen his claim at any time in the future.** (emphasis added).

5. Paragraph #13 of the Stipulation reads, in pertinent part:

> 13. The Respondents, therefore, agree to pay to the Claimant, coincidentally with the approval of this agreement, the sum of $30,292.00, as herein before provided.
>
> The Claimant agrees to accept this settlement as offered by the respondents and to **withdraw his claim for all workmen's compensation benefits <u>other than</u> medical, surgical and hospital arising** out of his injury or disease which cause disability on May 8, 1980….(emphasis added).

6. The Stipulation, in its entirety, addresses in great detail that Claimant was represented by counsel, was of sound mind at the time of the Stipulation, that he understands his future employment might be limited, that he might otherwise avail himself of vocational rehabilitation, and what his statutory rights might otherwise be if he persisted in his claim.

7. Despite all clearly written admonitions, Claimant signed the Stipulation, and availed himself of its benefits.

8. The Stipulation was approved by the Director on October 24, 1983.

9. Claimant, pro se, has now filed an Application for Hearing on January 28, 2019 endorsing medical benefits, petition to reopen, penalties, and permanent total disability benefits.

10. Claimant's claim for penalties in his Application for Hearing reads, *in its entirety:*

> Because of their continued efforts to not comply to the orders of October 20th 1983 and January 5th 1997 on multiple occasions over the last 39 years I am asking that a monetary penalty be assessed against Workmans Compensation Major Medical Division

CONCLUSIONS OF LAW

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

1. Rule 17, OACRP permits any party to file a motion for summary judgment seeking resolution of any endorsed issues for hearing. *See also Fera v. Industrial Claim Appeals Office of State,* 169 P.3d 231 (Colo. App. 2007); *McCormick v. Exempla,* W.C. No. 4-594-683 (July 03, 2007).

2. Summary judgment is a drastic remedy and is not warranted unless the moving party demonstrates that it is entitled to judgment as a matter of law. *Van Alstyne v.*

Housing Authority of Pueblo, 985 P.2d 97 (Colo. App. 1999). All doubts as to the existence of disputed facts must be resolved against the moving party, and the party against whom judgment is to be entered is entitled to all favorable inferences that may be drawn from the facts. *Kaiser Foundation Health Plan v. Sharp,* 741 P.2d 714 (Colo. App. 1987). However, once the moving party establishes that no material fact is in dispute, the burden of proving the existence of a factual dispute shifts to the opposing party. The failure of the opposing party to satisfy its burden entitles the moving party to summary judgment. *Gifford v. City of Colorado Springs,* 815 P.2d 1008 (Colo. App. 1991).

3. *Pro se* litigants must adhere to the same principles and procedures as those who are qualified to practice law. *Feeney v. Steamboat Ski & Resort Corp*., W.C. No. 4-246-365 (March 5, 1996); *Bryan v. City Market*, W.C. No. 4-799-180 (July 28, 2010). A *pro se* litigant is presumed to have knowledge of the applicable statutes and must be prepared to accept the consequences of his own mistakes if he elects to represent himself. *Dyrkopp v. Industrial Claim Appeals Office*, 30 P.3d 821, 823 (Colo. App. 2001); *Manka v. Martin*, 614 P.2d 875 (Colo. App. 1980); *Rosenberg v. Grady*, 843 P.2d 25 (Colo. App. 1992); *Paul v. Industrial Commission*, 632 P.2d 638 (Colo. App. 1981).

4. Section 8-43-204(1), C.R.S. provides that an injured worker may settle all or part of any claim and that if a settlement provides by its terms that the employee's claim shall not be reopened, such settlement shall not be subject to being reopened. As found, Claimant cannot seek permanent total disability benefits or the reopening of his claim.

5. Section 8-43-304(4), C.R.S. provides that a claim for penalties shall be pled with specificity. *Jakel v. Northern Colorado Paper Inc.,* W.C. No. 4-524-991 (October 6, 2003); *Gonzales v. Denver Public School District No. 1*, W.C. No. 4-437-328 (December 27, 2001); *Hendricks v. Industrial Claim Appeals Office,* 809 P.2d 1076 (Colo. App. 1990); *Lovett v. Stroup Insurance Services, Inc.*, W.C. No. 4-808-092 (August 30, 2013). As found, Claimant's claim for penalties is not plead with specificity.

6. There are no issues as to any material fact with regard to permanent total disability benefits, and reopening.

7. Claimant has failed to plead his claim for Penalties with sufficient specificity, as required by C.R.S. 8-43-304(4). No attachments accompany this claim. No facts are alleged with specificity. Respondents are unable to meaningfully respond or prepare for Claimant's vague claim.

8. Respondent is entitled to Summary Judgment as a matter of law on all issues endorsed in Claimant's Application for Hearing, except medical benefits.

ORDER

IT IS THEREFORE, ORDERED:

A. Respondent's Motion for Partial Summary Judgment is hereby GRANTED.

B. The only issue to be litigated at the hearing on June 13, 2019 is medical benefits.

C. Claimant is further advised that he is responsible for understanding all applicable Statutes, case law, and Rules while litigating this case. Failure to comply with said requirements could lead to sanctions, up to and including possible dismissal of his remaining claims.

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

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

ORDERED this 9th day of April, 2019.

/s/ William G. Edie
William G. Edie
Administrative Law Judge

ISSUES

- Whether the claimant has demonstrated by a preponderance of the evidence that she sustained an injury arising out of and in the course and scope of her employment with the employer on March 21, 2018.

- If the claimant proves a compensable injury, whether the claimant has demonstrated by a preponderance of the evidence that medical treatment she received from Vail Health was reasonable and necessary to cure and relieve her from the effects of the injury.

- This matter came before the ALJ as a "full contest". However, at hearing, the parties agreed that certain issues would be held in abeyance pending the ALJ's determination of the issues of compensability and the relatedness and necessity of medical treatment identified above.

- The issues the parties have agreed to hold in abeyance are: average weekly wage; temporary total disability benefits; whether the medical treatment the claimant received was authorized; the reasonableness and necessity of other medical treatment; and whether the claimant is entitled to a change of physician.

FINDINGS OF FACT

1. The claimant has worked for the employer for two and one-half years. On March 21, 2018 the claimant was working in Maintenance and Sanitation in the Bakery Department. The claimant's job duties in that position involved maintaining the cleanliness of the bakery, including cleaning dishes and floors. In addition, the claimant would "break out" frozen items for presentation in the bakery.

2. The claimant testified that on March 21, 2018, she was injured when she reached overhead for a box of bagels. The claimant testified that the box weighed approximately 12 pounds. The claimant also testified that as she reached overhead for the box she felt a "pop" in her neck and a dull ache on the right side of her neck. The claimant testified that in the days following the pop she developed pain in her right shoulder, right elbow, down her right forearm, and into her ring finger and little finger. The claimant did not report the incident on March 21, 2018 and completed her scheduled shift on that date.

3. The claimant sought medical treatment with her primary care physician, Dr. Jean Hadley, on March 21, 2018. The claimant sought treatment with Dr. Hadley at that time because she believed that her pain symptoms were related to her prior diagnosis of rheumatoid arthritis. The claimant reported to Dr. Hadley that she had had pain "in multiple joints for the last few weeks". In addition, the claimant reported that for

two to three months she had experienced pain in her right shoulder and neck that radiated into her right arm with numbness into her fingers. Dr. Hadley diagnosed the claimant with carpal tunnel syndrome on the right, with possible reoccurrence of the claimant's rheumatoid arthritis. On that date, testing was done to determine whether the claimant's symptoms were related to rheumatoid arthritis.

4. Thereafter, Dr. Hadley notified the claimant that the test results showed that the claimant's symptoms were not caused by rheumatoid arthritis. On March 30, 2018, Dr. Hadley authored a letter in which she noted that the claimant had work restrictions of no lifting over 10 pounds, and that the claimant had carpal tunnel syndrome. The claimant provided these work restrictions to the employer.

5. On March 31, 2018, the claimant sought medical treatment at the urgent care offices of Vail Health and was seen by Colleen Ihnken, NP. At that time, the claimant reported to Ms. Ihnken that she had been diagnosed with carpal tunnel. The claimant also reported that she wanted to pursue a workers' compensation claim because "when she went back to work [after seeing Dr. Hadley] someone mentioned that this could be a Worker's [sic] Comp claim". Ms. Ihnken extended the claimant's work restrictions and referred the claimant to a workers' compensation provider.

6. On April 6, 2018, the claimant was seen at Vail Health Occupational Health by Lucia London, CNP. The claimant again reported right arm pain with finger tingling. Ms. London listed the claimant's diagnoses as "[p]ossible carpal tunnel and/or cubital tunnel syndrome" and "[m]uscular aches and pains – not work related". Ms. London ordered electromyography (EMG) testing of the claimant's right upper extremity and referred her for physical therapy. The claimant testified that physical therapy did not help relieve her symptoms.

7. On May 8, 2018, Dr. Marc Treihaft administered EMG testing of the claimant's right upper extremity. Dr. Treihaft determined that the claimant's studies were negative for carpal tunnel. However, he did note that the claimant had C6-7 radicular changes, right greater than left.

8. The claimant returned to Ms. London on May 23, 2018. Ms. London noted the results of the EMG and opined that the claimant had cervical radiculopathy. At that time, Ms. London determined that the claimant's work restrictions would be limited lifting, carrying, pushing, and pulling over 15 pounds.

9. In May 2018, the claimant's job position was changed from the Bakery to working at the front door of the employer's store. The claimant's job duties in that position include checking customer receipts and membership cards. The claimant's new position is less physically demanding as compared to her prior position in the Bakery. However, the claimant's pain symptoms have not improved since she has changed work duties.

10. On June 29, 2018, the claimant was again seen by Ms. London and reported that her symptoms were worse. Ms. London referred the claimant for a magnetic resonance image (MRI) of her cervical spine and made a referral to Dr. Scott Raub for consultation.

11. On July 11, 2018, an MRI of the claimant's cervical spine showed diffuse degenerative disc disease and multiple level canal stenosis, greatest at the C5-6 level (which was described as "severe"). The MRI also showed diffuse uncovertebral and facet arthrosis with multilevel foraminal stenosis, greater on the right at the C5-6 level, and greater on the left at the C6-7 level.

12. The claimant was seen by Dr. Raub on July 23, 2018. At that time, the claimant reported that she was injured at work in March 2018 after doing "a lot of heavy repetitive lifting". Dr. Raub reviewed the claimant's EMG and MRI results and determined that due to the claimant's anatomy, she was not a candidate for interspinal injections. At that time, Dr. Raub referred the claimant to Dr. Ernest Braxton for a surgical consultation.

13. On August 3, 2018, the claimant was seen by Dr. Braxton. In the medical record of that date, Dr. Braxton noted that the claimant first experienced her symptoms "after doing heavy lifting at work." Based upon the claimant's MRI findings and his own exam, Dr. Braxton opined that the claimant has cervical radiculopathy, cervical disc degeneration, cervical stenosis, and osteoarthritis of the cervical spine. At that time, Dr. Braxton recommended that the claimant undergo either a C5-6 anterior cervical discectomy and fusion, or in the alternative, a C5-6 artificial disc replacement.

14. On October 2, 2018, the claimant attended an independent medical examination (IME) with Dr. Linda Mitchell. In connection with the IME, Dr. Mitchell reviewed the claimant's medical records, obtained a history from the claimant, and completed a physical examination. In her IME report, Dr. Mitchell opined that the claimant's diagnoses of cervical degeneration, cervical stenosis, osteoarthritis of the cervical spine, and cervical radiculopathy are not related to a work injury or accident. Dr. Mitchell noted that there is no evidence that the type of degenerative changes the claimant has would be caused by repetitive work, and more specifically repetitive work does not cause cervical degeneration or radiculopathy. Dr. Mitchell further opined that the claimant's symptoms are likely caused by her rheumatoid arthritis and a motor vehicle accident the claimant was involved in in the 1980's. Dr. Mitchell's testimony was consistent with her written report.

15. The ALJ notes that the claimant failed to report the alleged incident to the employer until someone mentioned that it might be a workers' compensation matter. She initially sought treatment for symptoms that she believed were related to her diagnosis of rheumatoid arthritis. Additionally, in her initial discussion of her symptoms with her various providers, the claimant believed that her symptoms were the result of a repetitive motion type injury (such as carpal tunnel) and did not mention a specific incident or injury. It was only later that the claimant began to assert the acute onset of

her symptoms. However, this contradicts the claimant's initial report to Dr. Hadley that she had experienced these symptoms for two to three months.

16. The ALJ credits the medical records and the opinions of Dr. Mitchell and finds that the claimant has failed to demonstrate that she suffered an injury arising out of and in the course and scope of her employment with the employer. The claimant has failed to demonstrate that she suffered an acute injury. The claimant has likewise failed to demonstrate an occupational disease arising from her employment with the employer.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2017).

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

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

5. The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by Section 8-40-201(14), C.R.S. as:

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

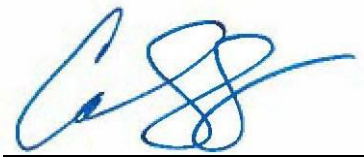
6. A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, Section 8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

7. As found, the claimant has failed to demonstrate by a preponderance of the evidence that she suffered an injury or an occupational disease that arose out of and in the course and scope of her employment with the employer. As found, the medical records and the opinions of Dr. Mitchell are credible and persuasive.

ORDER

It is therefore ordered that the claimant's claim for workers' compensation benefits is denied and dismissed.

Dated April 10, 2019



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

ISSUES

I. Does the ALJ have jurisdiction to hear Claimant's request for medical benefits, since a DIME opinion has determined that Claimant's left arm complaints are not related to his 9/15/2011 work injury?

II. Assuming jurisdiction remains, has Claimant shown, by a preponderance of the evidence, that the requested left arm EMG and left shoulder MRI are reasonable, necessary, and related to his work injury?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Claimant sustained an admitted work injury to his left shoulder on September 15, 2011 while working for the Respondent. Claimant was referred for treatment at CCOM, with ATP Dr. Richard Nanes, D.O. CCOM records for visits between 9/15/11 and 12/16/11 make no mention of elbow or forearm pain associated with the injury to treating providers. (Ex E pp. 61-65; Ex. A pp. 8-12; Ex. C pp. 25-27).

2. Claimant underwent a left shoulder arthroscopic acromioplasty and arthroscopic subacromial extensive debridement of bursal tissue, with scalene block on January 9, 2012. Sometime after surgery, Claimant reported pain and numbness in his left forearm. *Id*.

3. Claimant had an EMG/NCV on May 16, 2012 regarding the radial forearm numbness and pain complaints. The results were:

> 1. Mild left neuropathy at the wrist…likely a sub-clinical finding and is not related to his radial forearm symptoms.
>
> 2. No EDX evidence of brachial plexopathy, musculocutaneous neuropathy, radial neuropathy or cervical radiculopathy.
>
> 3. Clinical examination does reveal evidence of a lateral epicondylitis with irritation of the radial tunnel but no radial tunnel neuropathy noted on EDX study." (Ex. F pp. 73-77).

4. Dr. Nanes, the ATP, placed Claimant at maximum medical improvement (MMI) on July 11, 2012 with a 9% upper extremity rating for his left shoulder.

5. Respondents filed Final Admission of Liability ("FAL"). Claimant then timely objected and filed a Notice and Proposal for a Division IME ("DIME") on August 16, 2012. (Ex. B).

6. Dr. Velma Campbell was selected as the DIME physician. She evaluated Claimant on October 18, 2012. Claimant reported to her that on September 15, 2011 he pulled a door and felt a pulling sensation in his left shoulder with immediate pain. He reported that, following shoulder surgery, he experienced pain in his left neck and shoulder and numbness in his left arm. Claimant reported he had an ongoing feeling there was something wrong in his arm, that he felt pressure and pain. He also reported neck pain, headaches, right leg numbness, worsening low back pain over the past year, and numbness and burning in his feet. (Ex. A).

7. Dr. Campbell reviewed Claimant's medical records, including the May 16, 2012 EMG/NCV. She concurred with the MMI determination of Dr. Nanes of July 11, 2012. She opined that the median neuropathy found on the EMG was unrelated to the work injury. She also opined that Claimant's left arm paresthesia and pain was not related to the September 15, 2011 injury. She noted that the "left arm paresthesia without considering the cervical spine, scalene block could be associated with peripheral neuropathy and paresthesia, which usually resolved within 6 months of the block. In this case, the EMG/NCV did not show abnormalities of the potentially affected nerves." (Ex. A, p. 14).

8. Dr. Campbell opined "***no findings were identified that connect the neck pain or the left upper extremity and lower arm pain and paresthesia to the date of injury 9/15/11."*** (***emphasis added***). She opined that while the left arm and hand paresthesia ***may*** ***have*** a relationship to the scalene block, they are improving as would be expected and "***the other arm symptoms are not explained by peripheral nerve symptoms due to scalene block***." (*Id*.)(***emphasis added***).

9. Dr. Campbell also opined that Claimant's right shoulder, right leg pain, low back pain and paresthesia of the feet were not related to the September 15, 2011 injury. (*Id*.).

10. Respondent filed a FAL on November 20, 2012 consistent with the DIME's report. (Ex. A).

11. Claimant did not object to the November 20, 2012 FAL nor did he timely file an Application for Hearing to challenge the DIME's opinions. (Ex. B).

12. A second EMG/NCV was conducted on September 26, 2013 which again showed left median neuropathy with "mild progression since 5/2012" "c/w [consistent with] a mild left carpal tunnel syndrome." (Ex. F pp. 69-72).

13. Claimant continued to complain of left shoulder and arm pain. On November 27, 2013, Dr. Nanes opined that Claimant was no longer at MMI for his September 15, 2011 work injury. (Ex. E p. 59).

14. Subsequently, a General Admission of Liability (GAL) was filed reopening the claim on January 9, 2014. (*See* Ex. B).

15. Claimant subsequently underwent additional treatment and evaluation of his left shoulder and left forearm. (Ex. 3, E, F, G, H, I). This included left carpal tunnel surgery performed by Dr. Karl Larson on May 20, 2014 (Ex. 5).

16. Claimant was evaluated by Dr. Derek Purcel of the Colorado Center of Orthopaedic Excellence. On March 27, 2014 Dr. Purcell opined there was no significant evidence of rotator cuff or biceps pathology on exam. He did not recommend any surgical intervention for these conditions. (Ex. I pp. 86-87).

17. Dr. Robert Waltrip, an orthopedic surgeon, performed a peer review on March 30, 2015. Dr. Waltrip opined Claimant's September 15, 2011 work injury was limited to a left shoulder strain, with subacromial bursitis/impingement. Similar to the DIME, he opined there was no indication of an injury to the left elbow or forearm. He further opined that it did not make sense to attribute radial tunnel symptoms to either the interscalene block or the use of the sling following shoulder surgery. Dr. Waltrip opined Claimant's potential left radial tunnel syndrome, left elbow cubital tunnel, and lateral epicondylitis was unrelated to the September 15, 2011 work injury. (Ex. D).

18. On May 14, 2015, Dr. Nanes, noted he reviewed Dr. Waltrip's causation analysis and an Independent Medical Examination (IME) report of Dr. Griffis, and agreed that Claimant's left elbow conditions, including epicondylitis and possible left radial tunnel syndrome, were not related to Claimant's original left shoulder injury. (Ex. E, p. 58).

19. On May 20, 2015, Dr. Nanes had "a long discussion" with Claimant about the IME of Dr. Griffis and Peer-to-Peer report of Dr. Waltrip. He advised Claimant that he agreed with the physician, Dr. Waltrip, as he is the expert in the area. (Ex. 3, pp. 72-73).

20. Claimant was again placed at MMI by Dr. Nanes on June 10, 2015 without additional impairment. (Ex. 3, pp. 75-76).

21. A FAL was again filed on July 29, 2015, admitting to *maintenance care* for the September 15, 2011 injury. (Ex. 1).

22. Claimant then underwent a repeat left shoulder MRI on March 11, 2016 which noted tendinosis, but no rotator cuff tears. (Ex. G).

23. Dr. Daniel Olson took over Claimant's maintenance care as the ATP in March 2017. At that time, he noted that most of Claimant's records were in paper chart in storage. He also noted that Claimant's radial tunnel and elbow pain had not been accepted under the claim. (Ex. E, p. 99).

24. On March 26, 2018, Dr. Olson referred Claimant to Dr. Sandell for “chronic left arm pain, old EMGs showed radial tunnel syndrome,” carpal tunnel syndrome symptoms “returning/worsening also ? irritation from scalene block. Please repeat EMG/NCV of LUE.” (Ex. 7, p. 304).

25. At hearing, Claimant testified that at the time of injury he felt ‘like a rubber band snapped in his left shoulder’, and a burning to his elbow and forearm. He stated he reported his symptoms to the medical providers.

26. Claimant testified that he had shoulder surgery on January 9, 2012. He testified that following surgery, his entire arm felt dead from the scalene block and he had a heaviness that he had never had before and felt a burning sensation like a sunburn. He testified that he reported these symptoms to his treating physicians.

27. Claimant also testified that he underwent a DIME with Dr. Velma Campbell in 2012. He reported to her the ongoing symptoms he was having in his left arm, including the left elbow. He testified these were the same symptoms he is having now. Claimant testified that he was seeking treatment for his left elbow and forearm.

28. Dr. William Ciccone II performed an IME of Claimant on September 17, 2018, and provided testimony by deposition on February 20, 2019. Dr. Ciccone has been accepted as an expert in orthopedic surgery who is Level II Accredited. Dr. Ciccone reviewed medical records dating back to September 2011, took a history from Claimant, and performed a physical examination. Dr. Ciccone testified he also reviewed Claimant’s interrogatory responses, Claimant’s hearing testimony, and Dr. Olson’s deposition testimony.

29. Dr. Ciccone noted that Claimant initially reported pain in his left shoulder following the incident at work. He noted Claimant’s symptoms persisted through physical therapy and on January 9, 2012 left shoulder arthroscopy with subacromial decompression was performed with scalene block. Claimant then developed left arm numbness. He noted Claimant was felt to have *radial* tunnel syndrome, but EMGs from May 2012 and September 2013 were negative for this condition, although *carpal* tunnel was detected. He noted Claimant had been seen by multiple doctors to address his persistent forearm pain and that an EMG from August 12, 2015 showed left *cubital* tunnel syndrome and mild *radial* tunnel syndrome. (Ex. C).

30. Dr. Ciccone opined that Claimant’s upper extremity paresthesias was not related to the work injury, nor from the nerve block performed during surgery. He explained that while there was a less than 2% chance of nerve symptoms following an interscalene block, these symptoms show up initially after surgery, not at some later point. He noted that no nerve damage was noted on the initial EMG from May 16, 2012 prior to Claimant being placed at MMI.

31. Dr. Ciccone further opined that, while there was a small chance of peripheral neuropathy following an interscalene block, there was no relationship to the block and nerve entrapment, which is what carpal tunnel syndrome, radial tunnel syndrome and cubital tunnel syndrome were. He opined that the potential diagnosis of *radial* tunnel syndrome, and the incidental finding of *cubital* tunnel syndrome was not related to the work injury, nor to the regional anesthesia used during surgery. This should not, he opines, be covered by workers' compensation. (Ex. C pp. 42-43).

32. Dr. Ciccone confirmed that Claimant's current left arm symptoms were the same as those Claimant previously discussed with the DIME physician. He noted the DIME physician opined Claimant's left arm symptoms were not causally related to the work injury in this matter.

33. Dr. Ciccone opined that Claimant did not require any further imaging of his shoulder, as it would not be causally related to the work injury. (Ex. C. pp. 43[i]-43[ii]). In reaching this conclusion, Dr. Ciccone noted that Claimant had four MRIs. Further, a direct arthroscopic examination during his prior surgery had not revealed any significant shoulder pathology. He also noted Claimant was evaluated by a shoulder specialist on March 27, 2014, who did not feel Claimant's symptoms were secondary to rotator cuff or biceps pathology. (Ex. C).

34. Dr. Daniel Olson, Claimant's current ATP, provided testimony by deposition on January 24, 2019. Dr. Olson is accepted as an expert in occupational medicine who is Level II Accredited. Dr. Olson testified that he was familiar with Claimant's September 15, 2011 injury; however, Dr. Nanes was the original treating physician. He reviewed the initial medical report from September 15, 2011 and noted that Claimant reported only left shoulder and upper arm pain.

35. Dr. Olson testified that he first became involved when Claimant presented for a maintenance visit on March 27, 2017, after Dr. Nanes had retired. At this time, Claimant complained of forearm pain. Dr. Olson stated there has been disagreement on whether or not the presumed diagnosis of radial tunnel was related to this injury. He stated there had been a number of EMGs, of which he believed one was positive, and he was recommending an updated EMG to see where things stood. This exchange followed:

> Q. As of today's date, January 24, 2019, do you still believe he needs this third EMG; and depending on the outcome that he may need surgery?
>
> A. I think the EMG gives me the answers that we need to make any *treatment recommendations.* The argument whether it is related or not related will go on forever.
>
> Q. What is your opinion as to whether it is *work-related or not work-related?*

A. It is *hard for me* because I was not involved in the case, and *I would <u>have to</u> rely on the doctors who were seem him back then.* (Olsen Deposition, p. 20, ll. 14-22) (emphasis added).

36. Dr. Olson testified that Dr. Nanes had been the treating physician of Claimant's injury since September 2011. He also stated that the majority of Claimant's medical records pertaining to treatment for this injury were in storage. He testified that had not reviewed the medical records from September 2011 through the March 2017 [when he took over Claimant's care] other than the July 11, 2012 MMI report of Dr. Nanes. Dr. Olsen did further indicate that if Insurers deny care, the only practical alternative is to place the patient at MMI.

37. He testified his recommendation for the repeat EMG would be primarily to check on Claimant's *radial* tunnel and also the *cubital* tunnel. He stated he was not aware Claimant had a DIME addressing these symptoms/condition. Dr. Olson agreed Dr. Nanes' was of the opinion that Claimant's elbow complaints and potential radial tunnel syndrome was not related to the September 15, 2011 work injury. Dr. Olson stated he would not offer an opinion regarding whether he disagreed with Dr. Nanes without reviewing the documents Dr. Nanes reviewed in reaching his opinion.

38. At no time did Dr. Olson make mention of a current request for a left shoulder MRI or any other recommended treatment for Claimant's left shoulder.

CONCLUSIONS OF LAW

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

Generally

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

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every

item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). In this instance, the ALJ finds that Claimant has presented sincerely to his treatment providers and in his hearing testimony. However, it is understandable that Claimant's memory, with the passage of time, is not as persuasive as medical records which were kept contemporaneously with his reported symptoms. Secondly, while Claimant can describe his symptoms, he cannot be expected to offer persuasive opinions on issues of causation. Such opinions are best sought from medical professionals, as will be noted further.

D. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968). In this instance, two very capable and credible experts in infectious diseases have reached some similar conclusions, and some differing ones. Taken as a whole, the ALJ must determine which opinions are more persuasive on the ultimate issue of causation.

E. Further, courts are to be "mindful that the Workmen's Compensation Act is to be liberally construed to effectuate its humanitarian purpose of assisting injured workers." *James v. Irrigation Motor and Pump Co.*, 503 P.2d 1025 (Colo 1972).

Jurisdiction to Hear a Challenge of the DIME Opinion

F. Section 8-42-107(8), C.R.S. provides that a DIME's findings concerning MMI and permanent medical impairment are binding unless overcome by clear and convincing evidence. The determination of MMI inherently requires a DIME to assess as a matter of diagnosis whether the various components of a claimant's medical condition are causally related to the work injury. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). As such, a DIME's opinions regarding

causation are likewise entitled to presumptive weight. *See Laprino Foods Co. v. Indus. Claim Appeals Office*, 134 P.3d 475, 482 (Colo. App. 2005); *see also Egan v. Indus. Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998).

G. A *pro se* claimant is presumed to know applicable statutes and is required to act accordingly. *Kyrkopp v. Indus. Claim Appeals Office*, 30 P.3d 821 (Colo. App. 2001); *see Manka v. Martin*, 200 Colo. 260, 614 P.2d 875 (1980); see *also Muragara v. Xerox Business Services*, W.C. 4-946-815-02 (ICAO January 27, 2015). A claimant, pro se or not, has 30 days after the filing of a FAL to file an Application for Hearing on any disputed issues that are ripe for hearing. §8-43-203(2)(b)(II), C.R.S.

H. Absent a timely objection to the DIME physician's findings, an ALJ lacks jurisdiction to resolve a dispute as to those findings. *Leprino Foods Co. v. Indus. Claim Appeals Office*, *supra.*; *see also Schneider Nat'l Carriers, Inc. v. Indus. Claim Appeals Office*, 969 P.2d 817 (Colo. App. 1998).

I. In the present case, Claimant attended a DIME with Dr. Velma Campbell in October 2012 to evaluate his ongoing symptoms, including left elbow, forearm and hand pain/numbness, which he reported after the January 9, 2012 left shoulder surgery. The DIME opined that Claimant's left upper extremity median neuropathy (left carpal tunnel syndrome) ("CTS"), revealed in the May 16, 2012 EMG was *not related* to the September 15, 2011 shoulder injury-or the scalene block which preceded the surgery. The DIME also opined Claimant's "other arm symptoms were not explained by peripheral nerve symptoms that could be due to the scalene block." The DIME opined "no findings were identified that connect the neck pain or the left upper extremity and lower arm pain and paresthesia to the date of injury 9/15/11." The DIME found Claimant to be at MMI for conditions related to the September 15, 2011 shoulder injury.

J. Respondent filed a FAL consistent with the DIME report on November 20, 2012. Claimant did not timely challenge the DIME's MMI opinion, which inherently includes the finding that Claimant's left CTS, elbow and forearm pain and paresthesia, were *not related* to the injury or surgery. As such, the DIME's opinions are binding. The ALJ concludes, based upon the DIME report, that Claimant's left lower arm symptoms/conditions are not related to the September 15, 2011 injury.

K. Claimant acknowledges his current left arm symptoms for which he is seeking treatment are the same symptoms he reported to Dr. Nanes before being placed at MMI. They are essentially the same symptoms reported to the DIME in October 2012. In determining Claimant was at MMI, the DIME physician opined that Claimant's left arm/forearm symptoms were not causally related to the initial injury or surgery. As such, the ALJ finds that Claimant's claim for medical benefits to treat conditions beyond the scope of his work injury constitutes a constructive challenge to the DIME's MMI opinion. Claimant did not act to timely contest the causation opinions of the DIME. The ALJ is not now in a position to hear such a contest or resolve any dispute regarding the DIME's opinions. *Leprino Foods Co. v. Indus. Claim Appeals Office*, 134 P.3d 475 (Colo. App. 2005); *see also Schneider Nat'l Carriers, Inc. v. Indus. Claim Appeals Office*, 969 P.2d 817 (Colo. App. 1998).

Reopening of this Claim's Effect on the DIME Opinion

L. After a case is reopened based on a change in condition, causation is limited to whether there is a change in the claimant's physical or mental condition that can be causally connected to the original compensable injury. The original finding of causation cannot be challenged in reopening or post-reopening proceedings. *City and County of Denver v. Indus. Claim Appeals Office*, 58 P.3d 1162, 1164 (Colo. App. 2002).

M. The DIME's findings that Claimant's left upper extremity symptoms are not causally related to the September 15, 2011 injury or shoulder surgery became binding on the parties on December 21, 2012: 31 days after the unchallenged November 20, 2012 FAL.

N. The GAL filed on January 9, 2014 reopening the claim to address Claimant's worsened condition, did not allow, or provide, Claimant the ability to challenge the binding causation opinions made by the DIME in this matter over six years ago. The reopening of the claim in 2014- *to address Claimant's shoulder injury*- has no effect on the DIME's causation opinions for other body parts. As such, they remain binding on the parties. §8-42-107(8), C.R.S.; *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *City and County of Denver v. Indus. Claim Appeals Office*, 58 P.3d 1162 (Colo. App. 2002).

Causal Relationship Between the Work Injury and Current Treatment Recommendations / Repeat Left Arm EMG

In the event the ALJ is deemed to maintain jurisdiction to address Claimant's request for medical treatment on the merits, the ALJ makes the following Conclusions:

O. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. §8-42-101; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). Claimant must prove entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

P. Merely because a Respondent paid for prior treatment or a medical procedure does not allow for a finding that the Respondent has admitted that in the future that same treatment is either reasonable treatment or that it is *related* to the work injury. *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Morin v. ACE Hardware*, W.C. 4-906-748-04 (ICAO May 6, 2014). Even though an admission for maintenance benefits exists, "[t]he employer may contest any future claims for medical treatment on the basis that such treatment is unrelated to the industrial injury or occupational disease." *Grover v. Indus. Com'n*, 759 P.2d 705, 712 (Colo. 1988).

Q. Prior payment of treatment by Respondent directed toward Claimant's left elbow, forearm, CTS, radial and/or cubital tunnel syndrome and the filing of a FAL admitting to maintenance benefits for the September 15, 2011 injury does not equate to a waiver of the binding causation opinions of the DIME. *See Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *see also Morin v. ACE Hardware*, W.C. 4-906-748-04 (ICAO May 6, 2014). Nor does it waive Respondent's right to challenge future treatment or waive Claimant's burden to prove that the medical treatment being sought is reasonable, necessary and causally related to the September 15, 2011 work injury. *Grover v. Indus. Com'n*, 759 P.2d 705, 712 (Colo. 1988).

R. The DIME's opinion that Claimant's left upper extremity symptoms in his elbow, forearm, and wrist (CTS) are not causally related to the work injury are binding. As such, the Claimant has failed to prove a causal relationship between the September 15, 2011 work injury and the recommended EMG evaluation of his left upper extremity (elbow, forearm, wrist and/or hand), or any treatment recommended for same. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999).

S. The ALJ finds that even if the DIME's causation opinions were not binding, substantial evidence in the record supports a finding that Claimant's left elbow, forearm, and wrist symptoms/conditions are not causally related to the industrial injury. First, the DIME opined the CTS, which showed up on both the May 16, 2012 and September 26, 2013 EMGs, was unrelated to the shoulder injury or the scalene block performed with arthroscopy. Similarly, Dr. Ciccone opined that the CTS was an incidental finding, and not related to the work accident.

T. Second, the DIME opined that no findings were identified that connect the left upper extremity and lower arm pain and paresthesia to the date of injury. The DIME opined that Claimant's other arm symptoms were not explained by peripheral nerve symptoms due to scalene block. Dr. Robert Waltrip also opined Claimant's potential left radial tunnel syndrome, left elbow cubital tunnel, or lateral epicondylitis were unrelated to the September 15, 2011 injury, the interscalene block, or Claimant's use of a sling after surgery. Dr. Nanes, the ATP who had been treating Claimant since September 2011 for this work injury, agreed with Dr. Waltrip that Claimant's left elbow conditions, including lateral epicondylitis and possible left radial tunnel syndrome were not related to the original shoulder injury, over the contrary opinion of Dr. Griffis. Moreover, Dr. Ciccone, opined that Claimant's upper extremity paresthesia is not related to the work injury or the nerve block. Dr. Ciccone - like Dr. Waltrip - opined there was no relationship between nerve entrapment and the regional anesthesia used in the shoulder surgery. He also opined that the presence of radial tunnel syndrome and incidental finding of cubital tunnel syndrome are not related to the work injury or surgery.

U. The ALJ finds persuasive the opinions of the DIME Physician (Dr. Campbell), and Drs. Waltrip, Nanes, and Ciccone more than any opinions to the contrary. The ALJ finds Claimant has failed to meet his burden to prove that the potential conditions of radial tunnel syndrome, cubital tunnel syndrome, and/or carpal

tunnel syndrome, which Dr. Olson has indicated are the basis for his recommendation of a repeat left upper extremity EMG followed by any necessary treatment, are *causally related* to the work injury in this matter. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999); *Grover v. Indus. Com'n*, 759 P.2d 705, 712 (Colo. 1988).

Causal Relationship Between the Work Injury and Current Treatment Recommendations / Repeat Left Shoulder MRI

V. As noted, Respondents are liable to pay for medical treatment which is reasonably necessary to "cure and relieve" the claimant from the effects of the industrial injury. §8-42-101, C.R.S. The need for medical treatment may extend beyond MMI if claimant requires further treatment to relieve the effects of the injury or prevent deterioration of their condition. *Grover v. Indus. Com'n*, *supra.*

W. As also noted, even where the Respondents admit liability for post-MMI medical benefits, they remain free to contest the reasonable necessity and causal connection of any specific future treatment. *Grover v. Indus. Com'n*, 759 P.2d 705, 712 (Colo. 1988); *Milco Construction v. Cowan*, 860 P.2d 539 (Colo. App. 1992). Where the relatedness, reasonableness or necessity of medical treatment is disputed, Claimant has the burden to prove by a preponderance of the evidence that the disputed treatment is reasonably necessary to cure or relieve the effects of the injury. *Wal-Mart Stores, Inc. v. Indus. Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1997). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

X. In the present case, Claimant testified that he was also seeking a left shoulder MRI, which he believed was recommended by Dr. Olson. No recent medical report from CCOM specifically recommends or even mentions a repeat left shoulder MRI or discusses whether a left shoulder MRI would be reasonable or necessary at this time. Additionally, Dr. Olson made no recommendation for an MRI in his deposition testimony.

Y. Moreover, Dr. Ciccone opined that Claimant did not require any further imaging of his shoulder. In reaching this conclusion, Dr. Ciccone opined a repeat left shoulder MRI was not reasonably necessary or causally related given that four prior MRIs of the shoulder and a direct arthroscopic examination failed to reveal any significant shoulder pathology. The ALJ credits the opinions of Dr. Ciccone and finds that Claimant has failed to meet his burden to prove that a repeat MRI is reasonably necessary or causally related to the September 15, 2011 work injury, or that a recommendation for a repeat MRI even currently exists. *Wal-Mart Stores, Inc. v. Indus. Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1997).

ORDER

It is therefore Ordered that:

1. Claimant's request for repeat left arm EMG is denied and dismissed.

2. Claimant's request for repeat left shoulder MRI is denied and dismissed.

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

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

DATED: April 11, 2019

/s/ William G. Edie

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

ISSUES

- Whether the claimant has demonstrated by a preponderance of the evidence that the left L4-5 decompression surgery performed by Dr. James Gebhard on October 29, 2018 constitutes reasonable medical treatment necessary to cure and relieve the claimant from the effects of the May 15, 2018 work injury.

- Whether the claimant has demonstrated by a preponderance of the evidence that the left L4-5 transforaminal epidural injection recommended by Dr. James Gebhard constitutes reasonable medical treatment necessary to cure and relieve the claimant from the effects of the May 15, 2018 work injury.

FINDINGS OF FACT

1. The claimant was injured on May 15, 2018 while he was delivering a large television for the employer. The specific injury occurred when the claimant was removing the television from the back of his work truck, and while the claimant was stepping backwards out of the truck, he missed the step/bumper. This resulted in the claimant falling backwards and hitting his head on the ground.

Medical Treatment Prior to the May 15, 2018 Fall

2. Prior to the claimant's May 15, 2018 work injury, the claimant received treatment for low back pain that radiated into his left leg. The claimant testified that in October 2016, he was injured while working for the company Menards in St. Louis, Missouri. The claimant described that injury as occurring when he was operating a floor scrubber. The claimant further testified that he pursued a workers' compensation claim related to that 2016 injury.

3. The medical records entered into evidence indicate that the claimant received medical treatment for his October 2016 injury and low back symptoms at DePaul Medical Group beginning on October 17, 2016. At that visit the claimant reported that he had experienced low back pain for four weeks.

4. A magnetic resonance image (MRI) of the claimant's lumbar spine was taken on October 19, 2016. The MRI showed chronic minimal loss of height at the L2 level, with degenerative changes most significant at the L4-5 and L5-S1 levels.

5. When the claimant was seen by providers at Concentra on October 26, 2016, he reported that he had a compression fracture at the L2-3 level.

6. The medical records entered into evidence demonstrate that the claimant returned to Colorado and began treatment with the Department of Veterans Affairs (VA). The claimant was seen by Dr. John Severs at the VA on April 14, 2017. At that time,

the claimant reported to Dr. Severs that he had experienced low back pain since working in St. Louis. The claimant also reported that he had received three epidural steroid injections, but the injections were not helpful. At that time, Dr. Severs referred the claimant for further injections.

7. On May 10, 2017, the claimant began treatment with Dr. Ashish Chavda with Colorado Injury and Pain Specialists. Based upon the records entered into evidence, the claimant continued treatment with Dr. Chavda for his low back symptoms from May 10, 2017 through June 5, 2018. During that time, the claimant underwent a number of treatments for his low back pain and related radiculopathy including injections, medical branch blocks, and radiofrequency ablation.

8. On May 18, 2017, Dr. Chavda administered a left L5-S1 transforaminal epidural steroid injection (ESI). Thereafter on May 24, 2017, the claimant reported he had "almost no pain". On June 29, 2017, Dr. Chavda administered medial branch blocks (MBBs) at the right L4-L5 and L5-S1 levels. On July 11, 2017, the claimant reported that the MMBs did not provide any relief. As a result, on July 20, 2017, Dr. Chavda recommended and administered MMBs at the right L3-4, L4-5, and L5-S1 levels. On August 3, 2017, Dr. Chavda administered additional MBBs at those same levels. On August 9, 2017, the claimant reported that the MBBs provided "great relief".

9. Based upon the claimant's positive response to the MMBs, Dr. Chavda recommended radiofrequency ablation (RFA) at the right L3-4, L4-5, and L5-S1 levels. On September 21, 2017, Dr. Chavda administered RFA at those levels. On October 11, 2017, the claimant reported that the RFA provided relief of his low back pain, but he continued to have radiating pain down his left leg. On October 12, 2017, Dr. Chavda administered a transforaminal ESI at the left L5-S1 level. On October 30, 2017, the claimant reported improvement in his lower left leg pain. Thereafter, the claimant was seen by Dr. Chavda on January 19, 2018. At that time, the claimant continued to report left leg radiculopathy pain.

10. On March 27, 2018, the claimant again reported left leg radiculopathy pain. At that time, Dr. Chavda recommended repeat transforaminal ESI at the left L5-S1 level as well as the L4-L5 level.

11. The claimant testified that the injections recommended by Dr. Chavda on March 27, 2017 were not administered.

Medical Treatment After the May 15, 2018 Fall

12. The claimant testified that on May 15, 2018, he lost consciousness as a result of his fall. When he awoke, he called emergency services. Thereafter, the claimant was transported from the location of his fall in Battlement Mesa, Colorado to Grand River Hospital. The claimant reported to hospital personnel that that he had head pain, left lateral chest pain, and right lateral hand pain. The claimant remained at the hospital for observation related to symptoms of a concussion and closed head injury. The claimant was discharged from the hospital on May 16, 2018.

13. The claimant's authorized treating physician (ATP) for this claim is Dr. Craig Stagg. The claimant was first seen at Dr. Stagg's practice on May 22, 2018 by James Harkreader, NP. At that time, Mr. Harkreader noted that the claimant presented with head, back, and rib injuries. However, in that same medical record, Mr. Harkreader noted that the claimant denied neck and back pain. Mr. Harkreader diagnosed a closed head injury, a chest wall strain, and a left paralumbar back contusion. Mr. Harkreader placed the claimant on work restrictions of a 20 pound lifting and no CDL driving. Thereafter on May 29, 2018, Mr. Harkreader referred the claimant to physical therapy for six visits.

14. June 7, 2018, was the first time the claimant was seen by Dr. Stagg. At that time, the claimant reported significant cervical pain with radiation in to his bilateral shoulders. The claimant reported some back pain, but that his significant issues were related to double vision, blurry vision, and headaches[1]. Dr. Stagg referred the claimant for head and cervical spine MRIs.

15. The claimant returned to Dr. Stagg on June 18, 2018. At that time, Dr. Stagg noted that the MRI showed a compression fracture at T2. Based upon this information, Dr. Stagg referred the claimant to a spinal surgeon for consultation.

16. On June 26, 2018, an x-ray of the claimant's lumbar spine showed moderate lumbar spondylosis and a superior endplate compression at L2 of indeterminate age.

17. On June 27, 2018, the claimant was seen by Dr. Stagg who noted that the lumbar x-ray showed an endplate compression at the L2 level of indeterminate age as well as a compression fracture at the T2 level. Based upon this information, Dr. Stagg ordered MRIs of the claimant's lumbar and thoracic spines.

18. On July 3, 2018, an MRI of the claimant's lumbar spine showed multilevel facet arthrosis and multilevel mild degenerative disc disease with degenerative anterolisthesis of L5 on S1 and of L4 on L5. The MRI also showed moderately severe bilateral foraminal narrowing at the L4-5 level.

19. On July 5, 2018, the claimant was seen by spinal surgeon, Dr. James Gebhard. At that time, the claimant reported equal pain in his neck, upper thoracic spine, and lumbar spine. The claimant also reported left leg pain that he had experienced prior to the May 15, 2018 injury. Dr. Gebhard reviewed the claimant's lumbar spine MRI and noted age appropriate degeneration. Dr. Gebhard recommended the claimant continue with conservative treatment including physical therapy and a core strengthening program.

[1] As noted above, the claimant was diagnosed with a closed head injury following the May 15, 2018 fall. However, treatment of symptoms related to the claimant's head injury are not at issue in this order. Therefore, the ALJ does not make further reference to treatment of those head injury related symptoms.

20. On August 21, 2018, Dr. Gebhard administered a left L4-5 transforaminal epidural injection. The claimant returned to Dr. Gebhard on October 4, 2018, and reported two weeks of relief following the injection. However, at the time of the appointment, the claimant's left leg pain had returned. At that time, Dr. Stagg recommend a left L4-5 surgical decompression.

21. On September 12, 2018, Dr. Stagg referred the claimant to Dr. Ellen Price for physical medicine rehabilitation consultation. The claimant began treatment with Dr. Price on October 24, 2018.

22. At the request of the respondents, Dr. Michael Janssen reviewed the claimant's medical records and opined regarding the reasonableness, necessity, and relatedness of the recommended left L4-L5 decompression surgery. In his October 26, 2018 report, Dr. Janssen opined that the claimant could benefit from the recommended decompression surgery. However, Dr. Janssen also opined that the claimant's need for surgery is solely related to the claimant's preexisting degenerative spondylolisthesis. Dr. Janssen further clarified that in his opinion the claimant's symptoms and any need for surgery are not related to the May 15, 2018 fall at work.

23. Based upon the opinions of Dr. Janssen, the respondents denied authorization for the recommended left L4-5 decompression surgery.

24. Despite the respondents' denial of the decompression surgery, the claimant elected to proceed with the surgery. On October 29, 2018, Dr. Gebhard performed the left L4-5 decompression surgery. The cost of the surgery was paid for by the claimant's private health insurance and the claimant.

25. On November 13, 2018, the claimant was seen at Dr. Gebhard's office by Todd Ousley, PA-C. The claimant reported to Mr. Ousley that following the surgery, the claimant's left leg pain had significantly improved.

26. On December 6, 2018, the claimant was seen by Dr. Stagg and reported persistent symptoms of numbness down his left leg. Dr. Stagg referred the claimant to Dr. Mitchell Burnbaum for electromyography (EMG) testing.

27. On December 13, 2018, Dr. Gebhard saw the claimant and noted that the claimant was doing very well and had reported no back and no leg pain, with a little bit of tightness in his left knee.

28. On December 14, 2018, Dr. Burnbaum administered EMG testing of the claimant's left lower extremity. Dr. Burnbaum noted that the claimant had an L5 root injury with denervation in the L5-innervated muscles. Dr. Burnbaum recommended an additional MRI.

29. On January 8, 2019, a lumbar spine MRI showed mild granulation enhancement in the lateral epidural space and lateral recess at the L4-5 level with chronic moderate left foraminal narrowing at that level.

30. On January 17, 2019, the claimant returned to Dr. Gebhard and reported that his radicular symptoms had returned over the prior three to four weeks. Dr. Gebhard reviewed the claimant's most recent MRI results and noted a new disc herniation at the L4-5 level. Dr. Gebhard opined that the claimant's symptoms of left leg radiculopathy were caused by that new disc herniation. At that time, Dr. Gebhard recommended an transforaminal epidural injection at the left L4-5 level.

31. On January 28, 2019, Dr. Janssen reviewed the reasonableness, necessity, and relatedness of the recommended left L4-L5 transforaminal epidural injection. In his report, Dr. Janssen noted that the need for the recommended injection was secondary to the decompression surgery. As the surgery was unrelated to the claimant's work injury, Dr. Janssen opined that the recommended injection was likewise unrelated.

32. Based upon the opinions of Dr. Janssen, the respondents denied authorization for the recommended left L4-5 transforaminal epidural injection.

33. On December 5, 2018, Dr. Price recommended the claimant undergo sacroiliac (SI) joint injections, obtain an SI belt, and "microstem" treatment.

34. The respondents' arranged for the claimant to attend an independent medical examination (IME) with Dr. Brian Reiss. However, the claimant did not attend the IME. As a result, Dr. Reiss's February 24, 2019 report is based upon his review of the claimant's medical records. In his report Dr. Reiss opined that the claimant did not sustain a low back injury on May 15, 2018. Therefore, Dr. Reiss further opined that any diagnosis for the claimant's low back would not be attributable to the claimant's fall on May 15, 2018. It is the opinion of Dr. Reiss that the claimant's low back symptoms are related to the claimant's preexisting condition. With regard to the recommended decompression surgery, Dr. Reiss stated in his report that it is his opinion that there is not adequate pathology indicated in the MRI findings to perform a decompression and therefore the surgery is not reasonable or necessary to treat the claimant's symptoms. Dr. Reiss also opined that the recommended surgery is not related to the May 15,2018 work injury. Dr. Reiss's testimony at hearing was consistent with his written report.

35. Dr. Reiss testified that he does not agree with Dr. Gebhard that the decompression surgery is reasonable or necessary to treat the claimant's symptoms. Dr. Reiss stated that he does not believe there is enough pathology to support a decompression procedure. With regard to the issue of relatedness, Dr. Reiss testified that the claimant's symptoms are the result of a preexisting condition. Dr. Reiss further testified that the claimant's preexisting condition was not aggravated or changed by the May 15, 2018 fall at work.

36. On February 27, 2019, Dr. Brian Mathwich was asked to review the reasonableness, necessity, and relatedness of the recommended SI joint injections. In his report Dr. Mathwich opined that the claimant's current low back symptoms are not causally related to the May 15, 2018 work injury. Dr. Mathwich agreed with the opinions

of Dr. Janssen and noted that the claimant's symptoms are caused by his long standing degenerative condition.

37. Based upon the opinions of Dr. Mathwich, the respondents denied authorization for the recommended SI joint injections and microstem treatment.

38. The ALJ credits the medical records and the opinions of Drs. Reiss, Janssen, and Mathwich over the contrary opinion of Dr. Gebhard and finds that the claimant has failed to demonstrate that the left L4-5 decompression surgery performed by Dr. James Gebhard on October 29, 2018 constitutes reasonable medical treatment necessary to cure and relieve the claimant from the effects of the May 15, 2018 work injury.

39. The ALJ credits the medical records and the opinions of Drs. Reiss, Janssen, and Mathwich over the contrary opinion of Dr. Gebhard and finds that the claimant has failed to demonstrate that the recommended left L4-5 transforaminal epidural injection constitutes reasonable medical treatment necessary to cure and relieve the claimant from the effects of the May 15, 2018 work injury.

40. The medical records demonstrate that the claimant's low back pain and related left leg symptoms remained the same before, at the time of, and after the May 15, 2018 fall. The ALJ finds that the claimant did not suffer an acute injury to his low back on May 15, 2018 that necessitates surgical intervention and/or additional lumbar injections. The ALJ further finds that the claimant did not experience an aggravation or acceleration of his preexisting condition as a result of the work injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2017).

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

4. As found, the claimant has failed to demonstrate, by a preponderance of the evidence that the that the left L4-5 decompression surgery performed by Dr. James Gebhard on October 29, 2018 constitutes reasonable medical treatment necessary to cure and relieve the claimant from the effects of the May 15, 2018 work injury. As found, the medical records and the opinions of Drs. Reiss, Janssen, and Mathwich are credible and persuasive.

5. As found, the claimant has failed to demonstrate, by a preponderance of the evidence that the that the recommended left L4-5 transforaminal epidural injection constitutes reasonable medical treatment necessary to cure and relieve the claimant from the effects of the May 15, 2018 work injury. As found, the medical records and the opinions of Drs. Reiss, Janssen, and Mathwich are credible and persuasive.

ORDER

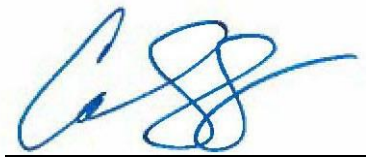
It is therefore ordered:

1. The claimant's request for reimbursement of the left L4-5 decompression surgery performed by Dr. James Gebhard on October 29, 2018 is denied and dismissed.

2. The claimant's request for authorization of the recommended left L4-5 transforaminal epidural injection is denied and dismissed.

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

Dated April 12, 2019



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

ISSUES

Whether the claimant has demonstrated by a preponderance of the evidence that continued mileage reimbursement related to travel to and from a gym is reasonable, necessary, and related to the admitted August 2, 2016 work injury.

FINDINGS OF FACT

1. The claimant suffered a compensable injury on August 2, 2016 when he was involved in a motor vehicle accident. At the time of the injury, the claimant injured his back, ribs, and left knee. These injuries resulted in a number of treatment modalities including surgery and injections.

2. The claimant's authorized treating physician (ATP) for this claim is Dr. Ellen Price. On November 28, 2018, Dr. Price opined that the claimant had reached maximum medical improvement (MMI)[1]. At that time, Dr. Price recommended maintenance medical treatment that included a one-year gym membership.

3. In a medical record dated January 7, 2019, Dr. Price noted that the claimant was trying to exercise daily and that he "goes to the gym and sits in the hot tub and the steam room and also goes to the pool". In that same medical record Dr. Price indicated that she encouraged the claimant to continue to do so and that the claimant should "stay active and busy".

4. Previously, the claimant attended an independent medical examination (IME) with Dr. Lawrence Lesnak on September 19, 2018. More recently, the respondents asked Dr. Lesnak to address whether the claimant's daily trips to the gym are reasonable and necessary. On January 11, 2019, Dr. Lesnak issued an addendum to his IME report on that specific issue. Dr. Lesnak opined that daily hot tub, pool and steam room treatment are not reasonable or necessary treatment for the claimant. In support of his opinion, Dr. Lesnak noted that there is "no current medical diagnosis that would require the [claimant] to 'make daily trips to the hot tub, pool or steam room.'" Dr. Lesnak also noted that there is "no medical diagnosis whatsoever that 'requires' daily hot tub, pool or steam room treatments."

[1] As of the date of the hearing, the respondents have not filed a Final Admission of Liability (FAL) as a Division Sponsored Independent Medical Examination (DIME) was performed on February 26, 2019.

5. On January 30, 2019, Dr. Price authored a letter in which she noted that the claimant was not using the hot tub and steam room only. Dr. Price further noted that the claimant goes to the gym "for physical conditioning and a home exercise program that was started by his physical therapist."

6. On February 26, 2019, the claimant attended a Division-sponsored independent medical examination (DIME) with Dr. John Hughes. In his report, Dr. Hughes opined that appropriate maintenance medical treatment for the claimant would include monitoring by Dr. Price in compliance with the Colorado Medical Treatment Guidelines for chronic pain. In addition, Dr. Hughes indicated in his report that "an independent progressive physical exercise program" would be appropriate for the claimant, but such an exercise program would not require "prescriptive medical supervision".

7. The claimant testified that a gym membership was previously recommended during this claim. The claimant recalls that he first received a gym membership in approximately July 2017. That membership was renewed for a second year in approximately July 2018. The claimant further testified that the respondents authorized and paid for his gym membership.

8. The claimant testified that he tries to go to the gym seven days a week. On Mondays, Wednesdays, and Fridays he primarily works on a cardiovascular workout in the pool, with some flexibility as well. On Tuesdays, Thursdays, and Saturdays the claimant focuses more on flexibility in the pool. On Sundays the claimant swims small laps in the pool. The claimant sits in the steam room prior to his exercises to loosen his muscles. He will then sit in the hot tub following his exercises.

9. The claimant credibly testified that he has continued these workouts to increase his ability to move and function. The claimant further testified that the buoyancy of the water helps him complete his exercises that he would otherwise be unable to do out of the water.

10. The ALJ credits the opinions of Drs. Lesnak and Hughes and finds that the claimant has failed to demonstrate that his daily trips to the gym are reasonable and necessary. While the ALJ recognizes that the claimant finds completing his exercises in the pool on a daily basis to be beneficial, there is no evidence that the claimant's routine is ordered by any authorized provider. Therefore, the ALJ finds that the claimant has failed to demonstrate that daily mileage to and from the gym is reasonable and necessary.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving

entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

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

4. Colorado courts have recognized that a claimant is entitled to reimbursement for travel to and from medically related appointments. *Safeway, Co. v. ICAO*, 186 P.3d 103 (Colo. App. 2008); *Sigman Meat Co. v. ICAO*, 761 P.2d 265 (Colo. App. 1988).

5. In addition, WRCP Rule 18-6 (E) specifically provides:

> The payer shall pay an injured worker for reasonable and necessary expenses for travel to and from **medical appointments** and reasonable mileage **to obtain prescribed medications**. The rate for mileage shall be 53 cents per mile. The injured worker shall submit a request to the payer showing the date(s) of travel and mileage, and explain any other reasonable and necessary travel expenses incurred or anticipated. (*emphasis added*).

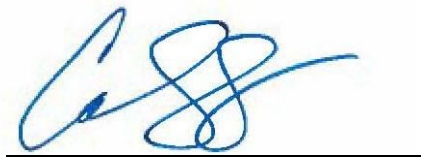
6. As found, the claimant has failed to demonstrate by a preponderance of the evidence that his daily mileage to and from the gym is reasonable and necessary. The claimant's daily trips to the gym are neither a "medical appointment" nor mileage "to obtain prescribed medications". While Dr. Price has encouraged the claimant to continue his exercise routine and to generally stay busy, the ALJ concludes that the mileage to and from the gym is not covered by WRCP Rule 18-6(E). The ALJ concludes that the claimant is not entitled to mileage reimbursement for mileage to and

from the gym. As found, the opinions of Drs. Lesnak and Hughes are credible and persuasive on this issue.

ORDER

It is therefore ordered that the claimant's request for mileage reimbursement related to his daily trips to and from the gym is denied and dismissed.

Dated April 16, 2019



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

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

ISSUES

- Is the amniotic wrap procedure recommended by Dr. Annest in conjunction with surgery for thoracic outlet syndrome reasonably necessary?

FINDINGS OF FACT

1. Claimant suffered admitted injuries on February 1, 2016 when she slipped on ice and fell on her outstretched left arm. Her compensable injuries include left thoracic outlet syndrome (TOS).

2. Dr. Stephen Annest, a vascular surgeon, has recommended TOS surgery. As part of the procedure, Dr. Annest plans to use an amniotic membrane wrap to protect the brachial plexus from inflammation and scar tissue formation.

3. Respondents authorized the surgery, but denied the amniotic wrap as experimental, unproven, and outside the MTGs.

4. One of the most significant risks of TOS surgery is recurrence of symptoms from scar tissue formation. Studies have shown a 25% to 30% recurrence rate at the 2-year follow-up. Surgeons have explored several techniques to mitigate scar formation, with varying degrees of success. Synthetic antiadhesive materials such as SurgiWrap and Seprafilm, that have successfully reduced adhesions in the abdomen, have not worked with TOS surgery. Some of the more effective options, such as fat wraps, saphenous veins, and latissimus muscles, entail additional surgical risks associated with harvesting the tissue.

5. In 2015, Dr. Annest and his partners started using amniotic wraps to protect the brachial plexus after surgery. After resecting the muscles and (usually) the first rib, the surgeon wraps a rectangular patch of amniotic membrane around the brachial plexus "like a blanket." The membrane retards the development of scar tissue and prevents it from encroaching on the nerves. It also inhibits inflammation that contributes to scarring, fibrosis, and adhesion formation. The membrane contains regenerative chemicals and stem cell-like properties that stimulate nerve growth.

6. The risks associated with amniotic wrapping are minimal. The wraps are made from placental tissue obtained from cesarean sections. The tissue is "immune-privileged" and triggers no adverse immune response. The risk of infection is minimal because the harvested tissue is tested for communicable diseases, carefully sterilized, and stored cryogenically until ready for use. No patient in Dr. Annest's practice has never developed an infection because of an amnion wrap.

7. During his deposition, Dr. Annest presented literature to support the procedure. A 2016 study in the Journal of Shoulder and Elbow Surgery showed amniotic

wrapping of the ulnar nerve was safe and effective for patients with debilitating recurrent cubital tunnel syndrome. There were no adverse reactions or complications in any patient, and all patients were satisfied with the results. A 2017 retrospective study published in the Journal of Hand Surgery showed good results with amniotic wrapping in three patients who underwent revision radial sensory nerve neurolysis for Wartenberg's syndrome. The authors found no adverse events or complications associated with the membrane. A 2018 study of sciatic nerve wrapping in rats showed "strongly reduced adhesions" and "significantly higher" postsurgical functional abilities. The authors concluded amniotic wrapping "is strongly effective against recurring nerve scarring and induces an anti-fibrotic and pro-regenerative effect, making it highly promising for treating adhesion-related disorders."

8. In 2018, Dr. Annest and Dr. Richard Sanders published a case study in the Journal of Vascular Surgery Cases and Innovative Techniques regarding a patient who had undergone TOS surgery and brachial plexus amniotic wrapping. The patient required a second surgery a year later due to recurrence of symptoms. During the second surgery, the amnion wrap was observed to be intact and the nerves underneath the wrap were clean and free of adhesions. However, dense scar tissue had formed around the brachial plexus nerve roots above the wrap, which accounted for the patient's recurrent symptoms. Dr. Annest and Dr. Sanders concluded the amniotic membrane had successfully protected the portion of the brachial plexus that had been wrapped. The poor outcome from the first surgery was not due to failure of the amnion wrap, but because the brachial plexus roots had not been wrapped.

9. Dr. Annest's case study article also includes statistics regarding the use of amniotic wrapping in his practice since 2015. Amnion wrapping had been used in 97 TOS operations by the time the article was written in 2017. The first 40 patients had been observed for one year, with only a 5% recurrence rate. The article noted patients must be observed for 24 months before acceptable long-term results can be established, and longer-term studies were in progress.

10. Dr. Annest has not finished compiling statistical data regarding long-term outcomes, so no hard numbers are available. In his reports, Dr. Annest said he has noticed an approximately 50% improvement in outcomes using the membrane. In his deposition, he estimated a recurrence rate of approximately 20% in cases where amnion wrap was used. It is unknown whether any recurrent cases were due to failure of the wrap or, like the patient in the June 2018 paper, because the wrap was not used extensively enough.

11. Based on his personal experience, Dr. Annest considers the amnion wrap "indispensable."

12. Respondents obtained a Rule 16 peer review regarding Dr. Annest's preauthorization request from Dr. Teruya, a vascular surgeon, and Dr. Sollender, a plastic surgeon. The peer review concluded, "The requested amniotic wrap is not recommended by the guidelines and peer-reviewed literature states long-term studies are in progress. Therefore, the request is modified to approve [the surgery] without the amniotic wrap."

13. Health insurance carriers have generally covered the amnion wrap, with the exception of Kaiser.

14. Amnion membranes have been used successfully for scar prevention in many areas of medicine and surgery, including burns, diabetic ulcers, chemical and thermal eye injuries, prostatectomy, and back surgery. Animal models have demonstrated "profound success" according to the authors of one study.

15. Dr. Annest's opinions regarding the reasonable necessity of the amnion wrap are credible and persuasive.

16. Claimant proved by a preponderance of the evidence inclusion of the amnion wrap as recommended by Dr. Annest is a reasonably necessary adjunct to the TOS surgery.

CONCLUSIONS OF LAW

The respondents must provide medical treatment reasonably needed to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a). The claimant must prove any requested treatment is reasonably necessary by a preponderance of the evidence. The Director has adopted Medical Treatment Guidelines (MTGs) to advance the statutory mandate to assure the quick and efficient delivery of medical benefits to injured workers at a reasonable cost to employers. WCRP Rule 17, Exhibit 6 addresses lower extremity conditions, including meniscal pathology. As the final arbiter of disputes regarding medical treatment, the ALJ may consider the MTGs as an evidentiary tool. *Logiudice v. Siemans Westinghouse*, W.C. No. 4-665-873 (January 25, 2011). But the ALJ is not bound by the MTGs when determining whether requested medical treatment is reasonably necessary or injury-related. Section 8-43-201(3).

As found, Claimant proved the amnion wrap is a reasonably necessary adjunct to the pending TOS surgery. Based on the evidence presented, the procedure appears reasonably efficacious, with no significant downside risk. Dr. Annest's explanations were cogent, well reasoned, and persuasive. The science behind the procedure is sound, and the technology is being successfully deployed in several areas of medicine. Dr. Annest has supportive anecdotal evidence from his patient population regarding its utility. Although empirical evidence regarding the procedure is limited at present, the available data shows good outcomes with minimal or no risk. Dr. Teruya and Dr. Sollender provided no opinions regarding the merits of the procedure, beyond simply noting the MTGs do not address it and long-term studies are ongoing. The current TOS MTGs were written in 2014, before Dr. Annest and his partner even started using amnion wraps. In any event, the MTGs recognize that "acceptable medical practice may include deviations from these guidelines, as individual cases dictate." Dr. Annest has adequately justified the use of amnion wrapping.

ORDER

It is therefore ordered that:

1. Insurer shall cover the amnion wrap in conjunction with the TOS surgery to be performed by Dr. Annest.

2. All issues not decided herein are reserved for future determination.

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

DATED: April 16, 2019

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

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that the cervical spine surgery performed by Dr. Paul Stanton on July 30, 2018, was reasonable, necessary, and related to his work injury of April 13, 2018?

II. Has Claimant shown, by a preponderance of the evidence, that the lumbar spine surgery performed by Dr. Paul Stanton on December 12, 2018, was reasonable, necessary, and related to his work injury of April 13, 2018?

STIPULATION

At hearing, the parties stipulated that Claimant's Average Weekly Wage is $1413.97. The ALJ accepted this stipulation.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Claimant has been employed by Global Medical Response as a paramedic since 1997. As a paramedic, Claimant's duties included responding to emergency medical calls, performing CPR, participating in rescues, and lifting and transferring injured people. On April 13, 2018, Claimant slipped and fell on icy stairs outside of his workplace. There were approximately 5 stairs. In his initial written injury report to the Employer, Claimant described the circumstances of his injury as follows:

> I fell onto concrete steps landing on my right elbow, back and ankle awkwardly. I felt immediate pain to right ankle, knee, elbow, and lower back. I went into the station and immediately took some ibuprofen and began icing my back and elbow and finished my shift. I went home and kept treating elbow, back, and ankle with ice due to swelling and severe pain to elbow. Later that day I began having increased pain, swelling, and numbness to right hand and was having problems grabbing or holding objects in hand. I called supervisor and advised him of injury and called off duty for my shift the next day, I filled out brief incident report." (Ex. Y, pp. 1-2).

Cervical Spine

2. Medical records do not show that Claimant reported injuring his head or neck in his initial written injury report relating to the April 13, 2018 slip and fall. *Id*

3. Between the date of injury and May 23, 2018, Claimant had 6 appointments through Concentra, including with Dr. Randall Jones, Dr. Timothy Hart, and Dr. George Johnson. (Ex. D, pp. 10-13). Cervical spine symptoms were not mentioned in the medical reports for any of these 6 appointments. *Id*.

4. At hearing, Claimant testified that he remembered describing cervical spine symptoms to Dr. Jones and Dr. Johnson at Concentra during his first two appointments, but alleged that each of the providers omitted the cervical spine symptoms from their respective medical reports.

5. Claimant testified he believed he aggravated the previous fusion when he fell and hit his head on the stairs. He had experienced the same kind of finger numbness and tingling after the previous work injury but the fusion surgery resolved those symptoms. He testified that his pre-existing neck pain resulted from an incident in which a large patient became combative and tried to overturn the stretcher that she was strapped onto. Claimant tried to catch the stretcher to prevent it from overturning, and in the process injured his neck. That was the injury which led to the fusion in 2010.

6. Claimant testified that he treated with Christopher Malinky, M.D. prior to the injury in this case. He was able to manage his pre-existing neck and low back pain through use of medications, stretching, and diet. He was fully able to perform his job with no restrictions. He typically worked a shift of 48 hours, then four days off. He frequently worked overtime. During time off work, Claimant played sports with his four children, coached baseball and basketball, and went hunting, fishing and hiking with them. He had no limitations in his activities of daily living prior to the injury in this case. Prior to this work injury, Claimant had some minor low back pain but no difficulty walking. After the injury, Claimant had low back pain with radicular symptoms in his lower extremities. Claimant described the low back pain as "completely different" than he experienced previously, and described it as feeling like someone "stuck a hot poker" in his back. After the injury, Claimant experienced some urinary incontinence. He had some of this after his original neck injury but it resolved after the fusion surgery in 2010. After initially admitting that he received acupuncture, physical therapy, and chiropractic treatment prior to the date of injury to treat his lower back, Claimant later described those treatments as part of a "body wellness" regimen.

7. Claimant also testified that his low back pain was severe. He knew it was a different type of pain than what he experienced by lifting patients and performing other normal tasks of a paramedic. He testified he was concerned he may have broken his tailbone. Claimant's pre-existing back pain was caused by an incident in which he was kicked out of the back of an ambulance by a "PCP patient." He struck the bumper of the ambulance then landed on the street. That incident happened approximately three years into Claimant's employment. Claimant experienced approximately nine other work-related injuries with Employer prior to this case. (Ex.

W). Some injuries were to his low back and some to his neck. Claimant did not have any surgery to his low back prior to the injury in this case. Claimant reported in his testimony that he didn't like methadone, stopped taking methadone tablets soon after it was prescribed, and did not request an increase to his methadone prescription.

8. On May 15, 2018, Claimant reported to Dr. Paul Stanton for an orthopedic evaluation. (Ex. R). Dr. Stanton performed an examination of Claimant's neck and upper extremities. They were found to be within normal limits. No cervical symptoms were mentioned in this medical report. *Id*.

9. On May 24, 2018, Claimant reported to Dr. Stanton for a follow up appointment. (Ex. S). No cervical spine symptoms were referenced. A cervical spine x-ray was ordered, to address Claimant's perineal numbness and erectile dysfunction, and it revealed a "previous anterior cervical fusion at C5-6 and C6-7. There appears to be stable position of his instrumentation. He does have *advanced disc disease* at C4-5 with mild retrolisthesis and posterior spondylotic ridging." (Ex. S, p. 71). Dr. Stanton ordered a cervical spine MRI to try to identify Claimant's erectile dysfunction and perineal numbness. (emphasis added).

10. On June 1, 2018, Claimant reported to Dr. Johnson for a follow up CCOM appointment. (Ex T). On physical examination, Dr. Johnson noted that the cervical spine appeared normal with no tenderness, and that Claimant stated that his neck was "normal for him." *Id* at 75.

11. On June 21, 2018, Claimant underwent a cervical spine MRI. This revealed:

> ACDF C5-C7 with mature osseous fusion, C4-5 circumferential disc osteophyte complexes contributing to severe central spinal canal stenosis with deformation of the cord and no cord signal abnormality, a C3-4 central protrusion resulting in mild spinal canal stenosis and moderate left neural foraminal stenosis, left paracentral osteophyte contributing to mild central spinal canal stenosis, and additional disc bulges and degenerative changes. (Ex. U).

12. On June 26, 2018, Dr. Stanton recommended Cervical Spine Surgery. (Ex. 3, p. 171). This surgery was denied by Respondents, based upon the Rule 16 Record Review of Dr. Michael Rauzzino, M.D., which opined that the Surgery was:

> …clearly outside the scope of the patient's injury and fall. The initial notes clearly document a lack of cervical symptoms or radiculopathy. The original note documents no evidence of cervical paresthesias. Dr. Stanton's original note also did not indicate cervical myelopathy or radiculopathy. He obtained cervical and

> thoracic MRIs due to the patient's complaints of erectile dysfunction and perineal numbness; these are not findings attributable to the chronic cervical spinal cord stenosis that are related to degenerative changes above the previous fusion." (Ex E, p. 19).

13. Dr. Rauzzino noted that during the June 26, 2018 appointment with Dr. Stanton, Claimant listed a number of new symptoms including numbness and tingling in his upper extremities, fine motor difficulty, trace Hoffman's, and mild weakness of the deltoids and biceps.

> Given the lack of cervical radiculopathy or myelopathy documented by the original providers after the fall including Dr. Johnson and Dr. Stanton, there is no evidence to indicate that Mr. McIntyre sustained any injury to his cervical spine in this fall.
>
> As is sometimes seen in these cases, only after a positive finding is noted do the appearance of clinical symptoms occur, i.e., the documentation of a positive Hoffmann's sign as well as weakness in the deltoid. These findings were clearly not evident immediately after the patient's fall.
>
> If Mr. McIntyre had, in fact, sustained an injury to his cervical spine, his symptoms would have been acute and would have then been expected to improve. They would not be expected to be quiescent and then abruptly develop several months after the injury." (Ex. E, p. 19).

14. Dr. Stanton reviewed the MRI results on June 26, 2018 and noted, "Douglas returns to the office for evaluation of his cervical and thoracic spine. He is now reporting that he is having numbness and tingling in his upper extremities. He has find [sic] motor difficulty. He said that he is dropping objects and also said that his balance has been off. This is one of the reasons we originally imaged his cervical and thoracic spine." (Ex. 3, p. 170). Dr. Stanton noted the cervical MRI "…demonstrates previous ACDF at C5-7 with retained instrumentation. The C4-5 level demonstrates collapse of disc space, retrolisthesis, a broad based disc herniation causing cord contact and flattening bilaterally slightly more on the right side. At C7-T1 there is a broad based subligamentous disc herniation without significant stenosis." (Id. at 171).

15. Dr. Stanton then remarked, "…At this point, I had a long talk with Douglas regarding options. His symptoms I think in regards to his balance, fine motor difficulties and upper extremity symptoms are mainly due to his cervical stenosis. There is cord compression with obvious flattening and he is exhibiting signs of cervical myelopathy. I think this is the more pressing issue. I think that this needs to be reconstructed surgically. He is already having myelopathic symptoms and I do not think that further conservative care is in his best interest. I think he needs a C4-

5 ACDF with revision of his anterior instrumentation…He understands the reason to have surgery for myelopathy is not necessarily for improvement of symptoms but to slow progression of his symptomatology. We would address his lumbar spine if needed following his cervical spine surgery." (Id. at 171, 172).

16. On July 30, 2018, Dr. Stanton performed the Cervical Spine Surgery. The surgery costs were paid through Claimant's personal health insurance.

17. Claimant testified he had no cervical symptoms of this nature prior to the work injury at issue. He also testified the lumbar surgery was successful. He no longer feels that something is "broken," and while he continues to have some problems with balance, they are improving and are better than before surgery. He is regaining strength and feeling in his legs.

18. Upon the submission of additional medical records, Dr. Rauzzino, performed a follow up Rule 16 Record Review. A report was submitted to Respondents on February 4, 2019. (Ex. F, pp. 21-32). Dr. Rauzzino found that:

> my opinion is unchanged regarding the causality of the need for cervical spine surgery. I would again point to Dr. Stanton's note dated 05/15/18 when he noted no neck pain or arm pain, numbness, weakness, tingling, or evidence of cervical radiculopathy. His subsequent note on 05/24/18 also failed to document any of these symptoms. Dr. Stanton ordered MRIs of the cervical and thoracic spine to investigate erectile dysfunction and perineal numbness. Dr. Stanton is certainly qualified as an orthopedic surgeon to diagnose cervical radiculopathy and myelopathy. I would again note the nature and timing of Mr. McIntyre's complaints along with Dr. Stanton's notes. This information excludes the possibility of cervical spine injury requiring treatment related to the fall." (Ex. F, p. 32).

19. The February 26, 2019 pre-hearing deposition of Dr. Rauzzino reveal the following excerpts:

> A. When [Claimant] had this fall, he didn't complain of neck pain or arm paresthesias or anything that was suggested an acute injury to a cervical spine. He did have some chronic neck pain from his previous injury, but Dr. Jones' note is very clear, no increase in chronic neck pain, no history of paresthesias; and also the way the doctor treated him – the doctor didn't order pictures of his neck or anything like that because that's not where the patient complained of symptomatology." (Depo. P. 11, ll. 15-25).
>
> A. Subsequent to this evaluation, the patient was seen – was referred to a Dr. Stanton, who is an orthopedic surgeon in Colorado

Springs, who was evaluating for his lumbar spine. In the process of evaluating the lumbar spine, the patient complained of some symptoms of erectile dysfunction, and as a result of that, Dr. Stanton ordered MRIs of both the thoracic and cervical spine. When the MRI of the cervical spine came back, it was noted the patient had very severe preexisting cervical stenosis above the previous fusion. At that point the narrative changed. As soon as this radiographic finding was noted, *new symptoms were documented* that suggested the patient needed to have surgery for this." (Depo. p. 12, ll. 1-15).

A. The findings that were noted on the MRI were chronic degenerative changes. *I'm not saying it would have been unreasonable to treat him given the amount stenosis that was found, but it was not related in any way to the single fall on the ice that occurred in April [2018]."* (Depo. p. 13, ll. 6-11).

A. [T]hat (cervical) surgery was prophylactically to treat him…..It was an elective surgery to be done to try to prevent Mr. McIntyre from having trouble with his neck down the line…" (Depo. pp. 18-19).(emphasis added).

20. Records reveal that Claimant has a pre-existing history of cervical spine conditions and complaints as documented below:

i. On February 5, 1998, Claimant injured his head, neck, back, and left knee. (Ex. W, p. 90).

ii. On October 16, 2003, Claimant suffered aggravated neck and back injuries following a motor vehicle collision. (Ex. W, pp. 91-92).

iii. On October 5, 2009, Claimant developed neck and left shoulder pain while moving a cot carrying a 500lb patient. (Ex. H, p. 34). He filed a worker's compensation claim for this injury.

iv. An x-ray of Claimant's cervical spine on October 12, 2009 showed "narrowing of the C5-6 disk space with significant posterior spurring of C5 and 6 at these disks." (Ex. G, p. 33). There was evidence of degenerative disc disease at C5-6 and C6-7.

v. An MRI of Claimant's cervical spine on October 26, 2009 revealed "a C5-6 disk protrusion with moderate spinal compression." (Ex. H, p. 34).

vi. On February 8, 2010, Dr. Ghiselli performed an anterior cervical decompression and fusion at C5-6/C6-7. *Id.*

vii. On September 21, 2010, Claimant was assigned a 20% whole person impairment rating for *abnormal cervical motion*, and an 11% whole person impairment rating for a "single-level operation with residual signs and symptoms for a spinal stenosis and segmental instability." (Ex. H, p. 36). These were combined for a 29% whole person impairment rating. Claimant's residual signs and symptoms at the impairment rating appointment included pain rated at 7/10, occasional bilateral arm and numbness, and a marked decreased cervical range of motion. *Id*, p. 35. (emphasis added)

viii. On January 4, 2012, Claimant experienced cervical and back strains. (Ex. W, p. 89).

ix. The same day, Claimant underwent a cervical CT which revealed mild degenerative disc disease at the level above the fusion ay C4-C5. (Ex. I, p. 37).

Lumbar Spine

21. As noted, Claimant's first appointment with his worker's compensation ATP (Dr. Randall Jones at Concentra) took place on April 19, 2018. (Ex. M). Claimant reported immediate pain and swelling in his right elbow, and some increase in his chronic back pain. *Id* at 50. The physical examination revealed left paraspinal and right paraspinal tenderness, full range of motion with painful flexion, and findings 'otherwise normal'. *Id*, at 51. No medications were prescribed or dispensed at this appointment.

22. At this April 19, 2018 appointment, Claimant underwent a lumbar spine x-ray. This revealed

1. Multilevel *degenerative* disc disease,

2. Straightening of the normal lordosis,

3. Slight loss of height of L1 and L2 *probably old*, and mild dextroscoliosis. (Ex. M, p. 54). (emphasis added).

23. During this same appointment, Claimant also underwent a lumbar spine MRI, which revealed the following:

> 1. L5-S1: assymetris spondylotic disc bulge, moderate-severe left and moderate right foraminal stenosis, bulging facet capsules contacts both exiting L5 nerve root in their foramina, spondylotic disc material contacts the undersurface of both exiting L5 nerve roots in the extraforaminal zones with continued contact into the lateral zones (correlate for L5 radicular symptoms on either side),

prominent left L7 transverse process has pseudoarticulation with the left hemisacrum (correlate for Bartolutti disease, especially on the left), mild left facet capsulitis, focal posterior end-plate edema (contusion versus stress reaction)

2. 22 degree dextroconvex lower lumbar curvature (severe lumbar scoliosis).

3. Bilateral L4 and L5 pars sclerosis with low-grade stress reaction the right L5 pars.

4. L1-2: asymmetric right foraminal-lateral spondylotic disc bulge, modic 1 end-plate edema, mild bilateral facet capsulitis, mild central thecal sac stenosis

5. L2-3: concentric spondylotic disc bulge, grade 1 retrolisthesis, modic 1 end-plate edema

6. L3-4: shallow concentric disc bulge, disc material gently contacts exiting left L3 nerve root as it exits the root foramina (Ex. N, p. 56).

24. On April 23, 2018, Claimant reported to PAC Haeffner for a medicine evaluation. (Ex. O). Claimant requested that he keep the same prescriptions, and reported lower back pain with radiculitis, bilateral posterior thigh and groin pain with some new urinary/bowel incontinence. *Id* at 57. Claimant's pain level was 9/10. His lumbar range of motion remained the same as his pre-injury range of motions, except that his flexion had decreased from 70º with pain to 45º. Trigger points included points to the sacrum/perineal area with numbness. Claimant was diagnosed with postlaminectomy syndrome, multiple sites of myositis, lumbar region radiculopathy, and right elbow pain. *Id* at 60. Claimant's prescriptions were renewed for Ambien, bupropion, gabapentin, methadone, oxycodone, Requip, Skelaxin, and Soma. *Id*.

25. On April 24, 2018, Claimant reported to Dr. Jones for a follow up appointment. (Ex. P). Claimant noted that his lower back pain had worsened. *Id* at 61. Dr. Jones noted regarding Claimant's lumbar spine that there was "no CE but chronic changes." Claimant had a full range of motion with painful flexion and U level bilateral paraspinal tenderness. *Id* at 62. Dr. Jones referred Claimant to Dr. Stanton for an orthopedic evaluation.

26. On May 8, 2019, Claimant reported to Dr. George Johnson for a follow up appointment. (Ex. Q). Claimant reported that his lower back pain was his primary concern, as it was severe, and worse with sitting and standing. *Id* at 65. On physical examination, Claimant's range of motion and paraspinal tenderness were unchanged. Dr. Jones opined that he did "not think [Claimant was] a surgical candidate. *90% of his pain is in his back not his legs.* He has intermittent numbness in his legs and occasional problems with urine retention. ***I do not think***

this is due to his back injury […] *I think that his disc problems are old and are not causing his current problems." Id* at 67. Claimant then informed Dr. Johnson that he could not return to work per Dr. Stanton. (emphasis added).

27. On May 15, 2018, Claimant reported to Dr. Stanton for an orthopedic evaluation. (Ex. R). Claimant rated his back pain as 8-10/10, and his leg pain as 6-10/10. *Id* at 68. On physical examination, Dr. Stanton found tenderness to palpitation over Claimant' lumbar spine and paraspinal muscles, decreased trunk flexion and extension secondary to pain, diffuse decreased sensation over the posterior and lateral aspects of his bilateral lower extremities, and an antalgic gait.

28. Lumbar x-rays conducted in Dr. Stanton's office showed "degenerative scoliosis of the lumbar spine apex right. Lateral view shows disc height collapse most severe from L1 to L3 with degenerative endplate changes and disc height collapse at L5-S1." *Id*. Dr. Stanton diagnosed *degenerative* scoliosis of the lumbar spine and bilateral lower extremity radicular symptoms. He prescribed a Medrol Dosepak and recommended that Claimant return with copies of his lumbar MRI.

29. On May 24, 2018, Claimant returned to Dr. Stanton complaining of significant pain and weakness in is lower extremities, extreme radicular pain, perineal numbness and erectile dysfunction with urine stream difficulties. (Ex. S, p. 71). He had undergone an epidural steroid injection, which had provided two days of relief. Claimant's physical examination was within normal limits except the he had mild weakness in the anterior tibialis and extensor hallucis longus, and he ambulated with an antalgic gait.

30. An updated lumbar MRI showed the severe collapse of the L5-S1 disk space with severe foraminal stenosis, a mild disc collapse of the L1-2 and L2-3 levels with asymmetric collapse and resultant mild foraminal stenosis. (Ex. S, p. 72). Claimant was diagnosed with lumbar region spinal stenosis with neurogenic claudation, lumbosacral intervertebral disc degeneration and disc disorders with radiculopathy, scoliosis, and thoracic spinal pain. Dr. Stanton recommended reconstruction of Claimant's L5-S1 segment.

31. This Surgery was also denied by Respondents, based upon the Rule 16 Record Reviews performed by Dr. Rauzzino. He opined that the Surgery was not causally related to Claimant's workplace injury. (Ex. D, p. 15; Ex. E, p. 18). In support of his determination, Dr. Rauzzino referenced the January 1, 2018 medical record from PAC Haeffner, wherein it was noted that Claimant had experienced significant back pain and radiculopathy prior to the workplace injury, "suggesting a crescendoing pattern of the pain." (Ex. D, pp. 14, 15). He also noted that *"[p]ost reported injury imaging of the lumbar does not appear to demonstrate a new acute structural injury to the lumbar spine that would produce ongoing symptoms or need for treatment."* (emphasis added).

32. On December 12, 2018, Dr. Stanton performed the Lumbar Spine Surgery. The surgery costs were paid through Claimant's personal health insurance.

33. Upon the submission of additional medical records to Dr. Rauzzino, a follow up Rule 16 Record Review was performed, with a report submitted to Respondents on February 4, 2019. RHE F. Dr. Rauzzino found that "the records clearly indicate a long history of low back pain going into his legs for which he required significant use of narcotics. He has a degenerative lumbar scoliosis and stenosis with no evidence of acute structural injury to the lumbar spine as a result of his fall. His ongoing symptoms after the reported fall were similar to those that he reported previously." *Id*, p. 32. "Mr. McIntyre has received a number of treatments for his low back pain in the past including injections, chiropractic care, and acupuncture. He was diagnosed with post-laminectomy syndrome, myositis, neuralgia, neuritis, and lumbar region radiculopathy and was being actively treated by Dr. Malinky for a number of years for these conditions prior to his fall. Mr. McIntyre was felt by Dr. Malinky to have opioid dependence and was being actively treated for symptoms at the time of his workplace injury." *Id*. Dr. Rauzzino therefore concluded that Claimant's need for surgery was "related to his multilevel degenerative disc disease with deformity and scoliosis which are unrelated to his fall." *Id*.

34. During the February 26, 2019 pre-hearing deposition of Dr. Rauzzino, the following excerpts are noted:

> A. He [Claimant] complained of very severe back pain with pain radiating to his legs. He saw his primary care provider, Dr. Zirkle, in January of that year, I believe, and at that time he was not to be taking methadone, Oxycodone, he had 8 out of 10 back pain. In fact, the patient at that point, Mr. McIntyre, was asking for an increase in his medications due to his symptoms. And, again, his medications were listed as gabapentin, 300 q.i.d., which is a medicine to treat nerve pain in the legs. Methadone, 5 milligrams, which is a very strong medicine to treat pain. He was taking Oxycodone, 10 milligrams, four times a day. He was taking Requip, Skelaxin, Soma. These are all medications to treat symptoms with back and leg pain, muscle spasm, and nerve pain." (Depo. p. 8, ll. 9:23).
>
> A. This [Lumbar Spine] surgery wasn't done for a single level of spine to his injury, it was done for chronic, multi-level degenerative changes. The fact that the surgeon treated three to five levels of the lumbar spine, basically the entirety of the lumbar spine – in fact, no level of the lumbar spine was left untreated. This shows this is a chronic deformity, a degenerative deformity, not an acute structural injury which occurs as a result of a single fall. (Depo. p.15, ll. 3-11).

35. Claimant has a history of lumbar spine complaints. (Ex. I-L).

x. On February 5, 1998, Claimant injured his head, neck, back, and left knee. (Ex. W, p. 90).

xi. On June 22, 2000, Claimant suffered a lumbar contusion and strain. RHE W, p. 91. Claimant received a 17% whole person impairment rating for this injury. (Ex. X, p. 103).

xii. On October 16, 2003, Claimant suffered aggravated neck and back injuries following a motor vehicle collision. (Ex. W, pp. 91-92).

xiii. On November 19, 2006, Claimant strained his lumbar and lumbosacral spine. (Ex. W, pp. 86-87).

xiv. On January 4, 2012, Claimant experienced cervical and back strains. (Ex. W, p. 89).

xv. The same day, Claimant underwent a lumbar spine x-ray which revealed mild lumbar dextroscoliosis, multilevel spondylosis and degenerative disk disease most pronounced at the L1-L2 and L5-S1 levels, and mild vascular calcifications. (Ex. I, p. 38).

xvi. In 2017-2018, Claimant was treating for chronic lower back pain with his primary care provider Dr. Christopher Malinky and PAC Adam Haeffner. (Ex. J-L).

xvii. On September 25, 2017, Claimant reported to PAC Haeffner for a medicine evaluation. (Ex. J, p. 39). Claimant was treating for *constant lower back pain* radiating down his legs with a pain level of 6-7/10. *Id*. He reported that he was "not sure how much relief he got with methadone" and he wanted to discuss his options. Claimant also reported that *his condition was worse with prolonged sitting, lifting, and at the end of the day.* Changing position, ice, and heat improved his symptoms. **Previous interventions:**

L L5/S1 TL ESI [translaminar epidural steroid injection] (multiple)

L L3-5 MBB [medial branch block]

R L3-5 MBB [medial branch block]

B/L L5/S1 SNRE [selective nerve root block], 50%

L4/5 TL ESI [translaminar epidural steroid injection] (emphasis added).

xviii. Claimant's lumbar range of motion was 10º tight extension, 70º flexion with pain, 20º left and right lateral. Trigger points included the L4 spine and bilateral anterior legs. *Id*. Claimant was diagnosed with postlaminectomy syndrome (not elsewhere

classified), multiple sites of myositis, and unspecified neuralgia and neuritis. PAC Haeffner recommended a lumbar spine MRI.

1. The specific symptoms reported by Claimant are as follows:

    a. Constitutional symptoms included chills, dizziness, fatigue, restless sleep, and sleeping problems. *Id* at 39.

    b. Cardiovascular symptoms included leg cramps or pain in legs when walking a short distance. *Id* at 40.

    c. Respiratory symptoms included shortness of breath or difficulty breathing, and 2 liters of oxygen every night. *Id*.

    d. Gastrointestinal symptoms included heartburn or indigestion. *Id*.

    e. Musculoskeletal symptoms included muscle pain, constant back pain, neck pain, intermittent joint pain, joint stiffness, neck stiffness, weakness, and occasional left leg pain. *Id*.

    f. Neurological symptoms included difficulty walking, difficulty with balance, falling down, leg numbness, and tingling or “pins and needles” in the legs. *Id*.

    g. Psychiatric conditions included anxiety. *Id*.

2. Claimant had an extensive medication regimen at this time, including: (Ex. J, p. 40)

    a. Skelaxin, 800mg, once/day for 90 days (quantity: 270 tablets), start date: 1/27/2016

    b. Gabapentin, 300mg, once/day for 90 days (quantity: 360 capsules, start date: 8/15/2016

    c. Bupropion HCl, 150mg, once/day for 90 days (quantity: 90 tablets), start date: 11/7/2016

    d. Provigil, 100mg, for 90 days (quantity: 60 tablets), start date: 11/7/2016

e. Soma, 350mg, once/day for 90 days (quantity: 90 tablets), start date: 11/7/2016

f. Requip, 4mg, (quantity: 30 tablets), start date: 2/8/2017, 2 refills

g. Oxycodone, 10mg, 1 tablet by mouth (quantity: 120 tablets), start date: 5/1/2017

h. Ambien, 10mg, once/day for 90 days (quantity: 90 tablets), start date:7/31/2017

i. Methadone, 5mg, twice/day (quantity: 60 tablets) start date: 7/31/2017

j. Oxycodone, 10mg, 1 tablet by mouth (quantity: 120 tablets), start date: 7/31/2017

k. Viagra, 100mg, for 90 days (quantity: 15 tablets), start date: 7/31/2017

l. Methadone, 5mg, twice/day (quantity: 60 tablets), start date: 9/25/2017

xix. On November 20, 2017, Claimant reported to PAC Haeffner for a follow up appointment. (Ex. K). Claimant reported his lower back pain level as 7/10, and his primary problem was mid and lower back pain with radiation into the left posterior and lateral thigh, and neuropathy. *Id*, p. 43. Claimant's prescriptions were renewed for Ambien, bupropion, gabapentin, methadone, oxycodone, Requip, Skelaxin, and Soma. *Id* at 46.

xx. On January 29, 2018, Claimant reported to PAC Haeffner for a follow up appointment. (Ex. L). Claimant reported his lower back pain level as 8/10. *Id*, p. 47. He was concerned about lower back pain radiating into his legs which was aggravated by walking and sitting, and relieved by "not doing the same thing for too long." *Id*. **"Pt. would like to consider medication <u>increase</u>, methadone."** Claimant was diagnosed with uncomplicated *opioid dependence*, a lumbar region intervertebral disc displacement, postlaminectomy syndrome, and multiple sites of myositis. *Id* at 49. His request for a methadone *increase* was denied, and Claimant's prescriptions were renewed for Ambien, gabapentin, methadone, oxycodone, Requip, Skelaxin, and Soma. (emphasis added).

CONCLUSIONS OF LAW

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

Generally

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

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

C. Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). In this instance, while the Claimant may well ascribe his improved condition to his surgeries, such description sheds no significant light on whether such need for surgery was causally related to his work injuries. As noted further, Claimant's contentions about his methadone usage, reporting of current symptoms, and prior back treatments are not convincing.

D. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d

186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968). In this instance, the ALJ finds Dr. Rauzzino's reports and testimony persuasive on the issue whether Claimant's surgeries were causally related to the work injury.

E. Further, courts are to be "mindful that the Workmen's Compensation Act is to be liberally construed to effectuate its humanitarian purpose of assisting injured workers." *James v. Irrigation Motor and Pump Co.*, 503 P.2d 1025 (Colo 1972).

Medical Benefits, Generally

F. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. §8-42-101; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Although Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury, Respondents may challenge the reasonableness and necessity of treatment. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). Claimant must then prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). Claimant must prove entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The ALJ's factual determinations must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Delta Drywall v. Industrial Claims Appeals Office*, 868 P.2d 1155 (Colo. App. 1993).

G. A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Moreover, a claimant is not required to prove causation by medical certainty. Rather, it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that that the condition for which he seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and the need for treatment. *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

H. In *Weber v. Shiloh House*, W.C. 4-540-459 (2005), the ICAO noted; "…Few principles are more fundamental to the Workers' Compensation Act of Colorado (Act) than the rule that "this state does not distinguish between disabilities that are the result of employment-related aggravation of pre-existing conditions and those that are not." Thus, where a "pre-existing condition is aggravated by an employee's work, the resulting disability is a compensable industrial disability." *Subsequent Injury Fund v. Thompson*, 793 P.2d 576, 579 (Colo. 1990). A similar expression of the same principle

is that the "employer must take the employee as it finds him so that the employer is responsible for any increased disability resulting to an employee from a pre-existing weakened condition." See *Cowin and Co. v. Medina*, 860 P.2d 535, 538 (Colo. App. 1992). At other times our courts stated the rule that a pre-existing condition or disease "does not disqualify a claim if the employment aggravates, accelerates, or combines with the disease or infirmity to produce the disability for which workers' compensation is sought." *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990).

Cervical Surgery

I. The records for this claim do not show that Claimant hit his head or neck on the stairs on the date of injury, nor did Claimant display any cervical spine symptoms resulting from the slip and fall. As adduced by Dr. Rauzzino, the Cervical Spine Surgery was a prophylactic measure to prevent future worsening of Claimant's symptoms due to his preexisting, degenerative disease and history of cervical injuries. The fact that the Surgery occurred contemporaneous with treatment for an unrelated worker's compensation injury does not create a presumption of causation or relatedness. The initial written incident report completed by the Claimant was detailed, and documented injuries to his right elbow, right ankle, knee, right hand, and lower back. The written report did not reference any injuries to Claimant's head or neck.

J. Cervical spine symptoms are not referenced in Claimant's first 6 appointments with 3 different doctors at Concentra, as acknowledged by Claimant. At hearing, Claimant alleged that he remembers orally reporting head and neck symptoms to his Concentra physicians, however, not one of his physicians lists a single relevant symptom in their initial reports. To the extent that Claimant now contends that the records are inaccurate in this respect, the ALJ finds this contention unconvincing.

K. Furthermore, the physician who recommended the Cervical Spine Surgery, Dr. Stanton, did not note any cervical symptoms in his first two appointments with the Claimant. Cervical surgery had not been discussed or considered by Dr. Stanton prior to June 26, 2018. Claimant had not been presenting any active symptomology before that date. The impetus of the surgery recommendation was the June 21, 2018 cervical spine MRI. This revealed a number of underlying cervical conditions, as noted in Finding of Fact #11. Per the expert opinion of Dr. Rauzzino: "[a]t that point the narrative changed. As soon as this radiographic finding was noted, *new symptoms were documented* that suggested the patient needed to have surgery..."

L. Claimant has a history of cervical spine complaints and surgery. Claimant did not report hitting his head or experiencing any relevant symptoms in his written injury report. There is no evidence of relevant symptomology in the medical records until June 2018. Respondents' expert witness Dr. Rauzzino confirmed that the June 21 MRI revealed very severe preexisting cervical stenosis above the previous fusion, and that it was this degenerative condition that the Cervical Spine Surgery treated, unrelated to Claimant's workplace injury. As Dr. Rauzzino concedes, ***"it would not have been unreasonable to treat,*** *given the amount of stenosis that was found".* However, the ALJ further finds (and therefore concurs with Dr. Rauzzino) that there is **insufficient**

evidence that the need for surgery is **causally related** to the fall which occurred at work on April 13, 2018. Nor was this surgery necessitated by an aggravation of a pre-existing condition.

Lumbar Surgery

M. Extensive documentation relating to Claimant's pre-existing degenerative lumbar condition and related opioid dependence exists in the record. This documentation was submitted to Dr. Rauzzino for three separate Rule 16 Record Reviews. Furthermore, Claimant's arguments in support of causation and relatedness rely upon statements made by the Claimant, both in his hearing testimony and as reported to his physicians. Claimant reported in his testimony that he didn't like methadone, stopped taking methadone tablets soon after it was prescribed, and did not request an increase to his methadone prescription. The documentary evidence suggests otherwise. Claimant was provided with methadone refills several times between September 25, 2017 and April 23, 2018. On January 29, 2018, Claimant requested an *increase* to his methadone dosage, according to the medical report of PAC Haeffner.

N. Claimant also minimizes the nature of the care for his preexisting lumbar condition. After initially admitting that he received acupuncture, physical therapy, and chiropractic treatment prior to the date of injury to treat his lower back, Claimant later described those treatments as part of a "body wellness" regimen. The medical reports from Interventional Pain Management document that Claimant's treatment was not for general care, but specifically for treatment of his lower back pain and radiculopathy. In addition to acupuncture, physical therapy, and chiropractic care significant "previous interventions" were noted:

> Left L5/S1 translaminar epidural steroid injection (multiple)
> Left L3-5 medial branch block
> Right L3-5 medial branch block
> Bilateral L5/S1 selective nerve root block, 50%
> L4/5 translaminar epidural steroid injection.

O. Claimant's degenerative lower back conditions are well documented, and have not been overcome through Claimant's unsupported testimony. Per Dr. Rauzzino's deposition testimony, "[t]he fact that [Dr. Stanton] treated three to five levels of the lumbar spine, basically the entirety of the lumbar spine – in fact, no level of the lumbar spine was left untreated. This shows this is a chronic deformity, a degenerative deformity, not an acute structural injury which occurs as a result of a single fall." The ALJ finds this reasoning persuasive.

P. The ALJ concludes that while the Lumbar Spine Surgery was arguably reasonable and necessary, it *was not related* to Claimant's current workplace injury. Claimant has a significant history of lumbar spine complaints and treatment. Although diminished the importance of the treatment provided in the months leading up to his date of injury, he failed to provide convincing evidence or testimony to overcome the medical records of his various treating physicians, and Respondents' expert witness testimony and Rule 16 Record Reviews. Nor does the ALJ conclude that the lumbar

surgery was necessitated by an aggravation of Claimant's pre-existing injury to his back.

ORDER

It is therefore Ordered that:

1. Claimant's request for reimbursement for the costs of his cervical and lumbar surgeries performed by Dr. Stanton is denied and dismissed.

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

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

DATED: April 16, 2019

/s/ William G. Edie

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-933-851-002

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Self-Insured Respondent.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on February 20, 2019, in Denver, Colorado. The hearing was digitally recorded (reference: 2/20/19, Courtroom 2, beginning at 1:30 PM, and ending at 4:20 PM).

Claimant's Exhibits 1 through 10 were admitted into evidence, without objection. Respondent's Exhibits A through O were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ established a post-hearing briefing schedule: Claimant's opening brief was due within 5 working days and one extension of time was granted. Despite requesting briefs (position statements or written closing statements as described in OACRP, Rule 24), Claimant filed "Proposed Full Findings of Fact, Conclusions of Law and Order on March 27, 2019, presumably indicating that Respondent was filing the same. As a matter of judicial protocol, the ALJ finds it to be inappropriate to entertain a presumed decision, as opposed to argument, which could create an appearance that the ALJ has abdicated his decision-making function. The ALJ will consider the Claimant's filing as an "opening brief." In this instance, the ALJ gives counsel for the Claimant the benefit of the doubt and infers that counsel was confused concerning the establishment of a post-hearing briefing schedule, which provided for the filing of an "opening brief" within five (5) calendar days; an answer brief within five (5) calendar days and a reply brief within 2 calendar days. On April 9, 2019,

Respondent filed its answer brief. No timely reply brief was filed and the matter was deemed submitted for decision on April 12, 2019.

ISSUES

The issues to be determined by this decision concern medical benefits (post maximum medical improvement (MMI) medical maintenance benefits, specifically, the reasonable necessity and causal relatedness of sympathetic nerve blocks recommended by authorized treating physician (ATP) Roberta Anderson-Oeser, M.D; the causal relatedness and reasonable necessity of an echocardiogram, recommended by Todd M. Bull, M.D. of uchealth; and, reimbursement of the Claimant for out-of-pocket $100 co-pays om her health insurance for sympathetic nerve blocks that the Claimant received at Kaiser and for which the Respondent would not pay..

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

FINDINGS OF FACT

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

Preliminary Findings

1. The Claimant suffered admitted work related injuries to her back and right lower extremity (RLE) on October 24, 2013, when she slipped and fell on a wet floor.

2. The latest Final Admission of Liability (FAL) dated August 23, 2018, admits for medical benefits, temporary total disability (TTD) benefits through April 11, 2016; an MMI date of April 12, 2016; and permanent partial disability (PPD) benefits, based on 18% whole person, and 20% of the RLE.

3. The Claimant began treating with Dr. Anderson-Oeser on October 31, 2013 and Dr. Anderson-Oeser is the Claimant's primary ATP.

4. On March 31, 2014, the Claiman Floyd Ring., M.D. After the block, Dr. Ring noted significant temperature rise and venous dilatation indicating a successful sympatholysis with near resolution of Claimant's pain complaints.

5. On May 1, 2014, Dr. Anderson-Oeser diagnosed the Claimant with probable RLE Regional Chronic Regional Pain Syndrome (CRPS) and referred the Claimant for another block with Dr. Ring. The Claimant underwent a total of 16 blocks between 2014 and 2018.

6. On May 14, 2014, after Dr. Ring administered a block, the Claimant instantly reported almost complete pain relief.

7. On June 3, 2014, Dr. Anderson-Oeser noted that Claimant had a positive response to the block performed on May 14 and "recommended that Claimant continue receiving lumbar sympathetic blocks."

8. On January 26, 2015, the Claimant underwent another block from Dr. Ring. Dr. Ring documented, "Diagnosis of CRPS with good response to blocks…"

9. On March 26, 2015, after performing an independent medical examination (IME) of the Claimant, Sander Orent, M.D., noted that the lumbar sympathetic blocks relieved Claimant's pain.

10. Dr. Orent also agreed that pulmonary issues are related. Dr. Orent also agreed with the opinion of Bull (a Pulmonologist at the University of Colorado Anschutz Center) that Claimant's pulmonary hypertension and tricuspid regurgitation was made worse by recurrent pulmonary embolus.

11. The Claimant underwent additional blocks from Dr. Ring on April 27, 2015; September 14, 2015; December 14, 2015; and February 22, 2016.

12. On March 10, 2016, Annyce Mayer, M.D., performed a Respiratory Impairment Evaluation. Dr. Mayer assessed, *inter-alia*, work-related right lower extremity DVT (deep vein thrombosis) and pulmonary embolism, as well as a pulmonary hypertension that worsened since the work injury. Dr. Mayer assigned a 20% whole person impairment rating for the conditions of pulmonary emboli and pulmonary hypertension.

13. On April 8, 2016, the Claimant reported to Dr. Mayer that her CRPS has improved with nerve blocks.

14. On April 25, 2016, the Claimant underwent another block from Dr. Ring and reported, on May 10, 2016, to Dr. Mayer that her CRPS improved with nerve blocks.

15. On June 23, 2016, Dr. Anderson-Oeser reported improvement of symptoms after the Claimant underwent a block.

Division Independent Medical Examination (DIME) by Douglas Scott, M.D.

16. On August 9, 2016, Dr. Scott performed the DIME. Dr. Scott reviewed the Claimant's medical records and he physically examined her. Dr. Scott determined that the Claimant sustained a peripheral nerve injury and CRPS Type 2, resulting from the work injury. Dr. Scott assigned an 18% whole person impairment rating when

addressing Claimant's work-related CTEPH (chronic thromboembolic pulmonary hypertension).

17. On September 20, 2016, Claimant reported a decrease in pain after undergoing blocks to Dr. Anderson-Oeser, and Claimant reported that she had since been able to "get up and get dressed, perform light cooking and cleaning, and leave the house to perform small errands."

Respondent's Independent Medical Examination (IME) by Lawrence Lesnak, D.O.

18. On March 21, 2017, Dr. Lesnak performed an IME of THE Claimant at the request of Respondents. Dr. Lesnak (a physical medicine doctor) questioned if Claimant sustained any pulmonary emboli. He ultimately stated the opinion that the Claimant did not have CRPS, as there were no clinical physical findings supporting a CRPS diagnosis, multiple inconsistencies in the report of George Schakaraschwili, M.D. (a reputed expert on CRPS), and no significant documented evidence of improvement.

Hearing Testimony

19. During the June 26 and June 30, 2017, hearing, Dr. Anderson-Oeser testified as an expert in physical medicine and rehabilitation and occupational medicine. Dr. Anderson-Oeser is board certified in physical and rehabilitation medicine and is Level II accredited. She testified consistently with her prior opinions in that she maintained that Claimant's work-related diagnosis were CRPS of the right-lower extremity, right peroneal neuropathy, chronic pain syndrome, depression and anxiety, muscle spasms, pulmonary embolis and pulmonary hypertension.

20. Dr. Anderson-Oeser further disagreed with Dr. Lesnak's opinion that Claimant's exam findings were inconsistent and that there was a low probability that Claimant's diagnosis is CRPS. Additionally, Dr. Anderson-Oeser expressed the opinion that the sympathetic blocks were helpful and allowed the Claimant to get out of bed, dress herself, do simple chores, and do light shopping. Without the blocks, the Claimant was bed-bound, according to Dr. Anderson-Oeser.

Todd M. Bull, M.D., Pulmonologist

21. On October 18, 2017, Dr. Bull stated, "In general, 3 months of anticoagulation would be recommended for provoked pulmonary embolisms without evidence of CTEPH. After a provoked PE, patients at 5% chance of recurrent VTE at 1 years and 15% chance of recurrent VTE at 5 years. There is evidence of a PH on RIGHT HEART CATH and on transthoracic echo. Here VQ does not show evidence of clot. We however do no have another cause of PH for her, so I suspect this may be CTEPH." Dr. Bull further stated, "She (Claimant) has noted chest tightness and shortness of breath since the most recent clot and that those symptoms had neither resolved nor improved in the interim. It was noted that Claimant complained of being

fatigued. She also had DOE (dyspenea on exertion) going up stairs or in the shower. She noted some dizziness with exertion as well.

ALJ Kara Cayce

22. On November 3, 2017, ALJ Cayce determined that the Claimant met the Colorado Division of Workers Compensation Diagnostic Criteria for the diagnosis of CRPS, because the Claimant had two positive diagnostic tests. ALJ Cayce further determined that the Claimant's testimony was credible and persuasive. ALJ Cayce credited the opinions of Dr. Anderson-Oeser and the supporting medical records over the conflicting opinion of Dr. Lesnak. According to ATP Dr. Anderson-Oeser, the Claimant's work-related diagnosis is CRPS, depression and anxiety, muscle spasms, pulmonary embolis and pulmonary hypertension.

23. On June 22, 2018, the Industrial Claim Appeals Office (ICAO) affirmed the ALJ Cayce's credibility determination in favor of Dr. Anderson-Oeser over Dr. Lesnak. ICAO stated in part, Dr. Anderson-Oeser or her medical staff saw [Claimant] on a monthly basis between the date of MMI and June of 2017. ICAO confirmed: "The ALJ found [Claimant] has been diagnosed with CRPS, depression, and anxiety resulting from the industrial accident." ICAO further confirmed, "The ALJ was not persuaded by Dr. Van Dorsten's or Dr. Catageorge's opinions that [Claimant] has a somatic pain disorder. The ALJ instead credited the conflicting testimony of [Claimant] and the opinions of Dr. Anderson-Oeser…

24. On May 25, 2018, Dr. Anderson-Oeser disagreed with Dr. Lesnak's second assessment of the Claimant. Dr. Anderson-Oeser was of the opinion that the right lumbar sympathetic blocks were reasonably necessary because as Dr. Anderson-Oeser had previously indicated, the prior blocks (the same that are being presently recommended) did, in fact, improve the Claimant's symptoms and increased her ability to function.

Amar Patel, M.D.

25. On August 24, 2018, Dr. Patel requested lumbar sympathetic blocks stating "This is the only treatment that provides her [Claimant] with pain relief."

26. On September 20, 2018, Dr. Anderson-Oeser reported, "Since the block, [Claimant] has been doing more around her home in regards to house work, cooking, laundry, and her ADLs (activities of daily living). She is also able to perform several errands such as light grocery shopping and taking her children to and from activities. She is going to the gym since she had the blocks. She is performing her water walking and also utilizing a stationary bike. She has been able to reduce her Gabapentin and has not had **any** Percocet since the block" *(Emphasis Added)*

27. On November 27, 2018, Dr. Anderson-Osier stated that [Claimant] responded well to right lumbar sympathetic block was able to reduce her oxycodone/APAP as a result of undergoing the blocks.

The Claimant's Hearing Testimony

28. During the February 20, 2019, hearing, [the Claimant] testified that she is currently receiving medications, nerve blocks, pool therapy, home exercise, and massage therapy as treatment. She further testified that the nerve blocks provider her with the most relief. She testified that the 16 or more nerve blocks she underwent relieved her from the wing daily symptoms: "extreme burning, aching, spasms, coldness in [the] leg, numbness, and tingling." Claimant testified that without the nerve blocks, her pain was a 9 out of 10. Further, she testified that the severe pain affected her ability to think, concentrate, and rendered her bedridden. In addition, she became very anxious or depressed, extremely irritable and she had a hard time dealing with noise or people. Claimant testified, "I'm completely miserable" when she isn't able to undergo a block.

29. [The Claimant] testified that all the blocks have helped her work related condition. Specifically, after the undergoing the block, [the Claimant] testified that she was able to think more clearly, do more things, be more active, perform her pool therapy, do light duties around the house, and even get out of the house for a little bit and drive.

30. [The Claimant] testified that after the undergoing the blocks, she took less Oxycodone (judicial notice – Oxycodone is taken for pain). She stated that the relief from the nerve blocks lasted between two and five months. She said that the sympathetic blocks increased her ability to function and required her to take less medication. According to the Claimant, she received her last block from Kaiser because the workers' compensation insurance company denied the nerve block recommended by Dr. Anderson-Oeser. As a result, [the Claimant] paid a $100.00- copay out of her pocket.

31. As it relates to the work-related pulmonary issues, the Claimant further testified that she continued to suffer from shortness of breath, fatigue, dizziness, headaches, and tightness in her chest. Although she had symptoms in August of 2013, the symptoms got "a whole lot worse" after the work-related injury.

Jeffrey Schwartz, M.D.

32. Dr. Schwartz is of the opinion that the Claimant does not have pulmonary hypertension. He disagreed with Dr. Bull because "he is treating her as if she has pulmonary hypertension." According to Dr. Schwartz, the Claimant does not have a work-related condition, because she does not have chronic thromboembolism or pulmonary hypertension. According to Dr. Schwartz, Pulmonologist Dr. Bull's opinions

were "**absurd"**. Based on this last characterization and Dr. Schwartz's categorical denial of any work-related condition in the face of considerable and respected medical information to the contrary, the ALJ finds Dr. Schwartz's opinions unworthy of belief ad, therefore, lacking in credibility.

Dr. Lesnak

33. Dr. Lesnak testified that repeat nerve blocks require a functional measure of return to work or maintaining a work status. In addition, Dr. Lesnak testified that functional objective measures were required to confirm a therapeutic response to nerve blocks. Such measures increased Range of Motion and Increased Strength. The medical treatment guidelines do not state that all factors are required, nor do they state that one is required. Dr. Lesnak fails to offer any persuasive underpinnings for this opinion which attempts to discredit the weight authorized medical opiniions herein.

34. Dr. Lesnak stated that Dr. Anderson-Oeser's reports never change medication levels and the doctor never reports (the Claimant] has returned to work. Dr. Lesnak stated that he did not review the most recent nerve blocks provided by Kaiser. He stated the last time he examined [the Claimant] was two years ago and his opinions were based solely upon the medical records he reviewed and he had not reviewed any of the [Claimant's] medical records for the past six (6) months. Dr. Lesnak testified that a lot or many of the medical records indicate [Claimant] is expressing a reduction over 50% of pain relief. Dr. Lesnak testified further that he had not seen any new or up to date psychological reports or test results since 2017. The last record that Dr. Lesnak reviewed was dated December 4, 2017. Nonetheless, it was his opinion that the Claimant does not have CRPS. His opinions are contrary to the weight of credible medical evidence in the record, his latest opinion appears to be "off-the-cuff," in order to be consistent with his previous opinions. For this reason and the reasons herein above specified, the ALJ finds Dr. Lesnak's opinions lacking in credibility.

Ultimate Findings

35. The ALJ finds the Claimant's testimony to be credible and supported by the weight of the persuasive medical evidence. For the reasons herein above specified, the ALJ finds the opinions of ATP Dr. Anderson-Oeser, Dr. Bull and Dr. Patel highly credible, persuasive as supported by the FAL of 18% whole person for the Claimant's back injury and 20% RUE. Also, the ALJ finds DIME Dr. Scott's diagnosis of CRPS and 18% whole person rating credible, persuasive and supported by the totality of the medical evidence in the record. On the other hand, as found herein above, the ALJ finds the opinions of Respondent's IME Dr. Lesnak and IME Dr, Schwartz as lacing in adequate study, underlying persuasive explanations and lacking in credibility.

36. Between conflicting medical opinions, the ALJ makes a rational choice, based on substantial evidence, to accept the opinions of ATP Dr. Anerson-Oeser, Dr. Bull, DIME Dr. Scott, Dr. Patel, and to reject the opinions of Dr. Lesnak and Dr. Schwartz and any other contrary opinions..

37. The Claimant's probable CRPS, pulmonary embolism and need for an EKG and other medical treatment and benefits by her authorized medical providers is causally related to her injuries of October 24, 2013 and reasonably necessary to maintain the Claimant at MMI and to prevent a deterioration of her condition.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant's testimony was credible and supported by the weight of the persuasive medical evidence. Also, the opinions of ATP Dr. Anderson-Oeser, Dr. Bull, DIME Dr. Scott and Dr. Patel were highly credible, persuasive as supported by the FAL of 18% whole person for the Claimant's back injury and 20% RUE. Additionally, DIME Dr. Scott's diagnosis of CRPS and his 18% whole person rating was credible, persuasive and supported by the totality of the medical evidence in the record. On the other hand,

the opinions of Respondent's IME Dr. Lesnak and IME Dr, Schwartz lacked adequate study, underlying persuasive explanations and overall credibility.

Substantial Evidence

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

Medical

c. An employer must provide an injured employee with reasonably necessary medical treatment to "cure and relieve the employee from the effects of the injury." § 8-42-101(1) (a), C.R.S. The employee must prove a causal relationship between the injury and the medical treatment for which the worker is seeking benefits. *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. Ct. App. 1997). Treatments for a condition not caused by employment are not compensable. *Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187, 1189 (Colo. Ct. App. 2002). An industrial accident is the proximate cause of a claimant's disability if it is the necessary precondition or trigger of the need for medical treatment. *Subsequent Injury Fund v. State Compensation Insurance Authority,* 768 P.2d 751 (Colo. App. 1988). In order to prove that an industrial injury was the proximate cause of the need for medical treatment, an injured worker must prove a causal nexus between the need for treatment and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). It is for the ALJ, as the fact-finder, to determine whether a need for medical treatment is caused by the industrial injury, or some other intervening injury. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). Respondents are liable for the "direct and natural consequences" of a work-related injury, including consequential injuries caused by the original compensable injury. *See Travelers Ins. Co. v. Savio*, 806 P.2d 1258 (Colo. 1985). The

chain of causation, however, can be broken by the occurrence of an independent intervening injury. *See* 1 A. *Larson, Workers' Compensation Law,* section 13.00 (1997). As found, the Claimant's probable CRPS, pulmonary embolism and need for an EKG and other medical treatment and benefits by her authorized medical providers is causally-related to her injuries of October 24, 2013.

d. An employee is entitled to continuing medical benefits after MMI if reasonably necessary to relieve the employee from the effects of an industrial injury. *See Grover v. Indus. Comm'n of Colorado*, 759 P.2d 705 (Colo. 1988). The record must contain substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve a claimant from the effects of an injury or to prevent further deterioration of his condition. *Stollmeyer v. Indus. Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995); *Grover v. Indus. Comm'n, supra*. Such evidence may take the form of a prescription or recommendation for a course of medical treatment necessary to relieve a claimant from the effects of the injury or to prevent further deterioration. *Stollmeyer v. Indus. Claim Appeals Office, supra*. An injured worker is ordinarily entitled to a general award of future medical benefits, subject to an employer's right to contest causal relatedness and reasonable necessity. *See Hanna v. Print Expediters,* 77 P.3d 863 (Colo. App. 2003). Treatment to **improve** a claimant's condition does **not** fall under the purview of *Grover* benefits. *Shalinbarger v. Colorado Kenworth, Inc.,* W.C. No. 4-364-466 [Indus. Claim Appeals Office (ICAO), March 12, 2001]. As found, Claimant is entitled to maintenance medical care, which is reasonably necessary to address the injury

Burden of Proof

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

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondent shall pay the costs of all medical maintenance benefits resulting from her injuries of October 24, 2013, subject to the Division of Workers Compensation Medical Fee Schedule.

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

DATED this 17 day of April 2019.

EDWIN L. FELTER, JR.
Administrative Law Judge

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-031-421-001

ISSUES

I. Whether Claimant has established by a preponderance of the evidence that he is permanently and totally disabled.

II. Permanent partial disability benefits.

(a) Whether Claimant has overcome the Division IME's opinion by clear and convincing evidence that Claimant does not have chronic regional pain syndrome (CRPS) and should be provided an impairment rating for such.

(b) Whether Claimant has established by a preponderance of the evidence that he has suffered functional impairment, which is not on the schedule of disabilities and is entitled to a whole person impairment rating.

III. Penalties:

(a) Whether Respondent is subject to penalties for the late payment of temporary total disability benefits.

(b) Whether Respondent is subject to penalties for the late payment of permanent partial disability benefits.

(c) Whether Respondent is subject to penalties for dictating the type or duration of medical treatment or degree of physical impairment.

IV. Overpayments.

(a) Whether Claimant has been overpaid, and recovery of same, is reserved.

FINDINGS OF FACT

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

1. Claimant is a 44-year-old male formerly employed with RTD. In April 2007, Claimant commenced his employment with RTD in the maintenance department. His position involved cleaning the interior and exterior of buses, checking fluids, including gas and oil, and fueling buses. Claimant worked in this capacity for approximately 7-8 years, then bid for, and accepted a subsequent position, vault puller. Claimant sustained a work injury during the second day of his new position. (Respondent's Exhibits, pp 546-47)

2. On November 4, 2016, Claimant presented to Dr. Christian Updike, an authorized treating physician. Claimant described the work injury as follows: “As he was stepping out [of a bus], the large metal bus door closed, hitting him on the inside of the left knee and left ankle.” Dr. Updike assessed Claimant with a left knee and left ankle contusion. He recommended Claimant undergo x-rays. (Respondent’s Exhibit A)

3. Subsequently, Claimant underwent x-rays, which revealed no fracture to the left knee, but a possible avulsion fracture to the lateral malleolus of the left ankle. (Respondent’s Exhibit B)

4. On November 15, 2016, Claimant returned to Dr. Updike, who assessed Claimant with left knee pain, “with reassuring x-ray;” and a possible left ankle avulsion fracture. Dr. Updike dispensed a walking boot and took Claimant off work pending a referral to an orthopedist. (Respondent’s Exhibit D)

5. On November 28, 2016, Claimant underwent an MRI of the left ankle, which revealed edema of the lateral talar dome, along with a possible stress reaction in the 4th and 5th metatarsal shafts. (Respondent’s Exhibit E)

6. On December 1, 2016, Claimant presented to Dr. Ocel. Claimant complained of pain in the left ankle in the 6/10 range. Claimant described the pain as aggravated by lifting, walking and standing, with no relieving factors. Dr. Ocel recommended that Claimant continue in a CAM boot and restrict his current activities. (Respondent’s Exhibit F)

7. On December 6, 2016, Dr. Updike assessed Claimant with left ankle pain with abnormal MRI, pending ultrasound. He recommended Claimant utilize Aleve over-the-counter along with continued use of a CAM boot. (Respondent’s Exhibit G)

8. On January 9, 2017, Claimant returned to Dr. Lugliani. Claimant requested medication for his pain as he was experiencing increased discomfort. He described the pain on the medial side of his left knee and lateral side of his left ankle with continued swelling. He denied any new symptoms. Dr. Lugliani acquiesced to Claimant’s request and prescribed Tramadol for breakthrough pain. (Respondent’s Exhibit H)

9. On January 9, 2017, Claimant underwent an ultrasound of the left ankle. (Respondent’s Exhibit I)

10. On February 2, 2017, Claimant returned to Dr. Ocel, who opined that Claimant sustained derangement of the ankle and failed conservative treatment. Dr. Ocel recommended diagnostic ankle arthroscopy and treatment of interarticular pathology as well as a lateral ankle stabilization. (Respondent’s Exhibit J)

11. On February 7, 2017, Dr. Updike assessed Claimant with acute left ankle pain and acute left knee pain. Dr. Updike noted that the recent ultrasound showed objective evidence of ligament instability. He opined the surgery recommended by Dr. Ocel would be reasonable.

12. On February 22, 2017, Claimant underwent surgery performed by Dr. Ocel, including left ankle arthroscopy, chondroplasty, and modified lateral ankle stabilization. (Respondent's Exhibit M)

13. On March 9, 2017, Dr. Ocel placed Claimant in a short-leg weight-bearing cast. He indicated Claimant would be in the cast for approximately 2 weeks and then switch to a CAM boot. (Respondent's Exhibit N)

14. On March 10, 2017, Dr. Updike recommended that Claimant commence physical therapy, including gentle range of motion for post-surgery treatment. At the examination, Claimant presented with a walking boot. He complained of pain when walking down stairs but otherwise had no new complaints. (Respondent's Exhibit O)

15. On March 23, 2017, Claimant underwent an MRI of the left knee, which revealed a lateral meniscus tear. (Respondent's Exhibit P)

16. On April 4, 2017, Dr. Updike noted that Claimant was doing well. Dr. Updike observed that Claimant's left lower extremity was slightly discolored compared to the other. However, he noted, "I assured him this was also normal with the healing process." Claimant requested additional medications for pain. Claimant did not describe any pain or symptoms to his lumbar spine. In fact, the general examination included the spine and returned normal. Dr. Updike agreed to refer Claimant to Dr. Hsin for an orthopedic evaluation of the knee. (Respondent's Exhibit Q)

17. On April 10, 2017, Claimant presented to Dr. Hsin, who assessed Claimant with acute lateral meniscus tear of the left knee. Dr. Hsin recommended surgery, but wanted to wait until after Claimant was out of the CAM boot. (Respondent's Exhibit R)

18. On April 18, 2017, Claimant returned to Dr. Updike. Claimant reported discoloration of his left leg, which completely went away when he elevated it. Additionally, Claimant noted "some minor back discomfort" when he was up walking for a long period. However, the pain completely alleviated when at rest. Dr. Updike recommended Claimant continue physical therapy three times a week for four weeks in relation to the left ankle. Additionally, he noted the surgery recommended from Dr. Hsin would be reasonable. (Respondent's Exhibit S)

19. On May 2, 2017, Claimant reported walking with his boot. Dr. Updike noted Claimant had proceeded in physical therapy in relation to the low back pain. Dr. Updike noted that left knee surgery was scheduled for May 9, 2017. He assessed Claimant with left ankle, status post surgery; left knee pain; and "low back discomfort, mild." (Respondent's Exhibit T)

20. On May 9, 2017, Claimant underwent left knee surgery performed by Dr. Hsin. The operation included left knee arthroscopy with partial medial and lateral meniscectomy. (Respondent's Exhibit U)

21. On May 15, 2017, Claimant returned to Dr. Updike. Claimant described no postoperative complaints. Claimant was out of the walker boot regarding his ankle and was only utilizing a cane. Dr. Updike noted, "He is making good functional

gains regarding the ankle." Under assessment, Dr. Updike noted left ankle surgery, left knee surgery, and low back pain, mild. However, the body of the report did not reveal any complaints from the Claimant with regards to his low back. (Respondent's Exhibit V)

22. On May 24, 2017, Claimant reported improvement with the left knee. Additionally, Claimant reported "occasional" back pain in the morning, "but it goes away when he walks." Dr. Updike reported Claimant was out of the walker boot regarding the ankle. (Respondent's Exhibit W)

23. On June 2, 2017, Dr. Updike reported that the physical therapist expressed concerns regarding Claimant's complaint of a sudden onset of left calf pain. "He was uncertain if there was symptom magnification or other concerns." Dr. Updike recommended a DVT ultrasound. Additionally, Dr. Updike assessed Claimant with left knee surgery, left ankle surgery, and low back pain mild. However, the medical report did not reveal specific lumbar complaints from the Claimant. (Respondent's Exhibit X)

24. On June 2, 2017, Claimant underwent the recommended ultrasound, which returned normal. (Respondent's Exhibit Y)

25. On June 8, 2017, Claimant returned to Dr. Updike reporting improvement. At this stage his pain had dropped to a 5/10. Claimant denied any new problems. Current medical treatment included physical therapy for the left ankle and left knee. Claimant complained of balance issues while walking. Dr. Updike noted, "I have discussed with the patient I do not feel that his balance problem is due to a brain issue or a medication issue. I think it is most clearly due to a weakness issue regarding the left knee." (Respondent's Exhibit Z)

26. On June 22, 2017, Dr. Ocel noted Claimant made strong progress in physical therapy but still described tenderness over the medial and laterally based portal sites. Physical examination revealed no soft tissue swelling or edema. "Relatively maintained a range of motion with slight diminution of dorsiflexion." Dr. Ocel was pleased with Claimant's progress and predicted an additional 4-6 weeks before complete healing. Claimant had no additional complaints. (Respondent's Exhibit BB)

27. On June 23, 2017, Claimant returned to Dr. Updike. He noted Claimant's chief complaints as left ankle surgery, left knee surgery, and minor low back discomfort secondary to altered gait. Dr. Updike noted that both Drs. Ocel and Hsin recommended additional physical therapy. Dr. Updike also noted, "His pain is primarily in his left knee and left ankle. He also has some discomfort in the low back." Regarding examination of the lower extremity, Dr. Updike noted, "Left ankle has expected post-operative minor edema. There are minor color changes. There is some lavender color possibly concerning for CRPS, but I do not think that is the case. Left knee has minor postoperative changes." Regarding the back, Dr. Updike noted, "Palpation of the back is nontender in the midline, nontender in the right lumbar area, nontender in the right buttock. Left back has significant point tenderness in the left muscular region of the posterior superior iliac spine." Regaring back pain, Dr. Updike wrote, "On today's exam, it appears to be purely

left lumbar musculature." Dr. Updike noted the case would be monitored for CRPS. (Respondent's Exhibit CC)

28. On July 5, 2017, Dr. Updike discussed the possibility of CRPS with the Claimant and recommended a bone scan. (Respondent's Exhibit CC)

29. On July 11, 2017, Claimant presented to Dr. Michael Varney, chiropractor. Regarding the lumbar spine, Dr. Varney noted, "In reference to the patient's bilateral, lumbar spinal and lumbosacral junction, that pain generators appear to be primarily compensatory in nature, post knee and ankle surgeries." (Respondent's Exhibit DD)

30. On July 19, 2017, Claimant returned to Dr. Updike. Claimant continued to utilize a left knee brace. However, Claimant disclosed his left foot was "hurting more." Physical examination revealed that Claimant's gait and station were "unremarkable." Regarding the lower back, under assessment, Dr. Updike noted, "Prior back pain that appeared to be muscular." (Respondent's Exhibit FF)

31. On July 21, 2017, Claimant underwent a triple-phase bone scan. The impressions included, "Slightly increased blood flow to the left foot and ankle as compared to the right which may be seen with inflammation or infection; … Low-grade blood pool activity over the lateral side of the left ankle and low-grade delayed activity over both sides of the left ankle and near the Achilles tendon insertion into the left calcaneus. Findings may reflect posttraumatic or postsurgical changes or arthritis. Infection unlikely given low-grade activity on delayed images." (Respondent's Exhibits, p. 118) Later, the radiologist attached an addendum per the request of Dr. Wakeshima: "The findings of slightly increased blood flow, slightly increased blood pool activity and mildly increased delayed phase activity in the left lower leg, foot and ankle are not specific but could be related to CRPS." (Respondent's Exhibits, p. 119)

32. On July 21, 2017, Claimant returned to Dr. Ocel who noted, "He is five months status post left ankle arthroscopy, treatment of interarticular pathology and lateral ankle stabilization. Unfortunately, he continues to have pain in the ankle particularly over lateral reconstruction site." Dr. Ocel recommended a repeat MRI "to determine structural integrity of reconstruction as well as an evaluation of the interarticular cartilaginous structures." (Respondent's Exhibit HH)

33. On July 25, 2017, Claimant returned to Dr. Updike. Under examination, Dr. Updike noted, "gait and station unremarkable." Under chief complaint, Dr. Updike noted minor low back discomfort, however the report does not reference specific complaints. For example, under assessment, Dr. Updike writes, "prior back pain that appeared to be muscular." (emphasis added) (Respondent's Exhibit II)

34. On July 31, 2017, Claimant underwent an MRI of the left ankle, which returned relatively normal. (Respondent's Exhibit JJ)

35. On August 4, 2017, Claimant returned to Dr. Updike, who addressed the MRI. He noted, "A copy of the MRI was given to the patient that the ATFL was intact, and that I anticipate Dr. Ocel may offer a steroid injection to the ankle to address postoperative inflammation versus additional ankle surgery to correct the cartilage

defect versus nothing left to offer." Dr. Updike did note, "He still has some low back pain." Under summary of interventions, Dr. Updike noted, "July 2017, triple-phase bone scan. No evidence of CRPS." Under the exam, Dr. Updike again noted, "Gait and station unremarkable." (Respondent's Exhibit KK)

36. On August 10, 2017, Claimant returned to Dr. Ocel. Claimant reported occasional erythema throughout the leg, along with occasional burning pain. Dr. Ocel noted the ankle itself appeared structurally sound. He recommended an evaluation by a pain management specialist to evaluate for CRPS. (Respondent's Exhibit MM)

37. On August 25, 2017, Claimant presented to Dr. Robert Kawasaki. Claimant complained of continued ankle and left knee pain, including swelling. Additionally, Dr. Kawasaki noted, "The patient is also incidentally indicating some low back pain that he says is related to his gait alteration." Regarding potential for CRPS, Dr. Kawasaki noted, "The patient clinically had some mild erythema of the left foot but otherwise did not have physical exam findings for CRPS. He had some symptoms that could be suspicious for CRPS. However, this has been ruled out with the triple-phase bone scan." Regarding the continued pain in the left lower extremity, Dr. Kawasaki recommended Claimant undergo an EMG nerve conduction study. Regarding the low back, Dr. Kawasaki assessed Claimant with, "complaints of low back but no specific injury to the lumbar spine." (Respondent's Exhibit OO)

38. On August 29, 2017, Claimant underwent a psychological consultation with Dr. Kevin Reilly, per Dr. Updike's request. Claimant described his mood as "very bad." Dr. Reilly noted, "His affect was variable and incongruent with thought content. Pain behaviors consistent with a very significant somatic focus in the patient's discussions." Dr. Reilly assessed Claimant with somatic symptom disorder with predominant pain, along with adjustment disorder with mixed anxious and depressed mood. (Respondent's Exhibit PP)

39. On August 31, 2017, Claimant returned to Dr. Updike. His complaints continued to include the left ankle, left knee, and "minor low back pain." Dr. Updike noted Claimant's gait continued to be "unremarkable." He recommended that Claimant undergo an MRI of the lumbar spine to rule out a pain generator in the spine that was causing the continued knee pain. (Respondent's Exhibit QQ)

40. On September 7, 2017, Claimant underwent a lumbar spine MRI. The MRI revealed severe multilevel lumbar spinal stenosis with disc bulges, paracentral disc protrusions and annular fissures. Findings were compounded by congenital stenosis with diffusely short pedicles. (Respondent's Exhibit RR)

41. On September 12, 2017, Claimant returned to Dr. Kawasaki, who noted Claimant had undergone the EMG which returned normal. Again, Dr. Kawasaki reported that Claimant did not have physical exam findings for CRPS. He did, however, recommend an additional test for further evaluation. (Respondent's Exhibit SS)

42. On September 14, 2017, Claimant returned to Dr. Updike. Regarding the lumbar spine, Dr. Updike assessed the MRI, noting "I discussed with the patient in brief that he has a significantly degenerated spine, but I do not see a focal problem suggestive of surgery. However, given the expanding and slow progress and

nature of the case, I think it is reasonable for a one-time evaluation with a conservative surgeon to review the case and opine: "(1) If the leg pain could be coming from the spine, and (2) if any invasive procedures should be done on the spine." Dr. Updike went on to explain that if any invasive procedures were recommended, it would be difficult to consider those procedures work-related. Accordingly, Dr. Updike referred Claimant to an evaluation with an orthopedic surgeon, along with a referral to CROM for purposes of CRPS diagnostics. (Respondent's Exhibit TT)

43. On September 22, 2017, Claimant returned to Dr. Updike for an unplanned evaluation. Claimant complained of increased back pain and increased left knee pain. Claimant requested muscle relaxants. Dr. Updike assessed claimant with a "back pain flare of unclear etiology." Dr. Updike noted that Claimant was a poor surgical candidate. (Respondent's Exhibit UU)

44. On September 28, 2017, Claimant presented to CROM and underwent a comprehensive medical consultation with Dr. Tashof Bernton. Dr. Bernton performed a clinical examination of the Claimant. He wrote, "The clinical findings are not impressive for complex regional pain syndrome. The patient has some decreased range of motion in the knee and slight color difference noted, but otherwise clinical examination is fairly benign." Dr. Bernton performed two diagnostic tests, including the autonomic testing battery which returned negative and the stress thermography which returned positive. Regarding the results of the two tests, Dr. Bernton opined, "Patient does not meet the criteria for diagnosis of complex regional pain syndrome under the Colorado Workers' Compensation Treatment Guidelines, which do require two positive objective tests. However, diagnosis is not ruled out by one negative test, and the autonomic testing battery results are fairly borderline, while the thermography is clearly positive." There is no indication that Dr. Bernton reviewed the triple-phase bone scan which returned, at best, ambiguous. Dr. Bernton recommended that Claimant undergo a diagnostic sympathetic block. (Respondent's Exhibit VV)

45. On October 2, 2017, Claimant underwent an evaluation with Dr. Andrew Castro. Dr. Castro noted that Claimant underwent surgeries performed by Drs. Ocel and Hsin for right ankle and knee problems. "He did very well from these procedures, but incurred the sudden onset of back pain and leg pain after walking in a boot. The back pain is much improved at this time, and the main complaint is the left lower extremity pain at the knee down to the ankle." Dr. Castro performed a physical evaluation of the lumbar spine: "No palpable deformity appreciated. Good lumbar range of motion with forward bending, extension, lateral bending, and rotation." Dr. Castro assessed Claimant with bilateral lumbar radiculopathy. "I will have him continue to walk and ambulate as long this is cleared by Drs. Hsin and Ocel. I recommend pool therapy, strengthening, stretching, and range of motion as much as possible. I do not think he is going to benefit from surgical intervention. I recommend a continued conservative algorithm for him as long as possible. I do not think back surgery is part of this case or that it will be required in this case." At no point during the evaluation did Dr. Castro opine that utilizing a walking boot was

the primary or even secondary cause of Claimant's subjective lumbar complaints. (Respondent's Exhibit WW)

46. On October 3, 2017, claimant attended an independent medical examination (IME) with John Hughes, M.D. (Claimant's Exhibit 4, p. 32.) After a thorough review of the medical history and a physical examination, Dr. Hughes diagnosed the following: (left knee, leg, ankle contusions sustained on 11/2/16; (2) left ankle anterior talofibular ligament disruption, chrondral injury involving the medial tibial plafond, and extensive synovitis; (3) persistence of left ankle arthritis; (4) left knee medial and lateral meniscus tears with persistence of left knee arthritis, (5) occult severe multi-level spinal stenosis and intervertebral disc pathology as seen on the MRI of 9/7/16; (6) antalgia of gait with development of axial lumbar spine pain, meriting continued supportive treatment; (7) emerging left lower extremity pain with clinical and thermographic features suggestive of CRPS-1; (8) suspected gout; and (9) opioid-induced constipation and hyperalgesia.

47. Dr. Hughes went on to opine claimant was not at MMI and that he needed a continued medical treatment, including assessment of the left knee and ankle. Dr. Hughes assigned a 20% whole person impairment rating and also stated that claimant had "profound" work restrictions that were consistent with the sedentary work demand level as defined by the U.S. Department of Labor.

48. On October 3, 2017, Claimant returned to Dr. Kawasaki. Claimant described symptoms consistent with CRPS, including erythema, swelling, hypersensitivity, and temperature change. Accordingly, Dr. Kawasaki recommended lumbar sympathetic blocks on the left side. (Respondent's Exhibit XX)

49. On October 9, 2017, Dr. Ocel explained that from a surgical standpoint, there is nothing further for the ankle. He did recommend continued physical therapy and pain management with Dr. Kawasaki. Regarding CRPS, Dr. Ocel noted, "He continues to have a relatively global pain about the left lower extremity [sic] pain is currently being evaluated by Dr. Kawasaki for possible CRPS although this is a low likelihood." (emphasis added) (Respondent's Exhibit YY)

50. On October 10, 2017, Dr. Updike noted "minor low back pain." Regarding CRPS, he explained, "It appears the patient may have CRPS, based on what the patient reports regarding the thermogram, and six sessions of pool therapy may be reasonable to try having the patient continue to move the left leg. I think it is reasonable to try CRPS nerve blocks." Regarding gait, Dr. Updike observed "unremarkable." (Respondent's Exhibit ZZ)

51. On October 24, 2017, Claimant returned to Dr. Updike, who noted Claimant recently continued treating with Drs. Reilly and William Beaver for counseling and biofeedback. Regarding Claimant's current medications, Dr. Updike noted, "The patient continues to be very vague about his medications." Gait evaluation was unremarkable. Dr. Updike noted that Claimant would be scheduled for a sympathetic nerve block. (Respondent's Exhibit CCC)

52. On October 27, 2017, Claimant returned to Dr. Kawasaki. Claimant reported no change with regards to his pain, swelling, and left lower extremity symptoms.

Claimant was scheduled that day for sympathetic nerve blocks but was unable to proceed due to a lack of IV access. (Respondent's Exhibit DDD)

53. On November 6, 2017, Claimant returned to Dr. Ocel. On physical examination, Dr. Ocel noted, "I do not detect any significant soft tissue swelling, edema, or erythema about the left ankle." (Respondent's Exhibit FFF)

54. On November 7, 2017, Claimant returned to Dr. Kawasaki. Unlike the evaluation from Dr. Ocel, Dr. Kawasaki observed mild distal edema around the ankle and into the foot. (Respondent's Exhibit HHH)

55. On November 8, 2017, Claimant complained of ongoing left knee pain, left shin pain, and left low back pain. Dr. Updike referred to Claimant's gait and station as "unremarkable." He assessed Claimant's back as "MRI showing degenerative changes." Dr. Updike no longer referred to the low back pain as related to altered gait. (Respondent's Exhibit III)

56. On December 5, 2017, Claimant continued to report pain in the 6/10 scale with regard to the left ankle and left knee. Dr. Updike noted that they had been unable to complete the lumbar sympathetic nerve block and Claimant agreed not to proceed. He recommended pool therapy. (Respondent's Exhibit MMM)

57. On December 18, 2017, Claimant returned to Dr. Ocel. Regarding the ankle exam, Dr. Ocel noted, "He is doing quite well with regards to his left ankle. He states that it is constantly getting better. His most notable complaints today are about his knee as well as his spinal issues that he has been having." Dr. Ocel recommended one final series of full therapy after which he would anticipate Claimant being at maximum medical improvement (MMI). (Respondent's Exhibit OOO)

58. On December 27, 2017, Claimant returned to Dr. Updike. Regarding gait and station, Dr. Updike noted "appear unremarkable." At this time, Claimant had been utilizing Lyrica, Voltaren, and Glucosamine. Additionally, Dr. Updike refilled Claimant's Percocet. (Respondent's Exhibit RRR)

59. On January 9, 2018, Claimant presented to Dr. Updike. Since the last visit, Claimant indicated that his condition was improving. He complained of continued back pain, blaming the walking boot. Dr. Updike assessed Claimant with left knee and left ankle pain, and CRPS. Claimant's medications included continued Lyrica. Dr. Updike recommended an evaluation with Dr. Wakeshima. Dr. Updike's work restrictions were 20 pounds lifting, with no other restrictions. (Respondent's Exhibit UUU)

60. On January 15, 2018, Claimant presented to Dr. Kawasaki. Claimant continued to complain of ankle, knee, and lumbar pain. "He did report some pain down the left leg with straight leg raise, but appeared to be more related to ankle and knee pain." Dr. Kawasaki noted that if Claimant was unable to undergo the sympathetic nerve block, there was no additional treatment required. Due to his continued knee complaints, Claimant requested a second opinion. (Respondent's Exhibit VVV)

61. On January 9, 2018, Claimant presented to Dr. Updike. At this visit, Dr. Updike indicated that he anticipated Claimant would be at MMI on February 1, 2018. Therefore, he referred Claimant to Dr. Wakeshima to perform an impairment rating.

Dr. Updike specifically stated in his report for Dr. Wakeshima to "please due IR [impairment rating] due to CRPS/complexity/career ending." Dr. Updike did not request Claimant's back to be rated. Quite the contrary, he only requested Dr. Wakeshima to rate Claimant's CRPS. (Claimant's Exhibit 9, p. 93.)

62. On January 10, 2018, Stephanie Daniels, from Dr. Updike's office, faxed a request to Wakeshima's office for him to perform an impairment rating. Consistent with Dr. Updike's last report, she wrote on the fax:

> Dr. Updike wants Dr. Wakeshima to complete an IR [impairment rating] due to CRPS/Complexity/Career ending. IR – 3rd Edition.

Consistent with Dr. Updike's January 9, 2018, report, Ms. Daniel's request for an impairment rating only requested Dr. Wakeshima to rate Claimant's CRPS.

63. On January 24, 2018, Claimant presented to Dr. Wakeshima for a permanent impairment rating. Regarding CRPS, Dr. Wakeshima noted that the stress thermogram on July 21, 2017 returned positive. Additionally, Dr. Wakeshima interpreted the triple-phase bone scan as demonstrating "findings consistent with" CRPS. Accordingly, he assigned a 25% whole person rating for CRPS. Regarding the lower extremity, Dr. Wakeshima assigned a 33% lower extremity rating for the left knee and a 12% lower extremity rating for the ankle. Regarding the lumbar spine, Dr. Wakeshima noted that:

> I was suspicious of whether the lumbar spine would warrant an impairment rating due to the patient's mechanism of injury and no further treatment performed to the lumbar spine aside from Dr. Castro's evaluation and MRI studies. I therefore had my medical assistant contact both Dr. Updike and the adjuster's office and they both confirmed that the lumbar spine is not work related and therefore would not warrant an impairment rating as related to his work injury of 11/2/16.

[The issue of the conversation noted in Dr. Wakeshima's report which indicates he spoke with Dr. Updike, and with someone at the adjuster's office, will be addressed in further detail below.] Dr. Wakeshima assigned a combined 37% whole person impairment rating. (Respondent's Exhibit XXX)

64. On January 31, 2018, Claimant returned to Dr. Updike, who opined that Claimant reached MMI on January 31, 2018. Regarding permanent restrictions, the sole restriction assigned by Dr. Updike was a 20-pound lift. (Respondent's Exhibit YYY)

65. Rather than admit to Dr. Wakeshima's rating, Respondent requested a Division-sponsored independent medical evaluation (DIME).

66. On February 7, 2018, Claimant presented to Dr. Ciccone for a second opinion on the lower extremity. Dr. Ciccone performed a physical examination which showed no obvious muscular atrophy, normal alignment, normal skin, and no significant color change. Dr. Ciccone concluded that Claimant did not require any surgical intervention. (Respondent's Exhibit ZZZ)

67. On April 13, 2018, Dr. Updike continued Claimant's permanent restrictions as, "lifting is limited to up to 20 pounds." There were no additional changes to the treatment plan. (Respondent's Exhibit AAAA)

68. On May 14, 2018, Claimant returned to Dr. Kawasaki. During this evaluation Claimant began complaining of increased cervical symptoms. Dr. Kawasaki noted that Claimant did have some signs and symptoms consistent with cervical radiculopathy and recommended an MRI and a referral for cervical epidural steroid injections. (Respondent's Exhibit BBBB)

69. On May 17, 2018, Dr. Stanley Ginsburg performed the DIME. Regarding CRPS, the DIME physician opined:

> I find no clinical evidence to suggest CRPS. The testing done as indicated in that report requires that both be positive and only one was positive, and triple-phase bone scan was not positive either. It is interesting that initially the clinicians did not describe symptomology suggesting CRPS. Later, there is a description compatible clinically with CRPS but the same clinician describing permanent clinical features did not see this initially. This is confusing at best and as I indicated, if sympathetic block is accomplished and it is markedly positive, I could probably be persuaded to change my mind but I would have to be convinced in that perhaps two trials would have to be accomplished.

70. Additionally, the DIME wrote:

> The diagnosis of CRPS has been applied and although throughout the patient's clinical examinations, there were very few examples of individuals testing him for possible CRPS, I thought it interesting that initially Dr. Kawasaki found no difference through side-to-side as did others and then a difference was found. The difference was stated by Dr. Hughes as well but when I see the patient in May 2018, I do not see a difference nor do I find an abnormal response to stimuli. Furthermore, and I think this is also interesting and I think is helpful, the patient actually does not complain of the type of pain which would accompany a CRPS syndrome.

Ultimately, the DIME physician opined that Claimant reached maximum medical improvement and was limited to an impairment rating to the lower extremity, 46%. (Respondent's Exhibit CCCC)

71. On July 11, 2018, Employer filed a Final Admission of Liability (FAL) consistent with Dr. Ginsburg's report. (Claimant's Exhibits, p. 142) Claimant filed an Application for Hearing raising numerous issues, including PPD, PTD, and penalties.

72. On May 25, 2018, Claimant returned to Dr. Wakeshima, who Dr. Updike had requested take over Claimant's pain treatment. Claimant's medications included

Lyrica and Percocet. Dr. Wakeshima noted that Claimant remained at MMI. He recommended a TENS unit for home use. Additionally, Dr. Wakeshima recommended that Claimant pursue the lumbar sympathetic nerve block. (Respondent's Exhibit DDDD)

73. On July 5, 2018, Claimant underwent an independent medical examination with Dr. Mark Failinger. Dr. Failinger reviewed the medical records and performed a physical examination. Regarding the issue of Claimant's ability to earn wages, he wrote, "Of importance are the patient's ongoing elevated pain complaints, which appear to be significantly elevated for the pathology identified on imaging studies and at his surgeries. The patient underwent an ankle ligament reconstruction which has provided stable ankle on examination. He was noted to have some chondromalacia at his ankle on surgery. However, his pain appears to be out of proportion to the MRI reading of chondromalacia of the talar dome, particularly with the extent of chondromalacia that was found by Dr. Ocel at surgery of 2/22/17. Likewise, the pain complaints in the left knee are out of proportion to what appears to have been found at the surgery performed on the left knee by Dr. Joseph Hsin on 5/9/17." Regarding his lumbar complaints, Dr. Failinger wrote, "His back complaints appear to be degenerative in nature. It is not likely, with a reasonable medical probability, that wearing a walking boot which weighs at most several pounds, that a patient, who is minimally ambulatory, could develop pain complaints and symptomatology in his lower back from the use of a boot when he is essentially sedentary with minimal ambulation over the months following his knee and ankle surgery." Dr. Failinger also addressed CRPS, and agreed with Dr. Ginsburg. "It certainly was not clear in the review of the medical records that CRPS is present. There has been a favoring by the various physicians who have examined Mr. Siyam that he does NOT likely have a CRPS diagnosis. Dr. Tashof Bernton felt that 'the clinical findings are not impressive for complex regional pain syndrome.' Dr. Kawasaki did not find obvious physical findings for CRPS in the clinic note of 9/12/17." Regarding Claimant's ability to work, he concluded that Claimant was not permanently totally disabled from a physical standpoint. Although he may not "choose to return to various work positions due to his subjective complaints, there does not appear to be evidence on examination nor on his imaging studies, nor on pathology found in surgery to support an inability to return back to a reasonable, although somewhat restricted, work capacity." (Respondent's Exhibit HHHH)

74. In July 2018, Employer performed video surveillance of the Claimant. (Respondent's Exhibit AAAAA) Employer forwarded the video surveillance to Dr. Updike who reviewed the information and provided a response. Regarding Claimant's assertion of an inability to earn wages, Dr. Updike concluded that Claimant is not totally disabled. "The video shows him walking and entering a vehicle without assistive devices. He appears that he can do most activities of daily functioning without much problem. Not only is he not disabled, he appears quite able to work modified duty jobs." Additionally, Dr. Updike clarified his opinion regarding the CRPS. He concluded that Claimant does not meet the Colorado Treatment Guideline criteria. Regarding clinical findings, Dr. Updike wrote, "In summary, the lack of confirmatory objective results, the lack of convincing clinical symptoms and the doubts of the experts Dr. Bernton and Dr. Ginsburg caused me

to doubt a CRPS diagnosis. Finally, after watching the video of Mr. Siyam limp as he walked out of my office, and then later casually walk under surveillance convinced me there is symptom magnification present. I no longer believe CRPS is present." Finally, with regards to Claimant's lumbar back complaints, Dr. Updike confirmed he did not believe Claimant's back pain relates to the industrial injury. "I have NOT seen leg injuries lead to long term back impairment nor disability. Even if the leg does not fully recover, the body adapts to the new normal of a patient's gait pattern." Regarding Claimant's exaggerated symptomology, Dr. Updike wrote, "Yes, his pain complaints are out of proportion to his anatomical findings, and the modest mechanism of injury. In my clinic he walks with quite a limp. He walks far more comfortably in the surveillance video than I have ever seen in clinic." (Respondent's Exhibit JJJJ)

75. On August 15, 2018, Dr. Wakeshima noted a normal gait pattern. Dr. Wakeshima discontinued the Lyrica and TENS unit and recommended that Claimant commence Cymbalta, and an H-wave unit. Additionally, he recommended that Claimant undergo the lumbar sympathetic nerve block. (Respondent's Exhibit LLLL)

76. On September 5, 2018, Claimant underwent the left lumbar sympathetic nerve block. Prior to the nerve block, Claimant described a pain level of 7/10. Two hours after the procedure, Claimant described a pain level of 3-5. Four hours after, a level of 4, and then thereafter it continued to rise. Over the next few days, Claimant's pain levels ranged from 3/10 to a 7/10. In the four days following the injection, Claimant did not perform any activities. (Respondent's Exhibit MMMM)

77. On September 12, 2018, Claimant followed up with Dr. Wakeshima. Claimant reported a current pain level of 4/10. Dr. Wakeshima noted that Claimant's pre-injection level was 7/10. Accordingly, Dr. Wakeshima believed the sympathetic nerve block was successful and demonstrated CRPS. During the same evaluation, Dr. Wakeshima continued Claimant on Cymbalta. (Respondent's Exhibit NNNN)

78. On November 7, 2018, Claimant returned to Dr. Wakeshima, reporting "profound" benefit from the H-wave unit. Further, Claimant reported continuing to utilize Cymbalta with benefit. Nonetheless, Claimant still described a pain level of 6/10, only one level less than his pain prior to the injection. (Respondent's Exhibit RRRR)

79. On November 29, 2018, Dr. Wakeshima testified by evidentiary deposition. In his opinion, Claimant met the criteria for CRPS. He relied upon the stress thermogram study from November 2016, which showed findings consistent with CRPS. Additionally, Dr. Wakeshima interpreted the triple-phase bone scan report as positive for CRPS. He testified that the Colorado Medical Treatment Guidelines required two positive diagnostic criteria for a diagnosis. Regarding functional impairment in the lumbar spine, Dr. Wakeshima noted that during his examinations Claimant's gait was normal. (Depo of Dr. Wakeshima, p. 18)

80. During cross-examination, Dr. Wakeshima conceded that the Colorado Medical Treatment Guidelines include both diagnostic and clinical criteria. (Depo of Dr. Wakeshima, p. 20) Dr. Wakeshima conceded that multiple physicians, including

the DIME physician, Dr. Updike, and Dr. Bernton, concluded that Claimant did not meet the clinical criteria for CRPS. (Depo of Dr. Wakeshima, pp. 21-22) Dr. Wakeshima noted that in his opinion he could not say that the DIME physician was incorrect in his conclusion. (Depo of Dr. Wakeshima, p. 23)

81. Regarding sympathetic nerve blocks, Dr. Wakeshima is not supportive of this procedure as a diagnostic tool. (Depo of Dr. Wakeshima, p. 37) "It's very subjective, yes. And that's why in treatment guidelines they have it up to 50 percent because it can – it can fluctuate on that." Notwithstanding the Medical Treatment Guidelines requiring two sympathetic nerve blocks within a 14-day period, Dr. Wakeshima did not perform a second sympathetic nerve block. (Depo of Dr. Wakeshima, p. 37)

82. To the extent Claimant reported improvement in September 2018, Dr. Wakeshima conceded that the switch to Cymbalta and H-wave unit may have improved Claimant's condition, as opposed to the sympathetic nerve block. (Depo of Dr. Wakeshima, pp. 39-40) Throughout the course of his testimony, Dr. Wakeshima did not offer an opinion as to whether Claimant sustained functional impairment to a body part not listed on the schedule of disabilities. Additionally, Dr. Wakeshima did not testify that the DIME physician clearly erred with regards to his opinion that Claimant did not sustain permanent impairment in relation to CRPS. Finally, Dr. Wakeshima did not address whether Claimant was unable to earn wages as a result of the work injury.

83. The matter proceeded to hearing on January 4, 2019. Claimant's wife testified. She indicated that Claimant does not perform the same physical activities now as before the work injury. She observes Claimant elevating his leg every day in order to alleviate the pain. Claimant can no longer drive for long periods of time but can do small trips such as take their children to school or drive to the grocery store. She advised they are attempting to sell their home to purchase new living arrangements without a set of stairs.

84. Claimant testified at hearing. Claimant attended Emily Griffith in 1995, where he learned English. He then began working at a car dealership. He worked there for approximately a year and then began employment at a Diamond Shamrock gas station. Claimant is a native Arabic speaker but was able to learn English. It should be noted that Claimant testified at hearing without the assistance of an interpreter. Further, there is no indication in the medical records that Claimant had any difficulty communicating in English with his treating physicians.

85. Claimant testified that after the two surgeries he began experiencing low back pain once he utilized a CAM boot. (Hearing Tr. p. 87) Claimant stated that there are a number of activities he can no longer do, including driving long distances or physical activities. Claimant testified that he experiences pain in his leg which is aggravated by the cold and only alleviated by elevation. Additionally, he experiences difficulty sleeping at night due to the pain.

86. During cross-examination, Claimant confirmed that prior to his injury performed all of the essential functions at his job. (Hearing Tr. p. 111) The essential duties are listed in Respondent's Exhibit YYYY. Claimant confirmed that after his injury he

was separated due to RTD's policy. (Hearing Tr. p. 111) Further, Claimant conceded he did not reapply for any positions at RTD. (Hearing Tr. p. 112) Claimant testified he applied to numerous positions. However, the vast majority of positions Claimant applied included commercial driving jobs. (Hearing Tr. p. 114) Claimant confirmed on the job applications that he spoke English. (Hearing Tr. p. 114)

87. During cross-examination, Claimant confirmed that his functional impairment is limited based upon his knee and ankle. (Hearing Tr. pp. 116-118)

88. During the hearing, Claimant exhibited numerous pain behaviors, which included elevating his left leg and resting it on a chair during the hearing.

89. Donna Ferris, vocational expert, submitted both a vocational report and testified at hearing. Ms. Ferris' conclusion, based upon the work restrictions provided by the authorized treating physicians, the employment records, her interview with the Claimant, and her job survey, is that Claimant maintains the ability to earn wages. Ms. Ferris identified numerous full- and part-time cashier positions including parking garages, casual fast food restaurants, car washes, and entertainment venues. She noted these positions were well within the Claimant's physical abilities as well as providing the ability for position changes. Additionally, she identified numerous full and part-time driving and light delivery positions which did not require a commercial driver's license. These driving positions included transporting vehicles for auto rental agencies, moving vehicles within auto rental agencies, picking up and delivering auto dealership service customers, and driving vehicles for a vehicle repair company. Delivery positions included local deliveries for a dental lab, takeout orders for fast food restaurants and newspaper deliveries. Additionally, Ms. Ferris identified a part-time school crossing guard position along with a part-time production position with a tea manufacturer. (Respondent's Exhibit WWWW) During her hearing testimony, Ms. Ferris testified she found Claimant articulate and very engaging. She reviewed notes that Claimant had brought to their meeting and found them well organized. (Hearing Tr. pp. 176-177) Ms. Ferris discussed the appropriate permanent work restriction. She persuasively testified that the ATP assigned a work restriction of 20 pounds lifting. She noted that Claimant's vocational expert, Joe Blythe, who did not testify at hearing, relied upon work restrictions which predated MMI. In her review, utilizing temporary work restrictions for purposes of determining a claimant's permanent ability to earn wages would be inappropriate. Additionally, she commented that aside from using the temporary work restrictions, Mr. Blythe relied upon restrictions assigned by Claimant's expert. In summary, Ms. Ferris credibly testified that the appropriate work restrictions to rely upon would be those assigned by the authorized treating physician. In this case, Ms. Ferris testified that there were numerous jobs available within those work restrictions.

90. Dr. Updike testified by evidentiary deposition. Dr. Updike testified that he assigned a permanent restriction of no lifting over 20 pounds. (Depo of Dr. Updike, p. 6) Additionally, while he has continued to see Claimant post-MMI, the permanent restrictions have not changed. (Depo of Dr. Updike, p. 6) Dr. Updike explained that a permanent restriction differs from a temporary restriction in that for

permanency he assigns the restriction that is medically necessary to prevent damage or worsening pain. (Depo of Dr. Updike, p. 8) Here, the 20-pound lifting restriction was sufficient to protect Claimant from injury or worsening. (Depo of Dr. Updike, p. 8) Dr. Updike confirmed that Claimant did not require any additional restrictions, such as elevation and/or positional changes. (Depo of Dr. Updike, p. 9) Dr. Updike confirmed that Claimant maintains the physical ability to earn wages. (Depo of Dr. Updike, p. 11)

91. Regarding Claimant's lumbar spine complaints, Dr. Updike confirmed his opinion that the lumbar pain does not relate to the industrial injury. Dr. Updike's opinion is based on his history as an occupational physician, along with medical research. (Depo of Dr. Updike, p. 12) In his experience, he has not observed permanent anatomical change from a limping gait. (Depo of Dr. Updike, p. 12) In the present case, Dr. Updike explained that he sent Claimant to Dr. Castro due to the "nature of the claim." (Depo of Dr. Updike, p. 13) Ultimately, based on his review of the medical records, his experience with Claimant as the treating physician, and viewing of the surveillance video, Dr. Updike persuasively testified that Claimant's lumbar complaints do not relate to the industrial injury. Additionally, he noted that Claimant showed signs of symptom magnification. (Depo of Dr. Updike, p. 14) "So if we cannot find an anatomic or physiologic explanation for the pain, then that is a concern. What I find most -- for me, most helpful in determining symptom magnification is surveillance because the anatomy and physiology does not change inside my clinic versus outside the clinic, but one's pain tolerance and motivation can. So when I saw him walking more comfortably, I was much more confident that there is a layer of symptom magnification. I do believe there is real pain there also." (Depo of Dr. Updike, p. 15) However, Dr. Updike clarified that the pain relates to Claimant's knee and ankle. (Depo of Dr. Updike, p. 15) But, he also testified that Claimant presented with "much more dramatic limping when he is in my office" compared to what was seen on the surveillance video. (Depo of Updike, p. 10.)

92. Regarding functional impairment, Dr. Updike testified:

> After seeing the video of him walking with a bit of a limp, what I saw outside was appropriate for somebody with a surgical knee and surgical ankle, and that was more what I would have expected. So I don't feel that the back is contributing to his limits of impairing his ADLs. (Depo of Dr. Updike, p. 15)

93. Counsel for Claimant examined Dr. Updike regarding the diagnosis of CRPS. Dr. Updike testified that he was not an expert on CRPS and would instead rely upon the opinions of Drs. Bernton, Ginsburg, and Wakeshima. (Depo of Dr. Updike, p. 26) With regards to CRPS, though, Dr. Updike noted that examination of Claimant's lower extremity did not consistently show signs of CRPS. (Depo of Dr. Updike, pp. 29-30)

94. The ALJ finds that Dr. Updike's testimony is consistent with the medical record and the evidence submitted at hearing, which includes the surveillance video of Claimant. Therefore, the ALJ finds Dr. Updike's testimony regarding Claimant's

restrictions, symptom magnification, and the extent of Claimant's work injury to be credible and persuasive.

95. On January 18, 2018, Dr. Mark Failinger testified by evidentiary deposition. Dr. Failinger is an expert in orthopedic surgery. Dr. Failinger testified that Claimant's subjective complaints did not match up with the objective findings. (Depo of Dr. Failinger, p. 7) Additionally, he agreed with Dr. Updike's assignment of a 20-pound lifting restriction. (Depo of Dr. Failinger, p. 8) Regarding Claimant's lumbar pain, Dr. Failinger did not believe that Claimant's current symptoms relate to the industrial injury. (Depo of Dr. Failinger, p. 11)

> There is not a lot of medical rationale that someone would have permanent back problems by wearing a boot that weighs a couple pounds at most." (Depo of Dr. Failinger, p. 11)
>
> So it is a long way of saying it wouldn't be a -- in my experience, a great medical rationale for developing any significant or permanent low back problems wearing a boot for several months like he did." (Depo of Dr. Failinger, p. 12)

Dr. Failinger credibly and persuasively testified that Claimant did not sustain functional impairment to a body part beyond the lower extremity. (Depo of Dr. Failinger, p. 13) Dr. Failinger discussed CRPS. He noted that there were inconsistent clinical findings with regards to such a diagnosis. (Depo of Dr. Failinger, pp. 13-14)

96. The ALJ finds Dr. Failinger's opinions in his report and testimony to be credible and persuasive since they are supported by the medical record and consistent with Dr. Ginsburg's testimony, the Division Examiner.

97. On January 31, 2019, the parties took the evidentiary deposition of the DIME physician, Dr. Ginsburg. At the time of the evidentiary deposition, Dr. Ginsburg had received supplemental records up through the date of the hearing, along with the surveillance video. Dr. Ginsburg conceded that at the time of his initial DIME report, he did not have a copy of Dr. Wakeshima's impairment report. However, he testified that such a report would not be something that he would usually rely upon in forming his opinion. (Depo of Dr. Ginsburg, p. 5) Dr. Ginsburg testified that the medical records did not reveal consistency regarding the Claimant's clinical presentations over the course of the claim. (Depo of Dr. Ginsburg, p. 19) Regarding the video surveillance, Dr. Ginsburg indicated that it was very persuasive. (Depo of Dr. Ginsburg, p. 21) He reconfirmed his opinion that Claimant does not suffer from CRPS and consequently a permanent impairment rating for that condition is not required. (Depo of Dr. Ginsburg, p. 22) Additionally, regarding his impairment rating, Dr. Ginsburg clarified that the reason he extended his rating out to a whole person was due to instructions based on the Level II training and the AMA Guides, Third Edition Revised. (Depo of Dr. Ginsburg, pp. 24-25) Finally, he agreed with Drs. Updike and Failinger that Claimant's lumbar pain did not relate to the industrial injury. (Depo of Dr. Ginsburg, p. 26)

98. Dr. Ginsburg also testified as to his assessment of the surveillance video of Claimant. Dr. Ginsburg testified that there is a dramatic difference between how Claimant presented at the DIME appointment and to his medical providers compared to what he saw on the surveillance video. Dr. Ginsburg testified that:

> Parenthetically, I might say that oftentimes we're shown videos. And my response is, So what? It doesn't prove one thing or another. It doesn't prove anything. There are some -- maybe three times in many years where I'm given a video and I go, Oh, wow, that is significant. The guy who said he couldn't walk and taught tennis. And you saw him teaching tennis. That was an example. This is another example. If he hadn't said he can't walk more than 10 feet or stay in the car more than a certain amount of time, and then it shows him walking normally in flip-flops, doing various tasks, getting into a vehicle and so forth, I wouldn't make a big deal out of it. But it's contradictory to his assertion of how bad the pain is. (Depo of Dr. Ginsburg p. 21.)

99. Dr. Ginsburg also testified that the testing performed to assist in making a diagnosis of CRPS was equivocal and ambiguous. He testified that when he performed the DIME, he concluded Claimant did not have CRPS based on the medical record, his physical examination, and other factors such as Claimant alleging he suffers from consistent and unrelenting pain but yet he was not taking his pain medication.

100. After reviewing all of the evidence, Dr. Ginsburg again concluded that a diagnosis of CRPS "just doesn't make any sense." (Depo of Dr. Ginsburg p. 22-23.)

101. In summarizing his assessment of the video and the contrast between Claimant's contention regarding the extent of his pain and disability due to his work injury and what Dr. Ginsburg observed as a physician, he said:

> I have to tell you, I've been shown many videos, and my usual response is, so what? You can't analyze somebody walking from the supermarket to the car. I don't buy that. ***But in this case, it was impressive*.** (Emphasis added.) (Depo of Dr. Ginsburg p. 23.)

102. The ALJ finds Dr. Ginsburg's opinions to be credible and persuasive. Dr. Ginsburg's opinions are consistent with the medical record as well as the opinions of Drs. Failinger and Updike.

103. The ALJ is left with the same impression as Dr. Ginsburg after viewing the surveillance video of Claimant. Claimant presented in court with numerous pain behaviors. This included elevating his left leg on a chair throughout the hearing and exhibiting additional mannerisms and pain behaviors which were intended to convey a state of being in pain and being disabled. However, the mannerisms and pain behaviors exhibited by Claimant during the hearing were completely absent from what was captured during the surveillance. The ALJ finds and concludes that

Claimant's representations as to the extent of his pain, the cause of his pain, the extent of his disability and the extent of his restrictions are not credible or reliable.

Penalty Issues

Dictation of Medical Care

104. In Dr. Wakeshima's report dated January 24, 2018 (Respondent's Exhibit XXX), Dr. Wakeshima wrote: "I did have my medical assistant contact the adjuster and Dr. Updike's office and was informed that the lumbar spine is not authorized for evaluation treatment under his workers' compensation claim and therefore the lumbar spine is not to be rated on the impairment rating. Therefore the impairment rating was not accomplished for the lumbar spine." (Respondent's Exhibits, pp. 277-78) Additionally, under assessment, Dr. Wakeshima wrote: "Upon receiving information from the adjuster, the lumbar spine is not authorized for treatment as related to his workers' compensation claim and therefore also not authorized for impairment rating." Respondent's Exhibits, p. 276) Finally, under chronic pain, Dr. Wakeshima wrote: "I therefore had my medical assistant contact both Dr. Updike and the adjuster's office and they both confirmed that the lumbar spine is not work related and therefore would not warrant an impairment rating as related to his work injury of 11/2/16." (Respondent's Exhibits, p. 277)

105. During his evidentiary deposition, Dr. Wakeshima did not address Claimant's allegation that the adjuster dictated that he not rate the lumbar spine. Additionally, Claimant did not present evidence in the form of Dr. Wakeshima's "medical assistant" with regards to the allegation of dictation of care.

106. At hearing, Christina Giles testified. Ms. Giles is the adjuster for RTD and handled Claimant's workers' compensation claim. Ms. Giles testified that Dr. Updike contacted her office to request a referral to Dr. Wakeshima to perform the impairment rating. Ms. Giles approved the referral. She testified she did not have any conversations with Dr. Wakeshima or his medical assistant regarding the scope of the impairment ratings. Ms. Giles testified that in the 11 years she has worked with RTD, she had never spoken to Dr. Wakeshima directly. When asked what her general practice was with regards to speaking with physicians and advising them what is and is not related to the claim, Ms. Giles responded:

> Ultimately, I would have allowed that to be Dr. Updike's decision. He is the ATP. If he is referring for the impairment rating, I anticipate he would ask what he wants for the impairment rating. We just - - whatever they rate, we would then file our FA according to the body part that we have accepted. But we wouldn't tell them what they can or can't do. (Hearing Tr., pp. 154-55)

Additionally, Ms. Giles testified that prior to hearing she reviewed her adjuster notes and confirmed that no reference existed with regards to any conversation with Dr. Wakeshima or Dr. Wakeshima's medical assistant.

107. The evidence presented by Claimant with regards to dictation of care or degree of impairment is neither credited nor found persuasive. In Dr. Wakeshima's report, he references a conversation with both the adjuster and Dr. Updike. It is difficult to discern whether Dr. Wakeshima's interpretation with regards to ratable body parts could just as well have come from Dr. Updike as opposed to the adjuster. Additionally, the reference in Dr. Wakeshima's report is based upon a conversation his medical assistant had with an additional person. Essentially, this is hearsay within hearsay. Claimant did not present the testimony of the medical assistant to further clarify this issue. Lastly, Ms. Giles persuasively and credibly testified that she did not have any conversations with Dr. Wakeshima's office regarding this issue. Finally, Ms. Giles persuasively and credibly testified that her general practice was to not dictate to the physicians what body parts to rate.

108. Accordingly, it is hereby found that there is insufficient credible, reliable, and persuasive evidence to establish that the adjuster dictated to Dr. Wakeshima the degree of impairment to provide Claimant in violation of 8-43-503(3).

Late Indemnity Payments

Failure to Plead Penalties with Specificity

109. Pursuant to Section 8-43-304(4), when a party files an application for hearing to seek a penalty, they must "state with specificity the grounds on which the penalty is being asserted." In addition, Section 8-43-211(2)(b) requires a request for hearing to be filed by using forms provided by the Office of Administrative Courts. Consistent with the statutory requirement to state with specificity the grounds on which each penalty is being asserted, the Application for Hearing form provided by the Office of Administrative Courts provides the following instructions:

> Penalties: Describe with specificity the grounds on which a penalty is asserted, including the order, rule or section of the statute allegedly violated, and the dates on which you claim the violation began and ended.
>
> (Attach additional pages as needed)

110. Claimant did not state with specificity the basis of his penalty allegations as required by the Act. Instead, Claimant cited merely a portion of the relevant rule regarding the payment of TTD and then failed to specify which TTD payments were late and how late. Claimant merely asserted Respondent violated the act by the late payment of TTD, TPD, and PPD. And, instead of providing any specificity regarding which payment were late and how late, Claimant merely asserted that the Respondent has access to the information and therefore the Respondent can figure out any penalty claims on their own.

On his Application, Claimant merely stated the following:

> WCRP 5-6 (B) provides in part "…Temporary total disability benefits are payable at least once every two weeks".

. . .

> Respondents did not make timely payment of TTD, TPD or PPD on multiple occasions in violation of Rules and Act. Specific dates are within Respondents' knowledge and reflected on indemnity checks.

111. Moreover, Claimant did not cite the rule that governs the payment of PPD benefits. Thus, Claimant also failed to state with sufficient specificity any penalty regarding the late payment of PPD benefits.

112. Therefore, Claimant failed to state with specificity the grounds on which each penalty regarding the late payment of indemnity benefits was being asserted.

113. At hearing, and in his post hearing submission, Claimant's lack of specificity continued. Claimant appears to argue that each TTD payment was due exactly two weeks from the prior payment - even if the prior payment was early. Under this theory, Claimant alleged Respondent was 37 days late in paying various TTD and PPD benefits.

114. Claimant, however, failed to cite WCRP 5-6 (B) in its entirety, and the missing portion of the rule undercuts his position. The rule provides that TTD benefits are payable at least once every two weeks based on the date of the admission. W.C.R.P. 5-6 (B) provides:

> Temporary disability benefits awarded by admission are due on the date of the admission and the initial payment shall be paid so that the claimant receives the benefits not later than five (5) calendar days after the date of the admission. Temporary total disability benefits are payable at least once every two weeks thereafter ***from the date of the admission***. (Emphasis added.)

115. Therefore, once an admission is filed for temporary total disability benefits, a check for TTD must be issued at least once during each two-week period. Moreover, the date by when each subsequent TTD check is due, before being late, is based on the date of the admission. The due date is not modified based on the date of each prior check.

Lack of Admission of Liability

116. Moreover, the record before the ALJ does not contain the relevant General Admission(s) of liability. Although the relevant General Admission of Liability admission might not be necessary to support Claimant's argument and theory, the relevant General Admission – with the date it was filed - is necessary for the ALJ determine the due date for each TTD payment at issue pursuant to W.C.R.P. 5-6 (B).

Penalties are not assessed on a strict liability standard.

117. Claimant takes the position that the imposition of penalties is mandatory if an indemnity payment is late. However, penalties under § 8-43-304(1) are not imposed on a strict liability standard. *See Cruz v. Sacramento Drilling, Inc*., W.C. No. 4-999-129-04, (July 28, 2017).

118. Once a claim for penalties is properly plead, the imposition of penalties under § 8-43-304(1) is a two-step process. The ALJ must first determine whether the disputed conduct constituted a violation of the Workers' Compensation Act, of a duty lawfully enjoined, or of an order. If the ALJ finds such a violation, he may impose penalties if he also finds that the actions were objectively unreasonable. *City Market v. ICAO*, 68 P.3d 601 (Colo. App. 2003); see also *Jimenez v. ICAO*, 107 P.3d 965, 967 (Colo. App. 2003) (reasonableness of conduct in defense of penalty claim is predicated on rational argument based in law or fact).

Claimant must prove by clear and convincing evidence Respondent knew or reasonably should have known they were in violation of the Act or Rule.

119. However, once a party files an application for hearing for a penalty pursuant to subsection § 8-43-304(1), with the requisite specificity of the violations asserted, the alleged violator shall have twenty days to cure the violation. If the violator cures the violation within such twenty-day period, and the party seeking a penalty fails to prove by clear and convincing evidence that the alleged violator knew or reasonably should have known such person was in violation, no penalty shall be assessed. *See* § 8-43-304(4), C.R.S.

120. By the time Claimant filed his application for hearing and asserted a penalty for the late payment of indemnity benefits, the indemnity benefits at issue had been paid. Thus, Respondent had cured any violations. Therefore, Claimant had to establish by clear and convincing evidence that Respondent knew or reasonably should have known they were in violation of the act.

121. Claimant's claim for penalties is based on his contention that certain indemnity benefits were late. Claimant argues that each TTD payment was due exactly two weeks from the prior payment - even if the prior payment was early. Claimant contends his interpretation is based on the unambiguous langue of Rule 5-6.

122. Ms. Giles, the adjuster, testified that it was her understanding of the Workers' Compensation Rule of Procedure that a TTD check shall be issued every two weeks and that the "two weeks" referenced by the rule refers to the indemnity period. Accordingly, so long as the indemnity check for the two-week period is issued on or before the last day of the indemnity period, the adjuster believed she met the applicable rules as the indemnity check has been issued every two weeks.

123. Therefore, the adjuster thought that benefits were timely if they were paid during the period for which they were compensating Claimant. For example, on July 20, 2017, Respondent issued a TTD check for $1,183.98 for the period of July 16, 2017 through July 29, 2017. The ALJ notes that this check was issued only 7 days after the previous TTD check. The check for the next TTD period, July 30, 2017 through August 12, 2017, was issued on August 10, 2017. The number of days between the July 20, 2017 check and the August 10, 2017 check equals 20 days. However, the TTD check issued August 10, 2017 was issued within the TTD period, July 30, 2017 to August 12, 2017.

124. The fact that Claimant is seeking an interpretation that is different from the adjuster's, and the interpretation of each party is different from the ALJ's interpretation, lends support to a finding that Claimant has failed to meet his burden of proof, i.e., that the adjuster's actions were objectively unreasonable. In other words, Claimant's contention as to how to calculate the due date for each TTD payment is inconsistent with the plain language of W.C.R.P. 5-6 (B). Therefore, the adjuster's failure to pay TTD pursuant to Claimant's theory cannot be found to be objectively unreasonable.

125. The adjuster also testified that when Claimant was terminated from employment, he was no longer in Respondent's payroll system from which TTD checks were being issued automatically. Therefore, once she was made aware of the problem, she promptly corrected the issue and began issuing ongoing TTD payments out of a different payment system. She testified that the payroll system would not allow a check for TTD or wages to be issued to someone who is not a current employee. The adjuster characterized the payment system as a bit archaic. However, merely describing a system as a bit archaic does not mean the system – by definition – is objectively unreasonable. There was no credible and persuasive evidence submitted which demonstrated what archaic meant and that such system was not reasonable under the circumstances for the payment of indemnity benefits by a self-insured Employer like Respondent.

126. Due to the foregoing reasons, the ALJ finds and concludes that Claimant has failed to establish that he is entitled to penalties regarding the payment of indemnity benefits.

CONCLUSIONS OF LAW

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

General Provisions

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

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

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

I. Whether Claimant has established by a preponderance of the evidence that he is permanently and totally disabled.

Pursuant to § 8-40-201(16.5)(a), C.R.S., a claimant is entitled to PTD benefits if he is "unable to earn any wages in the same or other employment." Section 8-40-201(16.5)(a), C.R.S. places the burden of proof on the claimant to establish by a preponderance of the evidence that he is permanently and totally disabled. The overall objective is to determine whether employment is reasonably available to the claimant under his particular circumstances. In making this determination, the ALJ may consider the effects of the industrial injury in light of the claimant's human factors. These factors may include the claimant's physical condition, mental ability, age, employment history, education and the availability of work the claimant can perform. *Weld County School District RE-12 v. Bynes*, 955 P.2d 550 (Colo 1998).

Here, the evidence establishes that Claimant maintains the ability to earn wages. This ALJ found that the ATP assigned a 20-pound lifting restriction, with no other limitations. While Claimant testified that other restrictions apply, such as elevating his leg and changing positions, Dr. Updike persuasively testified that those limitations were subjective and not necessary to protect Claimant from further injury. Dr. Failinger agreed that a 20-pound lifting restriction would be appropriate.

Based on this restriction, Ms. Ferris persuasively testified that Claimant maintained the ability to earn wages. She identified numerous available positions in the Denver area that Claimant could safely perform. Claimant's expert, Joe Blythe, is not credited as he based his analysis on temporary work restrictions, which do not reflect Claimant's permanent condition.

In addition, as found, Drs. Updike and Failinger persuasively testified that Claimant maintained the physical ability to perform physical work activities that are necessary to earn wages.

Dr. Ginsburg, the DIME physician, testified that Claimant's presentation on the surveillance video was impressive. The ALJ is left with the same impression when comparing Claimant's presentation as set forth in the medical records and during the hearing when compared to what is demonstrated on the surveillance video. The ALJ finds and concludes that Claimant's representations as to the extent of his pain and disability is neither credible nor reliable.

Claimant failed to prove by a preponderance of the evidence that he is entitled to PTD benefits.

II. Permanent partial disability benefits.

(a) Whether Claimant has overcome the Division IME's opinion by clear and convincing evidence that Claimant does not have chronic regional pain syndrome (CRPS) and should be provided an impairment rating for such.

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

Here, Claimant contends the DIME physician erred by failing to assign a permanent impairment rating for CRPS. The DIME physician's opinion is that Claimant does not suffer from CRPS and is therefore not entitled to an impairment rating. As found, the DIME physician's opinion is supported by the opinions of Drs. Updike, Failinger and Bernton. Further, the DIME physician reviewed the entirety of the medical records, including the diagnostics, surveillance video, and the impairment report authored by Dr. Wakeshima. Additionally, the DIME physician specifically referenced the diagnostic criteria set forth for CRPS in the Colorado Medical Treatment Guidelines. He concluded that the medical records, including his physical examination of the Claimant, did not meet the applicable criteria. While Dr. Wakeshima opined differently, a mere difference of opinion is not sufficient to establish the DIME physician clearly erred.

The ALJ finds and concludes that Claimant failed to overcome the DIME physician's opinion regarding impairment.

(b) Whether Claimant has established by a preponderance of the evidence that he has suffered functional impairment, which is not on the schedule of disabilities and is entitled to a whole person impairment rating.

Scheduled and nonscheduled impairments are treated differently for purposes of determining permanent disability benefits. "Specifically, the procedures of subsection (8)(c), which state that the division-sponsored independent medical examination finding as to permanent impairment can be overcome only by clear and convincing evidence and that such finding is a prerequisite to a hearing on permanent impairment, are applicable only to nonscheduled impairments." *Delaney v. Indus. Claim Appeals Office*, 30 P.3d 691 (Colo. App. 2000). Therefore, Claimant bears the burden of proving entitlement to benefits by a preponderance of the evidence. *Younger v. City and County of Denver*, 810 P.2d 647 (Colo. 1991).

"Whether claimant has suffered a functional impairment that is listed in the schedule of disabilities is a factual question to be resolved by the administrative law judge." *Strauch v. PSL Swedish Healthcare Sys*., 917 P.2d 366 (Colo. App. 1996); Delaney v. Indus. Claim Appeals Office, 30 P.3d 691 (Colo. App. 2000); *Kolar v. Indus. Claim Appeals Office*, 122 P.3d 1075 (Colo. App. 2005).

Here, Claimant contends the lower extremity rating should be converted to whole person because he sustained functional impairment to a body part not listed on the schedule of disability. Specifically, Claimant contends that beginning with his placement in a CAM boot he began experiences lumbar symptoms necessitating an MRI, chiropractic treatment, physical therapy, and a surgical evaluation. Further, Claimant contends his "altered gait" contributed to his symptoms. These lumbar symptoms, Claimant argues, have resulted in functional impairment.

First, the mere fact Claimant complains of lumbar symptoms does not result in conversion as the lumbar symptoms must relate to the industrial injury (i.e. the ankle/knee injuries). Here, Drs. Updike and Failinger specifically opined that Claimant's lumbar complaints did not relate to the industrial injury. Both physicians disagreed with the suggestion that a CAM boot would result in lumbar symptoms. Further, neither physician credited Claimant's suggestion that "altered gait" caused the problems. Rather, based on the opinion of Dr. Castro, the physicians concluded Claimant suffers from degenerative disc disease, unrelated to the industrial injury.

Second, as pointed out by Drs. Updike and Ginsburg, the surveillance video shows Claimant walking relatively normally, as opposed to the exaggerated gait displayed during medical visits. Accordingly, Claimant's descriptions of his gait and relationship to the alleged lumbar symptoms are not credited.

Third, Claimant failed to credibly testify that his lumbar pain resulted in any functional impairment. During the course of his testimony, Claimant testified as to all the activities he could no longer perform due the work injury. However, during cross-

examination, Claimant conceded these activities were limited due to his lower extremity injury, not lumbar pain.

Fourth, Claimant argues that because the DIME physician converted the scheduled rating to whole person, the DIME essentially opined Claimant's rating should be whole person. This is incorrect. The DIME physician testified that the AMA Guides and Colorado Division of Workers' Compensation Level II training instruct rating physicians to take all ratings up to whole person. This exercise is not related to a determination of "functional impairment." Further, the DIME physician testified that Claimant's lumbar symptoms did not relate to the industrial injury.

The ALJ finds and concludes Claimant failed to prove by a preponderance of the evidence that he sustained functional impairment to a body part not listed on the schedule of disabilities.

III. Penalties

(a) Whether Respondent is subject to penalties for the late payment of temporary total disability benefits.

(b) Whether Respondent is subject to penalties for the late payment of permanent partial disability benefits.

General Penalties Provision and Standard

Section 8-43-304(1) allows an ALJ to impose penalties of up to $ 1000 per day against any party "who violates any provision of articles 40 to 47 of [Title 8], or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel, for which no penalty has been specifically provided, or fails, neglects, or refuses to obey any lawful order made by the director or panel or any judgment or decree made by any court." The failure to comply with a procedural rule has been determined to be a failure to obey an "order" and failure to perform a "duty lawfully enjoined" within the meaning of § 8-43-304(1); *Pioneers Hospital v. ICAO*, 114 P.3d 97,98 (Colo. App. 2005).

Failure to Plead Penalties with Specificity

Pursuant to Section 8-43-304(4), when a party files an application for hearing to seek a penalty, they must "state with specificity the grounds on which the penalty is being asserted." In addition, Section 8-43-211(2)(b) requires a request for hearing to be filed by using forms provided by the Office of Administrative Courts. Consistent with the statutory requirement to state with specificity the grounds on which each penalty is being asserted, the Application for Hearing form provided by the Office of Administrative Courts provides the following instructions:

> Penalties: Describe with specificity the grounds on which a penalty is asserted, including the order, rule or section of the

> statute allegedly violated, and the dates on which you claim the violation began and ended.
>
> (Attach additional pages as needed)

Claimant did not state with specificity the basis of his penalty allegations as required by the Act. Instead, Claimant cited merely a portion of the relevant rule regarding the payment of TTD and then failed to specify which TTD payments were late and how late. Claimant merely asserted Respondent violated the act by the late payment of TTD, TPD, and PPD - and since the Respondent has access to the information, the Respondent can figure out any penalty claims on their own.

On his Application, Claimant merely stated the following:

> WCRP 5-6 (B) provides in part "…Temporary total disability benefits are payable at least once every two weeks".
>
> . . .
>
> Respondents did not make timely payment of TTD, TPD or PPD on multiple occasions in violation of Rules and Act. Specific dates are within Respondents' knowledge and reflected on indemnity checks.

Moreover, Claimant did not cite the rule that governs the payment of PPD benefits. Therefore, Claimant failed to state with specificity his penalty claims relating the payment of indemnity benefits.

At hearing, and in his post hearing submission, Claimant's lack of specificity continued. Claimant appears to argue that each TTD payment was due exactly two weeks from the prior payment - even if the prior payment was early. Under this theory, Claimant alleged Respondents were 37 days late in paying various TTD and PPD benefits.

Claimant, however, failed to cite WCRP 5-6 (B) in its entirety, and the missing portion of the rule undercuts his position. The rule provides that TTD benefits are payable at least once every two weeks based on the date of the admission. W.C.R.P. 5-6 (B) provides:

> Temporary disability benefits awarded by admission are due on the date of the admission and the initial payment shall be paid so that the claimant receives the benefits not later than five (5) calendar days after the date of the admission. *Temporary total disability benefits are payable at least once every two weeks thereafter from the date of the admission*. (Emphasis added.)

Therefore, once an admission is filed for temporary total disability benefits, a check for TTD must be issued at least once during each two-week period. Moreover, the date by when each subsequent TTD check is due, before being late, is based on the date of the admission. The due date is not modified based on the date of each prior check.

Lack of an Admission(s) of Liability

Moreover, the record before the ALJ does not contain the relevant General Admission(s) of liability. Although the relevant General Admission of Liability admission might not be necessary to support Claimant's argument and theory, the relevant General Admission – with the date it was filed - is necessary for the ALJ determine the due date for each TTD payment at issue pursuant to W.C.R.P. 5-6 (B).

Penalties are not assessed on a strict liability standard.

Claimant takes the position that the imposition of penalties is mandatory if an indemnity payment is late. However, penalties under § 8-43-304(1) are not imposed on a strict liability standard. *See Cruz v. Sacramento Drilling, Inc*., W.C. No. 4-999-129-04, (July 28, 2017).

Once a claim for penalties is properly plead, the imposition of penalties under § 8-43-304(1) is a two-step process. The ALJ must first determine whether the disputed conduct constituted a violation of the Workers' Compensation Act, of a duty lawfully enjoined, or of an order. If the ALJ finds such a violation, he may impose penalties if he also finds that the actions were objectively unreasonable. *City Market v. ICAO*, 68 P.3d 601 (Colo. App. 2003); see also *Jimenez v. ICAO*, 107 P.3d 965, 967 (Colo. App. 2003) (reasonableness of conduct in defense of penalty claim is predicated on rational argument based in law or fact).

Claimant must prove by clear and convincing evidence Respondent knew or reasonably should have known they were in violation of the Act or Rule.

Moreover, once a party files an application for hearing for a penalty pursuant to subsection § 8-43-304(1), with the requisite specificity of the violations asserted, the alleged violator shall have twenty days to cure the violation. If the violator cures the violation within such twenty-day period, and the party seeking a penalty fails to prove by clear and convincing evidence that the alleged violator knew or reasonably should have known such person was in violation, no penalty shall be assessed. *See* § 8-43-304(4), C.R.S.

By the time Claimant filed his application for hearing and asserted a penalty for the late payment of indemnity benefits, the indemnity benefits at issue had been paid. Thus, the Respondent had cured any violations. Therefore, Claimant had to establish by clear and convincing evidence that Respondent knew or reasonably should have known they were in violation of the act.

Claimant's claim for penalties is based on his contention that certain indemnity benefits were late. Claimant argues that each TTD payment was due exactly two weeks from the prior payment - even if the prior payment was early. Claimant contends his interpretation is based on the unambiguous langue of Rule 5-6. The adjuster, however, contends she thought benefits are timely if paid within the period when disability benefits are due.

The adjuster testified that it was her understanding that benefits were timely if they were paid during the period for which they were compensating Claimant. For example, on July 20, 2017, Respondent issued a TTD check for $1,183.98 for the period of July 16, 2017 through July 29, 2017. The ALJ notes that this check was issued only 7 days after the previous TTD check. The check for the next TTD period, July 30, 2017 through August 12, 2017, was issued on August 10, 2017. The number of days between the July 20, 2017 check and the August 10, 2017 check equals 20 days. However, the TTD check issued August 10, 2017 was issued within the TTD period, July 30, 2017 to August 12, 2017.

The fact that Claimant is seeking an interpretation that is different from the adjuster's, and the interpretation of each party is different from the ALJ's interpretation, supports a finding that Claimant has failed to meet his burden of proof, i.e., that the adjuster's actions were unreasonable. More specifically, Claimant's contention as to how to calculate the due date for each TTD payment is inconsistent with the plain language of W.C.R.P. 5-6 (B). Therefore, the adjuster's failure to pay TTD pursuant to Claimant's theory, which the ALJ rejects, cannot be found to be objectively unreasonable.

The adjuster also testified when Claimant was terminated from employment, he was no longer in Respondent's payroll system from which TTD checks were being issued automatically. Therefore, once she was made aware of the problem, she promptly corrected the issue and began issuing ongoing TTD payments out of a different payment system. She testified that the payroll system would not allow a check for TTD or wages to be issued to someone who is not a current employee. The adjuster characterized the payment system as a bit archaic. However, merely describing a system as a bit archaic does not mean the system – by definition – is objectively unreasonable. There was no credible and persuasive evidence submitted which demonstrated what archaic meant and that such system was not reasonable under the circumstances for the payment of indemnity benefits by a self-insured Employer like Respondent.

Due to the foregoing reasons, the ALJ finds and concludes that Claimant has failed to establish that he is entitled to penalties. Claimant failed to state with specificity his penalty allegations regarding the payment of indemnity benefits with sufficient specificity. Such failure, in and of itself, is sufficient to deny Claimant's claims for penalties as it relates to the payment of indemnity benefits.

Moreover, even if Claimant had stated with sufficient specificity his penalty allegations, his Claims still fail due to a lack of sufficient evidence to establish Respondent should be subject to penalties. Claimant had to establish that certain payments were late, as well as how late. Claimant also had to establish by clear and convincing evidence that the late payments were due to objectively unreasonable conduct of Respondent. As found, Claimant failed to submit the relevant General Admission(s) of Liability which would set forth the date payments were due. In addition, Claimant failed to establish by clear and convincing evidence the requisite negligence of Respondent. The mere fact that a payment is late does not mean that penalties must be awarded. The law as it relates to penalties does not expect perfection in the management of claims. The fact that a payment is late, and cured before an Application is filed, cannot mandate the automatic imposition of penalty. As stated above, penalties are not imposed on a strict liability standard. Thus, the fact that a payment is late cannot be used to establish the requisite negligence, via a theory such as the doctrine of res ipsa loquitur – a tort theory

- because such theory or doctrine reverses the order of proof and is contrary to the standard of proof mandated by the statute when a penalty has been cured. As indicated above, once a penalty is cured, the burden of proof shifts to Claimant.

In this case, the adjuster testified that TTD was not timely when Claimant was no longer an employee and the automatic TTD payments which were being made out of Respondent's payroll account ceased, because payroll payments, which includes TTD, cannot be made to non-employees. She credible and persuasively testified that once she was advised of the problem, she immediately restarted payments out of a different account/system. Again, although the system was not perfect, Claimant failed to establish that such occurrence was objectively unreasonable. Moreover, Claimant failed to establish the actual due date of each TTD check at issue since the relevant General Admission(s) of Liability is/are not part of the record. Lastly, the ALJ rejects Claimant's theory that indemnity payments are due exactly two weeks from when the last payment was made.

Therefore, the ALJ finds and concludes that Claimant has failed to meet his burden of proof and establish that penalties should be imposed on Respondent regarding the payment of indemnity benefits.

(a) Whether Respondent is subject to penalties for dictating the type or duration of medical treatment or degree of physical impairment.

Section 8-43-503(3) provides: "Employers, insurers, claimants, or their representatives shall not dictate to any physician the type or duration of treatment or degree of physical impairment."

As found, Employer did not direct to Dr. Wakeshima the degree of physical impairment by prohibiting the rating of the lumbar spine. While Dr. Wakeshima's impairment report contains a statement that the adjuster directed him not to rate the lumbar spine, the report also implies that this direction came from Dr. Updike. Further, as found, the contact was purportedly made by Dr. Wakeshima's "medical assistant," who did not testify, and Dr. Wakeshima did not address this issue during his deposition. Finally, Ms. Giles credibly testified that she was the sole adjuster on this claim and did not direct Dr. Wakeshima regarding impairment.

Ultimately, the ALJ finds and concludes that Claimant failed to prove a violation of § 8-43-503(3) by a preponderance of the evidence.

ORDER

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

1. Claimant's request for PTD benefits is denied and dismissed.

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

3. Claimant's request for penalties is denied and dismissed.

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

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

DATED: April 18, 2019

/s/ Glen Goldman

_____

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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she suffered an occupational disease to the form of Hypersensitivity Pneumonitis (HP) that began on January 30, 2017 during the course and scope of her employment with Employer.

2. Whether Claimant has demonstrated by a preponderance of the evidence that she suffered an occupational disease to the form of an aggravation of her pre-existing pulmonary condition that began on January 30, 2017 during the course and scope of her employment with Employer.

3. Whether Claimant has proven by a preponderance of the evidence that she is entitled to receive reasonable, necessary and causally related medical benefits for her occupational disease.

STIPULATIONS

The parties agreed to the following:

1. Claimant earned an Average Weekly Wage (AWW) of $1,446.29 in 2017 and $1,548.01 in 2018.

2. If Claimant's claim is compensable, she is entitled to receive Temporary Total Disability (TTD) benefits for the periods January 30, 2017 through April 20, 2017 and February 6, 2018 through May 29, 2018.

FINDINGS OF FACT

1. Employer is a public school district in Colorado. Claimant is a 45-year old female who works for Employer as a teacher. She contends that she suffers from a lung disease known as Hypersensitivity Pneumonitis (HP) with a date of onset of January 30, 2017. Claimant alleges that her exposure to airborne mold in classroom 2698 at Powell Middle School caused her HP or aggravated her pre-existing pulmonary condition.

2. Claimant's medical records reveal a significant history of pulmonary issues prior to beginning work at Powell Middle School. The medical records document Claimant's condition prior to her date of disability. On February 10, 2012 Claimant presented to her physician at Kaiser Permanente complaining of chest tightness and sinus issues. She remarked that teaching was difficult because she had to get closer to students in order to hear them. The treating physician assessed Claimant with chronic sinusitis. During the visit Claimant and the physician "had a long discussion about chronic fatigue."

3. On March 10, 2012 Claimant returned to her personal physician at Kaiser. Her diagnoses included persistent asthma with an acute exacerbation and chronic sinusitis. Claimant reported asthma exacerbation for three days with wheezing, coughing and night sweats. The doctor noted that Claimant was "frustrated as has recurrent asthma exacerbations and chronic sinus congestions. Wonders if she needs admission for full testing or eval at National Jewish."

4. On March 12, 2012 Claimant engaged in an e-mail exchange with Kaiser physician Lane Fairbairn, D.O. Claimant recounted that she had inquired about one month earlier whether she should take a leave of absence from work. She noted that she recently had a "very bad scare with asthma" and had to miss work "today for it as well." Claimant explained that she had been reading about Chronic Fatigue "and it seems like that fits my cycle of illness for the past 2 years and 9 months." She inquired whether she qualified for leave.

5. Later on March 12, 2012 Claimant exchanged correspondence with Peter J. Cvietusa, M.D. at Kaiser. Claimant again requested the possibility of a referral to National Jewish Hospital. She wrote, "I almost always have a sinus infection then sometimes it gets to my chest and makes my asthma so bad. I have been very ill this Jan-March. I'm starting to worry that I need a leave of absence from my work. I want my life and health back. I'm so limited in what I used to be able to do."

6. On March 19, 2012 Claimant visited Allergist Richard Crockett, M.D. for an evaluation. Dr. Crockett noted that Claimant's symptoms and respiratory infections started in 2009. He remarked that Claimant had "jaw surgery for persistent staph infection of the bone, which probably started from a sinus infection." Claimant reported frequent bronchitis and "chronic fatigue since 2009, getting worse." Dr. Crockett reviewed a prior CT scan of Claimant's sinuses from November 2009 that showed "extensive inflammatory changes."

7. On May 6, 2013 Claimant underwent spirometry testing at National Jewish. The testing did not reveal airflow obstruction at baseline or any change in her FBC and FEV1 after receiving nebulized Albuterol.

8. Claimant subsequently left the country for one year to live and teach in Costa Rica. She testified that she had very little trouble with her asthma and sinusitis. Claimant returned to Colorado and began teaching at Powell Middle School for the 2014-15 school year.

9. On March 2, 2015 Claimant returned to Kaiser complaining of shortness of breath and asthma. She was diagnosed with acute exacerbation of moderate, persistent asthma. Claimant complained of cough and dyspnea for the previous few days. She expressed concern about "missing more work" and wanted to ensure she could return to the classroom as soon as possible.

10. Claimant returned to her medical providers during the following year for continuing treatment of her chronic sinusitis and asthma symptoms. During the summer

months of 2015 Claimant visited her physicians on numerous occasions including June 8, 2015, July 12, 2015, July 20, 2015, July 21, 2015 and July 31, 2015. On July 21, 2015 Claimant presented with a chief complaint of "fatigue." She underwent a chest scan to address her concern regarding Churg-Strauss disease. The scan reflected that Claimant's "lungs and plural spaces are clear. The cardiac silhouettes and pulmonary vessels are within normal limits."

11. On October 29, 2016 Claimant visited Joseph Peila, M.D. at Kaiser for an evaluation. Dr. Peila diagnosed Claimant with moderate persistent asthma and chronic sinusitis. She had just traveled for a school trip to Washington, DC and developed worsening symptoms that included a productive cough, sinus pressure and increased discharge. Dr. Peila instructed Claimant to take prednisone as directed and use a nebulizer every 4-6 hours.

12. On January 3, 2017 Claimant suffered from an especially severe bout of asthma and chronic sinusitis symptoms while spending the weekend in the mountains with her family. She thus sought treatment at Fraser Medical Clinic in Winter Park, Colorado. After a brief examination, the providers at Fraser Medical Clinic diagnosed Claimant with High Altitude Pulmonary Edema ("HAPE"). However, Claimant's treating physicians subsequently ruled out the diagnosis.

13. On January 10, 2017 Claimant left a message for Dr. Cvietusa advising that her asthma had flared and she woke up the previous night unable to breathe. She remarked that "I don't understand why I am not controlling the asthma well. Very frustrated and feeling limited in what I can do."

14. On January 12, 2017 Claimant returned to Dr. Cvietusa to discuss her asthma and allergies. Claimant reported that her asthma was not well controlled and her quality of life was poor. Dr. Cvietusa commented that she "[f]eels she's not breathing right, that she constantly gets sick and/or has asthma flares, particularly in the winter. Less so in the summer." Additionally, Claimant advised that "she has had a bad quality of life for years now. Mostly poorly controlled asthma. Sinus disease better." Claimant informed Dr. Cvietusa that she would be speaking with her principal about taking a leave of absence from school. In commenting on spirometry testing Dr. Cvietusa noted, "[m]ore striking is the steady decline in both her FEV1 and FVC, while maintaining a stable ratio, suggesting restriction with increasing weight gain." He diagnosed Claimant with persistent asthma, obesity and rhinitis. Dr. Cvietusa summarized that Claimant's asthma was not well controlled and her condition was "somewhat related to her weight."

15. Claimant took a leave of absence from her job as a teacher at Powell Middle School from January 30, 2017 to April 20, 2017. She asserts that January 30, 2017 was the date of onset for either the occupational disease of Hypersensitivity Pneumonitis (HP) or the aggravation of her pre-existing pulmonary issues including asthma and chronic sinusitis.

16. Claimant testified that she took a leave of absence because Dr. Cvietusa had informed her that her lung volumes had been steadily declining over the prior four

years. She was concerned that her decreasing lung volume was attributable to Churg-Strauss disease. Claimant explained that her father had died of Churg-Strauss in February 2007 and she was concerned she might be suffering from the disease. Claimant detailed that the condition is a lung disease that develops in individuals who have suffered from long-term asthma and sinusitis. Because Claimant feared permanent lung damage from Churg-Strauss she sought to obtain proper rest, diet and exercise. However, Claimant noted that she was not ultimately diagnoses with the disease and sought a leave of absence primarily because of her increasing respiratory symptoms.

17. Despite Claimant's attempt to reduce her symptoms and improve her health, she continued to experiences a myriad of respiratory difficulties during her leave of absence. On February 21, 2017 Claimant visited Robert Douglas, M.D. She reported moderate, persistent asthma and presented with flu-like symptoms including fevers, chills, headache and sinus/head congestion. Claimant advised Dr. Douglas that she was not breathing well and used Albuterol. Dr. Douglas assessed Claimant with influenza including upper respiratory symptoms and moderate, persistent asthma with acute exacerbation. He also diagnosed Claimant with sinusitis that was probably secondary to influenza.

18. On March 20, 2017 Claimant sent an email to Dr. Cvietusa titled "lungs are terrible." Claimant explained that her condition was worsening. She detailed that "I am so frustrated because I have such a small stress level being on leave, I sleep and rest whenever I need it, and I am exercising more than I have in years." She noted that her lungs were in "bad shape."

19. On March 23, 2017 Claimant visited Dr. Cvietusa for an evaluation. She reported bronchitis/asthma flare symptoms. Dr. Cvietusa noted that Claimant experienced the flu approximately one month earlier and recovered well after receiving antibiotics and prednisone. Notably, Claimant utilized prednisone for respiratory symptoms three times within five months.

20. On April 18, 2017 Claimant contacted Kaiser by telephone. She reported worsening congestion and "terrible issues with her asthma." Dr. Cvietusa noted that Claimant might be experiencing inflammation from allergies.

21. Claimant returned to teaching from her leave of absence on April 21, 2017. Approximately five more weeks of the academic year remained until summer vacation.

22. On April 22, 2017 Claimant presented to Kaiser for an examination. A physician assistant summarized that Claimant "has been sick since February and notes that she has been on leave from work for 12 weeks and is out of leave and has to return to work to teach for the next five weeks of school no matter how poorly she feels. She notes that she has almost no quality of life now." Claimant underwent a chest scan that did not provide significant evidence of pneumonia. The radiologist noted, "scattered nonspecific round glass density opacities in both lungs which may represent hypo-inflation or mild pneumonitis." Throughout the remainder of 2017 Claimant continued to visit her treating physicians with respiratory conditions.

23. Claimant subsequently switched primary care physicians and obtained medical treatment at UC Health. Because of her steadily declining condition, Claimant was referred by her primary treating physician to pulmonologist Joshua Portnoy, M.D. Dr. Portnoy diagnosed Claimant with allergic rhinitis, reflux disease and asthma. He recommended a high resolution CT scan of the chest, pulmonary function testing and allergy testing with Arvin Rao, M.D.

24. On January 10, 2018 Claimant underwent a pulmonary function test with Dr. Rao. Dr. Rao noted decreased lung function and sensitivity to molds. He diagnosed Claimant with "persistent asthma, uncomplicated."

25. On January 15, 2018 Claimant underwent a chest CT scan. Dr. Portnoy testified that the CT scan revealed a finding of mosaic attenuation. In 29 out of 30 cases mosaic attenuation means the patient suffers from an interstitial lung disease instead of simple asthma. Dr. Portnoy thus ordered a surgical lung biopsy to further investigate Claimant's condition.

26. Claimant took a second leave of absence from her job as a teacher at Powell Middle School from February 6, 2018 through May 29, 2018. Claimant testified that she took the leave of absence because her symptoms had continued to escalate. She had trouble having a conversation at home, walking very far and awoke at night because she was unable to breathe.

27. Claimant underwent the recommended lung biopsy on February 16, 2018 at Littleton Adventist Hospital. The lung biopsy revealed bronchiolitis obliterans organizing pneumonia, granulomas and cellular inflammation. Dr. Portnoy testified that the three findings are generally considered the classic "triad" associated with a diagnosis of Hypersensitivity Pneumonitis (HP). HP is an immune inflammation in the lung that occurs in response to an inhaled agent. It can stimulate the immune system and may ultimately lead to lung scarring. Therefore, Dr. Portnoy recommended that Claimant begin taking the immunosuppressant CellCept. He determined that Claimant's HP was likely due to exposure to mold in her classroom. Claimant thus reported a work-related condition to Employer on March 12, 2018. Respondent referred Claimant to Authorized Treating Physician (ATP) John S. Hughes, M.D. for evaluation and treatment.

28. On April 2, 2018 Claimant visited Dr. Hughes for an examination. Dr. Hughes reviewed environmental studies from Powell Middle School and performed a physical examination. Claimant reported that she worked primarily in room 2698. He commented that room 2698 exhibited elevated mold levels but after remediation the levels "decreased significantly." Moreover, an environmental assessment of Claimant's house on March 14, 2018 reflected low mold probability except for the first floor or family room area of the structure. Dr. Hughes diagnosed Claimant with asthma and occupational exposure to mold with acute bronchitis. He concluded that Claimant suffered an occupational aggravation of her long-standing asthma. Dr. Hughes recommended permanent restrictions on any occupational exposure to mold and any respiratory irritants or sensitizers.

29. Claimant visited Dr. Hughes for continued evaluation and treatment on April 18, 2018, May 16, 2018 and June 27, 2018. In his reports he confirmed a diagnosis of HP. Specifically, in his June 27, 2018 report Dr. Hughes explained that Claimant's diagnosis of HP was confirmed by biopsy. Dr. Hughes remarked that HP "is probably a superimposed occupational disease that developed with exposure to airborne mold spores. This will take at least 6 months to resolve back to [Claimant's] baseline of long-standing asthma."

30. In addition to the referral to Dr. Hughes, Claimant was also referred to National Jewish Health for additional opinions regarding the diagnosis of HP. Claimant was evaluated by Michael Wechsler, M.D. and Cecile Rose, M.D. Both doctors confirmed that Claimant suffered from HP.

31. Dr. Rose practices pulmonology and occupational medicine at National Jewish Health. She focuses primarily on occupational and environmental lung disease diagnosis and treatment. Dr. Rose evaluated Claimant on July 12, 2018 at the request of Dr. Portnoy. After reviewing Claimant's medical records and conducting a physical examination, Dr. Rose concluded that Claimant suffers from HP.

32. Dr. Rose testified through a pre-hearing evidentiary deposition in this matter on October 8, 2018. She explained that patients who suffer from HP generally present with symptoms of shortness of breath and cough that may worsen slowly and subtly over time with ongoing exposure to an antigen. Dr. Rose commented that it is also common for a patient with HP to have abnormal lung function and abnormal chest imaging showing ground glass opacities and/or mosaic attenuation with air trapping. However, the most definitive test for HP is the surgical lung biopsy. The classic findings of HP on a lung biopsy are poorly formed noncaseating granulomas, organizing pneumonia and cellular infiltrates.

33. Dr. Rose explained that there are three primary causes of HP: (1) microbial bioaerosols, including bacteria, fungus and other organic dusts; (2) animal proteins most commonly found in birds; and (3) low molecular weight chemicals called bisophonates. She specifically determined that the cause of Claimant's HP was exposure to microbial contaminants in classroom 2698 at Powell Middle School. Dr. Rose considered the environmental sampling reports from Powell Middle School. Specifically, the March 19, 2018 report revealed penicillium aspergillus-like spore counts at over 200 times the outdoor level and three times higher than other areas of the school. Dr. Rose also noted that, because Claimant's symptoms worsened while at school and improved during periods of absences, mold exposure at school caused Claimant's HP.

34. On July 16, 2018 Claimant underwent an independent medical examination with pulmonologist Jeffrey Schwartz, M.D. Dr. Schwartz reviewed Claimant's medical history, conducted a physical examination and considered mold inspection reports from Powell Middle School. He specifically reviewed mold inspection reports for Claimant's classroom 2698 from August 15, 2017, August 24, 2017, March 15, 2018, March 19, 2018 and March 26, 2018. He noted that the March 15, 2018 report did not reveal visible mold in the classroom but air sampling reflected aspergillus-penicillium mold spores in room

2698 that were significantly higher than outdoor ambient concentrations. Dr. Schwartz remarked that the report recommended further investigation to determine the source of the mold spores and remediation of the problem. He detailed that excess airborne mold in Claimant's classroom 2698 was "discovered only during routine surveillance on 3/18/2018, four months after [Claimant] became acutely ill in November 2017 with symptoms typical of her multiple previous respiratory exacerbations." Dr. Schwartz concluded that, "whether the excess mold was present prior to her becoming ill in November 2017, is a matter for speculation."

35. Dr. Schwartz explained that the diagnosis of HP in this case was improper. Dr. Schwartz relied upon two pieces of medical literature: an article entitled Diagnosis of Hypersensitivity Pneumonitis written by Talmadge King, Jr., M.D. and an article entitled Hypersensitivity Pneumonitis: Perspectives in Diagnosis and Management, written by Martina Vasakova, M.D. Dr. Schwartz concluded that Claimant did not satisfy the diagnostic criteria for the development of HP enumerated in either of the preceding articles.

36. Dr. Schwartz explained that subacute and chronic forms of HP are caused by continued low-level exposure to an offending antigen. Symptoms typically include "shortness of breath with exertion, cough with mucoid sputum, anorexia and weight loss." Dr. Schwartz summarized that, based on Claimant's lack of acute symptoms while working in room 2698, recurrent, acute respiratory symptoms while not at work, pre-existing conditions and lack of specific diagnostic findings, Claimant does not have HP. He concluded that, because Claimant had never been satisfactorily diagnosed with HP and there is no evidence of an exacerbation of her pre-existing symptoms, Claimant did not suffer from a work-related condition.

37. On July 31, 2018 Dr. Hughes drafted a letter in response to inquiries from Respondent's counsel about Dr. Schwartz' conclusions. In addressing whether Claimant had HP, Dr. Hughes noted he was "unqualified" to directly provide an opinion regarding Claimant's HP diagnosis. However, he acknowledged that, from his past training in occupational pulmonary disease at National Jewish Health, Dr. Schwartz was correct and agreed to omit HP from Claimant's diagnoses. Furthermore, Dr. Hughes agreed with Dr. Schwartz that Claimant suffers from "substantial underlying pulmonary pathology and that the majority of her problems are non-occupational in nature." He commented that he expected Claimant to experience unpredictable flare-ups of her condition that would lead to complete disability independent of any occupational factors. Nevertheless, Dr. Hughes disagreed with Dr. Schwartz that Claimant did not suffer an aggravation of her pre-existing condition while working for Employer. Dr. Hughes agreed with Dr. Schwartz's review of the mold inspection reports from Powell Middle School. However, he maintained that Claimant "sustained measurable exposures to mold that aggravated her underlying condition." Dr. Hughes noted that, simply because testing was not performed at the time Claimant became ill, "does not exonerate a potential workplace risk factor." Finally, Dr. Hughes explained that Claimant will return to her baseline of pulmonary health and did not suffer a permanent impairment from her work at Powell Middle School.

38. Employer's Facilities Manager Brad Leitner testified at the hearing in this matter. His job duties include addressing air quality concerns and performing remediation at Employer's facilities. DS Consulting performed air quality testing and mold inspection sampling at Powell Middle School. Mr. Leitner located and produced all of the reports he could locate regarding testing at Powell Middle School. Many of the reports address locations other than Claimant's room 2689. Nevertheless, the air quality reports consistently demonstrate airborne mold as less-than or comparable-to the outdoor air. Between January 2013 and January 2017 each report demonstrated airborne mold as less-than or comparable-to the outdoor air.

39. The report dated August 15, 2017 specifically considered classrooms 2696 and 2698. The report noted that classrooms 2696 and 2698 are located on the second level of the science wing in the southeast corner of a multi-level structure. A known water intrusion had occurred in classroom 2698 "some time ago," but the problem had been corrected. The technician observed visible mold behind some cabinets in the southeast corner of classroom 2698. However, air quality testing demonstrated airborne mold as less-than or comparable-to the outdoor air. The area was remediated and a second air quality test of room 2698 was conducted on August 24, 2017. The testing demonstrated airborne mold as less-than or comparable-to the outdoor air. The August 24, 2017 report noted that there was no visible mold on "any of the remaining drywall, cabinets or insulation."

40. On March 15, 2018 an air quality report revealed elevated mold levels in classrooms 2696 and 2698. Although inspectors did not observe any visible mold, the level of mold spores in room 2696 was "slightly elevated" and the level in room 2698 was "significantly higher" than outdoor ambient concentrations. A March 19, 2018 follow-up report specified that a single piece of wood under a cabinet or kick plate showed visible mold. Testing on March 19, 2018 revealed elevated levels of airborne mold growth spores within room 2698 and the southeast cabinet within the room. However, tape lift samples of several locations for possible mold growth within room 2698 were negative. Remediation of mold growth in room 2698 was performed by removing the piece of wood debris in the cabinet underneath a sink. The cabinet was cleaned and treated with an anti-microbial material. A follow up air quality test on March 26, 2018 demonstrated airborne mold as less-than or comparable-to the outdoor air. The remaining air quality testing at Powell through October 2018 also demonstrated airborne mold as less-than or comparable-to the outdoor air.

41. Although Claimant testified that she would commonly see flooding in her classroom from snowmelt and rain, Mr. Leiter explained that he did not receive any reports of water issues. He also commented that, even if there was water in Claimant's classroom and the school janitor did not report the incident, there was no mold issue provided the water was timely removed.

42. Dr. Schwartz testified at the hearing in this matter. He recounted that Claimant has suffered a long history of asthma and other respiratory problems. Dr. Schwartz maintained that the environmental studies of Claimant's classroom 2698 only revealed the presence of mold four months after she became acutely ill in November

2017. Moreover, although Claimant's symptoms should have improved while she was away from school if mold in her classroom was the cause of her symptoms, medical records reflect Claimant suffered respiratory problems while away from school. Furthermore, relying on articles specifying the diagnostic criteria for HP, Dr. Schwartz concluded that Claimant did not have HP. He summarized that, because Claimant's respiratory symptoms preceded her work at Powell Middle School and she did not suffer an exposure based on the environmental testing, her work activities did not cause or aggravate her condition.

43. Dr. Portnoy testified in rebuttal at the hearing in this matter. He maintained that Claimant's lung biopsy confirmed the diagnosis of HP and the articles referenced by Dr. Schwartz only provide proposed criteria for physicians who suspect a patient may have HP. He also explained that he had no reason to suspect that Claimant suffered from anything other than asthma and allergies until he obtained the results of Claimant's chest CT scan that suggested a small airway disease. Dr. Portnoy acknowledged that he had not reviewed Claimant's Kaiser records or the environmental mold studies conducted at Powell Middle School.

44. Claimant has failed to establish that it is more probably true than not that she suffered an occupational disease to the form of HP or an aggravation of her pre-existing pulmonary condition that began on January 30, 2017 during the course and scope of her employment with Employer. The record reflects that Claimant has suffered an extensive history of recurrent, worsening asthma and other respiratory issues. Moreover, environmental studies conducted in Claimant's classroom 2698 demonstrate that there was an insufficient exposure to cause HP or aggravate her pre-existing condition. Finally, the persuasive report and testimony of Dr. Schwartz reveals that it is speculative to attribute Claimant's worsening respiratory symptoms to her work activities for Employer beginning on January 30, 2017.

45. Initially, the record is replete with medical records demonstrating that Claimant has suffered a long-history of worsening asthma and other respiratory conditions. In March 2012 Claimant visited her personal physician at Kaiser. Her diagnoses included persistent asthma with an acute exacerbation and chronic sinusitis. The doctor noted that Claimant was "frustrated as has recurrent asthma exacerbations and chronic sinus congestions. Wonders if she needs admission for full testing or eval at National Jewish." On March 12, 2012 Claimant exchanged correspondence with Dr. Cvietusa at Kaiser and again requested the possibility of a referral to National Jewish Hospital for testing. She noted that her respiratory issues limited her activities and inquired about a leave of absence from work. . Claimant began teaching at Powell Middle School for the 2014-15 school year after living and teaching in Costa Rica for one year. She continued to suffer chronic sinusitis and asthma symptoms with periodic flare-ups. By January 12, 2017 Claimant reported to Dr. Cvietusa that she had experienced a bad quality of life for years because of poorly controlled asthma. Dr. Cvietusa noted a steady decline in both Claimant's FEV1 and FVC testing. The medical records and Claimant's reports reflect that she had been suffering recurrent asthma symptoms that produced a steady decline in her quality of life and activities for years before and during her work at Powell Middle School.

46. Environmental mold studies reflect a dearth of evidence suggesting that Claimant was exposed to mold spores while teaching at Powell Middle School. Initially, many of the air quality reports from Powell Middle School address locations other than Claimant's room 2689. Nevertheless, the air quality reports consistently demonstrate airborne mold as less-than or comparable-to the outdoor air. Claimant contends that the occupational disease of HP or the aggravation of her pre-existing respiratory condition began on January 30, 2017. The records reveal that the first environmental mold testing of Claimant's room 2698 occurred on August 15, 2017. The technician observed visible mold behind some cabinets in the southeast corner of classroom 2698. However, air quality testing demonstrated airborne mold as less-than or comparable-to the outdoor air. The area was remediated and a second air quality test of room 2698 was conducted on August 24, 2017. The testing again demonstrated airborne mold as less-than or comparable-to the outdoor air.

47. Claimant took a second leave of absence from her teaching duties at Powell Middle School from February 6, 2018 through May 29, 2018 because of escalating respiratory symptoms. During Claimant's leave of absence a March 15, 2018 air quality report revealed elevated mold levels in classrooms 2696 and 2698. Although inspectors did not observe any visible mold, the level of mold spores in room 2696 was "slightly elevated" and the level in room 2698 was "significantly higher" than outdoor ambient concentrations. A March 19, 2018 follow-up report specified that a single piece of wood under a cabinet or kick plate showed visible mold. Mold remediation in room 2698 was performed by cleaning and removing the piece of wood debris in the cabinet underneath a sink. A follow up air quality test on March 26, 2018 demonstrated airborne mold as less-than or comparable-to the outdoor air. Notably, the positive mold report did not occur until after Claimant began her second leave of absence and more than 13 months after she alleged the onset of her occupational disease. The remaining air quality testing at Powell Middle School through October 2018 demonstrated airborne mold as less-than or comparable-to the outdoor air. The preceding testing reveals that Claimant did not suffer environmental mold exposure in excess of outdoor levels while teaching at Powell Middle School. In the absence of documented mold exposure, it is speculative to suggest that Claimant's teaching duties caused HP or aggravated her pre-existing respiratory condition.

48. Dr. Schwartz reviewed Claimant's medical history, conducted a physical examination and considered mold inspection reports from Powell Middle School. He noted that the environmental studies of Claimant's classroom only revealed the presence of mold four months after she became acutely ill in November 2017. Dr. Schwartz remarked that, "whether the excess mold was present prior to her becoming ill in November 2017, is a matter for speculation." He commented that Claimant's symptoms were typical of her multiple previous respiratory exacerbations. Moreover, although Claimant's symptoms should have improved while she was away from school if the presence of mold in her classroom caused her symptoms, medical records reflect Claimant suffered respiratory problems while away from school. Furthermore, relying on articles specifying the diagnostic criteria for HP, Dr. Schwartz concluded that Claimant did not have HP. He persuasively summarized that, because Claimant's respiratory symptoms preceded her work at Powell Middle School and she did not suffer an exposure

based on the environmental testing, her work activities did not cause or aggravate her condition.

49. In contrast, Drs. Rose and Portnoy concluded that Claimant's exposure to microbial contaminants in classroom 2698 while working at Powell Middle School caused her to develop HP. Dr. Rose considered the environmental sampling reports from Powell Middle School. Specifically, the March 19, 2018 report revealed penicillium aspergillus-like spore counts at over 200 times the outdoor level and three times higher than other areas of the school. Dr. Rose also noted that, because Claimant's symptoms worsened while at school and improved during periods of absences, mold exposure at school was the source of Claimant's HP. However, Dr. Rose's opinion reflects that she relied significantly on Claimant's subjective characterization of mold exposure in her classroom. For example, Dr. Rose noted in her report that in 2014 Claimant began working at Powell Middle School in a below ground classroom area that "had recurrent problems with moisture intrusion, water damage, and visible microbial contamination behind the cabinets." Additionally, in her deposition Dr. Rose described Claimant as "occupying this water damage and mold contaminated indoor environment" for years. Furthermore, Dr. Portnoy acknowledged that he had not reviewed Claimant's Kaiser records or the environmental mold studies conducted at Powell Middle School. Despite the opinions and testimony of Drs. Rose and Portnoy, the medical records reflect that Claimant has suffered a long-history of worsening asthma and other respiratory conditions. Furthermore, the environmental testing records do not document an environmental mold exposure in excess of outdoor levels while teaching at Powell Middle School. In the absence of documented mold exposure, it is speculative to suggest that Claimant's work activities caused HP or aggravated her pre-existing respiratory condition.

50. Dr. Hughes agreed with Dr. Schwartz that Claimant suffers from "substantial underlying pulmonary pathology and that the majority of her problems are non-occupational in nature." He commented that he expected Claimant to experience unpredictable flare-ups of her condition that would lead to complete disability independent of any occupational factors. Dr. Hughes ultimately withdrew his diagnosis of HP but concluded that Claimant's "sustained measurable exposures to mold" had aggravated her underlying condition. He noted that, simply because testing was not performed at the time Claimant became ill, "does not exonerate a potential workplace risk factor." However, attributing Claimant's symptoms to mold while working at Powell Middle School when the environmental testing records do not reveal elevated mold levels until Claimant was on her second leave of absence is speculative. The gradual worsening of Claimant's respiratory condition and the absence of exposure to mold reveal that Claimant's work activities did not cause, aggravate, intensify, accelerate or combine with her pre-existing condition to produce a need for medical treatment. Accordingly, Claimant's Workers' Compensation claim is denied and dismissed.

CONCLUSIONS OF LAW

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

C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

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

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

4. The test for distinguishing between an accidental injury and an occupational disease is whether the injury can be traced to a particular time, place and cause. *Campbell v. IBM Corp.*, 867 P.2d 77, 81 (Colo. App. 1993). "Occupational disease" is defined by §8-40-201(14), C.R.S. as:

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

5. A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, §8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the

occupational exposure contributed to the disability. *Id.* The failure to establish a causal connection between the injury and the employment defeats a claim for compensation. *In Re Murtha*, W.C. No. 4-876-210 (ICAP, Sept. 12, 2013).

6. As found, Claimant has failed to establish by a preponderance of the evidence that she suffered an occupational disease to the form of HP or an aggravation of her pre-existing pulmonary condition that began on January 30, 2017 during the course and scope of her employment with Employer. The record reflects that Claimant has suffered an extensive history of recurrent, worsening asthma and other respiratory issues. Moreover, environmental studies conducted in Claimant's classroom 2698 demonstrate that there was an insufficient exposure to cause HP or aggravate her pre-existing condition. Finally, the persuasive report and testimony of Dr. Schwartz reveals that it is speculative to attribute Claimant's worsening respiratory symptoms to her work activities for Employer beginning on January 30, 2017.

7. As found, initially, the record is replete with medical records demonstrating that Claimant has suffered a long-history of worsening asthma and other respiratory conditions. In March 2012 Claimant visited her personal physician at Kaiser. Her diagnoses included persistent asthma with an acute exacerbation and chronic sinusitis. The doctor noted that Claimant was "frustrated as has recurrent asthma exacerbations and chronic sinus congestions. Wonders if she needs admission for full testing or eval at National Jewish." On March 12, 2012 Claimant exchanged correspondence with Dr. Cvietusa at Kaiser and again requested the possibility of a referral to National Jewish Hospital for testing. She noted that her respiratory issues limited her activities and inquired about a leave of absence from work. . Claimant began teaching at Powell Middle School for the 2014-15 school year after living and teaching in Costa Rica for one year. She continued to suffer chronic sinusitis and asthma symptoms with periodic flare-ups. By January 12, 2017 Claimant reported to Dr. Cvietusa that she had experienced a bad quality of life for years because of poorly controlled asthma. Dr. Cvietusa noted a steady decline in both Claimant's FEV1 and FVC testing. The medical records and Claimant's reports reflect that she had been suffering recurrent asthma symptoms that produced a steady decline in her quality of life and activities for years before and during her work at Powell Middle School.

8. As found, environmental mold studies reflect a dearth of evidence suggesting that Claimant was exposed to mold spores while teaching at Powell Middle School. Initially, many of the air quality reports from Powell Middle School address locations other than Claimant's room 2689. Nevertheless, the air quality reports consistently demonstrate airborne mold as less-than or comparable-to the outdoor air. Claimant contends that the occupational disease of HP or the aggravation of her pre-existing respiratory condition began on January 30, 2017. The records reveal that the first environmental mold testing of Claimant's room 2698 occurred on August 15, 2017. The technician observed visible mold behind some cabinets in the southeast corner of classroom 2698. However, air quality testing demonstrated airborne mold as less-than or comparable-to the outdoor air. The area was remediated and a second air quality test

of room 2698 was conducted on August 24, 2017. The testing again demonstrated airborne mold as less-than or comparable-to the outdoor air.

9. As found, Claimant took a second leave of absence from her teaching duties at Powell Middle School from February 6, 2018 through May 29, 2018 because of escalating respiratory symptoms. During Claimant's leave of absence a March 15, 2018 air quality report revealed elevated mold levels in classrooms 2696 and 2698. Although inspectors did not observe any visible mold, the level of mold spores in room 2696 was "slightly elevated" and the level in room 2698 was "significantly higher" than outdoor ambient concentrations. A March 19, 2018 follow-up report specified that a single piece of wood under a cabinet or kick plate showed visible mold. Mold remediation in room 2698 was performed by cleaning and removing the piece of wood debris in the cabinet underneath a sink. A follow up air quality test on March 26, 2018 demonstrated airborne mold as less-than or comparable-to the outdoor air. Notably, the positive mold report did not occur until after Claimant began her second leave of absence and more than 13 months after she alleged the onset of her occupational disease. The remaining air quality testing at Powell Middle School through October 2018 demonstrated airborne mold as less-than or comparable-to the outdoor air. The preceding testing reveals that Claimant did not suffer environmental mold exposure in excess of outdoor levels while teaching at Powell Middle School. In the absence of documented mold exposure, it is speculative to suggest that Claimant's teaching duties caused HP or aggravated her pre-existing respiratory condition.

10. As found, Dr. Schwartz reviewed Claimant's medical history, conducted a physical examination and considered mold inspection reports from Powell Middle School. He noted that the environmental studies of Claimant's classroom only revealed the presence of mold four months after she became acutely ill in November 2017. Dr. Schwartz remarked that, "whether the excess mold was present prior to her becoming ill in November 2017, is a matter for speculation." He commented that Claimant's symptoms were typical of her multiple previous respiratory exacerbations. Moreover, although Claimant's symptoms should have improved while she was away from school if the presence of mold in her classroom caused her symptoms, medical records reflect Claimant suffered respiratory problems while away from school. Furthermore, relying on articles specifying the diagnostic criteria for HP, Dr. Schwartz concluded that Claimant did not have HP. He persuasively summarized that, because Claimant's respiratory symptoms preceded her work at Powell Middle School and she did not suffer an exposure based on the environmental testing, her work activities did not cause or aggravate her condition.

11. As found, in contrast, Drs. Rose and Portnoy concluded that Claimant's exposure to microbial contaminants in classroom 2698 while working at Powell Middle School caused her to develop HP. Dr. Rose considered the environmental sampling reports from Powell Middle School. Specifically, the March 19, 2018 report revealed penicillium aspergillus-like spore counts at over 200 times the outdoor level and three times higher than other areas of the school. Dr. Rose also noted that, because Claimant's symptoms worsened while at school and improved during periods of absences, mold

exposure at school was the source of Claimant's HP. However, Dr. Rose's opinion reflects that she relied significantly on Claimant's subjective characterization of mold exposure in her classroom. For example, Dr. Rose noted in her report that in 2014 Claimant began working at Powell Middle School in a below ground classroom area that "had recurrent problems with moisture intrusion, water damage, and visible microbial contamination behind the cabinets." Additionally, in her deposition Dr. Rose described Claimant as "occupying this water damage and mold contaminated indoor environment" for years. Furthermore, Dr. Portnoy acknowledged that he had not reviewed Claimant's Kaiser records or the environmental mold studies conducted at Powell Middle School. Despite the opinions and testimony of Drs. Rose and Portnoy, the medical records reflect that Claimant has suffered a long-history of worsening asthma and other respiratory conditions. Furthermore, the environmental testing records do not document an environmental mold exposure in excess of outdoor levels while teaching at Powell Middle School. In the absence of documented mold exposure, it is speculative to suggest that Claimant's work activities caused HP or aggravated her pre-existing respiratory condition.

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ORDER

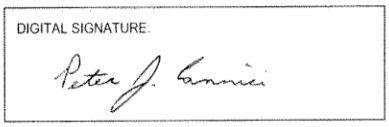
Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's Workers' Compensation claim is denied and dismissed.

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

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

DATED: April 18, 2019.



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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-061-884-001

ISSUES

I. Whether Claimant overcame the Division Independent Medical Examiner's opinion on permanent impairment by clear and convincing evidence?

II. Whether Claimant received an overpayment in permanent partial disability benefits?

STIPULATIONS

- The parties stipulated that Claimant was paid $18,073.65 in permanent partial disability (PPD) benefits.

FINDINGS OF FACT

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

1. This admitted claim occurred on May 22, 2017. Claimant suffered an injury to his low back when he twisted and bent in an awkward position to access paperwork. (*Respondent's Exhibit B, page 4.*)

2. Claimant has a history of low back complaints. Claimant's date of birth is January 27, 1956. When he was placed at MMI for this work related injury on November 16, 2017, Claimant was 61 years-old.

3. Claimant injured his low back in 1989 and underwent an L4 to S1 lumbar fusion in 1992. (*Respondent's Exhibit B, page 6*.) On September 14, 1993, Dr. Repert assessed an 11% whole person Table 53 impairment rating. (*Id.* at 8.) Flexion was invalid*. (Respondent's Exhibit E: Reichhardt Dep. #1 17:21-24*.) Claimant had hardware removed in 1994. *Id.*

4. Claimant injured his low back in 2007 and diagnostics showed increased changes at L2-3. (*Claimant's Exhibit 1, page 10.*) In 2007, Dr. Holthouser assessed a 12% Table 53 whole person impairment rating before apportionment, and 4% whole person impairment for range of motion. (*Respondent's Exhibit E: Reichhardt Dep. #1 10:4-12:14.*) Flexion was invalid after two sets of measurements, one with a computer assisted tracking system using two inclinometers. (*Respondent's Exhibit E: Deposition Exhibit B, page 51*.) After apportionment, claimant was assessed a 5% whole person impairment rating by Dr. Holthouser.

5. In 2016, Claimant injured his low back in a non-work related event and surgery was recommended. (*Hearing Tr. 39:7-15.*) Claimant refused surgery and is still

being treated with gabapentin and Lidoderm patches. (*Id. at 13-18.*) Claimant was also prescribed Vicodin for that injury. (*Id. at 40:7-10.*)

6. Dr. Reichhardt performed the Division independent medical examination (DIME) on May 2 and 3, 2018. *(Respondent's Exhibit E: Reichhardt Dep. #1 6: 10-12, January 4, 2019[1].)* Two days of evaluations were performed for repeat range of motion measurements. *Id.* Dr. Reichhardt is Board Certified in Physical Medicine and Rehabilitation, an instructor for the Division of Workers' Compensation, and teaches the Spinal Impairment Workshops through the Division. (*Id.* 4:18-5:6.)

7. Dr. Reichhardt took a medical history from claimant. (*Id.* 6:13-15.) Claimant did not report the 2007 injury to Dr. Reichhardt and Dr. Reichhardt was not aware of the 2007 injury when he performed his DIME and evaluated Claimant on May 2 and 3, 2018, and issued his report. (*Id.* 7:3-7.)

8. Dr. Reichhardt was made aware of claimant's 2007 back injury and impairment rating after his two evaluations of claimant. *Id.* Based on the new information, Dr. Reichhardt determined Claimant's whole person impairment rating after apportionment to be 3%. *Id.* (*Deposition Exhibit C.*) This was based upon a 2% physical impairment and a 1% mental impairment. *Id.*

9. As an instructor of the Spinal Impairment Workshop for the Level II Accreditation program, Dr. Reichhardt does not teach the attending physicians to complete the impairment analysis as Dr. Zuehlsdorff did in his independent medical examination of Claimant. (*Reichhardt Dep. #1 19:2-20*.) Dr. Reichhardt apportioned like from like (i.e. range of motion from range of motion and table 53 from table 53). (*Deposition Exhibit C*.)

10. Claimant indicated that he does not believe Dr. Reichhardt made a mistake, but felt Dr. Reichhardt was not thorough. (*Hearing Tr. 42:16-18*.) Claimant's independent medical examiner (IME), Dr. Zuehlsdorff, believes Dr. Reichhardt did a thorough job. (*Claimant's Exhibit 1, page 7; Hearing Tr. 42:12-15*.) Dr. Zuehlsdorff noted:

> The patient was asked directly why he has proceeded to a second Independent Medical Examination after the Division Independent Medical Examination with Dr. Reichhardt, when in fact, Dr. Reichhardt did recommend a rating obviously above and beyond what his primary, Dr. Tah had given him. The patient, at that time, pulled out two Final Admissions of Liability that he received from the insurance company. He first noted that he was to be given a certain amount of money, but the second one came out and assigned him nothing. He was very confused by this and felt he was potentially being ripped off by the insurance company. He claims that is the primary reason why he wanted to push his legal counsel to go forward with an Independent Medical

[1] Hereinafter, the citation of Dr. Reichhardt's first deposition on 1/04/19 will not include the date of the deposition or the exhibit letter. A second deposition conducted on 2/27/19 will be cited in full.

Examination after the Division Independent Medical Examination.

(*Claimant's Exhibit 1, page 9.*)

11. Dr. Zuehlsdorff acknowledged that Dr. Reichhardt's numbers were just different from his, and that he does not disagree with Dr. Reichhardt's measurements. (*Zuehlsdorff Dep. 20:20-22; 25:2-4.*) Dr. Zuehlsdorff stated, "I equate this to the fact that the range of motion numbers based on that patient that day, in a climate, in that setting can vary significantly." (*Id. at 11:10-22*.) Just because the previous three physicians who came up with invalid measurements does not mean they were incorrect. (*Id. at 17:5-20:18; Deposition Exhibits A and B.*) He states, "But the bottom line is, the only difference really between his and mine is the fact that I recognized lumbar flexion as valid in my range of motion numbers…" (*Id.* at *8:3-7*.)

12. Dr. Zuehlsdorff stated Dr. Reichhardt "did not put up any argument against that" [adopting Dr. Zuehlsdorff's range of motion measurements] and as a result, Dr. Zuehlsdorff interpreted this to mean Dr. Reichhardt adopted his findings. (Id. at 15:10-18.)

13. On February 27, 2019, a follow-up deposition with Dr. Reichhardt was conducted to address Dr. Zuehlsdorrf's assertions and assumption that Dr. Reichhardt adopted Dr. Zuehlsdorff's findings. Dr. Reichhardt indicated that he never intended to adopt Dr. Zuehlsdorrf's measurements. (*Reichhardt Dep. #2 6:6-21, February 27, 2019*.) Dr. Reichhardt stated that the Division evaluator has discretion to adopt the measurements of another physician, and felt he did not need to adopt Dr. Zuelsdorff's ratings or range of motion measurements. (*Id. at 6:22-7:9*.) "I feel comfortable with the range of motion measurements that I obtained and feel that the approach that I utilized was appropriate. And so I don't feel that there's a compelling reason to adopt somebody else's range of motion measurements." (*Id.* at 11:4-8.) Dr. Reichhardt also testified during his deposition that just because two physicians came up with different range of motion measurements does not mean either erred. (*Id. at 5:10-25*.) Therefore, the ALJ finds that Dr. Reichhardt did not adopt Dr. Zuehlsdorff's measurements and findings.

14. As found, Dr. Reichhardt determined Claimant's whole person impairment rating after apportionment to be 3%. *Id.* (*Deposition Exhibit C.*) This was based upon a 2% physical impairment and a 1% mental impairment. *Id.*

15. As testified to by Dr. Reichhardt, he is an instructor for the Division of Workers' Compensation, and teaches the Spinal Impairment Workshops through the Division. Moreover, the final impairment rating he assigned Claimant as documented in his deposition testimony and exhibits is consistent with the underlying medical record. Therefore, the ALJ finds Dr. Reichhardt's opinions as set forth in his report and subsequent deposition testimony and exhibits to be highly credible and highly persuasive.

16. The ALJ does not find Dr. Zuehlsdorff's opinions and testimony to be persuasive in establishing Dr. Reichhardt committed any errors in determining Claimant's impairment.

17. Based on the 2% whole person physical impairment rating of Dr. Reichhardt, PPD disability benefits owed (before overpayments) is $7,518.56.[2] PPD benefits owed for mental impairment (before overpayments) is $3,759.28.[3] This combines for total PPD benefits owed (before overpayments) of $11,277.84.[4]

18. Based on the stipulation of the parties at hearing, Claimant was paid $18,073.65 in PPD benefits. (*Hearing Tr. 4:25-5:2, January 11, 2019; see also Respondent's Exhibit A.*) Therefore, the overpayment to Claimant is $6,795.81.[5]

19. Respondent agreed to use the overpayment as a credit against future PPD benefits should that arise and not seek recovery of the overpayment via an order requesting Claimant to pay back the overpayment. (*Hearing Tr. 5:15-16.*)

CONCLUSIONS OF LAW

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

General Provisions

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

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

3. In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to

[2] Two percent physical impairment. (400 x 2% x 1.0 x $939.82 = $7,518.56.)
[3] One percent mental impairment. (400 x 1% x 1.0 x 939.82 = $3,759.28.)
[4] Total PPD award for physical and mental impairment. ($7,518.56 + $3,759.28 = $11,277.84.)
[5] Calculation of overpayment to Claimant. ($18,073.65 - $11,277.84 = $6,795.81.)

lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. In cases of permanent medical impairment, the employee's award…shall be reduced when the employee suffered more than one permanent medical impairment to the same body part and has received an award under the Workers' Compensation Act. The permanent medical impairment rating applicable to the previous injury to the same body part, established by award or settlement, shall be deducted from the permanent medical impairment rating for the subsequent injury to the same body part. § 8-42-104(5), C.R.S.

5. The term "overpayment" means:

> Money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive, or which results in duplicate benefits because of offsets that reduce disability or death benefits payable under said articles. For an overpayment to result, it is not necessary that the overpayment exist at the time the claimant received disability or death benefits under said articles.
>
> § 8-40-201(15.5), C.R.S.

6. Respondents bear the burden of proof to establish Claimant received an overpayment of benefits." *Marquez v. Americold Logistics*, W.C. No. 4-896-504-04 (August 7, 2014).

7. The findings of a DIME physician are binding as to MMI and permanent impairment unless overcome by clear and convincing evidence. § 8-42-107(8)(b)(III), C.R.S. "Clear and convincing evidence is evidence demonstrating it is 'highly probable' the DIME physician's rating is incorrect. Therefore, to overcome the DIME physician's opinion, the evidence must establish that it is incorrect. Such evidence must be unmistakable and free from serious or substantial doubt." *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAP, Nov. 17, 2000). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). A DIME physician is required to rate a claimant's

impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117, 1118 (Colo. App. 2003).

I. Whether Claimant overcame the Division Independent Medical Examiner's opinion on permanent impairment by clear and convincing evidence?

Dr. Reichhardt performed the division independent medical examination (DIME) on May 2 and 3, 2018. Two days of evaluations were performed for repeat range of motion measurements. Dr. Reichhardt is Board Certified in Physical Medicine and Rehabilitation, an instructor for the Division of Workers' Compensation, and teaches the Spinal Impairment Workshops through the Division.

Dr. Reichhardt took a medical history from Claimant. Claimant, however, did not report his 2007 injury to Dr. Reichhardt. After he performed the DIME, which included two evaluations, Dr. Reichhardt was made aware of Claimant's 2007 back injury and impairment during his deposition. Based on the new information, Dr. Reichhardt determined Claimant's whole person impairment rating after apportionment was 3%. This was based upon a 2% physical impairment rating and a 1% mental impairment rating.

As an instructor of the Spinal Impairment Workshop for the Level II Accreditation program, Dr. Reichhardt does not teach the attending physicians to complete the impairment analysis as Dr. Zuehlsdorff did in his independent medical examination of Claimant. Dr. Reichhardt apportioned like from like (i.e. range of motion from range of motion and table 53 from table 53).

Even Claimant's own IME, Dr. Zuelsdorff, felt Dr. Reichhardt did a thorough job. Three physicians determined claimant had invalid range of motion measurements. Only Dr. Zuelsdorff documented that he obtained valid range of motion measurements even though Claimant's pain was higher when undergoing the IME than when the DIME evaluation occurred.

Dr. Zuehlsdorff asserted that Dr. Reichhardt adopted his range of motion measurements based on silence. Dr. Zuehlsdorff ignored the fact that he calculated his final rating incorrectly because he did not do "like from like" when apportioning Claimant's prior injury and rating.

At a subsequent deposition with Dr. Reichhardt, he indicated that he did not adopt Dr. Zuelsdorff's numbers and that he has discretion to make this choice. Moreover, Dr. Zuelsdorff did not think Dr. Reichhardt erred in determining Claimant's impairment. Both physicians just had different measurements.

This claim is similar to *Almanza v. Majestic Industries*, W.C. No. 4-490-054 (November 13, 2003). In *Almanza*, the claimant underwent two range of motion (ROM) measurements prior to the DIME, both of which were invalid. The DIME physician's ROM measurements were also deemed invalid. The DIME physician performed more ROM measurements a few months later which were also deemed invalid. After the DIME, claimant retained an IME physician. The IME physician obtained a valid ROM measurement of claimant's lumbar spine. The ALJ found the

IME report was "simply not credible" because the IME physician obtained valid ROM measurements after four other measurements were reported as invalid. The Panel affirmed. See also *Fisher v. Cherry Hills Healthcare*, W.C. No. 4-646-00 & 4-646-001 (November 13, 2006) ["Dr. Lesnak clearly disagreed with the DIME rating but that disagreement did not demonstrate that it was highly probable or free from serious or substantial doubt that the DIME physician was wrong regarding the range of motion or the radiculopathy components of the rating."]

The ALJ finds and concludes Claimant has failed to overcome the impairment rating provided by Dr. Reichhardt, the DIME, by clear and convincing evidence.

II. Whether Claimant received an overpayment in permanent partial disability benefits?

The parties stipulated that claimant was paid $18,073.65 in PPD benefits. Dr. Reichhardt provided Claimant a 3% impairment rating. This was comprised of a 2% physical impairment rating and a 1% mental impairment rating. Claimant failed to overcome Dr. Reichhardt's impairment rating by clear and convincing evidence.

Claimant was paid $18,073.65 in PPD benefits. However, based on the impairment rating provided by Dr. Reichhardt, which Claimant failed to overcome, Claimant is only entitled to $11,277.84 in PPD benefits.

Therefore, the ALJ finds and concludes that Respondent has established by a preponderance of the evidence that Claimant has been overpaid $6,795.81.

ORDER

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

1. Claimant failed to prove by clear and convincing evidence that the DIME physician's impairment rating, which is comprised of a 2% physical impairment and a 1% mental impairment, was incorrect.
2. Respondent proved that there is an overpayment of $6,795.81. Respondent may use the overpayment against any future PPD benefits.
3. Issues not expressly decided herein are reserved to the parties for future determination.

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

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

DATED: April 19, 2019

/s/ Glen Goldman

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

ISSUES

Whether the claimant has demonstrated by a preponderance of the evidence that cervical injections recommended by Dr. Kirk Clifford (and administered by Dr. Robert Frazho) constitute reasonable medical treatment necessary to cure and relieve the claimant from the effects of the January 9, 2017 work injury.

Whether the claimant has demonstrated by a preponderance of the evidence that message therapy for the claimant's cervical spine, as recommended by Dr. Craig Stagg, constitutes reasonable medical treatment necessary to cure and relieve the claimant from the effects of the January 9, 2017 work injury.

FINDINGS OF FACT

1. The claimant is the owner/operator of the employer landscaping company. The claimant's job duties include all landscaping activities as well as billing and other management matters.

2. On January 9, 2017, the claimant slipped on ice and fell onto her right elbow and right hip.[1] The respondents have admitted liability for the January 9, 2017 injury.

3. The claimant testified that at the time of the injury she had neck symptoms that included pain, achiness, sharp needling, and stiffness. In addition, the claimant described pain that goes from her neck, down her trapezius, into her back and low back.

4. During this claim the claimant's authorized treating physician (ATP) has been Dr. Craig Stagg. The claimant first treated with Dr. Stagg on January 10, 2017. In paperwork completed by the claimant at that appointment, the claimant reported neck pain of 8 out of 10. Dr. Stagg also noted that the claimant had pain in her neck area. Dr. Stagg diagnosed an acute cervical strain and ordered x-rays of the claimant's cervical spine.

5. On January 10, 2017, x-rays of the claimant's cervical spine showed mild multilevel cervical degenerative disc disease and uncovertebral spurring that was causing foraminal narrowing bilaterally at the C5-6 level and on the right at the C3-4 and C4-5 levels.

[1] The claimant has received treatment for multiple body parts related to this claim including treatment for her right elbow, right shoulder, and sacroiliac joint. However, only recommended treatment of claimant's cervical spine is at issue in this order. Therefore, the ALJ does not address treatment of those other body parts at this time.

6. The claimant returned to Dr. Stagg on January 18, 2017 and on January 24, 2017. At both appointments the claimant reported improvement in her neck pain. The claimant testified that during this time the focus of her medical providers was her right shoulder. The medical records indicate that Dr. Stagg was primarily concerned about the claimant's right shoulder symptoms for a period of time.

7. On June 12, 2017, the claimant was seen by Dr. Stagg. At that time, the claimant reported tightness in her right trapezius with numbness into both hands. The claimant also reported that her symptoms were relieved by massage. Dr. Stagg referred the claimant for therapeutic massage and to Dr. Mitchell Copeland for consultation. In addition, Dr. Stagg ordered a magnetic resonance image (MRI) of the claimant's cervical spine.

8. On June 2, 2017, a cervical spine MRI showed multilevel degenerative disc disease with moderate to severe spinal canal narrowing at the C5-6 level (secondary to a posterior disc osteophyte complex) and mild to moderate spinal canal narrowing at the C4-5 level. In addition, the MRI showed a small disc bulge at the C7-T1 level, which with resulted in minimal effacement of the ventral thecal sac.

9. On June 30, 2017, the claimant reported to Dr. Stagg that she had pain in her cervical spine that was radiating into her right shoulder. Based upon the claimant's symptoms and the MRI results, Dr. Stagg referred the claimant to Dr. Kirk Clifford for consultation.

10. The claimant testified that it is her understanding that she has either a disc bulge or herniated disc at the C7-T1 level. The claimant also testified that she understands that she has arthritis in her neck that has now become symptomatic.

11. The claimant was seen by Dr. Copeland on July 11, 2017. At that time, the claimant reported continued posterior shoulder pain and neck pain. On that date, Dr. Copeland opined that the claimant's cervical spine was her main pain generator. He further opined that the claimant's fall on January 9, 2017 exacerbated a preexisting cervical condition. Dr. Copeland recommended formal physical therapy and noted the claimant would see Dr. Clifford for evaluation of her spine.

12. The claimant first treated with Dr. Clifford on July 12, 2017. Dr. Clifford noted that the claimant received treatment from Dr. Gebhard in 2005 related to degenerative changes at the C4-5 level and C5 radiculopathy. Dr. Clifford also noted that an MRI taken in 2005 showed a right sided disc herniation at the C4-5 level. Dr. Clifford also noted that the claimant had previously undergone electromyography and nerve conduction studies (EMG/NCS) with Dr. Mitchell Burnbaum and that Dr. Burnbaum had found indications of bilateral carpal tunnel syndrome.

13. Dr. Clifford diagnosed the claimant with multilevel cervical disc degeneration and a disc herniation with moderate stenosis. In addition, related to the claimant's right upper extremity pain, Dr. Clifford listed possible causes as "shoulder verses cervical versus carpal tunnel syndrome". Dr. Clifford recommended EMG/NCS

testing by Dr. Burnbaum. Dr. Clifford also noted that if the EMG/NCS testing showed a cervical root cause, he would recommend a cervical epidural steroid injection. Dr. Clifford did not recommend any surgical treatment for the claimant.

14. On July 19, 2017, the claimant was seen by Dr. Burnbaum who conducted EMG/NCS testing. In his report of that date, Dr. Burnbaum noted that he did not see "anything to suggest [the claimant] has a root compression" and opined that the claimant had "predominately myofascial pain".

15. On August 16, 2017, the claimant returned to Dr. Clifford. At that time, Dr. Clifford noted that Dr. Burnbaum found no evidence of obvious root compression. As a result, Dr. Clifford did not recommend surgery.

16. On August 18, 2017, Dr. Stagg noted that Dr. Burnbaum opined that the claimant had myofascial pain syndrome in her cervical spine, and Dr. Clifford agreed with that diagnosis.

17. On November 3, 2017, Dr. Stagg released the claimant to return to full duty. However, on December 8, 2017, Dr. Stagg placed the claimant on modified duty related to symptoms in her low back and right hip.

18. On January 16, 2018, the claimant returned to Dr. Stagg. At that time, the claimant reported that her neck symptoms were "basically the same still having some pain but overall improved."

19. On April 25, 2018, the claimant was seen by Dr. Stagg. The claimant reported that she was still having pain in her cervical spine and right shoulder.

20. At the request of the respondents, on July 25, 2018, the claimant attended an independent medical examination (IME) with Dr. Lawrence Lesnak. In connection with the IME Dr. Lesnak reviewed the claimant's medical records, obtained a history from the claimant, and completed a physical examination. In his IME report, Dr. Lesnak noted that during his examination of the claimant, the claimant had full range of motion of her cervical spine and that cervical root tension maneuvers reproduced no symptoms. Also in his IME report, Dr. Lesnak opined that the claimant did not injure her lumbar spine, her right sacroiliac (SI) joint, or her cervical spine. Dr. Lesnak determined that the claimant had reached maximum medical improvement (MMI) no later than December 8, 2017.

21. On August 7, 2018, Dr. Stagg noted that the claimant's upper extremity symptomology was stable and she was at maximum medical improvement. Dr. Stagg also noted the claimant's cervical sprain was "stable".

22. On September 24, 2018, the claimant treated with Dr. Clifford. At that time, Dr. Clifford referred the claimant to Dr. Robert Frazho for a right sided C4-5, C5-6, and C6-7 facet injection

23. On October 30, 2018, a request for authorization for the additional right cervical facet injection at C4-5, C5-6, and C6-7 was submitted to the respondents.

24. On November 9, 2018, Dr. Stagg completed a WC 164 form in which he recommended six additional massage therapy visits.

25. On November 16, 2018, Dr. David Orgel completed a peer advisor report related to the request for ongoing massage therapy to treat the claimant. In his report, Dr. Orgel noted that the claimant had had 54 massage therapy treatments during this claim. Dr. Orgel also noted that the Colorado Medical Treatment Guidelines (the MTG) indicate a total of 16 treatments for massage therapy. Dr. Orgel noted that even if the claimant were allocated 16 treatments for her cervical spine and 16 treatments for her SI joint under the MTGs, that total of 32 appointments was already exceeded during this claim. Finally, Dr. Orgel noted that there was no indication that the claimant was receiving improvement in her pain or function from massage therapy. Dr. Orgel recommended denial of the request for additional massage therapy. Based upon Dr. Orgel's opinions, the respondents denied additional massage treatment.

26. On November 29, 2018, the claimant was seen by Dr. Frazho. At that time, the claimant reported acute pain in the right side of her neck. Dr. Frazho diagnosed cervical spondylosis and cervical stenosis and recommended the claimant undergo a right C4-5, C5-6, and C6-7 facet injection.

27. On December 5, 2018, Dr. Joseph Fillmore completed a peer advisor report related to the facet injection recommended by Dr. Frazho. Dr. Fillmore reiterated opinions expressed by Dr. Lesnak in the July 2018 IME report that the claimant did not injure her cervical spine at the time of the January 9, 2017 injury. Dr. Fillmore recommended denial of the injection. Based upon Dr. Fillmore's report, the respondents denied authorization for the recommended facet injection.

28. On December 13, 2018, Dr. Stagg saw the claimant and noted that Dr. Clifford's recommendation for cervical injections. At that time, Dr. Stagg opined that the claimant's cervical symptoms are related to the work injury and that the claimant initially injured her cervical spine.

29. Despite the respondents' denial, the claimant opted to proceed with the recommended facet injection. On January 16, 2019, Dr. Frazho administered a right C4-5, C5-6, and C6-7 facet injection.

30. On January 18, 2019, the claimant returned to Dr. Stagg and reported that the cervical injection gave her some relief.

31. On February 27, 2019, the claimant was seen by Dr. Clifford and reported three weeks of 90 percent pain relief from the facet injection. At that time, Dr. Clifford indicated that the claimant should return to Dr. Frazho for additional treatment. Dr. Clifford noted that the claimant could be a candidate for rhizolysis.

32. The claimant testified that following the January 16, 2019 injection, she felt "wonderful" from mid-January until early March. Beginning in early March, she began to have a return of the feeling of pins and needles that have now radiated into her arms.

33. On March 4, 2019, Dr. Frazho recommended the claimant undergo another right C4-5, C5-6, and C6-7 facet injection. A request for authorization for the additional right cervical facet injection at C4-5, C5-6, and C6-7 was submitted to the respondents on March 3, 2019.

34. The claimant testified that this injection was also denied by the respondents. The claimant also testified that she had the second injection on March 29, 2019. The claimant testified that since that additional injection she has felt "much better". The claimant testified that both of the cervical spine injections administered by Dr. Frazho were paid for by her private insurance.

35. The claimant testified that massage therapy provides her with temporary pain relief. The claimant also testified that she does not take pain medications, so massage therapy is helpful in managing her pain symptoms. In addition, the claimant testified that due to the relief she experienced following the cervical injections, she did not have pain in her neck that necessitated massage treatment.

36. Dr. Lesnak's testimony at hearing was consistent with his IME report. Dr. Lesnak testified that in his opinion that the claimant's January 9, 2017 fall did not cause an injury her cervical spine. With regard to the request for additional massage therapy to treat the claimant's cervical spine symptoms Dr. Lesnak testified that additional massage is not reasonable or necessary. In support of his opinion, Dr. Lesnak noted that the massage therapy the claimant has already received exceeds the MTGs. In addition, Dr. Lesnak testified that he has not seen any indication that the claimant has received functional benefit from massage. Dr. Lesnak testified that cervical injections should also be denied as not reasonable or necessary. Dr. Lesnak noted that the claimant had no neck symptoms at the time of the IME exam and it is his understanding that the claimant's neck symptoms arose after the IME.

37. The ALJ credits the claimant's testimony, the medical records, and the opinions of Drs. Stagg, Copeland, and Clifford over the contrary opinion of Dr. Lesnak and finds that it is more likely than not that the January 9, 2017 fall at work caused an aggravation or acceleration of the preexisting degenerative condition of the claimant's cervical spine, resulting in the need for medical treatment.

38. The ALJ credits the claimant's testimony, the medical records, and the opinions of Drs. Stagg and Clifford over the contrary opinion of Dr. Lesnak and finds that it is more likely than not that the cervical spine injections administered by Dr. Frazho are reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury. The ALJ notes that the claimant has reported improvement in her cervical spine symptoms following the injections administered by Dr. Frazho.

39. The ALJ credits the medical records and the opinions of Drs. Lesnak and Orgel and finds that the claimant has failed to demonstrate that it is more likely than not that continued massage treatment is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury. Although the claimant did suffer an aggravation of her preexisting cervical spine condition, as found above, the claimant has failed to demonstrate that massage therapy provides any functional improvement. Therefore, the ALJ finds that the claimant has failed to demonstrate that continued massage therapy is reasonable and necessary.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2016).

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

4. The Colorado Workers' Compensation Medical Treatment Guidelines (MTG) are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). The statement of purpose of the MTG is as follows: "In an effort to comply with its legislative charge to assure appropriate medical care at a reasonable cost, the director of the Division has promulgated these 'Medical Treatment Guidelines.' This rule

provides a system of evaluation and treatment guidelines for high cost or high frequency categories of occupational injury or disease to assure appropriate medical care at a reasonable cost." WCRP 17-1(A). In addition, WCRP 17-5(C) provides that the MTG "set forth care that is generally considered reasonable for most injured workers. However, the Division recognizes that reasonable medical practice may include deviations from these guidelines, as individual cases dictate."

5. While it is appropriate for an ALJ to consider the MTG while weighing evidence, the MTG are not definitive. *See Jones v. T.T.C. Illinois*, Inc., W.C. No. 4-503-150 (May 5, 2006); ***aff'd Jones v. Industrial Claim Appeals Office*** No. 06CA1053 (Colo. App. March 1, 2007) (not selected for publication) (it is appropriate for the ALJ to consider the MTG on questions such as diagnosis, but the MTG are not definitive); *see also Burchard v. Preferred Machining*, W.C. No. 4-652-824 (July 23, 2008) (declining to require application of the MTG for carpal tunnel syndrome in determining issue of PTD); *see also Stamey v. C2 Utility Contractors et al*, W.C. No. 4-503-974 (August 21, 2008) (even if specific indications for a cervical surgery under the MTG were not shown to be present, ICAO was not persuaded that such a determination would be definitive).

6. WCRP 17 Exhibit 8 Section 3(d)(iii) of the MTG provides, in pertinent part:

> Patients with pain 1) suspected to be facet in origin based on exam findings and 2) affecting activity; OR patients who have refused a rhizotomy and appear clinically to have facet pain; OR patients who have facet findings with a thoracic component. . . In these patients, facet injections may be occasionally useful in facilitating a functionally-directed rehabilitation program and to aid in identifying pain generators. Patients with recurrent pain should be evaluated with more definitive diagnostic injections, such as medial nerve branch injections, to determine the need for a rhizotomy. Because facet injections are not likely to produce long-term benefit by themselves and are not the most accurate diagnostic tool, they should not be performed at more than two levels, neither unilaterally nor bilaterally. Due to the lack of proof that these injections improve outcome, prior authorization is required. There is insufficient evidence to support the use of therapeutic cervical facet injections. . . All injections should be preceded by an MRI or a CT scan.

7. As found, the claimant has demonstrated by a preponderance of the evidence that the January 9, 2017 fall at work caused an aggravation or acceleration of the preexisting degenerative condition in the claimant's cervical spine, resulting in the need for medical treatment. As found, the claimant's testimony, the medical records, and the opinions of Drs. Stagg, Copeland, and Clifford are credible and persuasive, on this issue.

8. As found, the claimant has demonstrated by a preponderance of the evidence that the cervical spine injections administered by Dr. Frazho are reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury. The ALJ has considered the MTG with regard to cervical facet injections and concludes that the opinions of Drs. Clifford and Stagg warrant a deviation from the MTG in this case, specifically with regard to cervical injections. As found, the ALJ places weight on the reports from the claimant that the injections have been effective in reducing her pain symptoms. As found, the claimant's testimony, the medical records, and the opinions of Drs. Stagg and Clifford are credible and persuasive, on this issue.

9. With respect to massage therapy for the cervical spine WCRP 17, Exhibit 8, Section 13(f) provides, in pertinent part:

> Massage is a generally well-accepted treatment consisting of manipulation of soft tissue with broad ranging relaxation and circulatory benefits. . . Indications include edema (peripheral or hard and non-pliable edema), muscle spasm, adhesions, the need to improve peripheral circulation and ROM, or to increase muscle relaxation and flexibility prior to exercise.

10. That same section of WCRP 17, Exhibit 8 provides that the time for massage treatment to be effective is "immediate"; the frequency of massage treatment is one to two times per week; with an "optimum duration" of six weeks and a "maximum duration of two months". If one assumes treatments occur twice a week for the maximum duration of two months (or eight weeks), the ALJ calculates this to be a total of 16 treatments, which was the total used by Drs. Lesnak and Orgel in referring the MTG.

11. As found, the claimant has failed to demonstrate by a preponderance of the evidence that further massage therapy is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury. Clearly the claimant has received many massage therapy treatments during this claim well outside the frequency and duration contemplated by the MTG. The ALJ finds no persuasive evidence on the record that supports a finding that the claimant has experienced functional improvement as a result of the massage. As found, the medical records and the opinions of Drs. Lesnak and Orgel are credible and persuasive, on this issue.

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ORDER

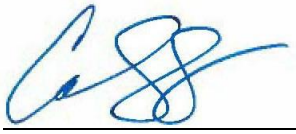
It is therefore ordered:

1. The respondents shall pay for the right C4-5, C5-6, and C6-7 facet injections administered by Dr. Frazho.

2. The claimant's request for massage therapy for her cervical spine is denied and dismissed.

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

Dated this 22nd day of April 2019.



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

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

ISSUES

The issues to be determined by this decision involve Claimant's entitlement to maintenance medical benefits. The question answered is:

I. Whether Claimant established, by a preponderance of the evidence, that the request for a trial of spinal cord stimulation, is reasonable, necessary, and causally related to Claimant's October 26, 2016 industrial injury.

FINDINGS OF FACT

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

1. Claimant suffered an admitted injury to his left knee when it buckled and he fell while carrying a board on October 26, 2016. Claimant underwent an MRI of his left knee which revealed pathological changes consistent with acute tearing of the anterior cruciate ligament (ACL) as well as the medial and lateral menisci.

2. Claimant underwent left knee surgery with Dr. Derek Purcell on January 9, 2017. Dr. Purcell performed a left knee hamstring autograft ACL reconstruction.

3. Post surgically, Claimant complained of increasing pain in his lower left leg prompting Dr. Purcell to recommend an ultrasound to rule out deep vein thrombosis (DVT). Ultrasound confirmed the presence of a DVT in the left calf. Consequently, Claimant was started on a blood thinning agent (Xarelto).

4. On February 9, 2017, Dr. Purcell documented that Claimant "continues to have some nerve-like symptoms though it is unclear if it represents irritation from his nerve block or is secondary to his DVT". By March 9, 2017, Dr. Purcell documented that another ultrasound had been performed and that Claimant's DVT had resolved. Despite resolution of the DVT, Claimant experienced persistent hypersensitivity, color changes and swelling in his left lower extremity raising concern from Dr. Purcell for "left lower extremity RSD" (reflex sympathetic dystrophy) also referred to as complex regional pain syndrome (CRPS). Accordingly, Claimant was referred to Dr. Kenneth Finn for further evaluation.

5. Dr. Kenneth Finn evaluated Claimant on April 3, 2017. As part of his examination, Dr. Finn documented a history of pain and swelling in the left knee and distal to the foot, sensitivity to light touch in the anterior shin to the top of the foot with paresthesias in a peroneal and tibial distribution and weakness with increased pain with prolonged standing, walking, sitting, or driving. Physical exam confirmed swelling, joint

line tenderness, and decreased sensation in the distribution of both the superficial and deep peroneal and sural sensory distributions. The left leg was slightly discolored and cool to touch on examination. Dr. Finn diagnosed Claimant with complex regional pain syndrome (CRPS) I of the left lower limb and recommended an EMG, a post-op MRI of the knee, and possibly a sympathetic nerve block.

6. Claimant followed up with Dr. Mary Seagraves—the vascular surgeon who treated his DVT— on April 5, 2017, two days after Dr. Finn's examination. Dr. Seagraves documented that Claimant has "significant chronic edema with associated erythema and temperature change between his left and right lower extremities clinically". Dr. Seagraves specifically documented that Claimant's entire left lateral calf was numb to touch.

7. Claimant returned to Dr. Finn on April 24, 2017 with continued complaints of "burning pain, electrical sensations in the left lower leg in a diffuse pattern with discoloration and hyperhidrosis". Physical exam by Dr. Finn documented a reddish discoloration of the left leg below the knee with allydonia and hyperalgesia and mild hyperhidrosis compared to the right lower leg. Dr. Finn diagnosed Claimant with CRPS I and causalgia of the left lower limb. Dr. Finn recommended a sympathetic nerve block and increased dosages of Lyrica.

8. Claimant underwent a sympathetic nerve block performed by Dr. Finn on May 3, 2017. Claimant subsequently followed up with Dr. Finn's nurse practitioner (NP), Sonya Griffith, on May 11, 2017. He reported 80% improvement with the lumbar sympathetic block for about 18 hours after which his pain returned to its original level. Claimant reported "excessive" swelling in his left lower extremity on this date. NP Griffith's examination documented pitting edema of the left lower extremity, a slight color change between the left lower extremity and the right lower extremity, and a slightly cooler temperature of the left lower extremity. It was reported that Claimant's DVT had been ruled out as a cause of his ongoing lower extremity symptoms and a second lumbar sympathetic block was recommended.

9. A second lumbar sympathetic block was administered on May 24, 2017. The same day, prior to the block, Claimant presented to Memorial Health to follow up with Dr. Seagraves. Dr. Seagraves diagnosed Claimant with a history of DVT of lower extremity and RSD. It was noted that Claimant had already undergone a nerve block which resulted in temporary pain relief, which was "consistent with RSD" per Dr. Seagraves. Claimant's post-injection follow up on June 13, 2017 with NP Griffith fails to document his response to the May 24, 2017 injection. Nonetheless, Claimant testified that he had an even better response to the second injection than he did to the first, in terms of both pain reduction and functional improvement.

10. Respondents requested an independent medical examination (IME) with Dr. Joseph Fillmore. Dr. Fillmore would perform an IME and a record review regarding Claimant's medical condition; the IME occurring July 17, 2017 and the records review taking place December 6, 2018. During his July 17, 2017 IME, Claimant reported that he was experiencing red color changes and little red spots on his leg, hypersensitivity,

swelling, and "some hair loss" at one time. Dr. Fillmore ultimately concluded as follows: "[Claimant] does have pain out of proportion with objective findings which is often the case with CRPS. He appears to have an element of sympathetically mediated pain but at this point without further testing he cannot be diagnosed with CRPS."

11. On July 18, 2017, Claimant underwent a "Comprehensive Consultation" with Dr. David Reinhard on the referral of Dr. Frank Polanco, Claimant's ATP in this case. The purpose of the consultation was to evaluate for "possible CRPS". Dr. Reinhard did not have any medical records for review and the history he took came exclusively from Claimant. Dr. Reinhard asked Claimant about his previous lumbar blocks. According to Dr. Reinhard, Claimant reported that he had two lumbar sympathetic blocks, and that the first time "he did not get that much relief" and while the second block provided relief for a couple of days, Claimant felt it was "negative from a diagnostic standpoint".[1] It is unclear whether Dr. Reinhard was aware that Claimant received 80% relief of his symptoms after the first block. Dr. Reinhard performed an autonomic testing battery that came back with a clinical score of 3 points out of a possible 9, which "represents a low probability of complex regional pain syndrome". According to Dr. Reinhard, Claimant's clinical score of 3/9 results in a "negative test for CRPS". Nonetheless, Claimant's laboratory testing revealed a score of 3 leading Dr. Reinhard to opine that Claimant may have "possible dysautonomia". In the event of progressive symptoms, Dr. Reinhard indicated that Claimant could be re-evaluated with a follow-up autonomic battery and stress thermography.

12. Claimant subsequently followed up with NP Griffith on August 3, 2017 for ongoing CRPS type symptoms. A referral was made to Dr. Mark Meyer for evaluation of a trial of spinal cord stimulation. The requested evaluation would not occur until January 24, 2018 as Respondents initially denied the request for referral to Dr. Meyer.

13. While waiting for the evaluation with Dr. Meyer, Claimant continued to follow up with Dr. Polanco. Dr. Polanco placed Claimant at MMI on November 3, 2017, noting that there had been an extensive workup for "CRPS" which was unremarkable per the battery of testing. Dr. Polanco provided a 13% lower extremity rating for Claimant's ACL injury. He did not include CRPS in his diagnosis. He did not rate for CRPS. Dr. Polanco stated, "As I have evaluated Mr. L_____ he does not present with any clear symptoms or findings of CRPS . . . In my opinion he does not meet criterial for spinal cord stimulator as he is reporting "total" leg pain. [Spinal cord stimulation] (SCS) is more useful for a dermatomal pattern radicular pain". Dr. Polanco recommended maintenance treatment consisting of follow up with orthopedics as needed for 12 months, and modified duty restrictions.

14. Claimant requested a Division Independent Medical Examination (DIME). Dr. Stephen Grey was selected through the DIME procedure as the physician to

[1] WCRP 7, Ex. 7, p. 24 states "For diagnostic testing, use two blocks over a 3-14 day period. For a positive response, pain relief should be 50% or greater for the duration of the local anesthetic and pain relief should be associated with demonstrated functional improvement."

complete the DIME. Dr. Gray would complete the DIME on April 24, 2018. In the interim Claimant would continue treatment with NP Griffith.

15. Claimant was seen NP Griffith on January 2, 2018 at which time it was documented that he continued to have an intense, painful tingling sensation from his left knee down to his toes. NP Griffith stated "I will once again place [a] referral to Dr. Mark Meyer as I still strongly believe that eval for SCS trial is a highly appropriate next step."

16. As noted above, Claimant would be evaluated by Dr. Meyer on January 24, 2018. The report from this date of visit reflects that Claimant described limb pain (left leg) but no "arthraglias, back pain, joint stiffness, myalgias, limping, cane/walker or wheelchair use/bound". While Dr. Meyer diagnosed Claimant with RSD and chronic pain syndrome, the report is devoid of any examination findings or other objective information outside of Claimant's height, weight, body mass index (BMI), blood pressure or pulse to support this diagnosis. Rather, regarding exams, the report indicates simply "SEE ATTACHED DICTATION".[2] Dr. Meyer recommended proceeding with a trial of SCS for Claimant's left lower extremity pain. NP Griffith documented on January 30, 2018, that Dr. Mayer felt Claimant was an "excellent candidate" for a trial of SCS and they were awaiting the required psychiatric evaluation to move forward with the process.

17. Per ¶ 14, Claimant's requested DIME was completed by Dr. Gray on April 24, 2018. Dr. Gray noted that testing for CRPS was negative. He made a point to state, "It would appear that the nurse practitioner has persisted in the use of the diagnosis of complex regional pain syndrome despite the negative workup for CRPS." The ALJ finds this a reference to NP Griffith, from Dr. Finn's office. Dr. Gray diagnosed Claimant with a left knee ACL tear and medial meniscus tear. He noted that Claimant was status-post left knee hamstring autograft ACL reconstruction, and "status-post left lower extremity DVT with persistent post-thrombotic syndrome, with persistent pain (causalgia/claudication) and edema". Dr. Gray assigned a 33% scheduled impairment rating of Claimant's left lower extremity, 10% of which represented impairment of Claimant's peripheral vascular system, specifically intermittent claudication with persistent moderate edema. He did not include CRPS in his diagnosis. He did not provide a rating for CRPS. The DIME indicated maintenance medical treatment was warranted and included the suggestion that Claimant be afforded a trial of a spinal stimulator "*if he meets the criteria for this procedure*". (emphasis added). His opinion was that this could be done as maintenance care.

18. Respondents filed a Final Admission of Liability (FAL) consistent with the MMI and impairment opinions expressed by Dr. Gray. The FAL was filed June 13, 2018. Claimant filed an objection to the final admission on June 29, 2018, and an hearing application for disfigurement that same day. A disfigurement award was issued on August 22, 2018.

[2] Despite careful review of the records submitted, the ALJ is unable to locate a separate dictation reduced to writing describing the "exams" performed by Dr. Meyer or the results of those "exams".

19. On September 6, 2018 Dr. Kathy McCranie performed a physician advisor review regarding the request for a trial of SCS. Noting the absence of a diagnostic confirmation for CRPS and a lack of clear neuropathic radicular pain, Dr. McCranie opined that Claimant was not a candidate for a trial of SCS trial per the Medical Treatment Guidelines.

20. On October 18, 2018, Claimant filed the present application for hearing seeking a trial of SCS on a maintenance medical basis.

21. Claimant sought an opinion from Dr. Miguel Castrejon who completed an IME on December 14, 2018. Claimant reported to Dr. Castrejon that he continued to have constant pain described as pins and needles and throbbing pain of the left lower extremity distal to the knee extending along the anterolateral leg to include the area of the tibialis anterior and calf musculature down to the lateral ankle. He described showering as feeling as if the water was "peeling his skin off". He reported that he was bothered by direct touch or pressure on the left lower leg, noting that he could only tolerate silk sheets and soft pants due to pain. He also reported a "substantial" decrease in his pain from the lumbar sympathetic blocks. Exam documented moderate swelling of the left lower leg. On palpation, the left lower extremity felt cooler than the right, and according to Dr. Castrejon, had somewhat of a clammy feeling to it.

22. Dr. Castrejon diagnosed Claimant with sympathetically mediated pain with neuropathic radicular pain qualities of the left lower extremity secondary to development of deep calf vein thrombosis resulting in probable CRPS. Differential diagnosis included post thrombotic syndrome.[3] In support of his diagnosis, Dr. Castrejon reasoned that left lower extremity neuropathic symptoms were documented nine days post-surgery with the diagnosis of a DVT, which symptoms only continued to worsen with time, despite resolution of the DVT. Dr. Castrejon pointed out a number of references in the record wherein Claimant reported symptoms which were consistent with CRPS or otherwise clear neuropathic radicular pain. He placed great importance on Dr. Finn's April 3, 2017 examination wherein Dr. Finn documented decreased sensation in the distribution of both the superficial and deep peroneal and sural nerves. This particular finding is consistent with that of the vascular surgeon, Dr. Seagraves, who had previously opined Claimant was not suffering from post-thrombotic syndrome. Dr. Castrejon also pointed out that there were very limited descriptions of the nature of Claimant's distribution of symptoms by many of Claimant's medical examiners. For example, Dr. Gray documented pain in a "stocking like distribution," yet his physical exam findings indicated Claimant was most sensitive in certain areas of the leg that he did not describe in detail, leading Dr. Castrejon to the conclusion that his statement of a "stocking like distribution" was inconsistent with his own exam findings.

23. In his report, Dr. Castrejon explained that neuropathic radicular pain consists of painful symptoms arising in an area of altered sensation, and that the signs

[3] At hearing, Dr. Castrejon testified that his inclusion of "versus post thrombotic syndrome" was an error on his part, as he later discussed in his report why he opined Claimant did not have post thrombotic syndrome. (Tr. 48:15 – 49:1). *See also* Clmt. Ex. 15, p. 372.

and symptoms can vary between patients and even within individual patients over time. Dr. Castrejon's physical examination was similar to the April 3, 2017 examination by Dr. Finn that documented specific dermatomal distributions. Dr. Castrejon proposed that Claimant had "neuropathic pain that [could not] be superficially discounted as not complying with the spinal cord stimulator criteria" set for in the Medical Treatment Guidelines. Therefore, he opined that Claimant's situation warranted "further discussion regarding a spinal cord stimulator trial and even possible implantation". Additionally, Dr. Castrejon summarized the report from psychologist Joel Cohen, Ph.D, indicating there was no identified need for a psychological follow-up as the testing done did not reveal any emotional behavioral factors.

24. Dr. Fillmore performed a records review on December 6, 2018. Dr. Fillmore reviewed updated medical records, including testing results, since his July 17, 2017 IME of Claimant and indicated that while Claimant appears to meet the clinical criteria for CRPS, he did not meet the diagnostic criteria for the diagnosis. Dr. Fillmore opined that because Claimant had not met the requirements of a spinal cord stimulator per Rule 17 of the Medical Treatment Guidelines, he is not a candidate for a spinal cord stimulator.

25. Claimant testified at hearing. He reported little change in his pain and symptoms since being placed at MMI. He continues to have 7/10 pain, numbness, tingling, swelling and hypersensitivity. Claimant testified that he currently relies on medication, including Nucynta, Tramadol, and topiramate to help relieve his symptoms and if he misses a dose of his medications his pain will become "excruciating" and "unreal". Claimant explained that his deep pain in and through his leg and through his toes was "fantastic" after the first block and that allowed him to walk much better. Nonetheless, he testified this pain relief and functional improvement was very short lived. According to Claimant, the second block resulted in better pain reduction and increased function but again these benefits only lasted one day. There was no cross-examination of Claimant.

26. Dr. Castrejon testified by telephone at hearing on behalf of Claimant in his capacity as an expert in the field of physical medicine and rehabilitation. He explained at hearing that his final impression of Claimant having sympathetic-mediated pain with neuropathic radicular pain qualities is essentially a form of CRPS, as CRPS is a form of ongoing neuropathic pain. Dr. Castrejon elaborated that Claimant's ongoing neuropathic pain differs slightly from a CRPS Type I or Type II diagnosis, and it is important to look at the Medical Treatment Guidelines, specifically Workers' Compensation Rule of Procedure (WCRP), Rule 17, Exhibit 9 to help determine Claimant's appropriate treatment. According to Dr. Castrejon, Rule 17, Exhibit 9 indicates that SCS is appropriate in a subset of patients who have clear neuropathic, radicular pain in a distribution amenable to stimulation coverage. Dr. Castrejon testified that Claimant "definitely" had neuropathic pain, and the guidelines discuss peripheral nerve stimulation for said pain. Dr. Castrejon further testified that current Blue Cross/Blue Shield guidelines accept spinal cord stimulation as an accepted form of treatment for neuropathic pain.

27. Dr. Castrejon explained why Dr. McCranie's reliance on a negative EMG result when considering SCS treatment was misplaced. According to Dr. Castrejon, an EMG will not diagnose radiculopathy or a condition involving the sensory nerve pathways. Dr. Castrejon's physical examination, like Dr. Finn's, revealed pain and sensory findings in a distribution that involved specific dermatomal areas that would be amenable to a peripheral form of nerve stimulation. Consequently, he supports a trail of SCS.

28. During cross examination, Dr. Castrejon acknowledged that Claimant does not meet the diagnostic criteria for CRPS I or II. In his testimony, he stated that it was his opinion that Claimant qualified for a diagnosis of CRPS NOS (not otherwise specified), because he felt there was no other explanation for his symptoms and complaints. He acknowledged that the Medical Treatment Guidelines do not mention CRPS NOS as a diagnosis appropriate for SCS treatment. Dr. Castrejon could not point to any evidence-based medical studies that show that spinal cord stimulators are successful in the treatment of CRPS-NOS. Dr. Castrejon testified that a SCS trial should move forward because the Medical Treatment Guidelines were outdated and, in his opinion, should include CRPS NOS as a diagnosis warranting the use of SCS. However, he acknowledged that in his report he declared that a definitive diagnosis had not been established. As noted, he provided a differential diagnosis of CRPS versus post thrombotic syndrome. In his report, Dr. Castrejon noted: "In my professional opinion, if an inadequate description exists then how can one appropriately argue against recommended treatment for stimulator trial or, for that matter, *the presence or not* of "neuropathic radicular pain" (emphasis added). Conversely then, Dr. Castrejon ostensibly recognizes that if there is not adequate evidence to support the presence of a diagnosis then it would be inappropriate to argue for a specific course of treatment, including, in this case SCS. In making the statement, "how can one appropriately argue against recommended treatment for stimulator trial," Dr. Castrejon apparently rejects the CPDMTG and the CRPSMTG as a basis for appropriately arguing against recommended treatment for a stimulator trial.[4] As noted, Dr. Castrejon would amend his opinion by asserting that his inclusion of post thrombotic syndrome as a differential diagnosis was in error. Moreover, in his arguments against the use of the Guidelines, Dr. Castrejon declared that they were outdated and did not consider relevant and recent developments. Dr. Castrejon would later confess to being unaware of updates to the Guidelines in 2017 and admitted he was referring to the prior versions of the Guidelines in forming his opinion. Dr. Castrejon could not provide any reference to evidenced-based medical studies supporting his assertion that SCS could be effective for a diagnosis of CRPS NOS.

29. Dr. Joseph Fillmore presented expert testimony at hearing. Dr. Fillmore has extensive experience in pain management, including conducting SCS trials. His patients include those with known CRPS and RSD. He also has experience as a member of a panel updating Colorado Division of Workers' Compensation Guidelines.

[4] Dr. Castrejon also makes arguments against the determinations of the DIME, which are not relevant, given the procedural posture of this claim. Claimant does not challenge the DIME or the MMI determination and impairment rating reflected in that final admission filed consistent with the DIME.

As noted, Dr. Fillmore evaluated Claimant and provided a written report on July 17, 2017 with recommendations for treatment. As testing to confirm CRPS had not been completed at that time, he recommended that this be done. He noted that if these tests confirmed CRPS, a SCS could be considered. Conversely, "[i]f these tests [were] negative, he would not be a candidate for a stimulator."

30. As noted further, post MMI Dr. Fillmore completed a medical records review taking into consideration further diagnostic work-up since his IME. His report of December 6, 2018 was to specifically issues to address whether a SCS trial is reasonable, necessary, and related to the work injury. It is his expert conclusion that it is not. His written report and his testimony explained that diagnostic testing was negative and Claimant's situation does not meet the criteria of the Chronic Pain Disorder Medical Treatment Guidelines (CPDMTG) and the Complex Regional Pain Syndrome/Reflex Sympathetic Dystrophy Medical Treatment Guidelines (CRPSMTG) to justify a trial of SCS as reasonable and necessary.

31. According to the current version of the CPDMTG, patients with established CRPS I or II or a failed spinal surgery are candidates for spinal cord stimulators. CPDMTG, H.1.a, Neurostimulation. Moreover, this guideline provides: "Traditional or other SCS may be indicated in a subset of patients who have a clear neuropathic radicular pain (radiculitis) with or without previous surgery". The prior version of the CPDMTG effective 2012 contained the following similar language: "SCS may be indicated in a subset of patient who have a clear neuropathic radicular pain (radiculitis)". This version of the guidelines goes on to explain that patients, who are not candidates for surgical intervention on the spine and whom have "burning pain in a distribution amenable to stimulation coverage and have pain at night not relieved by position", may be candidates for SCS. See CPDMTG H.1.c.i.

32. The DOWC Medical Treatment Guidelines provide a vetted consensus regarding the diagnosis of CRPS and a method of determining when SCS is reasonable and necessary as a treatment modality. Rule 17, *Division of Workers' Compensation Medical Treatment Guidelines-Methodology and General Literature Search Strategy for Medical Treatment Guidelines*. Per Rule 17, Exhibit 7, the "[d]iagnosis of CRPS continues to be controversial. The clinical criterial used by the International Association for the Study of Pain is thought to be overly sensitive and unable to differentiate well between those patients with other pain complaints and those with actual CRPS…Clinical criteria alone are not dependable nor necessarily reliable and require objective testing". CRPSMTG, Diagnosis of CRPS, page 14. "All operative interventions must be based upon positive correlation of clinical findings, clinical course and diagnostic tests. A comprehensive assimilation of these facts must lead to a specific diagnosis with positive identification of pathologic conditions." CPDMTG, B. 9, General Guideline Principles, Surgical Interventions, pg. 3.

33. The risks associated with SCS are significant and include less commonly, "spinal cord compression, paraplegia, epidural hematoma, epidural hemorrhage, undesirable change in stimulation, seroma, CSK leakage, infection, erosion, and allergic

response". Other complications include, dural puncture, hardware malfunction or equipment migration, pain at the implantation site, loss of pain relief, chest wall stimulation, and other surgical risks". CPDMTG, H.1.b, pg. 179. Recent studies have shown the device complication rates to be 25% at 6 months, 32% at 12 months, and 45% at 24 months. CPDMTG, H.1.b, Neurostimulation. For a neuro-stimulation trial, a temporary lead in implanted at the level of pain and attached to an external source to validate effectiveness. CRPSMTG I, pg. 98. While the temporary leads can be removed, the ALJ understands from the evidence presented, that placing them is invasive and creates risks, including on rare occasion, those outlined above.

34. Claimant's expert Dr. Castrejon described his symptoms as allodynia, pain that occurs from things that normally don't elicit pain. Studies show that SCS may not influence allodynia (regardless of diagnosis). CPDMTG, *p. 179, citing to (Barolat et al., 1998; Barolat et al., 2001; Frey et al., 2009; Kemler, de Vet, Barendse, van den Wildenberg, & van Kleef, 2008; Richard B. North et al., 2005).*

35. Dr. Fillmore testified that it is not reasonable and necessary to place a spinal cord stimulator in Claimant, and by the same logic, not reasonable and necessary to proceed with a trial of SCS for this Claimant because does he meet the diagnostic criteria for CRPS I or II, as defined by the CRPSMTG. According to the CRPSMTG a patient should have confirmed diagnosis of CRPS to proceed to SCS trial and permanent SCS. As explained in his report and testified to by Dr. Fillmore, Claimant does not meet the criteria for this procedure for the following reasons:

- Claimant's electrodiagnositic evaluation was normal. *Ex. A, Bates 6; Ex. C.*
- Claimant's three phase bone scan was not diagnostic for CRPS. *Ex. A, Baste 3*
- Lumbar sympathetic blocks were diagnostically negative for CRPS. *Ex. A, Bates 2; Ex. E, Bates 56; Claimant testimony.*
- Infrared Stress thermography performed by Dr. Polanco was negative for CRPS. *Ex. A, Bates 8.*
- Autonomic testing battery was negative for evidence of CRPS. *Ex A. Bates 3-8; Ex E, Bates 56.*
- Diagnosis of CRPS under CRPSMTG requires at least one symptoms in three of four particular categories: Sensory, vasomotor, sudomotor, and motor/trophic. Claimant does not meet this criteria. *Ex. A, Bates 6-9.*
- Diagnosis of CRPS under CRPSMTG also requires at least one sign at the time of evaluation in two or more of these particular categories:

Sensory, vasomotor, sudomotor, and motor/trophic. Claimant does not meet this criteria. *Ex. A, Bates 6-9.*

36. Claimant, through Dr. Castrejon counters that while he does not meet the diagnostic criteria for CRPS I or II, he probably has sympathetically mediated radicular pain in a dermatomal pattern amenable to stimulation. Sympathetically Maintained Pain (SMP) is characterized by complaints of pain in the absence of clinically detectable vasomotor or sudomotor signs which decreases significantly with sympathetic blocks. As noted here, while Claimant's pain relief with blocks was relatively short lived it was substantial, approaching 80%.[5] Consequently, Claimant argues he falls into the subset of patients for whom a trail of SCS is warranted and in this case reasonable and necessary to cure and alleviate the ongoing effects of his industrial injury.[6]

37. Based upon the totality of the evidence presented, the ALJ credits the opinions of Dr. Castrejon, Dr. Finn and Dr. Seagraves to find that Claimant likely suffers from neuropathic pain in his left lower leg caused by his knee injury, subsequent surgery and post-surgical complications. The ALJ is persuaded that Claimant is an appropriate candidate for a trial of spinal cord stimulation and that the need for this trial is related to his admitted work related injury and is otherwise reasonable and necessary to cure and relieve him of his ongoing symptoms. While Dr. Fillmore's opinion that Claimant lacks the diagnostic criteria to support an impression of CRPS I or II in this case is persuasive, he did not adequately address the likelihood of Claimant having SMP, i.e. neuropathic radicular pain. In this regard, the ALJ finds the opinions of Dr. Castrejon concerning Claimant's SMP diagnosis and need for a trial of SCS credible and persuasive.

38. The ALJ further finds Claimant's condition satisfies the requirements of the Medical Treatment Guidelines ("MTG's") necessary to warrant a trial of neurostimulation. As noted at ¶ 31 above, "[t]raditional or other SCS may be indicated in a subset of patients who have a clear neuropathic radicular pain (radiculitis) with or without previous surgery". While the parties presented scant evidence regarding Claimant's psychological examination, Dr. Castrejon noted that Joel Cohen, Ph.D, found no need for a follow up psychological examination as previous testing done did not reveal any emotional behavioral factors to preclude the trail of SCS from proceeding. Based upon the evidence presented, the ALJ is persuaded that Claimant has undergone the necessary psychological evaluation to proceed with a trial of SCS.

39. Based upon the evidence presented, the ALJ finds that Claimant has proven, by a preponderance of the evidence, that a trial of SCS to help alleviate the ongoing effects of probable SMP caused by his industrial injury spinal cord stimulation is reasonable and necessary.

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[5] The ALJ credits Claimant's testimony regarding the reduction in his pain complaints and functional improvement following his two sympathetic blocks.

[6] As noted in the CRPSMTG, patients who suffer from SMP may "use sympathetic blocks and active and passive therapy" from [the] guideline. CRPSMTG G.4.

CONCLUSIONS OF LAW

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

I. Generally

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

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

C. Assessing the weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo.App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence presented. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo.App. 2008). To the extent, expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); see also, *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo.App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary opinion). When considered in its totality, the ALJ concludes that the evidence in this case supports a reasonable inference/conclusion that Claimant suffers from SMP, i.e. neuropathic radicular pain in a distribution that may be amenable to stimulator. Accordingly, the ALJ concludes that while Claimant probably does not

have CRPS I or II, he falls into a subset of patients from whom neurostimulation may be effective. Without undergoing a trial of the same, the ALJ concludes that it is impossible to know whether Claimant would benefit from such treatment. For these reasons, the ALJ concludes that a trial of SCS is warranted in this case. Dr. Fillmore's contrary opinions are unpersuasive.

II. Medical Benefits

D. A claimant is entitled to medical benefits that are reasonably necessary to cure or relieve the effects of the industrial injury. *See* § 8-42-101(1), C.R.S. 2003; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office, supra*. Similarly, the question of whether medical treatment is reasonable and necessary to cure or relieve the effects of an industrial injury is one of fact. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003).

E. The Medical Treatment Guidelines (Guidelines) are regarded as the accepted professional standards for care under the Workers' Compensation Act. *Hernandez v. University of Colorado Hospital*, W.C. No. 4-714-372 (January 11, 2008); see also *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). The purpose of the Guidelines is to comply with C.R.S. § 8-40-102(1), "and assure the quick and efficient delivery of medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation." Rule 17-1.

F. The Medical Treatment Guidelines, Rule 17-2(A), W.C.R.P. provide: All health care providers shall use the Guidelines adopted by the Division. In spite of this direction, it is acknowledged that the Guidelines are not sacrosanct and may be deviated from under appropriate circumstances. *See*, Section 8-43-201(3) (C.R.S. 2014). Nonetheless, they carry substantial weight. The ALJ may also appropriately consider the Medical Treatment Guidelines as an evidentiary tool. *Logiudice v. Siemans Westinghouse,* W.C. 4-665-873 (ICAO January 25, 2011).

G. As provided for under § 8-43-201(3), the ALJ has "[considered] the medical treatment guidelines adopted under § 8-42-101(3) in determining whether certain medical treatment is reasonable, necessary, and related to an industrial injury or occupational disease." In keeping with the MTGs and as found above, the ALJ concludes that Claimant's current condition is directly related to his industrial injury and satisfies the requirements set forth in the Medical Treatment Guidelines ("MTG's") necessary to warrant a trial of neurostimulation. See generally, Rule 17, Exhibits 7 and 9. Here, Claimant most probably has neuropathic pain (radiculitis) which effectively responded to sympathetic blocks, albeit for a short duration of time. While there are

risks associated with the implantation of the temporary leads necessary to conduct the trail, these leads can be removed and the ALJ concludes that these attendant risks do not outweigh the potential benefit that Claimant may enjoy should the trial prove effective. Moreover, while SCS may not influence allodynia regardless of Claimant's diagnosis, the ALJ is cognizant that the very purpose of a trail is to determine just that, specifically, whether Claimant's persistent pain will respond to SCS. Accordingly, the ALJ is unimpressed with the assertion that a trial of SCS is not warranted because Claimant may not respond. Finally, the ALJ is persuaded based upon the evidence presented that Claimant has undergone a psychological evaluation, which determined that no clinically significant psychological indicators existed that would preclude Claimant from undergoing a trial of neurostimulation. Consequently, Claimant has established by a preponderance of the evidence that he is entitled to a trial of SCS as a reasonable and necessary treatment modality to potentially cure and relieve him of the ongoing pain and dysfunction caused by his admitted work related injury.

ORDER

It is therefore ordered that:

1. Respondents shall authorize and pay for the spinal cord stimulator trial as requested by Dr. Meyer.

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

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

DATED: April 22, 2019

/s/ Richard M. Lamphere

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

ISSUES

- Did Claimant prove he suffered a compensable work-related injury on or about September 2, 2018?

FINDINGS OF FACT

1. Claimant worked as a part-time "click list" clerk at Employer's grocery store in Monument. He typically worked five days per week, from 5:00 AM to 9:00 AM. Claimant's job was to fill online orders placed by customers. He walked through the store pushing a large wheeled cart with several divided containers or totes. He used a hand-held scanner to record items put into the cart as he filled the orders.

2. Claimant alleges an injury to his left arm and shoulder from pushing the cart. He identified the injury date as September 2, 2018 on his WC claim form. At hearing, he testified the pain started at work on August 31, but the symptoms intensified and "came together all at once" on September 2. On that date, he had stopped to retrieve some items and felt severe pain in his left arm to the shoulder after he let go of the cart. Claimant described the pain as "like a gunshot" and an "electrical shock." Claimant alleges his left hand swelled to "twice the size," and his left arm turned "red like Rudolph." Claimant became angry and threw his scanner to the ground. He resumed working for a brief time, but then left the store, went to his car, and sent a text message to his immediate supervisor, Ms. Shelia F[Redacted]. Claimant then went back inside and continued working.

3. At approximately 7:15 AM, the store manager, Ms. Michelle N[Redacted], encountered Claimant in the chip aisle. She wished Claimant good morning and asked how he was doing. Claimant was having no apparent difficulty working, and Ms. N[Redacted] noticed no physical abnormalities or pain behaviors. Claimant was hesitant to mention the injury because he wanted to report it to Ms. F[Redacted] instead. But he ultimately decided to tell Ms. N[Redacted], "because she was standing right there." He reported pain in his left hand and arm. Ms. N[Redacted] asked Claimant to come upstairs to her office to process his claim.

4. Claimant worked for approximately another hour before going to Ms. N[Redacted]'s office. Claimant and Ms. N[Redacted] completed handwritten incident reports and called in a report to a triage nurse at Sedgwick. Claimant gave the nurse the following statements regarding his injury:

> APPEARANCE of INJURY: There is swelling on my left hand and entire left arm. My left hand is twice the size of my right hand. The swelling on my left arm isn't massively but you can tell when you compare it to my right arm. There is a knot on the palm part of my left hand near the thumb (base of

thumb). The knot is horizontal. The length is 2 inches. My entire left arm and left hand is red.

SEVERITY: I can't grip or pick things up because of the pain in my left arm. I feel that a nerve is pinched. I don't have any strength. I can move my left arm but it's painful. I can bend and straighten my left arm completely. It hurts if I lift my arm over my shoulder.

5. Ms. N[Redacted] stated on the accident report she questioned the claim. When asked about that at hearing, she said it was because Claimant told her he was in pain for a couple of days, but she worked with him the day before and he said nothing about any pain or injury.

6. Ms. N[Redacted] gave Claimant a designated provider list, from which he chose the DaVita Urgent Care clinic.

7. Claimant saw Dr. Christopher McNulty at DaVita later that morning. He told Dr. McNulty, "on 08/31/18 he was pushing carts when he noticed severe pain that radiated from left shoulder down to wrist. Patient states he started favoring his left wrist by not using [it]. Patent states he has been trying to treat with IBU which has not helped. Patient states today he was pushing carts again when he felt severe pain radiating from left shoulder down to wrist back up to shoulder. Patient states he is unable to pick anything up at work or hold items."

8. Dr. McNulty examined Claimant's neck and noted "acute tissue changes bilaterally . . . worse on the left on the right." There was no tenderness "at all" beneath the scapula. Shoulder range of motion was nearly full with pain in the biceps tendon and AC joint at the extremes of abduction. Dr. McNulty noted "some generalized edema in these areas." Left wrist range of motion was reduced in all planes, with "a degree of generalized edema." Claimant had no significant loss of fine motor coordination in his left hand. X-rays of the neck, left shoulder, and left wrist were normal. Dr. McNulty diagnosed "chronic cervical strain with cervical radiculitis, acromioclavicular bursitis, bicipital tendinitis, [and] carpal tunnel syndrome." He prescribed a muscle relaxer, referred Claimant to therapy, and released him to work with no use of his left arm.

9. Claimant went back to the store and gave the restrictions to Ms. N[Redacted]. He also spoke with Randy J[Redacted], the assistant store manager, about modified work. Claimant wanted to fill his prescription at a different pharmacy and had not eaten lunch, so Ms. N[Redacted] allowed him to leave and come back the next day.

10. The parties presented conflicting evidence about when Claimant next went to work. Claimant testified he called off September 3 because he was in too much pain. He said he drove to Denver and purchased marijuana to make edibles for pain relief. Employer's witnesses testified Claimant came to work on September 3.

11. Whether it was September 3 or 4, Claimant returned to work and was assigned light duty "conditioning" shelves. This task entails pulling merchandise to the front edge of shelves to make sure it looks presentable and is within reach of customers.

While Claimant was working in the condiment section, a bottle of ketchup fell from the shelf. He was standing very close to the shelf and "instinctively" caught the falling bottle with his left hand. He testified this caused such excruciating pain in his left arm that he "peed my pants." Claimant became upset and left the store without telling anyone what happened. Later that day, Mr. J[Redacted] called Claimant to see where he was, and Claimant relayed the incident.

12. Claimant was seen at DaVita on September 5, 2018. He described the ketchup bottle incident, which he said happened "several days ago." Claimant stated Employer had sent him back for "reevaluation" because of the second incident. Dr. McNulty noted, "the patient says that the exacerbation of pain in the above areas has since quieted and he now has pain that he was here with originally when we opened his claim." The examination findings were similar to those at the initial visit on September 2, except there is no mention of any upper extremity swelling. Dr. McNulty opined Claimant had "exacerbated" his prior injury but "this seems to [have] quieted back down to baseline at this point." No treatment was recommended specifically for to the ketchup bottle incident. Dr. McNulty ordered an EMG "to confirm carpal tunnel syndrome of left wrist."

13. Claimant returned to work on September 5, 2018 as a greeter. He worked light duty until September 14, 2018 when he was terminated because his post-accident urine drug screen was positive for marijuana.

14. Claimant's last visit with Dr. McNulty was on September 15, 2018. He was improving but still had pain in the left wrist, forearm, and biceps, and "quite impressive tenderness" to palpation of the left acromioclavicular joint. He had "some chronic tissue changes" in the cervical musculature, but nothing "acute." Dr. McNulty opined, "I suspect that the patient is slowly improving secondary to a number of factors. He is no longer performing the duties that caused his current symptoms, he is getting an adequate amount of rest to the affected areas, and he is doing physical therapy." Dr. McNulty referred Claimant for an occupational medicine "evaluation."

15. Claimant saw Dr. Wallace Larson, an orthopedist, for an IME at Respondent's request on December 20, 2018. Dr. Larson noted Claimant gave "a very confusing history and flight of ideas." The physical examination showed "no objectively abnormal physical findings." Dr. Larson opined, "there is no objective and certainly no convincing subjective evidence the patient sustained a specific injury." He further opined, "[Claimant's] symptoms are not consistent with any known physical disorder."

16. Dr. Larson testified at hearing consistent with his report. He reiterated Claimant had "no objective abnormality on examination" and his subjective complaints matched no plausible diagnosis. Dr. Larson could discern no work-related medical condition that required treatment. He opined the evaluations and treatment received through DaVita were not reasonably necessary in relation to any work-related condition.

17. The testimony of Employer's witnesses was credible and persuasive. Dr. Larson's expert opinions are credible and persuasive.

18. Claimant failed to prove by a preponderance of the evidence he suffered any work-related injury that proximately caused a need for medical treatment or disability.

CONCLUSIONS OF LAW

To receive compensation or medical benefits, a claimant must prove he suffered an injury arising out of and in the course of employment. Section 8-41-301(1), C.R.S.; *see, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The claimant must prove entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S.

The Workers' Compensation Act recognizes a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence," whereas an "injury" is the physical trauma caused by the accident. Section 8-40-201(1). In other words, an "accident" is the cause, and an "injury" is the result. *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967). Workers' compensation benefits are only payable if an accident results in a compensable "injury." The mere fact that an incident occurred at work and caused symptoms does not establish a compensable injury. Rather, a compensable injury is one that requires medical treatment or causes a disability. *E.g., Montgomery v. HSS, Inc*., W.C. No. 4-989-682-01 (ICAO Aug. 17, 2016). Moreover, the fact that a claimant receives some medical treatment after an accident does not automatically establish a compensable injury if the evidence ultimately shows the treatment was not reasonably necessary or proximately caused by the accident. *McTaggart-Kerns v. Dell, Inc*., W.C. No. 4-915-218-02 (May 29, 2014).

As found, Claimant failed to prove he suffered a compensable work-related injury. The fact that Claimant experienced pain while, or shortly after, performing job tasks does not automatically mean he suffered a work-related injury. An incident that merely elicits pain symptoms with no causal connection to the industrial activities does not compel a finding that a claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). Simply because a claimant's symptoms arise after performing job functions does not necessarily create a causal relationship based on temporal proximity. *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (October 27, 2008). As noted in *Scully*, "correlation is not causation," and a merely coincidental correlation between the claimant's work and his symptoms does not mean there is a causal connection.

Claimant's dramatic descriptions of his symptoms and limitations are not consistent with the credible observations of his supervisors or supported by the medical records. Although he probably had some pain and swelling in his left arm, there is no

persuasive evidence those symptoms were proximately caused by his work on or around September 2, 2018. The onset of severe pain on September 2 was not associated with any exertion but occurred when he simply let go of the cart. Dr. McNulty diagnosed a litany of conditions, none of which the ALJ finds plausibly associated with Claimant's described work activities. Dr. Larson's opinions are persuasive. Dr. McNulty's opinions are not persuasive because provided no analysis and appears to have assumed Claimant's symptoms were work-related simply because they started at work. It was probably a coincidence Claimant's symptoms started at work becuase there is no demonstrated causal relationship to his employment duties. Although the incident with the ketchup bottle may have briefly exacerbated Claimant's pain, it did not proximately cause any need for medical treatment. When he saw Dr. McNulty on September 5, the exacerbation had resolved without treatment and he had returned to "baseline." After reviewing all the evidence, the ALJ concludes Claimant failed to carry his burden to prove a compensable injury.

ORDER

It is therefore ordered that:

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

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

DATED: April 23, 2019

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

ISSUES

I. Whether Claimant's ongoing prescriptions for Adderall, Aricept, and Geodon, as well as related medical appointments authorized treating physician (ATP) Steven Dworetsky, M.D., are reasonable, necessary and related to her February 10, 2009 work injury.

FINDINGS OF FACT

1. Claimant is a 65-year-old former project controls engineer.

2. Claimant has a longstanding prior history of treatment for post-traumatic stress disorder (PTSD) and depression. Since at least 2003, Claimant has taken anti-depressant medication, including Wellbutrin, and attended regular counseling sessions with psychotherapist Julie Rudiger, LCSW.

3. On February 10, 2009, Claimant sustained an admitted industrial injury when she tripped and fell forward, striking her head onto a glass door. Claimant then fell backwards and hit her head on the cement. Claimant reported she briefly lost consciousness during the incident.

4. Claimant was seen at Swedish Medical Center the same day. The medical record documents that Claimant had head and right shoulder injuries after tripping and falling, with loss of consciousness. It was noted Claimant had a headache with moderate swelling and small ecchymosis of the forehead, but no altered mental status. A CT scan of head revealed no acute changes. Claimant was released with instructions to follow up with a workers' compensation provider.

5. Claimant subsequently began complaining of cognitive issues and memory loss. In March 2009, Eric Hammerberg, M.D. assessed Claimant with post-concussion syndrome and situational adjustment reaction with anxiety and depression. Claimant also treated with Rafer Leach, M.D., who diagnosed Claimant with a mild traumatic brain injury. Claimant underwent a neurologic consultation with J. Bradley Gibson, M.D., who gave an impression of a Grade III concussion with loss of consciousness. Claimant also treated with Steven Dworetsky, M.D. a psychiatrist, who determined Claimant suffered a traumatic brain injury. Claimant underwent cognitive therapy and was prescribed, *inter alia*, Aricept, Adderall and Geodon.

6. On March 1, 2010, Gregory A. Thwaites, Ph.D. performed a neuropsychological evaluation at the request of Respondents. Dr. Thwaites determined Claimant sustained a mild concussion as a result of the February 10, 2009 work accident. He opined it was possible Claimant had subtle ongoing cognitive difficulties from the concussion, but that it was very difficult to assess the cause of the self-reported cognitive difficulties in light

of Claimant's sleep apnea, medication effects and pre-existing psychiatric concerns. Dr. Thwaites noted Claimant showed signs of symptoms magnification and response bias.

7. On March 26, 2010, Stephen Moe, M.D. performed a psychiatric IME at the request of Respondents. Based on Claimant's reports to him and the medical report from the date of injury, Dr. Moe concluded Claimant suffered a mild concussion on February 10, 2009, but noted other data called the diagnosis into question. He opined that, whether or not Claimant actually suffered a concussion as a result of the work injury, her current symptoms were due to other factors. Dr. Moe explained that Claimant's presentation was inconsistent with the prompt recovery expected with a mild concussion, and determined that Claimant's persistent physical and cognitive symptoms were due to somatoform disorder and cogniform disorder.

8. On August 24, 2010, Robert Watson, M.D. performed an IME at the request of Respondents. He opined Claimant sustained a closed head injury and deferred to Drs. Moe and Thwaites regarding neuropsychiatric issues. He noted concerns regarding the severity of Claimant's self-reported cognitive problems but, nonetheless, opined that Claimant appeared to have a mild neurological deficit from the work injury. Dr. Watson concluded Claimant had reached maximum medical improvement (MMI) and assigned a 19% whole person impairment rating, consisting in part, of a 5% whole person impairment rating for concussions under Section 4.1a of the AMA Guides.

9. Dr. Leach placed Claimant at MMI as of October 6, 2010.

10. Claimant subsequently underwent a Division-sponsored IME (DIME) with Ronald Swarsen, M.D. on February 22, 2011. Dr. Swarsen determined Claimant's work injury resulted in a closed head injury, without loss of consciousness, but with probable mild concussion, right shoulder impact injury, and sprain of the cervical spine. He opined that Claimant's psychological issues were pre-existing and not work-related. [1]

11. Respondents filed an amended Final Admission of Liability on July 22, 2011, admitting to Dr. Swarsen's 25% whole person impairment rating. Per the FAL, Respondents admitted liability for reasonably necessary *Grover*-type medical benefits per the recommendations of Dr. Swarsen. Dr. Swarsen recommended:

> Claimant has been on maintenance psychotropic drugs for quite some time before the work-related accident. Any psychotropic medications she was on before should be managed by her PCP and not under the work-related claim. Any medications prescribed for PTSD/panic disorder or sleep disorder which were pre-existing conditions would not be related to her work-related injury. This would include Wellbutrin, Zoloft, Temazepam and Valium (diazepam). Medications related to the closed head injury and brain issues should be continued indefinitely, including Adderall, Geodon, and Airicept. She should be tapered to the lowest effect doses of these

[1] Dr. Swarsen's DIME Report was not submitted at hearing by either party. Findings of Facts #10-13 of this Order adopts and incorporates the findings of fact set forth in ALJ Harr's February 7, 2012 Order, which was admitted into the record as Exhibit 3.

> medications. Follow-up visits with prescribing physicians for medication refills and adjustments are appropriate 2-3 times a year with appropriate laboratory monitoring as well.

12. A March 30, 2011 medical record of Dr. Gibson noted Claimant continued to have residuals of post-concussion syndrome manifested by cognitive dysfunction, posttraumatic visual disturbance and posttraumatic vertigo and disequilibrium.

13. On January 10, 2012, Claimant went to hearing before ALJ Michael E. Harr on the issue of whether ongoing treatment with Drs. Dworetsky and Gibson, and whether the medications prescribed by Drs. Dworetsky and Gibson, were reasonable and necessary maintenance treatment. ALJ Harr issued an order dated February 7, 2012. ALJ credited the opinions of Drs. Thwaites, Moe and Swarsen. He found Claimant failed to prove it was more probable than not "that the medications and treatment beyond those recommended by Dr. Swarsen are reasonably necessary to maintain her condition at MMI." ALJ Harr noted Respondents had admitted liability for ongoing treatment recommended by Dr. Swarsen, thus admitting liability for the Adderall, Geodon, and Aricept medications and for two to three follow-up visits per year with Dr. Dworetsky and Dr. Gibson to monitor claimant's medications. ALJ Harr ordered Insurer to pay for the Adderall, Geodon and Aricept medications prescribed by Dr. Dworetsky and Dr. Gibson and for three follow-up visits per year with Dr. Dworetsky and/or Dr. Gibson as reasonably necessary to monitor Claimant's medications. He specifically denied and dismissed Claimant's request for an award of medical benefits to cover medication and treatment for pre-existing depression, anxiety, PTSD, and psychological issues, including Wellbutrin, Zoloft, Temazepam and Valium.

14. Respondents continued to pay for Claimant's Adderall, Aricept and Geodon medications, as well as follow-up visits with Drs. Dworetsky and Gibson, pursuant to ALJ Harr's Order. Claimant continued to treat with Dr. Dworetsky after Dr. Gibson passed away.

15. On November 25, 2015, Allison M. Fall, M.D. performed an IME at the request of Respondents. Dr. Fall reviewed Claimant's medical records and interviewed and physically examined Claimant. Dr. Fall diagnosed Claimant with a work-related head contusion and mild concussion and preexisting PTSD/depression. She concluded that the cognitive deficits reported by Claimant were inconsistent with the injury Claimant sustained on February 10, 2009 and agreed with Dr. Moe's assessment. Dr. Fall opined that the medications being prescribed to Claimant for a traumatic brain injury are not medically reasonable and necessary as related to the work injury. She noted Claimant's cognitive symptoms likely have a functional basis, and further opined there was no medical indication for any further maintenance treatment as related to the work injury.

16. Dr. Fall performed a review of additional medical records and issued a supplemental report on August 16, 2018. It remained her opinion that medication for cognitive issues from a traumatic brain injury is not medically indicated in Claimant's case, and the medications prescribed by Dr. Dworetsky are not related to the work injury.

17. On February 20, 2019, Dr. Fall testified by pre-hearing deposition as an expert in physical medicine and rehabilitation. Dr. Fall testified consistent with her IME reports and continued to opine that the Adderall, Aricept and Geodon medications prescribed by Dr. Dworetsky are not reasonable, necessary or related to Claimant's February 10, 2009 work injury. Dr. Fall testified that Claimant suffered a mild concussion as a result of the work injury, which should have resolved without treatment in a short period of time. Dr. Fall opined Claimant does not have cognitive deficits as a result of a brain injury, but instead suffers from underlying unrelated psychiatric issues, as determined by Dr. Moe.

18. Dr. Dworetsky issued a letter dated February 28, 2019. Dr. Dworetsky noted Claimant was being treated with Aricept, Adderall and Geodon for a traumatic brain injury she sustained during the February 10, 2009 work incident. He explained that the Aricept was to help Claimant with memory and overall awareness, the Adderall was to help with cognition, attention and energy, and the Geodon was meant to decrease agitation and depression. Dr. Dworetsky noted Claimant's psychiatric status and cognitive status had not improved over the years and that Claimant "continues to require these medications to function at a minimal level."

19. Claimant testified at hearing she suffers from issues with cognition, memory, and speech as a result of the work injury. She testified that the issues began approximately two weeks after the work incident. Claimant testified she currently takes at least 12 different medications, including Valium, Hydrocodone, and Venlafaxine for depression. Claimant continues to see Julie Rudiger for depression and life coping skills. Claimant lives by herself, has a computer and an iPhone, and handles her banking with her son's assistance. Claimant testified she drives herself around, but requires the use of a GPS. Claimant testified she did not take Adderall, Aricept or Geodon prior to the work injury, and cannot currently function without the medications.

20. The ALJ credits the opinion of Dr. Dworetsky and the testimony of Claimant. The ALJ finds Claimant suffered a brain injury and cognitive issues as a result of her February 10, 2009 work injury. Claimant continues to treat with Dr. Dworetsky and take Adderall, Aricept and Geodon to alleviate the effects of the February 10, 2009 work injury. Claimant's ongoing treatment with Dr. Dworetsky and the prescriptions for Adderall, Aricept and Geodon are reasonable and necessary, as such treatment helps Claimant maintain a basic level of functioning.

21. The preponderant evidence establishes Claimant's ongoing prescriptions for Adderall, Aricept, and Geodon, as well as related medical appointments with Dr. Dworetsky, are causally related to the February 10, 2009 work injury and reasonably necessary to maintain Claimant at MMI.

22. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

Medical Maintenance Benefits

The respondents are liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. Colorado courts have ruled that the need for medical treatment may extend beyond the point of MMI where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the

effects of the injury or prevent further deterioration of her condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995).

In cases where the respondents file a final admission of liability admitting for ongoing medical benefits after MMI they retain the right to challenge the compensability, reasonableness, and necessity of specific treatments. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Ford v. Regional Transportation District,* W.C. No. 4-309-217 (ICAO February 12, 2009). The question of whether the claimant proved that specific treatment is reasonable and necessary to maintain his or her condition after MMI or relieve ongoing symptoms is one of fact for the ALJ. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Respondents argue Claimant did not suffer a traumatic brain injury as a result of the February 10, 2009 work injury; thus, ongoing treatment for cognitive issues, including the prescriptions of Adderall Aricept and Geodon, and the continued treatment with Dr. Dworetsky, are not reasonable, necessary or related. The ALJ disagrees.

Despite differing opinions on the severity of Claimant's head injury, all of Claimant's treating physicians and Respondents' independent medical examiners (RIMEs) found Claimant sustained, at the least, a mild concussion as a result of the February 10, 2009 work injury. This diagnosis is supported by Claimant's reports regarding the mechanism of injury and the medical records on the date of injury noting a head injury, loss of consciousness, and forehead swelling and ecchymosis. Although Claimant has a longstanding pre-existing history of psychological treatment for depression and PTSD, the record does not contain any evidence indicating Claimant suffered from cognitive issues prior to the work injury. While Claimant took numerous medications prior to the work injury, Claimant did not begin taking Adderall, Aricept or Geodon until after the work injury due to the effects of the work injury.

Drs. Thwaites, Moe, Watson and Fall, all RIMEs, acknowledged Claimant sustained a mild concussion, but opine that Claimant's persistent and significant symptoms are due to unrelated psychological issues and are inconsistent with the expected course of recovery for a mild concussion. Claimant's treating physicians, Drs. Dworetsky and Gibson, opine Claimant suffered cognitive dysfunction as a result of the concussion she sustained on February 10, 2009. DIME physician Dr. Swarsen specifically found Claimant's psychological issues were not work-related, and concluded any psychotropic drugs Claimant was on before the work injury, and any medications for Claimant's PTSD/panic disorder and sleep disorder were not work-related. However, he also specifically concluded that medications related to Claimant's closed head injury and "brain issues" should be provided as maintenance treatment. Implied in this opinion is the conclusion that Claimant's "brain issues" are the result of the February 10, 2009 work injury. Similarly, although ALJ Harr credited the opinions Drs. Moe and Thwaites, he further credited the opinion of Dr. Swarsen, concluding that Adderall, Geodon and

Aricept medications and follow-up appointments with Dr. Dworetsky (and Dr. Gibson) were reasonable and necessary to maintain Claimant's condition.

In his recent letter dated February 2019, Dr. Dworetsky credibly and persuasively explained the intended purpose of each medication, that each medication is being used to treat the effects of Claimant's work injury, and that each medication is needed in order for Claimant to maintain minimal function. Claimant credibly testified the medications help maintain her function. Thus, despite evidence in the record to the contrary regarding the severity and cause of Claimant's cognitive issues, the totality of the credible and persuasive preponderant evidence establishes that the ongoing prescriptions for Adderall, Aricept and Geodon, as well as continued follow-up visits with Dr. Dworetsky are causally related to the February 10, 2009 work injury, and are reasonable and necessary to maintain Claimant's condition at MMI.

ORDER

It is therefore ordered that:

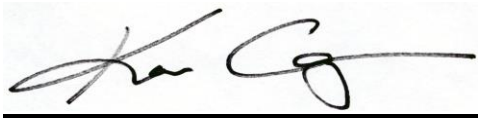
1. Respondents shall continue to pay for the Adderall, Aricept and Geodon medications prescribed by Dr. Dworetsky.

2. Respondents shall continue to pay for up to three follow-up visits per year with Dr. Dworetsky as are reasonably necessary to monitor Claimant's medications.

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

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

DATED: April 24, 2019



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that he suffered an occupational disease in the form of a full-thickness tear of the right shoulder rotator cuff that began on August 25, 2017 during the course and scope of his employment with Employer.

FINDINGS OF FACT

1. On May 14, 2008 Claimant began working for Employer as a Door Builder. Employer's facility includes an assembly department in which individuals build standard doors and a custom department in which employees construct customized doors.

2. Claimant explained that he works approximately 40 hours during a five-day workweek but occasionally works overtime on Saturdays. He noted that he primarily builds about 10-20 custom doors per day. However, when he works in the assembly department he constructs approximately 80-100 doors each day. Claimant detailed that building a custom door includes swinging an approximately three-pound mallet 15-20 times per door to strike dowels and connect door parts. He also uses numerous clamps to hold door pieces in place and operates power tools to build jigs that hold pieces and guide tools. Furthermore, Claimant carries door frames and retrieves items from storage shelves.

3. Claimant commented that he began experiencing right shoulder pain during the summer of 2017. On August 25, 2017 Claimant reported his symptoms and Employer completed a First Report of Injury. The Report specified that Claimant suffered soreness and stiffness in his right shoulder. Claimant attributed his symptoms to using a mallet to construct doors at work.

4. On March 19, 2018 Claimant visited Marc-Andre R. Chimonas, M.D. for an examination. Dr. Chimonas reported that Claimant builds large, heavy wooden doors for Employer. Claimant began noticing pain in his right shoulder in about July 2017 and the pain progressively worsened while swinging a mallet overhead to construct doors. Although Claimant attempted to ignore his symptoms for several months, he visited his primary care provider at Kaiser in February 2018. He underwent a right shoulder MRI that revealed a full-thickness tear of the supraspinatus and subscapularis tendons. Dr. Chimonas noted that Claimant's co-pays were very high and "feels this is work-related so he formally filed a Workers' Compensation claim." In reviewing Claimant's job duties Dr. Chimonas commented that Claimant swings an approximately 3.5-pound mallet to secure two pieces of wood to every door. Claimant remarked that he assembles up to 100 doors each day and spends about three hours per day swinging a mallet.

5. After conducting a physical examination Dr. Chimonas performed a causation analysis pursuant to the Colorado Division of Workers' Compensation *Medical Treatment Guidelines* (*Guidelines*). He explained that the *Guidelines* specify chronic overuse syndrome of the shoulder if any of the following criteria are satisfied: (1) overhead work for at least 30 minutes each day for five years; (2) shoulder movement of 15-36 repetitions without a two second pause for 80% of a work cycle; (3) shoulder force with more than 10% maximum exertion without a two second pause for 80% of a work cycle; and (4) heavy lifting of over 20kg 10 times per day. Dr. Chimonas concluded that Claimant's right shoulder condition was caused by his work activities for Employer. He reasoned that, because Claimant has worked for Employer for 10 years swinging a mallet to construct 100 doors each day, he has engaged in overhead work for at least 30 minutes per day. Notably, Dr. Chimonas added that Claimant "may" also meet the preceding criteria 2-4 in performing his job duties. Accordingly, Dr. Chimonas concluded that Claimant suffered a cumulative trauma condition of the right shoulder. He assigned work restrictions of no lifting in excess of two pounds with two arms and "all lifting with right arm should be performed with elbow at side."

6. On March 26, 2018 Claimant returned to Dr. Chimonas for an examination. Claimant reported that he was concerned about bruising that had recently developed on his right upper arm. After conducting a physical examination Dr. Chimonas diagnosed Claimant with an unspecified injury of the muscles and tendons of the right shoulder rotator cuff. Dr. Chimonas reiterated that Claimant's symptoms were related to his work activities for Employer. He explained that Claimant required "urgent but not emergent surgery" because of a full-thickness rotator cuff tear with atrophy and retraction.

7. On March 26, 2018 Dawn Leskinen completed a Job Demands Analysis and Risk Factor Analysis for the position of Custom Door Builder at Employer's facility. She issued a report on April 12, 2018. The Job Demands Analysis specified that Claimant spent 50-60% of his day assembling doors by building frames, using hand tools and machines, swinging a mallet to hammer wooden dowels and tightening/loosening clamps. He spent about 5-10% of his workday reviewing and analyzing work orders, drawings, blueprints and schedules. Claimant also spent about 5-10% of his day gathering materials, preparing work, unclamping doors from the previous night, setting up equipment and laying out parts. Finally, Claimant spent about 10-20% of his day engaging in intermittent tasks including preparing glass, moving doors, sweeping and cleaning. Notably, each wooden doors that Claimant assembled weighed 53 pounds and the mallet he used to strike dowels weighed 2.62 pounds.

8. Ms. Leskinen conducted time studies of Claimant's overhead work activities and shoulder movements. She specifically determined that Claimant spent two minutes and forty seconds of cumulative time during his work shift engaged in overhead activities. Relying on the *Guidelines*, Ms. Leskinen did not find evidence of any Primary or Secondary Risk Factors involved in Claimant's job duties. She specifically determined that no risk factors were present regarding Claimant's shoulder condition. Finally, Ms. Leskinen explained that Claimant performed a "consistent rotation of job duties throughout the work shift."

9. Employer subsequently reviewed Ms. Leskinen's Job Demands Analysis and determined that there were several inaccuracies requiring modification. Employer thus suggested several changes regarding Claimant's job activities. Notably, Employer maintained that Claimant worked on 8-15 doors each day and very rarely built fewer than 10 doors. Claimant also only used a stepstool to assemble doors approximately once per month. His used the mallet more frequently than identified or approximately 1-2 minutes per door on a daily basis. Most importantly, Employer noted that "we feel he performs overhead work (using the mallet or positioning door parts) at least 10 min[utes] total per day."

10. Claimant testified that, even with Employer's suggested modifications to the Job Demands Analysis, the report still contained inaccuracies. He noted that, when he worked in the assembly department, he constructed 60-100 doors each day. Moreover, he swung the mallet about 15-20 times to assemble each door. Claimant summarized that he engaged in overhead work in excess of 30 minutes each day.

11. Team Lead for the Custom Department Kevin Geminden testified that Claimant engaged in numerous tasks including retrieving parts, clamping and hammering that required overhead or forceful shoulder work. He summarized that Claimant engaged in overhead work for about 30 minutes each workday.

12. Team Lead for the Assembly Department Jeremy Burdick testified that the Assembly Department produces 80 doors each day. Hammering with a mallet requires overhead movement and employees perform overhead activities for about one-third of each workday.

13. On May 14, 2018 William Ciccone, II, M.D. conducted a records review of Claimant's claim. He commented that Claimant's March 10, 2017 MRI revealed a large, full-thickness right rotator cuff tear with muscle atrophy and biceps tearing. Physicians subsequently recommended a reverse arthropathy to repair Claimant's right shoulder. Dr. Ciccone concluded that Claimant's work activities did not cause his right shoulder rotator cuff tear. He disagreed with Dr. Chimonas' determination because the Job Demands Analysis did not meet the criteria for an overuse injury under the *Guidelines*. Dr. Ciccone explained that chronic rotator cuff pathology naturally becomes larger and worsens over time. Chronic rotator cuff tears are associated with muscle atrophy and "progress to the point where they affect the biomechanical balance of the shoulder." The individual then suffers loss of motion and pain, not because of a trauma, but because of the natural progression that occurs with shoulder pathology. Accordingly, Dr. Chimonas concluded that Claimant did not suffer an injury to his right shoulder while performing his work activities for Employer.

14. On June 22, 2018 Jose Carlos Cebrian, M.D. conducted a records review of Claimant's claim. After reviewing Claimant's medical records and considering the Job Demands Analysis, Dr. Cebrian performed a causation analysis pursuant to the *Guidelines*. He remarked that Claimant attributed his right shoulder symptoms to his work activities for Employer. Dr. Cebrian explained that, in order to perform a medical causation analysis for a cumulative trauma condition pursuant to the *Guidelines*, the first

step is to make a diagnosis, the next step is to clearly define the job duties and the final step is to explain any scientific evidence that supports a causal relationship between the diagnosis and exposure or injury. Dr. Cebrian summarized that Claimant did not engage in forceful and repetitive activity for an amount of time that meets the minimum threshold in the *Guidelines* to cause a right shoulder rotator cuff tear.

15. Dr. Cebrian initially noted that Claimant had been diagnosed with a right shoulder rotator cuff tear and atrophy. In delineating Claimant's job duties, Dr. Cebrian explained that Claimant makes between 8-15 doors per day. He uses a 2.62-pound hammer to strike wooden dowels when assembling custom doors. Claimant hammered at waist level from 128-240 times each shift. He specifically used the mallet at an overhead level to secure the top wood to the dowels below. Claimant used the mallet eight times per door for one second each time. Based on constructing 8-15 doors per day, Claimant hammered overhead from 64-120 times per shift. Notably, Claimant spent a total of about 10 minutes each shift performing overhead work. Furthermore, Claimant consistently rotated job duties throughout each day. He placed glass in doors, carried materials and put them on rolling racks, moved glass, applied moulding and operated a table saw.

16. Dr. Cebrian next considered the scientific evidence that supports a cause and effect relationship between Claimant's diagnosis and work activities. He initially explained that degeneration is not a "wear and tear process" but occurs at the cellular level. Degeneration is the inability to replace normal tissue as a result of the aging process. Healthy tissue is eventually replaced by less healthy tissue that begins to fray and tear. Dr. Cebrian explained that there is no question that an individual with shoulder degeneration will experience symptoms when repetitively elevating or internally rotating the arm while performing overhear materials handling. He reasoned that, although Claimant may have experienced symptoms while performing work activities, Claimant's symptoms were not caused by his job duties but instead reflected the underlying disease process in his right shoulder.

17. Dr. Cebrian remarked that the manifestation of symptoms while at work does not establish a causal relationship with job duties. He explained:

> There is no question that someone with shoulder degeneration will experience symptoms while repetitively elevating the arm, internally rotating the arm, or doing materials handling overhead. This is the reasonable medical expectation for the underlying condition. That [Claimant] may have had symptoms when doing certain activities at work is an indication of the underlying disease process and not of a causal relationship between the disease and the work exposure. The fact that symptoms are experienced at work does not require the medical inference that work is causal but rather the reasonable and symptomatic manifestation of the underlying condition.

18. Dr. Cebrian also applied the *Guidelines* in evaluating Claimant's right shoulder rotator cuff tear. The *Guidelines* specifically include factors for the development

of shoulder pathology. They include the following: (1) overhead work of 30 minutes per day for a minimum of five years; (2) shoulder movement at the rate of 15-36 repetitions per minute and no two second pauses for 80% of the work cycle; and (3) shoulder movement with force greater than 10% of maximum with no two second pauses for 80% of the work cycle. After reviewing the Job Demands Analysis and revisions, Dr. Cebrian concluded that Claimant did not engage in forceful and repetitive activity for an amount of time that meets the minimum threshold in the *Guidelines*. He detailed that Claimant's overhead work and pauses in excess of two seconds were well below the threshold levels enumerated in the *Guidelines*. Dr. Cebrian summarized that Claimant's right shoulder degenerative findings are the result of the normal aging process.

19. On February 20, 2019 the parties conducted the post-hearing evidentiary deposition of Dr. Cebrian. Relying on W.C.R.P. Rule 17, Exhibit 4 of the *Guidelines*, Dr. Cebrian maintained that Claimant did not engage in forceful and repetitive activity for an amount of time that meets the minimum threshold for the development of shoulder pathology. Considering the Job Demands Analysis and revisions, Dr. Cebrian explained that Claimant built between 8-15 custom doors per day. Only a portion of time hammering dowels into the frame and affixing styles onto the door involved work above shoulder level. Dr. Cebrian remarked that, "even if you were generous" and Claimant took 2-3 seconds per hammer strike of each dowel multiplied by the number of doors he assembled each day, overhead work still fell well below the 30-minute threshold enumerated in the *Guidelines*. In fact, as detailed in the Job Demands Analysis, Claimant's total overhead work time was closer to 10-minutes or less per day.

20. On February 25, 2019 the parties conducted the post-hearing evidentiary deposition of Dr. Chimonas. He maintained that Claimant's job duties for Employer caused his right shoulder rotator cuff tear. Relying on W.C.R.P. Rule 17, Exhibit 4, Dr. Chimonas specifically explained that Claimant lifted at least 10 custom doors each day weighing in excess of 50 pounds. The amount of lifting satisfied the criteria enumerated in the *Guidelines* for establishing a cumulative trauma injury. Moreover, Claimant's 10 years of overhead lifting while working for Employer contributed to his right shoulder cumulative trauma condition. However, Dr. Chimonas acknowledged that the criteria for repetitive, overhead lifting listed in the *Guidelines* was probably not satisfied based on the Job Demands Analysis and revisions.

21. On March 6, 2019 the parties conducted the post-hearing evidentiary deposition of Dr. Ciccone. Relying on the Job Demands Analysis, Dr. Ciccone maintained that Claimant's work activities for Employer did not cause his right rotator cuff tear. He explained that Claimant's right rotator cuff tear was caused by intrinsic rotator cuff disease unrelated to work. Claimant did not satisfy the criteria listed in W.C.R.P. Rule 17, Exhibit 4 for the development of a work-related shoulder cumulative trauma condition.

22. Claimant has failed to demonstrate that it is more probably true than not that he suffered an occupational disease in the form of a full-thickness tear of the right rotator cuff that began on August 25, 2017 during the course and scope of his employment with Employer. Although Claimant attributed his right shoulder symptoms to his work

activities, a review of his job duties reflects that they lacked the requisite force or repetition to cause a cumulative trauma disorder.

23. Relying on the *Guidelines* in conducting a Job Demands Analysis, Ms. Leskinen did not find evidence of any Primary or Secondary Risk Factors in Claimant's job duties. After conducting time studies of Claimant's work activities, Ms. Leskinen specifically determined that Claimant spent 50-60% of his day assembling doors by building frames, using hand tools and machines, swinging a mallet to hammer wooden dowels and tightening/loosening clamps. He spent about 5-10% of his workday reviewing and analyzing work orders, drawings, blueprints and schedules. Claimant also spent about 5-10% of his day gathering materials, preparing work, unclamping doors from the previous night, setting up equipment and laying out parts. Finally, Claimant spent about 10-20% of his day engaging in intermittent tasks including preparing glass, moving doors, sweeping and cleaning. Claimant thus engaged in a variety of tasks throughout his workday.

24. After reviewing the Job Demands Analysis and revisions, Dr. Cebrian persuasively concluded that Claimant did not engage in forceful and repetitive activity for an amount of time that meets the minimum threshold in the *Guidelines*. He detailed that Claimant's overhead work and pauses in excess of two seconds were well below the threshold levels enumerated in the *Guidelines*. Specifically, based on constructing 8-15 doors per day, Claimant hammered overhead from 64-120 times per shift. Notably, Claimant spent a total of about 10 minutes each shift performing overhead work. Furthermore, Claimant consistently rotated job duties throughout each day. He placed glass in doors, carried materials and put them on rolling racks, moved glass, applied moulding and used a table saw. Dr. Cebrian thus summarized that Claimant's right shoulder degenerative findings are the result of the normal aging process. He reasoned that, although Claimant may have experienced symptoms while performing work activities, his right rotator cuff tear was not caused by his job duties. Instead, Claimant's right shoulder reflected the underlying degenerative process. Moreover, Dr. Ciccone disagreed with Dr. Chimonas' determination because the Job Demands Analysis did not meet the criteria for an overuse injury under the *Guidelines*. He persuasively concluded that Claimant's work activities did not cause his right shoulder rotator cuff tear, but his condition was attributable to intrinsic rotator cuff disease. Dr. Ciccone explained that chronic rotator cuff pathology naturally becomes larger and worsens over time.

25. In contrast, Dr. Chimonas concluded that Claimant's right shoulder condition was caused by his work activities for Employer. He reasoned that, because Claimant has worked for Employer for 10 years swinging a mallet to construct 100 doors each day, he has engaged in overhead work for at least 30 minutes per day. Dr. Chimonas alternatively explained that lifting at least 10 custom doors each day weighing in excess of 50 pounds satisfied the criteria enumerated in the *Guidelines* for establishing a shoulder cumulative trauma injury. However, Dr. Chimonas acknowledged that the criteria for repetitive, overhead lifting enumerated in the *Guidelines* was probably not satisfied based on the Job Demands Analysis and revisions. Furthermore, the *Guidelines* only specify that jobs requiring heavy lifting in excess of 10 times per day over the years may contribute to shoulder disorders. Accordingly, based on the Job Demands Analysis,

a review of the medical records and the persuasive opinions of Drs. Cebrian and Ciccone, Claimant did not engage in forceful and repetitive activity for an amount of time that meets the threshold for a cumulative trauma condition. Claimant's employment activities did not cause, intensify, or, to a reasonable degree, aggravate his right shoulder condition to produce a need for medical treatment. Claimant's claim is thus denied and dismissed.

CONCLUSIONS OF LAW

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

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

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

4. The test for distinguishing between an accidental injury and an occupational disease is whether the injury can be traced to a particular time, place and cause. *Campbell v. IBM Corp.*, 867 P.2d 77, 81 (Colo. App. 1993). "Occupational disease" is defined by §8-40-201(14), C.R.S. as:

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

5. A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, §8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

6. Rule 17, Exhibit 5 provides an algorithm for evaluating Cumulative Trauma Conditions (CTC) pursuant to the *Guidelines*. In addressing applicability, the *Guidelines* note that "CTC's of the upper extremity comprise a heterogeneous group of diagnoses which include numerous specific clinical entities including disorders of the muscles, tendons and tendon sheaths, nerves, joints and neurovascular structures." W.C.R.P. Rule 17, Exhibit 5, p. 6. In determining a diagnosis when performing a cumulative trauma analysis the *Guidelines* delineate specific musculoskeletal conditions and peripheral nerve disorders. Nevertheless, the Guidelines provide that "[l]ess common cumulative trauma conditions not listed specifically in these Guidelines are still subject to medical causation assessment." W.C.R.P. Rule 17, Exhibit 5, p. 21.

7. The *Guidelines* include a Primary Risk Factor Definition Table for Force and Repetition/Duration. The Table requires six hours of two pounds pinch force or 10 pounds of hand force three or more times per minute. Other Primary Risk Factors involving Force and Repetition/Duration include six hours of lifting 10 pounds in excess of 60 times per hour and six hours of using hand tools weighing two pounds or more. An additional Primary Risk Factor category is Awkward Posture and Repetition/Duration. The factor requires four hours of wrist flexion greater than 45 degrees, extension greater than 30 degrees or ulnar deviation greater than 20 degrees, six hours of elbow flexion greater than 90 degrees, four hours of supination/pronation with task cycles 30 seconds or less or awkward posture for at least 50% of a task cycle. Secondary Risk Factors require three hours of two pounds pinch force or 10 pounds of hand force three or more times per minute. Other Secondary Risk Factors involving Force and Repetition/Duration include three hours of lifting 10 pounds greater than 60 times per hour and three hours of using hand tools weighing two pounds or more. Finally, Secondary Risk Factors for Awkward Posture and Repetition/Duration include three hours of elbow flexion greater than 90 degrees and three hours of supination/pronation with a power grip or lifting. If neither Primary nor Secondary Risk Factors are present, the *Guidelines* provide that "the case is probably not job related." W.C.R.P. Rule 17, Exhibit 5, p. 24.

8. The *Guidelines* also specifically delineate factors for the development of shoulder pathology. They include the following: (1) overhead work of 30 minutes per day for a minimum of five years; (2) shoulder movement at the rate of 15-36 repetitions per

minute and no two second pauses for 80% of the work cycle; and (3) shoulder movement with force greater than 10% of maximum with no two second pauses for 80% of the work cycle. Moreover, jobs requiring heavy lifting in excess of 10 times per day over the years may contribute to shoulder disorders. Notably, the *Guidelines* provide that, because of the lack of multiple, high quality studies, each case must be evaluated individually when addressing the likelihood of cumulative trauma contributing to shoulder pathology. W.C.R.P. Rule 17, Exhibit 4, p. 16.

9. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he suffered an occupational disease in the form of a full-thickness tear of the right rotator cuff that began on August 25, 2017 during the course and scope of his employment with Employer. Although Claimant attributed his right shoulder symptoms to his work activities, a review of his job duties reflects that they lacked the requisite force or repetition to cause a cumulative trauma disorder.

10. As found, relying on the *Guidelines* in conducting a Job Demands Analysis, Ms. Leskinen did not find evidence of any Primary or Secondary Risk Factors in Claimant's job duties. After conducting time studies of Claimant's work activities, Ms. Leskinen specifically determined that Claimant spent 50-60% of his day assembling doors by building frames, using hand tools and machines, swinging a mallet to hammer wooden dowels and tightening/loosening clamps. He spent about 5-10% of his workday reviewing and analyzing work orders, drawings, blueprints and schedules. Claimant also spent about 5-10% of his day gathering materials, preparing work, unclamping doors from the previous night, setting up equipment and laying out parts. Finally, Claimant spent about 10-20% of his day engaging in intermittent tasks including preparing glass, moving doors, sweeping and cleaning. Claimant thus engaged in a variety of tasks throughout his workday.

11. As found, after reviewing the Job Demands Analysis and revisions, Dr. Cebrian persuasively concluded that Claimant did not engage in forceful and repetitive activity for an amount of time that meets the minimum threshold in the *Guidelines*. He detailed that Claimant's overhead work and pauses in excess of two seconds were well below the threshold levels enumerated in the *Guidelines*. Specifically, based on constructing 8-15 doors per day, Claimant hammered overhead from 64-120 times per shift. Notably, Claimant spent a total of about 10 minutes each shift performing overhead work. Furthermore, Claimant consistently rotated job duties throughout each day. He placed glass in doors, carried materials and put them on rolling racks, moved glass, applied moulding and used a table saw. Dr. Cebrian thus summarized that Claimant's right shoulder degenerative findings are the result of the normal aging process. He reasoned that, although Claimant may have experienced symptoms while performing work activities, his right rotator cuff tear was not caused by his job duties. Instead, Claimant's right shoulder reflected the underlying degenerative process. Moreover, Dr. Ciccone disagreed with Dr. Chimonas' determination because the Job Demands Analysis did not meet the criteria for an overuse injury under the *Guidelines*. He persuasively concluded that Claimant's work activities did not cause his right shoulder rotator cuff tear, but his condition was attributable to intrinsic rotator cuff disease. Dr. Ciccone explained that chronic rotator cuff pathology naturally becomes larger and worsens over time.

12. As found, in contrast, Dr. Chimonas concluded that Claimant's right shoulder condition was caused by his work activities for Employer. He reasoned that, because Claimant has worked for Employer for 10 years swinging a mallet to construct 100 doors each day, he has engaged in overhead work for at least 30 minutes per day. Dr. Chimonas alternatively explained that lifting at least 10 custom doors each day weighing in excess of 50 pounds satisfied the criteria enumerated in the *Guidelines* for establishing a shoulder cumulative trauma injury. However, Dr. Chimonas acknowledged that the criteria for repetitive, overhead lifting enumerated in the *Guidelines* was probably not satisfied based on the Job Demands Analysis and revisions. Furthermore, the *Guidelines* only specify that jobs requiring heavy lifting in excess of 10 times per day over the years may contribute to shoulder disorders. Accordingly, based on the Job Demands Analysis, a review of the medical records and the persuasive opinions of Drs. Cebrian and Ciccone, Claimant did not engage in forceful and repetitive activity for an amount of time that meets the threshold for a cumulative trauma condition. Claimant's employment activities did not cause, intensify, or, to a reasonable degree, aggravate his right shoulder condition to produce a need for medical treatment. Claimant's claim is thus denied and dismissed.

ORDER

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

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

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

DATED: April 24, 2019.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici

ISSUES

- Did Claimant prove by a preponderance of the evidence he is entitled to medical benefits after MMI?

- Disfigurement.

FINDINGS OF FACT

1. Claimant is a firefighter who has worked for Employer for 16 years.

2. On January 15, 2018, Claimant suffered an admitted injury to his right knee while responding to a call. He was attempting to climb down from the fire engine backward and his right knee hyperextended and "popped," causing him to fall to the ground. Claimant immediately felt severe pain in his right knee and could not bear weight on his right leg.

3. Employer referred Claimant to its occupational medicine clinic, which has served as the primary ATP during the claim.

4. An MRI of the right knee on January 17, 2018 showed a complex tear of the posterior horn and body of the lateral meniscus, a bone bruise on the tibial plateau beneath the meniscal tear, and moderate joint effusion. The MRI also showed an intact ACL graft from a prior surgery.

5. Claimant tore his right ACL in 1988 playing lacrosse in high school. He underwent a successful ACL reconstruction with Dr. Oderia Mitchell. He rehabbed the knee for approximately one year and experienced a full recovery. After joining the fire department, Claimant had no problems with his right knee until the industrial injury on January 15, 2018.

6. Claimant had arthroscopic surgery with Dr. Derek Purcell on February 5, 2018. The initial plan was to perform a partial lateral meniscectomy, but Dr. Purcell also repaired a medial meniscus tear he discovered during surgery that the radiologist had missed. The articular cartilage in both compartments was in "good condition overall," as was the patellar articular cartilage. There was grade 2B cartilage change in the central aspect of the trochlea but no loose cartilage flaps.

7. Claimant recovered relatively quickly after surgery and was put at MMI on April 24, 2018. He saw Dr. Jay Neubauer for an impairment evaluation who signed a 9% scheduled lower extremity rating. Dr. Neubauer noted Claimant was using OTC pain relievers as needed, but did not recommend any ongoing treatment.

8. On April 26, 2018, Dr. Purcell authored a report addressing the potential for further treatment. Dr. Purcell stated,

> [Claimant] underwent a right knee arthroscopic partial medial and lateral meniscectomy on 02/05/2018 of this year. Partial medial and lateral meniscectomy increases his risk of developing tibiofemoral osteoarthritis, ultimately requiring the need for total knee arthroplasty. Arthroplasty may be required as early as over the next 15 years. He may continued conservative measures to treat the development of osteoarthritis over time.

9. Claimant saw Dr. John Tyler for a Division IME on September 25, 2018. Claimant set his greatest ongoing issue was occasional "popping and aching" in the knee. He had returned to full duty and was performing his job without difficulty. Claimant was taking over-the-counter anti-inflammatories periodically to manage the residual aching, particularly with weather changes. Dr. Tyler assigned a 21% lower extremity rating. Regarding future treatment, Dr. Tyler opined,

> As previously mentioned by Dr. Purcell in his report, this patient having the amount of loss he had to his lateral meniscus in the right knee puts him at a higher risk for requiring a total knee arthroplasty in the future. I am not a specialist in orthopedic surgery and, thus, cannot give any type of timetable in which a total knee arthroplasty would be required in his case and would prefer such judgment to Dr. Purcell. I do not see that further interventional care at this time from a conservative or surgical standpoint is required.

10. On October 31, 2018, Respondent filed a Final Admission of Liability admitting for Dr. Tyler's 21% scheduled rating. The FAL denied liability for medical treatment after MMI.

11. Claimant followed up with Dr. Purcell on November 29, 2018. He reported an episode of severe pain approximately one month before. His physical examination on the day of the appointment was relatively unremarkable. Dr. Purcell stated,

> We again discussed treatment for arthritis-related conditions of the knee. We reviewed the use of ice, avoidance of heat, trial of glucosamine and chondroitin, management of a healthy body weight, physical therapy and rehabilitation, bracing, Tylenol, anti-inflammatories, corticosteroids, and viscosupplementation. He understands that at some point in his lifetime he may also require total knee arthroplasty, but this should not be for many years to come.

12. Dr. William Ciccone II performed a record review at Respondent's request on February 15, 2019. Dr. Ciccone opined it was "unclear" whether the meniscus tears were work-related. He opined the medial meniscus tear was preexisting and asymptomatic, and the lateral tear could have been preexisting too. He disagreed with Dr. Purcell that Claimant will need treatment for developing arthritis and possible knee replacements of the next 15 years. He stated that meniscectomy increases the risk for

arthritis, but "does not mean it invariably leads to symptomatic arthritis." He noted early degenerative changes in Claimant's knee, which would not be related to the 2018 injury. He concluded, "While I believe that the claimant underwent appropriate care for his knee, I do not believe that the potential development of arthritis in the future can be wholly related to work."

13. Dr. Ciccone issued an addendum report dated February 26, 2019. Whereas he previously opined Claimant had "appropriate care," he now thought it "unclear" why Claimant had surgery before undergoing 6 weeks of rehabilitation. He indicated meniscus tears are usually caused by a twisting injury, not hyperextension. Dr. Ciccone opined, "Lacking an obvious mechanism for a meniscus tear, the lateral meniscus tear may have been pre-existing and asymptomatic alike the medial meniscus tear." He concluded,

> [C]laimant's continued symptoms are related to the pre-existing degenerative change. I do not believe that a fall backwards would cause any aggravation or acceleration of the degenerative change in the knee. I do not believe that the claimant should receive maintenance care, as the degenerative changes are not work related.

14. Claimant testified regarding the ongoing issues with his knee. He has some degree of knee pain "every single day," ranging from near-constant "dull pain" to episodes of "sharp" pain and "locking up." He perceives the pain is slowly worsening with time. He regularly takes OTC glucosamine and chondroitin supplements as recommended by Dr. Purcell, which he pays for himself. He performs low impact exercises to maintain strength and mobility in his legs and avoids high impact activities.

15. Claimant was a credible witness.

16. Claimant proved by a preponderance of the evidence he requires future medical treatment to relieve the effects of his injury.

17. Claimant has three (3) ½-inch diameter arthroscopic surgery scars around the right knee. The ALJ finds Claimant should be awarded $600 for disfigurement.

CONCLUSIONS OF LAW

A. General award of medical benefits after MMI.

The respondents are liable for medical treatment after MMI reasonably necessary to relieve the effects of the injury or prevent deterioration of the claimant's condition. Section 8-42-101; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). There is no requirement that a particular course of treatment be articulated or that the claimant actually be receiving treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999). Rather, proof of a current or future need for "any" form of treatment will suffice for an award of post-MMI benefits. *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). If the claimant establishes the probability of a need for future treatment, he is entitled to a general award of medical benefits after MMI, subject to the employer's right to dispute the compensability or

reasonable necessity of any particular treatment. *Hanna v. Print Expediters, Inc.*, 77 P.3d 863 (Colo. App. 2003).

As found, Claimant proved a probable need for future treatment to relieve the effects of his injury. The ALJ is not persuaded by Dr. Ciccone's causation opinions, and concludes the February 2018 knee surgery was directly related to the work accident. Claimant probably at least tore his lateral meniscus in the accident. But even if Dr. Ciccone were correct that both tears were pre-existing, they were entirely asymptomatic and non-disabling before January 15, 2018, despite 16 years of strenuous work as a firefighter. If the accident did not cause one or more meniscal tears, it substantially aggravated a latent pre-existing condition. Either theory establishes the requisite causal nexus. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990).

Nor is the ALJ persuaded that Claimant's current symptoms "are related to the preexisting degenerative change" as opined by Dr. Ciccone. The minimal pre-existing degenerative changes in Claimant's his knee were asymptomatic before the January 15 accident, and there is no persuasive evidence Claimant would have required any current treatment for his knee, much less surgery, absent the industrial injury.

The ALJ agrees with Respondent that the possibility Claimant may require a total knee replacement 15+ years in the future is too speculative and indefinite to support an award of *Grover* benefits. But the ALJ also agrees with Claimant that the continued use of over-the-counter anti-inflammatories for pain control, and supplements recommended by Dr. Purcell, provides a legally sufficient basis for a general award of medical benefits after MMI. The ICAO has repeatedly held that OTC medications are a permissible form of *Grover* benefits. *E.g.*, *Guillotte v. Pinnacle Glass Company*, W.C. No. 4-443-875 (November 20, 2001) ("the fact [a] medication is available without a prescription does not vitiate its compensability or nullify the award of *Grover*-style medical benefits."); *Mann v. Ridge Erection Company*, W.C. No. 4-225-122 (April 4, 1996) (no distinction between "over the counter" medications and prescribed medications for purposes of *Grover* benefits); *Ashton-Moore v. Nextel Communications, Inc*., W.C. No. 4-431-951 (September 12, 2002) (recommendation to use OTC anti-inflammatories "as necessary for pain" can support *Grover* award).

Claimant has been continually symptomatic since the accident, despite a relatively good outcome from surgery. Given the length of time since MMI, he will probably remain symptomatic for the foreseeable future. Therefore, it is reasonable for Claimant to retain access to anti-inflammatory medications for pain relief and other maintenance modalities as recommended by Dr. Purcell or other authorized providers.

B. Disfigurement

Section 8-42-108(1) provides that a claimant is entitled to additional compensation if he is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view." As found, Claimant has three (3) ½ inch diameter arthroscopic surgery scars around the right knee. The ALJ concludes that Claimant should be awarded $600 for this disfigurement.

ORDER

It is therefore ordered that:

1. Respondent shall pay for reasonably necessary medical treatment after MMI from authorized providers to relieve the effects of Claimant's injury or prevent deterioration of his condition.

2. Respondent shall pay Claimant $600 for disfigurement. Respondent may take credit for any previous disfigurement benefits paid in connection with this claim.

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

DATED: April 26, 2019.

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

ISSUES

I. What is the DIME physician's medical opinion regarding Claimant's Whole Person Impairment Rating and Maximum Medical Improvement?

II. Has Claimant overcome such DIME opinion by clear and convincing evidence?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Claimant sustained a mild concussion and nose abrasion when he ran into a door at his home on October 1, 2016. (Ex. I). He sought treatment with his primary care physician, Linda Silveira, who ordered x-rays to verify that his nose was not broken. Claimant missed work on Monday and Tuesday that same week due to this injury. He also had a follow-up visit with Dr. Silveira that week. (Ex. J).

2. At the initial hearing in this matter, Claimant testified that, on Thursday, October 6, 2016, he decided to dispose of three hard drives from a computer. (*see* Ex. 1-Findings of Fact, Conclusions of Law, and Order from ALJ Lamphere, dated 9/25/2017). Claimant explained that the hard drives stored data on a medium encased in a metal container roughly 3¼ inches in size. He threw the drives from a position approximately 12 feet above the ground on which the dumpster rested, and from the other side of a railing which separated his position from the opening below where the dumpster was located.

3. Several weeks later, on November 3, 2016, Claimant sought treatment with Dr. James Yohanan. Claimant detailed his October 1, 2016 concussion and nose abrasion. (Ex. K). He presented for evaluation for a "forehead, head, and neck injury," making no mention of any intervening cause (e.g., this alleged work injury). Claimant described: "accidently walked into the side of a door striking the bridge of his nose." *Id.* This injury resulted in a healed abrasion to the nose and a mild concussion. He complained at this time of bilateral ear pain and ringing in the ears. Dr. Yohanan concluded that he saw "no primary otologic disorder, nor would [he] expect one with this mechanism of injury." There was no mention whatsoever of the October 6, 2016 noise incident at work. (Ex. K).

4. At his January 4, 2017 visit with Dr. Shireen Rudderow and his January 25, 2017 visit with Dr. Barton Knox there was no mention of a neck injury. (Ex. L). Additionally, the physical examination by Dr. Knox revealed no neck pathology nor was any range of motion loss documented. (Ex. M).

5. Dr. Yohanan's February 16, 2017 report does mention the October 1, 2016 incident. (Ex. N). Dr. Yohanan opined that Claimant did not have hearing loss; rather, he had the "perception of hearing loss." (Ex. N). He opined that the 10/1/16 dumpster incident only "temporally and theoretically played a role in [Claimant's] symptoms." Even with the additional detail provided by Claimant, Dr. Yohanan still related all of Claimant's neck symptoms to his October 1, 2016 injury at home. *Id.*

6. Claimant acknowledged that he did not report the alleged incident to the Employer until after he saw Dr. Yohanan in November of 2016. (Ex. 1). Claimant eventually completed a Worker's Compensation Claimant's Report on January 16, 2017. Concerning his injuries, he stated: "Tinnitus and hearing loss in my right ear." (Ex. W). At no point even then did Claimant reference a neck injury-only the hearing loss. *Id.*

7. ALJ Lamphere issued Findings of Fact, Conclusion of Law, and Order dated September 25, 2017 (Ex. 1) finding the claim to be compensable, but denying the hearing loss claim. Instead, he found that Claimant sustained a compensable injury to his neck and ears, in the form of tinnitus. "While Claimant's exposure to a loud gunshot like sound probably did not cause a primary injury to the neck, the ALJ is persuaded that his ear pain and tinnitus indirectly caused the need for neck treatment." *Id.*

8. Claimant eventually began treating with Dr. Annu Ramaswamy. He was placed at MMI on June 26, 2018, and provided with a 4% whole person impairment rating for the cervical spine. (Ex. T). Dr. Ramaswamy stated: "In regards to range of motion, range of motion has been extremely limited and does not physiologically match the physical exam findings. Range of motion today is even lower than the last visit." *Id.* He then documented the dramatic drop in range of motion between the two visits, concluding that the severely restricted range of motion at that visit did not correlate with Claimant's physical examination that day.

9. Claimant requested a DIME, and Dr. Allison Fall was selected. At that examination, occurring 9/20/2018, Claimant presented the prior Order of ALJ Lamphere to the DIME physician. While not specifically referencing this Order in her DIME report, Dr. Fall notes in her opening paragraph: " The medical records provided were reviewed. He [Claimant] also brought in *additional documents* <u>which were reviewed</u>" (Ex. A, p. 1) (emphasis added). Claimant provided this Order without leave of an ALJ, permission of the Division of Workers Compensation, or by agreement of the parties. It was only later, at the *Samms* conference with the DIME physician on 1/11/2019, that Respondents confirmed that this had occurred at all.

10. Dr. Fall issued a report providing a 14% whole person impairment rating for the cervical spine, but did not include any analysis on why this was related to the noise incident of 10/6/16. (Ex. A).

11. Respondents moved for leave to schedule a *Samms* conference with the DIME physician. On 11/28/2018, ALJ Lamphere signed the Order authorizing this

conference, and specifically authorized Dr. Fall to issue a supplemental letter *"**clarifying** her DIME report".* (Ex. U, p. 81)(emphasis added).

12. Respondents then prepared a letter for Dr. Fall's review, with seven questions to be answered. Her answers were supplied on 2/14/19. (Ex. C, p. 21).

> 1. Did Mr. James Jones present you with a copy of the Findings of Fact, Conclusions of Law, and Order from the above-captioned workers compensation case when he presented for the DIME with you on September 20, 2018?
> A: Yes
>
> 2. Did your review of that Order influence your opinions in this matter concerning the extent of Claimant's injuries and medical causation in this case?
> A: Yes
> 3. Without the influence of that Order upon your independent medical judgment, would you have reached a different conclusion concerning the extent of Claimant's injuries and medical causation in this case?
> A: Yes
>
> 4. Based on your independent medical judgment, would Claimant's cervical injury be related to the noise incident at issue in this case?
> A: No
>
> 5. Based on your independent medical judgment, what would Mr. Jones permanent impairment rating be in this case? Please explain.
> A: It would be No impairment caused by the incident in this case.
>
> 6. Based on your independent medical judgment, what would Mr. Jones' date of maximum medical improvement be? Please explain.
> A: 2/16/17 as per the report of Dr. Yohanan, neck pain to the injury prior to work event, and <u>no</u> hearing loss (emphasis supplied).
>
> 7. Based on your independent medical judgment, would Mr. Jones require any medical maintenance care? Please explain.
> A: No. I would not have found causation for a cervical injury.

13. On 1/21/2019, Dr. John Burris' performed record review IME and addendum reports at Respondents' request. (Ex. B; D). Dr. Burris noted numerous inconsistencies in the medical records.

14. During a related medical evaluation (unrelated to Workers Compensation) on November 3, 2016 with Dr. Yohanan, Claimant attributed his symptoms of pain behind his ears to an event at home on October 1, 2016, when he walked into a door. Claimant did not mention a workplace event.

15. In his statements to his employer on November 29, 2017 and January 16, 2017, Claimant only claimed tinnitus and hearing loss with no mention of a neck injury or even neck pain.

16. The MRI of the cervical spine on May 25, 2018 revealed degenerative changes consistent with Claimant's previous cervical fusion, with no acute abnormalities associated with the October 6, 2016 noise incident. Ex. B. Dr. Burris' addendum indicated that Dr. Fall's revised opinion was now consistent with the medical records, and his own review of the case. (Ex. D).

17. At hearing, Claimant did not present any evidence challenging Dr. Fall's revised opinion.

CONCLUSIONS OF LAW

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

Generally

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

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

c. In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v.*

ICAO, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

The DIME Physician's Medical Opinion / Whole Person Impairment

d. Where a DIME physician issues conflicting opinions concerning a Claimant's medical impairment, the ALJ must determine the DIME physician's true opinion as a matter of fact. *Rainwater v. John Sutphin*, W.C. No. 4-815-042-04 (Sept. 9, 2014). Once the ALJ determines the DIME physician's true opinion, the party seeking to overcome that opinion bears the burden of proof by clear and convincing evidence. *Id*.

e. The DIME's determinations regarding MMI and whole person impairment are binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b) and (c), C.R.S.; *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. ICAO*, 961 P.2d 590 (Colo. App. 1998). "Clear and convincing evidence means evidence which is stronger than a mere 'preponderance;' it is evidence that is highly probable and free from serious or substantial doubt." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). Therefore, the party challenging a DIME's conclusions must demonstrate it is "highly probable" that the MMI and impairment findings are incorrect. *Qual-Med*, 961 P.2d at 592. A party meets this burden if the evidence contradicting the DIME physician is "unmistakable and free from serious or substantial doubt." *Leming v. ICAO*, 62 P.3d 1015 (Colo. App. 2002). A "mere difference of medical opinion" does not constitute clear and convincing evidence that the DIME is incorrect. *E.g., Gutierrez v. Startek USA, Inc.*, W.C. No. 4-842-550-01 (ICAO March 18, 2016); *Javalera v. Monte Vista Head Start, Inc.*, W.C. No. 4-532-166 (ICAO July 19, 2004); *see also Gonzales v. Browning-Ferris Industries of Colorado*, W.C. No. 4-350-356 (ICAO March 22, 2000).

f. The DIME's determination regarding the cause of the claimant's impairment is an "inherent" part of the diagnostic assessment, which comprises the DIME process of determining MMI and rating permanent impairment. *Egan v. ICAO*, 971 P.2d 664 (Colo. App. 1988); *see Yeutter v. ICAO*, 2019 COA 53, ¶ 23. Therefore, the DIME's determination that a particular impairment is or is not related to the industrial injury is binding unless overcome by clear and convincing evidence. *Id; See also Leprino Foods Co. v. ICAO*, 134 P.3d 475, 482 (Colo. App. 2005)

The Court of Appeals explained that:

> [A] DIME physician's opinions concerning MMI and permanent medical impairment are given presumptive effect. Both determinations inherently require the DIME physician to assess, as a matter of diagnosis, whether the various components of the claimant's medical condition are causally related to the industrial injury. Therefore, a DIME physician's

> determinations concerning causation are binding unless overcome by clear and convincing evidence.

Cordova v. ICAO, 55 P.3d 186 (Colo. App. 2002).

g. *In Braun v. Vista Mesa*, W.C. No. 4-637-254 (Apr. 15, 2010), the ICAO held that an ALJ's previous order which found that the claimant had sustained a compensable injury in the form of thoracic outlet syndrome did not serve as *issue preclusion* when a DIME doctor later determined the claimant did not have thoracic outlet syndrome and did not require further treatment for that condition. In a hearing challenging the DIME opinion, a second ALJ upheld the DIME's findings. The claimant appealed, arguing that the ALJ's order be set aside based upon issue preclusion due to the first ALJ's order. The Panel noted the evidentiary standards involved in the two ALJ decisions were distinct such that *issue preclusion* did not apply.

h. *In Ortega v. JBS USA, LLC*, W.C. No. 4-804-825 (Jun. 27, 2013)**,** the first ALJ held that certain body parts were not related to the compensable injury. A subsequent DIME concluded that those parts were related. Although the Panel initially held that the first order was not final, it went on to address whether issue preclusion might limit the review conducted by a DIME. The Panel rejected this position and distinguished *Lockhart* and *Younger* (now conclusively rejected by the ICAO in *Holcombe v. Fedex Corp.*, W.C. No. 4-824-259 (Mar. 24, 2017); *see also*, *Sharpton v. Prospect Airport Services*, W.C. No. 4-941-721-03 (Nov. 29, 2016); *Jackson v. Select Comfort Corp*., W.C. No. 4-914-418-03 (Nov. 16, 2016); *Madrid v. Trinet Group, Inc.*, W.C. No. 4-851-315-03 (Apr. 1, 2014)).

i. In this case, the ALJ finds that at the DIME exam, Claimant tendered Judge Lamphere's Order to Dr. Fall with the intent that it influence her *medical* opinion on causation. In fact, Claimant continues to persist in his position that ALJ Lamphere's Order has a preclusive effect on the DIME proceedings. While the ALJ herein stops short of finding that Claimant, *pro se*, acted in willful bad faith in so doing, it is inescapable that Claimant nonetheless did so, and in violation of Workers Compensation Rule of Procedure 11-4 (B)(2)/(7) then in effect. A *pro se* claimant is presumed to know applicable statutes and is required to act accordingly. *Kyrkopp v. Indus. Claim Appeals Office*, 30 P.3d 821 (Colo. App. 2001); *see Manka v. Martin*, 200 Colo. 260, 614 P.2d 875 (1980); see *also Muragara v. Xerox Business Services*, W.C. 4-946-815-02 (ICAO January 27, 2015).

j. Further, this ALJ finds that Claimant's actions actually had the effect he desired, to wit: Dr. Fall deferred to ALJ Lamphere's Order on the issue of causation, instead of using her independent medical judgment. In effect, she treated it as a matter of *issue preclusion,* thus somehow binding her. This was, through no fault of Dr. Fall, an erroneous *legal* conclusion she made, which then resulted in a *medical* conclusion-but subject to revision and clarification through appropriate legal process.

k. Dr. Fall then issued a letter on February 14, 2019 through the DIME Unit. That letter was issued in compliance with ALJ Lamphere's November 28, 2018 Order allowing

such a response following the *Samms* conference. That letter unequivocally revised **[clarified]** Dr. Fall's prior impairment rating, based on her own independent medical judgment. She concluded that to a reasonable degree of medical probability the noise incident did not cause a cervical injury. This ALJ finds, by clear and convincing evidence, that this represents the true medical opinion of the DIME physician, Dr. Fall, uninfluenced by the Order she was improvidently tendered at the DIME exam.

l. Nothing in the case law or statute precluded Dr. Fall from providing this revised opinion. She was not bound by the prior Order's determination on the *extent* of the compensable injury when providing a 0% permanent impairment rating. Outside of ALJ Lamphere's Order, Claimant has presented no evidence to the contrary. Accordingly, this ALJ finds that Claimant reached MMI as of February 16, 2017 with no permanent impairment.

ORDER

It is therefore Ordered that:

1. The DIME opinion is that Claimant reached MMI on 2/16/2017, and that Claimant has a 0% Whole Person Impairment.

2. Claimant has failed to overcome this DIME opinion.

3. Claimant's claim for Permanent Partial impairment benefits is denied and dismissed.

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

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

DATED: April 26, 2019 */s/ William G. Edie*

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

ISSUES

Whether the claimant has demonstrated by a preponderance of the evidence that the C5-C6 and C6-C7 anterior cervical fusion with decompression of the spinal cord and of the neuroforamen, as recommended by Dr. Douglas Orndorff, is reasonable medical treatment necessary to cure and relieve the claimant from the effects to of the admitted January 16, 2015 work injury.

FINDINGS OF FACT

The parties have stipulated to the claimant's testimony as stated in paragraphs 1 through 16, which the ALJ hereby adopts as findings of fact:

1. The claimant has been receiving temporary total disability (TTD) benefits since January 18, 2015.

2. As the claimant previously testified on February 14, 2018 (at a workers' compensation hearing in Durango, Colorado), he slipped and fell on ice while at work on January 16, 2015. At that time, the claimant sustained several different injuries at that time and experienced several complications as a result of the injuries or the medical care for the injuries.

3. The claimant underwent the following surgeries for injuries to his right hip:

   a. On September 17, 2015, a right hip arthroscopic labral debridement/partial labrectomy by Dr. Lawton;

   b. On July 5, 2016, a right total hip arthroplasty by Dr. Lawton;

   c. On December 25, 2016, a closed reduction of the right dislocated total hip arthroplasty by Dr. Lawton;

   d. On January 23, 2017, revision of the right total hip arthroplasty, with an acetabular liner, and femoral head to a constrained liner, by Dr. Mallette.

4. On December 20, 2016, Dr. Orndorff performed an emergency cervical surgery for the diagnosis of cervical myelopathy. That surgery consisted of cervical decompression at the C3 to C5 levels, posterior segmental instrumentation using NuVasive viewpoint lateral mass screw; C3-C4 laminectomy; posterolateral cervical arthrodesis at the C3-C4 and C4-C5 levels.

5. In 2016, the claimant developed urinary retention problems. He was treated by Dr. Carpio at Mercy Medical Center. The claimant was diagnosed as

suffering from neurogenic bladder and urinary retention. The claimant has to self-catheterize in order to empty his bladder. The claimant has had to do this since June 2017.

6. The claimant wants to have whatever medical care he can get which might help him be able to urinate on his own and not have to self-catheterize in order to empty his bladder.

7. The claimant's current authorized urological doctor is Dr. Sejal Quayle, of Durango. Dr. Quayle has recommended a specific operation for the claimant called "transurethral vaporization of the prostate". The purpose of this procedure is to remove (by vaporization) a portion of the prostate that is impinging on the claimant's ureter. This removal might allow the claimant to urinate by using his abdominal muscles. The claimant wants to have the surgery recommended by Dr. Quayle.

8. The respondents obtained the opinion of urologist Dr. Heppe and he agreed with Dr. Quayle that the procedure she recommended was reasonable and necessary. The respondents have now authorized the procedure to be performed by Dr. Quayle. The claimant and Dr. Quayle will soon schedule this surgery.

9. After the cervical surgery on December 20, 2016 by Dr. Orndorff, the claimant felt improvement in the symptoms of numbness in both arms from his elbows to his hands, weakness in his right leg, right sided hip pain, better balance, although he still has some loss of coordination in his hands, and perhaps urinary and bowel problems.

10. Beginning before July 17, 2018, the claimant experienced symptoms of numbness and searing type pain in his hands and hand dysfunction. He also has a cold feeling in his hands and feet and problems with his balance.

11. The claimant saw Dr. Orndorff on July 17, 2018. The claimant had a magnetic resonance image (MRI) on September 11, 2018. On September 18, 2018, the claimant met with Dr. Orndorff and understood from Dr. Orndorff that Dr. Orndorff recommended another cervical surgery, specifically a C5-C6 and C6-C7 anterior cervical fusion with decompression of the spinal cord as well as the neuroforamen.

12. Dr. Orndorff requested authorization from the respondents and authorization was denied. The claimant has not yet had the surgery recommended by Dr. Orndorff.

13. The claimant wants to have the surgery that Dr. Orndorff recommends because the claimant trusts Dr. Orndorff's recommendations for surgery

14. At the respondents' request, the claimant traveled to Denver on January 9, 2019 to meet with Dr. Reiss for a medical evaluation. The meeting lasted about 30 minutes. Dr. Reiss told the claimant that he did need a second cervical surgery to help control or lessen the new symptoms. The claimant first saw Dr. Reiss's report from that visit on February 14, 2019. The claimant understands that Dr. Reiss thinks the best

surgery for the claimant to undergo is an anterior cervical discectomy, partial corpectomy and fusion of C3-C4 to decompress the anterior portion of the cord.

15. The claimant does not want to follow Dr. Reiss's recommendations for his neck surgery. The claimant wants to follow Dr. Orndorff's recommendations.

16. The claimant wants to have the cervical surgery as soon as possible because his symptoms are not improving and are getting worse.

Based upon the depositions and exhibits entered into evidence, the ALJ makes the following findings of fact:

17. On September 27, 2018, Dr. Orndorff requested authorization from the respondents for a C5-C6 and C6-C7 anterior cervical fusion with decompression of the spinal cord and the neuroforamen.

18. On October 5, 2018 Dr. Carlos Cebrian issued a report in which he opined that the respondents should not authorize the surgery recommended by Dr. Orndorff. In support of his opinion, Dr. Cebrian noted that the claimant "does not have a progressive neurological deficit and as a result there is no urgency" for another fusion surgery. Dr. Cebrian also noted that it is unknown whether the claimant's symptoms would improve with an extension of the fusion. Dr. Cebrian further opined that it is unclear if the claimant's symptoms correlate to the C5-C6 and C6-C7 levels. Ultimately, Dr. Cebrian recommended that the claimant undergo an independent medical examination (IME) with a spine surgeon to obtain that surgeon's opinion regarding appropriate treatment of the claimant. Based upon Dr. Cebrian's report, the respondents denied authorization for the recommended cervical surgery and made arrangements for an IME with Dr. Brian Reiss.

19. Dr. Orndorff testified by deposition regarding the recommended surgery. Dr. Orndorff testified that it a two level fusion that would address the claimant's symptoms of radiculopathy. Dr. Orndorff also testified that the claimant has developed adjacent segment disease at the C5-C6 and C6-C7 levels as a result of the fusion performed in December 2016. Dr. Orndorff explained that adjacent segment disease is the cause of the claimant's radicular symptoms. With regard to the surgery proposed by Dr. Reiss, Dr. Orndorff testified that the claimant has already had decompression and fusion at the C3-C4 level, so additional surgery at that level does not make sense to Dr. Orndorff. Dr. Orndorff testified that the claimant has a bone spur anteriorly at the C3-C4 level. However, it is Dr. Orndorff's opinion that the 2016 surgery addressed that bone spur by allowing the spinal cord to move away from the spur. Dr. Orndorff also testified that it is his opinion that the C3-C4 bone spur is not causing the claimant's current symptoms.

20. On January 9, 2019, the claimant attended an IME with Dr. Reiss. In connection with the IME, Dr. Reiss reviewed the claimant's medical records, obtained a history from the claimant, and completed a physical examination. Dr. Reiss opined that the claimant does not have "true radiculopathy". Dr. Reiss further opined that the only

area of significant central stenosis is at the C3-C4 level, which Dr. Reiss opines is the probable source of the claimant's myelopathy. Dr. Reiss does not believe the surgery recommended by Dr. Orndorff at the C5-C6 and C6-C7 levels is appropriate. Instead, Dr. Reiss recommended that the claimant undergo an anterior cervical discectomy, partial corpectomy with fusion at the C3-C4 level.

21. Dr. Reiss's testimony by deposition was consistent with his written report. Dr. Reiss testified that if he had performed the 2016 surgery he would have utilized an anterior procedure at the C3-C4 level, and not the posterior procedure at C3-C5 Dr. Orndorff performed. Dr. Reiss further testified that the claimant's imaging showed a large spur at C3-C4, pushing posteriorly onto the claimant's spinal cord. Dr. Reiss opines that this bone spur is the primary cause of the claimant's myelopathy. Dr. Reiss further opined that the bone spur was not addressed by the 2016 surgery. Dr. Reiss reiterated his opinion that the claimant's symptoms are the result of worsening myelopathy and not by radiculopathy from C5-6 and C6-7. In his testimony, Dr. Reiss again recommended an anterior cervical discectomy, partial corpectomy with fusion at the C3-C4 level.

22. The ALJ notes that the parties agree that the claimant needs to undergo cervical spine surgery. However, as indicated by their experts, the parties disagree as to the appropriate surgery to address the claimant's symptoms. The ALJ credits the claimant's testimony, the medical records, and the opinions of the claimant's treating surgeon, Dr. Orndorff, over the contrary opinions of Dr. Reiss. Therefore, the ALJ finds that the claimant has demonstrated that it is more likely than not that the C5-C6 and C6-C7 anterior cervical fusion, as recommended by Dr. Orndorff, is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

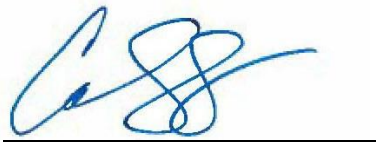
actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2014).

23. As found, the claimant has demonstrated, by a preponderance of the evidence, that the C5-C6 and C6-C7 anterior cervical fusion recommended by Dr. Orndorff is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury. As found, the claimant's testimony, the medical records, and the opinions of Dr. Orndorff are credible and persuasive.

ORDER

It is therefore ordered the respondents shall pay for the recommended C5-C6 and C6-C7 anterior cervical fusion with decompression of the spinal cord and of the neuroforamen, pursuant to the Colorado Medical Fee Schedule.

Dated this 29th day of April, 2019.



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

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-054-448-002

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Self-Insured Respondent.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on April 9, 2019, in Denver, Colorado. The hearing was digitally recorded (reference: 4/9/19, Courtroom 1, beginning at 8:30 AM, and ending at 12:18 PM).

Respondent's Exhibits A through SS were admitted into evidence, without objection. Claimant's Exhibits 1 through 9 were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ established a post-hearing briefing schedule. Respondent filed its opening brief, electronically, on April 16, 2019. Claimant filed her answer brief, electronically, on April 23, 2019.

ISSUES

The issues to be determined by this decision concern the request of the Respondent to overcome the Division Independent Medical Examiner's (DIME"s) , Jack Rook, M.D., opinion concerning the degree of permanent medical impairment, which was 11% whole person and Respondent's claimed overpayment of temporary total disability (TTD) benefits from February 27, 2018 [the date the Claimant was released to full duty by her authorized treating physician (ATP)] through March 13, 2018 [the date of

maximum medical improvement (MMI)., in the aggregate amount of $1,722.20, which Respondent requests as a credit against the permanent partial disability (PPD) award.

The Respondent bears the burden of proof by clear and convincing evidence on the issue of overcoming the DIME opinion. Respondent's burden on the issue of "overpayment" is by a preponderance of the evidence.

FINDINGS OF FACT

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

Preliminary Findings

1. The Claimant is a 35-year old Registered Nurse (RN) for the Employer. She sustained admitted injuries to the low back on July 20, 2017, when she tripped over a scale and landed on her back and buttocks. She sustained admitted injuries to her low back, the degree of which are now in controversy. Respondent admitted the claim and began paying the Claimant TTD benefits.

2. Respondent filed a Final Admission of Liability (FAL) on March 23, 2018, admitting for reasonably necessary post-MMI maintenance medical benefits; an average weekly wage (AWW) of $1,290.65; TTD benefits of $861.10 per week from August 1, 2017 through March 12, 2018; an MMI date of March 13, 2018; and, PPD benefits, based upon the 5% whole person rating of the ATP, Robert I. Kawasaki, M.D., in the aggregate amount of $26, 177.60.

3. The MMI date of March 13, 2018, adopted by DIME Dr. Rook and previously assigned by ATP Dr. Kawasaki, is not in controversy and the ALJ finds that the Claimant reached MMI on the admitted date of March 13, 2018 Respondent's Exhibits A, NN and OO).

4. In her answer brief, Claimant endorsed the Statement of Facts, 1 through 30, contained in the Respondent's opening brief. In essence, the ALJ adopts the Statement as Findings, with accretions and re-numbering.

5. Claimant disagrees that DIME Dr. Rook erred in assessing a 6% whole person rating, attributable to the Claimant's loss of ROM.

6. Claimant argues, in essence, that the variability in ROM numbers (between 0%, 2%, and 6%), in and of itself is enough to leave the presumptive effect of the DIME opinion intact. A mere difference of opinion between a DIME and an ATP is not enough to overcome the presumptive effect of a DIME opinion, however, the correct analysis herein is whether Dr. Rook's 6% rating for loss of ROM is clearly wrong in and of itself. Because Dr. Rook's 5% specific disorders rating has not been overcome, as

outlined in detail herein below, the ALJ will not further analyze Claimant's argument relative thereto.

7. Claimant makes an argument that because thw Independent Medical Examiner (IME), F. Mark Paz, M.D., engaged by the Respondent, did not rate any impairment, his opinion that DIME Dr. Rook's 6% rating attributable to loss of ROM should have no weight. Such an assertion is actually not accurate. Dr. Paz rated the Claimant's overall impairment at zero, and zero is a rating.

8. In an effort to argue for an alternative loss of ROM rating, Caroline Gellrick, M.D. found error in Dr. Rook's impairment rating as follows:

> Regarding Dr. Rook's impairment rating, this examiner found discrepancy with a valid straight leg raise. His tightest straight leg raise again was on the right at 95 degrees but the sum of the sacral range of motion of 98 with is 106 degrees. Taking 95 from 106 equals 11. This should be 10 or below for valid sacral range of motion. **This is the only error this examiner found in Dr. Rooks report; therefore, the impairment would differ by 4 degrees** and in theory the ROM should be repeated again of the lumbar spine three sets of measurements. If it is invalid again with the sacral range of motion, the patient has to be seen on a different day and two sets of three range of motion lumbar spine are completed unless there is a valid sacral range of motion +/- 10 of the tightest straight leg raise. **Otherwise, this examiner totally agrees with Dr. Rook's DIME opinions for causation and assignment of impairment using the Third edition revised AMA Guides and maintenance treatment**. (Exhibit 5, pp. 12-13). (Emphasis added).

Claimant concedes that no repeat ROM was accomplished by anyone. Therefore, the ALJ , according to Claimant, is faced with the question of which ROM score should be accepted: 0, 2 or 6%. In clearer focus, the issue is whether DIME Dr. Rook's ROM measurement was valid in the first place. Because no repeat ROM measurements were done by DIME Dr. Rook, this alone invalidates the portion of his opinion regarding loss of ROM, thus, making it clearly erroneous.and free from serious and substantial doubt. that the 6% attributable to loss of ROM has been overcome.

9. Claimant takes the initial position that Dr. Rook's 6% ROM score is the best indicator of her average range of motion deficit because it best approximates the condition of her back at the end of her shifts while working for the Employer, as she testified. This begs the question if Dr. Rook's ROM measurement is not valid, and the ALJ does not find this argument to be persuasive.

10. In her answer brief, theClaimant concedes that she recognizes, according to Dr. Gellrick, that Dr. Rook made an error in calculating her ROM score. Claimant further argues that given that Claimant's IME Dr. Gellrick was able to find a range of motion deficit notwithstanding the fact that Claimant had an SI injection just four days

before her examination and because Dr. Paz himself found a range of motion deficit (ie., lumbar flexion) upon examination, Claimant urges the ALJ to find, in the alternative, that Dr. Gellrick's two percent ROM score is the best indicator of her range of motion deficit given the facts of this case. Part of the issue at hand is whether DIME Dr. Rook made a clear error in rating loss of ROM. The ALJ finds that he did make a clear error and the portion of his overall rating for loss of ROM is invalid and has been overcome by clear and convincing. The next question concerns whether Dr. Gellrick's 2% rating, attributable to loss of ROM should be substituted for DIME Dr. Rook's 6% loss of ROM rating. Certainly, Claimant is not implying that Dr. Gellrick's 2% loss of ROM rating should be given presumptive effect in lieu of Dr. Rook's invalid loss of ROM invalid rating. In fact, for this argument to prevail, the "preponderance" standard of proof would be operative. Is it more likely than not that the Claimant should have a 2% loss of ROM rating. In light of the totality of the evidence, articulated herein below, the ALJ finds that it is more likely than not that the Claimant had a zero percent loss of ROM rating.

11. Respondent claims an overpayment of temporary total disability (TTD) benefits from February 27, 2018 [the date the Claimant was released to full duty by her authorized treating physician (ATP)] through March 13, 2018 [the date of maximum medical improvement (MMI)., in the aggregate amount of $1,722.20. Respondent specifically requests a credit against the permanent partial disability (PPD) award. Unfortunately, the FAL provided the final payment on the PPD award as February 26, 2019. Consequently, a credit against the PPD award is not possible. The credit is the only relief requested by Respondent. Because it is not possible, the credit should be denied.

FINDINGS CONCERNING EVIDENTIARY FACTS

12. On July 28, 2017, Richard North, M.D. evaluated the Claimant, and found that her "range of motion ["ROM"] of the back is full. Patient is able to touch her toes with ease" (Respondent's Exhibit B).

13. On August 24, 2017, the Claimant saw chiropractor Dr. Mark Testa, D.C., who also found normal ROM (Respondent's Exhibit D).

ATP Robert Kawasaki, M.D.

14. On October 18, 2017, the Claimant presented for the first time to physiatrist Dr. Kawasaki (who became the Claimant's ATP) to whom she complained of increased pain when in a stationary position, including sitting for a long period of time. Dr. Kawasaki noted that the Claimant was "able to bend forward and place her palms on the ground. She is able to extend past 30º and lateral bend to around 30º in both directions." Dr. Kawasaki also noted a normal gait and that the Claimant was able to toe-and-heel walk without difficulty (Respondent's Exhibit E). On November 13, 2017, the Claimant returned to Dr. Kawasaki, who again noted that she was able to bend forward and place her fingers on her toes, and still had normal gait (Respondent's Exhibit E). [

15. On November 21, 2017, the Claimant underwent an unremarkable lumbar MRI (magnetic resonance imaging) that did not demonstrate any impingement or compression underlying the Claimant's complaints of radicular symptoms (Respondent's Exhibits G and H).

16. On November 28, 2017, the Claimant told Dr. Kawasaki that she had been taking the bus and felt that "this has increased her pain in the back" (Respondent's Exhibit H).

17. On December 22, 2017, the Claimant underwent bilateral SI joint injections. The report noted an initial negative diagnostic response (Respondent's Exhibit I). At her next follow-up with Dr. Kawasaki, on January 3, 2018, the Claimant reported improvement of 50% to 75%. She also complained, however, of new and increased pain that made it difficult to walk. Dr. Kawasaki again noted that the Claimant demonstrated normal ROM (Respondent's Exhibit J).

Overpayment

18. ATP Dr. Kawasaki released the Claimant to return to her regular employment on February 27, 2018 and the Claimant reached MMI on March 13, 2018, thus, the ALJ finds that there was an overpayment of $1,722.20 in TTD benefits. Respondent is entitled to a credit against aggregate PPD benefits in this amount. The Claimant, in her answer brief, concedes the overpayment.

Joan Mankowsi, M.D.

19. On January 4, 2018, the Claimant reported to Dr. Mankowski that Claimant had worsened since her injection (Respondent's Exhibit K).

20. About this time, the Claimant complained that she felt her leg would "giveway" and that her right leg "gave out," causing her to fall forward to the ground. Dr. Mankowski found no lower extremity weakness or objective findings on examination, and the doctor did not provide a physiologic explanation to these subjective complaints (Respondent's Exhibt L). On January 24, 2018, the Claimant reported to Dr. Kawasaki that she was having some numbness/tingling down her right leg that made it difficult to walk, and that she was performing housework and her right leg went numb on her for four hours that past Friday. Dr. Kawasaki did not address the objective findings as they related to the subjective reports, but he recommended an EMG. The Claimant continued to present with full ROM (Respondent's Exhibit M). The EMG was substantially normal (Respondent's Exhibit P)**.** The MRI yielded no explanation. The EMG or examination did not explain the Claimant's several complaints that her leg was giving out or for the extended numbness.

ATP Dr. Kawasaki's PPD Rating

21. On February 27, 2018, Claimant reported to Dr. Kawasaki that she was 90% better and only had 1/10 pain in her back and some aching numbness and tingling

sensation in her right leg and into her thigh area. Dr. Kawasaki released the Claimant to full-time, full duty work (Respondent's Exhibit P).

22. On March 13, 2018, Dr. Kawasaki placed the Claimant at MMI. He performed formal ROM measurements and noted that the Claimant "displayed excellent range of motion (ROM) in all directions." He assigned a 0% ROM impairment. He assigned a 5% rating for specific disorders after diagnosing low back pain and sacroiliac inflammation (Respondent's Exhibit R). The next day, on March 14, 2018, Dr. Mankowski concurred with Dr. Kawasaki that the Claimant was at MMI, after the Claimant reported that she was working out at a gym four days per week, lifting up to 300 pounds on the leg press and performing 35- to 65-pound upper extremity curls and lateral pulldowns, and also spent 30 to 40 minutes on the recumbent bicycle. *Id.* In rating the Claimant's permanent impairment rating, ATP Dr. Kawasaki followed the Division of Workers Compensation (DOWC) Medical Treatment Guidelines (MTG).

23. On Mach 21, 2018, Respondent filed a FAL, based on Dr. Kawasaki's PPD rating (Finding No. 2 herein above) The Claimant objected and requested a DIME. Although Claimant lives in Denver, she listed Colorado Springs as her preferred location of choice (Respondent's exhibit PP). Respondent had the opportunity to strike Dr. Rook in the DIME selection process but did not do so.

After MMI

24. The Claimant returned to Dr. Kawasaki on July 18, 2018, at which time she reported that she had woken up that morning with excruciating pain in the left lower abdominal quadrant into the pelvis and buttock (Respondent's Exhibit S). At hearing, the Claimant testified that she was unable to perform testing on that date due to these issues.

25. The Claimant presented the same day to the Employer and reported pain extending into her pelvic floor, which complaints included back pain. Thereupon, the Claimant was hospitalized for six days due to an ovarian torsion, before discharge on July 24, 2018, during which time she experienced some complications (Respondent's Exhibit U). Subsequent CT scans over the following days confirmed a hernia that had been an ongoing issue since 2015 (unrelated to the workers' compensation claim), and the Claimant subsequently treated for torsion and hernia issues over the following weeks and months (Respondent's Exhibits W to KK). The ALJ finds that the ovarian torsion or an aggravation thereof is not causally related to the admitted injury herein.

26. On August 6, 2018, the Claimant returned to the Employer for her torsion issues, at which time she remained on work restrictions for that condition, unrelated to the herein work injury (Respondent's Exhibit W). The Claimant underwent additional pelvic PT (physical therapy) on August 16, 2018 (Respondent's Exhibit X). On September 4, 2018, the Claimant was seen again at the Employer (a hospital), at which time she was still on some restrictions ("try to limit heavy lifting"). She noted lower abdominal pain and was still on medications. Claimant was confused as to what constituted abdominal pain versus low back pain (Respondent's Exhibit Y).

27. On September 5, 2018 – five days before her DIME, the Claimant noted increased tension in the right piriformis and significant scar tissue in the lower abdomen that affected SI mobility (Respondent's Exhibit Z). The medical records in evidence establish that the Claimant remained symptomatic for her torsion issues, with complaints that were interfering low back ROM.

DIME of Jack Rook, M.D.

28. On September 10, 2018, the Claimant underwent a DIME with Dr. Rook--in Colorado Springs. His eight-page medical review does not include any reference to the recent ovarian torsion issues, or suggest that he was aware that Claimant was actively suffering functional limitations, was on work restrictions and undergoing treatment for this non work-related condition; or, that Dr. Rook understood that the Claimant was undergoing pelvic floor therapy outside of the workers' compensation context.. Dr. Rook found that the Claimant was at MMI on March 13, 2018, and he provided a 5% Table 53 [American Medical Association Guides to the Evaluation of Permanent Impairment, 3rd Ed., Rev. (hereinafter AMA Guides) rating and assigned an additional 6% lumbar ROM rating. Dr. Rook did not perform repeat loss of ROM testing as required. Thus, hos loss of ROM rating is clearly erroneous.

Non Work-Related Umbilical Hernia Affecting ROM

29. In addition to obtaining ongoing treatment for her abdominal issues, the Claimant also sought surgery for her umbilical hernia that had been present since 2015 but had increased in size "over the past few months," and for which the pelvic physical therapist had told her was contributing to her chronic pain. The attending physician noted that the hernia was easily reducible on examination but, given Claimant's BMI (body mass index), the Claimant would not be an elective surgical candidate. That report noted morbid obesity of a BMI between 45 and 49.9 (Respondent's Exhibit BB) and the Claimant later advised that she had gained 15 pounds between her late July ovarian surgery and an October evaluation (Respondent's Exhibit EE). The ALJ finds that a work-related aggravation of the umbilical hernia has **not** been proven.

30. On December 14, 2018, the Claimant returned to Dr. Kawasaki to undergo repeat right-sided SI injection (Respondent's Exhibit II). Claimant declined left-sided injection, because she did not need it.

Claimant's independent Medical Examination (IME) with Caroline Gellrick, M.D.

31. On December 18, 2018, the Claimant underwent an IME with Dr. Gellrick, Contrary to her status pursuant to Dr. Paz in June and before her torsion onset in July, the Claimant stated she was no longer able to perform weightlifting or martial arts, and she complained of problems with house and yard work. The Claimant stated that she had to stop martial arts due to her surgery. Dr. Gellrick noted that the Claimant had a slight limp

at the time **(**Respondent's Exhibit JJ). Pursuant to Dr. Rook's worksheets and the opinions of Drs. Gellrick, the ALJ finds Dr. Rook's loss of ROM rating invalid.

32. Dr. Gellrick specifically noted that Dr. Rook's findings were discrepant for valid straight leg raise, and that his ROM measurements were invalid. She found "only" a 2% ROM rating, based on mildly abnormal flexion, *Id*, at a time Claimant's torsion issues seemed to be tapering.

33. Dr. Gellrick also remarked that Claimant had to drive from Denver to Colorado Springs for the DIME, and Claimant acknowledged that she was: "stiff and sore. According to Dr. Gellrick, "the patient relates this today to this examiner. She was quite stiff when she got down to Dr. Rook's office for the Division IME. Therefore, under those conditions, the range of motion of the lumbar spine would reflect more stiffness with lumbar flexion/extension, which is evident on his measurements. When the patient does examinations locally in the Denver metropolitan region, such as with Dr. Paz, she has more fluid range of motion." *Id.*

Respondent's IME, F. Mark Paz, M.D.

34. On June 22, 2018, the Claimant underwent an evaluation with Dr. Paz. She repeatedly advised Dr. Paz that the SI injections in December 2017 increased her pain. She stated that she was by then participating in martial arts two to three times per week and was walking substantially at work. She agreed that she was capable of performing all physical activities and duties required of her work (Respondent's Exhibit V).

35. Dr. Paz took formal ROM measurements and found no ROM loss for the injury. *Id.* He also performed a Patrick's/FABERS (SI joint) test that was negative (did not support SI dysfunction) and he noted normal examination findings. According to Dr. Paz, extension and bending to about 30º would constitute normal or above-normal ROM.

36. According to Dr. Paz, the EMG or examination of Dr. Mankowski did not explain the Claimant's several complaints that her leg was giving out or for the extended numbness, which Dr. Paz testified were not physiologic.

37. According to Dr. Paz, Dr. Rook's measurements were invalid (Respondent's Exhibits AA and JJ).

38. Dr. Paz found to a reasonable medical probability that Claimant sustained contusions, but did not find a medically probable diagnosis. Specific to SI joint dysfunction, Dr. Paz emphasized that Claimant's low back symptoms were diffuse, that provocative testing on physical examination did not support the diagnosis and the prior medical records documented symptoms migrating from the left to the right over the course of care with inexplicable increases in symptomatology. The diagnostic imaging did not identify inflammatory changes or pathology of the SI joints. Additionally, SI injections completed by Dr. Kawasaki were neither diagnostic nor therapeutic. There was no

pathology in the lumbar spine or SI joints that correlated with clinical findings, and anatomical findings may not be considered pathological unless there is a clear physiologic relationship. According to Dr. Paz, Claimant had merely non-specific complaints of low back pain that did not support a specific diagnosis or Table 53 rating. Thus, Claimant had no ratable impairment. *Id.*

Findings Analyzing the Evidence

39. The DIME's finding of a 6% ROM rating is significantly contrary to the weight of persuasive medical evidence. The medical records establish that the Claimant demonstrated normal ROM from immediately after the initial injury through MMI and as late as June 2018, by which time the Claimant was re-engaged in a rigorous martial arts and gym program. The DIME physician found significant ROM loss that was an anomaly against a backdrop of the weight of persuasive medical evidence. The ALJ finds that the ROM loss was attributable to other facts that were not properly considered by the DIME physician, and for which Dr. Rook may not even have been aware: (1) he used invalid measurements; (2) the Claimant (by her own admission) was experiencing unusual and temporary stiffness due to the long drive to attend her DIME that was not indicative of permanency; and, (3) her results were impacted by significant, acute non-industrial medical conditions with an onset during the time between MMI and the DIME. The ALJ infers and finds that all of these factors had a significant impact on the quality of the measurements and skewed the ROM results. These non-industrial conditions were not accounted for by Dr. Rook. Any one of these issues alone could explain the error of Dr. Rook's ROM findings.

40. The ALJ finds that there is a high probability that the DIME's Range of Motion (ROM) rating is clearly wrong. The ALJ finds numerous faults in the DIME physician's findings, as they pertain to the 6% rating for ROM loss, any of which, by itself, is a misapplication of proper ROM measurements.

41. Section 3.3e of the *AMA Guides* ("Impairments Due to Range of Motion Abnormalities") requires a comparison of hip flexion and straight leg raise (SLR) on the tightest side provides a "validation measure." Pursuant to paragraph 4 on page 97, "[i]f a SLR exceeds total sacral (hip) motion (flexion + extension) by more than 10 degrees, the test is invalid …" As noted by Claimant's own IME physician, Dr. Gellrick, and by Respondent's IME, Dr. Paz, Dr. Rook's testing fails this test on its face. As found, Dr. Rook's measurements are invalid. Dr. Rook clearly misapplied ROM protocols and this amounts to an "unmistakable" error. The ALJ infers and finds that Dr. Rook did not realize this clear error, and there is no persuasive evidence to suggest that he offered to perform repeat testing or that the Claimant has requested it in the months since the DIME.

42. The ALJ infers and finds that the portion of the impairment rating attributable to loss of ROM was improperly assigned and invalid, even without the issues noted below that demonstrate any that ROM issues at the time of examination were temporary or not work-related. DIME Dr, Rook's findings of ROM loss are contrary

to the weight of credible medical evidence, compared to the consistent findings of normal ROM prior to the DIME.

43. Permanent disability is determined when a claimant has reached MMI. At the time of MMI, ATP Dr. Kawasaki performed formal dual inclinometer ROM measurements demonstrating no deficit in lumbar flexion, extension, right lateral flexion or left lateral flexion. He found no lumbar ROM loss, and assigned a 0%, for each of these categories, and a 0% rating for ROM loss as a whole. Dr. Kawasaki's ROM findings are highly consistent with all references to ROM made throughout the pendency of this case, including the initial examinations the Claimant underwent in the first few days and weeks following her injury, when Drs. North, Kawasaki and Testa all found full ROM, as well as the findings noted by these doctors in the weeks leading up to MMI. Indeed, there are several notations, both early and late, that the Claimant was able to touch the floor with her palms and demonstrated other abilities consistent with extremely good (in fact, above normal) flexibility and motion, and Claimant was also regularly engaging in her rigorous martial arts and gym program by the time of MMI, too.

44. Claimant's ROM was full, immediately or no later than eight days after the initial injury, and she was observed as unrestricted by multiple physicians over the next several weeks and months and was confirmed to be unrestricted through formal testing in both March 2018 and June 2018, while she was also performing impressive physical activities requiring a high degree of flexibility. No physician prior to September 2018 contradicted these findings.

45. Insofar as the intent of measuring ROM is to determine permanent impairment, any finding of ROM restriction made after this time would be contradictory to Claimant's presentation before, at and just after MMI. This, alone, gives rise to an inference that any loss of ROM findings documented in September 2018 are not credible and do not represent "permanent" impairment at the time of MMI." The ALJ finds that it is improbable that loss of ROM attributable to an injury would have an onset months after the initial injury despite consistent notations demonstrating no restrictions in motion beforehand. The more likely explanation is that such findings are the result of improper ROM testing methods and/or due to a cause other than the admitted injury herein.

46. There is no credible information that Dr. Rook sought to obtain clarification or otherwise reconcile his results of 6% ROM loss with the explicit or implicit findings reported in all the other medical records. In a case with such discrepant findings, according to Dr. Paz, such action would have been necessary. Even if there was no clear explanation for the inconsistency, the DIME's finding of loss of ROM is contradicted by the medical records as a whole, thus, along with the totality of the evidence, establishing an unmistakable error.

47. The ALJ infers and finds that any loss of ROM is attributable to what happened after the June 2018 IME, and before the September 2018 DIME. The DIME Examiner did not consider this proposition. The Claimant was unusually stiff for her DIME

examination, and the ALJ infers and finds that any findings of limitations of ROM were a temporary result of her travels from Denver to Colorado Springs to attend the DIM*E.*

48. Although the Claimant resided in Denver at all times since her injury, treated exclusively in Denver, worked in Denver, and has no known ties to Colorado Springs, she requested that the DIME take place in Colorado Springs. She testified that she drove two hours to the evaluation, in rush hour traffic, to attend the 9:00 AM DIME on a Monday workday morning. The Claimant acknowledged that she is prone to experience stiffness and unusual pain due to being in vehicles for extended periods of time (the record includes several references to stiffness from sitting/traveling). The ALJ infers and finds that the Claimant's stiffness was a temporary event that would manifest in an inaccurate and time-limited restriction of ROM.

49. The Claimant explicitly acknowledged that she was unusually stiff from the drive on the morning of her DIME examination. The Claimant's IME, Dr. Gellrick, attributed the DIME ROM findings to stiffness from travel, and Dr. Gellrick remarked that the Claimant's ROM "of the lumbar spine would reflect more stiffness with lumbar flexion/extension, which is evident on [Dr. Rook's] measurements." Dr. Paz agreed with the Claimant's own expert that the ROM discrepancy was attributable to temporary, non-industrials issues, that no person (expert or lay) has disputed. There is no credible information that Dr. Rook considered the temporary stiffness issues that negatively impacted the ROM outcome. Dr. Rook directed the Claimant to stretch in advance of the evaluation (Claimant did not testify that Dr. Rook had her do so or that he recognized the fact that ROM measurements could be affected by a long drive from another city made during workday, rush hour traffic. This is problematic insofar as Claimant's demonstrated ROM at the DIME was inconsistent with the multiple formal measurements and informal observations of ROM prior to Dr. Rook's DIME evaluation. The ALJ infers and finds that the Claimant's ROM measurements taken on September 10 were not indicative of actual permanent impairment, and that Dr. Rook did not properly account for it. The AJ finds that this establishes that is highly probable, unmistakable and free from serious and substantial doubt that Dr. Rook's ROM findings are unreliable.

Non-Work Related Condition

50. The Claimant sustained a non work-related major medical condition between Her MMI evaluation and the DIME, *i.e.*, an acute ovarian torsion that caused an ROM Restriction, which DIME Dr. Rook did not know about or consider.

51. In addition to a temporary onset of stiffness because of the long rush hour drive from Denver to Colorado Springs, there is another factor that explains the Claimant's diminished ROM found by the DIME physician but which was not present when Dr. Kawasaki took formal measurements at the MMI date of March 13, 2018 and/or when Dr. Paz took similar measurements on June 22, 2018 (or when any of the other physicians noted Claimant's ability to touch her toes/floor, engage in martial arts and other physical activities and observed full ROM on almost every occasion from the date of injury through MMI):

52. The Claimant's onset of a non work-related major medical issue was on July 18, 2018. On that date, she experienced an acute ovarian torsion for which she presented to the hospital and underwent emergent or semi-emergent surgery. The medical records reflect that the Claimant had some complications during her hospitalization that lasted six days. The records also establish that the Claimant required substantial work restrictions and medications thereafter; also, she underwent therapy (pelvic floor therapy). The records confirm that this situation caused back pain, and the Claimant was also confused to some degree as to whether her pain related to her back injury compared to what was related to the torsion issue. Leading up to the week of the Dr. Rook's DIME, the Claimant continued to undergo active treatment and remained under work restrictions – even as she presented to Dr. Rook. She admitted that scar tissue and other issues were restricting her mobility with low back movement. The Claimant has also acknowledged that she ceased performing her martial arts and apparently scaled down her physical activities, substantially, after July 18 2018, due to the surgery, which reduction in activities continued through the DIME (and for many weeks and months thereafter). Even after the DIME, the Claimant continued to treat and undergo pelvic floor therapy, medications and other evaluation and treatment for the effects of the torsion, which effects lasted into 2019. This treatment was not causally related to the industrial injury herein. According to Dr. Paz, the torsion injury could generally cause diffuse pain that may be misinterpreted as SI joint or lower back pain. It caused decreased low back ROM. The Claimant acknowledged this fact in her medical records leading to the DIME.

53. Dr. Rook did not consider the impact of the torsion surgery and subsequent functional and pain issues. In fact, he misunderstood that the Claimant's ongoing pelvic floor therapy was due to her workplace injury, when it was actually provided by treatment providers outside of the scope of the workers' compensation case, for an unrelated condition (pelvic floor therapy is not a treatment modality that would be provided for SI dysfunction, or back issues generally, according to Dr. Paz. In light of the normal ROM results found as late as June 22, 2018, and the abnormal findings noted by Dr. Rook on September 10, 2018, the July 18, 2018 torsion event and surgery explains the discrepancy. The Claimant was abled at the time of the DIME due to torsion condition. This is a highly probable cause of any diminished ROM noted by the DIME, not present at any time in the 14 months before it. Because Dr. Rook failed to consider the impact of the non-industrial condition – an acute illness, in the wording of the *AMA Guides,* that could have explained the contradiction, Dr. Rook's ROM findings are an unreliable and are unmistakably wrong.

54. The Claimant had no loss of ROM prior to the July 18, 2018 torsion event, but she did afterwards, up to the point that Dr. Gellrick saw her in December 2018 (by which time the effect had mostly subsided; Dr. Gellrick found that Claimant's 6% ROM loss was 2% by the time she evaluated her, which would also be consistent with the acuteness of the torsion issues around the time of the DIME). This, by itself, in addition to the invalidity and errors Dr. Rook made in performing the ROM measurements, the inconsistencies and stiffness condition noted herein above, supports a finding that Dr.

Rook was clearly and convincingly wrong in assigning ROM impairment related to the July 2017 injury.

55. The Claimant had other ongoing medical conditions that were present between Her MMI Date and the DIME. In addition, the medical records reflect that there were other confounding medical issues present on September 10, 2018 that were not present at the time of MMI (or earlier). The Claimant had an umbilical hernia that significantly pre-dated the present injury (since 2015) but was worsening, growing and becoming "more painful" during the relevant period, leading the Claimant to seek treatment and request surgery in the same month that the DIME occurred. There is no persuasive evidence that the admitted industrial injury aggravated the umbilical hernia.The Claimant stated that the condition had been progressing "for months" by October 2018, and was present at the time of the DIME. The ALJ infers and finds that this condition would cause loss of ROM. Dr. Rook did not consider this factor. Surgery could not be performed at the time of the DIME because of Claimant's weight issues. At hearing, the Claimant admitted to weighing over 300 lbs.

56. The Claimant's body habitus and weight (300 lbs. at times) constitute one more explanation why Claimant's ROM was diminished at the time of the September 10, 2018 DIME, when it was normal in all the evaluations between July 28, 2017 and June 22, 2018. According to Dr.Paz , obesity could generally impact ROM, but here, the Claimant noted a weight gain of 15 lbs between her torsion surgery on July 18, 2018 and October 2018, which could impact ROM measurements – but rather the unusual rapid gain of weight due to non-work-related issues is an important factor impacting ROM in this short time frame around the occurrence of the DIME.

57. The Claimant's 15-lbs weight gain since the torsion surgery is indicative of lack of activity (which Claimant herself has acknowledged) after July 2018. The torsion and hernia issues resulted in a disability not present at MMI and unrelated to the injury herein, and the Claimant's presentation to Dr. Rook was compromised by the time of the DIME due to non-work related issues.

58. It is highly probable that Claimant's hernia and/or weight gain over these weeks leading up to the DIME are a better explanation for ROM diminishment found by the DIME physician than that the workplace injury suddenly caused ROM loss for the first time, 14 months post-injury. The unusual, rapid weight gain and increasing hernia issues are two significant changes that occurred between the time Drs. Kawasaki and Paz saw the Claimant and Dr. Rook performed the DIME, in addition to the lingering effects of the torsion injury, surgery and active treatment therefor.

Specific Disorders/Table 53 Rating

59. ATP Dr. Kawasaki rated the Claimant's permanent medical impairment for specific disorders at 5% whole person for low back pain and sacroiliac inflammation. His rating for ROM was zero. He declared the Claimant to be at MMI on March 13, 2018 and

recommended reasonably necessary post-MMI medical maintenance care. Based on Dr. Kawasaki's rating, the Respondent filed a FAL, dated March 23, 2018.

60. Dr. Gellrick performed an IME at Claimant's behest on December 18, 2018. She diagnosed "lumbosacral contusion with LS strain and with buttock coccygeal contusion. She agreed with Dr. Kawasaki's MMI date. She rated the Claimant's specific disorders at 5% whole person—the same as Dr. Kawasaki, however, she also rated the Claimant's loss of ROM AT 2% whole person for her total impairment rating of 7% whole person. With respect to ROM, Dr. Gellrick states (see worksheet." There is no persuasive underlying rationale for her 2% loss of ROM on her worksheet, which only states "2% for loss of range of motion (Respondent's Exhibit JJ).

61. ATP Dr. Kawasaki, Claimant's IME Dr. Gellrick, and DIME Dr. Rook, are in agreement that the Claimant's specific impairment rating is 5% whole person. Respondent's IME, Dr. Paz, is of the opinion that the specific impairment rating should be zero for an overall whole person impairment of zero. To use Respondent counsel's characterization of DIME Dr. Rook's opinions as a whole, Dr. Paz is an "outlier" when it comes to a specific disorders impairment rating. Even if Dr. Paz makes a case for zero impairment for specific disorders [utilizing his interpretation of the AMA Guides, but moreso his interpretation of the Division of Workers' Compensation (DOWC) Medical Treatment **Guidelines** (MTG) and Rating **Tips,** this cannot supplant the independent clinical judgments of three Level 11 fully accredited physicians (by DOWC). The MTG are merely guidelines—not rules. The "Tips," although better than a tip on which horse will win the next race, are "tips" on how to utilize the guidelines and cannot compel a licensed physician to surrender his/her independent clinical judgment to a slavish adherence to tips and guidelines], Dr. Paz's arguments do not rise to the level of making it highly probable, un-mistakable and free from serious and substantial doubt that all three physicians, including the ATP and the DIME physicians were clearly in error when they rated the Claimant's specific disorders at 5% whole person.

62. The ALJ infers that according to Dr. Paz, there should have been an overall admission of zero permanent medical impairment. Respondent has not sought to withdraw its previously filed FAL because the ALJ infers and finds no grounds for prospective withdrawal of a FAL exist and there is no allegation of **fraud.** § 8-43-203, C.R.S. provides where respondents have admitted liability on a claim, payments pursuant to the admission must continue until an order is entered following a hearing. Where either party contests the admission, it is binding only until the controverted issue is determined after hearing. *HLJ Mgmt. Group, Inc. v. Kim*, *supra*. This provision permits respondents to obtain relief from **improvident or erroneous** admissions. *Vargo v. Indus. Comm'n*, *supra*. Because the FAL was based on the opinion of ATP Dr. Kawasaki, it can hardly be said that it was **improvidently** filed. The Respondent, based on Dr. Paz's opinion, would effectively cause a withdrawal of the FAL based on their IME's opinion, contrary to the statutory scheme for determining "whole person" permanent medical impairment. Dr. Paz's zero PPD opinion certainly creates a contest but, as found, his opinion of zero permanent impairment attributable to specific disorders must be weighed against the DIME opinion, corroborated by the ATP's

opinion. In this case, Dr. Paz's opinion concerning zero impairment attributable to specific disorders fails and is contrary to the weight of the medical evidence and lacks credibility.

Ultimate Findings

63. The DIME opinion of Dr. Rook, with respect to his 5% whole person rating for specific disorders is credible and supported by the opinions of ATP Dr. Kawasaki and Claimant's IME Dr. Gellrick. Although Respondent's IME Dr. Paz is credible with respect to his opinion regarding loss of ROM, he steps down from the "impairment train" at the station marked "Specific Disorders." He is the outlier in this regard and his "zero" specific disorders rating is not credible,

64. Between conflicting opinions concerning the loss of ROM rating, the ALJ makes a rational choice, based on substantial evidence, to reject the opinions of Dr. Rook (6% whole person attributable to loss of ROM, and Dr. Gellrick (2% attributable to loss of ROM); and, to accept the opinions of ATP Dr. Kawasaki (zero attributable to loss of ROM) and Dr. Paz (zero), who persuasively articulated why a rating for loss of ROM was not appropriate.

65. Respondent cannot withdraw an FAL, which was based on an ATP's opinion, as **improvidently** filed, because its own hired IME (Dr. Paz) has a different opinion. A controversy is created—nothing more—to be resolved by an ALJ weighing the evidence.

66. Respondent has failed to prove that it is highly likely, unmistakable, and free from serious and substantial doubt that DIME Dr. Rook was clearly in error by rating the Claimant's specific disorders at 5% whole person, thus, Claimant has failed to overcome DIME Dr. Rook's opinion of 5% whole person, attributable to specific disorders, by clear and convincing evidence.

67. On the other hand, Respondent has proven that it is highly likely, unmistakable, and free from serious and substantial doubt that DIME Dr. Rook's rating of 6% for loss of ROM is clearly erroneous as articulated in greater detail herein above. Therefore, DIME Dr. Rook's overall rating of 11% whole person is erroneous. The correct whole person rating is 5%.

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CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations,

determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the DIME opinion of Dr. Rook, with respect to his 5% whole person rating for specific disorders was credible and supported by the opinions of ATP Dr. Kawasaki and Claimant's IME Dr. Gellrick. Although Respondent's IME Dr. Paz was credible with respect to his opinion regarding no loss of ROM, he stepped down from the "impairment train" at the station marked "Specific Disorders." He is the outlier in this regard and his "zero" specific disorders rating is contrary to the weight of the medical evidence and lacking in credibility.

Substantial Evidence

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

plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting opinions concerning the loss of ROM rating, the ALJ made a rational choice, based on substantial evidence, to reject the opinions of Dr. Rook (6% whole person attributable to loss of ROM, and Dr. Gellrick (2% attributable to loss of ROM) and to accept the opinions of ATP Dr. Kawasaki (zero attributable to loss of ROM) and Dr. Paz (zero loss of ROM), who persuasively articulated why a rating for loss of ROM was not appropriate.

Medical Treatment Guidelines

c. The Division of Workers' Compensation Medical Treatment Guidelines (MTG) were developed by the Director of the Division of Workers' Compensation (DOWC) pursuant to legislative direction in § 8-42-101(3.5) (a), C.R.S. In *Hall v. Indus. Claim Appeals Office*, 74 P.3d 459 (Colo. App. 2003), the court noted that the **Guidelines** are to be used by health care practitioners when furnishing medical aid. The "Rule, "however, specifies in Workers' Compensation Rules of Procedure (WCRP), Rule 17-5 (c), 7 CCR 1101-3, that "the Division recognizes that reasonable medical practice may include deviations from these guidelines, as individual cases dictate." In those cases the "Rule" refers the provider to the preauthorization procedures in Rule 16-9. This section, and the following Rule 16-10, state that disputes over pre-authorization requests are to eventually be referred for adjudication procedures through the Office of Administrative Courts (OAC). That would be a hearing before an ALJ. An ALJ, therefore, has discretion to approve medical treatment even if it deviates from the **Guidelines.** The Industrial Claim Appeals Office has previously noted the lack of authority mandating that an ALJ award or deny medical benefits based on the **Guidelines.** *Thomas v. Four Corners Health Care*, W.C. No. 4-484-220 [Indus. Claim Appeals Office (ICAO), April 27, 2009]; *see also Burchard v. Preferred Machining*, W.C. No. 4-652-824 (ICAO, July 23, 2008) [declining to require application of medical treatment guidelines for carpal tunnel syndrome in determining issue of PTD]; *Jones v. T.T.C. Illinois, Inc.*, W.C. No. 4-503-150 (ICAO, May 5, 2006), ***aff'd*** *Jones v. Industrial Claim Appeals Office* No. 06CA1053 (Colo. App. March 1, 2007) (NSOP) [it is appropriate for the ALJ to consider the **Guidelines** on questions such as diagnosis, **but the guidelines are not definitive**); *Madrid v. Trinet Group*, W.C. No. 4-851-315 (ICAO, April 1, 2014). As found, Dr Paz relied on his **own interpretation** of the MTG in disagreeing with the ATP, the DIME and Claimant's IME Dr. Gellrick (all of whom are fully Level 11 accredited physicians by the DOWC) on the 5% specific disorders rating. His disagreement in this regard is a mere difference of opinion and does not rise to the level of clear and convincing evidence with respect to the 5% specific disorders rating.

d. On the other hand, Dr. Paz's articulation concerning why the MTG would not permit a rating of loss of ROM in the present case is persuasive because it is corroborated by ATP Dr. Kawasaki, and renders it highly likely, unmistakable and free from serious and substantial doubt that DIME Dr. Rook was clearly wrong in rating loss of ROM. Indeed, as found herein above, there were several non-work related factors that DIME Dr. Rook did **not** consider. The totality of the evidence supports an overcoming of DIME Dr. Rook's 6% loss of ROM portion of his total medical impairment rating by clear and convincing evidence, thus, the 5% specific disorders rating is all that stands.

Overcoming the DIME of Dr. Rook

e. The *AMA Guides,* 3rd Ed., Rev., require the rating physician to conduct a clinical and historical evaluation of a claimant's health status and compare the results to the rating criteria contained in the *AMA Guides*. *Wackenhut Corp. v. Indust. Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000). Pursuant to §3.3a of the *AMA Guides,"*[i]mpairment evaluation should be performed when the individual's condition has become static and well stabilized … [t]his precludes performing measurements when acute illness is present." A DIME physician's opinion on impairment is given presumptive weight, and is binding unless overcome by clear and convincing evidence. § 8-42-107(8)(b)(III), C.R.S.; *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590, 592 (Colo. App. 1998); *Leprino Foods Co. v. Industrial Claim Appeals Office,* 134 P.3d 475, 482 (Colo. App. 2005). Clear and convincing evidence is evidence that is stronger than a mere preponderance; rather, it is evidence that is highly probable and "free from serious or substantial doubt." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). All physical impairment ratings must be based on the *AMA Guides*, 8-42-101(3.7), CRS; *Kolar v. Industrial Claim Appeals Office*, 122 P.3d 1075 (Colo. App. 2005); 8-42-107(8)(c), CRS. A finding that the DIME did not comply with the directions of the *AMA Guides* supports a conclusion that such determinations have been overcome by clear and convincing evidence. *Silva v. Corporate Services Group Holdings, Inc*., W.C. No. 4-944-337-03 [Indus. Claim Appeals Office (ICAO), February 23, 2016]. As found, the part of DIME Dr. Rook's impairment rating attributable to loss of ROM has been overcome by clear and convincing evidence. As further found, Dr. Rook's specific disorders rating of 5% whole person, corroborated by ATP Dr. Kawasaki and Claimant's IME Dr. Gellrick, has **not** been overcome by clear and convincing evidence.

Overpayment

f. Although the Claimant concedes an overpayment of $1,722.20, Respondent asks for a credit against the PPD award. The last payment of the PPD award was as of February 21, 2019. Consequently, a credit against the PPD award is an impossibility.

ORDER

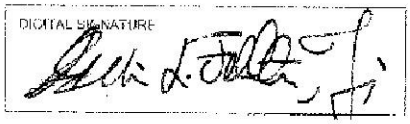
IT IS, THEREFORE, ORDERED THAT:

A. The Division Independent Medical Exam opinion of Jack Rook, M.D. having been overcome as to loss of range of motion of 6%, Dr. Rook's opinion relative thereto is hereby set aside.

B. Dr. Rook's opinion concerning specific disorders of 5% whole person not having been overcome, the Final Admission of Liability for 5% whole person and maintenance medical benefits is hereby re-affirmed and adopted.

C. Because it is impossible to exact a credit for an overpayment from the permanent disability award that has already been paid out, the claim for overpayment is hereby denied and dismissed.

DATED this 29th day of April 2019.



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EDWIN L. FELTER, JR.
Administrative Law Judge

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-026-853-003

ISSUES

- Whether Respondents overcome by clear and convincing evidence Greg Reichhardt's M.D. Division Independent Medical Examination report dated June 25, 2018 as to the correct date of Maximum Medical Improvement.

- Whether Respondents overcome by clear and convincing evidence Greg Reichhardt's M.D. Division Independent Medical Examination report dated June 25, 2018 as to the correct permanent medical impairment rating.

- Whether Claimant proved by a preponderance of the evidence entitlement to *Grover* medical benefits.

FINDINGS OF FACT

1. Claimant sustained a compensable industrial injury on September 24, 2016, when she fell from a motorized cart and landed on her right side.

2. Claimant initially sought treatment at the Platte Valley Medical Center emergency department. There, the emergency triage nurse noted:

- Claimant had lost consciousness for a brief duration.
- Claimant denied cervical tenderness.
- Claimant respiration was regular, non-labored and symmetric.

3. At the emergency department, Claimant complained of headache, right hip, shoulder, and chest pain. Claimant initially denied neck pain. On physical examination, Clamant presented no focal neurological deficits, no difficulty breathing, and no cervical spine pain.

4. The emergency department followed trauma protocols and performed brain and cervical spine CTs, and a right hip x-ray.

- Reading radiologist Dr. Lyders compared Claimant's brain CT to a brain CT performed on August 1, 2015, taken when Claimant presented with a severe headache. The scan revealed no hemorrhage or acute intracranial abnormality.
- The cervical spine CT showed no acute fracture or malalignment.
- The hip x-ray showed only a congenital finding.

Claimant's diagnoses included fall with loss of consciousness, facial contusion, scalp contusion, and right hip contusion.

5. Claimant's medical providers took her off work on September 24, 2016.

6. Claimant returned to the emergency department the next day reporting that the pain medication caused nausea. She was experiencing a headache with 10/10 pain. She indicated that she had no issues with her eyes or neck. Notes from the visit do not document neck pain, neurological deficits, or abnormalities in her eye examination. Claimant also underwent chest x-rays which Dr. Roth read as revealing no fractures.

7. On September 26, 2016, Claimant reported to Advanced Urgent Care, her initial workers' compensation provider. Claimant continued to report headache without dizziness and no vision change. Claimant's recent and remote memory were normal. Claimant continued to complain of right hip pain, and right eye pain. She also complained of neck pain. Although she complained of pain with cervical motion, she had full cervical range of motion. The nurse practitioner diagnosed contusion of eye, right shoulder pain, right hip pain, and head contusion with negative CT scan.

8. Over the next month, Claimant continued to report severe pain and an increasing number of symptoms. Claimant generally reported pain at 8/10, with headache pain of 9-10/10. Claimant began reporting right arm pain, dizziness, aggravation with any lifting or movement. Claimant's cervical range of motion continued to be full.

9. Claimant returned to work with restrictions in late October. She worked one day and then became unable to work more than three hours on the second day. Claimant reported nausea and muscle aches. She continued to have full range of cervical motion.

10. Claimant's provider, Dr. Parsons, recommended physical therapy. He increased Claimant's restrictions and returned her to modified duty.

11. On November 21, 2016, Claimant began to complain of blurred vision. Dr. Parsons noted Claimant exhibited multiple pain behaviors and reviewed with her the negative findings on the brain and cervical spine CT scans and x-rays. The doctor noted Claimant had full cervical range of motion.

12. On December 8, 2016, Claimant reported increased right eye, rib, and arm pain rated at 8/10. Claimant reported concern that her right forehead was "sinking in." For the first time, Claimant exhibited limited cervical range of motion. Dr. Parsons also documented that Claimant exhibited multiple pain behaviors.

13. Dr. Parsons referred Claimant to Dr. Anderson-Oeser, a pain management specialist. At that time, Claimant's active diagnoses were concussion with no loss of consciousness, contusion of chest, and neck sprain. Claimant reported the following symptoms

- Daily severe headaches

- Blurred vision in her right eye, which she later claimed became bilateral
- Cognitive issues with word recall problems and irritability
- Right-sided wrist pain with decreased range of motion
- Lateral right hip and groin pain, with sharp, stabbing pain in the anterior groin when rising from a seated position and with walking
- Claimant reported pain ranging from 8-10/10

14. Dr. Anderson-Oeser prescribed narcotic pain relievers, a Lido Pro patch and cream, and referred Claimant for a right hip injection and an opthalmygist. Claimant successfully underwent the injection which relieved her hip and groin pain.

15. Claimant returned to Dr. Parsons on January 23, 2017. Claimant reported worsening pain and a pain level of 10/10. Dr. Parsons again documented Claimant displayed multiple pain behaviors and referred her to Dr. Esparza for complaints of depression.

16. At an appointment three days later, her provider recommended a cervical spine MRI and a referral and to a psychiatrist.

17. Claimant underwent a cervical MRI on January 27, 2017. Radiologist Dr. O'Malley reviewed the films and noted the study was normal. Dr. D'Angelo, who performed a Respondents' sponsored independent medical evaluation, reported that Claimant's cervical MRI showed the same results she sees with pediatric patients. Claimant reported increased depression and anxiety. She reported only occasional radicular and paresthesia in her upper right extremity and decreased pain at 5-10/10.

18. On February 14, 2017, Dr. Esparza evaluated Claimant and reported that Claimant complained of restricted full-time work because of her excessive pain. Claimant continued to complain of headaches, back pain, and blurry vision. In addition, she had *new* complaints of needle-type pain in her eyes, lumbar back pain, and radiating symptoms into her buttocks.

19. Ophthalmologist Thomas Politzer evaluated Claimant in March 2017. Claimant had a change in refraction, but Dr. Polister did not causally relate the change to Claimant's work incident.

20. On April 4, 2017, psychiatrist Dr. Gutterman evaluated Claimant. Claimant offered no complaints of pain. The doctor noted her recent and remote memory were intact; her concentration appeared adequate; and she demonstrated no word finding difficulty.

21. Claimant continued to complain of headaches, right –sided cervical pain, right shoulder pain, and intermittent low back pain in mid-May 2017. She no longer complained of right upper extremity radicular symptoms, right-sided wrist pain, lateral pain

or right groin pain. Dr. Anderson-Oeser referred Claimant for osteopathic manipulation and prescribed massage therapy. Dr. Anderson-Oeser told Claimant that she did not expect Claimant to improve significantly unless Claimant became more involved in her home exercise program. Dr. Anderson-Oeser measured Claimant to have full cervical range of motion.

22. On May 23, 2017, Claimant reported more difficulty with her memory as time went on. Dr. Gutterman explained that would not be due to a head injury because those symptoms resolve, rather than increase, over time.

23. Throughout July, Claimant complained of headaches, cervical pain, right shoulder girdle and upper extremity pain, intermittent low back pain, depression, anxiety, memory problems, blurred vision, muscle spasm, decreased range of motion, and insomnia.

24. Dr. Anderson-Oeser re-examined Claimant on July 13, 2017. Claimant's chief presenting complaints were headaches, right shoulder girdle pain, right upper extremity pain, intermittent low back pain, depression and anxiety.

25. Dr. Anderson-Oeser re-examined Claimant on September 25, 2017. Claimant's chief presenting complaints were ongoing right shoulder girdle pain, headaches, depression and anxiety.

26. Dr. Anderson-Oeser explained a patient can have palpable spasm and tenderness but would have no permanent medical impairment if myofascial pain caused those symptoms.

27. On October 25, 2017, Dr. Anderson-Oeser found some increased tone of the trapezius and levator scapula muscles with tenderness over the right AC joint, subacromial space and right scapula with mild clicking and popping in the right shoulder. Claimant's cervical extension was minimally restricted, and she had minimal restrictions at the end range of forward flexion and extension, which, according to Dr. Anderson-Oeser, is common in people unless they are very limber. Other than following up with Dr. Gutterman regarding medication and continuing the cognitive behavioral therapies with Dr. Boyd, Dr. Anderson-Oeser prescribed no additional treatment.

28. Claimant underwent an FCE on December 8, 2017.

29. On January 10, 2018, Dr. Anderson-Oeser noted Claimant was doing well and had no pain at the time. Claimant reported occasional pain that would go to about a 2/10 but typically was a zero. Dr. Anderson-Oeser noted Claimant had finished her treatments with Dr. Boyd and Dr. Gutterman. As of January 10, 2018, Dr. Anderson-Oeser determined no treatment was reasonably needed to cure and relieve Claimant from, or related to, the effects of the industrial injury. Dr. Anderson-Oeser noted, "in fact, she weaned herself off all of the medications; the Tramadol, the Baclofen, the Duloxetine, the topical pain, she wasn't taking anything." Dr. Anderson-Oeser placed Claimant at MMI on January 10, 2018.

30. Dr. Anderson-Oeser has been Level II Accredited since 1988. She persuasively testified that if Claimant had a ratable medical impairment when she reached MMI, she would have given Claimant an impairment rating. However, based upon her Level II training, the AMA Guides and the Impairment Rating Tips Sheets, Claimant had no ratable impairment at MMI.

31. Claimant required no healthcare treatment that was reasonably needed to cure and relieve from, related to, the effects of the industrial injury after January 10, 2018. By that date, she had also weaned herself off all medications.

32. On June 25, 2018, Claimant underwent a DIME examination performed by Dr. Reichhardt. Dr. Reichhardt placed Claimant at MMI as of the date of his DIME, June 25, 2018, rather than on January 10, 2018. He did not explain why he chose June 25, 2018 as the date of MMI.

33. Dr. Anderson-Oeser reviewed a copy of Dr. Reichhardt's DIME report and testified that Dr. Reichhardt erred in placing Claimant at MMI as of the date of his DIME. Both Dr. Anderson-Oeser and Dr. D'Angelo opined that Claimant availed herself of no treatment between January 10 and June 25, 2018 to support and justify the later MMI date.

34. Dr. Reichhardt gave no medical justification pursuant to the AMA Guides to the Evaluation of Permanent Medical Impairment Third Edition Revised or the impairment rating Tips Sheets, or Level II Training that justifies a June 25, 2018 date of maximum medical improvement.

35. Dr. Anderson-Oeser reviewed Dr. Reichhardt's physical examination and opined that nothing in Dr. Reichhardt's physical examination establishes that his findings were direct and proximate results of the industrial injury. If what Dr. Reichhardt found was as a direct and proximate result of the industrial injury, Dr. Anderson-Oeser testified that she would have expected to find it at the time she put Claimant at MMI. Dr. Anderson-Oeser explained at the time she put her at MMI Claimant was not having any impingement, was having no pain, and was doing whatever she needed to do.

36. The ALJ finds that Dr. Reichhardt's assignment of June 25, 2018, as the date Claimant reached MMI finds no support in the medical record and is contradicted by the more persuasive opinions of Drs. Anderson-Oeser and D'Angelo. The ALJ finds that Respondents have met their burden of proof and established by clear and convincing evidence that Dr. Reichhardt erred in his MMI date.

37. In addition, Dr. Anderson-Oeser explained that without a Table 53 diagnosis, a doctor cannot rate range of motion limitations ascribed to an industrial injury.

38. The ALJ finds it highly probable and free from serious or substantial doubt that Dr. Reichhardt erred in providing the permanent medical impairment ratings and ascribing them to the industrial injury. Dr. Anderson-Oeser's testimony, supported by the medical evidence as well as Dr. D'Angelo's testimony, establishes Respondents met their

burden of proof. It is highly probable and free from serious or substantial doubt that Dr. Reichhardt erred in providing Claimant with a permanent medical impairment rating.

39. The ALJ finds Claimant sustained no permanent medical impairment as a direct and proximate of the industrial injury.

40. The ALJ finds that Claimant's subjective reports to her providers were often inaccurate. For example,

- Claimant reported to several providers that she has fractured ribs. However, Claimant underwent chest x-rays on September 26 and again on October 7, 2016. Dr. Roth, the reading radiologist of the September 26, 2016 x-ray, noted the absence of fracture. Dr. Parsons read the October 7, 2016 x-ray as normal.

- Claimant reported delayed and worsening cognitive and visual problems. These symptoms do not follow the natural history of acute blunt trauma or traumatic brain injury.

- Claimant's pain and numbness varied and migrated over time, inconsistent with the natural progression of her injury.

- Claimant's severe, unremitting pain complaints could not be substantiated by objective physical or radiologic findings.

- Claimant did not disclose to her treating physicians her longstanding history of severe headaches and anxiety.

CONCLUSIONS OF LAW

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

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

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

A DIME physician's opinions concerning MMI and impairment of the whole person are binding unless overcome by clear and convincing evidence. §8-42-107(8)(b)(III),

C.R.S. 2015; *Meza v. Indus.* Claim *Appeals Office,* 303 P.3d 158, 161 (Colo. App. 2013). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998).

The party seeking to overcome the DIME physician's impairment rating has the burden of proof. *Lambert & Sons, Inc. v. Indus. Claim Appeals* Office, 984 P.2d 656 (Colo. App. 1998). A party meets the burden of overcoming the DIME conclusion on MMI and permanent medical impairment only if the party demonstrates that the evidence contradicting the DIME physician is "unmistakable and free from serious or substantial doubt." *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002). The party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

The ALJ may consider a variety of factors in determining whether a DIME physician erred in his opinions, including whether the DIME appropriately utilized the *AMA Guides* in his opinions. C.R.S. § 8-43-301(8) (2015); *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo. App. 2000). A DIME physician must apply the *AMA Guides* when determining the Claimant's medical impairment rating. C.R.S. §8-42-101(3.7); C.R.S. §8-42-107(8)(c). The question of whether the DIME physician properly applied the *AMA Guides*, and ultimately whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office*, 17 P.3d 202 (Colo. App. 2000). Deviation from the AMA Guides constitutes evidence that the ALJ may consider in determining whether the DIME physician's rating has been overcome. *Wilson v. Industrial Claim Appeals Office*, 81 P.3d 1117 (Colo. App. 2003).

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

Maximum Medical Improvement

The ALJ concludes it is highly probable and free from serious or substantial doubt that Dr. Reichhardt erred in opining that MMI was June 25, 2018. Dr. Anderson-Oeser's MMI date was supported by objective medical evidence, including the September 24, 2016 cervical spine CT scan with no acute abnormality and the normal January 27, 2017 cervical spine MRI, both noted by Dr. D'Angelo and acknowledged by Dr. Reichhardt. Dr. Reichhardt's MMI opinion was not supported by objective medical evidence, as confirmed by Dr. D'Angelo's hearing testimony and an evaluation of the evidence. Dr. Anderson-Oeser's MMI opinion is supported by Dr. D'Angelo's hearing testimony and the objective medical evidence.

Dr. Reichhardt did not discuss Dr. Anderson-Oeser's MMI date opinion, providing no evidence that he was aware of, or analyzed, this relevant evidence. Dr. Anderson-Oeser's January 10, 2018 report establishes Claimant reported no pain on that date, Claimant believed she was capable of returning to full duty work without restrictions, and she denied depression. Dr. Anderson-Oeser's report noted Dr. Anderson-Oeser found cervical range of motion and bilateral shoulder range of motion was within normal limits. Failing to acknowledge this undermines Dr. Reichhardt's MMI date as this evidence clearly supported Dr. Anderson-Oeser's MMI date. Additionally, at the December 8, 2017 FCE, Claimant reported pre-FCE and post-FCE pain levels at zero out of ten. This FCE evidence, as confirmed by Dr. D'Angelo's hearing testimony, was consistent with Claimant's report of no pain to Dr. Anderson-Oeser at MMI.

The ALJ concludes Respondents have proven it is highly probable and free from serious or substantial doubt that Dr. Reichhardt erred when he found Claimant reached MMI on June 25, 2018. Accordingly, the ALJ concludes Dr. Reichhardt's DIME opinion regarding the date of MMI has been overcome by clear and convincing evidence.

Permanent Impairment Ratings

The ALJ concludes that Dr. Reichhardt's 9% permanent impairment rating for the cervical spine is erroneous, lacks credibility, and finds no support in the persuasive medical evidence. The ALJ finds the opinions of Dr. Anderson-Oeser and Dr. D'Angelo to be credible and persuasive. Dr. Reichhardt's cervical impressions consisted of a cervical strain, possible discogenic pain and possible periscapular myofascial pain. As Dr. D'Angelo testified, by definition a "strain" means a temporary -- not permanent -- issue. By its very nature, a cervical strain is not permanent and does not qualify as a specific disorder necessary to find an AMA Guides Table 53 permanent impairment. Mere possibilities of discogenic pain and periscapular myofascial pain do not qualify as specific disorders of the spine necessary to find a Table 53 permanent impairment. Dr. Anderson-Oeser also analyzed Dr. Reichhardt's report and testified there was no AMA Guides Table 53 specific disorder and Claimant was not entitled to permanent impairment for the cervical spine based on Dr. Reichhardt's report, let alone the temporal medical evidence at the time of MMI.

The ALJ concludes that Dr. Reichhardt's opinion regarding a 1% mental impairment rating is erroneous. Dr. Reichhardt did not establish the causation of the alleged depression to the admitted industrial injury or address Claimant's report of no

depression at her January 10, 2018 appointment with Dr. Anderson-Oeser. Dr. Reichhardt did not address a key issue that if the depression had resolved by January 10, 2018 and Claimant weened herself off her medications, how could Claimant's alleged depression six months later be causally related to the industrial injury. Claimant required no healthcare treatment to cure and relieve from, or related to, the effects of the industrial injury after January 10, 2018. In his report, Dr. Reichhardt simply noted Claimant reported some depression. No persuasive evidence supports that Claimant's depression at the time of the DIME was causally related to the industrial injury or why, after denying depression on January 10, 2018, she again reported depression at the DIME.

Furthermore, Dr. Gutterman's July 25, 2017 mental health impairment rating does not support Dr. Reichhardt's rating. Dr. Gutterman provided an impairment rating because Claimant was on psychotropics at that time, while Claimant had weaned herself off the psychotropics by January 10, 2018, and was not taking psychotropics on June 25, 2018 when she saw Dr. Reichhardt.

The ALJ concludes Dr. Reichhardt's opinion regarding an 11% upper extremity impairment is erroneous. Dr. Reichhardt did not relate the causation of the alleged range of motion deficit to the admitted industrial injury. Nor did Dr. Reichhardt address Claimant's full shoulder range of motion on January 10, 2018. Dr. Reichhardt did not relate Claimant's reported increase in shoulder pain since January 10, 2018, and decrease in shoulder range of motion since January 10, 2018, to the admitted injury. Claimant did not require medical treatment for the shoulder after January 10, 2018 and Claimant reported to Dr. Reichhardt, as noted in his report, she was not aware of any treatment that she might need. Dr. Reichhardts' opinion is also inconsistent with Dr. D'Angelo's hearing testimony.

Respondents have proven it highly probable and free from serious or substantial doubt that Dr. Reichhardt erred when he assigned Claimant the 9% cervical spine rating, the 1% mental health rating and the 11% upper extremity impairment rating. Accordingly, the ALJ concludes all of Dr. Reichhardt's impairment ratings have been overcome by clear and convincing evidence.

Once the DIME physician's opinion is overcome on any component of the Claimant's impairment, the question of the Claimant's correct medical impairment rating becomes a question of fact for the ALJ. *Serena v. SSC Pueblo Belmont Op Co. LLC*, W.C. No. 4-922-344-01 (ICAO Dec. 1, 2015); *Paredes v. ABM Industries*, W.C. No. 4-862-312 (ICAO Nov. 13, 2014).

The ALJ concludes Claimant's correct impairment rating for this industrial injury is zero. This is consistent with the medical evidence at and near the correct date of MMI, the FCE, Dr. Anderson-Oeser's report and the testimonial opinions of Dr. Anderson-Oeser and Dr. D'Angelo, whose opinions are credible and persuasive.

Grover Medical Benefits

The need for medical treatment may extend beyond the point of maximum medical improvement where the Claimant requires periodic maintenance care to prevent further deterioration of his condition. *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988). The Claimant must prove entitlement to Grover medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.*, 865 P.2d 915 (Colo. App. 1993). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must show medical record evidence demonstrating the "reasonable necessity for future medical treatment." *Milco Constr. v. Cowan,* 860 P.2d 539, 542 (Colo. App. 1992). Such treatment becomes reasonably necessary where the evidence establishes that, but for a particular course of medical treatment, the claimant's condition can reasonably be expected to deteriorate, so that he will suffer a greater disability. *Milco Constr. v. Cowan, supra;* see also *Hanna v, Print Expediters Inc.,* 77 P.3d 863, 865 (Colo. App. 2003).

If, in an FAL, the respondents deny liability for medical benefits after MMI it is incumbent on the claimant to request a hearing and present substantial evidence that ongoing medical benefit are or will be reasonably necessary to relieve the effects of the injury or to prevent future deterioration. *Hanna v. Print Expediters Inc*., 77 P.3d 863 (Colo. App. 2003), citing *Grover v. Industrial Commission*, 759 P.2d 705, 711-712 (Colo. 1988). Respondents filed a Final Admission of Liability denying post-MMI maintenance medical care.

Claimant failed to prove entitlement to post-MMI maintenance medical care by a preponderance of the evidence. Claimant provided no medical testimony or evidence, and no lay testimony of a need for post-MMI maintenance medical treatment that was reasonably necessary and related to the admitted industrial injury. At the DIME appointment with Dr. Riechhardt, Claimant reported, “[s]he was not aware of any treatment that she feels that she needs.” After Dr. Anderson-Oeser placed Claimant at MMI on January 10, 2018, Claimant did not obtain medical treatment reasonably necessary and related to the admitted industrial injury. Dr. Anderson-Oeser opined no maintenance medical care was required.

ORDER

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

1. Respondents' request to set aside the DIME opinion of Dr. Reichhardt regarding maximum medical improvement is GRANTED. The correct date of MMI is January 10, 2018.

2. Respondents have overcome Dr. Reichardt's DIME opinion that Claimant has a 9% whole person cervical spine rating.

3. Respondents have overcome Dr. Reichardt's DIME opinion that Claimant has a 1% mental health permanent impairment rating.

4. Respondents have overcome Dr. Reichardt's DIME opinion that Claimant has an 11% upper extremity permanent impairment rating.

5. The appropriate permanent impairment rating for Claimant's admitted industrial injury is zero, as assigned by Dr. Anderson-Oeser.

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

DATED: April 29, 2019

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

STATE OF COLORADO **OFFICE OF ADMINISTRATIVE COURTS** 1525 Sherman Street, 4th Floor Denver, CO 80203	
Claimant, v. Employer, and **Self-Insured** Respondent.	▲ **COURT USE ONLY** ▲ **WC NO: 4-850-887-002** **VENUE: Denver**

ORDER ON REMAND GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

On October 23, 2018 ALJ Cannici issued an Order granting Respondent's Motion for Summary Judgment in this matter. The Order dismissed issues pertaining to Claimant's Petition to Reopen and request for Temporary Total Disability (TTD) benefits.

Claimant appealed Judge Cannici's Order to the Industrial Claim Appeals Office (ICAP). Claimant asserted that genuine issues of material fact exist about whether she sought to reopen her claim within the statutorily mandated six years from her date of injury.

On March 18, 2019 the ICAP remanded the matter to perfect the record on appeal by including the prehearing order of PALJ Barbo issued on May 6, 2016 and the prehearing order of PALJ Broniak issued on July 10, 2018. The ICAP noted that the pre-hearing orders of PALJ's Barbo and Broniak may constitute essential information regarding "whether there are genuine issues of material fact that remain in dispute." The Office of Administrative Courts (OAC) has included the preceding pre-hearing orders in the file and thus perfected the record.

The ICAP also requested a determination of whether Claimant filed a timely Petition to Reopen her claim. The ICAP explained that the central issue is whether the language on many of Claimant's applications for hearing that "MMI was rescinded by ATP Sander Orent, M.D. on 8/5/15," in conjunction with extrinsic evidence, constituted a Petition to Reopen for jurisdictional purposes. Accordingly, the ICAP set aside ALJ Cannici's October 23, 2018 Order and remanded the matter for a new order.

ISSUE

Whether there are genuine issues of material fact about whether Claimant sought to reopen her claim within the statutorily mandated six years from her date of injury.

FINDINGS OF FACT

1. On March 11, 2011 Claimant suffered a work-related injury. On February 9, 2012 Respondent filed a Final Admission of Liability (FAL) that acknowledged medical maintenance benefits after Maximum Medical Improvement (MMI). Claimant did not challenge the FAL and the claim closed by operation of law.

2. On May 4, 2016 Claimant filed an Application for Hearing, listing, among other issues, Temporary Total Disability (TTD) benefits and "MMI was rescinded by ATP Sander Orent, M.D., on 8/5/15." Claimant did not endorse "Petition to Reopen claim" or file a Petition to Reopen. The matter did not proceed to hearing.

3. On May 6, 2016 PALJ Barbo conducted a prehearing conference with the parties in this matter. PALJ Barbo noted that Respondent's had requested a pre-hearing conference on the following two issues: (1) a motion to vacate the June 23, 2016 hearing for failure to comply with OACRP 8(I) and; (2) a motion to strike Claimant's Application for Hearing for failure to file a Petition to Reopen or comply with WCRP 7-3(A). PALJ Barbo granted Respondent's request to vacate the June 23, 2016 hearing because Claimant filed a hearing confirmation form in the absence of a mutually agreeable date for the hearing. ALJ Barbo denied Respondent's request to strike the Application for Hearing because the relevant statute "does not mandate that a Petition to Reopen be filed in order to confer jurisdiction on an ALJ to determine whether the matter should be reopened."

4. On February 2, 2017 Claimant filed an Application for Hearing, listing, among other issues, TTD and "MMI was rescinded by ATP Sander Orent, M.D., on 8/5/15." Claimant neither endorsed "Petition to Reopen claim" nor filed a Petition to Reopen. The matter did not proceed to hearing.

5. On August 4, 2017 Claimant again filed an Application for Hearing, listing, among other issues, TTD and "MMI was rescinded by ATP Sander Orent, M.D., on 8/5/15." Claimant again failed to endorse "Petition to Reopen Claim" and did not file a Petition to Reopen. The matter did not proceed to hearing.

6. On October 10, 2017 Claimant filed a fifth Application for Hearing, listing, among other issues, TTD and "MMI was rescinded by ATP Sander Orent, M.D., on 8/5/15." Claimant did not endorse "Petition to Reopen Claim" or file a Petition to Reopen. The matter did not proceed to hearing.

7. On December 6, 2017 Claimant filed another Application for Hearing, listing, among other issues, TTD and "MMI was rescinded by ATP Sander Orent, M.D., on

8/5/15." Claimant again did not endorse "Petition to Reopen Claim" or file a Petition to Reopen. The matter did not proceed to hearing.

8. On March 30, 2018 Claimant again filed an Application for Hearing, listing TTD and "MMI was rescinded by ATP Sander Orent, M.D., on 8/5/15." Claimant neither endorsed "Petition to Reopen Claim" nor filed a Petition to Reopen.

9. On July 10, 2018 PALJ Broniak conducted a pre-hearing conference with the parties in this matter. PALJ Broniak noted that the pre-hearing conference involved the following two issues: (1) Respondent's motion for clarification as to defenses available at the merits hearing and; (2) Claimant's motion to compel supplemental discovery responses. PALJ Broniak granted Claimant's motion to compel supplemental discovery responses. In addressing Respondent's request for clarification of available affirmative defenses, ALJ Broniak noted that Respondent's failed to endorse the statute of limitations defense "with respect to Claimant's petition to reopen." Respondent's were thus precluded from raising the defense at hearing.

10. On July 17, 2018 the parties appeared for the hearing on the March 30, 2018 Application but the matter did not proceed. At the outset of the hearing ALJ Michelle E. Jones sought to clarify the issues presented. In a written order dated July 18, 2018 ALJ Jones concluded that "Petition to Reopen" was not an issue adequately endorsed for hearing. She explained that "[a]lthough it might possibly be inferred from the March 30, 2018 Application for Hearing that Claimant might be pursuing a petition to reopen, it is not listed as an issue for hearing." She reasoned that the Application for Hearing was not "sufficiently clear to provide Respondent with adequate notice that Claimant was pursuing a petition to reopen her claim based on a worsened condition." She summarized that Respondent should not be required to infer "from the pleadings that Claimant intended to reopen her claim." ALJ Jones thus determined that "the issue of petition to reopen was not sufficiently endorsed to allow Respondent notice and opportunity to be heard on the issue of petition to reopen based on worsening." She permitted Claimant to withdraw and refile a new Application for Hearing.

11. On August 1, 2018 Claimant filed an Application for Hearing, endorsing issues similar to those in previous applications. However, Claimant added the following issues: "Petition to Reopen Claim" and "Claimant's condition has worsened and she wants her claim reopened." The hearing was set to commence on October 26, 2018.

12. On September 21, 2018 Respondent's filed a Motion for Summary Judgment. Respondent's asserted that the issues of reopening and TTD benefits were barred by sections 8-43-203(2)(b)(2)(A) and 8-43-303 C.R.S. Claimant responded that there was a disputed issue of material fact about whether she sought to reopen her claim within six years from the March 11, 2011 date of injury because she filed numerous Applications for Hearing and had written discussions with Respondent about her request for TTD benefits based on a worsened condition. On October 23, 2018 ALJ Cannici issued an Order granting Respondent's Motion for Summary Judgment in this matter. The Order dismissed issues pertaining to Claimant's Petition to Reopen and request for TTD benefits. Claimant appealed ALJ Cannici's Order to ICAP.

CONCLUSIONS OF LAW

1. Pursuant to O.A.C.R.P. Rule 17, "any party may file a motion for summary judgment seeking resolution of any endorsed issue for hearing." The rule allows a party to support its motion with affidavits, transcripts of testimony, medical reports, or employer records. A motion for summary judgment may be supported by pleadings, depositions, answers to interrogatories and admissions on file. C.R.C.P. 56; *See also Nova v. Industrial Claims Appeals Office,* 754 P.2d 800 (Colo. App. 1988) (noting that C.R.C.P. and C.R.E. apply insofar as they are not inconsistent with the procedural or statutory provisions of the Act).

2. Summary judgment is appropriate when the pleadings show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c); *Churcey v. Adolph Coors Co*., 759 P.2d 1336 (Colo. 1988). This rule allows the parties to pierce the formal allegations of the pleadings and save time and expense connected with trial, when, based on undisputed facts, one party could not prevail as a matter of law. *See Drake v. Tyner,* 914 P.2d 519 (Colo. Ct. App. 1996).

3. Once the moving party shows specific facts probative to a right to judgment, it becomes necessary for the non-moving party to set forth facts showing there is a genuine issue for hearing. See *Miller v. Van Newkirk*, 628 P.2d 143 (Colo. App. 1980). An adverse party may not rest upon the mere allegations or denials in his pleadings, but his genuine response by affidavits or other means must set forth specific facts showing that there is a genuine issue. C.R.C.P. 56(e). Genuine issues of material fact cannot be manufactured and arguments alone will not preclude summary judgment because contentions must be supported. *See Bauer v. Southwest Denver Mental Health Center*, Inc., 701 P.2d 114 (Colo. App. 1985). Accordingly, an affirmative showing of specific facts probative of a right to judgment uncontradicted by submitted counter-affidavits leaves a trial court with no alternative but to conclude that no genuine issue of material fact exists. *Terrell v. Walter E. Heller & Co.,* 165 Colo. 463, 439 P.2d 989 (1968).

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

> *[a]n admission of liability for final payment of compensation must include a statement that this is the final admission by the Workers' Compensation insurance carrier in the case, that the claimant may contest this admission if the claimant feels entitled to more compensation to whom the claimant should provide written objection and notice to the claimant that the case will be automatically closed as to the issues admitted in the final admission if the claimant does not, within thirty days after the date of the final admission, contest the final admission in writing and request a hearing on any disputed issues that are ripe for hearing included in the selection of an independent medical examiner pursuant to section 8-42-107.2, if an independent medical examination has not already been conducted.*

5. Section 8-43-303(1) C.R.S. specifies that: "[a]t any time within six years after the date of injury, the director or an administrative law judge may, after notice to all parties, review and reopen any award on the ground of fraud, an overpayment, an error, a mistake, or a change in condition…."

6. Section 8-43-303(2)(a), C.R.S. provides: "[a]t any time within two years after the date the last temporary or permanent disability benefits or dependent benefits excluding medical benefits become due or payable, the director or an administrative law judge may, after notice to all parties, review and reopen any award on the ground of fraud, an overpayment, an error, a mistake, or a change in condition…."

7. The undisputed facts establish the Claimant did not contest the FAL within thirty days after the date of the final admission. Accordingly, the issue of TTD benefits is closed pursuant to §8-43-203(2)(b)(II)(A).

8. The undisputed facts establish that Claimant did not seek to reopen her claim within six years from the date of injury. Claimant has not filed a Petition to Reopen. Further, while Claimant filed multiple Applications for Hearing, she did not endorse reopening until August 1, 2018. The undisputed facts establish that Claimant did not seek to reopen her claim within two years from the date the last indemnity benefit became due or payable. The last indemnity benefit was due and payable on December 12, 2012. Claimant neither filed a Petition to Reopen nor an Application for Hearing endorsing reopening, between December 12, 2012 and December 12, 2014. As explained by ALJ Jones in her order dated July 19, 2018 "Claimant's case is closed and has been since 2015. Claimant has not yet applied for hearing endorsing Petition to Reopen her closed case based on worsening."

9. Section 8-43-303, C.R.S. does not require the filing of a formal petition to reopen in order to confer jurisdiction on an ALJ to determine whether a claim should be reopened. *In Re Casias*, W.C. No. 4-740-818-02 (ICAP, Mar. 25, 2013). However, the issue presented is not whether Claimant filed a Petition to Reopen her claim, but rather whether Respondent had notice that Claimant sought to reopen her claim based on a worsening of condition. Section 8-43-303, C.R.S. specifically requires notice to all parties prior to reopening based on a change in condition.

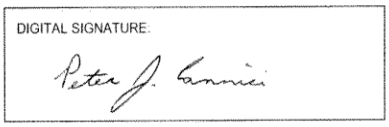
10. Claimant's argument is premised upon the notion that, because the facts are subject to conflicting interpretations, genuine issues of material fact exist. However, as ALJ Jones noted, Respondent should not be required to infer "from the pleadings that Claimant intended to reopen her claim." Specifically, Claimant's repeated use of the phrase "MMI was rescinded by ATP Sander Orent, M.D. on 8/5/15" on numerous applications for hearing, in conjunction with extrinsic evidence in the form of e-mails, did not provide Respondent with adequate notice that she sought to reopen her claim based on a worsening of condition. Speculating that Respondent had notice of Claimant's intent to reopen her claim based on a worsening of condition after numerous applications for hearing that did not mention reopening, is not a disputed fact that will preclude summary judgment Whether Claimant's Applications for Hearing provided Respondent adequate notice of endorsed issues did not constitute a disputed material fact but was instead an

argument about the application of the law to undisputed facts. Accordingly, having reviewed the record, including the pre-hearing orders of PALJs Barbo and Broniak, it is undisputed that Claimant did not timely seek to reopen her claim. Claimant is thus statutorily barred from reopening her claim and seeking additional indemnity benefits.

ORDER

Respondent's Motion for Summary Judgement is granted. The issues of reopening and TTD are denied and dismissed..

DONE this 29th day of April, 2019.



_____

Administrative Law Judge
Peter J. Cannici

COURT CERTIFICATE OF SERVICE

I hereby certify that I have served true and correct copies of the foregoing **ORDER ON REMAND GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT** by e-mail addressed as follows:

Julie D Swanberg, Esq.
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Ritsema & Lyon, P.C.
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Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

Date: _____ /s/_____
Court Clerk

ISSUES

I. Whether Claimant has proven by clear and convincing evidence that the determination of the Division Independent Medical Examination (DIME) physician regarding maximum medical improvement (MMI) is incorrect.

II. Whether Claimant has proven by a preponderance of the evidence that additional maintenance care is reasonable, necessary, and causally related to her admitted industrial injury.

III. Whether Claimant established the right to temporary total disability (TTD) from August 20, 2017 through September of 2018.

IV. Whether Claimant established the right to reimbursement for medical bills.

V. Whether Claimant established the right to compensation for her husband's time off from work.

VI. Whether Claimant has established the right to reimbursement for funds deducted by the Frickey Law Firm from her payout of permanent partial disability (PPD).

FINDINGS OF FACT

1. Claimant is a 31-year-old woman who works for Employer as a cook.

2. Claimant sustained an admitted industrial injury on April 6, 2016 when a metal fry basket fell off of a shelf and struck her on the right side of the forehead. Claimant was taken to the emergency department at Littleton Adventist Hospital where she reported a frontal headache and small lump to the right eyebrow, but no blurred vision, dizziness, neck pain or back pain. On physical examination, Claimant's head was normocephalic and atraumatic, with no swelling or bruising noted. Claimant was oriented to person, place and time. CT scans of the head and cervical spine were normal. Claimant was diagnosed with a closed head injury and prescribed Percocet and Zofran.

3. Claimant subsequently began treating with authorized providers Deana Halat, FNP-BC and Christian Updike, DO at HealthONE Occupational Medicine Center. Claimant was first seen on April 11, 2016 with complaints of 6/10 pain, headaches and light sensitivity. Claimant was taking over the counter Tylenol for pain. It was noted on exam there was no swelling, ecchymosis or redness about the right eye or eyebrow. Claimant's neck range of motion was full and without tenderness. Claimant was assessed with postconcussion syndrome and released to part-time work.

4. On April 18, 2016, Claimant complained to Dr. Updike of headaches, nausea, and dizziness, but denied vision changes, numbness, tingling, neck pain, and shoulder pain. Dr. Updike noted Claimant reported that she did have right-sided neck pain initially but that the neck pain had "pretty much resolved." Dr. Updike further noted a normal examination other than slight pain with cervical spine range of motion. He referred Claimant for a short course of physical therapy.

5. By May 13, 2016, Claimant was continuing to report persistent headaches. Dr. Updike remarked that Claimant's reports persistent headache were not consistent with her clinical exam during which she was smiling, talkative, jovial, and made good eye contact. He questioned the presence of symptom magnification. Dr. Updike released Claimant to return to full-time work on May 16, 2016.

6. On June 3, 2016, Dr. Updike opined that Claimant's persistent subjective symptoms were "likely an issue more of low pain tolerance," given the modest mechanism of injury, ability to work full duty, and negative CT results. He, however, ordered a brain MRI to rule out any occult pathology. Dr. Updike anticipated Claimant would reach MMI in three weeks and would likely continue to have subjective complaints. Claimant underwent a brain MRI on June 15, 2016, which was normal with no acute findings.

7. Claimant continued to treat with Dr. Updike and continued to report right-sided head and neck pain, as well as right shoulder pain. On August 16, 2016, Dr. Updike referred Claimant for massage therapy and a pain management consultation with Yusuke Wakeshima, MD. Dr. Updike continued Claimant on full duty work.

8. Claimant first presented to Dr. Wakeshima on September 9, 2016. He opined that that the clinical history, examination and mechanism of injury were most consistent with myofascial pain.

9. Dr. Updike placed Claimant on modified duty on September 12, 2016. He noted concerns for delayed recovery.

10. Claimant continued to treat with Dr. Wakeshima, reporting right ankle and posterolateral leg pain which she attributed to the work injury. Claimant also continued to report right-sided neck, shoulder and back pain. Dr. Wakeshima opined that the work incident likely caused an increased strain pattern about the right cervical paraspinal musculature upper trapezius or levator scapula.

11. Claimant underwent an extensive course of conservative treatment, consisting of medications, Lidoderm patches and cream, physical therapy, massage therapy, a TENS unit, and trigger point injections.

12. On December 1, 2016, Dr. Updike placed Claimant at MMI with no permanent impairment. His final assessment was: postconcussive syndrome, cervicalgia and right shoulder pain, and delayed recovery. He released Claimant to full duty and referred her for six additional massage therapy sessions as maintenance treatment, along with follow-up with Dr. Wakeshima for any additional needs.

13. Claimant requested a DIME, which was performed by Timothy O. Hall, M.D. on June 26, 2017. Dr. Hall interviewed and physically examined Claimant and performed a medical records review. Claimant complained of daily right-sided temporal and frontal headaches, nausea, light sensitivity, dizziness, memory issues, and neck stiffness and pain. Dr. Hal's impression was as follows: (1) blunt trauma to head with mild postconcussive symptomatology, (2) tension headache involving muscles of mastication, possible postconcussion headache, and (3) soft tissue/whiplash type injury of the cervical thoracic area. He opined Claimant was at MMI, noting there was not "a great deal more" that could be done for Claimant. Dr. Hall assigned a 10% whole person impairment with no permanent restrictions or need for maintenance care.

14. Respondents filed a Final Admission of Liability (FAL) on August 3, 2017 consistent with Dr. Hall's DIME report, admitting to a 10% whole person impairment and no maintenance care.

15. Claimant continued to treat with Dr. Wakeshima. As of December 13, 2017, Dr. Wakeshima noted Claimant remained at MMI and her symptoms were most consistent with myofascial pain. Claimant last saw Dr. Wakeshima on April 11, 2018. She continued to report 7/10 pain, persistent headaches, dizziness, nausea and shoulder pain.

16. On February 15, 2019, John Raschbacher, MD performed independent medical examination (IME) at the request of Respondents. Claimant complained of headaches, blurry vision, anxiety and depression. Dr. Raschbacher interviewed and physically examined Claimant and performed a medical records review. He agreed Claimant was at MMI with no need for restrictions or maintenance treatment.

17. Dr. Raschbacher testified by deposition as an expert in occupational medicine. He explained that MMI is the point in time where further application of medical resources is not likely to improve a person's function. Dr. Raschbacher explained that, if a claimant's function deteriorates due to their injury, they may no longer be at MMI. However, he testified there is no indication Claimant's function has deteriorated. He testified that her return to work indicated she had actually improved. Dr. Raschbacher testified there is no medical reason why Claimant's condition would deteriorate. There is no latency period for her type of injury. The anticipated recovery for Claimant's injury under the Colorado Medical Treatment Guidelines is two to three months, and not the three years Claimant is alleging. He explained that there is no medical reason Claimant should have ongoing neurological or neck symptomology. He testified that her symptoms are vastly out of proportion to the reported mechanism of injury. Dr. Raschbacher concluded that Dr. Hall's conclusions regarding MMI and maintenance treatment were not in error, opining that maintenance care is not likely to change Claimant's subjective symptoms or reports.

18. Claimant testified at hearing that she still needs medical attention due to persistent pain in her head, shoulder and hands. Claimant testified that her current pain is 6-7/10, and that she currently takes three to four pain pills a day, which are ineffective in addressing her symptoms. Claimant testified that her current symptoms are the same

symptoms she's been experiencing since the 2016 work injury. Claimant testified that her last treatment for these symptoms was in April of 2018, and her symptoms have remained the same. Claimant testified that the treatment she has received made her worse. She wishes to undergo acupuncture treatment, which she believes will help with her symptoms. Claimant testified she is currently working at a different location of Employer. She stated her goal is to return to the condition she was in before the work injury occurred. She further testified she wants reimbursement of the costs her attorney deducted since it came out of her pocket.

19. Claimant's husband testified at hearing that Claimant complains everyday of her head and shoulder hurting. He further testified that he missed time from work because he had to transport Claimant to various medical appointments.

20. Claimant's Exhibit 1 is a ledger from Frickey Law Firm documenting costs associated with her claim, including the cost of the DIME and a professional interpreter.

21. The ALJ finds the opinions of Drs. Updike, Hall, Raschbacher and Wakeshima, as supported by the medical records, more credible and persuasive than the testimony of Claimant and her husband.

22. Claimant failed to prove Dr. Hall's DIME opinion on MMI is highly probably incorrect.

23. Claimant failed to prove by a preponderance of the evidence maintenance care is reasonable, necessary and causally related to her work injury.

24. As Claimant reached MMI on December 1, 2016, Claimant is not entitled to TTD benefits from August 20, 2017 through September 2018.

25. Claimant did not provide evidence of unpaid medical bills. Claimant failed to prove she is entitled to reimbursement of medical bills.

26. Claimant is not entitled to compensation for her husband's time off from work.

27. Claimant is not entitled to reimbursement of funds deducted by the Frickey Law Firm from her PPD payout.

28. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of

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

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

Overcoming the DIME on MMI

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

Under the statute MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*,

176 P.3d 826 (Colo. App. 2007). A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Construction Management,* W.C. No. 4-356-512 (ICAO May 20, 2004); *Hatch v. John H. Garland Co.,* W.C. No. 4-638-712 (ICAO August 11, 2000). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. Therefore, the DIME physician's opinions on these issues are binding unless overcome by clear and convincing evidence. *See Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

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

As found, Claimant failed to prove by clear and convincing evidence that Dr. Hall's DIME determination concerning MMI is incorrect. Claimant's authorized treating providers, Drs. Updike and Wakeshima, the DIME physician Dr. Hall, and Respondents' IME, Dr. Raschbacher, have all credibly opined Claimant is at MMI. Dr. Hall credibly explained that MMI is the point in time where further application of medical resources is not likely to improve a person's function. A determination of MMI does not mean a claimant's symptoms have completely resolved, which is effectively what Claimant is seeking as indicated by her testimony that she wishes to return to her pre-injury condition. Claimant underwent an extensive course of conservative treatment with no significant improvement. There is no credible and persuasive evidence Claimant's condition has deteriorated, as Claimant continues to experience the same symptoms since sustaining the injury and since she last underwent treatment. There is no credible and persuasive evidence that there is any additional treatment that is reasonably expected to improve Claimant's condition. The totality of the credible and persuasive evidence supports Dr. Hall's determination that Claimant is at MMI.

Maintenance Medical Treatment

The need for medical treatment may extend beyond the point of MMI where the claimant presents substantial evidence that future medical treatment will be reasonably

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

As found, Claimant failed to prove entitlement to maintenance medical treatment. No credible and persuasive evidence was introduced indicating future medical treatment is or will be reasonably necessary to relieve Claimant from the effects of her work injury or to prevent deterioration of her condition. Claimant contends she continues to suffer from the same symptoms since the date of injury, and has remained the same since she last received maintenance treatment over one year ago. This indicates Claimant's condition is stable and requires no further care to remain stable. Furthermore, as previously discussed, Claimant is seeking treatment to improve her condition, which is not the purpose of maintenance treatment. Drs. Hall and Raschbacher credibly opined that no maintenance care is indicated for Claimant's work injury. Accordingly, Claimant failed to meet her burden to prove she entitled to maintenance care.

TTD and Request for Compensation for Husband's Lost Time from Work

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

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

Sections 8-42-105(3)(a) and (b), C.R.S. provide that TTD benefits shall continue until an employee reaches MMI or returns to regular or modified employment.

Dr. Hall's determination that Claimant reached MMI on December 1, 2016 has not been overcome by clear convincing evidence. Claimant is seeking TTD benefits from August 20, 2017 through an unspecified date in September 2018, which is after Claimant reached MMI. Accordingly, Claimant is not entitled to TTD for such time period.

Claimant has not provided any authority, nor is the ALJ aware of any, that would provide compensation for her husband's missed time from work. Additionally there is insufficient credible and persuasive evidence that her husband did, in fact, miss work due to Claimant's work injury.

Reimbursement of Medical Bills and Attorney Fees

Claimant provided no evidence of unpaid medical bills. There is insufficient evidence of any unpaid medical bills for which Respondents are liable. Regarding reimbursement of attorney fees, Claimant has not provided any authority, nor is the ALJ aware of any, that allows Claimant to seek reimbursement for attorney fees in this circumstance. Claimant chose to retain Frickey Law Firm as her representation and is now requesting Respondents assume financial responsibility for legal fees that appear properly paid for legal services rendered. Absent specific authority, Claimant is not entitled to reimbursement of such costs.

ORDER

It is therefore ordered that:

1. Claimant failed to prove by clear and convincing evidence that Dr. Hall's DIME opinion regarding MMI is incorrect. Claimant reached MMI as of December 1, 2016.

2. Claimant's request for maintenance treatment is denied and dismissed.

3. Claimant's request for TTD benefits from August 20, 2017 through September 2018 is denied and dismissed.

4. Claimant's request for reimbursement of medical bills and costs contractually paid to her attorney is denied and dismissed.

5. Claimant's request for compensation to her husband for missed time from work is denied and dismissed.

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

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver,

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

DATED: April 30, 2019

Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Did Claimant prove she suffered a compensable injury to her left arm on July 1, 2018?

- If compensable, is a triceps tendon repair and ulnar transposition surgery recommended by Dr. Kobayashi reasonably necessary?

- What is Claimant's average weekly wage (AWW)?

FINDINGS OF FACT

1. Claimant works as a housekeeper at Employer's nursing home. She has worked at the facility for approximately seven years. Her job duties are primarily cleaning residents' rooms and the kitchen, transporting food, busing tables, and washing dishes. According to Claimant's supervisor, the job requires the ability to lift "at least 50 pounds." Claimant alleges she injured her left elbow on July 1, 2018 while mopping, when she pulled her left arm back and hit her elbow against a fire extinguisher mounted on the wall.

2. Claimant had a previous work-related injury to the same elbow in June 2016 while working for Employer. She struck her elbow on the inside of a dryer while removing clothes. She was diagnosed with traumatic olecranon bursitis and triceps tendinitis. Claimant ultimately had surgery with Dr. Michael Morley on December 1, 2016 to remove the bursa sac in the left elbow.

3. Claimant had an IME with Dr. Dwight Caughfield on February 21, 2017. She was still symptomatic, with 7/10 pain in the left elbow and forearm. She said the area turned purple approximately once or twice a month. She had some forearm numbness in a posterior antebrachial cutaneous distribution, and a positive Tinel's over the bursectomy area. Dr. Caughfield diagnosed right posterior antebrachial cutaneous neuropathy, either from the initial injury or from the surgery. He recommended a trial of amitriptyline, with consideration of medications such as Neurontin, Lyrica, or Topamax if the amitriptyline was not helpful. He also recommended physical therapy for desensitization and scar mobilization. If she did not improve with therapy, he recommended up to three nerve blocks. Dr. Caughfield did not recommend any work restrictions other than being careful to protect the elbow from further trauma.

4. Claimant settled her claim in April 2017. She received no further treatment or evaluations relating to her elbow until after the July 1, 2018 accident that is the subject of this claim.

5. Claimant testified her elbow symptoms improved after she saw Dr. Caughfield and she felt no need for further treatment. She testified her arm was "normal"

again, with no significant problems in the months leading up to July 1, 2018. She worked full time with no limitations until July 2018.

6. On July 1, 2018, Claimant was mopping floors in the kitchen. She pulled her arm back and struck her left elbow on a fire extinguisher. She felt a sharp pain through her arm to her pinky and ring fingers, which caused her to drop the mop. The pain also radiated up the back of the arm to the mid-triceps. The pain was so bad she felt like she might "throw up." She noticed immediate swelling around the elbow. A co-worker witnessed the event and asked Claimant if she was okay. Her supervisor, Kathleen B[Redacted], was not at work that day, so she completed her shift and went home without reporting the accident.

7. Claimant came to work the next day and completed her regular duties. She relied more on her right arm to compensate for the pain in the left arm.

8. Claimant reported the incident to Ms. B[Redacted] on July 3, 2018. She had waited until July 3 only because Ms. B[Redacted] was not at work on July 1 in July 2. Ms. B[Redacted] testified Claimant did not appear in obvious pain when she reported the injury. Ms. B[Redacted] instructed Claimant to complete an incident report, but Claimant could not find the form and instead wrote a note on a blank piece of paper and slid it under Ms. B[Redacted]'s door after she had left for the day.

9. On July 5 or 6, Claimant spoke with someone in the HR department who suggested she see Dr. Archuletta. But Dr. Archuletta was taking new patients, so she made an appointment with Doug Miller, FNP, at Rocky Ford Family Health Center.

10. On July 9, 2018, while awaiting her first appointment with Mr. Miller, Claimant went to the Arkansas Valley Regional Medical Center emergency room because she was in too much pain to wait any longer. She was evaluated by Dr. James Brady who documented, "8 days ago she [hit] her left elbow while mopping at work. She continues to have some pain and swelling, she was trying to wait for her workplace to send her someplace, however they have not so she came to the emergency department for evaluation." Examination of her left arm showed tenderness around the olecranon and triceps, swelling, and limited elbow range of motion. The report states Claimant was not having any numbness or tingling distally, although Claimant disagreed with that notation at hearing. X-rays of the left elbow were interpreted as "normal" with "no acute fracture." Dr. Brady diagnosed a left elbow contusion and imposed work restrictions of no lifting over 5 pounds and "limited use" of the left arm.

11. Claimant's initial appointment with Mr. Miller took place on July 23, 2018. She stated she "hit my elbow on a fire extinguisher while mopping the kitchen floor." She described "sharp throbbing pain with some swelling." She also reported numbness, tingling, and weakness, which supports her testimony she reported similar symptoms at the ER. Examination of the left elbow showed pain and swelling around the olecranon. Mr. Miller diagnosed a left elbow contusion and ordered repeat x-rays and an MRI.

12. The x-rays were completed on July 24, 2018 and showed moderate soft tissue swelling overlying the olecranon but "no evidence of acute fracture."

13. Claimant returned to Mr. Miller on August 6, 2018 and reported her symptoms "were about the same" as at the initial visit. The physical examination findings were similar too. The MRI had been denied "because insurance stated that the injury was not work-related." Claimant was planning to call the insurance carrier "to find out what they will pay for and what needs to be done."

14. Claimant had a follow-up appointment on August 20, 2018, with similar symptoms and examination findings. She was still waiting for the MRI to be approved.

15. Claimant eventually had the MRI on October 4, 2018. It showed a nondisplaced fracture of the olecranon, ulnar neuritis, and a tear of approximately 75% of the triceps tendon.

16. After reviewing the MRI report, Mr. Miller referred Claimant to Dr. Ky Kobayashi, an upper extremity surgeon.

17. Claimant saw Dr. Kobayashi on October 25, 2018. His examination findings included tenderness over the left olecranon, a positive Tinel's at the ulnar nerve, decreased sensation in the ulnar aspect of the hand, and significant weakness with resisted triceps testing. X-rays taking in Dr. Kobayashi's office showed the olecranon fracture had healed. He diagnosed a high-grade partial triceps tendon rupture and left ulnar neuropathy/cubital tunnel syndrome. Dr. Kobayashi recommended a left triceps tendon repair and a left ulnar nerve transposition. While waiting for surgery, he gave Claimant an elbow brace that limited movement from 30° to 100°. She understood she was to wear the brace "at all times, except for at bedtime."

18. Respondents denied the surgery and scheduled an IME with Dr. Frederick Scherr.

19. Claimant saw Dr. Scherr on February 11, 2019. Claimant told Dr. Scherr her left elbow was "fine" before the injury and denied falling outside of work or having any other recent trauma involving the left elbow. Dr. Scherr noted atrophy of the left triceps and some mild skin mottling around the triceps and posterior elbow. He appreciated no sweating, cold sensation, or abnormal hair growth. Claimant was exquisitely tender to palpation from the mid-triceps down to the mid-forearm. He noted atrophy around the left elbow, left forearm, and left shoulder girdle musculature. She had diminished sensation of the left ring and pinky fingers and a positive Tinel's over the elbow. Her shoulder range of motion was significantly limited. Dr. Scherr diagnosed a left elbow contusion (resolved), healed left elbow olecranon fracture, a 75% distal triceps tear, and possible adhesive capsulitis of the left shoulder due to prolonged immobilization.

20. Dr. Scherr opined none of these diagnoses were caused by the incident at work, except for the resolved elbow contusion. He believed it was "highly unlikely" Claimant suffered a triceps tendon tear because of the incident. He opined a 75% distal triceps tendon tear would generally require some type of rotation injury, moderate to

severe elbow hyperextension with rotation, or a severe elbow flexion injury. He opined distal triceps tendon tears are uncommon and generally caused by falling on an outstretched hand. He opined the fracture and tendon tear would be so painful and limiting that Claimant would not have waited eight days before seeking treatment. He recommended she stop using the brace and start progressive PT to restore mobility in the shoulder and elbow. He concluded, "While the surgery may be reasonable and necessary it is not with a degree of medical probability related to the alleged July 1, 2018 industrial injury."

21. Claimant saw Dr. Castrejon for an IME at her counsel's request the same day as her IME with Dr. Scherr. Dr. Castrejon's physical exam findings were similar to those noted by Dr. Scherr. Dr. Castrejon opined the olecranon fracture, ulnar neuritis, and triceps tendon tear were caused by the July 1, 2018 accident. He opined Claimant's current situation is "entirely different" from the injury in 2016. He noted the pathology shown on MRI is consistent with the described mechanism of injury. Dr. Castrejon felt it "paramount" that Claimant be allowed to proceed with the treatment recommended by Dr. Kobayashi.

22. Dr. Castrejon and Dr. Scherr testified at hearing to expand on the opinions expressed in their IME reports. Dr. Castrejon referenced medical literature showing that patients who have been previously treated for left upper extremity bursitis and/or who have undergone bursectomy have a higher risk for triceps tendon ruptures. This is typically due to violation of the tissue, including removal of the bursa sac, which can cause weakening of the triceps tendon as it inserts into the olecranon. Claimant, in fact, suffered a rupture of the distal triceps tendon at the olecranon insertion. Dr. Castrejon opined the impact with the fire extinguisher was sufficient to cause the fracture and triceps tendon tear. Dr. Castrejon opined Claimant's behavior after the accident and presenting condition at subsequent medical appointments was consistent with her injuries. He was aware of the two negative x-rays but pointed to literature showing elbow fractures are missed by x-rays 6% of the time.

23. Dr. Scherr maintained his opinion Claimant's elbow condition is not related to the July 1, 2018 incident. He agreed with Dr. Castrejon that individuals who have had a bursectomy or previous triceps tendinitis are more likely to sustain triceps tendon ruptures, but opined it was only a "small increase." He acknowledged that x-rays occasionally miss elbow fractures, but thought it highly unlikely the fracture was missed by the serial x-rays in July 2018. He reiterated that the impact with the fire extinguisher did not generate enough force to cause a fracture or triceps tear.

24. Dr. Castrejon's opinions are credible and more persuasive than the contrary opinions offered by Dr. Scherr.

25. Claimant proved by a preponderance of the evidence she suffered a compensable injury to her left arm on July 1, 2018. The injuries include the triceps tendon tear, ulnar neuropathy, and possible adhesive capsulitis of the left shoulder due to prolonged immobilization.

26. Claimant proved the surgery recommended by Dr. Kobayashi is reasonably necessary to cure and relieve the effects of the compensable injuries.

27. Claimant earned $5,979.99 in the 13 weeks immediately preceding her accident, for a weekly average of $460. At the time of the injury, Claimant was earning $11 per hour. She received a raise to $12 per hour effective September 1, 2018, which represents a 9.1% increase.

28. Claimant's AWW is $501.86.

CONCLUSIONS OF LAW

A. Compensability

To receive compensation or medical benefits, a claimant must prove she is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which she seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The claimant must prove entitlement to benefits by a preponderance of the evidence. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). Each case is decided on its merits, and the facts in a workers' compensation case are not interpreted liberally for either claimant or respondents. Section 8-43-201.

The Workers' Compensation Act recognizes a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence," whereas an "injury" is the physical trauma caused by the accident. Section 8-40-201(1). In other words, an "accident" is the cause, and an "injury" is the result. *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967). Workers' compensation benefits are only payable if an accident results in a compensable "injury." The mere fact that an incident occurred at work and caused symptoms does not automatically establish a compensable injury. Rather, a compensable injury is one that requires medical treatment or causes disability. *E.g., Montgomery v. HSS, Inc*., W.C. No. 4-989-682-01 (August 17, 2016).

As found, Claimant proved she suffered compensable injuries on July 1, 2018, including the triceps tendon tear and ulnar neuropathy. The accident caused immediate severe pain around her elbow and symptoms in her left hand consistent with ulnar neuropathy. The symptoms continue unabated to date. Although Claimant had injured her elbow in 2016, the persuasive evidence shows she has a new injury and not merely a continuation of her prior problem. The ALJ acknowledges the significant symptomatology documented in Dr. Caughfield's February 2017 report but also notes that evaluation was less than three months after the surgery. There is no record of any treatment to the elbow between February 21, 2017 and July 1, 2018. Had Claimant remained significantly symptomatic during those 16 months, the ALJ expects she would have sought some treatment. At the least, the ALJ would expect a co-worker or supervisor

to have observed Claimant having difficulty with her elbow while performing her physically demanding job. There is no persuasive evidence she was limited in any way by her left elbow immediately before July 1, 2018. Although the ALJ doubts Claimant's elbow was entirely symptom-free during that time, there is no persuasive evidence she desired or required any medical treatment for it.

Dr. Castrejon is persuasive that the 2016 injury and surgery left Claimant's triceps tendon more susceptible to rupture from a trauma that might not otherwise have been injurious. The ALJ also credits Dr. Castrejon's opinion a fracture can occur from seemingly innocuous impacts, particularly in women over 50. The most confounding evidence is the two negative x-rays, which gave the ALJ pause in evaluating this case. But as Dr. Castrejon explained, x-rays miss approximately 6% of elbow fractures, which seems particularly pertinent with a non-displaced fracture such as involved here. The fracture was likely too subtle to be seen on x-ray but was picked up by the more sensitive MRI. Claimant had a known traumatic event at work that caused her to become and remain symptomatic, and there is no persuasive evidence of any other injurious event or cause around that time. While Respondents are not required to prove something outside of work caused the condition, the lack of any persuasive alternate theory of causation is a legitimate factor to consider. Ultimately, the weight of the persuasive evidence convinces the ALJ that Claimant probably tore her tendon and injured her ulnar nerve at work on July 1, 2018.

Claimant's injuries expanded to include the left shoulder because of prolonged immobilization related to the elbow injury. Although Dr. Kobayashi likely did not intend Claimant to remain splinted for such a prolonged period, she understood his instructions as wear the splint at all times unless she was sleeping. Claimant could not go back to Dr. Kobayashi because her claim has been denied and dutifully continued to his last instructions and wear the brace. Even Dr. Scherr agrees Claimant now has significant issues with her shoulder due to the immobilization.

B. The surgery is reasonably necessary

The respondents are liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a). The occurrence of a compensable injury does not compel the ALJ to conclude that all requested treatment is reasonably necessary or causally related. *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *McIntyre v. KI, LLC*, W.C. No. 4-805-040 (July 2, 2010). Where the respondents dispute the claimant's entitlement to medical benefits, the claimant must prove reasonable necessity and causation by a preponderance of the evidence. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

As found, Claimant proved the surgery recommended by Dr. Kobayashi is reasonably necessary to cure and relieve the effects of her compensable injuries. The ALJ credits Dr. Kobayashi and Dr. Castrejon in finding the surgery offers the best chance of relieving Claimant's severe symptoms and restoring her function. Dr. Castreon is persuasive that Claimant needs to move forward with treatment quickly to prevent further

deterioration of her condition. Even Dr. Scherr conceded the surgery "may be" reasonable, and his primary disagreement related to causation. Having resolved the issue of causation and Claimant's favor, the ALJ sees no persuasive reason to deny her the surgery.

C. Claimant's AWW is $501.86

Section 8-42-102(2), C.R.S. provides that compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But § 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that seems most appropriate under the circumstances. The entire objective of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993). The ALJ's discretionary authority includes the authority to include post-injury pay raises in the AWW. *Id*.; *Martinez v. City of Grand Junction*, W.C. No. 4-528-390 (September 30, 2003).

As found, Claimant's AWW is $501.86. The ALJ agrees with Claimant the post-injury raise should be included but believes the most appropriate method of calculating AWW is a hybrid of the parties' approaches. The best approximation of Claimant's actual wage loss is obtained by averaging the 13 weeks before the injury and increasing the result by the percentage of her September 2018 raise. This minimizes any potential skew based on a small sample size and avoids any distortion of her hours that may have been occasioned by the work injury. The raise from $11 to $12 per hour equates to a raise of 9.1%. Applying this percentage to Claimant's pre-injury hourly rate results in an AWW of $501.86 ($5,979.99 ÷ 13 = $460 x 1.091 = $501.86).

ORDER

It is therefore ordered that:

1. Claimant's claim for injuries on July 1, 2018 is compensable.

2. Insurer shall pay for all treatment from authorized providers reasonably necessary to cure and relieve the effects of Claimant's compensable injuries, including, but not limited to, the tendon repair and ulnar nerve transposition recommended by Dr. Kobayashi.

3. Claimant's average weekly wage is $501.86.

4. All issues not decided herein are reserved for future determination.

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

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

DATED: April 30, 2019

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

ISSUES

Whether claimant has shown by a preponderance of the evidence that he is permanently and totally disabled as a result of the May 19, 2017 work injury.

FINDINGS OF FACT

1. The claimant's date of birth is May 3, 1958 and at the time of the hearing he was 60 years old. The claimant resides in Grand Junction, Colorado. While employed with the employer, the claimant worked as a heavy line mechanic.

2. On May 19, 2017, the claimant was performing repairs on a vehicle that was up on a lift. The claimant was using a ladder to reach the area of the vehicle he was working on. While on the ladder, the claimant slipped and fell approximately six feet to the floor, landing on his buttocks.

3. On the date of the injury, the claimant received medical treatment at St. Mary's Hospital emergency department. This treatment included x-rays and a computerized tomography (CT) scan of the claimant's lumbar spine showed a compression fracture of the claimant's L1 vertebrae.

4. Following the initial treatment at the emergency room, the claimant treated with St. Mary's Occupational Health as his authorized treating provider (ATP). On May 22, 2017, the claimant was first seen at St. Mary's Occupational Health by James Harkreader, NP. Thereafter, the claimant was also seen at St. Mary's Occupational Health by Dr. Craig Stagg. The claimant's medical treatment during this claim has included acupuncture, injections, chiropractic treatment, physical therapy, pool therapy, a TENS unit, pain medications, and compound cream.

5. On July 17, 2017, the claimant was seen for a surgical consultation by Scott William Berry, PA for Dr. Basheal Agrawal. Based upon his examination of the claimant and the imaging, Mr. Berry opined that the claimant would not need surgery.

6. On September 19, 2017 a lumbar spine x-ray showed that the L1 had not changed since the imaging performed in May 2017. The x-ray also showed a 40 percent loss of height, anteriorly. Thereafter on October 6, 2017, a magnetic resonance image (MRI) of the claimant's lumbar spine showed that the fracture at L1 was unchanged, with greater than 50 percent height loss, anteriorly.

7. Thereafter, the claimant was seen by Dr. Agrawal on January 11, 2018. Dr. Agrawal opined that surgery would not benefit the claimant and recommended continued conservative pain management.

8. On, January 24, 2018, the claimant was seen by Dr. Kirk Clifford for a surgical consultation. Dr. Clifford opined that surgical intervention would not benefit the claimant. Instead, Dr. Clifford recommended that the claimant continue nonoperative treatment such as core strengthening exercises, a regular exercise program, anti-inflammatory treatment, and regular icing.

9. On February 6, 2018, the claimant attended a functional capacity evaluation (FCE) with Stacy Wood, PT with Grand Junction Therapies. Based upon the testing she conducted during the FCE, Ms. Wood noted in her report that the claimant qualified for a physical demand classification (PDC) of light duty. Although she assessed this PDC for the claimant, Ms. Wood further opined that the claimant was "disabled". Ms. Wood's testimony at hearing was consistent with her written FCE report.

10. On March 29, 2018, Dr. Stagg placed the claimant at maximum medical improvement (MMI) and assessed a permanent impairment rating of 17% whole person. Dr. Stagg determined that the claimant's permanent restrictions would be no lifting, pushing, or pulling over 20 pounds.

11. On July 18, 2018, the claimant attended an independent medical examination (IME) with Dr. Kathy McCranie. In connection with the IME, Dr. McCranie reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In her IME report, Dr. McCranie opined that the claimant is able to return to work in the light work category. Dr. McCranie noted that the claimant was able to lift up to 15 pounds and could progress up to 20 pounds. In addition, Dr. McCranie recommended that the claimant should limit kneeling, crawling, and stair climbing. The claimant's walking and standing should be limited to "an occasional basis", with no restrictions on sitting. Dr. McCranie's testimony by deposition was consistent with her written report.

12. Dr. McCranie testified that in her opinion the claimant is able to work within the sedentary and light work categories. Dr. McCranie also testified that she had concerns regarding the claimant's effort at the two FCEs.

13. The claimant has attended two vocational evaluations related to this claim. Based upon the claimant's testimony and the testimony of the two vocational experts in this matter, the ALJ makes the following findings of fact related to the claimant's educational and employment background.

14. The claimant was born in Mexico and attended school there until he immigrated to the United States in 1978. The claimant obtained a high school diploma in 1975. Prior to leaving Mexico the claimant worked in a shoe factory.

15. After moving to the United States, the claimant worked a number of jobs before training to become a mechanic. This prior employment included working as an orchard laborer, a landscaper, a mechanic's helper, a hotel housekeeper, a sandwich maker, and an auto detailer.

16. After he moved to the United States, the claimant enrolled in English as a second language (ESL) classes and learned English. From 1979 to 1982, the claimant completed a self-paced correspondence course with the California Aircraft Institute. Thereafter, the claimant attended a two-year, full-time program at Delta Montrose Technical Center training to become a mechanic.

17. From 1998 until the May 19, 2017 work injury the claimant has worked as an automobile mechanic, with focus on heavy line mechanics. In addition, during periods when the claimant was not working for others, he was self-employed as an auto mechanic from 1996 to 1998; from 2001 to 2003; and from 2008-2014. Over the course of his career as a mechanic, the claimant has received additional training and has obtained certifications through courses taught and tested in English.

18. On July 30, 2018, Robert Van Iderstine, Vocational Rehabilitation Specialist submitted his vocational evaluation report. Mr. Van Iderstine opined that the claimant would be unable to return to employment in his prior field. In addition, Mr. Van Iderstine opined that the claimant would be unable to return to any employment. In reaching these conclusions, Mr. Van Iderstine considered that the claimant would need to find entry level employment in the sedentary to light duty categories that would allow for position changes (sitting to standing), and not require lifting over 10 to 20 pounds. Based upon his review of the job market in Mesa County, Colorado, Mr. Van Iderstine was unable to locate any positions that would meet all of these requirements.

19. Mr. Van Iderstine's testimony at hearing was consistent with his written report. In addition, Mr. Van Iderstine provided extensive testimony regarding why he believes that positions identified by Ms. Harris (as described below) would not be appropriate employment for the claimant. Of particular concern for Mr. Van Iderstine was the claimant's self-report that he can only sit or stand for 20 minutes at a time. When he included this limitation in the claimant's vocational profile, Mr. Van Iderstine found that no positions in Mesa County would allow the claimant to change positions this frequently.

20. On September 5, 2018, the claimant attended a second FCE. This evaluation was with Lance Moore, PT with Peak Form Physical Therapy. Mr. Moore also assessed the claimant as being in the light demand category.

21. On November 13, 2018, Kristine Harris, MS, CRS, submitted her vocational assessment report regarding the claimant. In her report, Ms. Harris opined that the claimant is able to return to employment in the PDC of light duty. Ms. Harris noted a number of possible jobs available in Mesa County that fell within the light duty category. These positions included automotive customer service; service advisor; parking service specialist; delivery driver, floor staff/box office; line server; restaurant team member; server/kitchen/concierge; and vehicle rental driver. Ms. Harris's testimony by deposition was consistent with her written report.

22. Ms. Harris testified that she looked at the restrictions determined by both Dr. Stagg and Dr. McCranie. Ms. Harris also considered the findings of the FCEs. Based upon those various sources of information and her interview with the claimant, Ms. Harris determined that a number of positions were available in Mesa County that would comply with the claimant's limitations.

23. The claimant's daughter testified at hearing regarding the claimant's activities before and after his work injury. The claimant's daughter testified that the claimant previously enjoyed camping and riding ATVs with his family. She also testified that since his work injury the claimant has not engaged in those activities. The claimant's daughter also testified that she has assisted the claimant in completing job applications and other paperwork due to his limitations with reading and writing English.

24. The claimant's son also testified at hearing regarding the claimant's pre-injury and post-injury activity. Specifically, the claimant's son described the claimant enjoying working on cars, camping, and four wheeling before the injury. However, the claimant no longer does those activities because of his pain. The claimant's son testified that he has worked with the claimant and assisted him with his self-employment endeavors. The claimant's son described assisting the claimant with completing paperwork because of the claimant's limitations with reading English.

25. The claimant testified that his current symptoms include pain in his back that feels like the bones in his spine are rubbing together. The claimant also testified that walking causes his pain to increase. The claimant testified that he uses his pain medications, lidocaine patches, compound cream, and TENS unit to reduce his pain. The claimant also testified that he lies down on a flat surface to try to alleviate his pain symptoms. The claimant testified that he has to lie down five times each day.

26. Ms. B_____, owner of the employer, testified that she and the claimant communicated in English. Ms. B_____ also testified that the claimant as able to effectively perform his job duties as a heavy line mechanic while communicating in English, including completing paperwork.

27. The ALJ credits the opinions of Dr. McCranie and Ms. Harris over the contrary opinion of Mr. Van Iderstine and finds that the claimant is able to work in sedentary to light duty type work. The ALJ places weight on Dr. McCranie's assessment of the claimant's work restrictions are that the claimant can lift up to 15 pounds, (with progression 20 pounds); with limited kneeling, crawling, and stair climbing; and occasional walking and standing. With those restrictions in mind, the ALJ places weight on the opinion of Ms. Harris that jobs are available in the claimant's commutable labor market that would comply with these restrictions.

28. Therefore, the ALJ finds that the claimant is able to earn wages in his commutable labor market that fall within his work restrictions. The ALJ finds that claimant has failed to demonstrate that it is more likely than not that he is permanently and totally disabled and unable to earn any wages. Despite the educational and language limitations raised by the claimant, the ALJ finds that the claimant has acquired sufficient skills throughout his employment history in order to earn wages.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2016).

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

4. In order to prove permanent total disability, claimant must show by a preponderance of the evidence that he is incapable of earning any wages in the same or other employment. Section 8-40-201(16.5)(a), C.R.S. (2016). A claimant therefore cannot receive PTD benefits if he is capable of earning wages in any amount. *Weld*

County School Dist. RE-12 v. Bymer, 955 P.2d 550, 556 (Colo. 1998). The term "any wages" means more than zero wages. *Lobb v. ICAO,* 948 P.2d 115 (Colo. App. 1997); *McKinney v. ICAO*, 894 P.2d 42 (Colo. App. 1995). In weighing whether claimant is able to earn any wages, the ALJ may consider various human factors, including claimant's physical condition, mental ability, age, employment history, education, and availability of work that the claimant could perform. *Weld County School Dist. R.E. 12 v. Bymer*, 955 P.2d at 550, 556, 557 (Colo. 1998). The critical test is whether employment exists that is reasonably available to claimant under his particular circumstances.

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

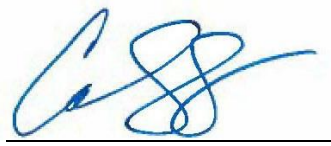
6. The respondents are not required to prove the existence of a job offer to refute a claim for permanent total disability benefits. *Black v. City of La Junta Housing Authority*, W.C. No. 4-210-925 (ICAO, December 1998) (claimant is not permanently totally disabled even though respondents' vocational expert was unable to identify a single job opening available to claimant); Beavers *v. Liberty Mutual Fire Ins. Co.,* (Colo. App. No. 96 CA0275, September 5, 1996) (not selected for publication); *Gomez v. Mei Regis*, W.C. No. 4-199-007 (September 21, 1998). Rather, the claimant fails to prove permanent total disability if the evidence establishes that it is more probable than not that the claimant is capable of earning wages. *Duran v. MG Concrete Inc.,* W.C. No. 4-222-069 (September 17, 1998).

7. As found, the claimant has failed to demonstrate by a preponderance of the evidence that he is incapable of earning wages in the same or other employment in his commutable labor market. As found, with his prior work experience and the work restrictions determined by Drs. Stagg and McCranie, the claimant is able to work in sedentary to light duty type work. As found, the testimony of Ms. Harris is likewise persuasive that sedentary to light duty employment opportunities are available in Mesa County, the claimant's commutable labor market. In reaching this conclusion, the ALJ has considered "human factors" including that Spanish is the claimant's first language, and he learned English through ESL classes. The ALJ also considered the claimant's age, physical condition, work restrictions, educational background, employment history, and other human factors.

ORDER

It is therefore ordered that the claimant's request for permanent total disability (PTD) benefits is denied and dismissed.

Dated this 1st day of May, 2019.



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

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

STIPULATION

At the commencement of the hearing the parties stipulated to an Average Weekly Wage (AWW) of $888.23. The parties' stipulation is approved.

ISSUES

I. Whether or not the pre-July 1, 2018 version of C.R.S. § 8-41-301 applies to Claimant's reported stress claim.

II. Whether Claimant demonstrated by a preponderance of the evidence that he suffered a compensable injury.

III. If Claimant's injuries are compensable, whether he demonstrated, by a preponderance of the evidence, that he is entitled to reasonable and necessary medical treatment benefits.

IV. Whether Claimant demonstrated by a preponderance of the evidence that he is entitled to Temporary Total Disability Benefits from August 12, 2018, and ongoing.

V. Whether Claimant demonstrated by a preponderance of the evidence that the right of selection of the treating physician passed to him due to Respondent's alleged failure to timely provide him with a list of designated physicians.

VI. Whether Claimant failed to timely report his claim to his employer as required by C.R.S. § 8-43-102.

Because the ALJ concludes that Claimant failed to establish that he suffered a compensable claim of mental impairment, this order does not address issues III-VI as outlined above..

FINDINGS OF FACT

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

1. Claimant began his employment with Respondent in 2006. He was hired as a sheriff's Patrol Deputy, later promoted to Patrol Sergeant, and ultimately demoted again to Patrol Deputy.

2. Claimant's essential duties and responsibilities as a Patrol Deputy and Patrol Sergeant included, in part: enforcement of state statutes by performing warrant, felony and misdemeanor arrests; responding to calls for assistance; providing aid and

assistance to victims by responding to injury accidents; assisting emergency personnel in treating and transporting victims of crime, traffic and other accidents; protecting crime scenes by establishing security perimeters/boundaries; locating, identifying and preserving evidence, briefing supervisors/investigators on their arrival to accident/crime scenes; interviewing victims and witnesses; detaining suspects; performing special assignments, such as searching for dangerous criminals, assisting with search and rescue operations and carrying a side arm and being prepared to use it with deadly force in defense of life.

3. Based upon the evidence presented, the ALJ finds that Claimant's work environment subjected him to significant risk of physical assault or injury by criminal elements and to psychologically traumatic events. Claimant's job description as a Patrol Sergeant was similar to that of a Patrol Deputy but included supervisory duties. Claimant admitted that as part of the position, Patrol Deputies and Sergeants were reasonably expected to respond to emergency situations including, but not limited to motor vehicle accidents, assaults, suicides, domestic violence calls etc.

4. During the course of his employment Claimant was exposed to numerous scenes involving catastrophic injury and violent death. He is seeking entitlement to workers' compensation benefits for mental impairment associated with post-traumatic stress disorder (PTSD) as a consequence of these exposures.

5. During his testimony, Claimant outlined several incidents that he asserts triggered the development of PTSD. According to Claimant, the initial incident occurred in 2008 when he responded to a semi-truck truck accident in his patrol area. Upon arrival, Claimant discovered that a tanker truck carrying gas had over-turned and caught fire. Claimant could hear screams coming from inside the truck's cab but due to extensive fire could not assist the driver to escape the wreckage. The driver burned to death and Claimant later found his severely burned corpse in the aftermath of the fire. In 2010, Claimant responded to a motorcycle accident and found the badly mangled body of the motorcyclist. In 2011, Claimant responded to a car accident where a female passenger was ejected through the windshield and struck a large boulder causing her broken body to contort in a very unnatural position. In 2012, Claimant responded to a child abuse call where he discovered a three-month old child laying on a bed. The child appeared cyanotic and had been burned on the cheek by a cigarette. In 2013, Claimant responded to a call and found a man who hung himself. According to Claimant the deceased man's face was so swollen that his eyes were "popping" out and his tongue was protruding from his mouth. In 2014, Claimant responded to a call for a welfare check and found a man who had committed suicide with a shotgun blast to the neck. That same year, Claimant responded to a suicide call involving a 17-year-old boy, who shot himself in the head. In 2015, Claimant was called to a mobile home on a welfare check because a foul odor was emanating from the trailer. Upon entry, Claimant discovered the bloated body of a dead man covered in maggots. In 2014 or 2015, Claimant responded to a motor vehicle accident where a vehicle left the roadway and plunged into a river. When the vehicle was pulled from the water, the first responders found the bodies of a drown couple holding hands. Other stressful incidents included

persons who died while Claimant was performing CPR on them and the transport a dead body wrapped in a blanket in the back of a truck.

6. Claimant admitted that the traumatic events to which he associates his PTSD were part of his job and job description. He admitted that responding to such incidents was not outside of a law enforcement officers, including a deputy sheriff's, usual experience. He also admitted that other first responders from the Sheriff's department and other agencies were normally present at these types of scenes.

7. Claimant testified that in addition to the above described calls, he responded to stressful calls and situations that did not involve death. In 2017, Claimant responded to a domestic violence call and upon responding to the scene he was fired upon by the suspect who was armed with a rifle. Claimant testified that he feared for his life; nonetheless, he did not reference this situation as the source of his PTSD.

8. Claimant first noticed a change in his psychological condition in 2016-2017. Claimant testified about anger issues at home and at work. He lost interest in previously enjoyed activities. He isolated himself. He reported trouble sleeping and that he screamed at night. He claimed that on one occasion, he did not sleep for 9 days straight. Claimant testified that radio dispatch, other deputies, and report writing irritated him at work, and he could not always control his anger. He testified he reported problems with anxiety and stress, and PTSD to Sergeant Johnston in 2017, and to Sergeant Owens in 2018.

9. Claimant began treating at Pueblo Community Health Center in February 2017. He met there with Cynthia Jimenez, a licensed clinical social worker (LCSW), on February 24, 2017. Claimant started psychotherapy treatment with Ms. Jimenez in March 2017. On March 7, 2017 Ms. Jimenez reported, "…Pt. has multiple exposures to various life-threatening and highly emotionally charged events via his career . . . Pt. reports increasing anxiety over the last several years, with significant increase in sx, including sleeplessness and intrusive thoughts over the last year." Ms. Jimenez diagnosed PTSD as early as May 2, 2017.

10. On August 22, 2017, Sheriff James L. B_____ disciplined Claimant and demoted him from the rank of Sergeant to the rank of Patrol Deputy for job performance issues, including his failure to supervise. Sheriff B_____ disciplined Claimant based on information gathered from Sheriff's Office staff, deputies, and others, who reported that Claimant would not listen/respond to his radio, could not be found at times, and was using unprofessional language over the radio. Poor report writing and approval were also cited as support for his demotion. As part of the demotion, Sheriff B_____ noted, "[b]ecause of these actions there has been a tremendous loss of confidence in your ability to effectively supervise deputies." Sheriff B_____ placed Claimant on "paid administrative leave" and three months of probation. As part of his demotion, Claimant's hourly salary was reduced from $23.37 to $18.29 effective August 14, 2017.

11. By December 2017, Claimant was receiving weekly PTSD treatment with Ms. Jimenez. On February 19, 2018, he reported continued nightmares, poor sleep, and intrusive thoughts about past incidents. Claimant saw Dr. Matthew Goodwin, a psychiatrist at Pueblo Community Health Center on April 19, 2018. Dr. Goodwin assessed Claimant with PTSD and reported, "…The patient is a law enforcement officer with a history of exposure to numerous potentially traumatic events throughout his career in law enforcement. He demonstrates numerous symptoms of PTSD including intrusive thoughts, recollections, and nightmares, increased psychomotor activity and anger along with depression episodes, isolation and emotional numbing . . . he is encouraged to continue follow-up in his individual therapy as this is perhaps the best intervention for his current symptoms. We also discussed realistic plans for his future given that he is in a very toxic and dangerous environment and this likely will continue to exacerbate his PTSD symptoms…"

12. On May 30, 2018, Dr. Goodwin reported, ". . . [Claimant] continues to be afraid that he will be fired if he was to tell people at work about his difficulties. At the same time, he felt that he needed to speak to his lieutenant about seeing a "Comp Doctor" for his problems. He is reluctant to request light duty as he feels that he would be letting the officers around him down. He feels very protective of them…"

13. On June 13, 2018, Dr. Goodwin reported, ". . . [Claimant] is expressing significant stress at his job at the Sheriff's office related to a former partner who is under internal investigation for illegal activities. He was recently notified by an internal affairs investigator that he would need to be interviewed regarding this person. He said that apparently his having a supportive conversation with him recently may have been misinterpreted . . . On the positive note he did approach his lieutenant and requested to receive help for his psychological problems as well as to be taken off of his current front line duties and placed in an alternate position. He says he has been scheduled to the "psych doctor" through the Sheriff's Department.

14. Employer required Claimant to attend a "fitness for duty evaluation" with psychologist Chad Waxman, Psy.D., on July 20, 2018. Dr. Waxman would issue a report dated August 20, 2018. In the interim, Claimant would be evaluated, on a onetime basis, for PTSD by Physician Assistant (PA) Steven Quackenbush on August 14, 2018.

15. Claimant filed an "Employee's Written Notice of Injury to Employer" on August 15, 2018. Claimant testified Employer never provided him with a list of Employer's designated medical providers. Employer's human resources director, Tammy C_____, testified that because a box was checked on Employer's form entitled "Worker's Compensation Checklist for all Claims" (page 216 of Claimant's hearing exhibits), she assumed such a list was provided to Claimant. She did not give him the list nor does she know who may have. Ms. C_____ testified that she does not have a copy of any such list. Ms. C_____ was in fact out of the office the week Claimant filed his written report of injury.

16. During his August 14, 2018 appointment with PA Quackenbush, Claimant admitted he had "non-reported escalation of symptoms since his initial employment with the Fremont County Sheriff's office over the past 12 years. As part of his evaluation, PA Quackenbush noted that "[m]any of [Claimant's] multiple and detailed descriptions of horrific accidents and injuries often resulting in death could be assumed to be a normal part of the job description and requirements of a County patrol officer." Nonetheless, PA Quackenbush indicated that Claimant had "perhaps witnessed more than his normally expected share of horrific injuries and death than would normally be assumed for a small rural community and County where the patient is employed." PA Quackenbush diagnosed PTSD and concluded Claimant "…obviously needs immediate and ongoing mental health and psychiatric care."

17. Claimant continued receiving treatment at Pueblo Community Health Center. On August 20, 2018, Ms. Jimenez noted, ". . . Pt. reports increased S/I (suicidal ideation) over the past couple of weeks and admits he asked his wife to hide his gun at one point. He denies he would act on his thoughts but says he is 'just so tired of not sleeping and of battling the intrusive thoughts…'" Respondents denied Claimant's claim the following day.

18. As noted above, Dr. Waxman issued a report dated August 20, 2018 following his fitness for duty evaluation. He reported, ". . . The Deputy is being referred by the department as a result of an 'outburst' where he 'screamed' at a superior deputy during an IA (internal affairs) investigation (of another deputy), where Deputy M_____ was a potential witness. It took time for him to calm down, and Deputy M_____ indicated that the nature of the investigation was 'triggering his PTSD' at the time." Dr. Waxman provided additional background information regarding the referral, by way of report given to him by a Lieutenant Johnston, as follows:

> On Monday 06/11/18, I [Johnston] was approached by Deputy Felix M_____, who asked if he could speak with me in private. Felix advised he was having some issues outside of work with inability to sleep and some anger issues. Felix advised he wakes up often with a dream about an incident he was involved with several years ago. The incident was a fatality accident involving a tractor trailer rig (fuel tanker), where the driver was trapped and burned to death. Felix describes that he heard the party scream for help.
>
> Felix told me he was currently seeing a counselor, and had started him on medication to help him sleep. I asked Felix if he felt counseling was helping, he said he felt a little, but not as must or as fast as he wanted it to. I asked Felix if he had any feelings of hurting himself or anyone else, Felix said he definitely did not have any of those feelings. Felix asked if the office had any resources for counseling, I told Felix I would check on it.
>
> I spoke to Felix's sergeant, Greg Owen, I asked Greg if he had any concerns with Felix's actions at work. Greg advised he did not. Greg did

advise that Felix had a similar conversation over his issues a few days previous with him also. I advised Greg to get with me if he says any concerns with Felix. At this time, I brought the issues to undersheriff Richard and Sheriff B_____. I also began to look into counseling options for Felix.

On the afternoon of 06/20/18, I was approached by Undersheriff Richards where she told me of an interview which Felix had been involved in. The interview was between Lt. Br_____ and Deputy M_____. Lt. Br_____ was asking what Felix had observed in a recent incident at the office. Lt. Br_____ advised Felix had begun screaming at him, asking him why he was doubting his integrity after working for the Fremont County Sheriff's Office for 12 years. It took Lt. Br_____ a little bit of time before he was able to calm Felix down. Lt. Br_____ felt this outburst was totally out of character for Felix. Undersheriff Richards told me, Lt. Br_____ told her Felix had said at one point in the interview that the interaction of the interview had triggered his PTSD at the time.

On the morning of 06/21/18, I spoke with Undersheriff Richards about Felix's actions from the day before, which concerned both of us as this is out of character for Felix. Undersheriff Richards and I agreed it would be best to seek a mental health professional to evaluate Felix's situation, to determine if a fitness for duty evaluation was warranted."

18. Dr. Waxman reported that the information above, from Lieutenant Johnston, ". . . [had] raised concerns about the [Claimant's] emotional stability and his ability to safely and effectively perform his duties as a law enforcement deputy. As a result, the [Claimant] is currently being evaluated to determine his psychological fitness to perform the full duties of a . . . Patrol Deputy."

19. Dr. Waxman reported that when asked about the reason for the referral to him, Claimant noted: "I have been having nightmares about certain deaths, I cry and get up and the past year my anger is worse and that it is affecting (his) family. Deputy M_____ stated that he has nightmares every night. He became tearful when discussing his family. Deputy M_____ stated that he has 'screamed' at his wife at times, causing her to leave him for periods of time. He denied his anger has ever led to physical aggression. With respect to his reported current symptoms, he indicated occasional trouble with breathing, blurred vision, anxiety (related to his thoughts of past traumatic events), irritability, dizziness, nightmares (reported as vivid dreams), and headaches. Deputy M_____ described his anxiety as 'water that keeps pouring out.' Deputy M_____ also stated he sometimes 'smells death' and needs to put a Vicks Vapor Rub under his nose to cope with the smell. He explained it is the 'ugliest smell you can smell.'"

20. Dr. Waxman noted that Claimant denied that his demotion resulted from disciplinary issues. Rather, Claimant related the outburst at work, prompting his referral to Dr. Waxman, to an email he received from internal affairs about being a witness in an investigation into another deputy's conduct. He stated that it made him angry and that he had trouble controlling it. Deputy M_____ then became irritable during the interview and explained the situation was 'bullshit' and that the deputy being investigated 'had nothing to do with it.' Deputy M_____ took the situation personally after he was 'questioned about dates in the past.' Deputy M_____ did not appear to look at this situation objectively or rationally (appreciating the typical process of an IA investigation). He clarified that he is a calm person in general and usually he would have just 'walked away…'"

21. Dr. Waxman added:

> When asked about his history of symptomatology, [Claimant] stated approximately two years ago, he started having anxiety and nightmares, as well as difficulty breathing. His symptoms appeared to have gotten worse over time. Deputy M_____ sated that one year ago he responded to a scene where a man was on fire and screaming for his life. He discussed witnessing the 'skin falling and melting off.' After this incident he was distressed and made the decision to seek therapy. Deputy M_____ stated that this incident 'blew everything up.' He started to remember previous traumatic incidents. The first incident he remembered was a deputy involved shooting, which occurred shortly before the incident with the burn victim. Deputy M_____ explained he was 'shot at for four hours,' and the suspected (sic) was subsequently apprehended. Since that time, he feels 'jumpy' when he hears gun fire."

22. Dr. Waxman reviewed other instances of trauma relayed by Claimant, including gruesome suicides and motor vehicle accidents, noting that Claimant reported that he could describe more traumatizing incidents, perhaps a 100 or more.

23. Dr. Waxman determined that Claimant was unfit for duty, noting: ". . . Deputy M_____'s self-report and collateral information is corroborated though [through] the testing he took. His PAI and MMPI-2-RF testing indicated he is experiencing anxiety that is causing him distress and ruminates on his physical impairments to a degree that is more than what is to be expected for his physical conditions. Additionally, he appears to be experiencing problems in his relationships, general irritability, and sensory/perceptual issues as a result. Overall, the available information suggests he is experiencing PTSD which is impacting major areas of his life including relationships, his health (i.e. motivation to take care of himself physically, drinking alcohol to cope with his thoughts, and experiencing insomnia), and his work as a Patrol Deputy (i.e. irritability with others as evident with the IA Investigation and difficulty coping with loud noises . . . Based on the background information, current test findings, observations, as well as the interview data, it is my conclusion, to a reasonable

degree of psychological certainty, that Deputy M_____ is ***unfit*** for duty at this time…" (Emphasis in original).

24. Dr. Waxman concluded, "…Collective evidence suggests that Deputy M_____ is suffering from Posttraumatic Stress Disorder (PTSD) as a result of complex trauma. He experienced over 100 critical incidents that have involved loss of life or traumatic in nature, as well as a situation where he feared for his life (i.e. four hour deputy involved shooting). As a result of his diagnosis of PTSD, it is recommended he engage in trauma specific treatment with a trained trauma focused therapist. Sessions for a person with complex trauma could take 26 or more sessions given his history of multiple traumas. While it is not unusual for there to be adjunctive treatment with psychotropic medication to assist with symptoms, there is no medication to treat the condition of PTSD itself…"

25. On August 30, 2018, Dr. Goodwin wrote to Employer noting, ". . . Mr. M_____'s symptoms are directly related to past and current stressful and traumatic experiences that he has had on the job as a Sheriff's Deputy for Fremont County. He has been strongly encouraged by this writer to request lighter duties that would take him off of street duties and allow him to possibly achieve some recovery from his symptoms. He has also been encouraged to seek evaluation for possible disability due to the severity of his symptoms."

26. On October 4, 2018, Claimant prepared a Worker's Claim for Compensation for PTSD/mental stress claim on exposure over the years to horrible things he was exposed to at work.

27. On October 22, 2018 Ms. Jimenez reported, "…[Claimant] was receptive to review and practice of coping skills. He accepted an article about PTSD and a treatment facility that specializes in treating first responders…" Claimant testified and the ALJ finds that the article Ms. Jimenez referred to is probably the item marked as Claimant's Exhibit 9, called "Damaged Goods." The article concerns first responders suffering from PTSD, and discusses treatment options at a facility called Transformations Treatment Center located in Delray Beach, Florida. At his own expense, Claimant traveled to Florida and participated in the PTSD treatment program offered at Transformations Treatment Center from November 26, 2018 to December 13, 2018. He testified the treatment was beneficial. While the ALJ finds that Ms. Jimenez probably provided Claimant with the brochure for Transformations Treatment Center (Transformations) on October 22, 2018, the record evidence does not support a finding that she actually referred Claimant to this facility for treatment. Rather, the evidence presented persuades the ALJ that after reading the materials supplied by Ms. Jimenez, Claimant elected to seek treatment at Transformations on a self-referred basis.

28. Dr. Robert Kleinman performed a Psychiatric Independent Medical Examination (PIME) of Claimant at the request of Respondents on November 13, 2018. He prepared and issued an initial report dated November 17, 2018. He subsequently reviewed additional medical records and prepared addendum reports dated, November

21, 2018, December 11, 2018, January 18, 2019 and January 23, 2019. He also testified at hearing. During the PIME, Claimant told Dr. Kleinman that he associated his PTSD to events occurring between 2008 and 2017. Claimant mentioned the tractor-trailer rig that caught fire in 2008 killing the driver. He also recounted other deaths that included babies, suicides, drownings, motorcycle accidents, etc. As noted, Dr. Kleinman subsequently issued four "addendum" reports after reviewing additional medical and employment records. Based upon the evidence presented, the ALJ finds that while Dr. Kleinman agrees that Claimant suffers from PTSD resulting from exposure to "critical incidents" at work, he concludes that these incidents "were not psychologically traumatic events that would generally be considered outside Claimant's area of "usual experience" and that "similar events would not evoke symptoms of distress in a worker in similar circumstances." As evidenced in his addendums, Dr. Kleinman opines that other complicating stressors, including Claimant's 2015 heart attack, 2016 and 2017 coronary stent placement surgery, his hypertension; and the aforementioned job demotion in 2017, that included a reduction in pay were perpetuating his PTSD in 2018.

29. The ALJ notes Claimant previously experienced some cardiac issues in June, 2016 that required placement of stents. Claimant took about one month off work for the procedure. Cardiologist Adam Strunk, M.D., reported on October 10, 2016, ". . . Mr. M_____ is doing much better. His energy has improved now that he is on BiPAP. He does have some difficulty with the mask but is getting used to it and does feel much better now that he is utilizing positive pressure ventilation. He has been able to chase people working as a policeman without dyspnea or chest discomfort and notes that his breathing is much better." Claimant denied that his cardiac condition was playing a role in perpetuating his PTSD, testifying that this medical condition was not stressful. Review of the record evidence reveals that on December 11, 2017, Claimant treated for chest pain following stent placement on December 5, 2017. Claimant "was released to go back to work but did not believe that he could do so." On December 27, 2017, psychotherapy notes referenced Claimant was depressed and anxious and that he recently had a cardiac event that resulted in a stint. Based upon the medical record and the potentially life threatening nature of Claimant's cardiac condition, the ALJ finds his assertion that this condition was "not stressful" or playing a role in his ongoing mental health symptoms, including his PTSD dubious.

30. Claimant also asserted that his work demotion was not stressful suggesting that it was not playing a role in his mental health symptoms/PTSD. The medical records reflect that on April 19, 2018, Dr. Goodwin noted that Claimant mentioned that his demotion made him feel incredibly angry and distrustful of people around him and on December 16, 2018, Therapist Matthew Taylor noted that Claimant reported feeling triggered by "nightmares" and "financial stress." Based upon the evidence presented, the ALJ finds that the medical records contradict Claimant's assertion that his demotion and subsequent reduction in pay were not playing a role in perpetuating his PTSD symptoms in 2018.

31. As noted at paragraph 14 above, Tammy C_____ testified that she did not provide Claimant a list of the Employer's designated medical providers. Rather, Ms. C_____ testified that she assumed such a list was provided to Claimant because the box was checked on the Employer's form entitled "Worker's Compensation Checklist for all Claims". As Human Resources Director for Fremont County, Ms. C_____ updates job descriptions and processes workers' compensation claims for the County. She testified that the events that led to Claimant's PTSD fell within the job descriptions for Patrol Sergeants and Patrol Deputies. She confirmed that multiple officers respond to the type of incidents described by Claimant. She indicated that approximately 24 Patrol Deputies and Sergeants work for the sheriff's department and, other than Claimant, none have reported a stress claim.

32. The opinions expressed by Dr. Kleinman are credible and more persuasive than the contrary testimony of Claimant or the opinions expressed by Dr. Goodwin.

CONCLUSIONS OF LAW

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

Generally

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

B. "Mental-mental" injuries are injuries in which mental impairment follows a solely emotional stimulus. *Oberle v. Indus. Claim Appeals Office,* 919 P.2d 918, 920 (Colo. App. 1996). "An injury that is 'the product of purely an emotional stimulus that results in mental impairment' requires a 'heightened standard of proof' to 'help prevent frivolous or improper claims.'" *Kieckhafer v. Indus. Claim Appeals Office*, 284 P.3d 202, 205–06 (Colo. App. 2012) (internal citations omitted). This is true because "[c]ases in which a claimed disability is based on emotional or psychological cause and in which physical injury is absent are less subject to direct proof and more susceptible to being frivolous in nature." *Dushane v. Beneficial Colorado, Inc.,* W.C. No. 4-218-217 (ICAO

July 17, 1996). In this case, there is little doubt that Claimant suffers from injuries that are "mental-mental" in nature. Rather, the question presented here is when did Claimant's PTSD become manifest, i.e. disabling so as to determine the date of injury and law in effect at the time.

Date of Injury

C. Concerning occupational disease claims, the date of injury is the date of the onset of disability, and the law in effect on that date governs the rights and liabilities of the parties. *Ortiz v. Charles J. Murphy & Co.,* 964 P.2d 595 (Colo.App. 1988). The onset of disability rule is designed to assist ALJs in resolving the difficult question of when the claimant actually sustains an occupational disease where resolution of that question affects the level of benefits. It is well settled that the onset of disability occurs when an occupational disease impairs a claimant's ability effectively and properly to perform his or her regular employment or which renders a claimant incapable of returning to work except in a restricted capacity. *Charles J. Murphy & Co*., 964 P.2d 595 (Colo.App. 1988); *Ricks v. Industrial Claim Appeals Office,* 809 P.2d 1118 (Colo.App. 1991.) In this case, the evidence presented persuades the ALJ that the disabling effects of Claimant's PTSD became evident prior to July 1, 2018.

D. Indeed, the evidence presented supports a conclusion that Claimant confirmed that the initial and primary incident which gave rise to his PTSD occurred in 2008 when he responded to a burning semi-truck. Claimant referenced other stressful incidents that occurred in 2010, 2011, 2013, 2014, and 2015, which unbeknownst to Claimant at the time, probably exacerbated his PTSD and the psychological sequela caused thereby. Claimant recognized that these incidents had a profound effect on him and he noticed a change in his psychological status by 2016-2017. He testified he had anger issues at home and at work. He lost interest in previously enjoyed activities. He was drinking excessively, was isolating himself and had trouble sleeping. He would scream at night. Consequently, he smartly sought psychological care with Ms. Jimenez in March 2017. Ms. Jimenez diagnosed PTSD as early as May 2, 2017 and by August 2017, the debilitating effects of Claimant's PTSD was causing persistent irritation with his co-workers and anger with having to listen to his radio and dispatch. He could not be located by radio and would lose control over his emotions, using unprofessional language over the radio and in the workplace. He was also having difficulty with the cognitive demands necessary for good report writing, all signs the ALJ concludes, from the evidence presented, are consistent with the disabling effects of PTSD.

E. By August 22, 2017, the debilitating effects of Claimant's PTSD, as outlined above, had resulted in performance issues Sheriff B_____ felt warranted discipline. As noted, Sheriff B_____ demoted Claimant from the rank of Sergeant to the rank of Patrol Deputy. Sheriff B_____ placed Claimant on three months' probation and reduced Claimant's hourly salary. The demotion lessened Claimant's work duties from that of a Patrol Sergeant to that of a Patrol Deputy. Also, Sheriff B_____ placed Claimant on "paid administrative leave," which rendered him incapable of returning to work while on leave. While Claimant was able to return to work, he did so in the reduced capacity of a Patrol Deputy and for lesser pay. By

December 2017, Claimant was involved in weekly PTSD treatment sessions. Around May 2018, Claimant felt he needed to speak to his lieutenant about seeing a "Comp Doctor" for his persistent mental health symptoms. In June 2018, Claimant had an emotional outburst at work after which he confided in another deputy that he could not sleep and was having problems controlling his anger. He reported he was taking medication and was involved in counseling. On June 13, 2018, Claimant reported to Dr. Goodwin that he did approach his lieutenant requesting help for psychological problems. He asked to be taken off of his front line duties and placed in an alternate position. These events would lead to a subsequent referral to Dr. Waxman for a fitness for duty evaluation. While the evaluation took place in August 2018, the sequela prompting the referral and the referral itself were ongoing and occurred before July 1, 2018. The materials presented to Dr. Waxman, including the information gleaned from Lieutenant Johnston in combination with the May and June records from Dr. Goodwin persuade the ALJ that Claimant was probably unfit for duty as early as June 11, 2018, when he confided to Deputy Johnson that he was having problems with symptoms consistent with the disabling effects of PTSD and certainly by June 13, when it was documented in Dr. Goodwin's notes that he requested to be removed from his front line position. Based on the evidence presented as a whole, the ALJ concludes that Claimant's occupationally induced PTSD was impairing his ability to effectively and properly to perform his regular employment duties as various times prior to July 1, 2018. Claimant's contrary assertion that he "had no injury" and was not disabled until Dr. Waxman found him "unfit for duty" on August 20, 2018, is unpersuasive. Accordingly, the ALJ concludes that Claimant's onset of disability predates July 1, 2018.

Compensability

F. As noted above, a claimant must prove, by a preponderance of the evidence, that his/her injury arose out of the course and scope of his employment with employer. Section 8-41-301(1)(b), C.R.S.; *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arise out of" requirement is narrower and requires a claimant to show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *Id*.

G. A stress claim, or mental impairment claim, is compensable only if it satisfies very specific statutory requirements. Section 8-41-301(2)(a), C.R.S., addresses the heightened burden of proof as referenced in paragraph B above in order to prove the compensable nature of a claim for mental impairment. Prior to July 1, 2018, "old law" provided that:

> A claim of mental impairment must be proven by evidence supported by the testimony of a licensed physician or psychologist. For

> purposes of this subsection (2), "mental impairment" means a recognized, permanent disability arising from an accidental injury arising out of and in the course of employment when the accidental injury involves no physical injury and consists of a psychologically traumatic event that is generally outside of a worker's usual experience and would evoke significant symptoms of distress in a worker in similar circumstances. A mental impairment shall not be considered to arise out of and in the course of employment if it results from a disciplinary action, work evaluation, job transfer, lay-off, demotion, promotion, termination, retirement, or similar action taken in good faith by the employer. The mental impairment that is the basis of the claim shall have arisen primarily from the claimant's then occupation and place of employment in order to be compensable.

H. Effective July 1, 2018, the mental impairment law changed ("new law"). The "new law" removed the term licensed "physician" and replaced it with licensed "psychiatrist". The "new law" also expanded the definition of "psychologically traumatic event" in PTSD claims to include cases where (A) The worker is the subject of an attempt by another person to cause the worker serious bodily injury or death through the use of deadly force, and the worker reasonably believes the worker is the subject of the attempt; (B) The worker visually witnesses a death, or the immediate aftermath of the death, of one or more people as the result of a violent event; or (C) The worker repeatedly visually witnesses the serious bodily injury, or the immediate aftermath of the serious bodily injury, of one or more people as the result of the intentional act of another person or an accident.

I. As concluded above, the ALJ determines that the disabling effects of Claimant's occupationally induced PTSD had become evident prior to July 1, 2018. Consequently, the ALJ determines that the analysis regarding the compensable nature of Claimant's mental impairment in this case falls under the requirements necessary to be proven under the law existing prior to July 1, 2018. Here, the ALJ is persuaded that Claimant failed to meet his burden to prove the compensable nature of his mental impairment claim under the version of the statute existing prior to July 1, 2018 for the following reasons:

> i. <u>There was no psychologically traumatic events outside of the Claimant's usual work experience</u>: "Old law" required that the accidental injury consist of a psychologically traumatic event generally outside of a worker's usual experience. The requirement of a "psychologically traumatic event" outside the worker's usual experience refers to the claimant's personal experience. See *Davidson v. City of Loveland Police Department*, W.C. No. 4-292-298 (October 28, 2001). Here, Claimant did not meet his burden to prove that the psychologically traumatic event(s) he claims are responsible for his PTSD were generally outside of a Patrol Deputy's and/or Deputy Sergeant's usual experiences. Indeed, Claimant conceded that his job as a Patrol Deputy and/or Deputy Sergeant contemplated the need to respond to such incidents and specifically

included that Claimant had a duty and responsibility to respond to calls for assistance; provide aid and assistance to victims by responding to injury accidents; assist emergency personnel in treating and transporting victims of traffic and other accidents; secure and protect crime scenes; assist and interview victims and witnesses; carry a side arm and be prepared to use it with deadly force. Claimant admitted that the traumatic events to which he associates his PTSD were part of his job, and part of his job description. Claimant admitted that responding to such incidents was not outside of a police officer's or sheriff deputy's usual experience. He admitted that other first responders from the Sheriff's department and from other agencies were normally present at the scene. PA Quackenbush and Dr. Robert Kleinman agreed that the accidents and injuries Claimant described as the basis for his PTSD were assumed to be a normal part of the job description and requirements of a County patrol officer.

ii. Claimant presented insufficient evidence that the events he asserts led to his PTSD would evoke symptoms in workers in similar circumstances: Under "old law", Claimant was required to prove that the psychologically traumatic event(s) would evoke significant symptoms of distress in a worker in similar circumstances. Courts have held that the question of whether the traumatic event would evoke symptoms of distress in a worker in "similar circumstances" is a question of fact to be judged by an objective standard for a worker with experience, training, and duties similar to the claimant. See *Davidson v. City of Loveland Police Department,* W.C. No. 4-292-298 (Oct. 28, 2001). In this case, Claimant did not meet his burden to prove that the psychologically traumatic event(s) would evoke significant symptoms of distress in a worker in similar circumstances. Indeed, County Human Resources Director, Tammy C_____, testified credibly that there were approximately 24 other patrol deputies and Sergeants who were responding to the types of calls that Claimant asserts led to his PTSD during the same time frame Claimant reported being exposed. As the workers' compensation administrator for the County, Ms. C_____ testified that she had not received any other reported stress claims associated with incidents similar to those described by Claimant. PA Quackenbush, also noted that Claimant's descriptions of horrific accidents and injuries often resulting in death could be assumed to be a normal part of the job description and requirements of a County patrol officer. Finally, Dr. Kleinman testified that the majority of first responders do not develop PTSD concluding that that the traumatic events reported by Claimant would not evoke significant symptoms of distress in a similar worker in similar circumstances As noted above, the evidence presented persuades the ALJ that Claimant's reaction to the traumatic events he was exposed to is probably an idiosyncratic response to events that Respondents established were unlikely to evoke significant symptoms of distress in a similarly situated worker called upon to respond to such calls. See generally, *Brown v.*

Family Inn of Colorado Springs, W.C. No. 4-271-351 (November 12, 1996).

iii. Disciplinary action and other work stressors may not support a compensable claim: Under "old law" a claim for mental impairment is not work related if it results from a disciplinary action, work evaluation, job transfer, lay-off, demotion, promotion, termination, retirement, or similar action taken in good faith by the employer. While Claimant denied the disciplinary action, i.e. his demotion in 2017 impacted his condition, the evidence suggests otherwise. Claimant testified that radio dispatch, other deputies, and report writing irritated him at work and he could not always control his feelings/emotions. On August 22, 2017, Sheriff B_____ disciplined Claimant and demoted him from the rank of Sergeant to the rank of Patrol Deputy because of repeated issues where Claimant did not listen to his radio, dispatchers could not locate him, his use of unprofessional language over the radio, and Claimant's poor report writing and report approval. Sheriff B_____ placed Claimant on three months' probation and reduced Claimant's hourly salary. On April 19, 2018, Dr. Goodwin noted that Claimant mentioned that the demotion made him feel incredibly angry and distrustful of people around him. Consequently, the suggestion espoused by Claimant that there was no persuasive evidence that the demotion caused or contributed to Claimant's PTSD is unconvincing. Here, the ALJ credits the opinion of Dr. Kleinman that Claimant's demotion was as least partially involved in his psychological presentation and the perpetuation of his PTSD symptoms.

J. Because Claimant failed to establish he was subjected to psychologically traumatic events generally outside his employment that would evoke significant distress in a worker in similar circumstances and/or that his demotion issued August 22, 2017, was taken in bad faith, his claim for mental impairment must be denied and dismissed. In reaching this conclusion, the ALJ is cognizant of the fact that cases applying the onset of disability rule typically involve a choice of laws question, as where a claimant's benefits would differ depending on the date of the injury. Eg. *SCI Manufacturing v. Industrial Claim Appeals Office*, 879 P.2d 470 (Colo. App. 1994) (applies onset of disability rule in determining whether claim governed by SB-218); *Henderson v. RSI, Inc*., 824 P.2d 91 (applies onset of disability rule to determine the claimant's average weekly wage). While an analysis of the evidence presented in this case under the "new law" surrounding mental impairment effective July 1, 2018 may have resulted in a different conclusion, the plausible inferences drawn from the record persuade the ALJ that Claimant was disabled from the ongoing effects of his PTSD no later than June 13, 2018, the date Dr. Goodwin documented that Claimant requested a different work assignment due to his PTSD. Here, the ALJ resolves the conflicts in the evidence in favor of Respondents to conclude that Claimant's ability to effectively and properly to perform his regular employment was impaired prior to July 1, 2018. Accordingly, the ALJ concludes that the version of C.R.S. § 8-41-301(2)(a) in effect prior to July 1, 2018 governs the rights and liabilities of the parties under this claim. When

analyzing the evidence under this “old” version of the statute, Claimant failed to meet his burden to prove that he suffered a compensable claim for mental impairment. Consequently, his remaining claims need not be addressed further.

ORDER

It is therefore ordered that:

1. Claimant has failed to meet the statutory requirements set forth in §8-42-301(2), C.R.S. to establish a claim of mental impairment. Therefore, his claim is denied and dismissed.

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

DATED: May 1, 2019

/s/ Richard M. Lamphere

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

ISSUES

I. Has Claimant overcome, by a preponderance of the evidence, the DIME opinion of Dr. Tyler on the issue of Permanent Partial Disability?

II. Has Claimant shown, by a preponderance of the evidence, that he is entitled to Temporary Partial Disability payments?

III. Has Claimant shown, by a preponderance of the evidence, that he is entitled to compensation for Disfigurement?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. This is an admitted claim. On Thursday, November 12, 2015, Claimant suffered an injury when a wood panel fell from a wall and struck him in the mouth. (Ex. A, p. 1; Ex. B. p. 2).

2. A First Report of injury was completed and filed that same day. (Ex. A). Respondent's timely submitted a General Admission of Liability on 11/30/15. (Ex. B).

3. On the date of injury, Claimant went to the emergency room, where he received limited treatment and was referred to Rebecca Facy, DDS, MD. (Ex. F, K). The Emergency Room report indicates Claimant suffered a 6 mm laceration to his lower lip, an upper lip laceration of 1.5 cm *which did not penetrate through the lip*, and damage to upper teeth including a fracture. (emphasis added). *Id.*

4. Dr. Facy repaired the lacerations to Claimant's mouth and extracted his #9 incisor. At that time, it was hoped to salvage the remaining 3 teeth which had been damaged. (Ex. K). Dr. Facy released Claimant to "light duty for six weeks . . . to avoid any job that has the potential of patient getting hit in the face." *Id.* at 87.

5. Claimant promptly returned to work, as reflected in his testimony and wage records. (Ex. M). Such records indicate he was paid for the remainder of the shift he was working (Thursday, Nov 12), as well as the next day (Friday, Nov. 13). Claimant missed two 8-hour days and three additional hours as an apparent result of his injury. (He left early after working 3 hours on Monday, Nov. 16; a snow day occurred on Nov. 17, he missed work on Nov 18, 19). Claimant returned to work, full time, on Friday, Nov. 20. (Ex. M, p. 120).

6. Dr. Facy provided follow up treatment through December 2, 2015. He was then seen by his designated ATP, Dr. Frank Polanco, along with Scott Draper, DDS, for remaining dental and oral issues. (Ex. E, H).

7. Claimant first saw Dr. Polanco on December 8, 2015, at which time Dr. Polanco released Claimant to return to full duty, with no restrictions. (Ex. E, p. 16).

8. Claimant continued to treat with Dr. Draper and Dr. Polanco, until separating from his job in February of 2016. He then moved to Eugene, Oregon, where he treated with Timothy Welch MD, DDS, and Larry Over, DDS. (Ex. I & Ex. L). Ultimately, Claimant had his top four front teeth extracted and replaced with permanent porcelain implants. *Id.*

9. Dr. Larry Over released Claimant at MMI (effective 1/17/2018) with 0% impairment, but recommended maintenance treatment of replacement implants when needed. (Ex. L, pp. 103-104). Respondents filed a Final Admission of Liability in accordance with the report of Dr. Over, and admitted for maintenance care as recommended.

10. Claimant, pro se, objected to the Final Admission, filed an Application for Hearing and also sought a Division Sponsored IME. After a prehearing conference, all issues endorsed by for hearing were held in abeyance pending completion of the DIME process.

11. Claimant attended a DIME appointment in Colorado Springs with Dr. John Tyler on October 22, 2018. Upon review of all medical records and a physical examination of the Claimant, Dr. Tyler issued his report which states:

> Examination essentially shows 4 perfectly aligned upper teeth including both incisors. There is no scarring to the external oral region of his face. There is no paralysis or weakness in the musculature of the oral cavity that I can note. There is, by the patient's report, no sensory deprivation externally around his mouth. (Ex. D, p. 11).

12. After spending over 30 minutes counseling the Claimant on his inability to provide any type of impairment, Dr. Tyler closed his report, concluding that Claimant did not have any permanent, ratable impairment, and also agreed with the MMI date noted by Dr. Over. (Ex. D, p. 11.)

13. Respondents filed a Final Admission in accordance with the DIME report, again admitting for recommended maintenance care. Medical expenses to date were admitted for $22,771.56. (Ex. C).

14. Claimant objected to the Final Admission. His Application for Hearing, dated 12/1/2018, endorsed issues of Compensability, Medical Benefits, Disfigurement, Scheduled Impairment, Temporary Partial Benefits from date of injury through MMI, and discussed a penalty claim alleging that ‘Respondents Failed to report

the injury within 10 days'. He also alleged that he was entitled to lost wages, due to missing 3 days of work due to injury.

15. At the outset of the hearing, this ALJ requested a clarification of issues endorsed by the parties. After a short discussion between the parties, it was determined that compensability was not at issue, since Respondents have filed multiple admissions. Claimant also withdrew his medical benefit claim, since the recommended care he was seeking (replacement prosthetics) was already admitted on the Final Admissions, and reiterated by Counsel for Respondents.

16. Claimant then proceeded on his claims seeking permanent partial disability/overcoming the DIME of Dr. Tyler, disfigurement, and temporary partial disability benefits for the period 11/16/15 to 2/9/2016.

17. At hearing, Claimant testified on his own behalf. He indicated that he was seeking temporary benefits for lost wages. He did not present any records of lost wages, and testified only that he was 'uncomfortable' working with panels for Employer and thus lost out on some wages. Lost wages were never quantified by Claimant.

18. Upon cross-examination Claimant stated that the only 'lost wages' had already been requested by Claimant, and been paid by Employer, upon his resignation in February of 2016. In fact, upon resigning his position with Employer, Claimant requested, and was paid for the 19 hours (Two 8-hour days plus 3 hours) of time that he missed from his work in November, 2015 due to the injury. (Ex. M, p. 120).

19. During the period that Claimant alleges he missed out on work hours due to his fear of working with panels, he had already been released by Dr. Polanco to return to full duty.

20. Claimant further testified that he believes he is entitled to permanent impairment in accordance with the Worker Compensation Statutes for loss of his teeth.

21. Claimant is seeking disfigurement, asserting that he incurred scarring on his upper lip, and that his gum line on his upper front teeth is higher than it was before the injury/implants.

22. The ALJ has viewed Claimant's mouth, and makes these observations: There is no visible scarring anywhere on Claimant's face. In the course of ordinary conversation, and even when Claimant is smiling, there is no defect in Claimant's teeth apparent to the viewer. Once Claimant used his fingers to pull fully upwards on his upper lip, the ALJ could then view, at a slightly upward angle, that Claimant's gum line is slightly raised, due to the implant protocol.

CONCLUSIONS OF LAW

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

Generally

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case are not interpreted liberally in favor of either party. Section 8-43-201, C.R.S. (2016).

B. A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. Pursuant to Section 8-43-215, C.R.S., the decision of the ALJ contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has discretion to make credibility determinations, draw plausible inferences from the record, and resolve conflicts in the evidence. *Davison v. Indus. Claim Apps. Office*, 84 P.3d 1023, 1025 (Colo. 2004). This decision does not address every item contained in the record, and incredible or implausible testimony or unpersuasive inferences that have not been specifically addressed have been implicitly rejected. *Magnetic Eng'ng, Inc. v. Indus. Claim Apps. Office*, 5 P.3d 385, 389 (Colo. App. 2000).

C. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. Colorado Jury Instructions, Civil, 3:16 (2018). The ALJ, as fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull*, 802 P.2d 1182, 1183 (Colo. App. 1990). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968); see also *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion).

D. The ALJ finds Claimant to be sincere in his testimony. There is no doubt he suffered pain from this injury, and considerable anxiety and inconvenience for some time afterwards. He was no doubt frightened by the experience, and was reluctant to work for some period of time following the injury. Nonetheless, the ALJ must apply the law as written. Further, Claimant did not present any expert testimony. The only expert opinions in evidence are found in the medical records submitted by Respondents. These records are consistent in finding that Claimant did not suffer any ratable permanent impairment as a result of the workplace injury.

Overcoming The DIME Physician's Opinions/Permanent Disability

E. While a DIME physician's findings of causation, MMI and whole person impairment are binding on the parties unless overcome by "clear and convincing evidence," the increased burden of proof required by the DIME procedures is not applicable to scheduled injuries Section 8-42-107(8)(b)(III) C.R.S. *Maestas v. Am. Furniture Warehouse*, W.C. No. 4-662-369 (ICAP June 5, 2007); *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004).

F. In this matter, Claimant seeks to overcome the DIME physician's opinion that he was not entitled to any impairment-on or off the schedule. As Claimant is seeking impairment 'on the schedule' for a loss of teeth, a mere preponderance of the evidence is required to overcome the DIME opinion. Despite this lowered burden, Claimant has failed to present sufficient evidence to overcome the DIME Physician's 0% rating.

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

H. In this matter, the DIME physician has properly applied the AMA Guides and, after thoroughly noting his explanation in his report, was "unable to come up with any type of impairment for [Claimant's] injuries or current symptomatology." Claimant has presented no evidence in the form of medical testimony to overcome the DIME physician's explanation and rating.

I. Permanent partial disability under the schedule found in §8-42-107(2) is available to a Claimant who suffers a workplace injury which results in functional impairment or disablement. *Warthen v. Indus. Claim Apps. Office*, 100 P.3d 581, 583 (Colo. App. 2004). Though addressing an earlier iteration of the Act, the Colorado Supreme Court found that impairment ratings measure "complete or partial loss of use." *World of Sleep, Inc. v. Davis*, 536 P.2d 34, 35 (Colo. 1975). Simply stated, without functional impairment or disablement, a Claimant is not entitled to an impairment rating under the schedule.

J. Though loss of a tooth is included on the schedule of impairments under §8-42-107(2)(ff), Claimant has not lost *functional* use of his teeth due to the permanent dental implants. While impairment measurements for nearly all other parts of the human body are measureable in terms of loss of range of motion or diminished functionality with respect to sensory organs, teeth occupy a unique niche. With teeth and modern dentistry as shown in Claimant's medical records, their functionality can be permanently repaired with dental implants, subject only to periodic replacement should one fail. Respondents have already admitted for any replacements which might be needed in the future.

K. As such, dental implants are not comparable to other prosthetic devices which might only *partially* replace functionality. It is the unique nature of a tooth, and the technology of permanent dental implants, which supports the DIME physician's 0% impairment rating. Additionally, due to the permanent nature of the dental implants, Claimant's case is not similar to cases involving removable dentures.

L. Claimant has presented no evidence to overcome the DIME physician's opinion on impairment or MMI. Claimant has not lost functionality of his teeth due to permanent replacement by means of implants. The ALJ finds, by a preponderance of the evidence, that Claimant has not overcome the DIME's determination.

Temporary Partial Disability

M. Temporary disability benefits are payable if the industrial injury causes a disability and as a result of the disability the claimant suffers a temporary wage loss. Section 8-42-103(1), C.R.S. 2019*; PDM Molding, Inc. v. Stanberg*, 898 P.2d 542, 545 (Colo. 1995). The claimant bears the initial burden to prove the entitlement to temporary disability benefits. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). In this case, Claimant seeks an award of Temporary Partial Disability Benefits from the date of his injury through MMI.

N. At hearing, Claimant testified that he was not earning as much money due to loss of hours after his injury because he was unwilling to work with panels for fear of future injury. While a letter from Claimant's initial treating dentist placed him on light duty for six weeks, he testified at hearing that the only time he missed due to injury was reflected in wage records, which show two missed 8-hour shifts and the remaining three hours of his shift on November 16, 2015.

O. Further, upon beginning treatment with his ATP, Dr. Polanco, as of December 8, 2015, Claimant was released to full duty. Any inability to work with panels after that date was the result of Claimant's own stated hesitance (however sincerely felt), rather than work restrictions placed on him by an ATP.

P. Claimant has not presented any evidence of wage loss as a result of the injuries. In fact, the wage records in evidence indicate that upon Claimant's resignation from Employer in February of 2016, he requested and was remunerated with full wages for the 19 hours that he missed as a result of his work. Claimant has failed to meet his burden to prove entitlement to temporary disability benefits.

Disfigurement

Q. "If an employee is seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view, in addition to all other compensation benefits provided . . . the director [or ALJ] may allow compensation . . . to the employee who suffers such disfigurement." §8-42-108(1), C.R.S. (2019). The ALJ is afforded great discretion when determining the amount of compensation to be awarded for

disfigurement. *Garcia v. Colo. Dep't of Corr.*, W>C. No 4-827-794-01 (ICAP Jan 27, 2012) citing Section 8-42-108, C.R.S.

R. As noted in Dr. Tyler's DIME report, and as observed by the ALJ at hearing, no outward scarring was visible on Claimant's mouth, lips or face.

S. Further, Claimant's receded gum line due to the dental implants does not warrant an award of disfigurement. To demonstrate to the ALJ that his gum line has receded, Claimant forcibly pulled back his upper lip with his hands. As such, the receded gum line is not *normally exposed to public view.* Despite the distress Claimant may experience from this change in his appearance which might manifest itself while, for example, brushing his teeth, he has not proven a claim for disfigurement under Colorado Workers Compensation law.

ORDER

It is therefore Ordered that:

1. Claimant has failed to overcome the DIME opinion. His Impairment Rating remains at 0%. His request for Permanent Partial Disability payments is denied and dismissed.

2. Claimant's claim for Temporary Partial Disability payments is denied and dismissed.

3. Claimant's claim for Disfigurement benefits is denied and dismissed.

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

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

DATED: May 1, 2019

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-084-677-002

ISSUES

I. Whether Claimant established by a preponderance of the evidence that she suffered a compensable injury on May 9, 2018.

II. Whether Claimant established by a preponderance of the evidence that she is entitled to reasonable and necessary medical treatment.

III. Whether Dr. Lauren Bull is an authorized treating physician.

IV. Whether Respondents are liable for the medical treatment provided by Denver Health.

STIPULATIONS

1. Claimant's average weekly wage is $494.00.
2. The issue of temporary disability benefits is reserved.

FINDINGS OF FACT

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

1. Claimant was born on November 10, 1960 and was 58 years old on the date of hearing.
2. Claimant attended 12 years of school.
3. At the time of her injury, Claimant worked performing housekeeping duties for Respondent- Employer. She was normally a floor technician, but on the night of her injury she had been assigned housekeeping duties.
4. Claimant was hired at Respondent-Employer in October 2017.
5. Claimant worked full time the second shift, 3:00 p.m. to 11:30 p.m.
6. Claimant's responsibilities as a floor technician included cleaning and polishing floors. Her responsibilities as a housekeeper included lifting, sweeping, cleaning restrooms, and other cleaning tasks in the Gary Pavilion at Children's Hospital.
7. Claimant was injured on May 9, 2018 in the course and scope of her employment. On that date, she lifted several bags of laundry, which she did not realize contained wet towels. She rapidly lifted the heavy bags from the floor to a

basket, which was about three to four feet off the floor. While lifting the heavy bags of wet towels, she injured her right upper extremity - shoulder.

8. Claimant verbally reported her injury to Erin Drayton, one of her supervisors, on the night of her injury. Subsequently she verbally reported her injury to another supervisor, Doug Banker, as well as to Victoria Zenteno, training manager, and James Burke, resident regional manager, employed by Respondent-Employer at Children's Hospital.

9. In contradiction to Claimant's testimony, Victoria Zenteno and James Burke testified that they never received notice of a work-related shoulder injury until after Claimant filed her claim for compensation on August 8, 2018. (*Exhibit 5*).

10. Claimant worked the rest of her shift on May 9, 2018. While leaving work that day, Erin, a supervisor, asked Claimant what was wrong with her shoulder. Claimant told Erin that it was hurting really badly. (*Hearing Tr., p. 21).* She reported to work the next day and verbally advised another supervisor, Doug Banker, of her injury. Mr. Banker instructed her to go to physical therapy at Children's Hospital (*Hearing Tr., p. 23*).

11. Claimant reported to the physical therapy department at Children's Hospital on May 10, 2018. However, a Hospital representative informed her that she could not use the Hospital's services because she worked for a contractor for the Hospital, and not the Hospital itself. Thereafter, Claimant went to Human Resources, spoke with Victoria Zenteno, and advised Ms. Zenteno that Children's Hospital would not treat her for her work injury because she worked for a contract company. At that time, Ms. Zenteno neither directed Claimant to a specific medical provider nor provided her a list of 4 medical providers. Claimant then told Ms. Zenteno that she was going to Denver Health to get medical treatment. At no time did Ms. Zenteno tell Claimant she should not treat at Denver Health for her work injury. (*Hearing Tr., p. 24-25*).

12. Because Claimant could not receive medical services at Children's Hospital, Claimant went to her personal medical provider, Denver Health, on May 11, 2018.

13. By report dated May 11, 2018, Jenna Cohen, PA at the Emergency Department of Denver Health Medical Center, noted:

> [Patient] works as a tech at children's hospital, has been doing a lot of lifting, housekeeping at work. 3 days ago, started having right shoulder pain and decrease rom [range of motion]. Has continued pain, although it has improved, but still decreased abduction.

PA Cohen diagnosed "Acute pain of right shoulder" and prescribed Voltaren and Flexeril. (*Exhibit I, Bate pp. 162-166*).

14. PA Cohen returned Claimant to work on May 15, 2018 with a restriction of "no heavy lifting over 10 pounds for 2 weeks." (*Exhibit 16*). Thereafter, Claimant worked for several weeks at full duty.

15. Claimant did not seek additional medical care for several weeks because she lost her health insurance. Claimant subsequently qualified for Medicaid, and then returned to Denver Health, and was evaluated by Dr. Lauren Bull.

16. By report dated June 20, 2018, Lauren Bull, M.D., at Denver Health, examined Claimant, prescribed occupational therapy, and returned her to work on June 21, 2018. At that visit, Dr. Bull noted Claimant's right shoulder had limited range of motion and mild decrease in strength. The possible diagnosis at that time included rotator cuff tendinitis, versus small tear, versus osteoarthritis. (*Exhibit I, Bates pp. 172-175; Exhibit 16, Note of June 20, 2018*).

17. Claimant initially did not report her injury in writing, but she later applied for leave under the Family and Medical Leave Act (FMLA). Subsequently she submitted a "Medical Certification Form for Family Medical Leave Act" to Respondent-Employer. Dr. Bull completed a section of the form on June 22, 2018. Dr. Bull noted on the Form that Claimant's medical "condition [was] due to a work related injury or illness." (*Exhibit D, Bate page 81*). Both Ms. Zenteno and Mr. Burke testified that the form was received by Employer's Human Resources department and that neither of them noticed that Dr. Bull had opined that Claimant's condition was work related. Ms. Zenteno further testified that Katherine Ernst, a human representative who has left the employment of Respondent-Employer, handled the leave of absence request. (*Hearing Tr. p. 77*).

18. Respondent-Employer approved a medical leave absence from June 28 to September 15, 2018. (*Exhibit 16, Bate p. 119*).

19. Because Respondent-Employer could not accommodate Claimant's restrictions, on or about June 4, 2018, Claimant went to work for another cleaning contractor, Carluttle DC/ARS, which provided cleaning services to the Veteran's Administration Hospital. (*Hearing Tr., p. 30*). At this new job she worked full time, earning $16.85 per hour. Her wages were in excess of her earnings for Respondent-Employer. While she started as a housekeeper, she progressed to floor technician, and then to supervisor.

20. Claimant has never returned to Respondent-Employer, although on several occasions she has requested reinstatement.

21. Claimant has not suffered a shoulder injury before or after May 9, 2018.

22. At the hearing, Claimant testified credibly that she continues to suffer from pain and restricted range of motion of her right shoulder and that she wants to receive treatment for her shoulder injury.

23. On August 10, 2018, Claimant participated in an initial occupational therapy evaluation performed at Denver Health by Joshua Knight, OT. He noted that the patient complained of "right shoulder pain, secondary to lifting when attempting to move a bag full of wet towels." (*See Exhibit 7, Report of Dr. Lesnak dated December 21, 2018, p. 4*).

24. Claimant underwent additional physical therapy through Denver Health on August 13, 20, 27 of 2018, as well as September 20, 2018.

25. In his IME report and in his deposition, Dr. Lesnak diagnosed subjective complaints of intermittent right anterior/lateral upper arm pain with residual stiffness of her right upper arm and shoulder girdle region. He stated: "If indeed the patient did lift multiple heavy bags of linen and twist to the right and place them on a nearby cart, it is possible that she may have sustained a mild strain of her right proximal biceps and/or right lateral deltoid muscle/tendons. (*See Exhibit 7, p. 6*).

26. In his deposition, Dr. Lesnak opined that:

> Well, based on her reported mechanism of the incident, and then my review of the records after my evaluation of her, I felt that she may have possibly had a soft tissue injury of her proximal biceps tendon or possibly her deltoid muscle surrounding her shoulder, and that at the time of my evaluation, she possibly may have some residual right proximal biceps tendinitis or possibly a residual mild lateral deltoid·myofascial syndrome. (*Lesnak Tr., pp. 8-9*).

27. Dr. Lesnak opined Claimant has likely not reached maximum medical improvement as it pertains her upper extremity - shoulder condition. He recommended additional medical treatment including 3-4 more weeks of outpatient occupational therapy, which should be performed by a physical therapist. (*See Exhibit 7, p. 6; Lesnak Tr., p. 10*).

28. Despite Respondents' having notice of Claimant's work injury, Respondents have not offered Claimant a choice of four medical providers to assess and/or treat her work related injury.

29. In her report dated June 20, 2018, Dr. Bull indicated that the "onset date" for Claimant's right upper extremity pain was April 15, 2018, (*Exhibit I, Bates p. 171*), but Claimant denied telling Dr. Bull that her pain began on that date. (*Hearing Tr., Bates p. 44*). Consistent with Claimant's testimony is the information Dr. Bull put on the FMLA Form. The FMLA form completed by Dr. Bull on June 22, 2018, indicates the date the condition commenced was "approx. 4/15/18." (*Exhibit D, Bates p. 81*).

30. By her own admission, Claimant is not good at remembering dates. (*Hearing Tr., p. 44*). The ALJ finds that Claimant's inability to remember certain dates with exact precision does not diminish Claimant's credibility when taken in context with the record as a whole.

31. Respondents argue that the claim should be denied because of:

    a. Perceived discrepancy in reported date of injury;

    b. Contradictory testimony about when Claimant reported her injury to Respondent-Employer;

    c. Mr. Burke's testimony that Claimant herself asserted that she did not have a work-related injury;

d. Dr. Lesnak's opinion that Claimant did not suffer a right shoulder injury but rather a bicep or deltoid strain; and

e. Dr. Lesnak's opinion that Claimant had "extremely self-limiting behavior and pain behaviors." (See Hearing Tr., pp. 13-14).

32. Claimant injured her right upper extremity-shoulder- on May 9, 2018.

33. Claimant verbally reported her injury to Employer on May 10, 2018.

34. Employer referred Claimant to the physical therapy department at Children's Hospital for treatment. Children's Hospital, however, refused to treat Claimant since she was not an Employee of the hospital, but an employer of a contractor.

35. Neither Employer nor Insurer provided Claimant a list of four medical providers from which Claimant could choose to treat her injury.

36. Since Employer and Insurer failed to provide Claimant a list of medical providers to treat her work injury, Claimant went to Denver Health for medical treatment.

37. The medical treatment provided by Denver Health on May 11, 2018, June 20, 2018, and August 10, 2018, was reasonable and necessary to evaluate and treat Claimant's work injury.

38. The physical therapy provided by Denver Health on August 13, 20, and 27 of 2018, and September 20, 2018, was reasonable and necessary to treat Claimant's work injury.

39. Claimant selected Dr. Bull, at Denver Health, to be her authorized treating physician for her work injury. Therefore, Dr. Bull is an authorized treating physician.

CONCLUSIONS OF LAW

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

General Provisions

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

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

every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

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

I. Whether Claimant established by a preponderance of the evidence that she suffered a compensable injury on May 9, 2018.

Claimant was required to prove by a preponderance of the evidence that at the time of the injury she was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

The ALJ finds and concludes Claimant has proven by a preponderance of evidence that she suffered a compensable injury to her right upper extremity and/or shoulder on May 9, 2018 for the following reasons:

Claimant credibly testified that she suffered an injury to her right shoulder when she lifted bags of wet towels at work. In addition, medical records from Denver Health corroborate Claimant's history of injury and her requests for medical attention. Moreover, Claimant's complaints to her medical providers, in injury reports, and in disability forms, are generally consistent as to mechanism of injury and the body part affected.

Additionally, in the Medical Certification Form for Family Medical Leave Act Form, dated June 22, 2018, Dr. Bull indicated that Claimant's right shoulder injury was work- related. Thereafter, Claimant submitted this report to Respondent-Employer as part of her FMLA application.

Even Respondents' independent medical examiner, Dr. Lesnak, testified that if Claimant's testimony about the mechanism of injury is credible, she probably suffered an injury to right arm or deltoid muscle.

Claimant testified credibly and without contradictory evidence that she did not have a problem with her right shoulder prior to her lifting bags of wet towels at work. Claimant also testified credibly and without contradictory evidence that she did not have an injury to her right shoulder after the May 9, 2018, industrial accident.

There is a minor discrepancy between the date of injury as reported by Claimant, May 9, 2018, and PA Cohen's statement that the shoulder injury occurred three days before the emergency room visit on May 11, 2019, which would make the date of injury May 8, 2018. Claimant testified that she was injured on May 9, 2018, and then reported the accident the next day to Doug Banker, who sent her to the physical therapy department at Children's Hospital. She testified that she went to Children's Hospital, which turned her away, on that same day. On the next day, May 11, 2018, she went to Denver Health. She testified that her visit to Denver Health was two days after the injury, not three. No credible and persuasive evidence was presented that Claimant was not working on May 8 or 9, 2018. This ALJ resolves this apparent conflict in the evidence finding that the date of injury is May 9, 2018.

For the same reasons, the ALJ is not persuaded that the injury date was April 15, 2018, as noted by Dr. Bull in a portion of the medical record. By her own admission, Claimant is not good at remembering dates. By the time she saw Dr. Bull on June 20, 2018, several weeks had elapsed between May 9 and that initial visit. Moreover, Dr. Bull put in the Family Medical Leave Act Form that the April 15, 2018, date was an approximation. Therefore, this ALJ reasonably infers that either Claimant or Dr. Bull erred in reporting of the date of injury and such error does not negatively impact Claimant's credibility.

This ALJ recognizes that there is contradictory evidence regarding whether Claimant verbally reported her injury to Respondent-Employer before her written report on August 8, 2018. Claimant testified that she verbally reported her work-related injury to Erin Drayton, one of her supervisors, on the night of her injury. Subsequently she testified that she verbally reported her injury to Doug Banker, Victoria Zenteno, and James Burke. Ms. Zenteno and Mr. Burke deny that Claimant ever gave them verbal notice of the injury. Because Ms. Drayton and Mr. Banker did not testify, Claimant's testimony regarding verbal report of injury to those two individuals stands unrebutted. As for Ms. Zenteno and Mr. Burke's testimony, this ALJ finds that neither witness worked in Human Resources, nor neither indicated that they conducted any research about the alleged incident. On balance, given the preponderance of other available information, this ALJ resolves the contradiction in the evidence by finding that the alleged failure to report the injury verbally to the two testifying witnesses does not call into question Claimant's overall credibility. Therefore, whether Claimant successfully reported her injury verbally to some employer representatives is not relevant to the ultimate finding whether Claimant suffered a compensable injury to her right upper extremity and/or shoulder.

The ALJ finds and concludes that the variances contained in the medical records regarding the date of injury are of the type that can occur when a patient is trying to convey to various medical providers what happened and the various medical providers are trying to document what was explained to them. The ALJ also finds and concludes that there are variances in the testimony of Claimant and the Employer witnesses regarding when and how Claimant reported her injury to Employer. However, the ALJ ultimately finds and concludes Claimant is credible and that she verbally reported her injury to her Employer on May 10, 2018.

As noted by the Colorado Supreme Court:

> It must be borne in mind that inconsistencies are not uncommon to the adversary process which, of necessity, must rely upon the sometimes contradictory and often incomplete testimony of human observers in attempting to reconstruct the historical facts underlying an event.

See People v. Brassfield, 652 P.2d 588, (Colo. 1982).

Moreover, Dr. Lesnak's testimony that Claimant did not injure her right shoulder joint, but rather her right arm or deltoid muscle, is not persuasive evidence that Claimant did not suffer any injury to her right upper extremity and/or shoulder while working for Employer. Furthermore, his testimony that he noted extreme guarding behaviors does not prove the absence of any injury. On the contrary, such evidence illustrates the importance of further evaluation and assessment of Claimant's condition to determine the extent of her compensable work injury.

The ALJ finds and concludes that Claimant has established by a preponderance of the evidence - as summarized above – that she suffered a compensable injury to her right upper extremity and/or shoulder on May 9, 2018.

II. Whether Claimant established by a preponderance of the evidence that she is entitled to reasonable and necessary medical treatment.

Based upon Claimant's pain complaints, and the medical reports from Denver Health, Claimant has established the need for medical treatment for her right upper extremity and/or shoulder. In addition, Dr. Lesnak's testimony that Claimant is not at MMI and needs three to four weeks of additional therapy, further supports this ALJ's finding and conclusion that Claimant is in need of additional medical treatment to cure and relieve her from the effects of her industrial injury.

Therefore, the ALJ finds and concludes that Claimant has established by a preponderance of the evidence that she is entitled to reasonable and necessary medical treatment for her right upper extremity and/or shoulder.

III. Whether Dr. Lauren Bull is an authorized treating physician.

Authorization to provide medical treatment refers to a medical provider's legal authority to provide medical treatment to the claimant with the expectation that the insurer will compensate the provider for the services rendered. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995).

Section 8-43-404(5)(a)(I)(A), applicable to this injury and claim for benefits, provides that:

> "In all cases of injury, the employer or insurer shall provide a list of at least four physicians or four corporate medical providers or at least two physicians and two corporate medical provider, where available, in the first instance, from which list an injured employee may select the physician who attends said injured employee."

The statute further provides that if "the services of a physician are not tendered at the time of injury, the employee shall have the right to select a physician or chiropractor."

This statute affords the employer the right to designate at least four physicians and/or corporate providers that are deemed authorized to provide medical treatment. Consistent with the version of § 8-43-404(5)(a) that was amended in 1997, the current version provides that the employer's right to designate the authorized providers may be lost and the right of selection passed to the claimant if medical services are not tendered "at the time of injury." *See Rogers v. Industrial Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987).

The Director (Director) of the Division of Workers' Compensation (DOWC) has adopted regulations governing the application of these statutory provisions. Recognizing that the statute does not define precisely when and how the mandated "list" of providers must to be given to the injured worker, the Director has adopted WCRP 8-2(A)(1). This rule states that:

> A copy of the written designated provider list must be given to the injured worker in a verifiable manner within seven (7) business days following the date the employer has notice of the injury.

Consistent with the statute, WCRP 8-2(E) provides that that:

> If the employer fails to supply the required designated provider list in accordance with this rule, the injured worker may select an authorized treating physician or chiropractor of their choosing.

Claimant reported her injury to Employer on May 10, 2018. Upon receiving notice of Claimant's injury, Employer referred Claimant to only one medical provider, Children's Hospital physical therapy department. Moreover, Claimant went to Children's

Hospital and they refused to treat Claimant since she did not work for the hospital, but a contractor providing services for the hospital.

There is a lack of credible and persuasive evidence that Respondents provided Claimant a list of four medical providers who were willing to treat Claimant. Therefore, Claimant went to Denver Health and was treated by Dr. Lauren Bull. Since Respondents failed to provide Claimant with a choice of four medical providers pursuant to Section 8-43-404(5)(a)(I)(A), C.R.S. and Rule 8-2, they have waived their right to designate a treating physician in the first instance. As such, Claimant is free to choose her own physician, and Claimant has chosen Dr. Lauren Bull at Denver Health.

Therefore, the ALJ finds and concludes that Denver Health and Dr. Bull are authorized to treat Claimant.

IV. Whether Respondents are liable for the medical treatment provided by Denver Health.

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether Claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

As found above, Denver Health and Dr. Bull are authorized to treat Claimant for her work related injury. The ALJ finds and concludes that the treatment provided by Denver Health on May 11, 2018, June 20, 2018, and August 10, 2018, is reasonable and necessary to treat Claimant's work injury. The ALJ also finds and concludes that the physical therapy provided by Denver Health on August 13, 20, and 27 of 2018, and September 20, 2018, was reasonable and necessary to treat Claimant's work injury.

ORDER

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

1. Claimant suffered a compensable injury to her right upper extremity and/or shoulder on May 9, 2018.
2. Dr. Bull, at Denver Health, is authorized to treat Claimant for her work injury, subject to the fees set forth by the Colorado Workers' Compensation Medical Fee Schedule.
3. Respondents shall pay for the medical treatment provided by Denver Health on May 11, 2018, June 20, 2018, and August 10, 2018, pursuant to the Colorado Workers' Compensation Medical Fee Schedule.

4. Respondents shall also pay for the physical therapy provided by Denver Health on August 13, 20, and 27 of 2018, and September 20, 2018, pursuant to the Colorado Workers' Compensation Medical Fee Schedule.

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

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

DATED: May 2, 2019.

/s/ *Glen Goldman*

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

ISSUES

I. Whether Respondent proved by a preponderance of the evidence that Claimant's claim for compensation is barred by the two-year statute of limitations set forth in § 8-43-103(2), C.R.S.

II. If Claimant's claim is barred by the two-year statute of limitations, whether Claimant proved by a preponderance of the evidence that there existed a reasonable excuse for the delay and that Respondent was not prejudiced thereby.

III. If Claimant's claim is not barred by the statute of limitations, whether Claimant proved by a preponderance of the evidence a prima facie compensable claim under § 8-41-209, C.R.S.

IV. If Claimant has proved a prima facie compensable claim under § 8-41-209, C.R.S., whether Respondent has proved by a preponderance of the evidence that Claimant's cancer did not arise out of Claimant's employment as a firefighter.

V. If the claim is compensable, whether Claimant has proved by a preponderance of the evidence that Respondent is responsible for the costs of Claimant's January 15, 2016 surgery and subsequent treatment.

STIPULATIONS

The parties stipulate Claimant has completed five or more years of employment as a firefighter, has cancer of the genitourinary system, and Claimant's employment physical from the late 1990s and physicals thereafter revealed no substantial evidence of cancer or related impairment that preexisted his employment as a firefighter.

FINDINGS OF FACT

1. Claimant is a 46-year-old man who has worked as a firefighter since the late 1990s, engaging in fire suppression and overhaul duties.

2. On December 9, 2015, at age 43, Claimant underwent a lumbar MRI for low back pain, which incidentally revealed a left kidney mass. Claimant sought treatment with a urologist who confirmed a diagnosis of renal clear cell carcinoma.

3. Claimant notified Employer of his diagnosis on December 18, 2015. The Report of Injury notes Claimant was diagnosed with kidney cancer and had been informed by his physician that "it could be due to the chemicals/toxins he has been exposed to at

work." It was further noted that it was "[e]xplained [to Claimant] that this starts a paperwork process and will leave his options of care open."

4. On December 30, 2015, Respondent filed an Employer's First Report of Injury form with the Division. Respondent filed a Notice of Contest on January 13, 2016.

5. On January 15, 2016, Claimant underwent treatment a successful nephrectomy to treat the renal cell carcinoma. He did not undergo any chemotherapy or radiation therapy. As of date of hearing, remains in remission.

6. Claimant did not work from January 15, 2016 through March 14, 2016 while recovering from the nephrectomy. Respondent paid Claimant line of duty wages during this time period, which were his full wages. Claimant did not perform any services for Respondent during this time period.

7. Claimant returned to regular full-duty work on March 15, 2016.

8. On March 16, 2016, Claimant's counsel sent Respondent the following documents: (1) an Entry of Appearance; (2) Objection to Admissions; (3) Notice of Objection to Verbal Communications with Claimant, Treating Physicians or Healthcare Providers; (4) Claimant's Combined Ongoing Production Request and Interrogatories; (5) Notice Pursuant to §8-41-203(4), C.R.S.; and (6) Release for Authorizations.

9. The Objection to Admissions and the Notice of Objections to Verbal Communications stated Claimant objected to any admissions of liability that had been filed, and to any verbal communications between any representative of Respondents and Claimant, respectively. The Combined Ongoing Production Request and Interrogatories requested information from Respondent.

10. The Notice Pursuant to § 8-41-203(4), C.R.S. notified Respondents Claimant may pursue any liable third parties arising out of "an injury and/or occupational disease occurring on 12/18/15."

11. The documents also contained a cover letter requesting that the claim file be provided and that all checks and past due temporary disability benefits, permanent disability benefits, and disfigurement be sent through counsel's office. The record contains no evidence of further written communications between Claimant and Respondent until Claimant's April 20, 2018 Application for Hearing. Claimant contends that his notification of his condition to Employer, along with the March 16, 2016 documents served as an informal substitute for a claim, providing constructive notice to Respondent of a compensable claim.

12. On April 26, 2017, Annyce Mayer, M.D. performed an Independent Medical Examination (IME) at the request of Claimant. Dr. Mayer interviewed and physically examined Claimant and reviewed his medical records. Dr. Mayer explained that smoke and soot produced by fires contains numerous carcinogens and, although it was impossible to estimate the intensity, duration or frequency of Claimant's exposures, it was likely Claimant was exposed to most, if not all, of these carcinogens over the

course of his 19 years as a firefighter. Dr. Mayer noted multiple risk factors for kidney cancer including, *inter alia*, hypertension, obesity, heavy smoking, and chronic renal failure. She noted Claimant was a non-smoker with no history of hypertension, chronic kidney failure, and nothing suggestive of hereditary kidney cancer syndrome. She acknowledged Claimant was obese, based on a body mass index (BMI) of 34.3 kg/m2; but noted obesity is a very common condition in the United States. Dr. Mayer noted that, between 2009 and 2013, the incidence of kidney cancer in white non-Hispanic males in Colorado aged 21-44 ranged from 2.3 to 4.7 per 100,000 while 20,000 to 25,000 per 100,000 were obese, meaning the overwhelming majority of those obese individuals did not get cancer. She concluded,

> In summary, [Claimant] sustained a number of typical firefighter exposures that increase the risk of kidney cancer over the course of his 19 years of work as a firefighter before his diagnosis, namely PAHs with some evidence of cadmium, asbestos, pesticides and solvents as well. As detailed above, for much of his career he had inadequate respiratory and skin protection, and was repeatedly exposed to carcinogens, including PAHs, which are present at virtually every fire scene. PAHs are well absorbed through the skin, making his inadequately cleaned bunker gear and hood highly relevant. Four large recent studies found significantly increased risk of kidney cancer in firefighters, in additional to the New Zealand Registry case control study. In my medical opinion to a reasonable degree of a medical probability, [Claimant's] kidney cancers meet the medical requirement of Colorado Firefighter Cancer Presumption statute 8-41-209, C.R.S., and there is no preponderance of the medical evidence that his kidney cancer did not occur on the job.

13. On November 1, 2017, Sander Orent, M.D. also performed an IME at the request of Claimant. Dr. Orent also interviewed and physically examined Claimant and reviewed medical records. Dr. Orent noted Claimant had kidney cancer at a young age with no known risk factors other than his extensive exposure to carcinogens throughout his career as a firefighter. He concluded,

> It is quite clear that the overhaul activities while working for [Employer] created a substantial exposure that has repeatedly exposed him to carcinogens such as polycyclic aromatic hydrocarbons and a variety of other agents including fluorinated compounds, phosphine gases, asbestos dust, and other potential agents. It should be clear from a causality perspective, the carcinogen exposure is the only and primary and identifiable risk factor for this man's hypernephroma. This is not a case to me that leaves any question regarding causality for the reasons I have detailed above.

14. Claimant filed an Application for Hearing on April 20, 2018 endorsing the issues of compensability, medical benefits, authorized provider, reasonably necessary benefits and average weekly wage.

15. On May 15, 2018, Claimant's counsel filed a Worker's Claim for Compensation with the Division.

16. On January 21, 2019, Robert W. Watson, MD, MPH performed an IME at the request of Respondent. Dr. Watson reviewed medical records and interviewed and physically examined Claimant. Dr. Watson also discussed medical literature concerning risk factors for development of renal clear cell carcinoma. Dr. Watson opined that many of the medical studies addressing firefighting as a risk factor for causation were undermined by poor methodology, confounding variables, and inconsistencies. He further opined that medical studies on obesity as a risk factor for renal cell carcinoma were, on the other hand, unequivocal. Specifically, Dr. Watson noted that medical research supported the finding that those who were obese were approximately twice as likely to develop renal cell carcinoma, and that a dose-response relationship between obesity and renal cell carcinoma was evident from the studies. Dr. Watson concluded it was unlikely Claimant's cancer was associated with his work as a firefighter and opined Claimant's obesity was associated with the development of Claimant's cancer.

17. Dr. Watson testified at hearing as an expert in occupational medicine and epidemiology. Dr. Watson testified consistent with his IME report, finding fault with the conclusions contained in the various studies relied upon by Drs. Mayer and Orent. Dr. Watson acknowledged Claimant is in a high-risk profession for exposure to carcinogens, and that there are multiple risk factors for the development of cancer. He testified that he does not know if Claimant's obesity is the sole cause of his cancer, but opined that his obesity has the strongest association.

18. Dr. Mayer testified at hearing as an expert in occupational medicine. Dr. Mayer disagreed with Dr. Watson that Claimant's obesity was the more probable cause of his cancer, explaining that obesity was a relative,but not an absolute, risk for the development of kidney cancer. She continued to opine Claimant's obesity was not a greater risk than all of the carcinogenic exposure Claimant sustained throughout his career as a firefighter.

19. Dr. Orent testified at hearing as an expert in occupational medicine. Dr. Orent also testified consistent with his IME report. He explained that obesity constituted evidence of correlation but not causation. Dr. Orent continued to opine Claimant's cancer was caused by years of carcinogenic exposure in his work as a firefighter.

20. The ALJ finds the opinions of Drs. Mayer and Orent more credible and persuasive than the opinion of Dr. Watson.

21. The ALJ finds that Claimant's claim is not barred by the statute of limitations set forth in § 8-43-103(2), C.R.S.

22. The ALJ finds Claimant met the threshold requirements for a compensable occupational disease under § 8-41-209, C.R.S., and Respondent failed to prove by a preponderance of medical evidence Claimant's cancer did not arise out of his employment as a firefighter.

23. Claimant has proved by a preponderance of the evidence that Respondent is responsible for reasonable and necessary medical treatment related to his renal cell carcinoma, including the costs of his January 15, 2016 surgery.

24. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

Statute of Limitations

Section 8-43-103(2), C.R.S. provides that the right to workers' compensation benefits is barred unless a notice claiming compensation is filed with Division within two years after the injury. However, §8-43-103(2), C.R.S. also provides, in relevant part, that the limitation does not apply to:

> [a]ny claimant to whom compensation has been paid or if it is established to the satisfaction of the director within three years after the injury or death that a reasonable excuse exists for the failure to file such notice claiming compensation and if the employer's rights have not been prejudiced thereby, and the furnishing of medical, surgical, or hospital treatment by the employer shall not be considered payment of compensation of benefits within the meaning of this section…

The statute of limitations begins to run when the claimant, as a reasonable person, should have recognized the nature, seriousness, and probable compensable character of the industrial injury. *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967); *Intermountain Rubber Industries v. Valdez*, 688 P.2d 1133 (Colo. App. 1984).

Claimant recognized the nature, seriousness, and probable compensable character of the occupational disease when diagnosed in December 2015. However, upon undergoing surgery to treat his cancer, Respondent paid Claimant his full wages while he did not work during his recovery. These payments constituted compensation, as Claimant missed work due to undergoing treatment for an occupational disease, Respondent was aware of this, and continued to pay him his full, line of duty wages during such time period. *See Stauss v. Industrial Commission*, 355 P.2d 1076 (1960), citing Pacific Employers Insurance Co., et. Al. v. Industrial Commission et al., 127 Colo. 400, 257 P.2d. 404, 409 (holding that, in order for payment of wages during an absence from work to be compensation under the Act, it must be established by competent evidence or reasonable inferences that the employer was making the payments conscious of the fact he was making the same as compensation, and the employee must receive the payments with the knowledge or reasonable assumption the payments were being made as compensation for his injuries). Respondent concedes that the payment of full wages during Claimant's absence from work due to the nephrectomy was compensation. Payment of this compensation had the effect of tolling the statute of limitations for the period during which compensation was paid. Thus, the statute of limitations began to run in Claimant's case on March 15, 2016, when he returned to performing full duty work at full wages.

Claimant did not file an Application for Hearing or formal claim for benefits within the two-year statute of limitations. Claimant argues, in part, that the March 16, 2016 pleadings constitute an informal substitute of a claim. A timely filed notice of claim need not take any particular form. *Saxton v. King Soopers, Inc.*, W.C. No. 4-200-777 (March 11, 1997), citing Colorado Auto Body, Inc. v. Newton, 160 Colo. 113, 414 P.2d 480 (1966); Intermountain Rubber Industries, Inc. v. Valdez, 688 P.2d 1133 (Colo.App. 1984). However, an informal substitute for a claim must, at a minimum, identify the

claimant, indicate that a compensable injury has occurred, and convey the idea that the claimant expects compensation for the injury. *Martin v. Industrial Commission*, 608 P.2d 366 (Colo.App. 1980). The Panel has held that an employer's First Report of Injury and Notice of Contest are not substitutes for filing a workers' claim for compensation. *Packard v. City and County of Denver*, W.C. 4-925-466 (ICAO 12-4-18), *McGlothlen v. Karman, Inc.*, W.C. 4-937-396-01 (April 2, 2018).

The ALJ is not persuaded the March 16, 2016 documents are sufficient to constitute an informal substitute for a claim. While the documents identify the claimant and refer to an occupational disease of December 15, 2016, they do not clearly convey the idea Claimant expected compensation for the injury. Nonetheless, the ALJ is persuaded a reasonable excuse for Claimant's failure to timely file a claim exists based on the totality of the credible and persuasive evidence. Claimant believed there was actual notice of a claim based on his notification to Employer of the alleged work injury and subsequent written communication by his attorney on March 16, 2016. As of December 18, 2015, Respondent was aware of Claimant's diagnosis and his contention that his condition was work-related. Although a Notice of Contest was filed, Respondent then proceeded to pay Claimant his full line of duty wages during a two-month absence while recovering from surgery related to what had already been reported as an alleged work injury. Shortly after Claimant returned to full duty, several pleadings were filed, indicating Claimant may pursue a claim. Additionally, Respondent was sent Dr. Mayer's April 2017 IME report in which she opined Claimant's condition was due to his work exposure. Based on this sequence of events, the ALJ is persuaded it was reasonable for Claimant to not file a claim within the required two-year period. The ALJ is further persuaded Respondent was not prejudiced by Claimant's failure to timely file a claim, as Respondent was immediately made aware of Claimant condition and his contention the condition was work-related, Respondent paid Claimant compensation while he missed work due to what Respondent knew was an alleged work injury, and received documents indicating the potential pursuit of a claim. Claimant filed both an Application for Hearing and formal claim with the Division within three years of March 15, 2016. Accordingly, his claim is not barred by the statute of limitations.

Compensability

Section 8-41-209, C.R.S. provides:

> (1) Death, disability, or impairment of health of a firefighter of any physical subdivision who has completed five or more years of employment as a firefighter, caused by cancer of the brain, skin, digestive system, hematological system, or genitourinary system and resulting from his or her employment as a firefighter, shall be considered an occupational disease.
>
> (2) Any condition or impairment of health described in subsection (1) of this section:

(a) Shall be presumed to result from a firefighter's employment if, at the time of becoming a firefighter or thereafter, the firefighter underwent a physical examination that failed to reveal the substantial evidence of such condition or impairment of health that preexisted his or her employment as a firefighter.

(b) Shall not be deemed to result from the firefighter's employment if the firefighter's employer or insurer shows by a preponderance of the medical evidence that such condition or impairment did not occur on the job.

In *City of Littleton v. Industrial Claim Appeals Office*, 370 P.3d 157 (Colo. 2016), the Colorado Supreme Court held that the presumption section in 8-41-209(2)(a) relieves a firefighter of the burden to prove that his or her cancer resulted from his or her employment as a firefighter for purposes of establishing a compensable occupational disease under the Act. The Court reasoned, however, that the presumption is not irrebuttable and, if met, shifts the burden of persuasion to the employer to show by a preponderance of medical evidence that the firefighter's condition "did not occur on the job." *Id*. at 165. The Court further held that an employer can meet this burden by establishing, by a preponderance of medical evidence, either: (1) a firefighter's known or typical occupational exposures are not capable of causing the type of cancer at issue; or (2) the firefighter's employment did not cause the firefighter's particular cancer, i.e. the firefighter was not exposed to the substance or substances that are known to cause the firefighter's condition or impairment, or where the medical evidence renders it more probable that the cause of the claimant's condition or impairment was not job-related. *Id.* at 172.

As found, Claimant satisfied the threshold requirements of Section 8-41-209, C.R.S. Respondent failed to show, by a preponderance of medical evidence, Claimant's condition did not occur on the job. The opinions of Drs. Mayer and Orent were more credible and persuasive than the opinion of Dr. Watson. Drs. Mayer and Orent credibly and persuasively explained that firefighting can lead to substantial carcinogenic exposure, which can lead to an increased risk of kidney cancer. It is not disputed Claimant was exposed to carcinogens over the course of his approximately 20-year career as a firefighter. Respondent argues Claimant's obesity put him at a significantly increased risk for developing renal cell carcinoma, and is the more likely cause of his condition. The ALJ is not required to rank risk factors in the course of determining whether an employer has rebutted the statutory presumption under §8-41-209, C.R.S. *City of Boulder v. ICAO,* P.3d 2011 COA 93 (June 28, 2018). Each of the expert witnesses acknowledged that cancer is multifactorial, and there is no way to precisely determine the specific cause of Claimant's cancer. Although Claimant was considered obese, he was subject to over 19 years of work exposure to carcinogens that have been shown capable of causing Claimant's cancer. Based on the totality of the credible and

persuasive evidence, Respondents have failed to prove it is more likely than not Claimant's employment did not cause his renal cell carcinoma.

ORDER

It is therefore ordered that:

1. Claimant's claim is not barred by the statute of limitations provided in § 8-43-103(2), C.R.S.

2. Claimant has established by a preponderance of the evidence that his renal cell carcinoma is compensable under § 8-41-209, C.R.S.

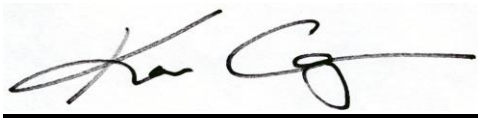
3. Respondent failed to establish by a preponderance of the evidence that Claimant's renal cell carcinoma did not occur on the job.

4. Respondent is liable for reasonable and necessary medical treatment related to Claimant's renal cell carcinoma, including his January 15, 2016 surgery.

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

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

DATED: May 2, 2019



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered compensable left shoulder injuries during the course and scope of his employment with Employer on August 4, 2018.

2. Whether Claimant has established by a preponderance of the evidence that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his August 4, 2018 industrial injuries.

STIPULATION

The parties agreed that Claimant's request for penalties against Employer for reporting violations under §§ 8-43-103 and 8-43-101(1), C.R.S. have been withdrawn with prejudice.

FINDINGS OF FACT

1. Claimant began working for Employer as a Flooring Installer in 2012. In mid-to-late July 2018 Installation Supervisor Greg Nicholson approached Claimant about performing work on a project in Steamboat Springs, Colorado. Mr. Nicholson specifically asked Claimant to perform moisture testing on concrete subflooring in a hospital MRI room to determine whether flooring could be applied over concrete. Employer informed Claimant that he could bring his friend Marcie and they could stay overnight. However, because Marcie did not want to take the trip, Claimant declined the project.

2. Approximately one week later Employer again approached Claimant about the Steamboat Springs project. After Employer permitted Claimant to drive his motorcycle to the site, Claimant agreed to perform the work. Claimant noted that his friend Dan Kler would be accompanying him on his own motorcycle. He remarked that he did not like to operate his motorcycle alone in the mountains.

3. Claimant explained that on Friday, August 3, 2018 he clocked in at Employer's shop in Aurora, Colorado and picked up some tools. He and Mr. Kler then drove west on I-70 and north towards Steamboat Springs.

4. Claimant detailed that he would clock in and out of jobs using his cell phone. He remarked that, when he had worked on mountain jobs in the past with Eric Peterson, they usually met and clocked in at Morrison, Colorado. Alternatively, if they met at Employer's shop, he would clock in there. Claimant explained that he never discussed his travel route to Steamboat Springs with Mr. Nicholson. However, he commented that he was not required to take a specified route because he was driving his motorcycle. He remarked that he would be compensated for his commute from

Morrison to Steamboat Springs as well as his return trip. Claimant would receive his regular hourly wage for commuting time and submit a travel reimbursement log for his mileage.

5. On Saturday, August 4, 2018 Claimant completed the moisture testing at the hospital in Steamboat Springs sometime in the latter part of the morning. Because he noticed storm clouds to the south and sought to avoid interstate driving, Claimant and Mr. Kler decided to travel north from Steamboat Springs towards Laramie, Wyoming. After getting to Laramie and heading east, Claimant planned to travel south on I-25 to his home in Dacono, Colorado. Claimant noted that he planned to clock out from work after traveling for three hours on the return trip.

6. At some location between Walden, Colorado and Laramie Claimant struck tar on the road and lost control of his motorcycle. He went off the road and crashed into an Aspen tree. Claimant noted that he clocked out from work shortly after the accident. His motorcycle was damaged and he injured his left shoulder area during the collision. Claimant contacted friends to transport him and the motorcycle back to Dacono.

7. Claimant visited the Indian Peaks Emergency & Urgent Care Center in Frederick, Colorado on the night of August 4, 2018. He explained that he hit a patch of black tar while coming around a corner on his motorcycle in Wyoming and went off the road. He struck his left shoulder and backside area on a tree.

8. On August 6, 2018 Claimant reported his accident and injuries to Mr. Nicholson. Claimant explained that he would be unable to work for the day. He did not specify that his injuries were related to his job duties for Employer.

9. Claimant testified that he did not call Mr. Nicholson to advise that he would be traveling home on a different route. He confirmed that it was his intention to ride north through Laramie, travel east, then head south through Fort Collins, Colorado and end at his home in Dacono. Claimant acknowledged that the route was longer in travel time and mileage than if he had returned through the Morrison exit. He specifically agreed that the return route involved an additional 45-50 miles of driving.

10. Claimant submitted a mileage reimbursement form regarding his trip to Steamboat Springs. He noted that his trip from the Morrison exit to Steamboat Springs was 178 miles. Although Claimant traveled a different route home, he requested identical reimbursement for 178 miles on the return trip because he did not want to bill Employer for the additional mileage to his home.

11. Claimant did not file a Workers' Claim for Compensation until October 29, 2018. He noted that he was involved in a motorcycle accident on August 4, 2018 on CO 127/WY 230 between Walden, Colorado and Laramie, Wyoming. On November 13, 2018 Respondents challenged the claim by filing a Notice of Contest. Respondents asserted that Claimant's injuries were not work-related.

12. On September 10, 2018 Claimant underwent left shoulder surgery through his personal health care provider George W. Chaus, M.D. Claimant continues to

receive medical treatment through Authorized Treating Physician (ATP) Roberta P. Anderson-Oeser, M.D. He suffers persistent left shoulder pain and weakness. Claimant has not reached Maximum Medical Improvement (MMI).

13. Mr. Nicholson testified at the hearing in this matter. He explained Employer's policy for clocking in and out for travel time and mileage. He noted that employee phones are equipped with an "app" and there is a geofence around the work area. For a mountain project, employees log in and out at designated locations. On August 3, 2018 Claimant clocked in at Employer's shop in Aurora and then drove to Steamboat Springs. Claimant worked on the project and clocked out for the evening. He then clocked back in on August 4, 2018 when he completed work on the project by reading tests and recording information. Employer then expected Claimant to leave Steamboat Springs to return home and clock out at the Morrison exit on I-70. Mr. Nicholson remarked that Claimant did not contact him about returning home through an alternate route from Steamboat Springs on August 4, 2018. He emphasized that Claimant was well aware that he was expected to clock out at the Morrison exit because he had followed the procedure about 1-2 months earlier when he completed a job in Steamboat Springs.

14. Employer's Executive Vice President and co-owner Eric Peterson testified at the hearing in this matter. He explained that Employer has created a geofencing system that is used for travel to job sites located outside of the Denver metropolitan area. The western boundary is located at I-70 and Morrison Road. Mr. Peterson remarked that Employer's travel policy provides that employees can clock in at the shop located in Aurora or at one of the outer boundaries. He explained that Employer created the geofencing system because it was having trouble with employees falsifying their time cards. With the ExakTime system on employees' phones, Employer can identify the location from which an employee is clocking in or out. Notably, Employer's Handbook specifies that employees are to clock in and out at the "Morrison exit."

15. President of Employer Corey Werner testified at the hearing in this matter. He explained that, when an employee is on the clock, his location is tracked through an ExacTime "app" on his phone. He noted that on August 4, 2018 the tracker revealed that Claimant left Steamboat Springs and went north to Walden towards Laramie. Claimant was in Wyoming at the time of his accident.

16. Claimant has demonstrated that it is more probably true than not that he suffered compensable injuries during the course and scope of his employment with Employer on August 4, 2018. Initially, after completing moisture testing for Employer at a facility in Steamboat Springs, Claimant noticed storm clouds to the south and sought to avoid interstate driving. Claimant thus decided to travel north towards Laramie. After reaching Laramie and heading east, Claimant planned to head south on I-25 to his home in Dacono, Colorado. However, Claimant hit a patch of black tar while coming around a corner on his motorcycle in Wyoming and went off the road. He suffered left shoulder injuries when he struck a tree.

17. Respondents assert that Claimant engaged in a substantial deviation from employment by failing to return home from Steamboat Springs on I-70 and clocking out at the Morrison exit. Claimant had taken the correct route to the Steamboat Springs project on August 3, 2018, but improperly failed to return through the same route. Respondents maintain that Employer's policy requires employees to return from mountain projects on I-70 and travel through Morrison. However, the totality of the circumstances reflect that the length and duration of Claimant's planned trip from Steamboat Springs into Wyoming and eventually to his home in Dacono did not attenuate the causal connection with his job duties to the extent that it exceeded the reasonable range of consequences contemplated by the employment contract.

18. The record reflects that Claimant was in travel status during his trip to and from Steamboat Springs. Travel was contemplated by Claimant's employment contract and constituted a substantial part of his service to Employer. Claimant's job duties for the Steamboat Springs project required him to travel to the site. The job specifically required Claimant to perform moisture testing on concrete subflooring in a hospital MRI room to determine whether flooring could be applied over concrete. The trip involved a round trip commute and Claimant was reimbursed for his total mileage. Claimant engaged in travel with the express consent of Employer and Employer received a special benefit from the travel. When Claimant accepted the job to travel beyond a fixed location to perform testing in Steamboat Springs the risks of travel became the risks of the employment.

19. Although Claimant was in travel status, the critical inquiry is whether he engaged in a substantial deviation that severed the causal connection with his employment. Employer's witnesses testified that there is a geofence around the Denver Metropolitan area that permits employees to clock in and out at designated locations. If an employee is traveling to the mountains for a project, he is expected to clock in and out at the I-70 and Morrison Road exit. However, the record reflects that the designated time tracking locations are designed to insure proper timekeeping and not to prescribe specific driving routes when employees perform jobs outside of the Denver Metropolitan area. Notably, Employer created the geofencing system because it was having trouble with employees falsifying their time cards. Although employees typically traveled on I-70 for mountain projects, the customary route did not establish a specific course.

20. Claimant's alternative route from Steamboat Springs to his home in Dacono constituted a reasonable, minor and insignificant deviation from the trip on I-70 through Morrison. Claimant credibly explained that, when leaving Steamboat Springs, he noticed storm clouds to the south and sought to avoid interstate driving. Claimant and Mr. Kler thus decided to travel north towards Laramie. After getting to Laramie and heading east, Claimant planned to drive south on I-25 to his home in Dacono. Although the route was somewhat farther than the trip east on I-70 to Morrison, Claimant noted that he planned to clock out from work after traveling for three hours. He also requested identical mileage reimbursement for his trips to and from Steamboat Springs. Claimant thus mitigated Employer's concerns about mileage and timekeeping. His route did not constitute such a deviation from the circumstances and conditions of his employment that he stepped aside from his job and was performing an activity for his sole benefit.

21. Claimant has demonstrated a nexus between his injuries and his employment duties for Employer. His route from Steamboat Springs and accident giving rise to his left shoulder injuries did not constitute a substantial deviation from his employment duties. Claimant had completed the Steamboat Springs project as requested and simply took a reasonable, alternate route while traveling home. He did not abdicate his job duties. Accordingly, Claimant's August 4, 2018 left shoulder area injuries occurred during the course and scope of his employment with Employer.

22. Claimant has demonstrated that it is more probably true than not that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his industrial injuries. As a result of his motor vehicle accident on August 4, 2018 Claimant suffered injuries to his left shoulder area and underwent surgery. Claimant continues to receive medical treatment through ATP Dr. Anderson-Oeser. He suffers persistent left shoulder pain and weakness. Claimant has not reached MMI. Accordingly, Claimant is entitled to reasonable and necessary medical treatment for his August 4, 2018 industrial injuries.

CONCLUSIONS OF LAW

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

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

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

Compensability

4. To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "time" limits of employment include a reasonable interval before and after working hours while the employee is on the employer's property. *In Re Eslinger v. Kit Carson Hospital,* W.C. No. 4-638-306 (ICAP, Jan. 10, 2006). The "place" limits of employment include parking lots controlled or operated by the employer that are considered part of employer's premises. *Id.*

5. Generally, injuries sustained by employees while they are traveling to or from work are not compensable because such travel is not considered the performance of services arising out of and in the course of employment. *Madden v. Mountain West Fabricators*, 977 P.2d 861, 863 (Colo. 1999). However, injuries incurred while traveling are compensable if "special circumstances" exist that demonstrate a nexus between the injuries and the employment. *Id.* at 864. In ascertaining whether "special circumstances" exist the following factors should be considered:

- Whether travel occurred during working hours;
- Whether travel occurred on or off the employer's premises;
- Whether travel was contemplated by the employment contract; and
- Whether obligations or conditions of employment created a "zone of special danger" out of which the injury arose.

Id. In considering whether travel is contemplated by the employment contract the critical inquiry is whether travel is a substantial part of service to the employer. *See id.* at 865.

6. "Special circumstances" may be found where the employment contract contemplates the employee's travel or the employer delineates the employee's travel for special treatment as an inducement. *See Staff Administrators Inc. v. Reynolds,* 977 P.2d 866, 868 (Colo. 1999). "Special circumstances" may also exist when the employee engages in travel with the express or implied consent of the employer and the employer receives a special benefit from the travel in addition to the employee's mere arrival at work. *See National Health Laboratories v. Industrial Claim Appeals Office,* 844 P.2d 1259, 1260 (Colo. App. 1992). The essence of the travel status exception is that when the employer requires the claimant to travel beyond a fixed location to perform his job duties the risks of the travel become the risks of the employment. *Breidenbach v. Black Diamond, Inc.,* W.C. No. 4-761-479 (ICAP, Dec. 30, 2009).

7. In considering whether travel was contemplated by the employment contract, case law reflects that the exception applies when a claimant is required by an employer to come to work in an automobile that is then used to perform job duties. The vehicle confers a benefit to the employer beyond the employee's mere arrival at work.

See Whale Communications v. Osborn, 759 P.2d 848 (Colo. App. 1988). As explained in 1 A. Larson, *Workmen's Compensation Law*, §17.50 (1985), "[t]he rationale for this exception is that the travel becomes a part of the job since it is a service to the employer to convey to the premises a major piece of equipment devoted to the employer's purposes. Such a requirement causes the job duties to extend beyond the workplace and makes the vehicle a mandatory part of the work environment."

8. There is no requirement under the Act that a claimant must be on the clock or performing an act "preparatory to employment" in order to satisfy the "course of employment" requirement. In re Broyles, W.C. No. 4-510-146 (ICAP, July 16, 2002). As noted in Ventura v. Albertson's, Inc., 856 P.2d 35, 38 (Colo. App. 1992):

> The employee, however, need not be engaged in the actual performance of work at the time of injury in order for the "course of employment" requirement to be satisfied. Injuries sustained by an employee while taking a break, or while leaving the premises, collecting pay, or in retrieving work clothes, tools, or other materials within a reasonable time after termination of a work shift are within the course of employment, since these are normal incidents of the employment relation.

9. The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). Nevertheless, the employee's activity need not constitute a strict duty of employment or confer a specific benefit on the employer if it is incidental to the conditions under which the employee typically performs the job. *In Re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). It is sufficient "if the injury arises out of a risk which is reasonably incidental to the conditions and circumstances of the particular employment." *Phillips Contracting, Inc. v. Hirst,* 905 P.2d 9, 12 (Colo. App. 1995). Incidental activities include those that are "devoid of any duty component, and are unrelated to any specific benefit to the employer." *In Re Rodriguez,* W.C. 4-705-673 (ICAP, Apr. 30, 2008). Whether a particular activity has some connection with the employee's job-related functions as to be "incidental" to the employment is dependent on whether the activity is a common, customary and accepted part of the employment as opposed to an isolated incident. *See Lori's Family Dining, Inc. v. Industrial Claim Appeals Office,* 907 P.2d 715 (Colo. App. 1995).

10. When the employer asserts a personal deviation from employment "the issue is whether the activity giving rise to the injury constituted a deviation from employment so substantial as to remove it from the employment relationship." *Roache v. Industrial Commission,* 729 P.2d 991 (Colo. App. 1986); *In Re Laroc,* W.C. 4-783-889 (ICAP, Feb. 1, 2010). If an employee substantially deviates from the mandatory or incidental duties of employment so that he is acting for his sole benefit at the time of injury, his claim is not compensable. *Kater v. Industrial Commission,* 729 P.2d 746 (Colo. App. 1986). The issue is thus whether the "claimant's conduct constitutes such a

deviation from the circumstances and conditions of the employment that the claimant stepped aside from his job and was performing an activity for his sole benefit." *In Re Laroc,* W.C. 4-783-889 (ICAP, Feb. 1, 2010); *see Panera Bread, LLC v. Industrial Claim Appeals Office,* 141 P.3d 970 (Colo. App. 2006). It is thus not essential that the activities of an employee emanate from an obligatory job function or result in a specific benefit to the employer for a claim to be compensable. *City of Boulder v. Streeb,* 706 P.2d 786 (Colo. 1985). Ministerial actions for an employee's personal comfort do not constitute a substantial deviation from employment unless the personal need being met or the means chosen by the employee to satisfy his personal comfort is unreasonable. *In Re Rodriguez,* W.C. 4-705-673 (ICAP, Apr. 30, 2008); *see Larson's Workers' Compensation Law,* §21.00. However, if an employee substantially deviates from the mandatory or incidental duties of employment so that he is acting for her sole benefit at the time of injury, his claim is not compensable. *Kater v. Industrial Commission,* 729 P.2d 746 (Colo. App. 1986). The question of whether a deviation is significant enough to remove the claimant from the course and scope of employment is a factual determination for the ALJ. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office,* 907 P.2d 715 (Colo. App. 1995).

11. As found, Claimant has demonstrated by a preponderance of the evidence that he suffered compensable injuries during the course and scope of his employment with Employer on August 4, 2018. Initially, after completing moisture testing for Employer at a facility in Steamboat Springs, Claimant noticed storm clouds to the south and sought to avoid interstate driving. Claimant thus decided to travel north towards Laramie. After reaching Laramie and heading east, Claimant planned to head south on I-25 to his home in Dacono, Colorado. However, Claimant hit a patch of black tar while coming around a corner on his motorcycle in Wyoming and went off the road. He suffered left shoulder injuries when he struck a tree.

12. As found, Respondents assert that Claimant engaged in a substantial deviation from employment by failing to return home from Steamboat Springs on I-70 and clocking out at the Morrison exit. Claimant had taken the correct route to the Steamboat Springs project on August 3, 2018, but improperly failed to return through the same route. Respondents maintain that Employer's policy requires employees to return from mountain projects on I-70 and travel through Morrison. However, the totality of the circumstances reflect that the length and duration of Claimant's planned trip from Steamboat Springs into Wyoming and eventually to his home in Dacono did not attenuate the causal connection with his job duties to the extent that it exceeded the reasonable range of consequences contemplated by the employment contract.

13. As found, the record reflects that Claimant was in travel status during his trip to and from Steamboat Springs. Travel was contemplated by Claimant's employment contract and constituted a substantial part of his service to Employer. Claimant's job duties for the Steamboat Springs project required him to travel to the site. The job specifically required Claimant to perform moisture testing on concrete subflooring in a hospital MRI room to determine whether flooring could be applied over concrete. The trip involved a round trip commute and Claimant was reimbursed for his total mileage. Claimant engaged in travel with the express consent of Employer and

Employer received a special benefit from the travel. When Claimant accepted the job to travel beyond a fixed location to perform testing in Steamboat Springs the risks of travel became the risks of the employment.

14. As found, although Claimant was in travel status, the critical inquiry is whether he engaged in a substantial deviation that severed the causal connection with his employment. Employer's witnesses testified that there is a geofence around the Denver Metropolitan area that permits employees to clock in and out at designated locations. If an employee is traveling to the mountains for a project, he is expected to clock in and out at the I-70 and Morrison Road exit. However, the record reflects that the designated time tracking locations are designed to insure proper timekeeping and not to prescribe specific driving routes when employees perform jobs outside of the Denver Metropolitan area. Notably, Employer created the geofencing system because it was having trouble with employees falsifying their time cards. Although employees typically traveled on I-70 for mountain projects, the customary route did not establish a specific course.

15. As found, Claimant's alternative route from Steamboat Springs to his home in Dacono constituted a reasonable, minor and insignificant deviation from the trip on I-70 through Morrison. Claimant credibly explained that, when leaving Steamboat Springs, he noticed storm clouds to the south and sought to avoid interstate driving. Claimant and Mr. Kler thus decided to travel north towards Laramie. After getting to Laramie and heading east, Claimant planned to drive south on I-25 to his home in Dacono. Although the route was somewhat farther than the trip east on I-70 to Morrison, Claimant noted that he planned to clock out from work after traveling for three hours. He also requested identical mileage reimbursement for his trips to and from Steamboat Springs. Claimant thus mitigated Employer's concerns about mileage and timekeeping. His route did not constitute such a deviation from the circumstances and conditions of his employment that he stepped aside from his job and was performing an activity for his sole benefit.

16. As found, Claimant has demonstrated a nexus between his injuries and his employment duties for Employer. His route from Steamboat Springs and accident giving rise to his left shoulder injuries did not constitute a substantial deviation from his employment duties. Claimant had completed the Steamboat Springs project as requested and simply took a reasonable, alternate route while traveling home. He did not abdicate his job duties. Accordingly, Claimant's August 4, 2018 left shoulder area injuries occurred during the course and scope of his employment with Employer. *See In Re Satterfield*, W.C. No. 5-069-072-001 (ICAP, Feb. 4, 2018) (where the claimant traveled from home office to dry cleaners and Office Depot Store to pick up binders for business presentation there was a sufficiently insubstantial deviation so that the trip remained part of the employment relationship); see also *In Re Rieks,* W.C. No. 4-921-644 (ICAP, Aug. 12, 2014) (where employer required the claimant to come to work in an automobile to attend appointments and meet with customers, transport of car was contemplated by the employment contract and the claimant's motor vehicle accident on the way to work occurred in the course of and arose out of his employment); *Norman v.*

Law Offices of Frank Moya, W.C. No. 4-919-557 ICAP, Apr. 23, 2014) (where attorney was required to use car to travel from work to courthouse and was injured in motor vehicle accident while she was driving to her first court appearance of the day, injuries were compensable because travel was contemplated by employment contract and conferred benefit to employer beyond mere arrival at work); *Lopez v. Labor Ready,* W.C. 4-538-791 (ICAP, Sept. 26, 2003) (where the claimant's job required her to spend large parts of her day in her personal vehicle and she was injured in a motor vehicle accident while driving home for lunch, claim was compensable because it conferred a benefit to the employer beyond the claimant's mere arrival at work). *Compare In Re Hall,* W.C. No. 4-689-120 (ICAP, Nov. 7, 2007).(where the claimant had a motor vehicle accident while driving to transport inmates to work in exchange for payment from the inmates and the employer was not involved in the agreement, the claimant's activities were not contemplated by the employment contract).

Medical Benefits

17. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In Re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

18. Section 8-42-101(1), C.R.S. requires the employer to provide medical benefits to cure or relieve the effects of the industrial injury, subject to the right to contest the reasonableness or necessity of any specific treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). The employer's obligation continues until the claimant reaches MMI. MMI is defined as the point in time when the claimant's condition is "stable and no further treatment is reasonably expected to improve the condition." §8-40-201(11.5), C.R.S.

19. As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his industrial injuries. As a result of his motor vehicle accident on August 4, 2018 Claimant suffered injuries to his left shoulder area and underwent surgery. Claimant continues to receive medical treatment through ATP Dr. Anderson-Oeser. He suffers persistent left shoulder pain and weakness. Claimant has not reached MMI. Accordingly, Claimant is entitled to reasonable and necessary medical treatment for his August 4, 2018 industrial injuries.

ORDER

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

1. Claimant suffered compensable Workers' Compensation injuries to his left shoulder area on August 4, 2018 during the course and scope of his employment with Employer.

2. Claimant shall receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his industrial injuries.

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

DATED: May 2, 2019.

DIGITAL SIGNATURE.

Peter J. Cannici

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

ISSUES

- Did Claimant meet her burden of proof to show the proposed surgery for her left knee is reasonable and necessary and related to the industrial injury?

FINDINGS OF FACT

1. Claimant has been employed as a salesperson for Employer since 2013.

2. Claimant's medical history was significant in that she previously injured her left knee at work on August 29, 2012.

3. On September 19, 2012, Claimant underwent an MRI of her left knee. The MRI revealed tricompartmental degenerative changes, with small tears of the medial and lateral meniscus.[1]

4. On October 15, 2012, Dr. Motz performed a medical meniscetomy and debridement on Claimant's left knee. Claimant testified she underwent one, possibly two arthroscopic procedures during this time.[2] A post-surgery MRI done on April 15, 2013 showed degenerative changes, with tears in the medial meniscus noted above.

5. On October 3, 2013, Claimant was evaluated by John Burris, M.D. At the time, she reported 5/10 pain in the knee, as well as locking, catching and the knee giving out. On examination, Dr. Burris noted the surgical scars were well-healed, with no unusual swelling, or tenderness. There was no ligamentous laxity to varus or valgus stress. Dr. Burris' diagnosis was: left knee meniscal tear. Although additional treatment was recommended, Claimant declined further treatment and Dr. Burris assigned a 13% lower extremity rating. The impairment rating included an 8% impairment for range of motion ("ROM") loss and 5% impairment assigned for the meniscal tears. Dr. Burris issued permanent work restrictions, which specified limiting kneeling and squatting to less than 33% of the time. There was no evidence this work restriction was ever lifted.

6. On April 14, 2014, Claimant was examined by Wayne Gersoff, M.D. at Advanced Orthopedic for continued pain and discomfort in the left knee. Dr. Gersoff stated Claimant never felt better after the October 2012 surgery. Dr. Gersoff noted a small joint effusion, along with medial and lateral joint line tenderness. Dr. Gersoff's assessment was: left knee pain, secondary to possible recurrent meniscal pathology and he recommended an MRI.

[1] The MRI report was not admitted into evidence, but was referenced in the report prepared by Dr. Burris.

[2] In an evaluation of the left hip done by orthopedic surgeon, Brian Larkin, M.D. on May 3, 2013, Claimant was noted to have undergone three left knee arthroscopies.

7. Claimant underwent an MRI on April 14, 2014, which was read by Andrew Sonin, M.D. The indication for the MRI was chronic left knee pain for a year, including locking and clicking. Dr. Sonin's impression was: interval medial meniscal resection since September 19, 2012, with no recurrent tear and almost no residual tissue remaining; interval resection of the free edge of the lateral meniscus since 2012, with no recurrent tear; degenerative change in the patellofemoral interval without much interval change since 2012; distal patellar tendinopathy without tear; small joint effusion, no loose body. The ALJ found this MRI showed pathology referable to the April 1, 2017 injury.

8. There was no evidence in the record Claimant required treatment from mid-April 2014 until April 1, 2017. Claimant testified she was not examined by any doctor during this period of time and was able to work and had no limitations.

9. On April 1, 2017, Claimant sustained an admitted industrial injury while working for Employer. She was driving a customer's car to be washed and thought she had put it in park. Claimant testified she tried to get back in but the vehicle rolled back and ran over her left leg.

10. Claimant was transported by ambulance to Swedish Hospital. The ambulance report noted left knee showed multiple small abrasions that looked like tire marks, redness, but no bleeding and a hematoma was beginning to form. X-rays were taken of Claimant's left knee at Swedish. In the emergency room, Claimant was evaluated by Suzanne Smith Chilton, M.D., who noted tenderness on the lateral aspect of the left knee, with multiple superficial abrasions to the lateral aspect of the left knee and thigh. Dr. Chilton found there was nothing to suggest fracture, dislocation, NV compromise or compartment syndrome. The x-ray results were reported as negative.

11. On April 7, 2017, Claimant was evaluated by Mary Zickefoose, M.D. at HeathOne Carenow Urgent Care. At that time, she was complaining of constant left leg pain since the injury, which occurred six days prior and said her knee felt unstable. Dr. Zickefoose noted Claimant's left knee was swollen, her right middle finger and fourth finger were also swollen. Dr. Zickefoose's diagnoses included: crushing injury of left knee, initial encounter; crushing injury of left lower leg, initial encounter; pain in right hip. An MRI was ordered because of instability in the left knee.

12. The MRI was performed on April 19, 2017. Charles Wennogle, M.D. reviewed the films and identified the following: nondisplaced fracture of the lateral tibia at the proximal tibiofibular articulation, with associated marrow edema; essentially absent medial meniscus, likely surgical; full-thickness articular defect of the superior aspect of the patella, including the patellar apex, lateral and medial facet; thickening of the patellar tendon likely represents prior injury; edema in the retroquadriceps fat pad likely indicates mild impingement; mild thinning of the articular cartilage overlying the medical femoral condyle, with osteophyte formation, consistent with osteoarthritis;

complex tear anterior horn lateral meniscus with small tear at the inner free edge margin of the body of the lateral meniscus, as described.

13. Claimant returned to Dr. Zickefoose on April 21, 2017, after the MRI. She was diagnosed with a nondisplaced fracture of the lateral condyle of the left tibia and torn lateral meniscus. Dr. Zickefoose prescribed Cyclobenzaprine and referred Claimant to Dr. Gersoff.

14. On April 26, 2017, Claimant was evaluated by James Ferrari, M.D. at Advanced Orthopedic, at which time Claimant described her symptoms as moderate-severe. X-rays were ordered. Dr. Gersoff evaluated Claimant on May 1, 2017 and noted decreased strength in the left knee, as well as decreased passive ROM. Ecchymosis and effusion were present in the left knee. Dr. Gersoff's assessment was: unilateral primary osteoarthritis and he recommended another course of viscosupplementation. In his review of the MRI, Dr. Gersoff noted Claimant had degenerative joint disease, which had been ongoing. He believed that the present accident probably exacerbated her pre-existing condition of osteoarthritis. The Synvisc injection was administered on May 8, 2017.

15. Claimant was evaluated by Dr. Zickefoose on May 8, 2017 and reported her knee symptoms were not getting better. Claimant also reported increased right hip and lower back pain since lying down for the MRIs. Dr. Zickefoose found left knee swelling and prescribed Naproxen and a Medrol pack. Claimant received no work restrictions. When she returned to Dr. Zickefoose on May 23, 2017, Claimant reported her knee gave out the week before and she was still experiencing knee pain. Dr. Zickefoose's diagnoses remained the same and she prescribed Ambien for Claimant. Dr. Zickefoose concluded Claimant could continue to work without restrictions.

16. The focus of Dr. Zickefoose's evaluation on June 7, 2017 was primarily the low back and left hip, with a referral for an evaluation of the left hip given on July 14, 2017. Claimant reported no long-lasting relief of pain in the left knee, which was said to be stable and improved by Dr. Zickefoose.

17. Claimant returned to Dr. Gersoff on July 21, 2017, after having a Synvisc injection. At this time, Claimant described her knee symptoms as chronic, non-traumatic, but continuous and worsening. Dr. Gersoff stated the Visco supplementation was not helpful. Dr. Gersoff opined that the degenerative joint disease in Claimant's knee joint was made worse by the accident and this accelerated the need for her to consider joint arthroplasty surgery. Dr. Gersoff referred Claimant to his colleague for an evaluation for a knee replacement.

18. Claimant returned to Dr. Zickefoose on August 10, 2017. At that examination, Claimant's left knee was found to be swollen laterally extending down into the calf. On September 13, 2017, Dr. Zickefoose indicated she was going to follow-up with Dr. Gersoff to see whether a request for partial or total knee replacement was made. At both appointments, Claimant's lumbar spine and hip were also addressed. Dr. Zickefoose had maintained Claimant on full duty status, but found she was unable to

work from September 13 through September 22, 2017. In the months of October through December 2017, the focus of Dr. Zickefoose's evaluations was not on Claimant's knee, but rather the low back and hip. Dr. Zickefoose noted Claimant continued to experience a left knee pain during this time and reported it during those evaluations.

19. Claimant was evaluated for a second opinion by R. P. Swann, M.D. at Advanced Orthopedic on January 11, 2018. She was complaining of pain, stiffness and instability on the left side. Dr. Swann noted decreased ROM on flexion and extension. Dr. Swann's impression was: Claimant had global pain, but only mild medial DJD. He showed her the data that she would not do well with a TKA. He said he would talk to Dr. Gersoff about scoping the lateral compartment and if Claimant had medial-sided symptoms, after that a UKA could be performed.

20. A Rule 16 medical causation review, dated January 22, 2018, prepared by Douglas Scott, M.D. was admitted into evidence. Dr. Scott opined Insurer should deny authorization for the requested left knee surgery because it was not reasonable, necessary, related to or indicated to treat the effects of the April 1, 2017 injury. Dr. Scott's opinion was based on the fact that Claimant did not injure her left knee medial meniscus and there was evidence of a prior medial meniscus excision in 2012. Dr. Scott noted that the left knee injury included abrasions, bruising and a bony contusion, without injury to her medial joint compartment. The MRI confirmed that the medial meniscus was completely absent and Claimant had ongoing degenerative joint disease in the left knee. Dr. Scott also noted Dr. Gersoff indicated Claimant never felt better after her surgery and continued to have pain/discomfort. Dr. Scott concluded that there was no evidence of acute structural injury to the medial joint of the left knee from diagnostic testing.

21. A request for authorization of left knee MM surgery was sent by Dr. Gersoff's office on February 15, 2018. The ALJ inferred the reference to MM was to medial meniscectomy and that this was an error, as it was the lateral meniscus which was the focus of the proposed surgery.

22. A denial of the request for a left knee medial meniscectomy was sent by Insurer on or about February 23, 2018.

23. Claimant returned to Dr. Gersoff on April 6, 2018 and she described her left knee pain as constant, with moderate symptoms. At that time, Dr. Gersoff administered a cortisone injection.

24. On June 7, 2018, Dr. Zickefoose evaluated Claimant and noted an increase in pain, as well as swelling in the left leg. Claimant was noted to be missing more time from work. The diagnoses were: complex tear of lateral meniscus, left knee-worsening; low back pain-worsening; pain in right hip-worsening.

25. Claimant returned to Dr. Zickefoose on July 23, 2018, complaining about continued knee pain. The diagnoses were the same as the June 7, 2018 appointment.

Dr. Zickefoose made a call to Dr. Gersoff's office to see if a formal request was made for the knee surgery. Claimant's work restrictions were continued.

26. Claimant was evaluated by Dr. Gersoff on September 7, 2018. Her left knee symptoms were said to occur constantly. Dr. Gersoff's impression was that the majority of Claimant's pain and discomfort, as well as functional disability was over the lateral aspect of her knee joints. Dr. Gersoff opined that the complex tearing of the anterior horn and anterior body of the lateral meniscus was directly related to her accident and this was directly related to her pain, discomfort and disability she experienced. The ALJ credited the opinion that the accident caused the tearing in the anterior horn and anterior body of the lateral meniscus Dr. Gersoff said Claimant's prior medial meniscectomy in the past was not a significant source of pain and discomfort.

27. Dr. Zickefoose performed a re-check of Claimant's left knee on October 17, 2018, at which time it was noted Claimant was having trouble getting up and down from a chair because of increased pain in the knee. Dr. Zickefoose's diagnoses were: complex tear of lateral meniscus, left knee-stable/improved; low back pain-stable/improved; pain in right hip-stable/improved. Claimant's prescriptions were re-filled and she was advised to work as tolerated.

28. Dr. Gersoff's office forwarded an authorization request to Respondents, dated October 18, 2018, with accompanying records seeking authorization for surgery a partial lateral menisectomy on Claimant's lateral meniscus.

29. A letter, dated October 29, 2018 was sent on behalf of Respondents pursuant to W.C.R.P. 16 that declined authorization for the surgery, pending an IME.[3]

30. Dr. Gersoff evaluated Claimant on November 5, 2018 and the symptoms of pain and swelling were described as occurring constantly. Dr. Gersoff's assessment was: derangement of unsp. lateral meniscus due to old tear/inj., left knee.

31. On November 7, 2018, Claimant was evaluated by Dr. Zickefoose, who noted symptoms of continued knee pain. Claimant reported her left knee was drained of 35 cc. of fluid on Monday by Dr. Gersoff. They were awaiting the decision on surgery for the left knee and an IME was being scheduled, which Dr. Zickefoose thought was too long for Claimant to wait. Dr. Zickefoose stated the condition of Claimant's left knee was worsening and ordered a repeat MRI.

32. On November 13, 2018, Claimant underwent an MRI of the left knee and the films were read by Dr. Sonin. Dr. Sonin was the radiologist who read the films for the MRI taken in 2014. Dr. Sonin's impression was: previous medical meniscectomy, with increasing chondromalacia in the medial compartment, but no loose body; joint effusion and small leaking Baker's cyst; small nondisplaced anterior horn tear of the lateral meniscus that may be new in the interval. The ALJ found the anterior horn tear was not present in the 2017 MRI.

[3] Exhibit H.

33. On January 4, 2019, an independent medical examination was performed by John Schwappach, M.D. on behalf of Respondents. Dr. Schwappach said the MRI demonstrated a complex tear in the anterior horn and lateral body of the lateral meniscus, a nondisplaced fracture of the lateral tibia and osteoarthritis. Claimant was treated by Dr. Gersoff. Claimant was diagnosed with left knee osteoarthritis by Dr. Ferrari and Swann. In his review of the treatment records, Dr. Schwappach noted Claimant had not tried physical therapy ("PT") and typically did not take any pain medication for her left knee. Her pain was on the lateral portion of the left knee and the left knee joint with flexion.

34. On examination, Claimant's left knee was stable, Dr. Schwappach found no tenderness to palpation and 100° of active ROM on flexion. There was full ROM on extension. Patellofemoral joint crepitus was positive on the left, not on the right. Dr. Schwappach concluded Claimant's complaints were consistent with a degenerative process in her left knee. He noted the requested transarthroscopic partial lateral meniscectomy of the left knee did not to follow the DOWC MTG guidelines. Where there was moderate to advanced osteoarthritis arthritis, there was no benefit to perform arthroscopic surgery for degenerative tears. Further, where Claimant had not tried PT and various injections provided no relief, surgery was not indicated. The concern about performing surgery where osteoarthritis was present was persuasive to the ALJ.

35. On January 9, 2019, Claimant returned to Dr. Zickefoose, at which time she was reporting pain 8/10. Claimant had an antalgic gait, favoring the left lower extremity. Dr. Zickefoose's diagnoses included: complex tear of the lateral meniscus, current injury, left knee; low back pain. Dr. Zickefoose opined the back surgery was being delayed unnecessarily, as no IME was ever ordered for her back. Her left knee IME had nothing to with her back. The plan was to try to manage Claimant's pain. In the M-164, MMI was said to be unknown.

36. Claimant testified her knee is very painful and swells constantly. She wanted to have the surgery.

37. Dr. Schwappach testified as an expert in orthopedic surgery at hearing. He is Level II accredited, pursuant to the W.C.R.P. He opined the recommended surgery was not appropriate, reasonable or necessary to provide relief for left knee pain under both Claimant's clinical presentation and the DOWC Medical Treatment Guidelines. Dr. Schwappach stated Claimant had not received PT to address the underlying condition in her left knee, which was recommended. He also did not believe Claimant would benefit from the surgery. The C-LJ credited Dr. Schwappach's opinion that surgery was not indicated where Claimant had not completed a course of PT.

38. Dr. Schwappach noted that the natural progression of Claimant's osteoarthritis was likely the result of the documented varus alignment in her knee along with the several prior surgeries she underwent, as opposed to the incident of April 1, 2017. Dr. Schwappach testified that some of Claimant's treatment, including the

Synvisc injections and draining of her knee, was for the osteoarthritis condition, not the April 1, 2017 injury. This was because meniscal tears typically do not cause edema.

39. On cross-examination, Dr. Schwappach agreed that the MRI done in April 2017 after the injury showed evidence edema and small tear of the lateral meniscus. These were not present in the 2014 MRI. Dr. Schwappach also testified there was no treatment for the left knee from April 14, 2014 to April1, 2017.

40. Dr. Schwappach issued a supplemental report on March 8, 2019, after reviewing the November 13, 2018 MRI report, which was not available at the time of his evaluation or testimony. Dr. Schwappach stated this study confirmed a nondisplaced anterior horn tear of the lateral meniscus, which appeared to be new when compared to the April 19, 2017 study. A leaking Baker's cyst and evidence of the prior medial meniscectomy were also identified, along with increased chondral loss indicating advanced osteoarthritis.

41. Dr. Schwappach noted Claimant had underlying advanced osteoarthritis, as diagnosed by Drs. Gersoff, Ferrari and Swann, which was confirmed by the November 13, 2018 MRI scan. He reiterated his opinion that isolated, nondisplaced anterior horn meniscal tears of the lateral meniscus rarely benefit from surgical treatment and the Claimant did not have complaints on the anterior lateral aspect of her left knee. Further, Claimant had not completed physical therapy of the left knee and Dr. Schwappach opined the proposed transarthroscopic partial lateral meniscectomy is not indicated under the DOWC MTG. The ALJ credited this opinion, as the fact that Claimant had not received PT and other conservative modalities of treatment.

42. Dr. Gersoff issued a supplemental report in connection with an evaluation that occurred on March 11, 2019. He noted Claimant was diagnosed as having a lateral meniscus tear and he recommended arthroscopic surgery. Dr. Gersoff stated the treatment plan was based on multiple visitations with her in which the location of her symptoms and pain were discussed. He reviewed the radiographic studies, as well as the MRIs, in addition to his evaluations of Claimant. The ALJ noted Dr. Gersoff had the benefit of evaluating Claimant on multiple occasions, including after the surgery in 2014 and his opinion on causation was persuasive.

43. Dr. Gersoff said that while Claimant had previous work done on the meniscus and was developing arthritis in compartment of her knee joints, it was also very apparent that she had damage to the lateral meniscus as a result of her work-related injury. He said Claimant consistently complained of mostly anterior lateral knee joint pain, which was consistent with the MRI findings. Dr. Gersoff opined that the arthroscopy and partial meniscectomy would help improve the symptoms of her lateral knee joint. This would not change the condition of her medial joint where there was some early osteoarthritic changes. The ALJ noted that Dr. Gersoff focused on the location of Claimant's symptoms and that the procedure would provide symptom relief. He did not provide an opinion on the DOWC MTG, the possible contraindications of the procedure, including acceleration of osteoarthritis.

44. Claimant proved that the condition of her left knee was aggravated by the April 1, 2017 admitted industrial injury.

45. Claimant failed to prove the proposed surgery was reasonable and necessary at this time.

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

CONCLUSIONS OF LAW

Generally

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

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. (2016). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

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

Medical Benefits

The instant case pits two expert opinions which are at contretemps-those of Dr. Gersoff and Dr. Schwappach. Claimant argued the left knee surgery recommended by Dr. Gersoff is reasonable, necessary, and related to Claimant's April 1, 2017 industrial injury. Claimant pointed to the fact she was able to work full time in the sales position, without any evidence in the medical records that the developing osteoarthritis in her left knee limited her activities. Claimant correctly pointed out there was no evidence Claimant required treatment for her left knee from April 2014 until the industrial injury. Claimant argued Respondents were responsible for providing medical benefits to Claimant because the April 1, 2017 caused the documented meniscal tear on the lateral side and this condition required surgery.

Respondents averred Claimant failed to prove a causal nexus between her workplace injury and the claimed need for a left lateral meniscectomy. In addition, Respondents contended the requested surgery was not recommended under the DOWC Medical Treatment Guidelines, relying upon the testimony and reports of Dr. Schwappach. Respondents also argued that Dr. Gersoff did not address whether this procedure was appropriate under the DOWC MTG.

As a starting point, Claimant suffered a previous injury to her left knee for which she underwent at least two surgical procedures. (Findings of Fact 2-3). This injury resulted in a permanent medical impairment and permanent work restrictions. (Finding of Fact 5). It was undisputed Claimant has developed osteoarthritis in her left knee. (Findings of Fact 3-4, 12, 15, 17, 33-34). This was borne out the medical evidence, including the MRIs, which were done in 2017 and 2018. However, this condition did not prevent Claimant from working, as she testified. (Finding of Fact 8). Also, there was no evidence in the records Claimant required treatment for three years. *Id.*

Based upon the totality of the evidence, the ALJ found Claimant did not meet her burden of proof as to the proposed surgery. The ALJ credited the opinions offered by Dr. Schwappach, who opined that the proposed arthroscopic surgery was not reasonable and necessary. As found, Claimant had not received PT and participated in active exercise and the like. (Findings of Fact 33-34). Dr. Schwappach testified the surgery was not reasonable and necessary where Claimant had not completed physical therapy. (Finding of Fact 37). Dr. Schwappach also questioned whether arthroscopy would provide a benefit in this case, which was persuasive to the ALJ. It was on this basis that the Court determined Claimant failed to meet her burden of proof.

When coming to this conclusion, the ALJ closely reviewed Dr. Gersoff's opinion. As found, Dr. Gersoff treated Claimant both prior to and for this injury. (Finding of Fact 42). Dr. Gersoff had the benefit as an ATP of reviewing the radiographs and MRI scans on the left knee. (Finding of Fact 42). More particularly, Dr. Gersoff offered his opinion that Claimant's symptoms were coming from the lateral side, which she had consistently reported that while he treated her. The ALJ credited Dr. Gersoff's opinion on causation, name that the April 1, 2017 injury aggravated the underlying osteoarthritis. (Finding of Fact 44). As determined in Finding of Fact 26, 42-43, the ALJ was not persuaded by Dr. Gersoff's surgery recommendation. In his most recent report, Dr. Gersoff opined the proposed procedure would relieve Claimant's symptoms, but did not address the lack of PT. The ALJ determined that Dr. Gersoff also did not specifically address whether the procedure would provide a benefit where this level of osteoarthritis was present, a concern raised by Dr. Schwappach. (Finding of Fact 43).

A review of the DOWC MTG applicable to this issue also supports the conclusion that the proposed surgery is not reasonable and necessary. The DOWC MTG general principles section provides guidance when surgical intervention should be considered for a knee injury. These sections suggest that Claimant should first receive conservative treatment, including PT and active exercise before surgery is considered:

B. GENERAL GUIDELINES PRINCIPLES

….

5. ACTIVE INTERVENTIONS: Emphasizing patient responsibility, such as therapeutic exercise and/or functional treatment, is generally emphasized over passive modalities, especially as treatment progresses. Generally, passive interventions facilitate progress in an active rehabilitation program with concomitant attainment of objective functional gains.

6. ACTIVE THERAPEUTIC EXERCISE PROGRAM: Goals should incorporate patient strength, endurance, flexibility, coordination, and education. This includes functional application in vocational or community settings.

…

9. SURGICAL INTERVENTIONS: Surgical interventions should be contemplated within the context of expected functional outcome and not purely for the purpose of pain relief. The concept of "cure" with respect to surgical treatment by itself is generally a misnomer. All operative interventions must be based upon positive correlation of clinical findings, clinical course, and diagnostic tests. A comprehensive assimilation of these factors must lead to a specific diagnosis with positive identification of pathologic condition(s)."[4]

More particularly, the DOWC MTG addresses treatment protocols for meniscal injuries:

f. Meniscus Injury:

….

v. Non-operative Treatment: Lower Extremity Injury Exhibit Page Number 91

A) Initial Treatment: ice, bracing, and protected weight-bearing.

B) Patient education should include instruction in self-management techniques, ergonomics, body mechanics, home exercise, joint protection, and weight management.

C) Medications such as analgesics and anti-inflammatories may be helpful. Refer to medication discussions in Section F.7, Medications and Medical Management.

D) Benefits may be achieved through therapeutic rehabilitation and rehabilitation interventions. They should include range-of-motion (ROM), active therapies, and a home exercise program. Active therapies include proprioception training, restoring normal joint mechanics, and clearing dysfunctions from distal and proximal structures. Passive as well as active therapies may be used to control

[4] Rule 17, Exhibit 6, p. 2-3.

pain and swelling. Therapy should progress to strengthening and an independent home exercise program targeted to further improve ROM, strength, and normal joint mechanics influenced by structures distal and proximal to the knee. Refer to Section F. Therapeutic Procedures, Non-operative.[5]

E) Return to work with appropriate restrictions should be considered early in the course of treatment

…

G) Surgical Indications/Considerations:

1) Locked or blocked knee precluding active therapy;

2) Isolated acute meniscus tear with appropriate physical exam findings;

3) Isolated degenerative meniscal tear is not an indication without locking or other major functional symptoms.

Multiple studies note increased osteoarthritis in knees with menisectomy, with a greater incidence in patients who have had a total menisectomy, allograft, lateral menisectomy, or degenerative tear.

There is some evidence that, in patients with degenerative tears of the medial meniscus, a conservative treatment plan may yield substantial functional and symptomatic benefits similar to arthroscopic meniscectomy when measured 2 years after the beginning of treatment. The conservative treatment plan must include both supervised physical therapy and a home exercise program.

…

There is good evidence that, in the initial management of knee OA with a torn meniscus, it is reasonable to start with nonoperative physical therapy. There is also good evidence that about 30% of patients may not respond to PT alone. The appropriate treatment changes for the patients who do not do well with PT are not evident from the study, since little is known about what accounts for their lack of benefit from the PT program."[6]

The DOWC MTG specifically reference the need for conservative treatment, such as PT and active exercise, which Claimant has not had. The DOWC MTG also suggest conservative treatment may increase function and help alleviate symptoms. In summary, the ALJ was not persuaded the surgery proposed for Claimant's left knee

[5] The ALJ notes that Section 2. KNEE a. Aggravated Osteoarthritis (OA), which covers treatment aggravated osteoarthritis in the knee also suggests the use of non-operative treatments, including therapeutic rehabilitation and rehabilitation interventions, manipulation/manual therapy and acupuncture. [DOWC MTG Rule 17, Exhibit 6, p. 67].

[6] Rule 17, Exhibit 6, p. 92.

was reasonable and necessary. The ALJ has denied this request for surgery based upon the evidence before the Court at this time. The ALJ makes no determination whether Claimant may require this procedure or another surgical procedure on her left knee in the future.

ORDER

It is therefore ordered:

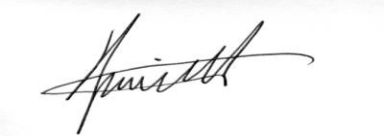
1. Claimant failed to meet her burden to show the proposed surgery is reasonable and necessary. The request for left knee lateral arthroscopy is denied and dismissed without prejudice.

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

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

DATED: May 2, 2019

STATE OF COLORADO



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

ISSUES

- Whether the claimant has demonstrated by a preponderance of the evidence that the L3-L4 and L4-L5 laminectomy with facet and femoral decompression surgery recommended by Dr. Douglas Orndorff is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted September 5, 2017 work injury.

FINDINGS OF FACT

1. The claimant suffered an admitted work injury on September 5, 2017. The claimant testified that on the date of his injury he was working as a laborer laying asphalt. The claimant's specific job task was to move the poured asphalt with a large rake. While raking the asphalt, the claimant felt a pop in his back followed by immediate pain.

2. The claimant reported the incident to his supervisor and he was sent by the employer for medical treatment at Southwest Walk-In Care. On September 5, 2017, the claimant was first seen at Southwest Walk-In Care and treated with Dr. Leslie Stanwix. Thereafter, Dr. Stanwix became the claimant's authorized treating physician (ATP) for this claim.

3. In the medical report dated September 5, 2017, Dr. Stanwix diagnosed lumbar radiculopathy and recommended x-rays, rest, and medication. In addition, Dr. Stanwix determined that the claimant was unable to work from September 9, 2017 through September 12, 2017. Dr. Stanwix also referred the claimant for physical therapy treatment with Southwest Memorial Hospital Physical Therapy.

4. While treating at Southwest Walk-In Care on September 5, 2017, x-rays of the claimant's lumbar spine showed no acute post traumatic sequelae and very mild degenerative changes of the lumbar spine.

5. On September 8, 2017, the claimant had his first physical therapy session at Southwest Memorial Hospital Physical Therapy.

6. On September 12, 2017, the claimant returned to Dr. Stanwix and reported that he was "getting better with [physical therapy] and hot baths." On that date, Dr. Stanwix released the claimant to return to work with work restrictions. Those work restrictions included no lifting, carrying, pushing, or pulling over 40 pounds.

7. On September 12, 2017, the claimant returned to physical therapy and reported that he was "having significantly less back pain". The claimant also reported that he was returning to work on September 13, 2017. The claimant did not pursue additional physical therapy treatment after September 12, 2017.

8. The claimant testified that despite his statements to his medical providers his symptoms had not improved and he continued to have back pain in September 2017. The claimant testified that he told Dr. Stanwix and the physical therapist that he had improved because he needed to get back to work. The claimant also testified that he stopped physical therapy treatment in September 2017 after two treatments because the physical therapy caused an increase in his low back pain. The ALJ has considered this testimony and does not find it credible or persuasive.

9. The claimant returned to work for the employer on September 13, 2017. The claimant testified that after he had worked approximately half of the day on September 13, 2017, he was informed that his employment was ending. The claimant also testified that he was told that the employer no longer needed him.

10. Approximately one week after his employment with the employer ended, the claimant found work operating a back hoe for his friend three to four days per week. The claimant testified that he performed that back hoe related work for one month.

11. The claimant testified that he continued to have pain and sought treatment with Dr. Stanwix. The claimant returned to Dr. Stanwix on November 1, 2017. On that date, the claimant reported that his pain had returned and that he was having low back pain that caused lightning-type sensations and pain that radiated into his legs and caused numbness. On that date, Dr. Stanwix referred the claimant to Dr. David Silva for consultation.

12. The claimant was first by Dr. Silva on December 13, 2017. At that time, the claimant described the September 5, 2017 raking incident. In addition, the claimant reported that he had low back and left thigh pain. Dr. Silva diagnosed central mechanical low back pain with L3 radicular features and recommended a magnetic resonance image (MRI) of the claimant's lumbar spine.

13. The recommended lumbar spine MRI was performed on December 15, 2017. The MRI showed multilevel degenerative changes in the claimant's lumbar spine with the greatest at the L3-L4 level, with moderate spinal canal narrowing in the setting of congenitally short pedicles. It was also noted that there was mild neural foraminal narrowing on the right at L3-L4 level and on the left at the L4-L5 level. In addition, the MRI showed an annular disc fissure at the L4-L5 level.

14. On January 17, 2018, the claimant returned to Dr. Silva. Based upon the MRI results, Dr. Silva recommended transforaminal epidural steroid injections (TFESIs) at the L3-L4 and L4-L5 levels. The recommended TFESIs were administered by Dr. Silva on January 22, 2018.

15. On February 27, 2018, the claimant returned to Dr. Silva and reported that the injections "took away all of his pain" for four to five days. After that period of pain relief, the claimant's pain returned, but not to level he was experiencing prior to the injections. On that same date, the claimant reported to Dr. Silva that he had pain in his left hip, buttock, and down his left leg. Dr. Silva recommended repeat TFESIs at the

same levels. The recommended repeat injections were performed by Dr. Silva on March 7, 2018.

16. On March 7, 2018, the respondents filed a General Admission of Liability (GAL) admitting for the claimant's September 5, 2017 work injury.

17. On March 21, 2018, Dr. Silva completed a WC-164 form outlining work restrictions for the claimant. Specifically, Dr. Silva noted that the claimant could return to full time work with work restrictions that included no lifting over 25 pounds, and no repetitive lifting or carrying of over 20 pounds.[1]

18. On April 2, 2018, the claimant returned to Dr. Silva and reported that the March 7, 2018 injections did not provide any relief of his symptoms. Dr. Silva recommended an electromyogram nerve conduction study (EMG/NCS) and referred the claimant for a surgical consultation.

19. On April 11, 2018, the claimant was seen by Dr. Amir Abtahi for the surgical consultation recommended by Dr. Silva. On that date, the claimant reported low back pain that was radiating into his left lower extremity. He also reported that physical therapy and injections had not provided relief of his symptoms. Dr. Abtahi noted the MRI finding of epidural lipomatosis at the L3-L4 level and the broad based disc bulge at the L4-L5 level. Dr. Abtahi opined that the claimant would not benefit from surgery, but opted to wait to see the results of the EMG before proceeding.

20. On April 19, 2018, an EMG/NCS was performed and showed no evidence of lumbar radiculopathy. The test results were deemed normal.

21. Also on April 19, 2018, the claimant was seen by Dr. Abtahi who reviewed the results of the EMG/NCS. The claimant continued to complain of axial back pain with radiating pain and/or numbness into the left thigh. Dr. Abtahi recommended that the claimant continue conservative treatment including additional epidural injections, physical therapy, and weight loss.

22. Dr. Abtahi testified by deposition in this matter and reiterated his opinion that surgical intervention would not benefit the claimant. In support of this opinion, Dr. Abtahi noted that the claimant's symptoms of radiculopathy are caused by the epidural lipomatosis at the L3-L4 level. Dr. Abtahi also reiterated his opinion that the claimant should continue conservative treatment.

23. On April 23, 2018 and April 24, 2018, Dr. Silva submitted authorization requests to the respondents for additional TFESIs. The respondents denied authorization of the additional injections.

[1] Based upon the medical records it appears that the claimant was not seen by Dr. Silva on March 21, 2018 and that the WC-164 form was completed at the request of one of the parties.

24. On May 15, 2018, the claimant returned to Dr. Stanwix and requested an additional surgical referral. On that date, Dr. Stanwix referred the claimant to Dr. Douglas Orndorff for surgical consultation.

25. On June 5, 2018, the claimant was seen by Dr. Orndorff and reported long standing low back pain with left leg radiculopathy. Dr. Orndorff did not make any specific treatment recommendations on that date because imaging was not available.

26. On June 8, 2018, the claimant returned to Dr. Orndorff. At that time, Dr. Orndorff recommended that the claimant undergo an L3-L4 and L4-L5 laminectomy with facet and femoral decompression. In making this recommendation, Dr. Orndorff noted that the claimant had exhausted more than six months of "all forms of conservative options". A request for authorization of the surgery recommended by Dr. Orndorff was submitted to the respondents.[2]

27. Dr. Orndorff testified by deposition in this matter. Dr. Orndorff testified that it was his understanding that the claimant was not responsive to conservative treatment. In addition, Dr. Orndorff testified that the claimant's radiculopathy was in an L4-L5 distribution, which correlates with stenosis at the L3-L4 and L4-L5 levels. Dr. Orndorff testified that the claimant did have preexisting epidural lipomatosis.

28. In an undated report, Dr. Michael Janssen, Physician Advisor for the respondents, reviewed the request for surgery and opined that the recommended surgery may be reasonable given the claimant's preexisting degenerative disease. However, Dr. Janssen also opined that the claimant's need for surgery is not related to the September 5, 2017 work injury. In addition, Dr. Janssen specifically opined that the claimant's injury on September 5, 2017 did not exacerbate or aggravate the claimant's preexisting condition.

29. At the direction of the respondents, on October 15, 2018, the claimant attended an independent medical examination (IME) with Dr. Mark Paz. In connection with the IME, Dr. Paz reviewed the claimant's medical records, obtained a history from the claimant, and completed a physical examination. In his IME report, Dr. Paz opined that the claimant may have developed myofascial low back pain at the time of the September 5, 2017 work injury. However, it is Dr. Paz's opinion that the claimant's pain generator is the lipomatosis at the L3-L4 level. Dr. Paz also opined that the claimant's lipomatosis was not caused by the September 5, 2017 work injury. In his report, Dr. Paz explained that lipomatosis is secondary to congenital factors and obesity. Dr. Paz opined that the raking activity that the claimant was performing at the time of his injury on September 5, 2017 did not aggravate or accelerate the lipomatosis. In addition, Dr. Paz noted that lipomatosis is not treated with injections or surgery. Specifically, with regard to the surgery recommended by Dr. Orndorff, Dr. Paz opined that the surgery is inconsistent with a diagnosis of L3-L4 level lipomatosis.

[2] At his post-hearing deposition taken on March 19, 2019, Dr. Orndorff testified that he performed the recommended surgery on January 10, 2019.

30. Based upon the opinions of Drs. Janssen and Paz, the respondents denied authorization for the recommended lumbar surgery.

31. Dr. Paz's testimony by deposition was consistent with his written report. Dr. Paz testified that it is his opinion that the most likely cause of the claimant's low back symptoms is the L3-L4 lipomatosis. Dr. Paz explained that lipomatosis is a collection of fat cells encased in a thin tissue. When lipomatosis develops in an enclosed space, such as the spinal canal, it can reduce the size of the canal and compress the contents of the canal. Dr. Paz further testified that lipomatosis occurs because of underlying genetic causes and obesity. Dr. Paz noted in his testimony that the claimant's lipomatosis was not caused by the work event of September 5, 2017. Nor did that September 5, 2017 event aggravate or accelerate the lipomatosis. Therefore, Dr. Paz opined that the recommended surgery is not related to the claimant's work injury.

32. The claimant testified that his current symptoms include low back pain and numbness in his left leg. The claimant also testified that prior to September 5, 2017 he did not have low back issues. However, at the IME, the claimant reported to Dr. Paz that he had prior back pain 10 to 15 years prior.

33. Medical records entered into evidence indicate that on October 23, 2013 the claimant reported to his personal care provider, Dr. Hope Barkhurst, pain in his back after heavy shoveling. The claimant also reported to Dr. Barkhurst that he had previously experienced pain in this same location in his back.

34. The ALJ does not find it credible that the claimant stopped physical therapy because it was increasing his symptoms. The ALJ credits the reports the claimant made to his medical providers at the time that he stopped physical therapy and finds as true that the physical therapy did improve the claimant's symptoms, allowing him to return to work.

35. The ALJ credits the medical records and opinions of Drs. Abtahi, Janssen, and Paz over the contrary opinion of Dr. Orndorff and finds that the claimant has failed to demonstrate that it is more likely than not that the L3-L4 and L4-L5 laminectomy with facet and femoral decompression surgery is reasonable, necessary, and related to the September 5, 2017 work injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation

case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2017).

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

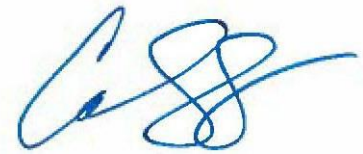
4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

5. As found, the claimant has failed to demonstrate by a preponderance of the evidence that the L3-L4 and L4-L5 laminectomy with facet and femoral decompression surgery recommended by Dr. Orndorff is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted September 5, 2017 work injury. As found, the medical records and opinions of Drs. Abtahi, Janssen, and Paz are credible and persuasive.

ORDER

It is therefore ordered that the claimant's request for the L3-L4 and L4-L5 laminectomy with facet and femoral decompression surgery is denied and dismissed.

Dated this 3rd day of May, 2019.



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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-047-135-001

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on April 18, 2019, in Denver, Colorado. The hearing was digitally recorded (reference: 4/18/19, Courtroom 1, beginning at 1:30 PM, and ending at 4:30 PM).

Claimant's Exhibits 1 through 13 were admitted into evidence, without objection. Respondents' Exhibits A through R were admitted into evidence, without objection.

The evidentiary deposition of William Ciccone II, M.D., taken on March 27, 2019, was lodged at the commencement of the hearing (hereinafter referred to "Ciccone Depo,, followed by page and line numbers) and shall serve in lieu of Dr. Ciccone's live testimony.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, which was filed, electronically, on April 29, 2019. On April 29, 2019, Respondents filed objections thereto, specifically, that paragraph (h) under the Conclusion of Law "fails to resolve conflict in the evidence. The initial report of Dr. Ciccone concluded that the Claimant did not sustain a left shoulder injury in the work incident in question." The objection is well taken and the conflict is resolved against Dr. Ciccone's initial left shoulder opinion as specified in more detail herein below. After a consideration of the proposed decision and the objection thereto, the ALJ has modified the proposal and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern medical benefits, specifically, whether Thomas Seib , M.D., and Douglas Nowak, M.D., are authorized providers; whether the left hip arthroscopy performed by Dr. Nowak on March 14, 2019 was reasonably necessary to cure and relieve the Claimant from the effects of the Claimant's admitted work injury of May 15, 2017; whether the left shoulder MRI (magnetic resonance imaging) with contrast requested by Jason Hsu, M.D., is reasonably necessary to lead to a treatment recommendation with the objective of curing and relieving the Claimant from the effects of his admitted injury; and, whether the Claimant is entitled to temporary total disability (TTD) benefits for the periods of August 12, 2018 through September 6, 2018, and from October 23, 2018 and continuing until terminable by law.

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

FINDINGS OF FACT

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

Preliminary Findings

1. This is an admitted claim with a date of injury of May 15, 2017. Respondents filed a General Admission of Liability (GAL), dated February 15, 2018, admitting for medical benefits, an average weekly wage (AWW) of $1, 318.19, and temporary total disability (TTD) benefits of $878.79 from May 17, 2017 through February 23, 2018 (Claimant's Exhibit 2, Bates No. 0003).

2. The Claimant is presently employed as a Captain for Frontier Airlines. On May 15, 2017, he was scheduled to fly a red-eye flight from Las Vegas to Pittsburg. At that time, he was a first officer.

Findings/The Injury

3. The Claimant was walking between flights on travertine tile, pulling approximately 70 pounds of luggage with his left hand. He stepped on spilled food with his right foot. His right foot shot out and his leg stayed back, putting him in nearly a full splits. His left arm rapidly swung to the front, still holding his luggage. He fell, landing on his right hand. His hips were twisted when he fell.

4. The Claimant immediately felt pain in his neck, left shoulder, and left hip.

5. The Claimant was able to take off and fly most of his flight as planned. His left shoulder swelled up during the flight and he felt unsafe operating the landing controls with his left upper extremity. He and the Captain agreed that the Captain would land the plane.

6. The Claimant landed in Pittsburg in the early morning of May 16, 2017. He telephoned his assistant chief pilot Aaron Rex to report his injury. Rex arranged for the Claimant to seek medical care at Concentra in Pittsburg.

7. The Claimant sought treatment at the Pittsburg Concentra on May 16, 2017, where he discussed his complaints of neck pain, shoulder pain and a knot running down his shoulder, pain in his left ribs, and left hip. The Concentra record states, "The patient presents today with Patient slipped and fell on the concourge (sic) floor injuring left side of neck, mid back, right hip and right wrist as well as left shoulder" (Claimant's Exhibit 5, Bates No. 000031)

8. The Claimant was taken off work by his Employer due to his injuries. Respondents have paid TTD benefits from May 17, 2017 to February 23, 2018 (Claimant's Exhibit 2, Bates No. 000003).

Physician' Assistant Gillam and Physical Therapy

9. The Claimant returned to his home in Seattle, Washington. Respondents furnished care with Physician's Assistant (PA) John Gillam at ZoomCare in Seattle beginning on May 18, 2017. On the initial visit, PA Gillam noted that Claimant's mechanism of injury was slipping on lettuce. "Pt fell at airport 3 days ago. Hurt left shoulder, neck and mid back and left hip" (Claimant's Exhibit 12, Bates No. 000239).

10. According to the Claimant, ZoomCare provided treatment for his neck, left shoulder, and left hip. PA Gillam requested an x-ray of the Claimant's left shoulder, neck, and left hip. The Claimant underwent those x-rays on May 22, 2017 (Claimant's Exhibit 9, Bates No. 000150-000151).

11. PA Gillam continued to note Claimant's left hip pain in his visits of May 22, May 30, June 15, June 29 and July 17, 2017 (Claimant's Exhibit 12, Bates No.000245-000265).

12. PA Gillam referred the Claimant for physical therapy (PT) at MoveMend. MoveMend treated the Claimant's left shoulder, left hip, neck, and left ribs. On the Claimant's initial visit of May 23, 2017, the physical therapist noted that Claimant's worst pain was his left shoulder, his neck was second worst, and his left hip was third worst (Claimant's Exhibit 8, Bates No. 000097).

13. The MoveMend physical therapists continued to note left hip pain and their treatment of the left hip continued on May 25, May 30, June 6, June 8, June 12, June 13, June 15, June 20, June 22, June 27, June 29, July 5, July 11, July 13, August 8,

August 10, August 14, August 15, August 20, August 23, August 29, September 6, September 20, and October 4, 2017 (Claimant's Exhibit 8, Bates Nos. 000101-000149).

14. Respondents provided a nurse case manager, (NCM) Donna Tanner, who began to attend the Claimant's medical appointments with him.

15. According to the Claimant, PA Gillam concluded that his clinic was not qualified to treat Claimant's injuries and ongoing pain. In his record of August 4, 2017, PA Gillam instructed Claimant as follows: "Please follow up with Physical Medicine and Rehab. We will not be able to see you anymore for this condition since it is a chronic pain issue and we are unable provide care for chronic pain at this clinic" (Claimant's Exhibit 12, Bates No.000269). On his Activity Prescription Form, PA Gillam noted, "Chronic pain issue can no longer be managed at ZoomCare. Referred to PM&R for definitive care & further management" (Claimant's Exhibit 12, Bates No.000270).

Medical/Chain of Authorized Referrals

16. PA Gillam referred the Claimant to Jason Hsu, M.D., an orthopedic physician specializing in the shoulder at the University of Washington. Dr. Hsu began treating the Claimant in July 2017, and only treated his left shoulder.

17. Dr. Hsu suggested continued conservative therapy at his visits from July through September 2017 (Claimant's Exhibit 11, Bates No. 000202-000223).

18. According to the Claimant, PA Gillam and NCM Donna Tanner discussed that Claimant needed a pain and rehabilitation specialist to address all of his symptoms, including his left hip. NCM Tanner gave the Claimant two options. , Paul Nutter, M.D., and Thomas Seib, M.D. The Claimant chose Dr. Seib, so he could get in sooner to see him.

19. The first provider designated by the Employer was ZoomCare, wherein PA Gillam treated the Claimant. The referrals to MoveMend, Dr. Hsu and Dr. Seib were within the authorized chain of referrals during the natural progression of medical care causally related to the admitted injuries of May 15, 2017.

20. NCM Tanner sent an email to claims adjuster Melissa Teregan on October 10, 2017, stating "I had previously talked to [Claimant] about changing providers to a physical medicine and rehab physician to guide treatment rather than just choosing specialists. He was able to get an appointment with Dr. Thomas Seib a physical medicine and rehab physician. Many of my co-workers have had him for their claimant's provider and highly recommend him" (Claimant's Exhibit 13, Bates No. 000277).

21. In a follow-up email on October 11, 2017, to Adjuster Teregan, NCM Tanner clarified her previous email: "I guess I didn't explain myself well enough. I did give him the option of Dr. Paul Nutter and his group in Puyallp or Dr. Seib and his group who practice in Everette and Edmonds. He was able to get into Dr. Seib the quickest.

He was seen initially at a ZoomCare clinic and they didn't want to see him anymore" (Claimant's Exhibit 12, Bates No.000278).

Thomas Seib, M.D.

22. The Claimant began treating with Dr. Seib in October 2017. NCM Tanner attended those appointments. Claimant testified that Respondents furnished these appointments.

23. On November 11, 2017, Dr. Seib noted that the Claimant "has pain in the left scapular region and left hip" (Claimant's Exhibit 10, Bates No. 000162).

24. The Claimant continued to note his left shoulder pain on his pain diagrams for Dr. Seib's visits from November 2017 through August 2018 (Claimant's Exhibit 10, Bates Nos. 000160, 000165, 000170, 000174, 000175, 000175, and 00018).

25. Dr. Seib prescribed a specific series of physical therapy, including work hardening, at Cascade and Concept Physical Therapies. Dr. Seib wrote the prescription for SI/Lumbar/ Hip (Claimant's Exhibit 4, Bates No. 00030). According to the Claimant, both facilities treated his left hip and his left shoulder.

26. On November 6 and November 14, 2017, the Claimant's providers at Cascade Rehabilitation Associates discussed his hip pain and/or special tests on the left hip (Claimant's Exhibit 4, Bates No. 000021, 000023, 000024,000027).

27. The Claimant noted issues with his left hip on his pain diagrams for Concept Physical therapy on: November 3, November 28, December 6, 2017, January 9, January 11, February 5, February 15, February 20, February 22, March 5, and October 17, 2018 (Claimant's Exhibit 6, Bates Nos. 000035, 000036, 000037, 000038, 000039, 000062, 000063, 000072, and 000075).

28. The Claimant's providers at Concept Physical Therapy discussed his complaints of left hip pain and their treatment of his left hip on: January 29, January 31, February 5, February 6, February 7, February 13, February 14 and February 20, 2018 (Claimant's Exhibit 6, Bates Nos. 000040, 000056, 000058, 000064, 000066, 000068, 000070, and 000073).

29. Dr. Seib released the Claimant to return to work at the end of February 2018. According to the Claimant, he returned to full duty flying and was promoted to Captain. His left shoulder and left hip continued to bother him and affect his sleep.

30. Dr. Seib saw the Claimant on April 4, 2018 and noted that Claimant had had a very severe flare in his symptoms recently and had had a complete relapse. The Claimant was still working full time but had taken occasional days off due to increased symptoms (Claimant's Exhibit 10, Bates No. 000180).

After the Relapse

31. According to the Claimant, on August 12, 2018, he called in sick to work due to his injuries. He walked to the parking garage to leave for the airport. His left shoulder was so painful that he did not think he could lift his luggage into the trunk. He did not attempt to lift his luggage, returned to his apartment, and called his Employer.

32. The Claimant reported his worsening of symptoms from the May 15, 2017 injury to his Employer. The Claimant was clear with his Employer that he did not sustain a new injury in August 2018. The Employer asked the Claimant to return to ZoomCare. Thereupon, the Respondents provided the Claimant with a new workers' compensation benefits card, with his original date of injury of May 15, 2017.

33. The Claimant returned to ZoomCare on August 23, 2018 with complaints of left shoulder and hip pain. FNP (Nurse Practitioner) Ranada Soltani noted, "Last appt for this claim, he was referred to PM&R. Pt reports he was instructed to return to work with follow up care to continue progressing to get better" (Claimant's Exhibit 12, Bates No.000271). FNP Soltani note: "Left shoulder is higher than right shoulder when sitting upright; left outer hip pain that radiates to low back when pressed. Pt stands during most of the visit" (Claimant's Exhibit 12, Bates No.000273).

34. According to the Claimant, ZoomCare took him off work and referred him back to Dr. Seib. FNP Soltani noted, "Work note provided to allow 1 week off work- pt has appt scheduled 1 week with provider who was initially managing this case. Advised pt to have his specialist determine work restrictions and when to return to full active duty" (Claimant's Exhibit 12, Bates No.000274).

35. Dr. Seib continued the Claimant's restriction from work through September 6, 2018 (Claimant's Exhibit 10, Bates No. 000187).

36. On August 30, 2018, Dr. Seib noted that Claimant "reports pain across the lumbosacral junction with pain along the lateral aspect of the left hip, radiating towards the groin." He requested an MRI (magnetic Resonance imaging) and arthrogram of the left hip to evaluate for labral tear on August 30, 2018 (Claimant's Exhibit 10, Bates No. 000184-000185).

37. Dr. Seib referred the Claimant back to Dr. Hsu for the left shoulder, to discuss surgical options (Claimant's Exhibit 10, Bates No. 0000187).

38. Dr. Seib again submitted a request for a left hip MRI on September 6, 2018 (Claimant's Exhibit 10, Bates No. 000188).

39. The Claimant received the MRI of the left hip on October 16, 2018. The findings were "detached tear of the left anterior-superior acetabular labrum, without adjacent cartilage abnormality" (Claimant's Exhibit 9, Bates No. 000155).

Claimant Off Work Again

40. The Claimant received the report with the findings on October 23, 2018. Upon reading that he had a complete detached labral tear, he telephoned Dr. Seib to ensure he understood the findings. He then called the Employer's Manager on Duty Line. He spoke to Elyse Swedberg. They discussed that if a plane lost an engine and the Claimant had to make a V-cut, his left lower extremity may not be strong enough and the plane could go off the runway. The plane could be damaged, and passengers could be injured or killed. Swedberg and the Claimant concurred that Claimant was not safe to fly. The Claimant was removed from the schedule, and his leave was coded as "OJI, " or on-the-job injury.

41. The Respondents did not reinstate TTD benefits on October 24, 2018. The Claimant has not returned to work since October 23, 2018 and has had no income in the interim.

42. Based upon the results of the MRI, Dr. Seib removed the Claimant from work on October 23, 2018, stating: "Pt has torn labrum L hip. Unable to work. Surgical eval needed" (Claimant's Exhibit 10, Bates No. 000189).

43. Dr. Seib referred the Claimant to orthopedic surgeon Douglas Nowak, M.D., on October 25, 2018, noting "MRI attached. Please review. We are requesting authorization for referral to Dr. Nowak for surgical consult" (Claimant's Exhibit 10, Bates No. 000190).

44. Dr. Seib continued to restrict the Claimant from work on November 11, 2018, stating "Vocational issues are discussed. At this point I do not believe patient is safe to pilot an airplane. He is capable of light duty work if other work is available. Patient is given an APF indicating this" (Claimant's Exhibit 10, Bates No. 000193).

45. Dr. Seib continued to restrict the Claimant from work on February 13, 2019, stating "Patient is capable of working modified duty, but not able to return to job of injury due to ongoing shoulder injury, as well as hip injury" (Claimant's Exhibit 10, Bates No. 000201).

Douglas Nowak, M.D.

46. Dr. Nowak first saw the Claimant on October 31, 2018. Dr. Nowak noted that Claimant had "left hip pain for about a year and a half from a work injury. He injured this in a slip & fall while working on 5/15/17…The hip hurts anterolateral deep about the hip and also about the sacroiliac joint. Pain is worst with sitting and bending. He rates the pain as 8 out of 10 and is constant. Pain quality is sharp, dull, stabbing, throbbing and aching. It frequently interferes with his sleep." Dr. Nowak recommended first trying an intra-articular hip corticosteroid injection (Claimant's Exhibit 7, Bates No. 000077-000079).

47. Dr. Nowak saw the Claimant again on February 11, 2019, after the **Claimant had had the corticosteroid injection. Dr. Nowak was of the following opinion: "I feel surgery is indicated at this time given his prior conservative treatment, duration & severity of symptoms and diagnosis**" (Claimant's Exhibit 7, Bates No. 000082).

48. Dr. Nowak was of the opinion that the need for the surgery was related to the Claimant's work injury., stating "I feel this condition is related to the work injury on a more likely than not basis and treatment for this should fall under a workers' comp claim" (Claimant's Exhibit 7, Bates No. 000082).

49. Dr. Nowak and the Claimant discussed the surgery again on March 6, 2018. Dr. Nowak stated: "I feel [Claimant] is a good candidate for hip arthroscopy. He has failed conservative treatment as noted above in HPI. Symptoms are moderate to severe and are consistent with femoroacetabular impingement. Further, he does not have any contra-indications for FAI surgery" (Claimant's Exhibit 7, Bates No. 000086).

50. Respondents denied authorization for the surgery (Claimant's Exhibit 1, Bates No. 000001-000002).

The Hip Surgery

51. The Claimant underwent the requested surgery with his own money on March 14, 2019.

52. Dr. Nowak performed a left hip arthroscopy with femoroplasty, acetabuloplasty, labral repair, synovectomy, chondroplasty, and intraoperative fluoroscopy with interpretation (Claimant's Exhibit 7, Bates No. 000088- 000092).

53. According to the Claimant, the surgery considerably alleviated his left hip pain and increased his function. He is one week ahead of his physical therapy schedule.

54. Dr. Nowak saw the Claimant for post-surgery follow up on March 25, 2019. He noted that the Claimant was doing well. His pain was well controlled, and he was no longer requiring pain medication (Claimant's Exhibit 7, Bates No. 000094-000095).

Return to Dr. Hsu

55. The Claimant returned to Dr. Hsu on Dr. Seib's referral on October 16, 2018. Dr. Hsu stated, : [Claimant] returns for evaluation concerning left shoulder pain that has been persistent since his injury over a year ago. Given persistence of symptoms and inconclusive findings on his previous non-contrast MRI from last year**, I'd suggest we get an arthrogram MRI to assess for true labral pathology"** (emphasis supplied) (Claimant's Exhibit 11, Bates No. 000225).

56. Dr. Hsu requested authorization for the left shoulder MRI with contrast on October 16, 2018 (Claimant's Exhibit 11, Bates No. 000230). His request noted the diagnostic studies were medically necessary (Claimant's Exhibit 11, Bates No. 000233).

57. Respondents' claim manager Patty Atherton denied the MRI (Claimant's Exhibit 11, Bates No. 000234).

58. The Claimant continues to have pain and functional limitations in his left shoulder. It rolls forward and is unstable. It continues to affect his sleep.

Respondents' Independent Medical Examiner (IME), William Ciccone, M.D.

59. Respondents retained Dr. Ciccone to conduct an IME. Dr. Ciccone submitted two reports and testified by evidentiary deposition.

60. Dr. Ciccone's original report was submitted to the parties by ExamWorks on February 25, 2019 (Claimant's Exhibit 3; Respondents' Exhibit A).

61. Dr. Ciccone provided a seven-page summary of Claimant's medical treatment from May 15, 2017 to October 16, 2018, describing each medical record (Claimant's Exhibit 3, Bates No. 000009-000015).

62. Dr. Ciccone concluded,: "I believe that the claimant suffered an injury to the left hip labrum as a result of the work incident. The claimant explained to me that he was walking through the airport pulling his bags behind him with his left arm. His right foot slipped forward causing him to twist and fall to the right. His left foot remained planted on the ground and he pulled his bag forward quickly with his left arm. His left foot remained planted on the ground causing his hip to twist as his right hand hit the ground" (Claimant's Exhibit 3, Bates No. 000016).

63. Dr. Ciccone discussed the Claimant's complaints of left hip pain throughout the medical records. He stated that he believes the note regarding right hip pain in the May 16, 2017 Concentra record was a typographical error. "Throughout the claimant's care he has intermittent complaints of left hip pain that sometimes radiates into the back side of the hip at the SI joint" (Claimant's Exhibit 3, Bates No. 000016).

64. Dr. Ciccone stated,: "While there was definitely a lot of attention paid to the left shoulder initially, the claimant did have intermittent recorded complaints of left hip pain" (Claimant's Exhibit 3, Bates No. 00017).

65. Dr. Ciccone concluded that "the clamant suffered an acute labral tear in the left hip due to the twisting injury on 5/15/17…In this instance the MRI of the left hip

from 10/16/18 did not reveal any degenerative changes in the hip, leading to the conclusion that this an acute tear" (Claimant's Exhibit 3, Bates No. 000017).

66. Dr. Ciccone discussed the Claimant's mechanism of injury: "I believe that a twist with the claimant's full weight on the left hip would be an appropriate mechanism to cause a labral tear. Further, his examination findings are consistent with a symptomatic labral tear" (Claimant's Exhibit 3, Bates No. 000017).

67. Dr. Ciccone stated the opinion that the requested left hip surgery was reasonable and causally related to the work injury, as Claimant had failed conservative management and had relief of the diagnostic injection. (Claimant's Exhibit 3, Bates No. 000017).

68. Dr. Ciccone, in his first report, stated: "I do not believe the claimant suffered a work related injury to ther left Shoulder" (Claimant's Exhibit 3, Bates No. 000016). In arriving at this conclusion, Dr. Ciccone assumed that there was no impact to the Claimant's left shoulder. This assumption is contrary to the Claimant's testimony about the admitted injuries and it is contrary to the weight of the aggregate medical evidence. Although the ALJ finds Dr. Ciccone's first opinion concerning the Claimant's left hip credible (his changed opinion is **not** credible), the ALJ finds his first opinion regarding the left shoulder lacking in credibility.

Dr. Ciccone's Second Report

69. Dr. Ciccone sent Respondents' counsel a new report on February 26, 2019 (Respondents' Exhibit A, Bates No. 00001-00015). Dr. Ciccone's record review and summary of twenty-eight of Claimant's medical records is identical to that of his first report (Respondents' Exhibit A, Bates No. 0005-001). He testified that he did not review any additional medical records or diagnostic scans **prior to changing his opinions** (emphasis supplied). (Ciccone Depo. Tr. p.40:lns 9-22).

70. In his new report, Dr. Ciccone changed his conclusion regarding Claimant's work-related diagnosis of his hip. He stated, "I do not believe that the claimant suffered a minor sprain/ strain to the left hip as a result of the work incident on 5/15/17" (Respondents' Exhibit A, Bates No. 0011). Later in the report, he stated, "I believe that the claimant suffered a minor sprain/ strain to the let hip resulting in trochanteric bursitis" (Respondents' Exhibit A, Bates No. 00012).

71. Dr. Ciccone changed his opinion regarding Claimant's complaints of hip pain following the date of injury. Whereas he previously deemed the Concentra note regarding the right hip to be a typographical error, he stated in his new report that Dr. Applegate found no hip pain in his "thorough" and "complete" exam (Respondents' Exhibit A, Bates No. 00011).

72. Dr. Ciccone testified, "[Claimant] didn't have hip pain on the initial evaluations. (Ciccone Depo. Tr. p.13: lns 2-4).

73. Dr. Ciccone stated: “In this instance, the claimant had no left hip pain until almost a week after the injury” (Respondents’ Exhibit A, Bates No. 00012). In his deposition, Dr. Ciccone acknowledged that PA Gillam repeatedly noted left hip pain on May 18, 2017, two full days after the date of injury (Ciccone Depo. Tr. p.47:lns. 8-13).

74. Dr. Ciccone stated that Claimant’s hip pain continued to resolve until 7/17/17. “In medical records there is no other mention of hip pain until 1/10/18” (Respondents’ Exhibit A, Bates No. 00012).

75. Dr. Ciccone changed his opinion regarding the nature of Claimant’s hip labral tear:I do not believe that the MRI findings on 10/16/18 reveal an acute injury but rather a degenerative tear” (Respondents’ Exhibit A, Bates No. 00012).

76. Dr. Ciccone stated he did not review any new scans or radiology reports to change his conclusion regarding the nature of the tear (Ciccone Depo. Tr. p. 41:lns. 4-7). “We know from some of the science when you look at individuals who have asymptomatic or painless hips and you MRI them, up to 60 percent of them have labral tears already (Ciccone Depo. Tr. p.25, lns. 5-8).

77. Dr. Ciccone stated he was aware of the statistics regarding the prevalence of labral tears when he issued his first report (Ciccone Depo. Tr. p.64: lns. 2-13).

78. Dr. Ciccone changed his opinion regarding the reasonable necessity of surgery: “It would be unlikely that the claimant would benefit from this surgery and likely would get worse” (Respondents’ Exhibit A, Bates No. 00012). In his deposition, Dr. Ciccone stated that Claimant had a positive response to the hip injection: “So in that situation, the option for hip arthroscopy exists” (Ciccone Depo. Tr. p.27:lns. 5-6).

79. Dr. Ciccone changed his opinion regarding Claimant’s credibility. “The claimant’s history as related to me is suspect” (Respondents’ Exhibit A, Bates No. 00012).

80. Dr. Ciccone testified that Claimant did not tell him he fell down onto the ground. He did not dispute that the first sentence Claimant stated to him was “It was a slip and fall at the Las Vegas airport.” He did not dispute that Claimant told him he was twisted when he hit (Ciccone Depo. Tr. p.55:ln.19; p. 56 ln. 7).

81. Dr. Ciccone changed his :“I do not believe that the mechanism of injury that is stated in the claimant’s early evaluations following the injury would cause a hip labral tear” (Respondents’ Exhibit A, Bates No. 00013).

82. Dr. Ciccone testified that his first report was a draft that was unfortunately released, and he should not have emailed it (Ciccone Depo. Tr. p.14: lns.14; p. 15:ln. 1). He stated the first report was “an **argument** (emphasis supplied) superficially to see if could be actually defended, and I just couldn’t critically defend it” (Ciccone Depo. Tr.

p.23:lns. 20-22). The ALJ finds this explanation totally lacking in credibility. It, therefore, undermines the entire credibility of dr. Ciccone's second report and changed opinion.

83. Dr. Ciccone stated that Respondents' counsel contacted him after he sent out the first report, but he could not recall their conversation (Ciccone Depo. Tr. p.61: lns. 7-15).

84. Dr. Ciccone testified that he did not review images of Claimant's hip or shoulder (Ciccone Depo. Tr. p.17:ln. 15). He did not accept the images Claimant brought to the IME. He did not request the images from Respondents (Ciccone Depo. Tr. p.52: lns. 1-15).

Ultimate Findings

85. The evidence relied upon by the Respondents' concerning their theory that the Claimant had no permanent effects from the admitted injuries of May 15, 2017 is Respondents' IME Dr. Ciccone's two opinions that the Claimant did not sustain a work related injury to the left shoulder, which the ALJ has found to be lacking in crediblity; and, Dr. Ciccone's second opinion that there were no permanent effects to the left hip, which opinion is a 100% "about face" which, as found, is based on an unsatisfactory and incredible explanation for the "about face," *i.e.,* the first report was a draft and not intended to go out. At first, Dr. Ciccone was of the opinion that left hip surgery was "reasonable and necessary." In his changed opinion, it was no longer necessary. The ALJ infers and finds, "You must be kidding me, Dr. Ciccone!" Dr. Ciccone's changed opinions are contrary to the totality of the medical evidence in the case. At first Dr. Ciccone considered the Claimant to be credible. In his changed opinion, Dr. Ciccione waffled on the issue of Claimant's credibility. The ALJ reasons that there is no room for a mercurial approach to causal relatedness and the need for surgery when the Claimant's future as a pilot is at stake. As found, the previous treating and evaluating physicians did not "have a dog in the fight." The opinions of Dr.Hsu, Dr. Seib and Dr. Nowak are persuasively articulated in an objective fashion, supported by the underlying medical record, consistent throughout, and highly credible. The Claimant's history has been consistent throughout. He presented as an articulate, careful, straight-forward and credible individual. His testimony is corroborated by the credible medical evidence developed by his treating physicians.

86. Between conflicting medical opinions, the ALJ makes a rational choice, based on substantial evidence, to accept the opinions of Zoon PA Gillam, Dr. Hsu, Dr. Seib, Dr. Nowak, plus the testimony of the Claimant, and to reject the opinions of Respondents' IME Dr. Ciccone almost entirety, with the exception of Dr. Ciccone's first opinion concerning the left hip, which is corroborated by the weight bf medical evidence. His second opinion concerning the left hip is rejected, thus, the ALJ has resolved the conflicts in the evidence.

87. All of the Claimant's medical providers for the left shoulder and left hip injuries of May 15, 2017, began with an Employer referral to ZoomCare, and referrals

emanating from Zoomcare were made in an unbroken chain of referrals through Dr. Hsu, Dr. Seib and Dr. Nowak (who performed the surgery at issue). Consequently the chain of referrals remains in an unbroken chain in the natural progression of treatment for the Claimant's admitted, compensable conditions.

88. All of the Claimant's medical care and treatment for the left shoulder and left hip injuries of May 15, 2017 is causally related thereto and reasonably necessary to cure and relieve the effects thereof.

89. There is no issue concerning the Claimant's admitted average weekly wage (AWW) of $1,318.19 and resultant TTD rate of $878.79 per week, or $125.54 per day, which the ALJ hereby finds as fact.

90. As found herein above, the totality of the evidence supports the fact that the Claimant was placed off work with restrictions, effective October 23, 2018; has not been released to full duty; has not been offered sustainable modified duty; has not reached maximum medical improvement (MMI); and, has been sustaining a 100% temporary wage loss since October 23, 2018. Therefore, the Claimant has been temporarily and totally disabled since October 23, 2018 and continuing. The period from October 23, 2018 through the hearing date, April 18, 2019, both dates inclusive, is a total of 178 days..

91. The Claimant has sustained his burden of proof, by a preponderance of the evidence on all issues.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254

(1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the evidence relied upon by the Respondents' concerning their theory that the Claimant had no permanent effects from the admitted injuries of May 15, 2017 is Respondents' IME Dr. Ciccone's later opinions that the Claimant did not sustain a work related injury to the left shoulder (first and second opinions), which the ALJ found to be lacking in crediblity; and, Dr. Ciccone's second opinion that there were no permanent effects to the left hip, which opinion is a 100% "about face" which, as found, is based on an unsatisfactory and incredible explanation for the "about face," *i.e.,* the first report was a draft and not intended to go out. At first, Dr. Ciccone was of the opinion that left hip surgery was "reasonable and necessary." In his changed opinion, it was no longer necessary The ALJ infers and finds, "You must be kidding me, Dr. Ciccone!" Dr. Ciccone's changed opinions are contrary to the totality of the medical evidence in the case. At first Dr. Ciccone considered the Claimant to be credible. In his changed opinion, Dr. Ciccone waffled on the issue of Claimant's credibility. The ALJ reasons that there is no room for a mercurial approach to causal relatedness and the need for surgery when the Claimant's future as a pilot is at stake. As found, the previous treating and evaluating physicians did not "have a dog in the fight." The opinions of Dr.Hsu, Dr. Seib and Dr. Nowak are persuasively articulated in an objective fashion, supported by the underlying medical record, consistent throughout, and highly credible. The Claimant's history has been consistent throughout. He presented as an articulate, careful, straight-forward and credible individual. His testimony is corroborated by the credible medical evidence developed by his treating physicians.

Substantial Evidence

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

evidence which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting medical opinions, the ALJ made a rational choice, based on substantial evidence, to accept the opinions of ZoomCare PA Gillam, Dr. Hsu, Dr. Seib, Dr. Nowak, plus the testimony of the Claimant, and to reject the opinions of Respondents' IME Dr. Ciccone almost entirety, with the exception of Dr. Ciccone's first opinion concerning the left hip, which is corroborated by the weight bf medical evidence. His second opinion concerning the left hip is rejected, thus, the ALJ has resolved the conflicts in the evidence.

Chain of Authorized Referrals

c. To be authorized, all referrals must remain within the chain of authorized referrals in the normal progression of authorized treatment. *See Mason Jar Restaurant v. Indus. Claim Appeals Office,* 862 P. 2d 1026 (Colo. App. 1993); *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P. 2d 501 (Colo. App. 1995); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). As found, all of the Claimant's medical providers for the left shoulder and left hip injuries of May 15, 2017, began with an Employer referral to ZoomCare, and referrals emanating from Zoomcare were made in an unbroken chain of referrals through Dr. Hsu, Dr. Seib and Dr. Nowak (who performed the surgery at issue). Consequently the chain of referrals remains in an unbroken chain in the natural progression of treatment for the Claimant's admitted, compensable conditions.

Medical

d. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, Claimant's medical treatment is causally related to his aditted left hip and left shoulder injuries of May 15, 2017. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment was and is reasonably necessary.

Average Weekly Wage (AWW)

e. An AWW calculation is designed to compensate for **total** temporary wage loss. *Pizza Hut v. Indus. Claim Appeals Office,* 18 P. 3d 867 (Colo. App. 2001). *See* § 8-42-102, C.R.S. As further found, Claimant has had a 100% temporary wage loss

since October 23, 2018. the Claimant's admitted average weekly wage (AWW) of $1,318.19 yielded a TTD rate of $878.79 per week, or $125.54 per day.

Temporary Total Disability Benefits

f. To establish entitlement to temporary disability benefits, a claimant must prove that the industrial injury has caused a "disability," and that he has suffered a wage loss that, "to some degree," is the result of the industrial disability. § 8-42-103(1), C.R.S; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). When a temporarily disabled employee loses his employment for other reasons which are not his responsibility, the causal relationship between the industrial injury and the wage loss necessarily continues. Disability from employment is established when the injured employee is unable to perform the usual job effectively or properly. *Jefferson Co. Schools v. Headrick*, 734 P.2d 659 (Colo. App.1986). This is true because the employee's restrictions presumably impair his opportunity to obtain employment at pre-injury wage levels. *Kiernan v. Roadway Package System*, W.C. No. 4-443-973 (ICAO, December 18, 2000). There is no statutory requirement that a claimant must present medical opinion evidence from of an attending physician to establish her physical disability. See *Lymburn v. Symbois Logic*, 952 P.2d 831 (Colo. App. 1997). Rather, the Claimant's testimony alone is sufficient to establish a temporary "disability." *Id*, however, the treating physicians and the Employer have kept the Claimant off work because of safety issues concerning the Claimant's work-related condition

g. Once the prerequisites for TTD are met (*e.g.,* no release to return to full duty, MMI has not been reached, modified employment is not made available, and there is no actual return to work), TTD benefits are designed to compensate for a 100% temporary wage loss. *See Eastman Kodak Co. v. Industrial Commission,* 725 P. 2d 107 (Colo. App. 1986); *City of Aurora v. Dortch,* 799 P. 2d 461 (Colo. App. 1990). As found herein above, the totality of the evidence supports the fact that the Claimant was placed off work with restrictions, effective October 23, 2018; has not been released to full duty; has not been offered sustainable modified duty; has not reached maximum medical improvement (MMI); and, has been sustaining a 100% temporary wage loss since October 23, 2018. Therefore, the Claimant has been temporarily and totally disabled since October 23, 2018 and continuing. The period from October 23, 2018 through the hearing date, April 18, 2019, both dates inclusive, is a total of 178 days.

h. Past due TTD benefits at the rate of $878.79 per week, or $125.54 per day, are due from October 23, 2018 through April 18, 2019, both dates inclusive, a total of 178 days, in the aggregate amount of $22,346.12. TTD benefits from April 19, 2019 and continuing until terminable by law are warranted.

Burden of Proof

i. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24

P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012).. A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained his burden on all issues.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents shall pay all the costs of all authorized, reasonably necessary and causally related medical care and treatment for the Claimant's left shoulder and left hip injuries of May 15, 2017, including the surgery performed by David Nowak, M.D., subject to the Division of Workers Compensation Medical Fee Schedule.

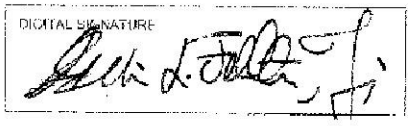
B. Respondents shall pay the Claimant temporary total disability benefits of $878.79 per week, or $125.54 per day, from October 23, 2018 through April 18, 2019, both dates inclusive, a total of 178 days, in the aggregate amount of $22,346.12, which is payable retroactively and forthwith.

C. From April 18, 2019 until temporary benefits are terminable by law, Respondents shall continue to pay the Claimant $878.79 per week in temporary total disability benefits.

D. Respondents shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

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

DATED this 3rd day of May 2019.



EDWIN L. FELTER, JR.
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-843-821-003

Issue

Whether Claimant's current medications prescribed by Dr. Kuklo, are reasonable, necessary, and related to Claimant's workers compensation injury.

Findings of Fact

1. In 2010, Claimant sustained an admitted work injury. She underwent treatment and ultimately her authorized treating physician (ATP) placed her at maximum medical improvement (MMI) in March 2012, and provided a fifteen percent whole person impairment rating for her cervical spine. Claimant's ATP recommended continuing Claimant's prescription medications for six to twelve months. Respondents filed a final admission of liability shortly thereafter.

2. Dr. Timothy Kuklo assumed Claimant's care post MMI and continues to provide maintenance medical treatment. Dr. Kuklo's care has consisted primarily of continuing to prescribe Claimant narcotic pain relievers and the benzodiazepine Valium.

3. Respondents challenge whether Claimant's medications remain reasonably necessary and related to her work injury.

4. Dr. Allison Fall testified on Respondents' behalf as an expert in physical medicine and rehabilitation. She evaluated Claimant on February 1, 2017. Claimant currently takes 5 mg of Oxycodone, and 2-5 mg of Valium per day. She occasionally takes a low dose of Dilaudid for breakthrough pain. Dr. Fall opined that the risks associated with Claimant continuing on these medications exceed their benefits. Dr. Fall identified the risks as falls, over-sedation, liver damage, overdose, and decreased respiration. She doubted that Claimant received benefit from the medications because the Oxycodone had a short duration, and the Valium was effective only for short-term treatment. Dr. Fall opined that Claimant should take an anti-inflammatory rather than Oxycodone.

5. Dr. Fall opined that Claimant's underlying work injury remained at MMI and that Dr. Kukla's treatment now related to Claimant's degenerative changes and central tremor rather than the radiculopathy and chronic pain from the work injury.

6. Dr. Fall opined that Claimant's medications have no effect on her ability to function.

7. Dr. Fall opined that Claimant could stop taking all of her medications without side effects.

8. Dr. Kuklo testified on Claimant's behalf as an expert in orthopedic spine surgery, a field in which he is board certified and has in excess of twenty years of experience. Dr. Kuklo has treated Claimant for approximately eight years.

9. Dr. Kuklo opined that Claimant's treatment is reasonable, necessary, and related to her work injury.

10. Dr. Kuklo did not share Dr. Fall's concerns about the risk of an overdose because her dose -- one-sixth what it was originally was -- "is incredibly small." He also testified that he knows no one who experiences traditional side effects at Claimant's dosage.

11. Dr. Kuklo acknowledged that generally, anti-inflammatories are preferable to opioids, however, he had trialed Claimant on Tramadol and Gabapentin without success and Claimant experienced an adverse reaction to Celebrex. Further, although a pharmacy review performed by Optum Pharm had recommended that Claimant taper off of the opioid and instead use an over-the –counter acetaminophen, Claimant was not able to tolerate acetaminophen.

12. Overall, Dr. Kuklo testified that based on Claimant's function, her medications are a "good working formula," with very low risk.

13. Claimant testified that she has ongoing pain and numbness travelling down from her neck through her arm into her hand, greater on her left, dominant side. Her ongoing pain causes sleep difficulties that Valium eases. She has limited range of motion in her cervical spine and complies with her ten-pound lifting restrictions. Claimant takes 2.5 mg of Oxycodone when she wakes to help reduce her pain and increase her function. Claimant credibly testified that she does not believe she could remain functional in her job and her activities of daily living without continuing with her medications.

Conclusions of Law

Where the respondents file a final admission admitting for post-MMI medical treatment pursuant to *Grover v. Industrial Comm'n*, 759 P.2d 705 (Colo. 1988), respondents retain the right to contest liability for a particular treatment. When respondents contest liability for a particular medical benefit, the claimant must prove that such contested treatment is reasonably necessary to treat the industrial injury. *Id*. at 712; *Snyder v. Industrial Claim Appeals Offc*., 942 P.2d 1337 (Colo. App. 1997). However, where the respondents attempt to modify an issue they had admitted, the respondents bear the burden of proof for such modification. Section 8-43-201(1), C.R.S. (2018). This includes the termination of previously admitted maintenance medical benefits. *Arguello v. State of Colorado*, W.C. No. 4-762-736-04 (May 3, 2016); *Salisbury v. Prowers County School District*, W.C. No. 4-702-144 (June 5, 2012).

Accordingly, Respondents bore the burden of proof with respect to the reasonable necessity and relatedness of Claimant's continued medications. Respondents bore the burden of proving by a preponderance that medications Dr. Kuklo currently prescribes are no longer reasonably necessary and causally related to the 2010 work injury.

The *Guidelines* provide, in relevant part, that "medications should be clearly linked to improvement of function, not just pain control." WCRP 17, Exhibit 9 (H)(6). Furthermore, the *Guidelines*, specify that, "examples of routine functions include the ability to perform work tasks, drive safely, pay bills or perform math operations, remain alert and upright for 10 hours per day, or participate in normal family and social activities." WCRP 17, Exhibit 9(H)(6).

As found Dr. Kuklo has been Claimant's ATP since she reached MMI in 2012. He persuasively explained that Claimant suffers from chronic pain because of her 2010 industrial injury. She requires Oxycodone, Valium and occasional Dilaudid to reduce her pain and maintain her ability to function in her job and activities of daily living. Without the medications, Claimant would likely become non-functional. Dr. Kuklo noted that Claimant takes a low dose of her medications and faces none of the usual risks of long-term opioid use. Furthermore, Claimant noted that her pain medications reduce her symptoms. Although the medications do not eliminate her pain, they reduce her pain enough to allow improved sleep and function.

Claimant's persuasive testimony also supports the conclusion that she is able to function in her job and activities of daily living while on her medications.

As found, Respondents have not established by a preponderance of the evidence that Claimant's maintenance treatment is no longer reasonably needed, or that the maintenance treatment is no longer related to Claimant's work injury. The record is replete with evidence that Claimant continues to suffer chronic pain with some numbness, sleep disturbances, limited range of motion, and lifting restrictions because of her 2010 work injury.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the ALJ hereby Orders:

1. The opioids and the benzodiazepines prescribed by Dr. Kuklo are reasonable, necessary, and related to Claimant's work injury.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, Denver, Colorado, 80202. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: May 3, 2019

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge

ISSUES

1. Whether Claimant has overcome Division Independent Medical Examination (DIME) physician Dr. Thurston's opinion on maximum medical improvement (MMI) by clear and convincing evidence. If so, Claimant requests an order requiring Respondents to provide additional reasonable, necessary, and causally related medical treatment.

2. Whether Claimant has overcome DIME physician Dr. Thurston's opinion on Claimant's permanent partial disability (PPD) rating as a result of her work injury.

3. Whether Claimant has established by a preponderance of the evidence an entitlement to temporary total disability (TTD) benefits prior to being placed at MMI.

FINDINGS OF FACT

1. Claimant is a 55-year-old woman who is employed by Employer as a service specialist team lead. Claimant has been employed by employer for approximately 17 years.

2. As part of her duties, Claimant assisted call center representatives with any issues they had while on the phones or while doing additional work. Claimant attempted to resolve issues and her area of specialty involved life insurance questions. Claimant regularly worked from 7 a.m. until all issues were resolved for the day, ending her work days anywhere between 5 p.m. and 9 p.m.

3. In April of 2014, Claimant was sent by Employer to Texas to assist newly hired call center representatives who had been in training for six weeks or less and who were just starting to actively answer phone calls from Employer life insurance agents.

4. On April 9, 2014, Claimant was at work at the call center and needed to use the restroom. As she walked into the restroom, the floor turned from cement to tile with a slight raised threshold estimated to be approximately 1 inch. Claimant's foot hit the raised threshold and tile and she tripped.

5. Claimant testified that she hit her left leg and that she landed with her knee kind of bent, on her feet, but with her hands on the ground of the bathroom floor.

6. Claimant testified that she had low back pain and a sharp shooting pain immediately in her back and buttocks to the left and 2-3 inches below her pants and that it felt like stabbing with a knife.

7. On April 14, 2014, Sarah Holder, D.O. at Carenow in Texas evaluated Claimant. Claimant reported that she tripped in the bathroom at work and had pain in her back at a 7/10. X-rays were taken and showed no fracture in the lumbosacral or pelvis area. It was recommended that Claimant rest, use heat, and stretch as needed. Claimant was allowed to return to work without restrictions. Claimant was diagnosed with strain/sprain of the back lumbosacral and sacroiliac. *See* Exhibit 1.

8. On April 18, 2014, Claimant completed her work assignment in Texas and returned to Colorado.

9. On April 24, 2014, John Charbonneau, M.D. evaluated Claimant. Claimant reported that she was walking into the women's restroom when she tripped on the raised threshold between the cement in the room and the tile inside the restroom. Claimant reported that she fell forward onto outstretched upper extremities and had instant left low back pain, primarily in the area of the left SI joint. Claimant reported that it happened very quickly. Claimant said she had pain primarily in the upper one-half of the left SI joint and that at times, the pain radiated around the lateral aspect of her pelvis to the anterolateral aspect of the pelvis. Claimant reported that at times she had some pain into the left buttock but not below that point. Claimant reported that she was quite fatigued by the end of the day due to the combination of pain and abnormal walking. Claimant reported a significant history of previous spinal injury and surgery including what Dr. Charbonneau thought sounded like an L4-5 laminectomy and discectomy in 2009 for removal of a free fragment. Claimant reported that she made a full recovery. Claimant also reported what Dr. Charbonneau believed was probably a C5-6 anterior cervical discectomy and fusion. Dr. Charbonneau found Claimant to walk with significant discomfort and to sort of roll her pelvis, which he opined was characteristic of someone who had an SI joint injury. Dr. Charbonneau noted an appearance of a little bit of scoliosis but opined it may be compensatory for Claimant's pelvic tilt from the left SI joint pain. Claimant had mild to moderate tenderness in the upper one-half of the left SI joint. Claimant had pain in range of motion. Dr. Charbonneau diagnosed lumbosacral sprain and he recommended frequent position changes as needed. *See* Exhibits 2, C.

10. On May 8, 2014, Dr. Charbonneau evaluated Claimant. Dr. Charbonneau noted that he believed Claimant had a lumbosacral sprain and left SI joint dysfunction superimposed on a previous L4-5 laminectomy and discectomy procedure. Claimant reported that her pain was different and seemed to be extending to the right with more stiffness and a sense of popping in the lower back. Claimant also reported that her buttocks were now getting numb. Dr. Charbonneau noted that Claimant appeared considerably less uncomfortable than when he last saw her and that her transitions from sitting to standing and back again were much more fluid. Dr. Charbonneau found her paraspinal muscle tenderness to be largely gone but found the tenderness in the upper one-half of the left SI joint to remain. Dr. Charbonneau told Claimant that he felt she was moving better but she reported she was having just as much pain. Dr. Charbonneau recommended physical therapy twice per week for three weeks. *See* Exhibits 2, C.

11. On May 22, 2014, Dr. Charbonneau evaluated Claimant. Claimant reported that her pain was killing her and that she had a lot of tightness and pain in the left lower back area primarily over the upper reaches of the left SI joint. Claimant reported the pain was awakening her at night multiple times. Claimant reported sharp pains in the left lower back in the superior portion of the left SI joint and over the left L5-S1 facet joint and also reported more diffuse general low back pain. Claimant reported some popping in her lower back and a little bit of throbbing in the lateral aspect of her left foot. Claimant reported that she had purchased a TENS unit on eBay but that it did nothing for her low back pain. Claimant was observed walking with an abnormal gait with a decreased swing through her left lower extremity. Claimant also was very cautious in changing form sitting to standing to lying and back again. Claimant was reproducibly tender in the superior one-third of her left SI joint. Claimant had positive results on the left for reproduction of left SI joint pain with the Patrick test and the FABER test. Dr. Charbonneau opined that the primarily pain generator was the left SI joint and that Claimant may have some L5-S1 facet joint dysfunction. Dr. Charbonneau noted his concern with the potential for delayed recovery or medication dependence. Dr. Charbonneau referred Claimant to Dr. Nieves for consideration of injection therapy. *See* Exhibits 2, C.

12. On May 29, 2014, Dr. Charbonneau evaluated Claimant. He noted that Claimant was leaving for a business trip in a few days and would be gone for two weeks. Claimant reported that she had not even gotten her Nucynta medication until the day prior and that she was about the same. Claimant reported that her pain was better localized to the superior portion of the left SI joint with no true radicular symptoms. Claimant reported that if she sat for too long, her legs would go numb circumferentially from the distal thigh out to the tips of her toes but that it reversed promptly when she stands up and moves around. Claimant reported that she was working full time at her regular work. On exam, Claimant was tender only in the superior one-third of the left SI joint with no other tenderness. Dr. Charbonneau diagnosed lumbosacral sprain and left SI joint dysfunction superimposed on a previous L4 laminectomy and discectomy. Dr. Charbonneau recommended continued medications, using heat/ice, and noted Claimant would see Dr. Nieves after her business trip. *See* Exhibits 2, C.

13. On July 9, 2014, Ricardo Nieves, M.D. evaluated Claimant. Claimant reported tripping at work on April 9 where she did not quite fall but twisted her lower back and had left sided low back pain. Claimant reported a history of back surgery in 2007 and 2008 and reported a history of cervical spine surgery. On exam, Dr. Nieves found tenderness in the left side lower lumbar spine and left sacroiliac joint. He opined that the clinical findings suggested left sided lower lumbar facet joint dysfunction and possible left sacroiliac joint dysfunction. He recommended scheduling left sided L5-S1 facet joint injections as diagnostic and therapeutic and opined that if they provided significant but temporary help, Claimant would require confirmatory facet joint medial branch blocks and possible radiofrequency ablation. He opined that if the facet joint injection provided no help, then he might need to look into SI joint injections or an MRI. *See* Exhibit 5.

14. On July 16, 2014, Claimant underwent left L5-S1 facet joint steroid injections. At a later visit, Claimant reported that the injections did not help and that she

continued to have pain in the left sided lower back and an MRI was recommended. *See* Exhibits 5, I, K.

15. On July 24, 2014, Carenow in Texas again evaluated Claimant. Carenow continued to diagnose strain/sprain of the back lumbosacral and sacroiliac. Carenow gave Claimant work restrictions of no kneeling, squatting, bending, stooping, pushing, pulling, and climbing ladders. Carenow recommended that Claimant quit smoking and follow-up with workers compensation in Colorado. *See* Exhibit 1.

16. On August 20, 2014, Dr. Charbonneau evaluated Claimant. Claimant reported worsening low back pain to the left of the spine, that her right knee was getting sore, and that she was getting depressed. Claimant reported that she had been treated for depression a long time ago, and Dr. Charbonneau noted that it was 2 years prior. Dr. Charbonneau noted in the diagnosis section of his report that Claimant seemed to be slowly worsening despite a relatively benign clinical examination and intervention by a pain medicine/spine care specialist, therapy, and medications. Dr. Charbonneau noted Claimant had a preference for narcotic pain medication that he opined was not appropriate care for Claimant. *See* Exhibit C.

17. On August 26, 2014, Claimant underwent an MRI of her lumbar spine. The MRI was compared to a prior MRI that was performed on May 6, 2009 prior to her work injury. Radiologist Bruce Berkowitz, M.D. opined that Claimant had no change in the lumbar spine other than interval improvement in the appearance of the postsurgical changes at the level of L3-4. He noted that a right far lateral disc protrusion was unchanged at L3-4, a diffuse disc bulge asymmetric to the right at L4-5 was unchanged, and a minimal broad based central disc protrusion at L5-S1 was unchanged. *See* Exhibit 6.

18. On September 3, 2014, Dr. Charbonneau evaluated Claimant. He reviewed Claimant's MRI with her and opined that it showed multi-level degenerative disk disease and degenerative facet joint disease. Dr. Charbonneau opined that the MRI showed no major focal disc herniations and that when compared to Claimant's May 2009 MRI, this new MRI showed improved appearance at Claimant's prior operative level and showed a stable appearance at all other levels. Claimant's pain again was noted to be limited to the upper half of her left SI joint. Dr. Charbonneau diagnosed left SI joint strain and inflammation. Dr. Charbonneau recommended Claimant return to Dr. Nieves for left SI joint injections. *See* Exhibits 2, C.

19. On October 8, 2014, Dr. Nieves injected Claimant's left SI joint with steroid injections and lidocaine. In a follow up visit, Claimant reported that she had complete pain relief for a short time following the left SI joint injection. Dr. Nieves recommended referral to another pain specialist for SI joint denervation. *See* Exhibits 5, I, K.

20. On October 13, 2014, Dr. Charbonneau evaluated Claimant. Claimant reported that she was not regularly taking the recommended medications. Claimant reported that a left SI joint injection had given her complete resolution of all her left low

back pain for about 4-5 hours but that it came back by the end of the day. Dr. Charbonneau noted that Claimant definitely had a positive result during the anesthetic phase. Dr. Charbonneau noted that Claimant's entire presentation had changed with the exception of Claimant's antalgic left lower extremity gait. He noted that Claimant was smiling, talkative, and her mood and affect was much improved. Again, on exam, the only area of tenderness was in the upper one-half of the left SI joint. *See* Exhibits 2, C.

21. Dr. Charbonneau evaluated Claimant on November 10, 2014 and December 18, 2014. He noted that a biopsychosocial evaluation reported from Dr. Bruns noted that Claimant had major depression and a pain disorder and had recommended biofeedback in individual psychotherapy sessions. He also noted that Claimant reported a few days of lower pain after her left SI joint injection and that they could consider it a positive response. Dr. Charbonneau noted that Dr. Nieves was no longer performing left SI joint denervation procedures but that Claimant could see Dr. Columbus for consideration of a left SI denervation. *See* Exhibits 2, C.

22. On January 16, 2015, David Columbus, D.O. evaluated Claimant. Claimant reported pain in the lumbar spine and sacro-iliac. Dr. Columbus noted that Claimant had been injected twice by Dr. Nieves, in the left facets and the SI joint and that he had referred Claimant for evaluation for radiofrequency ablation of facets and SI joint. On exam, Dr. Columbus found tenderness over the left lower segments and the left SI joints. *See* Exhibit 7.

23. On February 2, 2015, Dr. Columbus diagnosed lumbar spondylosis and lumbar region post laminectomy syndrome. Dr. Columbus listed the procedure performed that day as destruction of left L3-4, left L4-5, and left L5-S1 using standard radiofrequency thermocoagulation of the left L4, L5, and S1 medial branch nerves. *See* Exhibits 7, I.

24. On February 12, 2015, Dr. Charbonneau evaluated Claimant. He noted that Claimant had undergone left facet rhizotomies at the L3-4, L4-5, and L5-S1 on February 2. Claimant reported that the procedure had helped and that she overall had a lower level of pain. Dr. Charbonneau opined that on physical examination it was clear that Claimant was feeling better and that she was moving more comfortably after making transitions from sitting to standing. He also noted that after she loosened up, she was walking with an essentially normal gait. Claimant reported pain at a 2-3/10. Dr. Charbonneau recommended observing Claimant's response to the facet rhizotomy for one more month and he explained to Claimant the impairment rating process and maintenance care and noted that if Claimant was doing well in one month, he would get her set up for a permanent partial impairment rating and definition of maintenance care. *See* Exhibits 2, C.

25. On March 12, 2015, Dr. Charbonneau evaluated Claimant. Claimant reported she was about the same as her last visit. Dr. Charbonneau noted that meant Claimant was substantially improved with low back and left SI joint pain as she had steadily improved after her radiofrequency ablation. Claimant reported numbness in the left upper extremity, but Dr. Charbonneau opined that had nothing to do with the work

injury. Dr. Charbonneau noted Claimant was clearly feeling better, could sit and stand comfortably, had full range of motion in her lumbar spine, and had limited tenderness in the superior portion of the left SI joint. Claimant reported pain at a 3-5/10. Dr. Charbonneau opined that Claimant's depression was stable and probably back to pre-injury level but wanted an opinion and final visit with Dr. Bruns to make sure there was no injury related psychological impairment. Dr. Charbonneau opined that it was time for a permanent partial impairment rating and requested that Dr. Reichhardt perform the rating. Dr. Charbonneau opined that Claimant would be at maximum medical improvement the date of her rating with Dr. Reichhardt and requested that Dr. Reichhardt also define maintenance care, including the potential for additional nerve ablation procedures and maintenance medications. Dr. Charbonneau opined that after Claimant saw Dr. Bruns and Dr. Reichhardt, he would see her for a wrap up session to make sure Claimant had a plan for maintenance care. *See* Exhibits 2, C.

26. On April 8, 2015, Dr. Bruns evaluated Claimant. Dr. Bruns noted that as Claimant had reached MMI medically, he was evaluating her work related mental health impairment. Claimant reported sleep disorder ongoing and difficulty with irritability and forming interpersonal relationships. Claimant reported that due to the strain of dealing with her physical problems, she could become excessively irritated with people around her both at home and at work. Dr. Bruns provided an impression that this was at least in part a preexisting personality trait. Dr. Bruns opined that Claimant was at MMI psychologically and did not need maintenance care. *See* Exhibit D.

27. On April 20, 2015, Dr. Charbonneau evaluated Claimant. He noted that the visit was supposed to be a maintenance visit following MMI and impairment rating visit with Dr. Reichhardt but that Claimant failed to show up for her appointment with Dr. Reichhardt. Claimant reported that she felt like crap and had pain in her left upper SI joint. Dr. Charbonneau noted that Claimant was walking with an antalgic gait, had limited lumbar range of motion with reported tightness and pain in her upper left SI joint, and had point tenderness in the superior one-half of the left SI joint. Dr. Charbonneau noted that Claimant had been doing very well for 3-4 months after a left lower lumbar facet joint rhizotomy but now was complaining of recurrent symptoms. Dr. Charbonneau recommended Claimant see Dr. Columbus again to determine if any additional procedures are needed for the recurrent left SI joint pain. He noted that if Dr. Columbus did not recommend anything, he would get Claimant set up with Dr. Reichhardt again for MMI and an impairment rating. *See* Exhibits 2, C.

28. On May 13, 2015, Dr. Columbus evaluated Claimant. Claimant reported pain in the left side at the superior SI joint area following the radiofrequency in February. Dr. Columbus planned to inject Claimant's SI joint. On June 1, 2015, Dr. Columbus performed a therapeutic left SI joint injection of anesthetic and steroid and performed a left superior cluneal nerve injection. *See* Exhibits 7, I.

29. On June 11, 2015, Dr. Charbonneau evaluated Claimant. Claimant reported that a June 1, 2015 left SI joint injection had significantly helped and that she was feeling a lot better with a substantial reduction in her symptoms. Dr. Charbonneau

noted that it was clear Claimant was feeling better and moving better at the appointment. Dr. Charbonneau again referred Claimant to Dr. Reichhardt for an impairment rating and definition of maintenance care. *See* Exhibits 2, C.

30. On July 6, 2015, A.C. Lotman, M.D. issued a medical record review addendum. Dr. Lotman opined that Claimant had a very complicated history with a prior cervical spine surgery and prior lumbosacral spine surgery. Dr. Lotman opined that Claimant's diagnosis remains lumbar spondylosis, failed lumbar spine surgery, and chronic left SI joint dysfunction. Dr. Lotman opined that injections were necessary and related to Claimant's work injury and that it was probable she would need further injections in the future. *See* Exhibit 4.

31. On July 13, 2015, Gregory Reichhardt, M.D. evaluated Claimant. Dr. Reichhardt noted that Claimant was there for an evaluation of permanent impairment. Claimant reported that she was injured when walking into a bathroom and tripping over the edge of the tile, which was higher than the carpeting and had no transition strip. Claimant reported that she caught herself and did not impact the ground. Claimant reported that she had the immediate onset of pain in the low back and SI area. Claimant reported that she had done physical therapy and had SI injections and that the injections provided some temporary relief. Claimant reported she also underwent a left L3 to S1 radiofrequency rhizotomy and had a month of relief. Claimant also reported she underwent right SI injections and right cluneal nerve injections in June of 2015 and did not have significant relief. Claimant also reported symptoms of depression. Claimant reported continued aching in the low back and left gluteal area with some numbness extending down the posterior aspect of the thigh. Claimant reported that she had a previous back injury and had surgery and had no significant ongoing problems or functional limitations at the time of this work injury. Dr. Reichhardt opined that Claimant was at MMI with an MMI date of July 13, 2015. He opined that it would be appropriate for Claimant to have six follow up visits with a physician, four follow up visits with a physical therapist, and coverage of medications. Dr. Reichhardt opined that there were no specific injections recommended as Claimant did not have a particularly good response to the rhizotomy with only one month of relief and had no significant relief with her most recent SI injections. He opined Claimant could work full duty. Dr. Reichhardt performed an impairment rating and opined she had a 13% rating for lumbar impairment with no apportionment, as Claimant's low back condition was not independently disabling at the time of injury. Dr. Reichhardt also reviewed psychiatric impairment, which he noted was 2% whole person. Dr. Reichhardt opined that Claimant, overall, had a 15% whole person impairment as a result of the work injury. *See* Exhibit J.

32. On July 30, 2015, Dr. Charbonneau evaluated Claimant. Dr. Charbonneau noted that this was his final case closure visit. Claimant reported that she still had some left upper SI joint pain. Dr. Charbonneau opined that Claimant was at MMI and he agreed with the impairment rating and maintenance care recommendations given by Dr. Reichhardt. He opined that Claimant had reached MMI on July 13, 2015 with a 15% whole person impairment and attributed the permanent partial impairment to the work injury in question. *See* Exhibits 2, C.

33. Dr. Charbonneau evaluated Claimant at maintenance visits on November 19, 2015 and January 29, 2016. Claimant reported chronic pain in her left lower back, that the pain was interfering with her daily activities and frequently awakened her. Dr. Charbonneau found tenderness to the left of the spine at the lumbosacral junction but no tenderness in the left SI joint. By January of 2016, Claimant reported that her left lower back pain was smoldering and continued to hurt when she sat or twisted. Claimant reported an exacerbation at the end of the year and that she had pain every day. On exam, Claimant reported diffuse superficial tenderness over the lumbosacral junction. Claimant reported that she was going through the Division Independent Medical Examination process. Dr. Charbonneau opined that Claimant's July 13, 2015 MMI date remained unchanged and recommended another maintenance visit in six months. *See* Exhibits 2, C.

34. On June 22, 2016, Claimant underwent a Division Independent Medical Examination (DIME) performed by Lloyd Thurston, D.O. Dr. Thurston reviewed significant medical records including numerous records predating Claimant's work injury. Dr. Thurston reviewed the imaging and diagnostic studies and performed a physical examination. Dr. Thurston found Claimant's description of her symptoms, activity, work, and life changes due to the injury to be dramatic. Claimant walked with a markedly antalgic gait involving a shortened stance phase of the right leg which Dr. Thurston opined was the opposite of what he anticipated with left leg/hip pain. Dr. Thurston opined that pain behaviors demonstrated included facial grimacing, occasional moaning, and extensive verbal and written description of symptoms and how the injury affected Claimant's life. *See* Exhibits 11, A.

35. Dr. Thurston opined that Claimant's medical records prior to the April 9, 2014 work injury show anxiety, pain disorder, severe stress reaction, and depression that existed for years before the April 9, 2014 work injury. Dr. Thurston opined that the mechanism of injury in this case was minor and that Claimant's subjective complaints were out of proportion to the injury. Dr. Thurston pointed out that the imaging studies did not identify a physical injury and that the lack of response to appropriate conservative care was consistent with somatic symptom disorder. Dr. Thurston opined that no pain generator was identified and that Claimant's response was most consistent with somatic symptom disorder where she has a mental illness characterized by physical complaints. Dr. Thurston opined that there was no Table 53 diagnosis and therefore no range of motion impairment. Dr. Thurston opined that Claimant had a 0% permanent partial disability impairment as a result of the work injury. He agreed that Claimant reached MMI on July 13, 2015. Dr. Thurston opined that Claimant had no permanent partial disability rating for psychiatric impairment as she had documented anxiety, stress reaction, pain disorder, and depression before the injury. Dr. Thurston recommended no further medical care but recommended further psychological and psychiatric treatment outside the workers' compensation system. *See* Exhibits 11, A.

36. On July 28, 2016, Dr. Charbonneau evaluated Claimant. Dr. Charbonneau noted that Claimant had undergone a DIME that concluded she was at MMI with a 0%

permanent impairment. Claimant reported she was not feeling good at all and had started having mental problems and difficulty with her performance at work and her memory in February. Claimant felt her mental problems were due to her work injury. Claimant reported that she had been off work for about 4-5 months and had been back for about 4 weeks or so. Claimant reported pain at a 6-7/10. Dr. Charbonneau opined that Claimant continued to be stable, but with chronic pain. Dr. Charbonneau noted Claimant's reports of worsening mental health issues and memory problems leading to performance issues at work and he opined it was not clear that those were related to the work injury. *See* Exhibit 2.

37. On August 4, 2016, Claimant sought treatment outside the workers' compensation system. Chris Kottenstette, PA evaluated Claimant. Claimant reported persistent low back and left leg pain after a work injury in April 2014. Claimant reported that the workers' compensation system had not adequately managed her pain and that she couldn't stand it anymore. Claimant reported that she had done physical therapy and multiple injections as well as having her nerves burnt in the lower back. Claimant reported about three months of relief from the nerve burning. *See* Exhibit 10.

38. Claimant continued to treat outside the workers compensation system and eventually underwent lower back surgery- a posterior lumbar interbody fusion at L4-5 with spondyloreduction on September 27, 2016. Claimant continued to follow up with providers outside the workers' compensation system. *See* Exhibit G.

39. On November 12, 2018, Claimant underwent an Independent Medical Evaluation performed by Kathleen D'Angelo, M.D. Dr. D'Angelo took a history from Claimant and reviewed medical records. Dr. D'Angelo noted multiple presentations to medical providers between March of 2009 and February of 2013 for low back pain with pain radiation and numbness. Dr. D'Angelo also noted that in January of 2014 Claimant had chest pain with malaise aggravated by her inspiration and anxiety and that moderate depression was revealed in examination. In January of 2014, a severe stress reaction was noted. Dr. D'Angelo also noted that on March 28 of 2014, Claimant was evaluated by Dr. Haskins and reported persistent fluctuating back pain in the lower back and left flank with radiation to the left calf, left foot, and left thigh aggravated by daily activities including sitting, twisting, and walking. Medication and exercises were encouraged as well as consideration of physical therapy. Dr. D'Angelo noted that twelve days after Claimant was encouraged to take medication, do exercises, and consider physical therapy for her low back pain, she had the work injury in question. Dr. D'Angelo noted that at an April 24, 2014 evaluation after the work injury with Dr. Charbonneau, Claimant reported lumbar spine surgery in 2009 followed by 6-8 weeks of symptoms and then a full recovery without residual symptoms. *See* Exhibit B.

40. After reviewing voluminous medical records from both prior to and after the April 9, 2014 work injury, Dr. D'Angelo reached a conclusion. She opined that Dr. Charbonneau, Dr. Thurston, and Dr. Reichhardt were correct in placing Claimant at MMI on July 13, 2015. Dr. D'Angelo opined that Claimant's underlying and pre-existing spinal degenerative disease, which required copious medical care prior to and following

Claimant's minor work incident, was not causally related to the Claimant's work event. Dr. D'Angelo opined that Claimant's need for treatment for identical complaints continued unabated after Claimant caught her foot on flooring at work. Dr. D'Angelo opined that the mechanism of injury was minor. Dr. D'Angelo opined that the complaints before the date of injury were identical to the complaints after the date of injury and that the last appointment for lumbar pain was less than two weeks before the work incident. Dr. D'Angelo opined that regardless of whether Claimant stumbled in her worksite bathroom, Claimant would have the same issues and complaints as she currently presents with. Dr. D'Angelo opined that the length of time of Claimant's complaints prior to the injury, the identical nature of the complaints, the lack of neurological objective findings on exam, and Claimant's pre-existing psychiatric disease all contribute to her determination that Claimant's current symptoms were not related causally related to the April 2015 work injury. Dr. D'Angelo opined that Claimant's lumbar complaints, need for surgery, and ongoing care through her primary care provider and psychiatrist for mood disorder as well as her complaints of left leg and foot numbness were due to Claimant's personal and pre-existing medical and psychiatric issues. Dr. D'Angelo opined that Claimant does not require maintenance care, permanent work restrictions, and opined that Claimant does not have a permanent impairment due to the April 9, 2016 work event. *See* Exhibit B.

41. Dr. D'Angelo opined that Claimant did not have a Table 53 diagnosis stemming from a work related injury. Dr. D'Angelo opined that Claimant did not sustain a work related injury to her spine. *See* Exhibit B.

42. Dr. D'Angelo testified by deposition consistent with her Independent Medical Evaluation report. She opined that Claimant's symptoms and presentation before April of 2014 was essentially the same as after the report of injury. Dr. D'Angelo also testified that Claimant had pre-existing psychiatric conditions as well. Dr. D'Angelo testified that Claimant was not forthcoming in presenting her preexisting lumbar spine history and her preexisting psychiatric history to the workers' compensation providers post injury. Dr. D'Angelo noted that at Claimant's April 24, 2014 visit with Dr. Charbonneau Claimant reported that she had lumbar spine surgery in 2009 and made a full recovery without residual symptoms, which was clearly not consistent with Claimant's medical history. Dr. D'Angelo opined that Claimant's symptoms were very subjective and not consistent with objective findings. Dr. D'Angelo testified that Dr. Thurston, the DIME physician, did not err in any way. She agreed that Claimant had a 0% impairment. Dr. D'Angelo testified that the surgery Claimant underwent in September of 2016 was not causally related to her work injury.

43. Claimant testified at hearing. Overall, Claimant's testimony as well as her reports to medical providers is not found consistent with the weight of the credible medical evidence. As pointed out by Dr. Thurston and Dr. D'Angelo, while claimant reported to her treating providers that she had fully recovered from a prior back surgery with no residual symptoms, claimant's medical records prior to the date of injury indicate not only ongoing complaints for low back pain, but complaints dating back to 2011 that are significantly similar, if not the same, to symptoms reported as a result of the work injury.

44. Claimant's treating providers, including Dr. Reichhardt and Dr. Charbonneau do not mention the significant pre-existing history and they rely on Claimant's inaccurate subjective reports.

45. Claimant's pre-existing treatment for low back pain includes the following:

- 03/13/2009 – Lumbar Spine MRI: disc bulge at L4-5, extruded disc fragment at L3-4 with moderate to severe right sided neuroforaminal narrowing with impingement on exiting right L3 nerve root. (Ex. N, p. 545, 549).

- 03/17/2009 – Front Range Center for Brain & Spine Surgery: neurosurgical evaluation with MRI evidence of a herniated disc and recommendation for laminectomy. (Ex. M, p. 519-20).

- 05/29/2009 – Ct Lumbar Spine: impression included moderate to severe right foraminal stenosis with mass effect on the right L3 nerve root. (Ex. N, p. 546-47).

- 05/29/2009 – Lumbosacral Myelography: mild disc bulges at L3-4 and L4-5. (Ex. N, p. 548).

- 10/19/2011 – Family Physicians: ***recurrence* of low back pain/left hip pain with radiation to the left foot**; symptoms include limping, numbness, tingling, weakness; prior history of herniated disc with surgical removal; PT considered. (Ex. H, p. 478).

- 10/25/2011 – Family Physicians: reports of **worsening low back pain with radiating pain down left leg and medial thigh**; assessment is chronic thoracic or **lumbosacral neuritis or radiculitis** with history of laminectomy, physical therapy does not work in general and ESI has not worked in the past; repeat lumbar spine MRI ordered. (Ex. H, p. 474).

- 11/01/2011 – Lumbar Spine MRI: ordered due to lumbar pain, impression included disc protrusion at L4-L5 with moderate right neural foraminal encroachment, and L5-S1 broad-based disc bulge. (Ex. N, p. 539).

- 11/03/2011 – Family Physicians: claimant presented with **low back pain with pain radiating to the left thigh and left buttock**. Lumbar MRI scan looked normal without evidence of herniation. Medication and physical therapy were recommended. (Ex. H, p. 471-72).

- 12/20/2011 – Orthopaedic & Spine Center: evaluation for **3 months of left hip pain**, labral tear identified on MRI and felt not to be responsible for her SI/low back pain, assurance provided. (Ex. L, p. 517).

- 04/05/2012 – Family Physicians: report of low back/hip pain without injury; assessment was **low back pain related to lumbar degenerative joint disease or**

sacroiliitis. Physical therapy and Prednisone recommended with consideration for injections. (Ex. H, p. 468).

- 09/12/2012 – Family Physicians: claimant reported **worsening low back pain with pain radiating to the left calf without a new injury**. Percocet and Prednisone for sciatic pain and consideration for PT. (Ex. H, p. 465).

- 02/11/2013 – Family Physicians: **reports of low back pain/sciatica, pain radiating to the left calf, left foot, and left thigh**. Treatment included Vicodin. (Ex. H, p. 460).

- 02/18/2013 – Family Physicians: reports **continued pain and numbness down left leg to bottom of foot**; consider repeat MRI or ESI. (Ex. H, p. 457).

- 03/28/2014 – Family Physicians: claimant reports **3 months of fluctuating, but persistent low back pain which radiates to the left calf, left foot, and left thigh**. No specific injury. Symptoms include aching, dull, sharp, and shooting pain and **aggravated by daily activities, sitting, twisting, and walking**. Impression is **left low back pain, left SI joint pain, and left sciatica pain**. Vicodin prescribed and PT considered. (Ex. H, p 442-43).

46. In addition to her pre-existing history of significant low back problems, Claimant also had a history of depression, anxiety, memory issues, and sleep problems dating back to 2009. The medical records include the following:

- 03/16/2009 – Front Range Center for Brain & Spine Surgery: client questionnaire with endorsed symptoms including: back pain, **memory lapses or loss**, pain in the leg, **depression**, **sleep disturbances**, weight change, night sweats, and nausea; also noted that claimant was on medication for depression. (Ex. M, p. 522, 524).

- 12/06/2013 – Family Physicians: complaints of **worsening insomnia**. The assessment included anxiety and insomnia. Ambien, Fluoxetine and Xanax were prescribed. Claimant was noted to be "**moderately depressed**." (Ex. H, p. 454-56).

- 01/02/2014 – Family Physicians: claimant seen for insomnia and an acute and severe stress reaction due to separation and impending divorce. Psychiatric review of symptoms was positive for anxiety, depression, and insomnia. Claimant was observed to be uncomfortable, anxious and crying. Dr. Haskins noted claimant was "moderately depressed." (Ex. H, p. 450).

- 01/13/2014 to 06/30/2016 – Dr. Jane Derk: Marriage counseling and therapy with notations regarding depression and bipolar disorder. (Ex. F, p. 340-58).

- 03/03/2014 – Family Physicians: claimant evaluated for **chronic anxiety and insomnia**. It was noted that she was in counseling, along with marital counseling. Zolpidem to help with her sleep disorder was refilled. (Ex. H, p. 446).

- 03/28/2014 – Family Physicians: chronic problems included anxiety and ADD. Past medical history was **positive for memory loss**. Active medications included Fluoxetine and Clonazepam. (Ex. H, p. 442-43).

- 05/16/2016: Depression and Bipolar Clinic – A past psychiatric history documents a pre-existing history of bipolar disorder, ADHD, ADD, anxiety or panic disorder, PTSD, depression, and physical/sexual abuse. (Ex. E, p. 262).

47. Claimant also testified at hearing regarding non-work related factors contributing to her depression and anxiety, including a history of domestic violence, prior abuse, attempted murder involving her uncle, involvement with the FBI, marital issues, a fiancé who committed suicide, and raising three children alone. Claimant further admitted that she had been on and off anxiety medication since approximately 2009.

CONCLUSIONS OF LAW

Generally

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

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

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

Overcoming the DIME opinion on MMI

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

Under the statute MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007). A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Construction Management,* W.C. No. 4-356-512 (ICAO May 20, 2004); *Hatch v. John H. Garland Co.,* W.C. No. 4-638-712 (ICAO August 11, 2000). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. Therefore, the DIME physician's opinions on these issues are binding unless overcome by clear and convincing evidence. *See Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

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

finding regarding MMI has overcome the finding by clear and convincing evidence is one of fact for the ALJ.

Claimant has failed to establish by clear and convincing evidence that DIME physician Dr. Thurston's determination of MMI was incorrect. Dr. Thurston's MMI opinion and finding MMI existed on July 13, 2015 is consistent with the opinions of Dr. D'Angelo and Dr. Charbonneau. By July 13, 2015, Claimant had undergone significant treatment including imaging for a very minor mechanism of injury. Despite attempts, providers were not able to identify a pain generator. Claimant has failed to show that Dr. Thurston erred by determining MMI. Rather, by July 13, 2015 there were no additional diagnostic procedures needed nor was there additional medical treatment needed to improve Claimant's injury related medical condition. By this point, Claimant was in the same condition she was prior to the work injury. Claimant had low back symptoms similar to those she had prior to the injury. Claimant had psychiatric issues similar to those she had prior to the injury. Claimant has failed to meet her burden and the determination of MMI is consistent with the weight of the medical records and the credible medical opinions.

Overcoming the DIME opinion on Permanent Impairment

A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. Section 8-42-101(3.7), C.R.S.; §8-42-107(8)(c), C.R.S. The finding of a DIME physician concerning the claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

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

The questions of whether the DIME physician properly applied the AMA Guides, and ultimately whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000). A mere difference of opinion between

physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

Claimant has failed to establish by clear and convincing evidence that DIME physician Dr. Thurston's determination of 0% permanent impairment was incorrect. Dr. Thurston's opinion is clear, detailed, and consistent with the credible report and testimony of Dr. D'Angelo. Although Dr. Reichhardt rated Claimant with a 15% whole person impairment, Dr. Reichhardt did not have the available pre-existing records and relied on Claimant's subjective reports that she was doing well prior to her work related injury. The subjective reports were not accurate. Dr. Thurston and Dr. D'Angelo had the benefit of a full record review and both were able to review extensive pre-existing records relating to both the lower back and psychological issues. Further, the ALJ finds credible and persuasive that no Table 53 impairment existed to allow rating as there was no Table 53 diagnosis. Dr. Thurston and Dr. D'Angelo's opinions are more persuasive and credible than the opinion of Dr. Reichhardt, given the limitations that Dr. Reichhardt had without all available pre-existing records.

Medical Treatment

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Claimant has failed to establish by a preponderance of the evidence that any medical treatment subsequent to her MMI date of July 13, 2015 including fusion surgery and ongoing psychiatric care, is reasonable, necessary, or causally related to her April 9, 2014 work injury. As found above, DIME physician Dr. Thurston credibly opined that no further treatment was warranted. Dr. D'Angelo agreed and explained in her detailed report and in her testimony why further treatment was not warranted under the claim. Claimant has not established that the medical treatment she eventually underwent including a fusion surgery and the psychiatric treatment she is still undergoing is reasonable and necessary to treat her April 9, 2014 injury. Rather, the credible and persuasive evidence is that the treatment, and any future treatment, is to address Claimant's pre-existing problems that pre-dated her work injury and were not accelerated or exacerbated by her minor slip at work.

Temporary Total Disability Benefits

If an injury or occupational disease causes disability lasting more than three regular working days and the injured employee leaves work as a result of the injury, an award of temporary disability benefits is payable. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542, 546 (Colo. 1995). "Disability" involves medical incapacity evidenced by loss of restriction of bodily function and loss of wage-earning capacity as demonstrated by claimant's inability to resume her prior work. See *Montoya v. ICAO* 2018 COA 19 (Colo.

App. 2018). Claimant bears the burden of proving an entitlement to TTD benefits. § 8-43-201(1), C.R.S.

TTD continues until the first occurrence of any one of the following: (a) the employee reaches MMI; (b) the employee returns to regular or modified employment; (c) the attending physician gives the employee a written release to return to regular employment; or (d) the attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment. § 8-42-105(3), C.R.S.

Claimant has failed to establish by a preponderance of the evidence an entitlement to TTD benefits. Although Claimant testified that she used vacation days when she attended physical therapy and other doctor appointments, Claimant failed to point out how many days/hours of work she missed due to her injury. Claimant failed to identify specific dates/hours of missed work totaling more than three regular working days. Claimant also failed to establish medical incapacity or loss of wage-earning capacity due to any inability to resume her prior work. Rather, the records establish that Claimant was never placed on work restrictions prior to her placement at MMI and they establish that Claimant worked her regular pre-injury job the entire time. Claimant also failed to establish that she lost any wages or had loss of wage earning capacity due to medical incapacity. Claimant has thus failed to meet her burden.

ORDER

It is therefore ordered that:

1. Claimant has failed to overcome DIME physician Dr. Thurston's opinion on maximum medical improvement (MMI) by clear and convincing evidence. Claimant reached MMI on July 13, 2015.

2. Claimant thus is not entitled to an order requiring Respondents to provide additional reasonable, necessary, and causally related medical treatment. No further treatment is necessary or related to her April 9, 2014 work injury.

3. Claimant has failed to overcome DIME physician Dr. Thurston's opinion on Claimant's permanent partial disability (PPD) rating as a result of her work injury. Claimant has no permanent impairment resulting from her April 9, 2014 work injury.

4. Claimant has failed to establish, by a preponderance of the evidence, an entitlement to TTD benefits prior to being placed at MMI.

5. Any issues not determined herein are reserved for future determination.

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

DATED: May 3, 2019

/s/ Michelle E. Jones

_____

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

ISSUE

Whether Claimant has established by a preponderance of the evidence that he is entitled to receive reasonable, necessary and related medical maintenance benefits designed to relieve the effects of his admitted June 27, 2005 lower back injury or prevent further deterioration of his condition pursuant to *Grover v. Industrial Comm'n.,* 759 P.2d 705 (Colo. 1988).

FINDINGS OF FACT

1. On June 27, 2005 Claimant suffered an admitted industrial injury to his lower back while working for Employer. Claimant received conservative medical treatment through Authorized Treating Physician (ATP) Robert Kawasaki, M.D.

2. In February 2006 Gary Ghiselli, M.D. performed microdiscectomy surgery at the L5-S1 level of Claimant's lumbar spine. However, Claimant continued to report lower back and left lower extremity symptoms. A lumbar MRI revealed recurrent disc herniation at the L5-S1 level that displaced the left S1 nerve root. Dr. Ghiselli informed Claimant that a repeat microdiscectomy would likely relieve his left lower extremity symptoms. However, because of concerns about Claimant's lower back pain, Dr. Ghiselli referred Claimant back to Dr. Kawasaki for diagnostic/therapeutic epidural steroid injections (ESIs).

3. Dr. Kawasaki administered ESIs and medial branch blocks. He also prescribed physical therapy. On November 14, 2006 Dr. Kawasaki determined that Claimant had reached Maximum Medical Improvement (MMI) and assigned a 16% whole person impairment rating.

4. In a November 28, 2006 visit with Dr. Kawasaki Claimant reported occasional decreased sensation in his genital area and erectile dysfunction (ED). Although Claimant had been experiencing the ED symptoms for several months, he was reluctant to report them to Dr. Kawasaki. Dr. Kawasaki noted that the ED symptoms failed to represent an acute change in Claimant's condition. He subsequently referred Claimant for a repeat lumbar spine MRI.

5. On January 11, 2007 Dr. Ghiselli reviewed the repeat MRI findings with Claimant. The MRI continued to reflect the recurrent disc herniation that existed on the initial MRI. Dr. Ghiselli commented that Claimant's radicular symptoms were not significant. He explained that "[d]ue to the confounding ED, it would be unreasonable to decompress the L5-S1 level. I do not think that this is the reason for his [ED] and it may be contributing to his lower back and left lower extremity complaints." Dr. Ghiselli recommended a second surgery but Claimant was reluctant to proceed. He thus referred Claimant back to Dr. Kawasaki to discuss additional treatment options.

6. Dr. Kawasaki referred Claimant to urologist Seth Glick, M.D. Dr. Glick recommended a trial of Viagra for Claimant's ED. He did not believe there were any problems with Claimant's lower urogenital tract and noted that the ED could be related to psychological issues or back pain.

7. On March 15, 2007 Claimant returned to Dr. Ghiselli for an examination. Dr. Ghiselli again recommended surgery to decompress the L5-S1 level. He reasoned that surgery would likely improve Claimant's left lower extremity complaints but would not likely correct his back pain or ED symptoms.

8. On April 24, 2007 Claimant underwent a Division Independent Medical Examination (DIME) with Greg Reichhardt, M.D. Claimant reported decreased sensation throughout the entire left side of his body including his face, arm, trunk and leg. Dr. Reichhardt noted diffuse weakness throughout the entire left upper and lower extremity. He diagnosed Claimant with lower back pain, left hemi-body sensory loss unlikely related to his industrial injury, sexual dysfunction and gross numbness of uncertain etiology. Dr. Reichhardt detailed that "Claimant's presentation raises several concerns. His sexual dysfunction is not well explained based on the lumbar MRI. In addition, he has neurologic symptoms and findings which are unexplained based on his back injury. This likely represents a neurologic condition unrelated to his work-related injury or manifestation of a non-physiologic presentation." He recommended a psychological evaluation, further urologic testing and electrodiagnostic testing. Dr. Reichhardt agreed with Dr. Kawasaki that Claimant had reached MMI on November 14, 2006. He assigned a 10% impairment for a specific disorder of the lumbar spine and a 17% rating for range of motion deficits for a total 25% whole person impairment. Dr. Reichhardt did not assign impairment ratings for sexual dysfunctions or depression because the conditions were not related to his June 27, 2005 industrial injury.

9. On October 29, 2007 Claimant visited clinical psychologist Rebecca Hawkins, PhD. for an examination. Claimant reported that he had not experienced ED problems prior to his February 2006 back surgery. Dr. Hawkins noted that, after the discectomy in February 2006, Claimant no longer had typical morning erections and did not respond to sexual stimulation. Claimant's ED did not improve with Viagra.

10. On October 31, 2007 Administrative Law Judge Michael E. Harr issued Findings of Fact, Conclusions of Law and an Order in the present matter. ALJ Harr concluded that Claimant had demonstrated his condition worsened as of September 25, 2007 and he was no longer at MMI. He thus determined that Dr. Kawasaki's recommendations for further urological testing and a psychological evaluation were reasonably necessary to cure and relieve the effects of Claimant's June 27, 2005 industrial injury. Nevertheless, ALJ Harr reasoned that Claimant's "ongoing prescription for Viagra or similar medication" was not reasonable and necessary.

11. On November 6, 2007 Claimant returned to Dr. Hawkins for an evaluation. Claimant reported multiple issues including ED, psychological concerns and postsurgical problems. Dr. Hawkins diagnosed major depressive disorder, probable male erectile disorder and a pain disorder. She determined that psychological factors

were likely contributing to his experience of pain and suffering. Dr. Hawkins also noted that Claimant's ED might be multifactorial. She recommended up to 10 psychotherapy sessions and treatment with Wellbutrin. Dr. Hawkins summarized that Claimant's depressive symptoms appeared to be "reactive to his injury, chronic pain, and limitations in his ability to function occupationally and sexually."

12. On May 5, 2008 Claimant's treating urologist Fred Grossman. M.D. addressed the cause of his ED and hypogonadism after Insurer's adjuster denied treatment for the conditions. Dr. Grossman explained that Claimant had hypogonadism or reduced testosterone as a result of "sustained action oral opioids" that subsequently caused his ED. He included "a copy of a recent article from the Journal of Pain that documented the occurrence of hypogonadism in men consuming sustained action oral opioids."

13. On May 15, 2008 urologist Richard R. Augspurger, M.D. provided his opinion on the cause of Claimant's ED after reviewing Dr. Grossman's report. He noted that he could not demonstrate that a neurological condition was causing Claimant's ED. However, he remarked that low testosterone levels may be attributed to narcotic use. Dr. Augspurger reasoned that, if Claimant's ED was related to narcotic use, the ED would be "indirectly related" to his industrial lower back injury.

14. After additional conservative medical treatment, diagnostic testing and psychological counseling Claimant returned to Dr. Kawasaki on August 25, 2009. Claimant reported that he continued to suffer leg pain and back stiffness. Dr. Kawasaki noted that he had multiple discussions with Claimant about decreasing opioid medications to restore endocrine function and "potentially" restore sexual function. He diagnosed Claimant with the following: (1) L5-S1 discectomy with postlaminectomy syndrome; (2) chronic left S1 radiculopathy; (3) chronic opioid dependence; (4) hypogonadism with hypotestosteronism secondary to opioid use that resulted in sexual dysfunction; and (5) adjustment disorder with depressed mood. Dr. Kawasaki determined that Claimant had reached MMI. However, Claimant would require significant medical maintenance treatment including a gym membership for 12 months and 10 psychological visits with Dr. Hawkins over the following 12 months. Dr. Kawasaki explained that Claimant would continue the following medications for an indefinite period: (1) Ambien CR; (2) Wellbutrin XL; (3) Ibuprofen and (4) Zoloft. He also remarked that Claimant would require follow-up care with Dr. Grossman. Dr. Grossman was prescribing Cialis, Androgel and penile injections. Finally, Dr. Kawasaki commented that Claimant was not interested in any additional surgical interventions.

15. On January 25, 2011 Claimant returned to Dr. Kawasaki for maintenance treatment. Dr. Kawasaki remarked that Claimant had been taken off multiple medications because of an elevation in liver function results after being treated for tuberculosis. Claimant reported that subsequent additional liver function testing revealed that his blood levels were returning to normal. He commented that he would be returning to Mali at the end of the week but would return in mid-March.

16. During 2015 and 2016 Claimant visited an emergency room for right-sided neck, back and hip pain. Claimant did not seek additional urological treatment during the period.

17. After additional maintenance visits with Dr. Kawasaki in 2017, Claimant returned to Dr. Hawkins for psychological treatment on January 16, 2018. Claimant reported that he had returned to the area because he had an independent medical examination scheduled with Brian D. Lambden, M.D. for the following day. He reported significant anxiety and depression as well as nocturnal panic attacks.

18. On January 17, 2018 Claimant visited Dr. Lambden for an independent medical examination. Dr. Lambden performed a physical examination and thoroughly reviewed Claimant's medical records. Claimant reported continued lower back symptoms that included low-level radiating pain down his left leg. Dr. Lambden concluded that Claimant's ED was not likely caused by opioid use, borderline low testosterone levels or surgery because his symptoms preceded his opioid use and surgery. He noted that medical literature suggested a likely psychological cause for Claimant's ED symptoms. Dr. Lambden thus determined that he was "not sure anything else" needed to be done for Claimant's ED. In addressing Claimant's chronic pain, Dr. Lambden reasoned that no further treatment was necessary because Claimant was not interested in surgical intervention and it was questionable whether surgery would provide a benefit 10 years after Claimant's industrial injury. Claimant had thus reached MMI. Regarding opioid dependence, Dr. Lambden agreed that Claimant should be switched from Opana to Percocet but attempt opioid tapering to reduce dependence. He also questioned whether Claimant required Lyrica and recommended reduction in Ibuprofen use. Finally, Dr. Lambden noted that Claimant's depression would resolve over time with case closure. He also stated that Claimant's use of anti-depressants was not unreasonable, but suggested the discontinuation of Sertraline because Claimant was not exhibiting depressive symptoms and the medication has a negative effect on ED.

19. In a March 22, 2018 report Dr. Lambden reviewed additional medical records from Dr. Kawasaki and Dr. Hawkins. He also considered a January 30, 2018 urine toxicology report that reflected Claimant's testosterone level was 291 with a normal range of 250-827.

20. On April 3, 2018 Claimant visited urologist John W. Tillett, M.D. for an examination. He evaluated Claimant's ED and hypogonadism. Claimant recounted that he had suffered an industrial lower back injury on June 27, 2005, subsequently underwent surgery and continued to experience back pain. Dr. Tillett noted that Claimant has received narcotic pain medications since 2005 and had visited Dr. Grossman since 2007 for ED and hypogonadism until Dr. Grossman's retirement. Claimant denied any ED prior to surgery and has managed his ED well with Cialis 10mg since 2008. He remarked that he currently lives in Mali but spends significant time in Denver to visit his ex-wife and children. Dr. Tillett noted that Claimant was taking the following medications: (1) Oxycodone HCL capsule; (2) Ibuprofen 800 mg oral capsule; (3) Lyrica 75 mg oral capsule; (4) Temazepam 7.5 mg oral capsule; (5) Bupropion HCL

tablet; (6) Cialis 10 mg oral tablet; and (7) Sertraline HCL 100 mg oral tablet. After conducting a physical examination, Dr. Tillett diagnosed Claimant with ED and hypogonadism or low testosterone.

21. On April 5, 2018 Dr. Tillett conducted a medical records review of Claimant's case. He recounted that Claimant had suffered an industrial lower back injury on June 27, 2005, subsequently underwent surgery and continued to experience back pain. In an addendum report dated April 24, 2018 Dr. Tillett noted that Dr. Lambden determined Claimant's ED was unrelated to chronic opioid use, low testosterone or surgery because the condition preceded surgery and opioid use. In contrast, Dr. Tillett explained that there was no evidence in the medical records that Claimant's ED existed prior to his surgery or opioid use. He also disagreed that low testosterone was unrelated to ED.

22. Claimant and Dr. Kawasaki testified at the hearing in this matter that Claimant currently takes the following medications:

a. 100 milligrams of Sertraline (an anti-anxiety medication for panic disorders);
b. Bupropion (an anti-depressant medication for major depressive disorders);
c. Ibuprofen (an anti-inflammatory medication for pain);
d. Lyrica, 75 milligrams (a neuropathic pain medication);
e. Oxycodone, 10 milligrams every six hours (a narcotic medication for pain),
f. Cialis 10 milligrams (for ED);
g. Temazepam (for sleep).

23. Respondents clarified at hearing that they were challenging the medications prescribed by Drs. Kawasaki and Tillett. Respondents specifically contested prescriptions for Cialis, Oxycodone, Lyrica and Bupropion. They did not seek a denial of all medical maintenance treatment.

24. Claimant testified at the hearing in this matter that he began suffering from constant back pain, depression and ED shortly after his June 27, 2005 industrial injury. He emphasized that he had not experienced ED prior to his lower back injury. Claimant noted that his pain medications reduce his symptoms. Although the medications do not completely eliminate his pain, they allow improved sleep and function. Claimant remarked that his psychotropic medications help him deal with anxiety and depression. Nevertheless, he continues to suffer panic attacks that are typically worse at night.

25. Dr. Kawasaki testified at the hearing in this matter. He stated that he has been Claimant's ATP since August 2005. Dr. Kawasaki explained that Claimant suffers from chronic pain as a result of his June 27, 2005 industrial injury. He requires opioid pain medications to improve his function. Without the medications Claimant would likely become non-functional and have difficulty getting out of bed. Dr. Kawasaki noted that Claimant takes a reasonable amount of opioid medications and there are no plans for weaning. Claimant specifically takes about 60 milligrams of morphine equivalent. The amount does not place Claimant in the "danger zone." In contrast, when individuals

take 90-120 milligrams of morphine equivalent, they tend to develop opioid-related problems. Dr. Kawasaki summarized that opioid medications assist Claimant in performing activities of daily living. He noted that Claimant has never presented with any addictive or aberrant behavior since he began treatment in August 2005.

26. Dr. Kawasaki explained that chronic pain can increase depression, anxiety and other psychosocial issues. He summarized that Claimant requires anti-depressant medications because of his industrial injury. Dr. Kawasaki specifically prescribed Bupropion 300 mg. Temazepam 75 mg and Sertraline 100 mg on January 15, 2018 for Claimant's symptoms of anxiety and depression. Furthermore, because Claimant has exhibited both objective and subjective pain symptoms consistent with the injured nerve in his lower back, Dr. Kawasaki prescribed Lyrica 75 mg on January 15, 2018.

27. Dr. Kawasaki explained that Claimant's extended opioid use for pain is partially responsible for his ED. He remarked that log-term use of opioid medications generally affects the endocrine system. Specifically, the use of opioids impairs the gonadal system that produces testosterone. Dr. Kawasaki commented that, although Claimant's ED was secondary to chronic opioid use, psychologic issues also contributed to his sexual dysfunction. He explained that Claimant felt powerless, had a shift in identity, lost his job, suffered pain, felt fear and experienced performance anxiety. Dr. Kawasaki commented that the preceding factors contribute to Claimant's sexual dysfunction. He detailed that Claimant underwent unsuccessful ED treatment modalities with penile injections, testosterone, clomid and Viagra. However, Claimant had success treating his ED when he began taking Cialis. Dr. Kawasaki thus continues to prescribe Cialis.

28. Dr. Tillett testified at the hearing in this matter. He explained that ED is a distressing medical condition in which a man is unable to achieve or sustain an erection. Hypogonadism refers to suboptimal production of sperm or testosterone. Dr. Tillett diagnosed Claimant with both ED and hypogonadism. He maintained that Claimant's chronic opioid use constituted a significant causative factor in his ED and hypogonadism conditions. Dr. Tillett remarked that the longer an individual is taking opioid medications, the greater the effect on erectile and testicular function. Moreover, Claimant's anxiety and depression may be contributing to his ED. Dr. Tillett determined that reducing Claimant's opioid medication now would likely not have much impact on his ED and testosterone function. The chronicity of opioid therapy has damaged Claimant's ability to recover erectile function and testosterone secretion.

29. Dr. Tillett recommended additional diagnostic testing for Claimant's hypogonadism condition. He explained that hypogonadism therapy can produce benefits such as increased sexual desire, libido, energy and lean muscle mass while also improving a general sense of well-being. The therapy can also cause improvements in emotional/psychologic parameters, lipid profiles/cholesterol levels and ED. Thus, beginning testosterone treatment could help decrease Claimant's depression while increasing his energy and level of functioning. Dr. Tillett explained that testosterone levels and erectile function are intertwined. He commented that the American Urology Association (AUA) guidelines on the management of ED recommend

that every man presenting with ED have a serum testosterone work-up. Dr. Tillett agreed with Dr. Kawasaki that Claimant should continue to use Cialis 10 mg. for treatment of his ED.

30. Dr. Lambden testified at the hearing in this matter. He maintained that Claimant should be gradually tapered from opioid medications. He specifically recommended ceasing Sertraline, Temazepam, Oxycodone, Bupropion, Lyrica and Ibuprofen. Dr. Lambden remarked that his preference for chronic pain management is to decrease opioids whenever possible. He also commented that opioids and Lyrica negatively impact ED. He explained that ED is a multifactorial problem not associated with Claimant's testosterone levels. Therefore, Claimant's use of opioids for his June 27, 2005 industrial injury did not cause his ED and Cialis should be discontinued. Furthermore, Dr. Lambden noted that Claimant was not having sufficient depressive symptoms to warrant continuing Sertraline in light of its negative effect on ED. He summarized that, once the case has been closed and Claimant has adjusted to living in Mali, his depression symptoms should resolve without medication.

31. Claimant has established that it is more probably true than not that he is entitled to receive reasonable, necessary and related medical maintenance treatment designed to relieve the effects of his admitted June 27, 2005 lower back injury or prevent further deterioration of his condition. Initially, Claimant suffered an industrial lower back injury on June 27, 2005, subsequently underwent surgery and continued to experience back pain. The record is replete with evidence that Claimant continues to suffer chronic pain, sleep disturbances, psychological problems and urological issues as a result of his June 27, 2005 injury.

32. Dr. Kawasaki has been Claimant's ATP since August 2005. He persuasively explained that Claimant suffers from chronic pain as a result of his June 22, 2005 industrial injury. He requires opioid pain medications to improve his function. Without the medications Claimant would likely become non-functional and have difficulty getting out of bed or completing activities of daily living. Dr. Kawasaki noted that Claimant takes a reasonable amount of opioid medications and there are no plans for weaning. Furthermore, Claimant noted that his pain medications reduce his symptoms. Although the medications do not completely eliminate his pain, they allow improved sleep and function.

33. Claimant remarked that his psychotropic medications help him deal with anxiety and depression. Nevertheless, he continues to suffer panic attacks that are typically worse at night. Dr. Kawasaki explained that chronic pain can increase depression, anxiety and other psychosocial issues. He summarized that Claimant requires anti-depressant medications because of his industrial injury. Dr. Kawasaki specifically prescribed Bupropion 300 mg. Temazepam 75 mg and Sertraline 100 mg on January 15, 2018 for Claimant's symptoms of anxiety and depression. Furthermore, because Claimant has exhibited both objective and subjective pain symptoms consistent with the injured nerve in his lower back, Dr. Kawasaki also prescribed Lyrica. Finally, Dr. Hawkins summarized that Claimant's depressive symptoms appeared to be

"reactive to his injury, chronic pain, and limitations in his ability to function occupationally and sexually."

34. Dr. Kawasaki further explained that Claimant's extended opioid use for pain is partially responsible for his ED. He remarked that long-term use of opioid medications generally affects the endocrine system. Specifically, the use of opioids impairs the gonadal system that produces testosterone. Dr. Kawasaki commented that, although Claimant's ED is secondary to chronic opioid use, psychologic issues also contribute to his sexual dysfunction. Similarly, Dr. Tillett diagnosed Claimant with both ED and hypogonadism. He maintained that Claimant's chronic opioid use constituted a significant causative factor in his ED and hypogonadism conditions. Dr. Tillett remarked that the longer an individual is taking opioid medications, the greater the effect on erectile and testicular function. He determined that reducing Claimant's opioid medication now would not likely have much impact on his ED and testosterone function. Furthermore, Dr. Grossman explained that Claimant had hypogonadism or reduced testosterone as a result of "sustained action oral opioids" that subsequently caused his ED. Moreover, Dr. Augspurger remarked that low testosterone levels may be attributed to narcotic use. He reasoned that, if Claimant's ED was related to narcotic use, the ED would be "indirectly related" to his industrial lower back injury.

35. Dr. Tillett also recommended additional diagnostic testing for Claimant's hypogonadism condition. He explained that hypogonadism therapy can produce benefits such as increased sexual desire, libido, energy and lean muscle mass while also providing a general sense of well-being. The therapy can also cause improvements in emotional/psychologic parameters, lipid profiles/cholesterol levels and ED. Thus, beginning testosterone treatment could help decrease Claimant's depression while increasing his energy and level of functioning.

36. In contrast, Dr. Lambden maintained that Claimant should be gradually tapered from opioid medications. Dr. Lambden concluded that Claimant's ED is a multifactorial problem not likely caused by opioid use, borderline low testosterone levels or surgery because his symptoms preceded his opioid use and surgery. He reasoned that Claimant's use of opioids as a result of his June 27, 2005 industrial injury did not cause his ED and Cialis should be discontinued. Furthermore, Dr. Lambden noted that Claimant was not having sufficient depressive symptoms to warrant continuing Sertraline in light of its negative effect on ED. He summarized that, once the case has been closed and Claimant has adjusted to living in Mali, his depression symptoms should resolve without medication. However, the persuasive evidence reveals that Claimant began suffering from constant back pain, depression and ED as a result of his June 22, 2005 industrial injury. The record and medical opinions of Drs. Kawasaki, Hawkins and Tillett reflect that Claimant's pain medications, psychotropic prescriptions and ED medications have not only reduced his pain but also maximized his level of function over an extended period of time consistent with the Division of Workers' Compensation *Medical Treatment Guidelines* (*Guidelines*). Moreover, the testosterone therapy recommended by Dr. Tillett will likely decrease Claimant's depression while improving his level of functioning. Accordingly, Claimant shall receive reasonable, necessary and

related medical maintenance benefits designed to relieve the effects of his June 27, 2005 industrial injury or prevent further deterioration of his condition.

CONCLUSIONS OF LAW

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

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

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

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

5. The *Guidelines* provide, in relevant part, that "medications should be clearly linked to improvement of function, not just pain control." WCRP 17, Exhibit 9 (H)(6). Furthermore, the *Guidelines*, specify that, "examples of routine functions include

the ability to perform work tasks, drive safely, pay bills or perform math operations, remain alert and upright for 10 hours per day, or participate in normal family and social activities." WCRP 17, Exhibit 9(H)(6).

6. As found, Claimant has established by a preponderance of the evidence that he is entitled to receive reasonable, necessary and related medical maintenance treatment designed to relieve the effects of his admitted June 27, 2005 lower back injury or prevent further deterioration of his condition. Initially, Claimant suffered an industrial lower back injury on June 27, 2005, subsequently underwent surgery and continued to experience back pain. The record is replete with evidence that Claimant continues to suffer chronic pain, sleep disturbances, psychological problems and urological issues as a result of his June 27, 2005 injury.

7. As found, Dr. Kawasaki has been Claimant's ATP since August 2005. He persuasively explained that Claimant suffers from chronic pain as a result of his June 22, 2005 industrial injury. He requires opioid pain medications to improve his function. Without the medications Claimant would likely become non-functional and have difficulty getting out of bed or completing activities of daily living. Dr. Kawasaki noted that Claimant takes a reasonable amount of opioid medications and there are no plans for weaning. Furthermore, Claimant noted that his pain medications reduce his symptoms. Although the medications do not completely eliminate his pain, they allow improved sleep and function.

8. As found, Claimant remarked that his psychotropic medications help him deal with anxiety and depression. Nevertheless, he continues to suffer panic attacks that are typically worse at night. Dr. Kawasaki explained that chronic pain can increase depression, anxiety and other psychosocial issues. He summarized that Claimant requires anti-depressant medications because of his industrial injury. Dr. Kawasaki specifically prescribed Bupropion 300 mg. Temazepam 75 mg and Sertraline 100 mg on January 15, 2018 for Claimant's symptoms of anxiety and depression. Furthermore, because Claimant has exhibited both objective and subjective pain symptoms consistent with the injured nerve in his lower back, Dr. Kawasaki also prescribed Lyrica. Finally, Dr. Hawkins summarized that Claimant's depressive symptoms appeared to be "reactive to his injury, chronic pain, and limitations in his ability to function occupationally and sexually."

9. As found, Dr. Kawasaki further explained that Claimant's extended opioid use for pain is partially responsible for his ED. He remarked that long-term use of opioid medications generally affects the endocrine system. Specifically, the use of opioids impairs the gonadal system that produces testosterone. Dr. Kawasaki commented that, although Claimant's ED is secondary to chronic opioid use, psychologic issues also contribute to his sexual dysfunction. Similarly, Dr. Tillett diagnosed Claimant with both ED and hypogonadism. He maintained that Claimant's chronic opioid use constituted a significant causative factor in his ED and hypogonadism conditions. Dr. Tillett remarked that the longer an individual is taking opioid medications, the greater the effect on erectile and testicular function. He determined that reducing Claimant's opioid medication now would not likely have much

impact on his ED and testosterone function. Furthermore, Dr. Grossman explained that Claimant had hypogonadism or reduced testosterone as a result of "sustained action oral opioids" that subsequently caused his ED. Moreover, Dr. Augspurger remarked that low testosterone levels may be attributed to narcotic use. He reasoned that, if Claimant's ED was related to narcotic use, the ED would be "indirectly related" to his industrial lower back injury.

10. As found, Dr. Tillett also recommended additional diagnostic testing for Claimant's hypogonadism condition. He explained that hypogonadism therapy can produce benefits such as increased sexual desire, libido, energy and lean muscle mass while also providing a general sense of well-being. The therapy can also cause improvements in emotional/psychologic parameters, lipid profiles/cholesterol levels and ED. Thus, beginning testosterone treatment could help decrease Claimant's depression while increasing his energy and level of functioning.

11. As found, in contrast, Dr. Lambden maintained that Claimant should be gradually tapered from opioid medications. Dr. Lambden concluded that Claimant's ED is a multifactorial problem not likely caused by opioid use, borderline low testosterone levels or surgery because his symptoms preceded his opioid use and surgery. He reasoned that Claimant's use of opioids as a result of his June 27, 2005 industrial injury did not cause his ED and Cialis should be discontinued. Furthermore, Dr. Lambden noted that Claimant was not having sufficient depressive symptoms to warrant continuing Sertraline in light of its negative effect on ED. He summarized that, once the case has been closed and Claimant has adjusted to living in Mali, his depression symptoms should resolve without medication. However, the persuasive evidence reveals that Claimant began suffering from constant back pain, depression and ED as a result of his June 22, 2005 industrial injury. The record and medical opinions of Drs. Kawasaki, Hawkins and Tillett reflect that Claimant's pain medications, psychotropic prescriptions and ED medications have not only reduced his pain but also maximized his level of function over an extended period of time consistent with the Division of Workers' Compensation *Medical Treatment Guidelines* (*Guidelines*). Moreover, the testosterone therapy recommended by Dr. Tillett will likely decrease Claimant's depression while improving his level of functioning. Accordingly, Claimant shall receive reasonable, necessary and related medical maintenance benefits designed to relieve the effects of his June 27, 2005 industrial injury or prevent further deterioration of his condition.

ORDER

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

1. Claimant shall receive specifically delineated reasonable, necessary and related medical maintenance benefits as prescribed by Drs. Kawasaki and Tillett. The medical maintenance medications that Claimant shall receive include: (1) 100 milligrams of Sertraline (an anti-anxiety medication for panic disorders); (2) Bupropion (an anti-depressant medication for major depressive disorders); (3) Ibuprofen (an anti-

inflammatory medication for pain); (4) Lyrica, 75 milligrams (a neuropathic pain medication; (5) Oxycodone, 10 milligrams every six hours (a narcotic medication for pain); (6) Cialis 10 milligrams (for ED); and (7) Temazepam (for sleep).. Claimant shall also receive the additional testosterone therapy recommended by Dr. Tillett. Respondents shall be financially responsible for the preceding medical maintenance benefits.

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

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

DATED: March 5, 2019.

DIGITAL SIGNATURE.
Peter J. Cannici

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

ISSUES

- Whether respondent has demonstrated by a preponderance of the evidence that claimant's temporary partial disability benefits should be suspended based on an intervening event?

FINDINGS OF FACT

1. Claimant is employed with employer as an assistant grocery manager. Claimant sustained a compensable work injury on July 1, 2017 when she was pushing a bookshelf and felt a pop in her right knee. Claimant sustained a second injury that same day when a co-worker kicked out claimant's right knee causing her knee to buckle.

2. Claimant came under the care of Dr. McClellan for her work injury. Dr. McClellan treated claimant conservatively and provided claimant with work restrictions that included no lifting more than 10 pounds and no walking or standing greater than 2 hours per day as of July 5, 2017.

3. Claimant underwent a magnetic resonance image ("MRI") of the hip and was diagnosed with a labral tear. Claimant subsequently underwent an arthroscopy on October 25, 2017 and the primary finding was synovitis.

4. Claimant provided the work restrictions to employer and was originally taken off of work and provided with temporary total disability benefits beginning July 27, 2017. Employer subsequently provided claimant with modified work within her restrictions, and limited claimant to 30 hours of work per week. As a result of the modified duty, claimant was provided with temporary partial disability ("TPD") benefits in the amount of $166.00 per week ($232 every two weeks). Respondent transitioned claimant to TPD benefits effective January 15, 2018. The temporary disability benefits paid to claimant are reflected in a general admission of liability ("GAL") dated June 21, 2018 and entered into evidence at hearing.

5. Claimant's work restrictions would periodically change minimally during the time in which she was receiving TPD benefits. As of September 4, 2018, claimant was still limited to no lifting, carrying, pushing or pulling over 10 pounds with limitations on walking and sitting of no more than 3 hours.

6. During this period of time, claimant became pregnant. Claimant also developed the onset of low back pain. A repeat MRI was recommended but claimant testified she could not have the MRI accomplished until after the first trimester of her pregnancy. Claimant testified that once she was past the first trimester of pregnancy where the MRI could be performed safely, the MRI was denied.

7. Claimant applied for family leave from employer on November 8, 2018. The leave claimant elected was related to her pregnancy and offered by employer and not related to her work injury. Claimant testified at hearing that she left work on the advice of her mid wife who told claimant if she wanted to take leave, she could. Claimant testified that the due date for her baby was November 29, 2018.

8. After claimant took leave for her pregnancy, respondent filed a petition to suspend temporary disability benefits on December 6, 2018. Claimant objected to the petition to terminate and respondent sought a hearing on whether employer could terminate claimant's ongoing temporary partial disability benefits.

9. At hearing, respondent argued that the earnings for claimant would have been reduced to $0 once claimant elected to take leave for the birth of her child, regardless of the work injury. Respondent argued that the leave claimant sought represented an intervening event sufficient to terminate claimant's ongoing receipt of temporary disability benefits as the wage loss was related to the family leave, and not the work injury as of November 8, 2018 when claimant stopped working due to her pregnancy.

10. The ALJ agrees that the basis for the wage loss after November 8, 2018 is related to claimant's maternity leave, and not the work injury. In fact, claimant does not appear to dispute this fact. However, the Colorado Workers' Compensation Act does not provide that temporary disability benefits can be cut off under these circumstances. The Act specifically provides that benefits continue until either claimant is placed at maximum medical improvement ("MMI"), or is released to return to work by a treating physician in a modified duty position, a position is offered to the claimant in writing, and claimant does not return to work.

11. As argued by claimant, claimant's temporary disability benefits would have continued whether she was taking the leave for her pregnancy or not until a statutory cut off for the temporary disability benefits occurred. While there was an interruption in claimant's treatment for her work injury in order for claimant to give birth to her child, the extent to which the interruption delayed claimant reaching MMI is speculation.

12. Insofar as the Act does not allow for TPD benefits to be suspended under the circumstances in this case, respondent's request for an Order suspending receipt of TPD benefits while claimant is on leave is denied.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the

rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2017).

3. Section 8-42-106(2), C.R.S., provides in pertinent part:

> Temporary partial disability shall continue until the first occurrence of either of the following: (a) The employee reached maximum medical improvement; or (b)(I) The attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment.

4. While the ALJ agrees that the claimant's total wage loss was related in this case to the election to undergo leave related to claimant's pregnancy and not related to the work injury, the ALJ finds that the Act does not allow for temporary disability benefits to be suspended in this case based on the election of the claimant to take family leave offered by employer.

5. Due to the fact that respondent has failed to establish a statutory basis for the suspension of TPD benefits, the request to suspend benefits is herby denied.

ORDER

It is therefore ordered:

1. Respondent's request for an Order suspending claimant's TPD benefits due to an intervening event is denied.

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

Dated May 7, 2019

Keith E. Mottram

Keith E. Mottram
Administrative Law Judge

ISSUES

- Whether claimant has established by a preponderance of the evidence that respondent is in violation of an Order and subject to penalties of up to $1,000 per day pursuant to Section 8-43-304(1), C.R.S.?

FINDINGS OF FACT

1. Claimant testified at hearing that he brought a workers compensation claimant against employer and attended a settlement conference on April 26, 2018. Claimant testified that at the settlement conference which was attended by a prehearing conference judge, the employer and claimant by telephone, he agreed to settle his claimant against employer.

2. Claimant testified that as a result of his injury he missed three months of work and had approximately $10,000 in medical bills that needed to be reimbursed.

3. Claimant entered into evidence at hearing copies of the settlement agreement in which employer agreed to pay claimant $15,000 to settle the workers' compensation claim. Pursuant to the settlement agreement, employer agreed to pay claimant $417.00 per month for 36 months. The settlement agreement was approved by the Director of the Division of Workers' Compensation on May 9, 2018. The Order was mailed to the parties.on that same day.

4. Claimant testified employer paid claimant pursuant to the settlement agreement for the first two months, with a payment of $420.00 on May 28, 2018 and a payment of $420.00 on July 2, 2018. Employer then made two partial payments of $300 on July 30, 2018 and $120.00 on August 10, 2018. Claimant testified he did not receive any further payments after August 10, 2018.

5. Claimant testified that total amount of the four payments made in this case amounted to $1,260.00.

6. Employer testified in this case and explained that he was unemployed and was unable to make payments, which resulted in him failing to abide by the Order approving the settlement agreement. Employer testified that he obtained a new job on October 31, 2018 and would continue to make payments if he could.

7. Employer testified he did not make any payments after October 31, 2018 because he did not know he could continue to make payments after the application for hearing was filed seeking penalties.

8. Employer testified as to volunteer coaching activities he performs on behalf of Jack Rabbit Baseball, but denied receiving any compensation for his coaching

activities. Employer testified he intends to comply with the settlement agreement and make payments to claimant pursuant to the settlement agreement.

9. The ALJ finds that claimant has established that employer was ordered by the settlement agreement to make payments of $420.00 per month and has failed to abide by the Order of the Director approving the settlement agreement. The ALJ therefore finds that claimant has established the employer is subject to penalties pursuant to Section 8-43-304(1), C.R.S.

10. The ALJ finds that penalties are appropriate in this case as there is a lack of communication from employer to claimant or his counsel of his hardship in complying with the terms of the settlement agreement. However, insofar as employer intends to comply with the settlement agreement, the ALJ finds that the penalties should not be so egregious as to make compliance with the original settlement agreement impossible.

11. Claimant argued at hearing that the penalties should begin as of August 11, 2018, as employer did not make any further payments after that date. However, employer's next payment was not due until September 1, 2018 as the two partial payments made on July 31 and August 10, 2018 complied with the required payment that was due for Auigust.

12. Therefore, the ALJ determines that employer is subject to penalties beginning September 1, 2018 and continuing until April 11, 2019, the date of hearing, in the amount of $6.73 per day for a period of 223 days.

13. The ALJ notes that the extent of the penalties awarded in this case could have been much more significant, but intends to provide employer with an opportunity to comply with the settlement agreement in this case.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider,

among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2017).

3. Section 8-43-304(1), C.R.S. provides that penalties of up to $1,000 per day may be ordered if a party "violates any provision of articles 40 to 47 of this title, or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel, for which no penalty has been specifically provided, or fails, neglects, or refuses to obey any lawful order made by the director or panel.

4. Pursuant to Section 8-43-304(1), a claimant must first prove by a preponderance of the evidence that the disputed conduct constituted a violation of statute, rule, or order before a court can assess penalties against a respondent. *Allison v. Industrial Claim Appeals Office*, 916 P.2d 623 (Colo. App. 1995).

5. As found, claimant has demonstrated by a preponderance of the evidence that respondent has failed to obey an Order by failing to pay claimant the pursuant to the settlement agreement and is subject to penalties of up to $1,000 per day for violation of that Order.

6. Respondent is hereby ordered to pay to claimant $6.73 per day for 223 days for failure to comply with the Order approving the settlement agreement in this case.

ORDER

It is therefore ordered:

1. Employer shall pay claimant $6.73 per day for a period of 223 days.

Dated May 8, 2019

Keith E. Mottram

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

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

In lieu of payment of the above compensation and benefits to the claimant, the Respondent-Employer shall:

a. Within ten (10) days of the date of service of this order, deposit the sum of $1,500.79 with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to: Division of Workers' Compensation/Trustee. The check shall be mailed to the Division of Workers' Compensation, P.O. Box 300009, Denver, Colorado 80203-0009, Attention: Gina Johannesman/Trustee; OR

b. Within ten (10) days of the date of service of this order, file a bond in the sum of $1,500.79 with the Division of Workers' Compensation within ten (10) days of the date of this order:

(1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation; or
(2) Issued by a surety company authorized to do business in Colorado.

The bond shall guarantee payment of the compensation and benefits awarded.

IT IS FURTHER ORDERED: That the Respondent-Employer shall notify the Division of Workers' Compensation of payments made pursuant to this order.

IT IS FURTHER ORDERED: That the filing of any appeal, including a petition to review, shall not relieve the employer of the obligation to pay the designated sum to the trustee or to file the bond. §8-43-408(2), C.R.S.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-065-765-001

ISSUES

I. Whether Respondent overcame the opinion of the DIME physician, Dr. Justin Green, by clear and convincing evidence regarding Claimant's impairment rating.

FINDINGS OF FACT

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

1. Claimant is a member of the Denver Fire Department and has been a firefighter with the department for approximately fifteen years.
2. Claimant's date of birth is July 23, 1982.
3. While on a run on December 26, 2017, Claimant slipped on some ice and twisted his back. He felt his back getting tight and over the course of his work shift, he experienced increasing stiffness and pain in his low back. While at home after his shift, in the early morning hours, Claimant found himself unable to walk. His pain was incapacitating and he was unable to drive himself to the hospital. Therefore, Claimant was taken by ambulance to Parker Adventist Hospital. While getting ready to be discharged, he again experienced shooting left lower extremity pain and he was transferred to Sky Ridge Hospital.
4. Claimant was released from the hospital on January 9, 2018. Shortly thereafter, he underwent a lumber MRI, which demonstrated a herniated disc at L3-L4. A repeat MRI was performed on February 27, 2018. The MRI findings noted a persistent large left subarticula disc extrusion at L3-L4 with inferior migration of extruded disc material with increased inferior migration. Additional findings included persistent compression and displacement of the descending left L4 and the left L5 nerve roots. There was also persistent moderate and persistent L3-L4 spinal stenosis. In addition, the left subarticular disc extrusion at L4-L5 posteriorly was displacing the distending left L5 nerve root. There was also narrowing of the left lateral recess with moderate bilateral L4-L5 foraminal narrowing.
5. Claimant underwent an extensive regimen of physical therapy, massage therapy, and saw several specialists including Dr. Mankowski, Dr. Castro and Dr. Ghiselli. The physical therapy was ongoing for approximately twice a week from February 2018 until June 2018. Massage therapy occurred approximately once a week for the same time.
6. Claimant was provided work restrictions and ultimately returned to light duty work.

7. Dr. Ghiselli examined Claimant on April 19, 2018 and noted that there was full flexion and full extension. However, there is no indication Dr. Ghiselli formally measured Claimant's range of motion using dual inclinometers - as required by the AMA Guides - for measuring Claimant's lumber flexion and extension. Dr. Lesnak commented in his testimony that there is no indication Dr. Mankowski used dual inclinometers and performed a formal range of motion exam using the parameters set forth in the AMG Guides. (*Hearing Testimony P. 46.*)

8. On June 5, 2018, Claimant saw his primary authorized treating physician, Dr. Mankowski and/or clinician Vicki Haseman. At this appointment, Claimant was released to full duty and placed at maximum medical improvement. The report from this visit indicates Claimant reported "some back stiffness" and indicated that he had "increased low back stiffness after working his second shift." (*Ex. E, p. 77*.) Dr. Mankowski or Ms. Haseman performed a physical examination of Claimant. As part of the physical examination, the following was noted:

> AROM: (all painess) [sic]
> Flex fingers to toes
> Bilat bend 30 dgr
> Ext 30 dgr.

(*See Ex. E, p. 78*.)

According to this report, Claimant was noted to have full lumbar range of motion in all planes without pain. (*See Green Depo. 39:18-20*.) However, there is no indication Dr. Mankowski and/or Ms. Haseman formally measured Claimant's range of motion using inclinometers and that the range of motion measurements met the validity criteria of the AMA Guides. Moreover, there is no indication in the report that Dr. Mankowski or Ms. Haseman believed Claimant would have full range of when measured pursuant to the AMA Guides. This is supported by the fact that they sent Claimant to a physical therapist, Laura Curran, for formal range of motion measurements, which would meet the validity criteria of the AMA Guides, to assist in determining Claimant's impairment pursuant to the AMA Guides.

9. On July 17, 2018, Claimant underwent range-of-motion testing with physical therapist Laura Curran for purposes of determining his impairment rating pursuant to the AMA Guides. (*Ex. D, p. 71.*) Physical therapist Curran measured Claimant's lumbar range of motion as follows:

> 57° of lumbar forward flexion;
>
> 9° of lumbar extension;
>
> 22° of lumbar right lateral flexion; and
>
> 12° of lumbar left lateral flexion.

(E*x. D, p. 74*.)

10. Dr. Mankowski accepted physical therapist Curran's range-of-motion measurements for purposes of determining Claimant's impairment rating

pursuant to the AMA Guides. (*Ex. D, pp. 71-72*.) The impairment rating Dr. Mankowski ultimately assigned was 18% of the whole person. (*Ex. D, p. 71*.) This was based on 13% for range-of-motion deficits based on the measurements taken by the physical therapist, and 6% for a Table 53 diagnosis. (*Ex. D, p. 71*.)

11. On August 16, 2018, Claimant successfully completed a Fitness for Duty performance evaluation that was conducted by Employer. Lieutenant Lacy Burke testified and showed a film demonstrating the various physical tasks, which simulated various job duties, each firefighter had to be able to perform in order to be deemed "fit for duty." The film showed someone, other than Claimant, performing various simulated job duties that each firefighter must be able to perform within a certain time in order to successfully perform their job as a firefighter.

12. Lt. Burke was not present when Claimant successfully performed his Fitness for Duty evaluation. Therefore, she was unable to testify how Claimant performed each task and whether, in her lay opinion, he exhibited range of motion deficits that were inconsistent with what was documented by the Division Examiner, Dr. Green, or consistent with what was measured by Dr. Lesnak as set forth in his IME and worksheets.

13. Claimant testified that he found it very difficult to move for a week after performing the Fitness for Duty test. He also testified that he is very competitive and always gives his full effort when he undertakes tasks, whether it be those shown in the video, tasks at work, or performing movements at an examination. Claimant also testified that he tried to modify certain tasks to limit his lumber flexion and instead of bending over would try to squat to complete certain tasks in the performance examination.

14. The ALJ finds Claimant's testimony to be credible and persuasive.

15. On September 21, 2018, Dr. Lawrence Lesnak performed an IME for Employer. He noted in his report that there was active lumber flexion range of motion of 62 degrees and maximum lumber extension of 28 degrees. Dr. Lesnak testified that he did the measurements in accordance with the AMA Guides and completed the appropriate worksheets. The worksheet, which contains his range of motion measurements, is contained in Respondent's Hearing Exhibits. (*Exhibit C, P. 68*.)

16. On November 12, 2018, Claimant underwent a Division independent medical examination (DIME) with Dr. Justin Green. Claimant complained of left paralumber back tightness and persistent left anterolateral leg hypestesia. He also reported decrease in strength in his left quad. In addition, Claimant reported experiencing an occasional charley horse-like cramping sensation of his left anterior thigh and occasional right lower extremity sciatic when he is working hard. He had right lateral hip pain with long periods of standing and reported occasional posterior right legal parshesia. Dr. Green did an appropriate evaluation and performed the appropriate range of motion measurements as required by the AMA Guides. Dr. Green also validated the range of motion measurements pursuant to the AMA Guides. He concluded Claimant had a 14%

whole person impairment rating. The 14% rating was comprised of a 7% rating for specific disorders under Table 53 and 7% for decreased range of motion.

17. In his report, Dr. Green documented the objective tests, MRI findings and neurological deficits - as well as the prior range of motion measurements used by Dr. Mankowski in providing Claimant an impairment rating, which corroborated the existence of medical impairment based on specific disorders and range of motion deficits.

18. In addition, Dr. Green's rating was consistent with the rating provided by Dr. Mankowski in that it demonstrated medical impairment due, in part, to a decrease in lumbar range of motion.

19. Dr. Green testified that when he reviewed Dr. Lesnak's conclusions and opinions regarding Claimant's lumbar range of motion measurements, he gave them less weight because he did not feel that he could rely on them as being compliant with the AMA Guides because he was not provided Dr. Lesnak's worksheet that contained his range of motion measurements. (*Deposition Dr. Green P. 35:3 – 14*). It is not clear whether Dr. Green was directed to review Dr. Lesnak's worksheet with his range of motion measurements during the deposition. However, when the discrepancy between his range of motion measurements and Dr. Lesnak's was pointed out, as well as the higher range of motion deficits used by Dr. Mankowski, Dr. Green did not recommend any additional evaluations to resolve the disparity between his measurements, the physical therapists, Dr. Lesnak's, and the comments in some of the medical records that indicated Claimant had normal lumbar range of motion. (*Green Depo. 44:5*.)

20. Dr. Green testified that he thought the medical records that indicated Claimant had normal lumbar range of motion did not contain any information that the providers actually measured Claimant's lumbar range of motion in accordance with the AMA Guides. Therefore, he appropriately discounted such comments. He stated that was why he discounted Dr. Mankowski's June 5, 2018 observations (*Deposition Dr. Green P.37:2 – P. 38:12*). He also testified that Dr. Ghiselle's observation on April 19, 2018, of Claimant's range of motion, was also not consistent with the AMA Guides as it relates to measuring range of motion. (*Deposition Dr. Green P. 39:24 – P. 40:9*). Again, in Dr. Ghiselle's report, there was no showing of any measurements or validation of Claimant's lumbar range of motion. Therefore, Dr. Green reasonably assumed it was just a visual observation.

21. Dr. Green was shown the Fitness for Duty video and observed that someone with Claimant's limited range of motion in their lumbar spine may or may not be limited in their ability to perform the physical tasks demonstrated in the video. He stated it would depend on the person's morphology (ex. long arms, long torso), and the flexibility in their thoracic spine to help compensate. (*Deposition Dr. Green P. 10:5 – P. 11:11*).

22. Dr. Green testified in his deposition that individuals with lumber problems can compensate by performing tasks in different ways and that some people put up

with pain and can have greater flexion and extension than someone not willing to put up with the pain.

23. Dr. Green also testified that range of motion can vary. Dr. Lesnak's testimony was in accord. He testified there are a wide variety of reasons range of motion can vary. A patient may have pain on one day or slept wrong or stiffness (*Transcript P. 49: 9 – 14*). When asked whether the difference in Claimant's range of motion [as measured by Dr. Green and Dr. Lesnak] could be consistent with day-to-day variances, Dr. Lesnak stated, "It can be again for a variety of reasons. (*Transcript P. 51:10-18*).

24. A key point to which Dr. Green also testified is that functional capacity and range of motion are two fundamentally different things. (*Deposition P. 14:10-12.*) This key point is covered in detail in Chapter 1 of the AMA Guides, which sets forth what the AMA Guides measure. The AMA Guides, in Chapter 1, *Concepts of Impairment Evaluation*, provides that the AMA Guides measure "medical impairment" and that "medical impairment" is different from disability. In Chapter 1 of the AMA Guides, the point is driven home that "medical impairment" can exist without occupational "disability." In explaining this concept, the AMA Guides provides the following explanation:

> Various terms used in the *Guides*, such as "impairment," "disability," and "handicap," appear in laws, regulations, and policies of diverse origin without prior agreement on the ways in which they are to be used. It is no wonder there is uncertainty, if not controversy, about the meanings of these words. This book remedies that situation through careful definition and delineation of the domain in which each term is applied. Accordingly, even when the terminology of the *Guides* may differ from that of a particular law, regulation, or administrative system, analysis in accordance with the following discussion should indicate how the principles embodied in the *Guides* may be interpreted and applied within that law or system.
>
> The accurate and proper use of medical information to assess impairment depends on the recognition that, whereas impairment is a medical matter, disability arises out of the interaction between impairment and external demands, especially those of an individual's occupation. As used in the *Guides*, "impairment" means an alteration of an individual's health status that is assessed by medical means, "disability," which is assessed by nonmedical means, is an alteration of an individual's capacity to meet personal, social, or occupational demands for statutory or regulatory requirements. Stated another way, "impairment" is what is wrong with a body part or organ system and its functioning; "disability" is the gap between what the individual *can* do and what the individual *needs* or *wants* to do.

> ***An individual who is "impaired" is not necessarily "disabled."*** Impairment gives rise to disability only when the medical condition limits the individual's capacity to meet the demands of life's activities. For example, losing the distal phalanx of the little finger, right-hand, will impair the functioning of the digit and hand of both a concert pianist and a bank president, but the bank president is less likely to be disabled than the pianist. An individual who is able to meet a particular set of demands is not "disabled," even if a medical exam and shows impairment. (Emphasis added.)
>
> . . .
>
> It is difficult to overstate the importance of examining the context in which the terms "impairment," "disability," and "handicap" appear. In general, a physician's evaluation of the patient should be understood to be a medical evaluation of health status or, in terms of the *Guides*, an evaluation. ***The Physician does not determine industrial loss of use, economic loss, or any other type of loss giving rise to disability payments.*** [1] (Emphasis added.)

25. Dr. Green stood by the impairment rating he provided Claimant as set forth in his DIME report. Dr. Green did not think there was any reason to change the impairment rating he provided Claimant based on his review of the various medical records, which included Dr. Lesnak's, during his deposition. Dr. Green also did not think he should change the rating he provided Claimant after viewing the Fitness for Duty evaluation video, which showed someone other than Claimant performing various simulated work tasks. In the end, Dr. Green concluded that his findings were in substantial accordance with the information available to him and there was no need to undertake further clinical evaluation to resolve any disparities in the information that was available to him.

26. The ALJ finds Dr. Green's opinions and testimony to be credible and persuasive.

27. The ALJ finds Dr. Green properly applied the AMA Guides in evaluating Claimant and determining Claimant's impairment.

28. The ALJ does not find the Fitness for Duty video to be persuasive evidence that Dr. Green did not properly apply the AMA Guides in determining Claimant's impairment. Moreover, the ALJ does not find the rating provided by Dr. Green to be inconsistent with Claimant's ability to pass the Fitness for Duty test as demonstrated in the video.

29. The ALJ also does not find the range of motion measurements documented by Dr. Lesnak and physical therapist Curran, as well as the visual observations and notations of other providers that Claimant had normal range of motion, to be

[1] AMA Guides, pp. 1-2.

persuasive evidence that supports a finding Dr. Green erred in determining Claimant's impairment pursuant to the AMA Guides.

CONCLUSIONS OF LAW

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

General Provisions

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

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

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

I. Whether Respondent overcame the opinion of the DIME physician, Dr. Justin Green, by clear and convincing evidence regarding Claimant's impairment rating.

A DIME physician must apply the AMA Guides when determining Claimant's medical impairment rating. Section 8-42-101(3.7), C.R.S.; §8-42-107(8)(c), C.R.S. The finding of a DIME physician concerning the claimant's medical impairment rating shall

be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

In *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000), the court noted that under the AMA Guides the "evaluation or rating of impairment is an assessment of data collected during a clinical evaluation and the comparison of those data to the criteria contained in the Guides." Consistent with this concept the Industrial Claim Appeals Office has upheld a DIME physician's impairment rating that excluded "valid" range of motion deficits from an impairment rating based on the determination that the range of motion deficits did not correlate with clinical observations and data. *Adams v. Manpower,* W.C. No. 4-389-466 (I.C.A.O. August 2, 2005); *Garcia v. Merry Maids,* W.C. No. 4-493-324 (I.C.A.O. August 12, 2002).

Ultimately, the question of whether the DIME physician properly applied the AMA Guides, and whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office, supra*. Not every deviation from the rating protocols of the AMA Guides requires the ALJ to conclude that the DIME physician's rating has been overcome as a matter of law. Rather, deviation from the AMA Guides constitutes evidence that the ALJ may consider in determining whether the DIME physician's rating has been overcome. *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117 (Colo. App. 2003); *Logan v. Durango Mountain Resort,* W.C. No. 4-679-289 (ICAO April 3, 2009). Moreover, a mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

The "Fitness for Duty" Video (Exhibit I)

Respondent introduced a video of a firefighter performing various simulated work tasks. Respondent contends the 14% impairment rating Dr. Green provided Claimant, pursuant to the AMA Guides, must be wrong because someone with a 14% impairment of the lumbar spine could not perform the firefighter related tasks illustrated in the video.[2]

As specifically set forth in the AMA Guides, and previously stated in the foregoing findings of fact, the AMA Guides evaluates "medical impairment" and not "disability." Therefore, the degree of medical impairment under the AMA Guides does not always equate with occupational disability.

Respondent's witness, Lieutenant Lacy Burke from the fire department, who authenticated the video, stated that this was not a video of Claimant performing the work-related tasks. While Lieutenant Burke believed the video illustrated how the tasks

[2] The 14% rating provided by Dr. Green is comprised of a 7% rating for specific disorders under Table 53 and 7% for decreased range of motion.

should be performed, she was not present when Claimant performed the tasks and would not know how he performed the tasks.

Dr. Green was shown the video and observed that someone with degree of Claimant's lumbar range of motion, as he measured, may or may not be limited in their ability to perform certain physical tasks. He stated it would depend on each person's morphology, (ex. long arms, long torso), and the flexibility in their thoracic spine to help compensate. (*Deposition Dr. Green P. 10:5 – P. 11:11*).

Consistent with the AMA Guides, Dr. Green testified that functional capacity and range of motion are two fundamentally different things (*Deposition P. 14:10-12*).

There was no medical opinion offered that indicated how Claimant performed the tasks depicted in the video and whether he performed the tasks in the way depicted in the video. In addition, there was no credible or persuasive medical testimony that indicated the performance of the tasks depicted in the video could not be performed with someone with a 14% rating under the AMA Guides with the same Table 53 disorders and range of motion deficits as Claimant.

Therefore, the ALJ did not find the video to be persuasive in overcoming the impairment rating provided by Dr. Green.

Various Range of Motion Observations and Measurements

The June 5, 2018, report of Dr. Mankowski indicates either Dr. Mankowski and/or Ms. Haseman noted their general observations of Claimant's lumbar range of motion at that visit. However, there is no indication Dr. Mankowksi and/or Ms. Haseman formally measured Claimant's range of motion pursuant to the AMA Guides. Moreover, the fact that Claimant was sent out to a physical therapist for the sole purpose of measuring his lumbar range of motion for his impairment rating supports a finding that the mere observations noted in the record were not meant to be a definitive finding regarding Claimant's range of motion deficits for impairment rating purposes. Had the general observations been intended as such, there would have been no need to send Claimant to have formal range of motion measurements performed by a physical therapist and performed pursuant to the AMA Guides. Moreover, the fact that Dr. Mankowski used the range of motion measurements – which showed a deficit – provides additional evidence that despite the general observations contained in the medical records, Dr. Mankowski was of the opinion that Claimant did not have normal lumbar range of motion.

The same is true of Dr. Ghiselli's April 19, 2018 report. There was no indication Dr. Ghiselli formally measured Claimant's lumbar range of motion in conformity with the AMA Guides.

Dr. Green testified that he only considered or gave weight to any measurements that he could verify were done according to the AMA Guides. He testified that he just had to compare apples to apples. For this reason, Dr. Green discounted visual observations without documented repeat and validated measurements and opinions.

It is not clear whether Dr. Green reviewed Dr. Lesnak's range of motion worksheet that was submitted as an exhibit during his deposition. However, Dr. Green was asked to comment on Dr. Lesnak's IME report and the range of motion measurements documented in his IME. Moreover, at the time he performed his IME, it is not clear whether he really cared whether Dr. Lesnak's measurements were done in conformity with the AMA Guides in light of his assessment of the matter.

In his deposition, Dr. Green stood by the impairment rating he provided Claimant as set forth in his DIME report. Dr. Green did not think there was any reason to change the impairment rating he provided Claimant based on his review of the various medical records, which included Dr. Lesnak's, during his deposition. Dr. Green also did not think he should change the rating he provided Claimant after viewing the Fitness for Duty evaluation video, which showed someone other than Claimant performing various simulated work tasks. Furthermore, he did not think he should change the rating he provided Claimant based on the range of motion measurements taken by the physical therapist. In the end, Dr. Green concluded that his findings were in substantial accordance with the information available to him and there was no need to undertake further clinical evaluation to resolve any disparities in the information that was available to him.

Dr. Lesnak conceded in his testimony that he had no evidence that Dr. Green did not perform the measurements in accord with the AMA Guides. He also conceded that there was no evidence that Dr. Green did not validate the range of motion measurements pursuant to the AMA Guides. At best, Dr. Lesnak's opinion, which is based on different range of motion measurements, is merely a difference of opinion between examiners regarding range of motion measurements and the proper rating to assign Claimant pursuant to the AMA Guides.

Although a DIME physician can ignore valid range of motion measurements, when such measurements are inconsistent with the underlying information contained in the record and/or evaluation of the physician, Dr. Green chose not to disregard his own range of motion measurements that were valid. However, he reasonably chose to disregard the range of motion measurements documented by Dr. Lesnak and those used by Dr. Mankowski.

The ALJ finds Dr. Green's opinions and conclusions to be credible and persuasive for a number of reasons. First, the rating provided by Dr. Green is consistent with the DIME physician's clinical evaluation and observations. Second, Dr. Green documented the objective tests, (i.e., MRI findings and neurological deficits) as well as the other data that corroborated the existence of medical impairment as determined by the AMA Guides. Third, Dr. Green, in his deposition, credibly testified that he believed his rating was appropriate despite the various range of motion measurements contained in the record.

Therefore, the ALJ finds and concludes that Respondent has failed to overcome Dr. Green's opinion regarding Claimant's impairment by clear and convincing evidence.

ORDER

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

1. Respondent has failed to overcome Dr. Green's opinion regarding Claimant's impairment rating by clear and convincing evidence.
2. Respondent shall pay Claimant permanent partial disability benefits based upon the 14% whole person impairment rating as determined by the DIME physician, Dr. Green.
3. Issues not expressly decided herein are reserved to the parties for future determination.

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

DATED: May 9, 2019

/s/ Glen B. Goldman

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

ISSUES

I. Whether Claimant overcame Dr. Orgel's DIME opinion on maximum medical improvement (MMI) by clear and convincing evidence.

II. If Claimant failed to overcome Dr. Orgel's DIME opinion on MMI, whether Claimant proved by clear and convincing evidence that Dr. Orgel erred in finding that Claimant has a 10% whole person impairment.

III. Whether Claimant has proved by a preponderance of the evidence that she is entitled to ongoing reasonably necessary and related medical treatment, including reimbursement for the April 5, 2018, surgical implant of a vagal nerve stimulator (VNS).

IV. Whether Claimant has proved by a preponderance of the evidence that she is entitled to temporary total disability (TTD) benefits from September 19, 2017, through ongoing.

V. Whether Respondent has proved by a preponderance of the evidence that there is an overpayment for combined TTD and permanent partial disability (PPD) benefits paid in excess of the statutory cap.

STIPULATIONS

The parties agreed to the bifurcation of permanent total disability pending the determination of the above issues.

FINDINGS OF FACT

1. Claimant is a 53-year-old woman who worked for Employer as a recreational coordinator. Claimant sustained an admitted industrial injury on July 12, 2001 when she was thrown off a horse while leading a teen adventure program. Claimant's horse became startled and began running, then came to an abrupt stop, causing Claimant to flip over the front of the horse and land on the ground. Immediately following the injury, Claimant was transported to McKee Medical Center in a school bus. An EMT record from the same day notes Claimant fell off a runaway horse, hit her pubis on the horn of the saddle, and struck her lower back on a rock. It was further noted Claimant denied hitting her head, loss of consciousness, and cervical spine pain.

2. Claimant was seen at Denver Health on July 13, 2001. Cynthia Kuehn, M.D. noted the following regarding the mechanism of injury: "The patient reports that her horse got spooked by weather, and she was thrown off, landing on her lower back." No head injury was noted. Claimant complained of severe low back and tailbone pain as

well as some neck and shoulder stiffness. Dr. Kuehn initially diagnosed Claimant with a low back strain and contusion, coccydynia secondary to contusion, and cervical spine and trapezius muscle strain. Follow-up evaluations with Dr. Kuehn on July 16 and July 30, 2001 document low back and groin complaints, as well as some upper back discomfort. A lumbar MRI revealed degenerative disc disease at L5-S1 with a posterior disc bulge.

3. On July 31, 2001, Claimant presented to Barry Ogin, M.D. upon the referral of Dr. Kuehn. Claimant completed a patient questionnaire, reporting that she flipped over a horse onto her back. The pain diagram does not indicate any head or neck symptoms. Dr. Ogin documented the following regarding the mechanism of injury:

> She noted that the horse began to speed up and then ran into another horse coming to a complete stop. The patient believes that she flipped over the front of the horse and landed on the ground on her buttocks. She does not think she lost consciousness, but tells me that things happened so fast that she is unsure exactly whether she flipped or not or what she landed on. She had immediate pain in her low back and pelvic region.

Dr. Ogin recommended Claimant treat with medication, physical therapy and an electric stimulator. Claimant underwent the recommended conservative treatment and was eventually placed at MMI for her low back injury on September 24, 2001.

4. Claimant experienced her first seizure on July 23, 2002 and was seen at Denver Health with noted tonic-clonic seizure activity. She subsequently underwent a CT scan of the head and an awake EEG, both of which were normal. Claimant continued to experience seizures and was ultimately diagnosed with posttraumatic epilepsy by Richard L. Hughes, M.D., Chief of Neurology at Denver Health. In a letter dated October 22, 2002, Dr. Hughes opined that Claimant's posttraumatic epilepsy was the result of the July 12, 2001 work injury. He noted Claimant "was thrown over the top of a horse after it abruptly stopped. She was dazed, and it is unclear how long her period of change in conscienceness [*sic*] lasted (it wasn't really long)." Dr. Hughes concluded it was likely Claimant's seizures were the result of the July 2001 injury as Claimant "has no inborn tendency for epilepsy from her family, has had no infectious processes affecting her as child or young adult, and has not had anything resembling a seizure until this event in July 2001…" Claimant was placed on medication to control the seizures.

5. On October 24, 2003, Duane J. Glatz, M.D., a neurologist, performed an independent medical examination (IME) at the request of Respondent. Regarding the mechanism of injury, Dr. Glatz noted Claimant's horse began running and stopped abruptly, resulting in Claimant being thrown over the head of her horse and the back of another horse in a somersault fashion, landing on her back. He specifically noted there was not a direct head injury and no loss of consciousness. Dr. Glatz diagnosed Claimant with generalized tonic-clonic seizures and complex partial seizures. He opined Claimant's seizures were posttraumatic in nature and were caused by the fall from a horse on July 12, 2001. Dr. Glatz explained that, although posttraumatic epilepsy is

more likely to occur in individuals who have had a direct head injury with loss of consciousness, it was not essential for a diagnosis of post-traumatic epilepsy. He wrote,

> [Claimant] did not sustain a 'minor' fall from the horse. The history indicates that she was, in effect, ejected from the horse and thrown over another animal, landing forcefully on her back. There apparently was no direct blow to the head. However, the mechanism of injury itself probably was great enough to cause forceful movement of the brain over the base of the skull bones, which have many sharp protuberances and ridges. This, in effect, resulted in the development of enough scar tissue for the onset of post-traumatic epilepsy.

Dr. Glatz noted Claimant's development of epilepsy in July 2002 was within the expected time for post-traumatic seizures. He further noted that idiopathic epilepsy is unlikely to develop in an individual in his or her thirties, and there was no other known reasons for Claimant to have developed epilepsy.

6. On October 30, 2003, Lynn Parry, M.D., a neurologist, performed an IME at the request of Claimant. Claimant reported to Dr. Parry she was thrown over the head of the horse and over the back of another horse onto uneven ground. Dr. Parry noted, "She does recall hitting the ground and standing up but felt immediately profoundly dizzy and had to lie down again." Dr. Parry reviewed Claimant's medical records and noted an August 15, 2001 physical therapy record documented complaints of dizziness over the past two months. Dr. Parry opined Claimant sustained a traumatic brain injury as a result of the July 2001 work injury and diagnosed her with post-traumatic seizures. She wrote,

> Often these patients actually are not aware of specific loss of consciousness unless it has been prolonged. Often they simply have difficulty with accounting for specific periods of time which can represent either loss of consciousness, post-traumatic amnesia, or post-traumatic condition, all of which are indicators of a traumatic brain injury.

Dr. Parry noted Claimant fell within the time period for developing posttraumatic seizure disorder, as seizures can develop up to 24 months after a head injury. She also noted Claimant had no other known risk factors.

7. On November 19, 2003, Peter S. Quintero, M.D., a neurologist, performed an IME at the request of Respondent. Dr. Quintero noted Claimant was thrown forward off of a horse, struck a second horse, and landed on her back on a rock. He noted Claimant did not strike her head but was dazed by the impact. Claimant reported to Dr. Quintero that after the injury she experienced intermittent headaches. Dr. Quintero opined Claimant suffered from posttraumatic generalized tonic-clonic seizures and complex partial seizures as a result of the July 12, 2001 work accident. He noted that, while Claimant did not strike her head during the incident, "it was a rather violent blow to her back, and she was dazed by the incident" and subsequently developed headaches. He made note that Claimant had no family history of seizures, and no previous history

of seizures, syncope, head injury, central nervous system disease, central nervous system congenital malformation, or other abnormalities that would account for the seizure disorder. Like Dr. Glatz, Dr. Quintero noted it would be unusual for a patient to develop idiopathic seizures in his or her thirties.

8. Claimant returned to Dr. Ogin for reevaluation on December 23, 2003. Claimant reported she developed neck discomfort and headaches towards the end of 2001. Dr. Ogin noted that, when he first evaluated Claimant, she was not complaining of neck problems and her neck was not an issue throughout his treatment of Claimant. He opined it was unlikely all of Claimant's current neck problems were related to the July 2001 fall. He did, however, diagnose Claimant with a seizure disorder, noting Drs. Hughes, Glatz and Quintero had all opined Claimant's seizure disorder was related to the July 2001 work accident. Dr. Ogin referred Claimant to Kristen Bracht, M.D. for a neurologic consultation.

9. Claimant first saw Dr. Bracht on February 12, 2004. Dr. Bracht noted Claimant fell off of a horse while at work, got up and did not initially lose consciousness, but then laid back down and "may have passed out for a minute." She noted Claimant had experienced approximately seven seizures since July 2002, the majority usually occurring in her sleep, with incontinence and tongue biting, followed by confusion. Dr. Bracht opined Claimant suffered from posttraumatic epilepsy related to the July 12, 2001 injury.

10. Claimant underwent an awake EEG on August 29, 2004, the results of which were normal. Dr. Hughes noted Claimant had a right hand tremor which did not correlate with any epileptiform activity. Claimant underwent a brain MRI on January 10, 2006, which was also normal. Claimant continued to use medication to treat the seizures.

11. Claimant returned to Dr. Bracht on June 22, 2009 having last been evaluated in October of 2007. Dr. Bracht noted Claimant's seizures had increased to one seizure a month in the preceding fall season in the setting of significant family stressors, then did not occur for another five months. Dr. Bracht noted Claimant underwent a 48-hour ambulatory EEG on March 14-16, 2008 that was read as showing left temporal intermittent slowing with somewhat sharp features at times. The reading was felt most consistent with a tendency towards partial seizures emanating from the left temporal region. Dr. Bracht further noted Claimant's seizures were under varying control and tended to increase with stress.

12. On July 29, 2009, Claimant was placed at MMI by DIME physician Johnathan Woodcock, M.D., a neurologist, with a 10% whole person impairment rating for episodic neurologic disorders. He opined Claimant had chronic posttraumatic seizure disorder related to the July 12, 2001 fall from the horse and required chronic antiepileptic drug management.

13. Respondent filed a Final Admission of Liability (FAL) on May 14, 2010 admitting for a 10% whole-person rating and reasonable, necessary and related medical

maintenance benefits. Total TTD benefits admitted as of that date were $10,583.18. Total PPD admitted was $30,719.90 (noting PPD paid out from July 2009 to March 2011).

14. Claimant continued to treat for seizures with Dr. Bracht and her primary care physician, Dr. Grace Alfonsi, in 2010, 2011 and 2012. On January 28, 2013, Dr. Alfonsi noted Claimant's seizure disorder was worsening.

15. On February 10, 2013, Claimant presented to the emergency room at Denver Health after experiencing tongue numbness and bilateral handshaking. Michael Earnest, M.D. felt the particular episode was not an epileptic seizure but rather a psychogenic nonepileptic seizure, "based on the fact that the episode primarily involved bilateral hand shaking with complete retention awareness. In addition, the length of the episode of 20 to 30 minutes does not fit a difficult epileptic seizure…"

16. On February 25, 2013, Dr. Alfonsi completed a reasonable accommodation request for Claimant indicating that she may need time away from work due to her seizures, and that she was struggling with computer activities and writing reports. Claimant needed to avoid bright lights was having difficulty with short-term memory post seizure. She struggled to relearn her job and performing her essential duties.

17. On March 23, 2013, Claimant filed a Petition to Reopen her claim based on a worsening of condition of her seizure disorder.

18. On July 9, 2013, Claimant began treating for her seizure disorder with neurologist and epileptologist Edward H. Maa, M.D. at Denver Health.

19. On August 26, 2013, Claimant attended a neurological consultation with William Wagner, M.D. Regarding the mechanism of injury, Dr. Wagner noted Claimant was thrown from a horse, hit her head and lost consciousness. Claimant reported to Dr. Wagner that most of her seizures consisted of right-sided jerking at night, but also grand mal seizures and daytime seizures. Dr. Wagner diagnosed Claimant with posttraumatic refractory complex partial epilepsy with secondary generalization and recommended Claimant undergo in-patient EEG monitoring.

20. From September 30, 2013 through October 2, 2013, Dr. Maa performed epilepsy monitoring of Claimant consisting of continuous EEG and video monitoring. Six left temporal onset complex partial seizures were captured during the testing.

21. On November 5, 2013, Bennett J. Machanic, M.D., a neurologist, performed an IME at the request of Claimant. Dr. Machanic noted Claimant was thrown overhead and "apparently landed on her head and was unconscious for several minutes." Dr. Machanic concluded Claimant suffered from refractory posttraumatic epilepsy with some generalized convulsive episodes but also complex partial seizures. He opined Claimant's condition had worsened and strongly suggested Claimant's case be reopened for further evaluation.

22. A SAMMs conference was held with Dr. Wagner on February 28, 2014. In a letter dated April 28, 2014, Dr. Wagner confirmed it was his opinion that Claimant's current seizure disorder was related to her July 12, 2001 work injury. He further confirmed it was his opinion that further diagnostic testing and treatment was necessary to improve Claimant's seizure problems and bring them back under control. He also confirmed that he could see and treat Claimant as a general neurologist, but that Claimant also needed to see an epileptic specialist, such as Dr. Maa, and should continue to be seen by Dr. Maa or an epileptic neurological specialist.

23. The parties eventually stipulated that Claimant was no longer at MMI. Respondent voluntarily reopened Claimant's claim in an August 12, 2014 General Admission of Liability (GAL). The total combined TTD and PPD paid out prior to reopening was $40,371.24. The August 12, 2014 GAL admitted for retroactive TTD for periods during 2013 and 2014.

24. Claimant continued to experience refractory seizures throughout 2015 and 2016, requiring additional time off from work and additional accommodations.

25. On March 31, 2016, John J. Raschbacher, M.D. performed an IME at the request of Respondent. Regarding the mechanism of injury, Dr. Raschbacher noted, "She does not remember having a head injury at the time but also thinks that she had a head injury and migraine after the fall. On history, this issue does not appear to be very clear." Dr. Raschbacher noted Claimant had been diagnosed with pseudoseizures or psychogenic seizures, and questioned the actual frequency of Claimant's non-psychogenic seizures. He further questioned the diagnosis of posttraumatic seizures, stating,

> There was no head injury, brain injury, concussion, or similar problem at the time of her fall from a horse. It appears that the history that she offered to neurologists and others later changed. It is not clear to what extent these physicians, acting in good faith, were affected by the history that she had actually injured the head.

26. Dr. Raschbacher explained that no head injury is necessary to produce the onset of seizures in adulthood, and that epilepsy can occur idiopathically in the absence of any head injury. Dr. Raschbacher opined Claimant has some secondary gain issues, and recommended a psychiatric IME and forensic neurologic medical record review be performed.

27. On April 7, 2016, Eric Hammerberg, M.D., a neurologist, performed an IME at the request of Respondent. Dr. Hammerberg noted Claimant had been thrown from a horse and landed on her back. He diagnosed Claimant with posttraumatic complex partial seizures, with secondary generalization, and pseudoseizures. He opined Claimant probably has a left anterior temporal lobe focus and recommended a referral to Dr. Bracht for further evaluation before surgery was contemplated. Dr. Hammerberg explained that the focal injury of the anterior temporal lobe can occur following head trauma without clinical evidence of concussion or post concussive syndrome and he

therefore agreed with the other neurologists that Claimant's problems were the result of her July 2001 work-related injury. He further agreed with Dr. Raschbacher that a forensic psychiatric evaluation should be performed in addition to the other recommendations.

28. On April 26, 2016, Claimant was being evaluated for potential brain surgery. According to Scott Pearson, PA-C, Claimant's symptoms were coming from Claimant's left temporal lobe based upon an EEG and PET scan with hypometabolism in the right temporal lobe. PA-C Pearson indicated that Claimant was unable to complete WADA testing to assess memory and language localization because of a blockage in the ascending aorta. Claimant was to complete a neuropsychological evaluation as the next step to help with localization of neurological strengths and weaknesses. A functional MRI was being ordered to assist with language localization.

29. On July 12, 2016, Claimant was determined to be medically disqualified from her job based upon her medical condition of post-traumatic epilepsy.

30. On October 4, 2016, Claimant saw Brandon Schreiber, PA-C, under the supervision of Dr. Maa in the neurology department at Denver Health. Claimant presented with convulsions. PA-C Schreiber noted the convulsions appeared somewhat suppressible and distractible by the consulting neurology staff. He concluded that "[t]he features suggested against any pathologic or drug induced tremor and intact cognition in setting of full body shaking makes seizure unlikely. It is most likely functional."

31. On February 23, 2017, Stephen A. Moe, M.D. performed a psychiatric IME at the request of Respondent. Dr. Moe noted there were no reports in any of the medical records at the time of indicating acute signs or symptoms of a concussion. He also addressed Dr. Glatz's theory that Claimant could have suffered a brain injury without direct impact to the head. Dr. Moe noted that medical research on the topic has shown that the degree of whiplash necessary would need to be comparable to that experienced in a military aircraft crash and would be sufficient to cause cervical spine fractures in a human cadaver. With regard to Claimant's diagnosis for epilepsy, Dr. Moe noted he did not have sufficient medical records to confirm a diagnosis of epilepsy, though he did not rule out the possibility. However, Dr. Moe felt that regardless of whether Claimant suffered from epilepsy, she also suffered from psychogenic non-epileptic events or episodes (PNEE). He opined that Claimant's condition, whether due to epilepsy or PNEE, was not the result of the July 12, 2001 work injury.

32. On March 7, 2017, PA-C Schreiber, under the supervision of Dr. Maa, recommended Claimant undergo VNS surgery to treat Claimant's refractory seizures.

33. Dr. Hammerberg reviewed additional records and issued an addendum to his IME report on March 21, 2017. Dr. Hammerberg reiterated his opinion that Claimant had posttraumatic epilepsy as a result of the July 12, 2001, but also noted that some of Claimant's seizure activity may be psychogenic in nature. He noted that, on March 7, 2017, PA-C Schreiber recommended Claimant be referred for a VNS. He noted further that one possible explanation for the refractoriness of Claimant's seizures is that the

seizures are not truly epileptic, but psychogenic. Dr. Hammerberg stated that it is impossible to treat a claimant for seizure activity without defining which seizure phenomena are caused by electrical paroxysmal discharges in the brain and which are not. He recommended that Claimant undergo prolonged video and EEG recording for 7 to 10 days or longer in a hospital setting to determine the type of seizures Claimant was experiencing. Dr. Hammerberg agreed with Dr. Moe that PNEE would not have been caused by the July 12, 2001 work injury, but disagreed with Dr. Moe that the trauma on the date of injury would not have caused epileptic seizures. He explained that, although the medical records do not document a traumatic brain injury, it is quite possible that being thrown from a horse and landing on one's back could have caused a countercoup injury to the tip of the left anterior temporal lobe which developed into a seizure focus the following year.

34. In response to questions regarding the VNS, Dr. Hammerberg indicated that a VNS is an appropriate option when seizures are poorly controlled with medication like Claimant's, as long as the seizures are truly epileptic. He indicated that because he had not been provided with Dr. Maa's records for review and Dr. Maa may have addressed all of the ambiguities in the case, it was not possible to comment upon this without being provided with and reviewing his reports. Dr. Hammerberg indicated that the benefits of a VNS were that the epilepsy becomes easier to control with medication, and surgical complications of VNS surgery are rare and include pain at the site of the incision, infection and scarring, as well as difficult vocal cord paralysis which is usually temporary. In addition, other problems may include voice changes, hoarseness, throat pain, cough, headache, chest pain, difficulty breathing, difficulty swallowing, abdominal pain, insomnia and brachiocardia. Dr. Hammerberg also indicated that the success rate of the VNS in reducing and controlling the frequency of seizures by decreasing them between 20% and 50%. He indicated that the seizure intensity may also diminish, and patients may also note improved mood and improved quality of life.

35. Claimant was placed at MMI by Dr. Alissa Koval of Denver Health on September 19, 2017 with no additional impairment. Respondent filed a FAL on October 10, 2017 admitting for reasonably necessary and related maintenance medical care. And noting the existence of an overpayment. Claimant filed a timely objection to this admission and requested a DIME.

36. From October 29, 2017 through March 17, 2018, Claimant received $520.00 per week in unemployment insurance benefits through the Colorado Department of Labor.

37. On February 12, 2018, Dr. Machanic performed a second IME at the request of Claimant. Dr. Machanic was of the opinion that, as a result of the work injury, Claimant had a cerebral concussion, mild traumatic brain injury, and post-traumatic mixed epilepsy with both episodes of generalized convulsive activity and also left focal complex partial seizures. He noted that, although there were allegations of non-epileptic seizures, he was unable to sort out precisely what component of altered consciousness was due to non-epileptic events versus organic post-traumatic epilepsy. He stated, "[t]he evidence is clear and massive that the patient suffers from posttraumatic mixed epilepsy and any non-epileptic seizures activity would be trivial compared to what is

going on with brain pathology at his point…" Dr. Machanic opined Claimant was not at MMI for her epilepsy and needed additional treatment with Dr. Maa, medication management, and consideration of the implantation of a VNS. Dr. Machanic was of the opinion that Claimant would require medical treatment with a neurologist for the foreseeable future. He provided a provisional impairment rating of 25% for Claimant's episodic neurological disorders based upon moderate interference with the Claimants activities of daily living per Table 1 page 109 of the AMA Guides in addition to ratings of 12% whole person for Claimant's cervical spine, 17% of her lumbar spine and 9% of the right upper extremity, which combined for a 45% whole person impairment rating.

38. On March 27, 2018, Claimant's counsel sent Respondent's counsel an e-mail stating, "Dr. Maa has scheduled Claimant for VNG (*sic*) surgery on April 5, 2018. Please reinstate TTD benefits as of that date." Attached were instructions given to Claimant for the procedure, indicating Claimant was scheduled for a VNS Insertion with Dr. Ojemann on April 5, 2018. Prior authorization for the procedure was not requested.

39. In a letter dated April 3, 2018, Respondent's counsel noted that Respondent was not in receipt of any preauthorization request for the procedure being performed and, to the extent the March 27, 2018 e-mail constituted a preauthorization request, such request was denied.

40. Claimant underwent VNS implant surgery on April 5, 2018, performed by Dr. Ojemann. Dr. Maa referred Claimant to Dr. Ojemann to perform the procedure. Respondent does not dispute Dr. Ojemann's status as an authorized provider. [1]

41. David Orgel, M.D. performed the DIME on May 9, 2018. Dr. Orgel reviewed Claimant's medical records dating back to the July 12, 2001 injury, including the multiple IME reports conducted at the requests of Respondent and Claimant. Dr. Orgel concluded that, based on the records, Claimant's diagnosis appeared to be complex partial left temporal lobe seizure with pseudoseizures. He explained, "I based this on the nocturnal study which did show some focal abnormalities in the left temporal lobe associated with seizures in the October 2013 inpatient evaluation. However further workup suggested pseudoseizures as well." Dr. Orgel concluded that Claimant's temporal lobe epilepsy appeared to be primarily nocturnal. He referenced three journal articles regarding nocturnal seizures, and noted such epilepsy may present during adulthood, is generally not described as being posttraumatic, and its most common differential diagnosis is pseudoseizures. Dr. Orgel opined that Claimant's grand-mal-type seizures were actually psychogenic non-epileptic seizures, and did not represent a generalization of Claimant's partial complex epileptic seizures. He felt that Claimant's primary diagnosis was conversion disorder with psychogenic non-epileptic seizures and that this was the cause of Claimant's ongoing disability. He wrote,

[1] Respondent did not endorse authorized provider as an issue on the Response to Application for Hearing, in any CIS, or at hearing. At hearing, Respondent's counsel conceded Dr. Ojemann was within the chain of referral and is an authorized treating physician by virtue of Dr. Maa's referral. Additionally, Respondent made no argument in its position statement challenging the status of Dr. Ojemann as an authorized provider.

> I do believe that she has temporal lobe epilepsy. I do not believe that this has caused her grand mal seizures, that is, I do not feel that her temporal lobe epilepsy has generalized. This would be inconsistent with its occurrence at night, and her generalized seizures seem to be related to stress. Therefore I think her grand mal presentation is related to her pseudoseizures. Given this conclusion, her complaints of injury during seizure activity would not be work-related as pseudoseizures are not work-related. Based on the literature reviewed I'm not convinced that her temporal lobe seizures are work-related either, and much of her treatment has not been to her benefit in my opinion, given her proven diagnosis of pseudoseizures.

42. Dr. Orgel placed Claimant at MMI as of the date of his examination, noting Claimant's treatment had reached its logical conclusion with the recent placement of the VNS. Despite Dr. Orgel expressing doubt as to the work-relatedness of Claimant's temporal lobe seizures, he nonetheless stated he "accept[ed] this as being her only work-related condition," and assigned Claimant a 10% whole person impairment based on Table 1, page 109 of the AMA Guides under slight interference with daily living. He opined Claimant did not require any maintenance treatment.

43. Respondent filed an Amended FAL on June 11, 2018, noting the revised MMI date. Exhibit A.1. The FAL noted that total TTD admitted was $64,702.39, that total TPD admitted was $5,599.94, and that total PPD admitted was $30,719.90.

44. On November 5, 2018, Dr. Moe performed a follow-up psychiatric IME. Claimant reported a reduction in the frequency of her grand mal seizures since the implementation of the VNS. Dr. Moe reviewed the results of Claimant's video EEG from late September 2013 and early October 2013 and accepted the diagnosis of partial complex seizures. He noted, however, that the diagnosis did not change the fact that Claimant's early medical records were devoid of a July 12, 2001 head or brain injury that could tie the diagnosis to Claimant's July 12, 2001 accident. He continued to question whether Claimant's reported tonic-clonic seizures actually represented epileptic seizures instead of psychogenic non-epileptic events.

45. Dr. Maa testified by pre-hearing deposition as an expert in neurology with a subspecialty in epilepsy. In explaining the condition of epilepsy, Dr. Maa used the analogy of a fire breaking out in a brain. Dr. Maa explained that the same seizure can have different stages of severity if allowed to "spread," beginning with partial seizures/focal awareness seizures, then going to complex partial seizures/focal unaware seizures, and then generalized tonic-clonic seizures/grand mal seizures/bilateral convulsions. Dr. Maa explained that just because a patient is only having complex partial seizures without convulsions does not mean they are no longer having seizures.

46. Dr. Maa stated that Claimant's current diagnosis is posttraumatic epilepsy, confirmed by the continuous EEG and video monitoring results, which correlate with Claimant's clinical findings. Dr. Maa reviewed the conclusions of DIME physician Dr.

Orgel and opined that Dr. Orgel's determination that Claimant has complex partial left temporal lobe seizures with pseudoseizures is wrong, as no nonepileptic seizures were captured during the EEG video testing, which would have occurred if Claimant had, in fact, been suffering from nonepileptic seizures. Dr. Maa testified he had not seen any evidence that Claimant had pseudoseizures, but acknowledged he had not reviewed Dr. Moe's report. Dr. Maa described pseudoseizures as psychogenic, resulting from a conversion disorder in which internalized trauma manifests. He testified that 30 percent of individuals with epilepsy have nonepileptic seizures in addition to epileptic seizures. He further explained that stress can provoke both nonepileptic and epileptic seizures; thus, just because a seizure is triggered by stress does not mean the seizure is nonepileptic. Dr. Maa opined that Claimant does not have nonepileptic/pseudoseizures, as she has a confirmed diagnosis of focal epilepsy. He testified that Dr. Orgel's opinion that Claimant's primary diagnosis of a conversion disorder with pseudoseizures is wrong because her epileptic seizures were captured on video and by EEG.

47. Dr. Maa testified that the information cited by Dr. Orgel in his DIME report regarding nocturnal frontal lobe epilepsy is true if a patient actually has a diagnosis of nocturnal frontal lobe epilepsy. He explained, however, that Claimant does not have a diagnosis of nocturnal frontal lobe epilepsy, and that such diagnosis is completely different from Claimant's actual diagnosis, and has a completely different presentation on EEG. Dr. Maa testified that Dr. Orgel's statement that "Claimant has a left temporal lobe epilepsy but that is not what caused her grand mal seizures" indicates a lack of understanding of epilepsy and the generalization of epileptic seizures. Dr. Maa also indicated that Dr. Orgel is wrong in his conclusion that Claimant's current condition is not as a result the July 2001 work injury. He explained that, although Claimant's first seizure had delayed onset, it occurred within the average 18-month timeframe for the development of posttraumatic epilepsy.

48. Dr. Maa further testified that one-third of epileptic patients become refractory over time and worsen when the seizures are not well-controlled. He opined that Claimant is not at MMI, as she is currently having a seizure a week and is at high risk of injury or death. Dr. Maa stated that Claimant's continuing need for treatment is related to her post-traumatic epilepsy. He opined that brain surgery will be Claimant's best chance at controlling her seizures, as the VNS did not provide the amount of seizure control he had hoped for. Dr. Maa testified that a properly chosen surgical candidate who undergoes brain surgery has a 50-80 percent chance of seizure freedom.

49. Dr. Maa testified that his understanding of the mechanism of injury was that Claimant was thrown from a horse, struck her head, passed out, and woke up in the hospital. Dr. Maa initially testified that Claimant's injury could not have caused posttraumatic epilepsy if the mechanism of injury did not involve hitting her head. He later clarified that, absent striking her head, whiplash-type motion in which Claimant's head whipped over and bounced back could cause a rapid acceleration/deceleration injury and brain contusion.

50. Dr. Moe testified at hearing as an expert in forensic psychiatry. Dr. Moe testified that mild traumatic brain injuries typically involve a physical force exerted against the

brain. He explained a traumatic brain injury results from "an impulsive force delivered to the brain of sufficient magnitude to cause acute mental status changes and then potentially persistent neurological problems." Dr. Moe testified that, in order to diagnose a mild traumatic brain injury, there must be both a plausible mechanism of injury consistent with a brain injury as well as acute changes in neurological functioning that occur shortly after the injury. Dr. Moe explained that, absent a direct impact to the skull, brain injuries can occur in whiplash situations, but would require such force in a conscious adult that it would result in severe neck injuries.

51. Dr. Moe further testified that his review of Claimant's medical records during the weeks and months after the injury indicated no account of Claimant striking her head or suffering any neck injury, aside from some initial stiffness. Dr. Moe also testified that those records revealed no evidence of an acute change in neurological functioning, as would be consistent with a brain injury, despite evidence that medical providers were paying attention to Claimant's mental status. Dr. Moe acknowledged that the Colorado Medical Treatment Guidelines do not require a blow to the head or loss of consciousness in defining a traumatic brain injury. Dr. Moe opined that Claimant suffers from epileptic and non-epileptic psychogenic seizures, but continued to opine no traumatic brain injury resulted from the July 12, 2001 work injury.

52. Claimant testified at hearing that, although the VNS has helped with decreasing the frequency and severity of her seizures, her seizures have not resolved. Claimant continues to take antiepileptic medications including Lamictal, Keppra and Onfi. She testified that, as a result of the work injury, she is struggling physically and financially, her memory has been affected, she is unable to drive, and is very light sensitive. Claimant stated she requires sunglasses and is unable to function in environments with bright or fluorescent lighting. Claimant stated she continues with pain in her right arm, neck and upper back at this time, and has chronic low back problems since the accident. Claimant testified she is not currently able to work or perform the essential job duties of the position she held with Employer.

Ultimate Findings

53. Claimant's testimony is found credible and persuasive.

54. The ALJ finds the opinions of Drs. Maa, Machanic, Hammerberg, Wagner, Hughes, Glatz, Parry, Quintero, Ogin, Bracht and Woodcock more credible and persuasive than the opinions of Drs. Orgel, Moe, Raschbacher, Koval, and Earnest.

55. Claimant suffers from posttraumatic epilepsy as a result of the July 12, 2001 work injury.

56. Claimant proved it is highly probable Dr. Orgel's DIME finding on MMI is incorrect and that she is not at MMI for her work-related condition. Additional evaluation and treatment is reasonably expected to improve Claimant's work-related condition. Claimant is entitled to ongoing reasonably necessary medical treatment related to the July 12, 2001 work injury.

57. Claimant is entitled to reimbursement for the costs of the VNS surgery, which was performed by an authorized provider and was reasonably necessary and related to the July 12, 2001 work injury.

58. As Claimant is not at MMI, she is entitled to TTD benefits beginning September 17, 2017 and ongoing, subject to offsets for unemployment insurance benefits.

59. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as

unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Overcoming the DIME

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. A DIME physician's finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician's finding concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). The question of whether the party challenging the DIME physician's finding regarding MMI has overcome the finding by clear and convincing evidence is one of fact for the ALJ.

Under the statute MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007). A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Construction Management,* W.C. No. 4-356-512 (ICAO May 20, 2004); *Hatch v. John H. Garland Co.,* W.C. No. 4-638-712 (ICAO August 11, 2000). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. Therefore, the DIME physician's opinions on these issues are also binding unless overcome by clear and convincing evidence. *See Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

Claimant argues Dr. Orgel's opinion on MMI is in error because she requires additional curative treatment for her temporal lobe epileptic seizures, which were caused by the July 12, 2001 work injury. While Respondent maintains it does not challenge Dr. Orgel's causation opinion, finding of MMI, or impairment rating,

Respondent argues Claimant never suffered a head injury, thus making her epilepsy and ongoing need for epilepsy treatment non-work-related.

Although Dr. Orgel noted he doubted the work-relatedness of Claimant's temporal lobe seizures, he nonetheless stated he accepted the temporal lobe seizures as Claimant's only work-related condition and provided an impairment rating for such condition. The totality of the credible and persuasive evidence supports Dr. Orgel's ultimate causation opinion that Claimant's temporal lobe epilepsy resulted from the July 12, 2001 work fall. Drs. Hughes, Glatz, Parry, Quintero, Bracht, Woodcock, Wagner, Machanic, Hammerberg and Maa, who are all neurologists, opined Claimant suffered from posttraumatic seizure disorder as a result of the July 12, 2001 work injury. The ALJ acknowledges that the medical records indicate different physicians had different understandings regarding whether Claimant struck her head and/or lost consciousness during the work injury. Drs. Hughes, Wagner, Machanic and Maa (initially) believed Claimant struck her head and/or loss consciousness, while Drs. Parry, Bracht, and Hammerberg did not reference any hitting of the head or loss of consciousness, and Drs. Glatz and Quintero specifically noted neither occurred. The ALJ further acknowledges that medical evaluations in the days following the incident do not document any reported head injury or loss of consciousness.

Nonetheless, Drs. Glatz, Quintero, Hammerberg and Maa credibly opined that a direct head injury with loss of consciousness is not required for a diagnosis of posttraumatic epilepsy. Drs. Glatz, Quintero and Maa credibly explained that being thrown over the head of a horse after coming to an abrupt stop and landing forcefully on one's back was not a minor incident and could result in head trauma that causes seizures. The ALJ is persuaded the mechanism of injury was sufficient to cause Claimant's condition. Although Claimant did not develop seizures until approximately one year after the work injury, Drs. Glatz, Parry, and Maa also credibly explained Claimant was within the average timeframe to develop posttraumatic seizures. Additionally, multiple physicians noted Claimant was beyond the typical age for developing idiopathic seizures, and there were no other known reasons for her development of seizures.

While Dr. Orgel's ultimate causation opinion regarding temporal lobe seizures is correct, the totality of the credible and persuasive evidence establishes that it is highly probable his determination of MMI is incorrect. Dr. Orgel opined that Claimant's primary diagnosis is conversion disorder with pseudoseizures, concluding that the majority of Claimant's presentation and impairment is related to pseudoseizures. He opined that Claimant's temporal lobe epilepsy had not generalized and was not the cause of her grand mal seizures, stating it "would be inconsistent with its occurrence at night, and her generalized seizures seem to be related to stress." Dr. Maa, a neurologist and epileptologist, credibly explained that Dr. Orgel's conclusions demonstrate a fundamental misunderstanding of Claimant's diagnosis and the generalization of seizures. In support of his conclusions, Dr. Orgel cited medical literature regarding nocturnal frontal lobe epilepsy, which Dr. Maa credibly explained is an entirely different diagnosis than Claimant's. Dr. Maa credibly explained that stress can provoke both

nonepileptic and epileptic seizures, further undermining Dr. Orgel's inference that Claimant's continuing seizures are nonepileptic because they are provoked by stress.

Dr. Maa further credibly opined Dr. Orgel's opinion that Claimant's primary diagnosis of a conversion disorder with pseudoseizures is incorrect, as Claimant's epileptic seizures were captured with objective testing. Dr. Maa credibly testified that pseudoseizures present with completely different electrical activity, and no pseudoseizures were observed on his continuous EEG monitoring of Claimant. Dr. Maa credibly explained that individuals who do not specialize in the treatment of epilepsy may misdiagnose patients or misinterpret certain signs. Additionally, Dr. Machanic credibly opined that any non-epileptic seizure activity would be trivial in light of the substantial evidence that Claimant suffers from posttraumatic epilepsy. Here, the opinions of Drs. Maa and Machanic go beyond a mere difference of opinion. Dr. Orgel's reliance on medical literature regarding a completely different diagnosis than Claimant's diagnosis, along with other credible and persuasive evidence, supports a conclusion that his finding of MMI is highly probably incorrect.

Dr. Maa credibly opined Claimant's condition is refractory, and she is at high risk for injury or death due to posttraumatic epilepsy, which was caused by the July 12, 2001 work injury. Dr. Maa credibly opined additional treatment, including brain surgery, is necessary and reasonably expected to improve Claimant's work-related condition. As further treatment is reasonably expected to improve Claimant's work-related condition, she is not at MMI.

Reimbursement for VNS Surgery

Section 8-42-101(1)(a), C.R.S., provides that respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The claimant bears the burden of establishing her entitlement to medical treatment by a preponderance of the evidence. *See Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office, supra*. Whether the claimant sustained her burden of proof is a factual question for resolution by the ALJ. *See City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997).

Respondent argues Claimant is not entitled to reimbursement for the VNS surgery because the surgery was not reasonably necessary to treat any work-related condition. Respondent further argues that, even if the ALJ finds that the VNS surgery was reasonably necessary and related to cure and relieve the effects of the July 12, 2001 work accident, Respondent is not liable for the surgery because the treatment was unauthorized, relying on the Panel's holding in *Gosselova v. Vail Resorts*, W.C. No. 4-975-232-02 (ICAO December 24, 2018).

In *Gosselova*, the claimant independently sought and underwent treatment with a physical therapist and orthopedic surgeon who were not authorized to treat the claimant. The ALJ concluded that, regardless of whether the medical treatment was

reasonable and necessary, the respondent was not required to pay for unauthorized treatment. The Panel affirmed the ALJ's order, stating they were aware of no legal authority that requires respondents to pay for unauthorized medical treatment. The Panel stated,

> We cannot ignore the uncontroverted record evidence that the respondent did not give permission for the claimant to be treated by therapist Doyle or Dr. Gottlob, the claimant did not attempt to obtain prior authorization, nor did respondent know of the treatment until after the treatment had been rendered. Treatment sought the claimant apart from that performed by the selected physicians and their referrals is not the liability of the respondent.

Gosselova, supra.

While the Panel in *Gosselova* referred to the claimant's lack of attempt to obtain prior authorization, the crux of the Panel's analysis focused on whether the providers were authorized to provide treatment. *Gosselova* is distinguishable from the facts of the present case in that Respondent here does not dispute that Dr. Ojemann status as an authorized provider. Rather, Respondent argues that the failure to request prior authorization for the VNS surgery renders Respondent free from any liability to reimburse Claimant for the cost of the procedure.

The purpose of prior authorization under WCRP 16 is to facilitate a determination of the reasonableness of treatment in advance of the treatment by directing the physician to submit a request for prior authorization. Thus, even though WCRP 16 purports to address "authorization" for treatment, the purpose of the rule is to establish the "reasonableness and necessity" of treatment provided by an authorized treating physician. *Arszman v. Target Corporation*, W.C. No. 4-798-406 (December 15, 2011); *Bray v. Hayden School Dist. RE-1*, W.C. No. 4-418-310 (Apr. 11, 2000); *Repp v. Prowers Medical Center*, W.C. No. 4-530-649 (September 12, 2005), aff'd, Case No. 05CA2085 (Colo. App. May 11, 2006) (not selected for official publication). The Panel has previously held that an authorized physician's failure to request prior authorization of a procedure does not preclude a claimant from proving that the disputed treatment is reasonably necessary and related and from obtaining an order requiring the respondents to pay for treatment. *Arszman, supra; Repp, supra; Bray, supra.*

Accordingly, the failure to request prior authorization in this case does not, by itself, absolve Respondent from any liability to pay for the procedure. As such, the ALJ next considers whether Claimant met her burden to prove that the VNS surgery was reasonably necessary and related to the July 12, 2001 work injury. As previously discussed, the ALJ finds and concludes Claimant suffered from posttraumatic epilepsy as a result of the July 12, 2001 work injury. Dr. Maa referred Claimant for VNS surgery to treat the effects of her posttraumatic epilepsy. Dr. Hammerberg credibly opined that VNS implantation is an appropriate option for patients suffering from epileptic seizures that are poorly controlled with medication, and can reduce seizure intensity and frequency. Although Dr. Maa testified the VNS implantation was not as effective as hoped, Claimant credibly testified the VNS has provided some assistance with

decreasing the frequency of her seizures. Despite the failure to request prior authorization of the VNS surgery, as the procedure was performed by an authorized provider, and was reasonably, necessary and causally-related to the July 12, 2001 work injury, Respondents are liable to reimburse Claimant for the cost of the procedure.

TTD Benefits

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

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

As found, Claimant overcame Dr. Orgel's DIME opinion that she is at MMI. Claimant's posttraumatic epilepsy resulting from the July 12, 2001 work injury resulted in an inability to resume her prior work. Claimant was determined to be medically disqualified from her job based upon her medical condition of posttraumatic epilepsy. Accordingly, Claimant is entitled to TTD benefits beginning from September 19, 2017, and ongoing.

Overpayment

The Act defines "overpayment" as "money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive, or which results in duplicate benefits because of offsets that reduce disability or death benefits payable under said articles." Section 8-40-201(15.5), C.R.S. (2018). Section 8-42-107.5, C.R.S., as in effect at the time of the work injury on July 12, 2001, provided that a claimant whose impairment rating is twenty-five percent or less may not receive greater than $60,000 of combined temporary and permanent partial disability benefits, and a claimant whose impairment rating is greater than twenty-five percent

may not receive greater than $120,000 of combined temporary and permanent partial disability benefits.

Respondents argue Claimant was overpaid $41,022.23 in combined temporary and permanent disability benefits based on the statutory cap of $60,000. Claimant argues that the determination of an overpayment cannot be determined or recouped until Claimant is at MMI, as the applicable cap is determined based upon the final physical impairment rating and a determination is made as to whether Claimant is permanently and totally disabled. The ALJ agrees that, based on the finding that Dr. Orgel's DIME opinion on MMI has been overcome, the issue of a potential overpayment cannot be considered at this time, as a final impairment rating will need to be determined once Claimant is again placed at MMI. The issue of overpayment is thus reserved for future determination.

Offsets

Section 8-42-103(1)(f), C.R.S. provides that compensation for temporary disability shall be reduced, but not below zero, by the amount of unemployment insurance benefits received. As found, Claimant received unemployment insurance benefits in the amount of $520.00 per week from October 29, 2017 through March 17, 2018, entitling Respondent to offset Claimant's unemployment benefits against her TTD benefits.

ORDER

It is therefore ordered that:

1. Claimant suffers from posttraumatic epilepsy as a result of the July 12, 2001 work injury. Claimant overcame Dr. Orgel's DIME opinion on MMI by clear and convincing evidence. Claimant is not at MMI and is entitled to ongoing treatment that is reasonably necessary and casually related to the July 12, 2001 work injury.

2. Respondent shall reimburse Claimant for the cost of the April 5, 2018 VNS surgery.

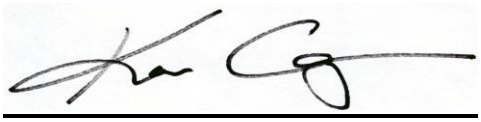
3. Respondents shall pay Claimant TTD benefits from September 17, 2017, and ongoing, subject to offsets for unemployment insurance benefits.

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

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

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

DATED: May 9, 2019



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-044-615-003

CORRECTED FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

No substantive changes have been made in the following corrected decision. It is issued to correct typographical errors.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on April 30, 2019, in Denver, Colorado. The hearing was digitally recorded (reference: 4/30/19, Courtroom 1, beginning at 1:30 PM, and ending at 4:45 PM). The official Spanish/English Interpreter was Jovana Gray.

Claimant's Exhibits 1 through 9 were admitted into evidence, without objection. Respondents' Exhibits A through I were admitted into evidence, without objection.

At the conclusion of the Respondents' case-in-chief, Claimant's counsel moved for a judgment in the nature of a directed verdict, which was granted as to Respondents' attempt to overcome the Division Independent Medical Examination (DIME) opinion of Miguel Castrejon, M.D., regarding impairment and denied as to Respondents' attempt to overcome the DIME regarding the Claimant not having reached maximum medical improvement (MMI). Having heard the arguments of both counsel, the ALJ referred preparation of a proposed decision to counsel for the Claimant, which was filed, electronically, on May 7, 2019. On May 10, 2019, Respondents indicated that they had no objection to the proposed decision. Having considered the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern whether Respondents

have overcome the DIME opinion of Dr. Castrejon that Claimant is not at MMI for her February 20, 2017 injury until she undergoes a repeat right shoulder MRI (magnetic resonance imaging) and surgical consultation. If Respondents overcome the DIME opinion with respect to MMI, whether the Claimant is entitled to the permanent impairment (PPD) rating assigned by the DIME for her head and neck conditions.

The Respondents' burden of proof is by "clear and convincing evidence."

FINDINGS OF FACT

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

Stipulated Facts and Findings Thereon

1. At the conclusion of the hearing, the parties stipulated, and the ALJ finds, that Claimant's psychological impairment rating is 2% of the whole person.

2. The parties further stipulated, and the ALJ finds, that Respondents paid Claimant PPD benefits consistent with the 2% psychological impairment rating.

Preliminary Findings

3. This admitted claim stems from an incident that occurred at work on February 20, 2017. On that date, a number of strainers fell hitting the Claimant on the head and neck. She injured her head and neck and was diagnosed with a closed head injury and acute cervical sprain (Claimant's Exhibit 5, bates 39).

4. Ultimately, the Respondents filed a Final Admission of Liability (FAL), admitting for an average weekly wage (AWW) of $461.31; temporary total disability (TTD) [TTD rate was $307.54 per week] and temporary partial disability benefits through January 24, 2018; 2% impairment rating for psychological impairment; and admitting liability for post-MMI medical maintenance benefits. The Claimant filed a timely objection and Notice and Proposal for Selection of a DIME. Miguel Castrejon, M.D. was selected as the DIME Examiner.

Concentra Medical Centers

5. Claimant's authorized treating provider (ATP) was Concentra Medical Center (Concentra). When the Claimant first presented to Concentra on February 20, 2017, she described feeling dizzy and having a headache (Claimant's Exhibit 5, bates 35). She returned to Concentra the following day and described headaches with neck pain. Glenn Petersen, PA-C (certified physician's assistant) assessed the Claimant's condition as a closed head injury and acute cervical sprain (Claimant's Exhibit 5, bates 39).

6. The Claimant was initially referred to physical therapy (PT) within Concentra for treatment of her neck (Claimant's Exhibit 5, bates 39, 46). PT continued, but due to ongoing complaints, the Claimant was referred to Frederic Zimmerman, D.O., a physiatrist within the Concentra system. In each of the visits with the Claimant, Dr. Zimmerman identified "increased muscle tone" as well as trigger points. He performed trigger point injections on two separate occasions and documented complete relief of the Claimant's symptoms. He felt this was a diagnostic response (Claimant's Exhibit 5, bates 54 and 61). In addition to the trigger point injections, Dr. Zimmerman also prescribed amitriptyline and referred the Claimant to WalterTorres, Ph.D. a licensed clinical psychologist, for a psychological consultation.

7. The Claimant was also referred to Mark Failinger, M.D., an orthopedic surgeon, who first evaluated the Claimant on May 25, 2017. Dr. Failinger was concerned that her right shoulder might be involved and referred the Claimant to an MRI of the right shoulder. That MRI found only tendinosis of the rotator cuff of the right shoulder. Dr. Failinger recommended a subacromial cortisone injection which he performed on June 8, 2017 (Claimant's Exhibit 5, bates 81). When the Claimant returned to Dr. Failinger on June 29, 2017, she reported no benefit from the injection. She wanted to discuss surgery on the shoulder and Dr. Failinger recommended another injection which he performed at that appointment. Again, Claimant reported no benefit from the injection and Dr. Failinger concluded that the Claimant was not a surgical candidate and that he had no other treatments to offer (Claimant's Exhibit 5, bates 88).

8. On July 13, 2017, the Claimant was seen by Albert Hattem, M.D., who recommended a cervical MRI which was done on August 4, 2017. That MRI was interpreted as normal with the exception of a syrinx which no physician has considered as part of the claim (Claimant's Exhibit 5, bates 99).

9. On the January 24, 2018, John Burris, M.D., placed the Claimant at MMI without physical impairment. He recommended ongoing care with Gary Gutterman, M.D., a psychiatrist, and Eric Hammerberg, M.D., for medications. (Respondents' Exhibit E, bates 15). On February 19, 2018, Dr. Gutterman provided a psychiatric impairment rating of 2% whole person (Claimant's Exhibit 9, bates 209), which Respondents admitted.

Eric Hammerberg, M.D.

10. Dr. Hammerberg is a neurologist to whom the Claimant was referred by Concentra. He first examined the Claimant on May 18, 2017. His impression after taking the Claimant's history and performing a physical examination was that the Claimant was suffering from posttraumatic headaches with vertigo and right hemisensory loss. He recommended and requested authorization for an MRI scan of the brain (Claimant's Exhibit 7, bates 184). At Claimant's next visit to Dr. Hammerberg, he reviewed the MRI of the brain which he interpreted as normal. Nonetheless, he concluded that the Claimant was suffering from posttraumatic headaches and

prescribed gabapentin (Claimant's Exhibit 7, bates 185). The Claimant continued to describe headaches at subsequent appointments and Dr. Hammerberg continued to prescribe gabapentin to treat her symptoms (Claimant's Exhibit 7, bates 186-187).

George Vladimir Schakaraschwilli, M.D.

11. At Respondents' request, Dr. Schakaraschwilli saw the Claimant for an independent medical examination (IME) on July 6, 2017. Dr. Schakaraschwilli noted complaints of ongoing headaches and found, on physical examination, that Claimant's cervical range of motion was limited and painful on the right side of the neck (Respondents' Exhibit F, bates 3 and 7). Dr. Schakaraschwilli also found some lost range of motion in the right shoulder but, based on his review of records from other medical providers, concluded that Claimant's shoulder range of motion (ROM) was most likely self-limited. He concluded that ongoing right shoulder treatment was not indicated (Respondents' Exhibit F, bates 7). He also concluded that given Claimant's ongoing complaints of neck pain that an MRI of the cervical spine should be obtained to rule out a disc herniation as the cause of the symptoms in Claimant's right upper quadrant (Respondents Exhibit F, bates 7). The ALJ finds Dr. Shakaraschwilli's assessment highly credible and persuasive as it pertains the the right shoulder (RUE).

12. Dr. Schakaraschwilli testified at hearing. He stated that the history the Claimant provided of her mechanism of injury, specifically strainers falling on her head and neck, was inconsistent with a right shoulder injury. He noted that all of the medical records available for review at the time of the IME indicated the same mechanism of injury. He agreed that the history the Claimant provided to Dr. Castrejon of raising her right arm above her head to fend off the falling strainers might be sufficient to injure a shoulder. Nevertheless, because the only physician to whom Claimant relayed that history was the DIME, after recounting the injury to several other physicians, Dr. Shakaraschwilli concluded that it was not likely that she used her right shoulder to deflect the falling strainers. The ALJ finds Dr. Schakaraschwilli's opinions as to the lack of evidence of a right shoulder injury credible and persuasive. Specifically, the ALJ finds that Dr. Schakaraschwilli established that it is highly probable, unmistakable and free from serious or substantial doubt that Dr. Castrejon was in error assigning a tentative rating for the RUE.

13. As to Claimant's cervical spine, Dr. Schakaraschwilli did not disagree with other physicians' conclusions that the February 20, 2017 incident caused a cervical strain. He agreed that the likely response to objects falling on one's head would be to turn the head to avoid such objects and that such a motion is not only sufficient to cause a cervical sprain but possibly a herniated disc in the cervical spine. He was of the opinion that to the extent Claimant suffered such a cervical sprain, it would have been mild and he would have expected it to resolve shortly after the incident. This ALJ finds that Dr. Schakaraschwilli's report and testimony primarily focused on this issue of MMI and ongoing treatment for the right shoulder. He did not persuasively argue that Claimant did not merit permanent impairment for her neck and headaches. His opinion that Claimant could not merit a neck rating without findings on the cervical MRI is not

supported by Table 53 of the *American Medical Association Guides to the Evaluation of Permanent Impairment,* 3rd Ed., Rev. (hereinafter "AMA Guides").

14. The testimony of Dr. Shakaraschwilli with regard to Claimant's ongoing headaches focused on the normal MRI of the brain. Dr. Shakaraschwilli concluded that there was no injury to the brain that would explain the Claimant's ongoing headaches. Nonetheless, he conceded that other physical conditions such as tight muscles in the neck could cause cervicogenic headaches. As with his testimony regarding Claimant's neck, Dr. Schakaraschwilli's opinions do not address with specificity Dr. Castrejon's opinion regarding impairment for chronic headaches. Dr. Shakaraschwilli's attempt to minimize the head injury as just a contusion is not persuasive because it fails to address the reports of a neurologist, Dr. Hammerberg, who examined and treated Claimant for posttraumatic headaches for more than six months.

15. Although Dr. Shakaraschwilli presented as straight-forward, articulate and convincing in his assessments, hos opinions amount to a mere difference of opinion with DIME Dr. Castrejon, with the exception of Dr. Shakaraschwilli's opinion concerning the RUE (which makes it highly probable that DIME Dr Castrejon was in error in this regard), do not rise to the level of the other opinions that DIME Dr. Casterejon was in clear error.

John Burris, M.D.

16. Dr. Burris became involved in the herein claim as a "delayed recovery specialist" within the Concentra system. He first saw Claimant nearly eight months after her injury (Respondents' Exhibit E, bates 20). On physical examination, Dr. Burris noted essentially a normal physical examination. He did not document loss of range of motion, trigger points or spasms which had been regularly documented by other physicians. Dr. Burris attributed the Claimant's ongoing pain complaints to "secondary gain" (Respondents' Exhibit E, bates 22). He concluded that Claimant was likely at an endpoint for care pending reports from Dr. Gutterman and Dr. Hammerberg. Dr. Burris then saw Claimant twice more waiting for reports from Dr. Gutterman and Dr. Hammerberg and then he released Claimant at MMI without impairment. He recommended maintenance care in the form of ongoing visits with Dr. Gutterman and Dr. Hammerberg (Respondents' Exhibit E, bates 15).

17. Dr. Burris testified at hearing. His testimony consisted of little more than a regurgitation of the findings and conclusions outlined in his medical reports. Dr. Burris did not outline specific errors that he found in Dr. Castrejon's report other than Dr. Burris' conclusion that he found no objective explanation for Claimant's ongoing complaints. This ALJ finds that Dr. Burris' opinions amounted to a mere difference of opinion with DIME Dr. Castrejon and do not rise to the level of clear and convincing evidence.

Miguel Castrejon, M.D., DIME Examiner

18. Dr. Castrejon evaluated the Claimant as a DIME physician on June 25, 2018. Dr. Castrejon took note of the Claimant's description of her injury to Concentra on February 20, 2017. He then documents that he questioned Claimant further as to how the injury occurred and that she told him that when the strainers fell she lifted her right arm above her head and attempted to "swat" the containers away. Dr. Castrejon questioned the Claimant regarding details of specific appointments with medical providers for her claim. He noted that she did not recall much specific information regarding these appointments. Yet, when he asked the Claimant how she responded to the injection performed by Dr. Failinger, she told Dr. Castrejon that it provided long term relief even though, according to Dr. Failinger, she did not report any benefit from the injection. On physical examination, Dr. Castrejon identified objective findings such as hypertonicity and trigger points. He also documented, using a goniometer, lost range of motion in the right shoulder and neck. Claimant reported that her headaches, neck pain and depression had stabilized with use of medication and that her primary concern was her right shoulder. Dr. Castrejon, relying on Claimant's history that the subacromial injection had helped with pain, concluded that Claimant was not at MMI for her right shoulder and implicitly found that Claimant was at MMI for her other conditions. Dr. Castrejon recommended a repeat right shoulder MRI and a second opinion with an orthopedic surgeon. Dr. Castrejon provided a provisional impairment rating for Claimant's cervical spine, headaches, right shoulder, and depression. For the cervical spine he assigned a 10% rating, 4% based on Table 53, page 80 of the *AMA Guides to the Evaluation of Permanent Impairment*, 3rd Ed. revised (AMA Guides), and 6% for lost range of motion. He assigned a 5% whole person rating for Claimant's chronic posttraumatic headaches, a 6% scheduled rating for the right shoulder, and 2% for psychiatric impairment due to required use of psychotropic medication. The ALJ finds that in general Dr. Castrejon's opinions are credible, well-reasoned and supported by the medical records with the exception that his opinion regarding the Claimant's right shoulder. The ALJ finds that it is highly probable and free from any serious or substantial doubt that Dr. Castrejon's erred by relying on Claimant's history regarding the injection, given that the injection took place over a year before the DIME and that multiple providers documented no lasting benefit from the injection (Claimant's Exhibit 5, bates 88, 90, and 93).

19. The ALJ finds that Dr. Castrejon's opinions with regard to permanent impairment of the cervical spine and chronic headaches are credible and supported by medical records and the AMA Guides.

Ultimate Findings

20. At the conclusion of the Respondents' case-in-chief, their evidence could not get any better and they had failed to overcome DIME Dr. Castrejon's opinions by clear and convincing evidence, with the exception of his opinion concerning the recommended right shoulder MRI and surgical consultation, thus, delaying MMI, in which case the DIME opinion concerning the right shoulder had been overcome.

21. The opinions of all other physicians in evidence are not sufficiently

persuasive to extend beyond differences of opinion with DIME Dr. Castrejon and, therefore, do not make it highly probable, unmistakable and free from serious and substantial doubt that Dr. Castrejon's PPD ratings, with the exception of the right shoulder delay of MMI were in error. In the later regard. It is highly probable, unmistakable and free from serious and substantial doubt that Dr. Castrejon's opinion that the Claimant was **not** at MMI was clearly in error. This being the case, the ALJ finds that the Claimant reached MMI for all admitted injuries on February 19, 2018. Therefore, Dr. Castrejon's tentative ratings became actual ratings, as intended by the dictates of the AMA Guides.

22. For the reasons stated herein above, the ALJ finds that the Claimant reached MMI for all conditions related to her February 20, 2017 work injury on February 19, 2018 (physiological and psychological). The ALJ also finds that the Claimant has not established a permanent impairment rating for her right shoulder symptoms because the aggregate medical evidence does not support permanent impairment of the right shoulder.. The ALJ finds, however, that the Claimant has established (in addition to the admitted permanent psychological impairment), a permanent impairment rating for her spine (10% whole person) and headaches (5% whole person), plus 2% whole person, psychiatric, for a grand total of 17% whole person permanent medical impairment, according to the AMA Guides Combined values Chart of which the ALJ takes administrative notice.

23. Between conflicting medical opinions with regard to Claimant's MMI status, the ALJ makes a rational choice, based on substantial evidence, to accept the opinion of Dr. Schakaraschwilli that Claimant is at MMI and that the repeat MRI and surgical consultation for the RUE are not reasonably necessary or causally related to the February 20, 2017 work injury.

24. The Respondents have proven that it is highly likely, unmistakable, and free from serious and substantial doubt, that Claimant is at MMI for all conditions related to her February 20, 2017 work injury. Respondents have also proven by clear and convincing evidence that Claimant's ongoing right shoulder complaints do not merit a permanent impairment rating.

25. The ALJ finds, based on substantial evidence, that Claimant's permanent medical impairment rating should be 10% whole person for the cervical spine, 5% whole person for the chronic posttraumatic headaches, and 2% for psychiatric impairment for a total of 17% whole person, according to the "Combined Values Chart of the AMA Guides of which the ALJ hereby takes administrative notice. The ALJ makes a rational choice to accept the opinion of Dr. Castrejon and to reject the opinions of Dr. Shakaraschwilli and Dr. Burris with respect to Claimant's impairment ratings for the spine and chronic headaches because their opinions amount to a difference of opinion that does not rise to the level of clear and convincing evidence.. Dr. Castrejon's opinion is supported by medical records which consistently document ongoing pain complaints in the neck and head with objective findings and diagnostic responses to trigger point injections. Furthermore, his opinions have presumptive effect unless overcome by clear

and convincing evidence.

26. Based on § 8-42-107 (8) (e), C.R.S., the Claimant's age of 39 on the date of MMI, February 19, 2018 and her PPD of 17% whole person, the formula provides for an aggregate PPD award of $29, 696.06 [Age factor of 1.42 X 400 weeks X TTD rate of $307.54 per week X 17% whole person = $29, 696.06].

27. The FAL admitted for all causally related and reasonably necessary post-MMI medical maintenance benefits. In doing so, the respondents were contemplating post-MMI psyciatricc care to implement their 2% psychiatric impairment admission. In light of the herein decision, the ALJ finds the the award of post-MMI (*Grover*) medical maintenance benefits should be a general award covering the spine, headaches and causally related conditions subject of this decision.

CONCLUSIONS OF LAW

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

Judgment in the Nature of a Directed Verdict

a. Colo. Rules of Civil Procedure, Rule 41(b) (1), provides that, after a plaintiff in a civil action *tried without a jury* has completed the presentation of his evidence, the defendant may move for a dismissal on the grounds that the plaintiff has failed to present a prima facie case for relief. In determining whether to grant a motion to dismiss or in the nature of a directed verdict, the court is not required to view the evidence in the light most favorable to the plaintiff, as argued by a claimant. *Rowe v. Bowers*, 160 Colo. 379, 417 P.2d 503 (Colo. 1966)*; Blea v. Deluxe/Current, Inc.*, W.C. No. 3-940-062 [Indus. Claim Appeals Office (ICAO), June 18, 1997] (applying these principles to workers' compensation proceedings). Neither is the court required to "indulge in every reasonable inference that can be legitimately drawn from the evidence" in favor of the Claimant. Rather, the test is whether judgment for the respondents is justified on the claimant's evidence. *Amer. National Bank v. First National Bank*, 28 Colo. App. 486, 476 P.2d 304 (Colo. App. 1970); *Bruce v. Moffat County Youth Care Center*, W. C. No. 4-311-203 (ICAO, March 23, 1998). The question of whether the Claimant carried this burden was one of fact for resolution by the ALJ. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). As found, at the conclusion of the Respondents' case-in-chief, their evidence could not have gotten any better and they had failed to overcome DIME Dr. Castrejon's opinions by clear and convincing evidence, with the exception of his opinion concerning the recommended right shoulder MRI and surgical consultation, this, delaying MMI, in which case the DIME opinion concerning the right shoulder had been overcome.

Credibility

b. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the opinions of all other physicians in evidence were not sufficiently persuasive to extend beyond differences of opinion with DIME Dr. Castrejon and, therefore, did not make it highly probable, unmistakable and free from serious and substantial doubt that Dr. Castrejon's PPD ratings, with the exception of the right shoulder delay of MMI were in error. In the later regard , it is highly probable, unmistakable and free from serious and substantial doubt that Dr. Castrejon's opinion that the Claimant was **not** at MMI was clearly in error.

Substantial Evidence

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

particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting medical opinions with regard to Claimant's MMI status, the ALJ made a rational choice, based on substantial evidence, to accept the opinion of Dr. Schakaraschwilli that Claimant is at MMI and that the repeat MRI and surgical consultation are not reasonably necessary or related to the February 20, 2017 work injury. The ALJ made a rational choice to accept the opinion of Dr. Castrejon and to reject the opinions of Dr. Shakaraschwilli and Dr. Burris with respect to Claimant's impairment ratings for the neck and chronic headaches. Dr. Castrejon's opinion is better supported by medical records which consistently document ongoing pain complaints in the neck and head with objective findings and diagnostic responses to trigger point injections.

Overcoming the DIME

d. The party seeking to overcome a DIME physician's opinions bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office***,** 5 P.3d 385 (Colo. App. 2000). *Also see Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475 (Colo. App. 2005). The DIME physician's determination of MMI is binding unless overcome by "clear and convincing evidence." *Metro Moving & Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995); *See also Peregoy v. Indus. Claim Appeals Office,* 87 P.3d 261 (2004); and § 8-42-107(b)-(c), C.R.S. *Also see Whiteside v. Smith,* 67 P.3d 1240 (Colo. 2003). Where the threshold determination of compensability is not an issue, a DIME physician's conclusion that an injured worker's medical problems were components of the injured worker's overall impairment constitutes a part of the diagnostic assessment that comprises the DIME process and, as such the conclusion must be given presumptive effect and can only be overcome by clear and convincing evidence. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475, 482 (Colo. App. 2005); *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 400 (Colo. App. 2009). "Clear and convincing evidence" is evidence, which is stronger than preponderance, is unmistakable, makes a fact or facts highly probable or the converse, and is free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert, supra; Leming v. Indus. Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). In other words, a DIME physician's finding may not be overcome unless the evidence establishes that it is "highly probable" that the DIME physician's opinion is incorrect. *Postelwait v. Midwest Barricade,* 905 P. 2d 21 (Colo. App. 1995). To overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt". *Adams v. Sealy, Inc.,* W.C. No. 4-476-254 [Indus. Claim Appeals Office (ICAO), Oct. 4, 2001]. A mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of

the DIME physician. *Javalera v. Monte Vista Head Start, Inc.,* W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Bush, Inc.,* W.C. No. 4-380-560 (ICAO, Nov. 17, 2000). As found, Respondents have proven that it is highly likely, unmistakable, and free from serious and substantial doubt, that Claimant reached MMI on February 19, 2018 for all conditions related to her February 20, 2017 work injury. Respondents have also proven by clear and convincing evidence that Claimant's ongoing right shoulder complaints do not merit a permanent impairment rating. As also found,, the Claimant's permanent medical impairment rating should be 10% whole person for the cervical spine, 5% whole person for the chronic posttraumatic headaches, and 2% for psychiatric impairment for a total of 17% whole person, according to the AMA Combined Values Chart.. The ALJ makes a rational choice to accept the opinion of Dr. Castrejon and to reject the opinions of Dr. Shakaraschwilli and Dr. Burris with respect to Claimant's impairment ratings for the neck/spine and chronic headaches. Dr. Castrejon's opinion is adequately supported by medical records which consistently document ongoing pain complaints in the neck and head with objective findings and diagnostic responses to trigger point injections. Furthermore, as found, DIME Dr. Castrejon's opinion in this regard has presumptive effect unless overcome by clear and convincing evidence.

Post-MMI Medical Maintenance Benefits

e. An injured worker is ordinarily entitled to a general award of future medical benefits, subject to an employer's right to contest causal relatedness and reasonable necessity. *See Hanna v. Print Expediters,* 77 P.3d 863 (Colo. App. 2003). As found, the Claimant is entitled to post-MMI medical maintenance benefits for all causally reated and reasonably necessary consequences of the February 20, 2017 admitted injury, including treatment for the spine/neck and headaches.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Pursuant to the Final Admission of Liability, Respondents shall pay the costs of all causally related and reasonably necessary post maximum medical impairment medical maintenance benefits, including treatment for the spine and headaches, subject to the Division of Workers Compensation Medical Fee Schedule.

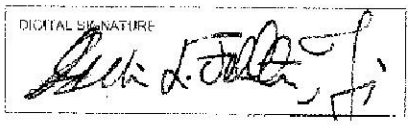
B. Respondents having overcome the opinion of Miguel Castrejon, M.D., in part, that Claimant was not at maximum medical improvement, the Claimant reached maximum medical improvement on February 19, 2018, at which time the Claimant was 39-years old (d.o.b. August 15, 1978).

C. Based on the Claimant's permanent partial disability of 17% whole person, Respondents shall pay the Claimant aggregate permanent partial disability benefits of $29, 696.06 06 [Age factor of 1.42 X 400 weeks X TTD rate of $307.54 per week X 17% whole person = $29, 696.06].

D. Respondents are entitled to a credit of $3,493.65, paid pursuant to the admission of 2% whole person psychiatric permanent disability and an overpayment credit of $878.69, for a total credit of $4,372. 34, thus Respondents shall pay the Claimant net permanent partial disability benefits of $25, 323.72, payable retroactively and forthwith.

E. Respondents shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

DATED this 13th day of May 2019.



_____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

ISSUES

- Did Claimant prove tha an L4-5 fusion surgery recommended by Dr. David Wong is reasonably necessary to cure and relieve the effects of his industrial injury?

FINDINGS OF FACT

1. Claimant worked for Employer as a tractor-trailer truck driver for approximately six months. Before that, he worked in a relatively physically demanding position as a welder.

2. Claimant suffered serious injuries in a head-on motor vehicle accident on August 29, 2016. He was driving his tractor-trailer eastbound on Highway 160 near Fort Garland when a car traveling in the opposite direction crossed the centerline and struck him head-on. The driver of the car was killed. Claimant was jostled around in the cab badly, despite wearing his seatbelt. After the accident, Claimant tried to exit the cab. Unfortunately, he did not realize the stairs on the side of his truck had been torn off, and he fell backward to the ground, landing on his back and buttocks. He developed severe back pain immediately after falling.

3. Claimant has a long history of low back pain starting with a work-related injury in the mid-2000s. His symptoms were relieved with physical therapy and epidural steroid injections, and he was released with no restrictions or impairment. Claimant experienced episodic back pain after that primarily associated with strenuous activity.

4. Claimant also suffers from gout, and the symptoms appear to have overlapped the low back issues to some degree.

5. The record contains a handful of treatment notes relating to Claimant's low back before the August 2016 MVA. On July 7, 2014, Claimant saw his primary care provider, PA-C Brian Jackson, for pain in his back and feet. He was "currently taking no medications. Just having significant pain." Examination showed muscle spasm in the lumbar area and positive straight leg raise. His feet were tender with reddening and increased warmth, consistent with gout. Mr. Jackson prescribed allopurinol and colchicine for gout, but nothing specifically for the back pain.

6. Claimant returned to Mr. Jackson on December 1, 2014 for "back pain and exacerbation of gout." The physical exam was largely benign with only tenderness in the low back and foot. Mr. Jackson recommended Claimant continue taking the allopurinol and added an NSAID (piroxicam). He did not state whether the piroxicam was prescribed for the back pain or gout, although it would generally address symptoms of both conditions.

7. On April 27, 2015, Claimant saw Mr. Jackson again for "chronic back pain and gouty arthritis." Mr. Jackson prescribed a Medrol Dosepak "for [his] back and gout," and ordered a lumbar MRI to evaluate a possible herniated disk.

8. The MRI was done on May 19, 2015. It showed bilateral L4 pars defects with approximately 8mm anterolisthesis of L4 on L5; moderate to advanced L4-5 disc degeneration, minimal L4-5 degenerative endplate changes, and moderate bilateral foraminal stenosis at L4-5. There was a disc bulge at L4-5 but no herniation.

9. After reviewing the MRI, Mr. Jackson referred Claimant to "Dr. Wong" for an orthopedic evaluation.[1]

10. Claimant saw PA-C Boyd Larson at Parkview Neurosurgery on June 18, 2015. Claimant reported his low back pain had "worsened over the last year." The pain was primarily in his back, but radiated into his right buttock in the back of his right thigh, stopping at the knee. He also reported "infrequent and less severe" pain radiating into the left buttock and back of the left thigh. He rated his pain as 8/10. The only significant clinical finding was "mild" tenderness to palpation at the midline of his low back. The neurological examination was entirely normal, with normal sensation, strength, and deep tendon reflexes bilaterally, negative straight leg raise bilaterally, and a normal gait. Mr. Boyd ordered flexion-extension x-rays and an EMG. He gave Claimant a back brace and advised him to call or come back after the EMG was complete.

11. The flexion-extension x-rays showed bilateral chronic spondylolysis, anterolisthesis of L4 on L5 that increased from 11 mm to 13 mm with motion, and severe L4-5 disc space narrowing.

12. Claimant did not follow up with Mr. Boyd again. He saw Mr. Jackson on February 3, 2016, who noted "history of lumbar back disc problems. No problems right now." There are no further treatment records addressing Claimant's low back until after the August 2016 accident.

13. Claimant credibly testified that immediately before the August 29, 2016 accident he had no back pain, no numbness, tingling, or pain down his legs, and performed all the duties of his job without limitation or difficulty. He credibly testified his pain complaints and symptoms changed significantly after the accident. The ALJ finds Claimant's testimony in this regard consistent with and supported by the medical records.

14. After the MVA, Employer referred Claimant to the SLV Regional Medical Center Occupational Medicine Program (ROMP). He initially saw Dr. Susan Geiger but saw Dr. Kevin Rice at the third visit, who has been the primary ATP since.

15. On November 21, 2016, Dr. Rice ordered flexion-extension x-rays because of persistent low back pain. The x-rays showed retrolisthesis of L5 relative to L4, most

[1] The ALJ presumes the referral was to Dr. David Wong or Dr. Doug Wong, both of whom are spine surgeons.

likely due to bilateral pars defects. Claimant returned to Dr. Rice on November 22, 2016 to review the x-rays, which Dr. Rice noted were radiographically similar to the 2015 MRI.

16. Dr. Rice referred Claimant for an updated MRI, which was completed on November 25, 2016. The radiologist compared the images to the May 18, 2015 MRI, and noted no interval change. Dr. Rice recommended Claimant continue physical therapy.

17. On December 16, 2016 Claimant told Dr. Rice physical therapy was not helping his back pain. Dr. Rice recommended Claimant stop therapy and referred him to Dr. Bernard Guiot for a surgical evaluation.

18. Claimant saw Dr. Guiot on December 21, 2016. He told Dr. Guiot he had been having back pain "24/7" since the accident, with pain levels ranging from 4/10 to 8/10. Claimant also reported numbness from his low back down through the buttocks and hamstrings bilaterally and to his knee on the right side. Claimant explained therapy had not helped. Claimant also told Dr. Guiot about his pre-injury history of "intermittent" low back pain. He explained the symptoms "had typically been self-limiting. Indeed, the patient would have experienced back pain only after heavy activity. His symptoms would have lasted no more than 24 hours and were managed effectively with a hot bath and NSAIDs."

19. Dr. Guiot recommended an L4-5 fusion, but wanted new flexion-extension x-rays and a repeat CT scan to verify the extent of the pars defects before making the final decision.

20. Claimant underwent a CT scan on February 1, 2017. It revealed grade 1 anterolisthesis of L4 on L5 with bilateral L4 spondylolysis. The radiologist noted the findings were not significantly changed compared to the prior CT scan from August 29, 2016. The flexion-extension x-rays were completed on February 23, 2017, and showed grade 1 anterolisthesis of L4 on L5, and bilateral L4 spondylolysis.

21. Claimant returned to Dr. Guiot on March 16, 2017 to discuss the imaging studies. Dr. Guiot concluded Claimant's pain was emanating from the L4 pars defects resulting in grade 1-2 spondylolisthesis with high-grade spinal stenosis. He formally requested authorization for an L4-5 fusion.

22. Dr. Brian Mathwich reviewed the request on March 29, 2017 and opined,

> Obviously, the pars defect and spondylolisthesis are pre-existing conditions, and the patient also had pre-existing back pain; however, in the records, there is no specific correlation of the patient's baseline back pain prior to the work-related injury and after.
>
> [I recommend] that the authorized treating provider do a thorough evaluation of the old records to determine exactly what the patient's baseline back pain was prior to surgery, compare that to his current injury, and determine whether there has been a significant change. While the underlying structural changes are pre-existing and non-work-related, the

> patient may have suffered an exacerbation or permanent aggravation due to the accident. If that is the case, surgery would be warranted under the workers' compensation [system]. However, [if] the patient's current pain is at or near his baseline pain prior to the injury, then there would be no significant increase of his underlying pre-existing injury, and no further treatment will be warranted.

23. On March 30, 2017, Claimant returned to Dr. Rice who opined, "there has without question been a change in the severity, character, and frequency of [Claimant's] back pain since the accident." And on July 26, 2017, in response to correspondence from Respondents' counsel, he reiterated his opinion the need for surgery was due to the accident.

24. The surgical request was re-staffed with Dr. James Ogsbury, a spine surgeon. Dr. Ogsbury noted Claimant's symptoms persisted despite 65 visits of physical therapy and acupuncture. He thought the surgery was "obviously" and "clearly" necessary, but had questions about causation despite Dr. Rice's assessment. Dr. Ogsbury agreed with Dr. Mathwich it was important to determine Claimant's preinjury pain pattern to determine if the accident aggravated or accelerated his pre-existing condition. He thought an evaluation by spine surgeon was unnecessary and recommended an IME with a physiatrist.

25. Claimant saw Dr. Allison Fall for an IME at Respondents' request on December 13, 2017. Dr. Fall opined Claimant's reports of "intermittent" and "self-limiting" low back pain were "not consistent with the medical records indicating numerous follow-ups for the back pain including MRI and MRI follow-up and then referral to a surgeon." Dr. Fall opined Claimant's presentation at the examination was exaggerated and "self-limited." She saw no indication of any acute change in Claimant's spine after the MVA and opined he suffered at most a myofascial strain. She opined there was no objective evidence of any worsening of his lumbar spine condition and Claimant's subjective presentation was unreliable. Ultimately, Dr. Fall concluded the requested surgery was not causally related to the accident.

26. The parties attended a hearing before the undersigned ALJ on July 19, 2018 regarding Dr. Guiot's propoed surgery. Dr. Rice testified consistent with the opinions he previously expressed regarding causation. Dr. Rice reiterated that claimant's back problems and associated level of function worsened after the accident, leading him to conclude the accident substantially aggravated his pre-existing condition and caused the need for surgery. Dr. Fall testified consistent her IME report. She reiterated there was no objective evidence to indicate Claimant aggravated or accelerated his pre-existing condition. She opined Claimant sustained a mild myofascial injury but returned to baseline, and the requested surgery was not causally related to the August 2016 accident.

27. During the hearing, it was discovered Dr. Guiot had retired. Respondents moved to dismiss the application for hearing on the grounds the issue was moot. The ALJ deferred ruling on the motion and asked the parties to address the issue in their post-hearing position statements.

28. Before the briefs were filed, Dr. Rice referred Claimant to Dr. David Wong for a surgical evaluation. Dr. Wong ordered flexion and extension x-rays which showed unstable spondylolisthesis at L4-L5, shifting from 10mm to 17mm with motion. Dr. Wong recommended a decompression and intertransverse fusion and pedicle screw instrumentation at L4-5.

29. Insurer staffed Dr. Wong's request with Dr. Ogsbury on September 12, 2018. Relying on Dr. Fall's IME report. Dr. Ogsbury opined the surgery was not work-related.

30. On November 15, 2018, the ALJ convened a status conference to discuss the procedural posture of the case. The ALJ and the parties agreed it was most appropriate to use the evidence and testimony already presented at the July 19, 2018 hearing, but schedule a second hearing so the parties could supplement the record with any further evidence deemed necessary to resolve the issue of medical benefits, which now changed to involve the surgery recommended by Dr. Wong.

31. Dr. Michael Rauzzino performed a records review on behalf of Respondents on October 29, 2018. Dr. Rauzzino noted that Claimant's low back was symptomatic within a year of the work injury, and none of the radiographic imaging after the accident demonstrated an acute structural change to Claimant's lumbar spine. Rauzzino agreed with Dr. Fall that at most, Claimant strained his lumbar spine after the accident, but absent a new structural injury to his lumbar spine, his ongoing symptomatology did not relate to the accident. Dr. Rauzzino stated:

> As of June 2015, [Claimant] was reporting the same type of pain he is reporting now after the motor vehicle accident. It is the same type of pain in terms of quality, intensity, and location with no acute structural changes in the spine caused by the accident. The measurement of the spondylolisthesis that Dr. Wong feels has moved from grade 1 to grade 2 is really not significantly different in my opinion. [Claimant] had at least grade 1 spondylolisthesis in 2015 and while there may be some slight progression of this in 2018, this would be expected with the natural history of his underlying disease.

32. Dr. Wong testified via deposition on March 7, 2019. He opined Claimant substantially aggravated his pre-existing condition and the need for surgery is related to the admitted work injury. Dr. Wong reviewed pre-accident medical records that confirmed his impression Claimant's condition changed significantly after the accident. Dr. Wong noted the biggest changes were the extent of Claimant's radiculopathy and the amount of movement shown on the flexion and extension x-rays. Dr. Wong opined it was very unusual for this degree of instability to develop naturally, and the most medically probable cause is the work accident.

33. Dr. Rauzzino testified via deposition on March 11, 2019. Dr. Rauzzino reiterated his opinion that Claimant's need for surgery is not related to the accident. He based his conclusion on the following factors: (1) Claimant has a known multiyear history

of spondylolisthesis at L4-L5 that was symptomatic; (2) Claimant had numerous episodes where he had significant back pain before the accident; (3) Claimant had radicular pain into his legs bilaterally leading up to the accident very similar to the pain he is currently reporting to his medical providers.

34. Dr. Rauzzino testified it is common for spondylolisthesis to change or worsen. Dr. Rauzzino stated the choice to prescribe Claimant a back brace in June 2015 reinforces his opinion Claimant had symptomatic instability in his lumbar spine before the work accident. Dr. Rauzzino indicated Claimant's pain complaints after the accident were similar to those that he experienced and reported in June 2015. At the outset of the claim, Claimant reported primarily back pain that radiated into his upper thighs, it was not until almost two years later that his pain radiated down his leg. Dr. Rauzzino testified this is similar to what would be seen in the natural progression of Claimant's lumbar spine condition absent any aggravation or acceleration. Dr. Rauzzino testified that had the accident caused an aggravation or acceleration of Claimant's pre-existing condition he would have expected to see an immediate increase in his radiculopathy.

35. The ALJ finds the causation opinions of Dr. Rice and Dr. Wong credible and more persuasive than the contrary opinions offered by Dr. Fall, Dr. Rauzzino, and Dr. Ogsbury. The ALJ is particularly persuaded by the analysis and discussion in Dr. Wong's deposition testimony.

36. Claimant's testimony regarding his pre-accident physical condition and level of function is credible and consistent with the other persuasive evidence of record.

37. Claimant proved by a preponderance of the evidence the surgery recommended by Dr. Wong is reasonably necessary and causally related to the August 29, 2016 industrial accident.

CONCLUSIONS OF LAW

The respondents must provide medical treatment reasonably needed to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a). Even if the respondents admit liability, they retain the right to dispute the relatedness of any particular treatment, and the mere occurrence of a compensable injury does not compel the ALJ to find that all subsequent medical treatment was caused by the industrial injury. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997); *McIntyre v. KI, LLC*, W.C. No. 4-805-040 (July 2, 2010). Where the respondents dispute the claimant's entitlement to medical benefits, the claimant must prove that an injury directly and proximately caused the condition for which he seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must prove entitlement to medical benefits by a preponderance of the evidence. *Page v. Clark*, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally, for either claimant or respondents. Section 8-43-201.

The existence of a pre-existing condition does not preclude a claim for medical benefits if the claimant proves an industrial injury aggravated, accelerated, or combined

with the pre-existing condition to produce the need for medical treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). The ultimate question is whether the need for treatment was the proximate result of an industrial aggravation or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

As found, Claimant proved the surgery recommended by Dr. Wong is reasonably necessary to cure and relieve the effects of his industrial injury. The persuasive evidence shows Claimant's low back was substantially worse after the accident. Before the accident, he had episodic flares of back pain, whereas his symptoms have been constant since the MVA. His clinical presentation has changed significantly as well. In August 2015, he had primarily low back pain, with some referred pain to the thigh but not the foot. He had no loss of sensation, normal strength, and negative straight leg raise bilaterally. He had 2mm of movement at L4-5 on flexion-extension x-rays, which falls below the established surgical threshold. His symptoms at the time were not severe enough to pursue injections or surgery, and he opted to a back brace. He did physically demanding work without limitation, and in February 2016 specifically told his PCP he was having "no problems" with his back. He now has progressive neurological deficits including weakness and worsening sensory loss. He has 7mm of documented movement on flexion-extension x-rays, well beyond that needed to justify a fusion. His symptoms are much worse than before and prevent him from working or performing other avocational activities he did before previously. The ALJ is persuaded by Dr. Wong's analysis and conclusion that the substantial change in Claimant's condition and the current need for surgery is a natural and proximate result of the MVA rather than the natural progression of his pre-existing condition.

ORDER

It is therefore ordered that:

1. Insurer shall pay for the L4-5 fusion surgery recommended by Dr. Wong.

2. All issues not decided herein are reserved for future determination.

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

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

DATED: May 13, 2019

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

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 1525 Sherman Street, 4th Floor, Denver, CO 80203	
In the Matter of the Workers' Compensation Claim of: , Claimant, VS. , Employer, Self Insured Respondent	▲ COURT USE ONLY ▲ **CASE NUMBER:** **WC 5-018-070-001**

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Hearing in this matter was held on October 18, 2018, before Margot W. Jones, Administrative Law Judge. Claimant was present and was represented by_____, Esq. _____, Esq. represented Respondent. This matter was digitally recorded in Denver, Colorado in Courtroom 4 convening at 8:30 a.m. The parties' exhibits 1-3 and A-P were admitted into evidence.

In this order, K is referred to as "Claimant" and Respondent-Employer _____, self-insured, is referred to as "Respondent" or "Employer."

Also in this order, "ALJ" or "Judge" refers to the Administrative Law Judge, "C.R.S." refers to Colorado Revised Statutes, "OACRP" refers to the Office of Administrative Courts Rules of Procedure, 1 CCR 104-1, "the Act" refers to the Workers' Compensation Act of Colorado, Section 8-40-101, et seq., C.R.S and "WCRP" refers to Workers' Compensation Rules of Procedure, 7 CCR 1101-3.

ISSUES

1. Whether Respondent proved by clear and convincing evidence that the determination of the Division independent medical examiner (DIME) is most probably incorrect.

2. Whether Claimant proved by a preponderance of the evidence that the medical treatment recommended by Dr. Khoi D. Pham is reasonably necessary and related medical treatment.

FINDINGS OF FACT

1. Claimant is a 36 year old female who worked for Employer from February 2015 until September 2016 in the Pharmacy Department. On December 10, 2015, Claimant suffered an admitted injury to her back, among other body parts. Claimant reported a work injury from catching her right foot on a mat and tripping. Claimant testified credibly, as follows:

> So the mats in the pharmacy were I – I had heard from the manager were pulled over from the meat department, so they had these rubber studs that stuck up. Occasionally, it would trip me so I would have to catch my footing. This time it really caught my foot. I turned the corner; it caught my foot; I couldn't go any further. I fell forward, I hit my right knee, I – my back jerked forward and flew it – my left hand flew into a medication shelf which then fell over into the next shelf and then fell over into the next shelf and almost broke the front pharmacy glass. Hundreds of medications went everywhere. I just remember the loud bang, medications went everywhere. Immediately, I was scared. Tr. 28:5-16.

2. Claimant was referred for authorized medical care. On December 29, 2015, Claimant's treating physician, Paul Ogden, MD, noted that Claimant had difficulty attending her medical appointments because of her family's schedule. By March 30, 2016, Dr. Ogden continued to report that Claimant has difficulty attending medical appointments because of childcare issues.

3. On April 19, 2016, Claimant treated with Dr. Robert Kawasaki, M.D. who assessed facet joint dysfunction combined with sacral iliac joint dysfunction. The doctor referred Claimant to Jason Gridley, DC, for active release techniques. Ultimately, Claimant did not receive chiropractic care because her case was closed for non-compliance.

4. On June 21, 2016, after reviewing Claimant's MRI films, Dr. Kawasaki diagnosed facet arthropathy at L2-3, L3-4 and L4-5 and sacroiliac joint dysfunction of both sides

related to her work injury. He also noted Claimant's challenges with scheduling and that Claimant's case was closed for noncompliance.

5. On June 22, 2016, Dr. Ogden reported Claimant's case was closed administratively due to non-compliance. On closure, he did not express his opinion on maximum medical improvement (MMI).

6. In the year 2000, Claimant was involved in a motor vehicle accident which resulted in temporary paralysis, Brown Sequard syndrome, and right-side weakness and hyperesthesia with "significant foot drop." Claimant testified that she has no recollection from the 2000 injury, but that the car she was in did somersaults into the desert. She testified to a cervical fusion and inpatient care for 3 months.

7. Medical records reflect that during the next decade and a half, Claimant sporadically sought medical attention for back pain. In August 2004, Claimant received chiropractic care rating her average back pain as 9/10, and her bilateral leg pain as 5/10.

8. In 2007 Claimant filed for disability based on severe back pain and a right foot drop condition. On a pain questionnaire, Claimant reported back pain when standing or sitting for long periods. Claimant reported awakening several times at night with neck and back pain. After filing for disability, on November 12, 2007, Claimant was evaluated by Dr. Claudia Elsner for back, right leg, right foot, and right-hand pain. Dr. Elsner diagnosed lower back pain arising from Claimant's right foot drop and unphysiologic gait. Dr. Elsner recommended physical therapy and a neurologic evaluation.

9. In 2014, Claimant presented to Kaiser Permanente with "significant back pain" rated 8/10. Claimant inquired at Kaiser Permanente about a surgery to repair her foot drop.

10. On June 6, 2015, Claimant's opioid prescription was refilled by Dr. Ada Gillis. The doctor recommended a lumbar MRI and acupuncture for the lumbar condition.

11. On June 9, 2015, a neurosurgery referral was made for Claimant at Kaiser, and she was diagnosed with low back pain with bilateral sciatica.

12. On August 5, 2015, Claimant saw neurosurgeon Dr. Christine Munson. Claimant reported constant pain from her injury in the 2000s. Dr. Munson diagnosed Claimant with Brown Sequard, radicular pain and back pain.

13. Dr. Robert Kawasaki, M.D. examined Claimant for her work-related injury on April 19, 2016. He noted a prior car accident for Claimant but also that she had "regained" all left-sided strength and function with only a degree of right-sided weakness remaining. He diagnosed her with low back pain and joint dysfunction as a result of this claim, which is consistent with Dr. Pham and Claimant's testimony.

14. After Claimant's December 10, 2015, Workers' Compensation case was administratively closed for non-compliance, on March 13, 2017, Claimant treated with Danilo Mazzella, M.D. at Kaiser. The doctor reported, as follows:

> Review of her chart and discussion with patient indicates that she has had new lower back pain and symptoms since work related injury in December, 2015. These symptoms are different from previously existing symptoms related to an mva with cervical spine trauma in 2000. (Exhibit 2, p.13)

15. Respondent filed a Final Admission of Liability on or about August 18, 2017, to which Claimant objected and requested a DIME.

16. The DIME was performed by Khoi D. Pham, M.D. on December 18, 2017. After reciting her medical history, Dr. Pham related Claimant had ongoing pain from the back into the buttock area and over her tailbone. Claimant stated to him that the pain was "stabbing and burning," was made worse with activity and that he felt she had been given inadequate treatment. He mentioned in his report that further valid treatments had already been scheduled by Claimant. Importantly, he delineated between a "pre-existing cord injury" for Claimant and this claim, in which different injuries occurred. Dr. Pham testified that he had Claimant's medical records prior to the work injury and was aware of the 2000 injury. He opined that despite the records of Claimant reports of back pain after the 2000 injury, Dr. Pham continued to believe that Claimant required medical treatment and is not at MMI. Dr. Pham opined that Claimant needed to return to Dr. Kawasaki.

17. Respondent applied for a hearing to challenge the results of the DIME. Dr. Cebrian's deposition was taken in preparation for the hearing. Dr. Cebrian diagnosed Claimant with a work related lumbar strain that resolved in 2016. Dr. Cebrian testified that Claimant's pain levels were consistently high at the time of his examination that she presented with ongoing complaints indicating the need for care. Dr. Cebrian opined that Claimant is at MMI for the work injury, did not have a permanent impairment nor does she require additional medical treatment. Dr. Cebrian points to what he characterizes as Dr. Pham's error in his failure to provide an impairment rating even though he opines Claimant is not at MMI.

18. Dr. Cebrian's opinion that Claimant is at MMI amounts to a difference of opinion, since Dr. Pham was fully apprised of Claimant's medical history and, even in the face of that history, Dr. Pham opined that Claimant required additional medical treatment to cure and relieve her of the effects of the work injury.

19. Dr. Pham appeared at the hearing, was present for Claimant's testimony and testified in support of his DIME report and Claimant's need for medical treatment overall. He reiterated that his opinions on the issues of MMI and medical treatment were unchanged.

20. Claimant credibly testified at hearing regarding the mechanism of injury. The ALJ finds that Claimant's work related injury involved a fall with great force. She also credibly testified that her ongoing pain, additional symptoms and need for additional treatment were as the result of this admitted claim and no other causative factor.

21. Respondent has failed to present clear and convincing evidence to support the contention that Dr. Pham's determination of MMI was most probably incorrect. Dr. Cebrian offered contrary evidence which was found to be less credible and persuasive than the opinions of Dr. Pham. Dr. Pham At best, Dr. Cebrian's opinions amount to a difference of opinion regarding the hearing issues.

22. Claimant has proven by a preponderance of the evidence that the care as recommended by Dr. Pham is necessary to cure or relieve the effects of her admitted work injury.

CONCLUSIONS OF LAW

General Legal Principles

1. The purpose of the Act is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimant bears the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S.; City of Boulder v. Streeb, 706 P.2d 786, 789 (Colo. 1985). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

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

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

Dime procedure

4. Respondent contends that it overcame the opinion of Dr. Pham with regard to MMI by clear and convincing evidence. By contrast, Claimant argues that Respondents have not met their burden of proof.

5. The determination of MMI and the assessment of permanent impairment both require the DIME physician to diagnose the claimant's condition or conditions, and determine their causal relationship to the industrial injury. *See Cordova v. Industrial Claim Appeals Office*, P.3d (Colo. App. No. 01CA0852, February 28, 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). The burden of proof rests on the party challenging the DIME physician's determinations to overcome them by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office, supra; Lambert & Sons, Inc. v. Industrial Claim Appeals Office*, 984 P.2d 656 (Colo. App. 1998). Clear and convincing evidence is evidence demonstrating that it is "highly probable" that the DIME physician's rating is incorrect. *American Compensation Insurance Co. v. McBride,* 107 P.3d 973, 980 (Colo. App. 2004). Such evidence must be unmistakable and free from serious or substantial doubt. *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1150 (Colo. App. 2002). The questions of whether the DIME physician has correctly applied the rating protocols, and ultimately whether the rating itself has been overcome by clear and convincing evidence, are questions of fact for the ALJ. *McLane Western Inc. v. Industrial Claim Appeals Office,* 996 P.2d 263 (Colo. App. 1999*); Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 2002 (Colo. App. 2000).

6. Further, even if the ALJ finds the DIME physician deviated from the rating protocols of the AMA Guides, the party challenging the rating must still demonstrate that the deviation casts substantial doubt on the overall validity of the rating. *Schrameck v. USA Waste Management*, W.C. No. 4-407-221 (ICAO May 18, 2001), *Rivale v. Beta Metals, Inc*., W.C. No. 4-2655-360 (April 16, 1998), *aff'd. Rivale v. Industrial Claim Appeals* Office, (Colo. App. No. 98CA0858, January 28, 1999) (not selected for publication). A mere difference of opinion between physicians fails to constitute error. *See, Gonzales v. Browning Ferris Indust. of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

7. The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). Since the DIME physician is required to identify and evaluate all losses and restrictions which result from the industrial injury as part of the diagnostic assessment process, the DIME physician's opinion regarding causation of those losses and restrictions is subject to the same enhanced burden of proof. *Qual-Med v. Industrial Claim Appeals Office*, *supra.*

8. In this case, Dr. Cebrian maintains that Claimant's current symptoms are not related to the work injury. However, Dr. Pham expresses the contrary conclusion. Dr. Pham and Cebrian have a difference of opinion on the question of Claimant's

condition and her MMI status. Dr. Cebrian's opinion does not amount to clear and convincing evidence that Dr. Pham's MMI determination is incorrect.

Medical benefits

9. Claimant contends she sustain her burden of proof to establish that she is entitled to reasonably necessary and related medical benefits. Claimant points in support of her claim to Dr. Pham's determination that she is still in need of medical treatment to cure and relieve her of the effects of the 2015 work injury.

10. If there is a compensable injury, the employer and its insurance carrier must provide all medical benefits, which are reasonably necessary to cure and relieve the work-related injury. Section 8-42-101 C.R.S.; *Owens v. Indus. Claim Appeals Office of State of Colo.,* 49 P.3d 1187, 1188 (Colo. Ct. App. 2002). The right to workers' compensation benefits, including medical payments, arises only when an injured employee initially establishes, by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-42-101, C.R.S.; See *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. Ct. App. 1997). Where liability for a particular medical benefit is contested, the claimant must prove that it is reasonably necessary to treat and is causally related to the industrial injury. *Id*.; See *Grover v. Industrial Commission,* 759 P2d 705 (Colo. 1988). The record must distinctly reflect that the medical treatment was necessary and designed to cure or relieve the effects of the work injury. *Pub. Serv. Co. of Colorado v. Indus. Claim Appeals Office of State of Colo.,* 979 P.2d 584, 585 (Colo. Ct. App. 1999).

11. Dr. Pham credibly opined that Claimant's condition requires treatment to cure and relieve her of the effects of the work injury. Dr. Pham recommends that Claimant be permitted to return to Dr. Kawasaki for medical treatment. Dr. Cebrian's opinions to the contrary were considered and dismissed since those opinions were premised on Dr. Cebrian's MMI determination.

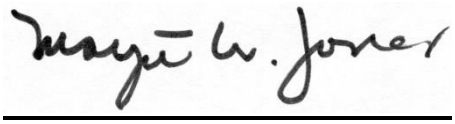
12. Since it is concluded that Claimant requires additional medical treatment, Respondent shall be liable for reasonably necessary and related medical treatment to cure and relieve Claimant of the effects of the 2015 work injury.

ORDER

1. Respondent failed to establish by clear and convincing evidence that the DIME opinion is incorrect.

2. Claimant established by a preponderance of the evidence that he is entitled to medical benefits to cure and relieve him of the effects of the work injury. Respondent is liable for the medical treatment recommended by Dr. Pham.

DATED: May 14, 2019



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

If you are dissatisfied with the Judge's Order, you may file a Petition to Review the Order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the Order, as indicated on the certificate of mailing or service; otherwise, the Judge's Order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the Order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see § 8-43- 301(2), C.R.S. (as amended, SB 09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a Petition to Review at ttp://www.colorado.gov/dpa/oac/forms-WC.htm.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-015-735-001

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on May 1, 2019, in Denver, Colorado. The hearing was digitally recorded (reference: 5/1/19, Courtroom 1, beginning at 8:30 AM, and ending at 9:30 AM).

Stipulated Exhibits A through I were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, which was filed, electronically, on May 8, 2019. Respondents were given 2 working days within which to file objections. No timely objections were filed. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern average weekly wage (AWW) and permanent partial disability (PPD) benefits, specifically, whether Claimant's AWW and the temporary total disability (TTD) weekly rate at the time of maximum medical improvement (MMI) should be used as part of the formula provided in § 8-42-107 (8) (e) C.R.S. , to determine Claimant's PPD benefits? An additional issue is whether the Claimant is entitled to bodily disfigurement benefits?

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

FINDINGS OF FACT

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

Stipulation of Fact and Findings Thereon

1. The parties stipulated, and the ALJ finds, that Claimant's AWW on the date of injury was $806.63. The parties further stipulated, and the ALJ finds, that Claimant's AWW on the date of MMI was $1,167.88.

Preliminary Findings

2. The Claimant's date of birth is August 21, 1982, and she was was 35 years old on the date of MMI, June 7, 2018, thus, establishing an age factor of 1.5, as part of the formula provided in § 8-42-107 (8) (e), C.R.S.

3. This is an admitted claim with a date of injury of January 26, 2016. Respondents filed a Final Admission of Liability (FAL), dated July 31, 2018, admitting for PPD benefits of $452.10 per week, based on 4% whole person PPD and an admitted AWW OF $678.15, calculated at $10,850.40 (4% x 400 x $452.10 x 1.5). Claimant filed a timely objection to the FAL, filed an Application for Hearing on the issues of PPD and AWW, and the hearing referenced hereinabove occurred.

4. The Claimant at all relevant times was employed as a mechanic for Employer. She developed a kin disease on her feet due to a work-place exposure. Claimant was not placed on temporary or permanent restrictions following her date of injury.

5. According to the Claimant's testimony at hearing, her injury consists of severe rashes on both feet that itch and are painful. Her skin will peel off her feet. Her job duties require her to be on her feet 90% of the day. At the time of MMI, the Claimant's pay was dependent on her productivity. She had to sit down and remove her shoes daily to address her feet condition, including application of cream prescribed by her doctor, thus, significantly affecting her productivity and pay. According to the Claimant her current wages as of the time of the hearing are about the same as they were at the MMI date. The testimony of the Claimant is credible and persuasive.

Ultimate Findings

6. Based on the totality of the evidence, the ALJ finds that the fairest method to calculate Claimant's PPD benefits is to utilize her AWW at the time of MMI.

The parties stipulated, and the ALJ found an AWW of $1,167.88 at the time of MMI. In the exercise of discretion, the ALJ finds that the fairest method used to compute Claimant's PPD benefits, is by using the AWW and consequent weekly TTD rate as part of the formula for calculating whole person PPD. The corresponding TTD rate is 2/3 of $1,167.88, or $778.58. As a result, Claimant's PPD award should be $18,685.92 [4% x 400 x $778.58 x 1.5 (Age Factor)). Respondents previously admitted and paid $10,850.40 in PPD benefits pursuant to the FAL, dated July 31, 2018. Respondents are entitled to credit this amount against the PPD awarded by this Order.

7. The ALJ finds the Claimant's testimony concerning her work pay and limitations after the admitted injury straight-forward, credible and dispositive.

8. The ALJ observed reddish discolorations and evidence of skin falling off the bottoms of the Claimant's feet, plainly visible to public view.

9. The Claimant has sustained his burden of proof, by a preponderance of the evidence on all issues.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v.*

Cline, 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005); *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant's testimony concerning her work pay and limitations after the admitted injury straight-forward, credible, undisputed and dispositive. *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony.

Average Weekly Wage

b. . To determine an employee's AWW, the ALJ may choose from two different methods set forth in § 8–42–102. *Benchmark/Elite, Inc. v. Simpson,* 232 P.3d 777 (Colo. 2010). The first method, referred to as the "default provision," provides that an injured employee's AWW "be calculated upon the monthly, weekly, daily, hourly, or other remuneration which the injured or deceased employee was receiving at the time of injury." *Id. (citing* § 8–42–102(2); The default provision lists six different formulas for conducting this calculation, such as multiplying the monthly wage or salary at the time of the accident by twelve and then dividing by fifty-two. *Id.* (citing § 8–42–102(2)(a)–(f)) The second method for calculating an employee's AWW, referred to as the "discretionary exception," applies when the default provision "will not fairly compute the [employee's AWW]." *Id.* (citing § 8–42–102(3). In such a circumstance, the ALJ has discretion to "compute the [AWW] of said employee in such other manner and by such other method as will, in the opinion of the director based upon the facts presented, fairly determine such employee's [AWW]." *Id.* The overall purpose of the statutory scheme is to calculate "a fair approximation of a claimant's wage loss and diminished earning capacity." *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). As such, § 8-42-102(3), C.R.S., grants the ALJ substantial discretion to calculate the AWW if any of the statutorily prescribed methods will not "fairly compute" the AWW. See *Pizza Hut v. Indus. Claims Appeal Office*, 18 P.3d 867 (Colo.App. 2001) (ALJ acted within the scope of his discretion in determining that the higher wage earned at the time of MMI more fairly compensates claimant for his future loss of earnings). As found, the Claimant's AWW of $1,167.88 (with a corresponding TTD rate of $778.59) at the time of MMI more fairly compensates the Claimant for her future loss of earnings arising out her work-related injury, as part of the formula.

Permanent Partial Disability

c. The admitted PPD of 4% whole person, the MMI date of June 7, 2018, the Claimant's date of birth of August 21, 1982, the fact that she was 35 years old on the date of MMI, which establishes a formula age factor of 1.5, is undisputed. Consequently, ursuant to § 8-42-107 (8) (d) and (e), C.R.S., medical impairment benefits are determined by multiplying the medical rating by the age factor, by 400 weeks and by TTD rate. As found, Claimant is entitled to medical impairment benefits

in the aggregate amount of $18,685.92 (4% x 400 x $778.58 x 1.5). Respondents previously admitted and paid $10,850.40 in medical impairment benefits pursuant to the FAL, dated July 31, 2018. Respondents are entitled to credit this amount against the medical impairment benefits awarded by this decision. After the credit, Respondents are liable for the net amount of $7, 835.52 due in PPD benefits.

Bodily Disfigurement

d. Section 8-42-108 (1), C.R.S., provides for a disfigurement award up to $4,000, plus an annual escalator based on the State Average Weekly Wage (AWW) if the injury is to an area in public view and is permanent. Bodily disfigurement is assessed according to appearance not loss of function. *Arkin v. Indus. Comm'n. of Colorado,* 145 Colo. 463, 358 P.2d 879 (1961). Compensation beyond $4,000, plus the AWW escalator, is only appropriate if the disfigurement affects the face, is comprised of extensive body scars or burns, or manifests itself as stumps due to loss or partial loss of limbs. § 8-42-108 (2). Because facial deformities "are presumed to impact on an individual's social and vocational functioning." the statutory maximum award is appropriate. *See Gonzales v. Advanced Component Systems*, 949 P.2d 569 (Colo. 1997). As found, in the present case, the Claimant's disfigurement affects the bottom of her feet, specifically, as reddish discolorations and evidence of skin falling off the bottoms of the Claimant's feet, plainly visible to public view, but is serious, unpleasant looking and plainly visible to public view. It is not among the listed schedule disfigurements in § 8-42-108 (2), with an $8,000 maximum award. It is within the purview of a maximum $4,000, plus the State AWW escalator, award. Therefore, an award of $2,000.00 is appropriate.

Burden of Proof

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

ORDER

IT IS, THEREFORE, ORDERED THAT:

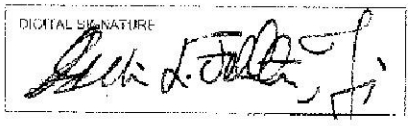
A. Respondents shall pay the Claimant medical impairment benefits for 4% whole person permanent medical impairment in the aggregate amount of $18,685.92 (4% x 400 x $778.58 x 1.5), from June 7, 2018, the date of maximum medical improvement.

B. Respondents previously admitted and paid $10,850.40 in medical impairment benefits pursuant to the Final Admission of Liability, dated July 31, 2018. Therefore, they are entitled to credit in this amount against the medical impairment benefits awarded by this decision. After the credit, Respondents shall pay the Claimant permanent partial disability benefits in the net amount of $7, 835.52, which is payable retroactively and forthwith.

C. For and account of the Claimant's bodily disfigurement, in addition to other benefits, Respondents shall pay the Claimant the amount of $2,000.00, payable in one lump sum.

D. Respondents shall pay the Claimant statutory interest at the rate of eight percent per annum (8%) on all amounts of indemnity benefits due and not paid when due.

DATED this 15th day of May 2019.



EDWIN L. FELTER, JR.
Administrative Law Judge

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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-086-383-001

ISSUES

- Whether Claimant established by a preponderance of the evidence that he sustained a compensable injury in the April 27, 2018 motor vehicle accident,
- Whether Claimant is entitled to additional medical benefits,
- Whether Claimant is entitled to temporary indemnity benefits,
- Whether Claimant was at fault for his separation from employment,
- Penalties for late reporting under C.R.S. § 8-43-102(1)(a), and
- Penalties for failure to wear a safety device under C.R.S. § 8-42-112(1)(a)&(b).

STIPULATIONS

1. The parties stipulated that Claimant's average weekly wage was $488.99.
2. The parties stipulated that, if this matter is found compensable, Denver Health, Center for Occupational Safety and Health, would continue as the authorized provider.
3. Claimant stipulated that he was not wearing a seatbelt at the time of the motor vehicle accident.

FINDINGS OF FACT

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

1. Claimant is a 40-year-old former seasonal employee of Respondent's Parks and Recreation Department. The Department employed Claimant at the Crestmore Park location performing general labor and parks maintenance for the summer 2018 season.

2. On April 27, 2018, Claimant was driving Respondent's Ford F350 work truck when another vehicle traveling at approximately 15 miles per hour rear-ended the truck. Claimant was in the course and scope of his employment at the time of his accident. As stipulated, Claimant was not wearing a seatbelt at the time of the accident. Respondent's vehicle sustained minor damage in the accident and the at-fault vehicle sustained moderate damage.

3. Claimant testified that the rear-ending vehicle drove under the work truck,

almost causing the truck to flip over, struck the front tires of the work truck pulling it down and preventing it from flipping over, and then drove out from underneath the truck. Claimant's description of the mechanism of accident defies the laws of physics. It is also inconsistent with the police report, medical reports, and photographs of the accident scene.

4. Claimant testified that during the accident, he struck his head on the roof of the truck and that his body struck the steering wheel. Claimant testified to a brief loss of consciousness and that he experienced shock like symptoms, internal swelling, and shortness of breath. Claimant testified that he did not speak with Brian N_____ at the scene of the accident or immediately thereafter.

5. Claimant did not report any injury to the responding police officers; neither did Claimant report any injury to his supervisor at the accident scene. Later, Claimant returned to Respondent's maintenance facility at Crestmore Park, and then went home for the remainder of the day.

6. Claimant's supervisor, Brian N_____, testified that Claimant called him to inform him of the accident. Mr. N_____ arrived shortly thereafter and inquired whether Claimant was injured. Claimant denied any injury. After the police investigation, Mr. N_____ drove the work truck and Claimant drove Mr. N_____'s truck back to the shop. When they met at the shop, Mr. N_____ again asked whether Claimant was injured, and Claimant again denied any injury. Mr. N_____ allowed Claimant to go home for the remainder of the day. In the days following the accident, Mr. N_____ continued to ask Claimant whether he needed medical treatment, and Claimant continued to deny any need for treatment.

7. Mr. N_____ testified credibly that Claimant performed medium to heavy manual labor at Crestmore Park. This included mowing, weeding, painting, cleaning and hauling trash. Mr. N_____ credibly testified that Claimant was able to complete all assigned job duties in the summer of 2018 without issue, without pain complaints, and without any sign of injury.

8. Claimant resigned from his seasonal position with Respondent on August 15, 2018 via a text message to Brian N_____. Twelve days later, Claimant texted Mr. N_____ that he sustained an on the job injury. Later, Claimant called Respondent's OUCH Line to report his injury.

9. Claimant testified he sustained injuries to his heart, spine, neck, stomach, kidneys, and liver. He also sustained a head injury with headaches and shock like symptoms. Claimant testified that shortly after the accident, he had diffuse muscle bruising and swelling. Claimant testified he experienced 10 out of 10 pain shortly after the accident and ongoing. Claimant's testimony regarding the scope of his injuries and the types of injuries sustained is inconsistent with the medical records and the mechanism of the accident. The ALJ finds it highly unlikely that Claimant experienced such extreme pain given that he continued to work full duty, and did not report any injury for over four months. The ALJ finds Claimant's testimony is not credible.

10. Claimant first sought medical treatment for the alleged April 27, 2018 accident on August 20, 2018, when he reported to the emergency room at Lutheran Medical Center. There, Claimant reported experiencing back pain, neck pain, headache, and intermittent tingling in his bilateral arms after the accident. However, Claimant denied having the symptoms when the medical provider examined him. Claimant provided no persuasive explanation for why he went to the emergency room if he was not then experiencing symptoms.

11. After Claimant reported the injury to Respondent, Respondent referred Claimant to authorized treating physician, Dr. Kuehn at Denver Health – COSH. Dr. Kuehn initially evaluated Claimant on August 22, 2018. Claimant reported he was in a rear end motor vehicle accident, that he was a restrained driver, and that he sustained multiple muscle strains and contusions in the accident. Claimant stated he felt something move in his back at the time of the accident, and that he felt numbness and pain over the next few days. Claimant reported intermittent paresthesias in the fourth and fifth digits of both hands and in the great toes bilaterally. He also reported headaches, seeing blue streaks, nausea, neck pain, mid back pain, low back pain and pain at the top of his head. Dr. Kuehn noted that she could not reproduce lumbar or cervical pain on physical examination. With respect to causation, Dr. Kuehn stated, "Of note, the patient has diffuse complaints of pain throughout his spine. However, I cannot reproduce that pain when I palpate the spine or the paraspinous musculature. At this point, the relationship of his diffuse pain to his remote motor vehicle accident is unclear. Given the delay in evaluation, assessing causality is going to be very difficult."

12. Claimant returned to Denver Health on September 12, 2018. He reported that his condition was worsening and that he was spending all of his time in bed. Again addressing causation, Dr. Kuehn noted that, "the etiology of this patient's symptoms is unclear at this time. His mechanism of injury over 4 months ago would not seem likely to generate this progressively severe and diffuse symptomology." Dr. Kuehn did recommend physical therapy three times a week to address Claimant's pain complaints.

13. On October 5, 2018 Claimant returned to COSH continuing to complain of diffuse pain. Dr. Kuehn added to her causation assessment following this evaluation stating:

> As I stated in my initial note, the causality of this patient's symptoms is difficult to determine. His injury was in April of this year. However he did not seek care for this reported injury until 8/20/18 at Lutheran Hospital and then subsequently with our clinic. The fact that he waited to come in for his reported injury makes assessing the temporal relationship between his pain and the injury very difficult. Additionally, the delay in seeking care for his reported injury makes assessment of biological plausibility very difficult. At this point, the patient's exam is not consistent with discogenic disease as there are not radicular symptoms. His complaints of paresthesias do not follow a dermatome. The patient's complaints of pain are consistent throughout his visits but the etiology of his pain remains obscure.

14. On October 19, 2018, Claimant returned to Dr. Kuehn. At this evaluation, he reported episodes of incontinence. Dr. Kuehn noted a report of incontinence and that protocol mandated an MRI be performed. MRIs of the thoracic spine and lumbar spine were completed on October 27, 2018. The lumbar spine MRI revealed no acute pathology. The thoracic spine MRI found a reduction in height at T8, which Dr. Kuehn opined was likely not related to the MVA. The radiology results did not indicate that Claimant sustained any injury to either his lumbar or thoracic spine in the April 27, 2018 accident.

15. Dr. Kuehn's final evaluation took place on October 29, 2018. He noted that Claimant reported spasms from the back of his head into his back and that Claimant was concerned about abdominal swelling. Dr. Kuehn noted that Claimant previously reported taking multiple muscle relaxants, was instructed to bring in his medications, and that Claimant had failed to bring his medications to the evaluation. She also noted Claimant was unable to provide a urinary sample or request.

16. Dr. Kuehn opined that no injury resulted from the accident. Dr. Kuehn's medical reports and causation analysis are based on the objective evidence and are credible. Dr. Kuehn accurately noted Claimant's delay in reporting symptoms, inconsistencies in Claimant's reported symptoms and the mechanism of injury, the lack of findings in radiology, and symptoms out of proportion to objective findings, in reaching her conclusions.

17. At Respondent's request, Dr. J. Tashof Bernton saw Claimant on February 19, 2019 for an independent medical examination. Dr. Bernton also performed a Battery for Mental Health II assessment. Dr. Bernton reviewed Claimant's medical records, performed an examination, and concluded that Claimant was not injured in the MVA.

18. Dr. Bernton testified live at hearing. Dr. Bernton testified that he was unable to diagnose any injury associated with the April 27, 2018 accident. Dr. Bernton noted it was unlikely Claimant was injured as he was able to engage in a job requiring heavy fliting for four months without reporting an injury, that there was no objective evidence of injury -only Claimant's subjective complaints, and that Claimant's symptoms were out of proportion to the objective findings. Dr. Bernton persuasively testified that any treatment Claimant obtained was based on his subjective symptom reporting and not due to any actual injury. Dr. Bernton explained that Dr. Kuehn's referrals and restrictions were reasonable based on Claimant's reported symptoms, but were not necessary because Claimant sustained no injury requiring treatment. The ALJ finds Dr. Bernton's testimony credible, persuasive and consistent with the opinions of the authorized treating physician and medical records.

19. Dr. Bernton testified persuasively regarding Claimant's mental health assessment. Claimant has possible somatoform symptoms or malingering, with extreme results in the Battery for Mental Health II evaluation. Claimant had somatic complaints in the 92nd percentile, pain complaints in the 99th percentile, and functional complaints in the 99th percentile. As stated in Dr. Bernton's report:

> This profile is uncommon with extremely high levels of somatic complaints, pain complaints and functional complaints coupled with low levels of self-disclosure, defensiveness, hostility and borderline and chronic maladjustment characteristics. The combination of these scales indicate that this is an individual who is extremely likely to have a strong somatoform contribution to pain complaints, and pain complaints should not be taken at face value.

20. The ALJ finds the opinions of Dr. Kuehn and Dr. Bernton persuasive with respect to causation. Both physicians considered the temporal relationship between the accident and Claimant's report of injury, as well as the lack of objective findings on examination, in determining that Claimant did not sustain an injury in the April 27, 2018 motor vehicle accident.

21. The ALJ further finds Claimant's testimony is not credible and does not support a finding that Claimant sustained any injury on April 27, 2018. Claimant testified to a highly improbable mechanism of injury inconsistent with natural laws, the police report, photographs, and witness statements. Claimant's testimony regarding his symptoms and pain complaints are internally inconsistent, inconsistent with the medical records, and are exaggerated beyond plausibility.

22. Based on the totality of the evidence, the ALJ finds Claimant did not establish by a preponderance of the evidence that he sustained any injury.

CONCLUSIONS OF LAW

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

For a claim to be compensable under the Act, a Claimant has the burden of proving that he suffered a disability that proximately caused by an injury arising out of and within the course and scope of employment. C.R.S., §8-41-301(1) (c). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for determination by the ALJ. *Id*. at 846.

A compensable injury is an injury that "arises out of" and "in the course of" employment. *See* C.R.S. §8-41-301(1) (b). In deciding whether a Claimant has met his burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence." *See Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002).

Credibility is a significant consideration when determining compensability. In assessing credibility, the ALJ should consider, among other things, the consistency or

inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness of the testimony; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (1936).

The ALJ must examine the totality of the circumstances to determine whether there is a sufficient nexus between the employment and the injury such that the accident may be said to have occurred in the scope of the Claimant's employment. *City and County of Denver School District No. 1 v. Industrial Commission*, 581 P.2d 1162 (1978). In establishing causation, a Claimant "must show that the industrial injury bears a 'direct causal relationship between the precipitating event and the resulting disability.'" *See Garcia v. CF&I Steel*, W.C. No. 4-454-548 (ICAO May 14, 2004).

The ALJ concludes that the following persuasive factors support a finding that Claimant did not suffer a compensable injury on April 27, 2018.

- Claimant's symptoms were entirely subjective with no objective findings of injury in the medical records.
- Claimant's symptoms were extreme and inconsistent with the findings on examination.
- Claimant exaggerated his physical symptoms, testifying to extreme pain and diffuse pain complaints in excessive of objective findings by physicians.
- Claimant was able to work an entire summer in a physically demanding position without accommodation or seeking medical care despite the alleged severe injuries.
- Claimant waited over four months to report any injury and only did so after resigning from his employment with Respondent.
- A preponderance of objective medical evidence supports this conclusion, with the authorized treating physician and Dr. Bernton both concluding Claimant did not sustain a compensable injury in the April 27, 2018 incident.

The ALJ further concludes that Claimant was not credible for the following reasons.

- Claimant testified to a mechanism of injury that was extremely improbable and exaggerated the magnitude of the auto accident.
- Claimant was a poor historian. His testimony was often inconsistent with his responses to interrogatories, his own statements at hearing, and prior statements.
- Claimant was not forthcoming with his medical providers and other doctors by failing to inform them accurately of the force of the accident and of his

not wearing a seatbelt.

- Claimant was not forthcoming on cross-examination. For example, when asked for details about additional medical treatment sought, Claimant responded that he was seen in multiple emergency rooms, but that he was never treated as he was turned away by the emergency rooms.

- Thus, the ALJ concludes that Claimant did not suffer a compensable injury on April 27, 2018. Having concluded that Claimant did not suffer a compensable injury, the ALJ need not address other issues endorsed for hearing.

ORDER

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

1. Claimant failed to meet his burden of proving by a preponderance of the evidence that he sustained a compensable injury on April 27, 2018.

2. Claimant's claim is not compensable, and is denied and dismissed.

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

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

DATED: May 16, 2019

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

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence she is entitled to ongoing medical treatment to her right hip for the compensable work injury suffered on February 8, 2017.

II. Whether Claimant has proven by a preponderance of the evidence the right hip surgery recommended by Dr. White is reasonable medical treatment necessary to cure and relieve the effects of the February 8, 2017 work injury.

III. Whether Claimant has demonstrated by a preponderance of the evidence she sustained a compensable injury to her left hip arising out of and within the course and scope of her employment on October 14, 2018.

IV. If Claimant has proven she sustained a left hip compensable injury on October 14, 2018, whether Claimant has proven by a preponderance of the evidence she is entitled to receive reasonable, necessary and causally related medical benefits.

FINDINGS OF FACT

1. Claimant is a 44-year-old woman with an April 23, 1975 date of birth. Claimant worked for Employer as a personal shopper, collecting items for customers' online orders.

2. On February 8, 2017, Claimant sustained an admitted industrial injury when she fell backwards off of a six-foot tall ladder and landed on the ground. Claimant presented to authorized provider Concentra reporting that she straddled the ladder as she fell and then landed on her buttocks. Claimant complained of vaginal bleeding and tailbone pain. She was referred to the emergency department at Sky Ridge Medical Center, where a pelvic CT scan revealed a non-displaced mildly comminuted distal sacral fracture at the S5 level. Claimant was diagnosed with a fractured sacrum and labial laceration.

3. Claimant returned to Concentra on February 9, February 11, February 12 and February 15, 2017 for recheck of her labial laceration and sacral fracture. She reported coccyx pain and vaginal bleeding. Claimant also sought treatment at Sky Ridge on February 11, 2017 for vaginal bleeding.

4. During a follow-up appointment at Concentra on February 17, 2017 Claimant reported having severely painful muscle spasms down both legs, pain in the left buttock, pain along the lateral aspect of her thighs, and intermittent numbness from her hips bilaterally down the anterior aspect of her thighs.

5. Claimant treated with Concentra on February 21, February 27, and February 28, 2017, reporting severe pain in the sacral area. Her ongoing diagnosis was a coccyx contusion, closed fracture of the sacrum, and laceration of the labia majora.

6. On March 7, 2017, Claimant presented to Michael Rauzzino, M.D. for a neurosurgical consultation. Claimant complained of primarily sacral pain without radiculopathy on the left side, along with some pain starting around the sacrum radiating around to the right upper part of her leg. She reported that her symptoms had worsened and changed over the previous week. Dr. Rauzzino ordered MRIs of Claimant's pelvis, sacrum and lumbar spine, noting Claimant had some pain in the right side of her pelvis.

7. Claimant underwent the MRIs on March 9, 2017. The lumbar and sacrum MRI revealed some chronic left facet joint arthritis at L4-5 with minimal spondylolisthesis. The pelvic MRI confirmed the findings of a fractured coccyx.

8. During a follow-up evaluation at Concentra on March 14, 2017, Claimant reported pain in her left buttock and right lateral hip. On March 19, 2017, Claimant presented to Sky Ridge Medical Center and reported increased sacral and abdominal pain after participating in physical therapy.

9. Claimant attended a follow-up appointment with Dr. Rauzzino on April 4, 2017, complaining of what she described as nerve pain starting in her hips and radiating down the lateral aspect of both legs, right greater than left, as well as continuing coccygeal pain. Dr. Rauzzino reviewed the March 9, 2017 MRIs and opined surgery was not indicated.

10. Claimant presented to delayed recovery specialist John Burris, M.D. on April 12, 2017. Dr. Burris noted Claimant's main issue had been persistent low back pain. He opined that the sacral fracture had likely healed and recommended Claimant treat with physical therapy, a TENS unit and pool therapy to focus on increasing function and mobility.

11. Claimant subsequently switched her care from Concentra to U.S. HealthWorks, presenting to Ryan Otten, M.D. on April 28, 2017. Claimant complained of sharp and burning right hip pain that radiated to the knee, as well as lower back pain. Dr. Otten's diagnosis was a closed fracture of the sacrum and coccyx. He placed Claimant on work restrictions and continued her physical therapy.

12. On May 1, 2017, Claimant reported to Dr. Otten worsening right hip nerve pain. On physical exam, Claimant reported tenderness in the right buttock, greater trochanter and thigh. She exhibited no muscle weakness of the hips. Dr. Otten diagnosed arthralgia of the right hip and closed fracture of the sacrum.

13. On May 9, 2017, Claimant presented to Lori Rossi, M.D. at U.S. HealthWorks after presenting to the emergency room on May 8, 2017 for increased right hip pain. Dr. Rossi diagnosed right hip pain and closed fracture of the sacrum and coccyx and ordered a continuation of light duty. Claimant continued to receive treatment from Dr. Rossi, who eventually referred Claimant for a right hip MRI.

14. A May 24, 2017 right hip MRI revealed a focal small nondisplaced partial anterior acetabular labral tear. On June 8, 2017, Dr. Rossi noted a right hip joint labral tear was discovered as another event in the injury of February 8, 2017. She kept Claimant on light duty restrictions and recommended additional physical therapy. On June 30, 2017 Claimant stated to Dr. Rossi that she felt no one had listened to her regarding her right hip pain for the first three months of her treatment.

15. On June 29, 2017, John T. Sacha, M.D. administered a sacrococcygeal joint injection and a right hip intraarticular joint injection. Dr. Sacha performed a ganglion impar block and a caudal epidural steroid injection on August 24, 2017, and a repeat right greater trochanteric bursa corticosteroid injection on September 19, 2017. The hip injections did not provide any significant sustained relief.

16. Upon the referral of Dr. Rossi, Claimant presented to Nathan D. Faulkner, M.D. on November 6, 2017. Claimant denied any antecedent hip pain or dysfunction. Dr. Faulkner reviewed the May 24, 2017 right hip MRI, noting mild effusion and a nondisplaced superior labral tear. He also reviewed radiographs taken on October 3, 2017, noting femoroacetabular impingement. Dr. Faulkner opined that Claimant's labral tear was more likely than not caused by the February 8, 2017 work injury. He recommended proceeding with a right hip arthroscopy, CAM debridement and labral repair.

17. On December 20, 2017, Alfred C. Lotman, M.D. performed an Independent Medical Examination (IME) at the request of Respondents. Dr. Lotman examined Claimant and reviewed medical records, including the May 24, 2017 right hip MRI. He opined that Claimant suffered from a small nondisplaced superior labral tear as a result

18. On February 22, 2018, Claimant underwent a right hip arthroscopy with CAM depression, subspine decompression and acetabular labral repair, performed by Dr. Faulkner. No complications were noted. Claimant reported improvement in her right hip pain during follow-up appointments with Dr. Faulkner on March 9 and April 16, 2018. On March 9, 2018, Claimant reported more pain on her left side which she attributed to overcompensation due to her right-sided symptoms.

19. Claimant returned to Dr. Rossi on May 7, 2018 with a chief complaint of increased pain in the right hip after performing a new exercise in physical therapy. On May 11, 2018, Dr. Faulkner also noted Claimant reported increased groin pain after doing some new physical therapy exercises the week prior. Dr. Faulkner noted it appeared Claimant had some tendinitis.

20. Claimant subsequently continued to report right hip pain. Dr. Faulkner noted that repeat radiographs of the pelvis taken on June 4, 2018 showed well maintained joint spaces with no interval change, excellent CAM decompression and normal alignment with no fractures. He ordered a repeat right hip MRI.

21. Claimant underwent the repeat right hip MRI with arthrogram on June 7, 2018, which was compared to Claimant's March 9, 2017 pelvic MRI. Radiologist Frank

Crnkovich, M.D. interpreted the results and noted expected postoperative change to Claimant's anterosuperior labrocapsular interface. His impression was, in relevant part: postoperative appearance of the right hip, no recurrent labral tear.

22. Dr. Faulkner reviewed the June 7, 2018 right hip MRI at a follow-up evaluation of Claimant on June 11, 2018. He noted the MRI showed no recurrent labral tear, with the labrum and capsular repair intact with no fractures and minimal effusion. Dr. Faulkner recommended Claimant restart physical therapy.

23. On June 25, 2018, Claimant reported to Dr. Faulkner experiencing intermittent sharp stabbing pain over her anterolateral hip that radiated down her thigh. Dr. Faulkner administered a right hip intraarticular injection. During a follow-up exam with Dr. Faulkner on July 30, 2018, Claimant reported experiencing 50% relief in her right hip pain after the injection. She complained, however, of developing increased left hip pain, worse than right.

24. On September 6, 2018, Dr. Rossi noted Claimant had been slowly progressing since undergoing the acetabular tear repair until roughly three weeks ago with aggravation of right hip pain. Physical exam revealed active range of right hip motion, functionally within normal limits. Dr. Rossi's assessment was: recent setback of tendinitis of right hip injury. She recommended Claimant continue physical therapy. On September 21, 2018, Dr. Faulkner referred Claimant to Dr. White for a second opinion on Claimant's continued right hip pain.

25. Claimant alleges she suffered a left hip injury on October 14, 2018 while lifting bags of cat and dog food. Claimant reported the incident to co-manager Melody Metz that same day. Ms. Metz completed a claim form listing the incident description as "was lifting dog and cat food onto the GHS cart and hurt her left hip." Ms. Metz and Claimant also completed an Associated Incident Report on October 14, 2018, indicating Claimant was lifting dog food and cat food and hurt her left hip. After completing her shift, Claimant sought care at Concentra and was diagnosed with a left hip strain by Mary Nolan, M.D. and released to work with restrictions.

26. Claimant returned to Concentra on October 15, 2018 and was evaluated by Dr. Rossi. Claimant reported having a left-sided hip injury from the day prior that Dr. Rossi opined was likely nothing more than a "simple strain" based on Claimant's exam and mechanism of injury. She noted Claimant's right hip condition was unchanged. Dr. Rossi continued Claimant on restrictions related to the February 8, 2017 work injury. No treatment was prescribed for Claimant's left hip.

27. On October 25, 2018, Dr. Rossi noted Claimant had failed multiple lengthy treatment modalities for the right hip. She did not recommend Claimant undergoing any further surgery under any circumstances.

28. Dr. White evaluated Claimant on October 31, 2018. Claimant reported continued deep pain in the groin. Dr. White opined that Claimant's repeat right hip MRI was suggestive of a re-torn labrum or a labrum that did not completely heal. He

reviewed intraoperative photographs and noted, “Her labrum is quite small. I just think it was a poor quality labrum that, though repaired well, did not heal well and is still an irritant in the joint.” Dr. White opined Claimant is a reasonable candidate for revision hip arthroscopy and conversion to labral reconstruction. Dr. White requested prior authorization of a right hip arthroscopy revision to full labral reconstruction with PRP for healing augmentation.

29. Dr. Rossi reevaluated Claimant on November 1, 2018, noting Dr. White’s recommendation for right hip reconstruction surgery. She expressed her concern regarding Claimant undergoing “another more extensive surgery with a typical 4-month recovery time and if that didn’t work a total hip replacement. Can’t predict how Claimant will recover and response to another surgery.” She stated she did not feel qualified to “weigh the risks and benefits of the surgery and will leave this to Dr. White and the Adjuster.” Dr. Rossi did not recommend further physical therapy due to Claimant’s lack of functional improvement. She maintained Claimant on restrictions.

30. On December 21, 2018, Claimant presented to Medical Center of Aurora with chief complaint of worsening right hip pain. Claimant underwent a CT of the pelvis. Impression was a lower sacral fracture involving the sixth segment and a healed fracture involving the fifth sacral segment.

31. Claimant returned to Dr. Rossi on December 24, 2018. She noted a recent CT showed a nondisplaced S-6 fracture and healed S-5 fracture. She recommended Claimant follow up with her primary care physician, noting she would see what happens at the upcoming IME. Dr. Rossi noted an anticipated MMI date of April 1, 2019.

32. On January 3, 2019, Timothy S. O’Brien performed an IME at the request of Respondents, reviewing medical records and physically examining Claimant. Dr. O’Brien opined that the only injury Claimant incurred as a result of the February 8, 2017 work injury was a minimally displaced sacrococcygeal fracture that healed within three months without permanent disability or any need for ongoing medical treatment. He opined that Claimant did not sustain a right hip injury, including a labral injury. Dr. O’Brien opined that the reported mechanism of injury would not produce an intraarticular labral tear of the hip, and concluded that the right hip MRI findings were most consistent with a normal age-related genetically-induced labral area of degeneration. He further opined that Claimant’s delayed onset of right hip pain was nonorganically-based and generated by the secondary gain issues inherent to all workers’ compensation claims. He disagreed with Drs. Faulkner and White regarding Claimant’s diagnosis and need for surgery, noting both physicians did not Claimant’s medical records. Dr. O’Brien stated Claimant was never a surgical candidate, and the surgery recommended by Dr. White is “categorically contraindicated” and will fail.

33. Dr. O’Brien subsequently reviewed additional medical records in connection with the alleged October 14, 2018 left hip injury and issued two supplemental IME reports dated January 29, 2019. He opined Claimant did not sustain a work-related injury on October 14, 2018, as there was no objective evidence an injury occurred.

34. Claimant continues to work as a personal shopper with restrictions. Claimant testified at hearing she informed her treating physicians of her right hip pain towards the beginning of her treatment, but was not initially offered treatment for her right hip. She testified continues to experience right hip symptoms, including sharp and shooting pains, cramping, pinching, and throbbing, which are symptoms also present in her left hip. Claimant testified she wants to undergo the right hip surgery recommended by Dr. White to help with pain and function. Claimant testified she has received unauthorized chiropractic treatment for her left hip.

35. Dr. Rossi testified at hearing on behalf of Respondents. Dr. Rossi testified Claimant has had no sustained pain relief or functional improvement from any of the treatment provided, and stated there were concerns of delayed recovery. She acknowledged she had not reviewed Dr. White's medical report, but opined Claimant would not recover well from the proposed surgery. Dr. Rossi stated she had not examined Claimant since December 24, 2018 and had yet to place Claimant at MMI, but agreed with Dr. O'Brien reached MMI on May 1, 2017. She stated she did not place Claimant at MMI at such time because Claimant continued to report right hip issues. Dr. Rossi testified she relied on Dr. Faulkner's determination that Claimant suffered a labral tear as a result of the February 8, 2017 work injury, but that she now agrees with Dr. O'Brien that Claimant only suffered a sacral fracture and labial laceration as a result of the February 8, 2017 work injury. Dr. Rossi opined that the treatment Claimant received after May 2017 exceeded the standards set forth in the Colorado Medical Treatment Guidelines. Regarding Claimant's alleged left hip injury, she testified she had no reason to think Claimant did not sustain an injury on October 14, 2018, but based her opinion on Claimant's subjective reports.

36. Dr. O'Brien testified by post-hearing deposition as a Level II accredited expert in orthopedics and orthopedic surgery. He testified consistent with his IME reports and continued to opine Claimant's labral tear was not caused or aggravated by the February 8, 2017 work injury. Dr. O'Brien reiterated his opinion that the surgery Dr. White requested is not reasonable, necessary, or related to the February 8, 2017 work injury. He testified that the surgery will not improve Claimant's function and likely will not relieve her pain, opining that the surgery recommended by Dr. White will categorically fail and potentially do so catastrophically. Regarding Claimant's alleged left hip injury, Dr. O'Brien testified that Claimant was complaining of left hip pain, greater than right prior to the alleged accident of October 14, 2018, and opined that it is not medically probable the incident of October 14, 2018 aggravated Claimant's pre-existing left hip complaints. Dr. O'Brien further opined that a simple hip strain will resolve with or without treatment, and testified that a patient with a simple hip strain will not lose time from work or suffer permanent physical impairment.

37. The opinions of Drs. Rossi and O'Brien regarding the necessity and reasonableness of ongoing right hip treatment and the proposed right hip surgery is found credible and persuasive, as is Dr. O'Brien's opinion regarding the alleged October 14, 2018 left hip injury.

38. Claimant failed to prove by a preponderance of the evidence that ongoing medical treatment, including the right hip surgery proposed by Dr. White, is reasonable, necessary and related to Claimant's February 8, 2017 work injury.

39. Claimant failed to prove by a preponderance of the evidence she suffered a compensable left hip injury on October 14, 2018.

40. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as

unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Medical Treatment for the Right Hip

A respondent is liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. *See generally Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company*, W. C. No. 4-445-060 (February 22, 2002).

Respondents argue Claimant never sustained a right hip injury as a result of the February 8, 2017 work injury thus, any ongoing treatment for the right hip, including the proposed surgery, is not related. The ALJ is persuaded Claimant did, more likely than not, suffer an initial right hip labral tear as a result of the February 8, 2017 work injury. The medical records reflect Claimant complained of symptoms in her right upper leg and pelvis as early as March 7, 2017; however, a right hip MRI was not obtained until May 24, 2017. The May 24, 2017 MRI provided objective evidence of a focal small nondisplaced partial anterior acetabular labral tear. Dr. Faulkner and Dr. Lotman (as well as Dr. Rossi, initially), all credibly opined Claimant's labral tear was caused by the February 8, 2017 work injury. Nonetheless, the preponderant evidence does not establish that ongoing treatment is reasonable, necessary and related to the February 8, 2017 work injury.

Claimant underwent extensive treatment for her right hip, including surgery and various conservative measures, all with no significant sustained improvement. Dr. White's request for the proposed surgery appears to be largely based on his opinion that the repeat right hip MRI was suggestive of a re-torn labrum or a labrum that did not completely heal. The opinion contradicts the credible and persuasive interpretation of the radiologist who read the MRI and specifically noted no recurrent labral tear. Dr. Faulkner credibly opined the repeat MRI showed an intact labrum and capsular repair with no fractures, minimal effusion, and no recurrent labral tear. In addition to a dispute regarding the objective basis for the proposed surgery, Drs. Rossi and O'Brien credibly and persuasively opined the surgery likely would not be successful for Claimant, considering concerns of non-organic pain and delayed recovery. Dr. O'Brien credibly opined the surgery would likely not lessen Claimant's pain or improve her function. Based on the totality of the credible and persuasive evidence, Claimant failed to prove it is more likely than not the right hip surgery proposed by Dr. White is reasonably necessary and causally related to the February 8, 2017 work injury.

Compensability of the Left Hip Injury

Claimant is required to prove by a preponderance of the evidence that at the time of the injury she was performing service arising out of and in the course of employment,

and that the alleged injury was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990).

However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

The question of whether the claimant met the burden of proof to establish a compensable injury is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

As found, Claimant failed to prove by a preponderance of the evidence she suffered a compensable left hip injury on October 14, 2018. The record reveals Claimant was complaining of left hip symptoms for months prior to the alleged October 14, 2018 incident even reporting, at times, left hip pain worse than right. The October 14 and October 15, 2018 diagnoses of a strain were based on Claimant's subjective reports to providers. Although the ALJ is persuaded Claimant experienced left hip symptoms while at work on October 14, 2018, the preponderant credible and persuasive evidence does not establish that her employment proximately caused, aggravated or accelerated Claimant's left hip issues, or caused any disability or need for treatment. The preponderant evidence establishes Claimant's left hip symptoms and subsequent treatment were the result of a pre-existing left hip issues.

ORDER

It is therefore ordered that:

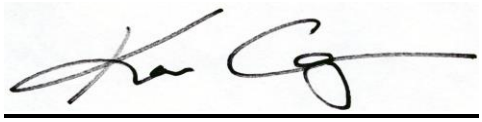
1. Claimant failed to prove she is entitled to ongoing right hip treatment, including the requested right hip surgery proposed by Dr. White. Claimant's request for prior authorization of the surgery is denied and dismissed.

2. Claimant’s claim for benefits arising out of an alleged October 14, 2018 left hip injury is denied and dismissed.

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

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

DATED: May 16, 2019



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether Respondents have overcome Division Independent Medical Examination (DIME) physician Dr. Lindenbaum's opinion that Claimant is not at maximum medical improvement (MMI) by clear and convincing evidence.

2. Whether Respondents have overcome DIME physician Dr. Lindenbaum's opinion on Claimant's permanent partial disability (PPD) rating as a result of her work injury.

FINDINGS OF FACT

1. Claimant is employed by Employer as a car detailer. On May 8, 2017, while so employed, Claimant suffered a compensable work related injury.

2. On that date, Claimant was cleaning out a car with an air hose vacuum. The air hose broke and the hose was flailing about inside the vehicle that Claimant was working on. At the time, Claimant was on both knees inside the vehicle. Claimant attempted to quickly exit the vehicle to avoid being hit by the air hose. The air hose hit her on both legs, the right inner thigh, and the left knee. As she quickly exited the vehicle, Claimant testified that she felt immediate severe pain in her left knee. Claimant testified that she couldn't walk anymore with her left leg, couldn't stretch her leg, and couldn't stand on her leg. Claimant testified that she was told to go back to work and that she continued working.

3. On May 11, 2017, PA Jonathan Joslyn evaluated Claimant at Concentra. Claimant reported pain at a level of 8/10. Claimant reported that she was working in the interior of a vehicle at her employer's car wash when an air hose broke, was flailing about inside the vehicle, and hit her in the right thigh. Claimant reported she attempted to get out of the vehicle as soon as possible. PA Joslyn found swelling in the left knee and found the left knee to be tender diffusely over the anterior knee and diffusely tender over the medial knee. PA Joslyn also found ecchymosis on the right thigh. PA Joslyn assessed sprain of the medial collateral ligament of the left knee. He recommended ibuprofen, physical therapy three times per week for two weeks, and a knee sleeve. He recommended sitting 75% of the time, no squatting, no kneeling, no climbing stairs or ladders, and that Claimant wear the knee sleeve on her left lower extremity constantly. *See* Exhibit A.

4. On May 11, 2017, Claimant underwent x-rays of her left knee. The results showed no fractures, no dislocation, and no effusion. *See* Exhibit A.

5. On May 31, 2017, PA Valerie Skvarca evaluated Claimant. Claimant reported pain at a 7/10. Claimant reported that she continued to have increased pain and decreased range of motion and that physical therapy was not helping much. Claimant reported that an air hose struck her knee as it was flailing in the car. PA Skvarca noted Claimant was limping and complaining of pins and needles in the affected wound area. On examination, PA Skvarca found tenderness diffusely over the lateral knee and in the undersurface of the patella. PA Skvarca ordered an MRI to assess for ligament tear. *See* Exhibit B.

6. On July 11, 2017, Amanda Cava M.D. evaluated Claimant. Claimant reported pain at a level of 8/10. Claimant reported that the pain was improving in the left medial knee but that she was still having a lot of pain in the medial calf and posterior knee. Claimant reported that the air hose hit her in multiple spots in the left knee, calf, and right inner thigh. Dr. Cava noted that Claimant's gait demonstrated antalgia on the left and limping on the left and that claimant appeared uncomfortable. Dr. Cava found joint hypertrophy in the left knee. Dr. Cava found swelling in the proximal posterior knee/calf, tenderness in the posterior and proximal, and noted mild firmness/cord? With pain in the left lower leg. Dr. Cava assessed pain and swelling of the left lower leg. Dr. Cava planned to do a Doppler duplex to rule out deep vein thrombosis/venous injury to the left lower extremity due to the pain and swelling in the left lower leg. Dr. Cava also planned for an ultrasound of the soft tissue to be performed for gastrocnemius strain of the left. *See* Exhibit C.

7. On July 19, 2017, Jerald Solot, D.O. evaluated Claimant. Claimant reported some improvement but still a lot of pain. Claimant reported that a hose broke at work striking her in the left knee and left lower leg. Dr. Solot noted that Claimant had a negative knee MRI and negative ultrasound of the left calf. Dr. Solot noted that an MRI of the left lower leg had been requested. Claimant reported the pain to be mostly in the left calf with occasional pain in the left medial aspect of the knee and Dr. Solot noted that Claimant was wearing a knee brace. Dr. Solot noted on exam a mild resolving ecchymosis on the left anterior shin, no appreciable swelling of the left calf, left calf tenderness, and mild pain in the medial aspect of the left knee. Dr. Solot assessed gastrocnemius strain. *See* Exhibit D.

8. On August 22, 2017, Cary Motz, M.D. evaluated Claimant. Dr. Motz noted that Claimant was returning for follow up after an MRI of the left lower extremity. Dr. Motz noted that the results showed no evidence of significant Baker's cyst, neurovascular issues, compartment swelling, or significant soft tissue contusions. Dr. Motz noted that a prior MRI of the left knee showed moderate degenerative changes in all three compartments with an expected medial meniscal tear. Dr. Motz provided the impression of left knee contusion, degenerative arthritis, and degenerative medial meniscal tear. Dr. Motz noted that the recent MRI of the left calf was essentially negative. Dr. Motz noted that Claimant had two MRIs of the knee and opined that they showed degenerative changes. Dr. Motz opined that Claimant was not a candidate for arthroscopy and it would be unlikely to improve her symptoms. Dr. Motz also noted that the mechanism of injury was a direct blow with an air hose to the knee, which would not cause a meniscal tear or

cause arthritis. Dr. Motz noted that they had treated the arthritis to the extent they could and that there was really nothing further to offer Claimant. *See* Exhibit E.

9. On October 23, 2017, Michael Hewitt, M.D. evaluated Claimant. Claimant reported that she was injured on May 8, 2017 when she was inside a car cleaning and the power hose on the vacuum broke and forcibly flipped around the car. Claimant reported that she exited the car as quick as possible and noted increasing pain within the hour. Claimant reported continued pain with medial and posterior pain and swelling. Dr. Hewitt found moderate knee diffusion and significant medial joint line tenderness. Dr. Hewitt reviewed imaging studies. He opined that Claimant had patellofemoral and medial compartment arthritis but a well preserved medial joint space. Dr. Hewitt noted he discussed treatment options with Claimant and that the final treatment option was arthroscopy and noted Claimant understood arthroscopy does not significantly alter the natural history of arthritis. Dr. Hewitt noted that Claimant was six months from the injury with MRI documented changes in the medial meniscus and focal medial sided knee pain. Dr. Hewitt noted that Claimant would follow up as needed. *See* Exhibit 2.

10. On February 27, 2018, Wallace Larson, M.D. performed an independent medical examination. Claimant attended with a Spanish interpreter. Claimant reported that on the date of injury she was working inside a car with her right knee bent over the seat and the left knee bent while vacuuming. Claimant demonstrated a position that Dr. Larson noted was about 45 degrees of flexion of the left knee. Claimant reported that the hose ripped and hit her left knee on the medial aspect, then hit the right knee, and reported that the hose was going everywhere so she got out of the car and turned off the air supply. Claimant reported that she could not extend her leg or straighten her leg afterwards and that she had a lot of pain in her leg. Claimant reported that Dr. Hewitt recommended surgery for a torn meniscus but that it had not been approved. Claimant reported that she keeps her leg in a brace and uses ice and continued to have pain. Claimant reported no prior knee problems. *See* Exhibit F.

11. On physical examination, Dr. Larson noted that Claimant subjectively reported diffuse left knee tenderness. Claimant used a crutch for ambulation and would not walk without the crutch. Dr. Larson found Claimant to be hyper reactive to palpation and opined that she had significant pain behavior including groaning and hyper reaction. Dr. Larson noted no left knee joint effusion and no muscle atrophy. Dr. Larson noted severe antalgic gait even while using the crutch. In addition to performing a physical examination, Dr. Larson also reviewed medical records. *See* Exhibit F.

12. Dr. Larson opined that Claimant sustained a very minor contusion to the knee, which was the type of injury that would typically not require any treatment at all. Dr. Larson noted that Claimant had MRI evidence of a degenerative meniscal tear completely unrelated to her occupational exposure. Dr. Larson also opined that Claimant had a tremendous amount of pain behavior and non-physiologic signs and symptoms. Dr. Larson opined that Claimant's symptoms were non-physiologic in nature with multiple non-anatomic complaints and that none of the current complaints were related to the occupational exposure. Dr. Larson opined that Claimant was at maximum medical

improvement and that the most likely date of MMI was the date of injury or, at the extreme, a very minor contusion such as Claimant's could take 10 days to resolve which would place her date of MMI at May 18, 2017. Dr. Larson recommended no further treatment and opined that Claimant had no ratable impairment. *See* Exhibit F.

13. On October 6, 2018, Stephen Lindenbaum, M.D. performed a Division Independent Medical Evaluation (DIME). Claimant was present with her nephew who provided translation. Claimant reported that while she was working inside of a car the vacuum cleaner hose came detached and was flying around in the car. Claimant reported that she was afraid the hose was going to hit her head and that she jumped out of the car rapidly and twisted on her left knee. Claimant reported no prior knee problems. Claimant reported that the hose struck her just above her thigh on the left side. Claimant reported that her left knee still bothered her, predominantly over the medial joint line. Dr. Lindenbaum reviewed medical records and performed a physical examination. *See* Exhibits 1, G.

14. Dr. Lindenbaum noted that Dr. Hewitt thought Claimant should consider an arthroscopy of the knee to evaluate the medial compartment of the left knee and the meniscal tear. Dr. Lindenbaum noted that psychologist Dr. Cohen did not see any significant red flags concerning Claimant. Dr. Lindenbaum opined that Claimant had underlying arthritis not related to this trauma. Dr. Lindenbaum opined that it appeared that Claimant's MRI showed some degenerative changes of the medial compartment, but that Claimant had a torn medial meniscus that was causing her discomfort. Dr. Lindenbaum opined that Claimant had not yet reached MMI and felt it imperative that Claimant follow up with Dr. Hewitt again and that if he felt Claimant was a candidate for medial meniscal arthroscopy, it should be done before Claimant was placed at MMI. Dr. Lindenbaum opined that if Dr. Hewitt did not feel the surgery would be of benefit, he would give Claimant the rating of 10% lower extremity based on the torn medial meniscus. *See* Exhibits 1, G.

15. On December 31, 2018, Dr. Larson issued a medical records review report after reviewing the DIME report of Dr. Lindenbaum. Dr. Larson opined that his prior report was correct and that Claimant did not have an occupationally related disorder. Dr. Lindenbaum opined that the imaging findings were most consistent with a degenerative medial meniscal tear rather than a traumatic meniscal tear. Dr. Larson also opined that Claimant's physical examination findings could not be explained on the basis of relatively minor contusion or degenerative or even traumatic medical meniscal tear and that Claimant demonstrated multiple non-physiologic findings. Dr. Larson opined that Dr. Lindenbaum's report was not correct and that it was not appropriate to assign an impairment rating based on a degenerative tear especially one that does not correlate with the mechanism of injury or physical examination findings. *See* Exhibit H.

16. Dr. Larson testified by deposition on February 27, 2019. Dr. Larson is a board certified orthopedic surgeon. Dr. Larson noted that when he examined Claimant, she reported diffuse tenderness beginning about 4 inches above the left knee and extending to about 4 inches below the knee and reported the tenderness was all around

the entire knee and not localized. Dr. Larson testified that after meeting with Claimant he reviewed on the MRI report that Claimant had moderate changes of osteoarthritis in all three knee compartments and a tear of the meniscus that was most likely degenerative. Dr. Larson noted that the physicians did not diagnose a meniscal tear as part of the traumatic injury and that the initial reports looked like a relatively minor contusion. Dr. Larson testified that a degenerative meniscal tear is very different from a meniscal tear due to injury. Dr. Larson opined that there was nothing on the MRI scan indicating trauma to Claimant's knee. Dr. Larson opined that, in all likelihood, if Claimant had an MRI scan one month before the incident at work, the MRI would have looked just exactly the same with some arthritis and the most likely degenerative meniscal tear.

17. Dr. Larson testified that there was significant inconsistency in the range of motion Claimant demonstrated to the DIME physician and to him. Dr. Larson also noted that DIME physician Dr. Lindenbaum seemed to defer an opinion to Dr. Hewitt rather than generate an opinion. Dr. Larson also noted that without apparent explanation, Dr. Lindenbaum said that the meniscus tear was related to the work incident. Dr. Larson noted that they knew well beyond a reasonable degree of medical probability that the meniscus tear was not caused or aggravated by Claimant's work related injury and thus would not be something that would result in assignment of an impairment rating. Dr. Larson testified that on examination, Claimant's symptoms and reports and exaggerated responses were far out of proportion to what would ever be anticipated by any known or suspected physical abnormality and even from what would be normal for someone who had severe arthritis, or a torn meniscus.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been

contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

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

Overcoming the DIME opinion on MMI

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

Under the statute MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007). A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Construction Management,* W.C. No. 4-356-512 (ICAO May 20, 2004); *Hatch v. John H. Garland Co.,* W.C. No. 4-638-712 (ICAO August 11, 2000). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. Therefore, the DIME physician's opinions on these issues are binding unless overcome by clear and convincing evidence. *See Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

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

Respondents have overcome DIME physician Dr. Lindenbaum's opinion by clear and convincing evidence. It is highly probable Dr. Lindenbaum is incorrect and erred by finding that Claimant's meniscal tear was related to the work incident on May 8, 2017. Rather, as noted by multiple other physicians, the meniscal tear shown on the knee MRIs was a degenerative tear and was not due to any work-related explanation. Claimant's reports, overall, are not consistent. Although Claimant reported to Dr. Lindenbaum a twisting mechanism of the knee, prior reports to multiple providers simply mention being hit with the vacuum hose and exiting the vehicle quickly. Claimant's pain complaints and physical examinations cannot be explained and are not consistent with the expected pain or complaints related to a meniscal tear. The pain she is reporting is not consistent with a meniscal tear.

Although it is clear from imaging that Claimant has degeneration in her left knee, Dr. Lindenbaum noted the degeneration but did not distinguish how the degeneration impacted his overall conclusion. Several providers and the MRI noted that the meniscal tear was likely degenerative, but Dr. Lindenbaum did not explain why he believed the tear was acute or aggravated acutely by Claimant's work incident. Overall, there is a lack of evidence supporting a traumatic or acute meniscal tear, aggravation, or injury in this case. Dr. Lindenbaum erred by failing to adequately provide a causation analysis. The analysis performed by Dr. Larson is more persuasive and consistent with the overall weight of the evidence and with the inconsistencies in Claimant's presentation. Respondents have established by clear and convincing evidence that Claimant is at maximum medical improvement and has been at maximum medical improvement since April 4, 2018.

Overcoming the DIME opinion on Permanent Impairment

A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. Section 8-42-101(3.7), C.R.S.; §8-42-107(8)(c), C.R.S. The finding of a DIME physician concerning the claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

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

The questions of whether the DIME physician properly applied the AMA Guides, and ultimately whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000). A mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

As found above, DIME physician Dr. Lindenbaum provided a provisional rating of 10% lower extremity impairment, although he ultimately opined that Claimant was not yet at MMI. Respondents have overcome the MMI opinion and Claimant was at MMI as of the date of April 4, 2018 when placed at MMI by her authorized treating provider. The ALJ finds that Claimant has sustained no permanent impairment as a result of her work related injury. Claimant's rating, provided by the DIME physician, was based entirely on a meniscal tear which, as found above, is a degenerative tear. Although the rating was only provisional, Respondents have established by clear and convincing evidence, that the rating was in error as it rated a degenerative condition.

ORDER

It is therefore ordered that:

1. Respondents have overcome DIME physician Dr. Lindenbaum's opinions by clear and convincing evidence.

2. Claimant reached maximum medical improvement on April 4, 2018 and has no permanent impairment as a result of her May 8, 2017 injury.

3. Any issues not determined herein are reserved for future determination.

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

DATED: May 16, 2019

/s/ Michelle E. Jones

_____

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

ISSUES

- Did Claimant prove the ACL reconstruction and meniscus repair surgery recommended by Dr. Hunter is causally related to his July 2, 2018 industrial accident?

FINDINGS OF FACT

1. Claimant started working for Employer on May 29, 2018 as a general construction laborer. The work was heavy and entailed tasks such as excavating, setting and removing concrete forms, and shoveling dirt.

2. Claimant suffered an admitted injury to his left knee on July 2, 2018 while his crew was mud jacking a concrete floor at the YMCA in Pueblo. The mud jacking process entails drilling multiple 1-inch diameter holes several feet deep through the concrete slab and injecting a mixture of cement, sand, and mud at very high pressure to level the slab. Claimant was assigned to operate the hose, which entailed placing a metal hose fitting into each hole and holding it while the mud mixture was pumped into the ground. Claimant typically stood over the holes with his knees flexed at approximately 30° and pushed down with considerable strength to keep the nozzle from pushing out of the hole.

3. Occasionally rocks or debris prevented the mud from going completely into the hole, resulting in back pressure and causing the nozzle to "blow out." After filling approximately twelve holes, a "blow out" occurred. Claimant was standing over the hole with the hose between his legs. He lost control of the hose and it started whipping around due to the high pressure. The hose struck the inside his left foot or lower leg such that the leg was forcibly abducted and twisted, which swept Claimant off his feet. The iron fitting at the end of the hose also struck the medial aspect of Claimant's left knee.

4. Claimant felt immediate severe pain in his left knee and remained on the ground for approximately 15 minutes. Eventually, a co-worker helped him get up and walk to another room so he could sit in a chair. Claimant could not bear weight on the left knee and had difficulty straightening or flexing the knee. A coworker brought him some ice, and he sat in the chair with his leg elevated for several hours. A co-worker then helped him hobble out to the company truck to speak with his manager.

5. Claimant's manager told him to go home and take it easy over July 4th holiday, and if his knee was still bothering him on the 5th they would send him to the doctor.

6. Claimant rested the next two days at home, icing and elevating his leg. He went back to work on July 5 and spoke to his manager. His knee was still very painful,

causing him to limp and making it difficult to climb stairs. Employer referred him to Dr. Lakin at Southern Colorado Clinic.

7. Claimant saw Dr. Lakin's PA-C, Terry Schwartz, at the initial visit on July 5, 2018. He was limping and favoring the left knee and rated his pain at 6/10. Range of motion was painful and limited to 10-110°. Mr. Schwartz appreciated no ligamentous laxity, no erythema, and no ecchymosis. The report also notes "mild" swelling about the knee. At hearing, Claimant disagreed with the characterization of the swelling as "mild," and testified he perceived "significant swelling." The report also states Claimant "denies twisting knee," which Claimant also disputed. X-rays showed joint effusion but no fractures. Mr. Schwartz opined Claimant "would be expected to improve over [the] next few days, no obvious bruising to knee, maybe some effusion on x-ray." He advised Claimant to continue icing and elevating the knee and taking ibuprofen. He restricted Claimant to primarily seated work and anticipated he would be better by his next appointment in two weeks.

8. Claimant saw Dr. Lakin at his next appointment on July 17, 2018. He stated there was "no improvement so far," and his knee was "still quite painful, stiff." Claimant was walking with a limp. Dr. Lakin noted "mild" effusion and limited range of motion from 10-90°. McMurray's test was negative, and Dr. Lakin noted, "[I] cannot get [joint line] clicking or movement to free extension." He noted the ligaments were "stable in all planes." Dr. Lakin referred Claimant to physical therapy, ordered an MRI, and referred him to Dr. Robert Hunter for an orthopedic evaluation. He continued the work restrictions of primarily seated duties with no kneeling, crawling, climbing, ladders, and limited stairs.

9. At his July 24 appointment, Claimant was no better. He was still limping and reported 7/10 pain. The MRI was pending in a few days.

10. Claimant had the MRI on July 31, 2018. It showed a tear of the posterior horn of the medial meniscus, a "subacute" complete tear of the anterior cruciate ligament, a minimal "subacute" nondisplaced avulsion fracture underlying the ACL insertion at the tibia, and a small residual joint effusion.

11. Claimant saw Dr. Hunter on August 7, 2018. Dr. Hunter noted Claimant had been "struck aggressively by a nozzle of a high-pressure hose while at work on July 2. He has been treating himself with ice and feels as though the swelling has gotten better and he is feeling a bit more comfortable. He still complains of the medial pain and diffuse interior pain. Prior to this event, he had no previous history for injuries to the knee." Physical examination showed "mild" effusion and medial joint line tenderness to palpation. ACL testing showed "Losee is 2, Lachman's is 3, posterior drawer is 1." Dr. Hunter recommended an ACL reconstruction and medial meniscus repair.

12. Everyone agrees Claimant needs the recommended surgery. But Respondents' liability for the surgery is confounded by a motorcycle accident Claimant had a few months before the accident at work.

13. In approximately early April 2018, Claimant crashed his dirt bike when his front tire caught a rut in the trail. Claimant was in second gear and estimated he was traveling approximately 25 m.p.h. He laid the bike down on its left side and landed with his left leg under the bike. He was wearing protective gear including hinged knee braces that covered his knees and clipped into his motorcycle boots. After the accident, Claimant's knee felt painful, stiff, and became swollen. He rode back to his truck and loaded his motorcycle into the truck without assistance.

14. At the time of the motorcycle accident, Claimant was working as a roughneck for a water well drilling company. The job was very physically demanding. After the motorcycle accident, he took a couple of days off work while he iced his knee and "took it easy." He then returned to work and worked for the drilling company for approximately three or four weeks before leaving due to "personal differences."

15. During that month, Claimant's knee remained swollen and somewhat painful. Eventually his father urged him to get it checked out. On May 2, 2018, Claimant saw Dr. Edward Jonassen, an orthopedist in Salida, who documented the following history,

> He was riding his motocross bike at high speed about 3 weeks ago when he crashed landing on his left side. Says his left knee was pinned between his motocross bike and the ground. He was wearing a protective knee brace at the time but he had pain on both sides of his knee and anteriorly. He was unable to weight-bear without significant pain . . . . [H]is knee swelled up a bit but was not huge and he lost the ability to extend his knee fully and bend it fully. Now, he is able to walk on his left leg without pain but he still has inability to extend his knee fully and flex it fully. He still has some swelling of his knee, still has pain when he tries to extend his knee . . . . He denies any medial or lateral joint pain, instability, or crepitus.

16. Physical examination showed no joint tenderness, no ecchymosis, but showed a 2+ joint effusion. Flexion and extension were limited due to pain, and there was a 10° contracture. McMurray's and Lachman's tests were negative, as were valgus and varus stress tests. Dr. Jonassen felt the knee was "stable." Dr. Jonassen concluded,

> He has persistent effusion of his left knee with inability to extend fully or flex fully. He has no definite tenderness over the medial meniscus. However, I am suspicious he may have a medial meniscal tear. He could in fact have a bucket handle tear with displacement. His knee x-rays are normal but this does not rule out knee contusion are called fracture. We discussed the fact that he feels his left knee has gotten better but because of the concern of persistent effusion and contracture of his knee, an MRI is indicated to rule out meniscus tear. The MRI could be delayed to see if he has further improvement of his knee or should be done sooner because of the contracture. He elected to go ahead with MRI of his left knee.

17. The MRI was scheduled for May 25, 2018.

18. Claimant did not get the MRI or pursue further treatment. He testified the knee continued to improve over the next few weeks and he no longer perceived the need for additional workup or treatment.

19. Claimant applied for work with Employer on May 25, 2018. His application states he stopped working for the drilling company in March 2018. At hearing, he testified he must have made a mistake on the date, and was confident he worked "three or four weeks" for the drilling company after the dirt bike accident.

20. Claimant started his job with Employer on May 29, 2018. He did heavy physical labor with no difficulty or limitation for approximately one month before the "blowout" incident on July 2. No persuasive evidence was presented to show he was limited in any way by knee pain or problems before July 2.

21. Dr. John Douthit, an orthopedic surgeon, performed a Rule 16 review of Dr. Hunter's surgery request. He agreed surgery was appropriate, but opined, "the history is murky and the cause of the injury is disputable." He noted there was some evidence to support a causal connection to the July 2 accident, particularly the fact that Dr. Jonassen found no evidence of instability in his exam on May 2. He stated Claimant's physical condition when he was hired by Employer was "unknown." Ultimately, he concluded the pathology shown on MRI was more likely related to the motorcycle accident, which "presumably" was a "twisting injury." He thought it less likely the direct blow to the knee from the hose on July 2 would cause a fracture and ACL tear. He did not mention the other aspect of the hose incident, namely having his left leg forcefully abducted and being "swept off his feet."

22. Dr. Lakin met with Claimant on September 10, 2018 to discuss Dr. Douthit's report. Dr. Lakin thought the limited flexion and extension at the time of Dr. Jonassen's exam suggested a meniscal tear. Nevertheless, he opined, "I believe the most important issue was he hired and working at full duty without apparent left knee issues prior to this injury, and if witnesses corroborate the MOI that occurred in a manner for a left knee injury, this would be a WC injury."

23. On October 18, 2018, Dr. Hunter and Dr. Douthit had a "lively discussion" about the case, and each wrote a report addressing the causation question. Dr. Hunter noted,

> We both agree now there is no question [Claimant has] an ACL deficient knee that needs and merits attention and reconstruction. The question remains was this injury caused by his work-related trauma or was it caused by a pre-existing motorcycle injury . . . . The dynamic from my perspective is that Dr. Jonassen, in his evaluation, found that there was no instability with Lachman's testing . . . he still had some swelling in his knee and pain when he tried to extend his knee but he denied any medial or lateral joint line pain, instability or crepitus at that time. My exam definitely confirmed anterior cruciate ligament insufficiency to be present, which was confirmed on the MRI that was read at that time.

24. Dr. Douthit opined Dr. Jonassen could have missed the torn ACL because "in my career which began before the advent of MRIs, we missed at least 50% of acute anterior cruciate ligament tears . . . . MRI changed our ability to diagnose ACL tears." He had reviewed the x-rays and MRI and had spoken with the radiologist, who confirmed there was no way to determine the age of the pathology from the imaging studies. He opined Claimant's instability was "nuanced," which explains why Dr. Jonassen missed it. He stated, "The difference of the exams by the 2 orthopedic surgeons is significant and should be considered, but as it is the only fact in support of the argument that the injury occurred at work it cannot prevail . . . ." He ultimately concluded it was more than 50% likely the injury did not occur at work on July 2, 2018, but acknowledged, "I think there is room for differences of opinion."

25. Claimant saw Dr. Thomas Higginbotham for an IME at his counsel's request on November 23, 2018. Dr. Higginbotham obtained a detailed history regarding the July 2, 2018 incident, the motorcycle accident, and the condition of Claimant's knee leading up to the work accident. Dr. Higginbotham emphasized Claimant was working full duty at a heavy job and "there was no seemingly disabling condition of the left knee at the time of this injury event of 07/02/2018." He opined it was "unlikely" Claimant could have performed that work with the findings noted on the MRI. Dr. Higginbotham thought the described mechanism of injury was sufficient to cause meniscus and ACL tears, and wrote,

> I am impressed with the sudden forces from the work-related injury of 07/02/2018. At the time . . . he was leaning over with knees bent at about 30° when he was thrown abruptly away with his left leg under rotational stress and then contused hard about the medial aspect of his knee. With the mud jack's 4" diameter hose filled with mud with a cast-iron fitting on its end under high-pressure, a lot of force was received in a short, sudden period of time.

26. Dr. Higginbotham concluded, "beyond a reasonable degree of medical probability [ ] his left knee condition is causally related to the incident of 07/02/2018."

27. Dr. Timothy O'Brien performed an IME for Respondents on January 18, 2019. Dr. O'Brien opined that July 2 work accident did not cause the ACL tear or the meniscus tear, and indeed, caused no significant injury whatsoever. He emphasized Mr. Schwartz's July 5 report noting "mild" swelling, which he opined was inconsistent with an acute ACL or meniscus tear. He opined it was "virtually impossible" Claimant could have torn his ACL and meniscus three days earlier and not show "massive swelling in the knee joint and a large hemarthrosis or effusion." He opined "massive" swelling "occurs 100 percent of the time," and its absence was "proof positive that no ACL tear occurred, and no medial meniscus tear occurred on July 2, 2018." He also opined the described injury mechanism would not cause a torn ACL or torn meniscus, both of which require the foot to be planted and torsional force applied to the knee. He considered Claimant an "unreliable historian" because of "multiple inconsistencies," particularly his failure to mention the motorcycle accident to Mr. Schwartz or Dr. Hunter at the initial appointments. Dr. O'Brien concluded, "the surgery being recommended by Dr. Hunter, while appropriate,

should not be misconstrued as in any way being causally related to or necessitated by the July 2, 2018 incident which produced a very self-limited, self-healing contusion of the left leg."

28. Dr. Higginbotham testified at hearing consistent with his report. He continued to highlight the significant change in Claimant's "functionality" before and after the July 2 accident. He disagreed with the "absolutist" nature of Dr. O'Brien's opinions, which fail to account for varied and nuanced physical responses of individual bodies. He referenced medical literature showing a significant portion of ACL tears produce minimal or no swelling or effusion. He agreed ACL tears more commonly occur with a planting and twisting motion, but also opined the "significant valgus force" associated with Claimant's work accident "is a significant mechanism for an ACL tear." He also offered an alternative theory of causation: Claimant may have damaged his ACL and meniscus in the motorcycle accident, but the work accident substantially aggravated his condition and provided the catalyst for the recommended surgery.

29. Dr. O'Brien testified in a post-hearing deposition on March 26, 2019 consistent with the opinions expressed in his report. He maintained it is "virtually impossible to tear the ACL unless the foot is planted and the body rotates," and thought the likelihood the blow from the iron hose fitting caused the tear "is almost 0 percent." He opined the "subacute" findings from the July 31, 2018 MRI were much more likely related to the motorcycle accident than the work accident. He was not impressed that Claimant worked for Employer for a month, analogizing to competitive athletes who use knee braces to finish a season despite torn ACLs. He did not consider Dr. Jonassen's May 2 physical examination reliable or accurate. He agreed the work accident "could have" aggravated a pre-existing ACL and meniscal tears, but did not believe that happened in this case.

30. The ALJ credits the opinions of Dr. Hunter, Dr. Higginbotham and Dr. Lakin, and Claimant's testimony, over the contrary opinions of Dr. Douthit and Dr. O'Brien. More likely than not Claimant either tore his meniscus and ACL or substantially aggravated pre-existing tears at work on July 2, 2018. Given the substantial change in his level of symptoms and functional abilities after July 2 accident, the ALJ finds it unlikely the surgery is solely related to the motorcycle accident with no substantial contribution from the work accident.

31. Claimant proved by a preponderance of the evidence the surgery recommended by Dr. Hunter is causally related to the July 2, 2018 work accident.

CONCLUSIONS OF LAW

The respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997). Even if the respondents admit liability, they retain the right to dispute the relatedness of any particular treatment, and the mere occurrence of a compensable injury does not compel the ALJ to find that all subsequent treatment was caused by the industrial accident. *Snyder v. City*

of Aurora, 942 P.2d 1337 (Colo. App. 1997). Where the respondents dispute the claimant's entitlement to medical benefits, the claimant must prove that an injury directly and proximately caused the condition for which he seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The existence of a preexisting condition does not disqualify a claim for compensation if an industrial accident aggravates, accelerates, or combines with the preexisting condition to produce disability or a need for medical treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). The claimant must prove entitlement to medical benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

As found, Claimant proved the knee surgery recommended by Dr. Hunter is causally related to the July 2, 2018 accident. The ALJ agrees with Dr. Higginbotham that the question of causation cannot be answered strictly by reference to medical factors, but must also account for the dramatic difference in Claimant's apparent level of symptomology and functional abilities before and after the work accident. In the ALJ's mind, this factor tips the scale in favor a causal connection. Dr. Douthit and Dr. O'Brien's opinions are less persuasive because they relied primarily on medical factors and heavily discount Claimant's input. Dr. Douthit never examined Claimant and had no opportunity to elicit or discuss information beyond that contained in medical records. Claimant appeared very credible at the hearing, and the ALJ is inclined to give him the benefit of the doubt regarding the condition of his knee after the motorcycle accident and the reason he did not mention the motorcycle incident to Dr. Hunter. The ALJ also notes no persuasive evidence was introduced to contradict Claimant's testimony he did physically demanding work for nearly 2 months after the motorcycle accident with no difficulty.

The persuasive evidence shows the work accident either caused MRI findings or substantially aggravated pre-existing damage. The aggravation theory offered by Dr. Higginbotham seems to best account for the pieces of the puzzle here. It is certainly possible Claimant partially tore his ACL in the motorcycle accident and tore the rest on July 2. That scenario would explain why Dr. Jonassen appreciated a 2+ joint effusion approximately three weeks after the accident. A partial tear would also explain the lack of instability in May 2018, both on exam and to Claimant's perception. The subsequent tearing of the remainder of the ACL on July 2 would not necessarily lead to the "massive" swelling posited by Dr. O'Brien because there was simply not enough remaining intact tissue. The same logic applies to the meniscus; if Claimant partially tore the meniscus in the motorcycle accident, further tearing from the work accident would not necessarily lead to significant swelling. And if the ACL were already partially torn, it would reasonably require less torsional force to tear it the rest of the way. In any event, regardless of whether the accident directly caused the tears or aggravated pre-existing tears, the ALJ is persuaded the July 2 accident is the proximate cause of Claimant's disability and need for surgery.

ORDER

It is therefore ordered that:

1. Insurer shall cover the ACL reconstruction and meniscus repair surgery recommended by Dr. Hunter.

2. All issues not decided herein are reserved for future determination.

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

DATED: May 16, 2019

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-062-035-002

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

[Redacted],

Claimant,

v.

[Redacted],

Employer,

and

[Redacted],

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on May 9, 2019, in Denver, Colorado. The hearing was digitally recorded (reference: 5/9/19, Courtroom 1, beginning at 8:30 AM, and ending at 12:15 PM).

The Claimant was present in person and represented by [Redacted], Esq. Respondents were represented by [Redacted], Esq.

Hereinafter [Redacted] shall be referred to as the “Claimant." [Redacted] shall be referred to as the “Employer.” All other parties shall be referred to by name.

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

The evidentiary depositions of Charles Wenzel, D.O., taken on April 25, 2019; and, Matthew Lugliani, M.D., taken on April 25, 2019, were lodged with the ALJ, in lieu of live testimony, at the commencement of the hearing.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Respondents, which was filed, electronically, on May 14, 2019. On May 15, 2019, Claimant's counsel indicated that Claimant had no objection to the form of the proposed decision. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern the causal relatedness of the Claimant's esophageal rupture and the resulting medical care; and, if causally related, temporary total disability (TTD) benefits from January 6, 2018 to April 17, 2018.

The Claimant bears the burden of proof by a preponderance of the evidence .

FINDINGS OF FACT

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

Stipulations and Findings Thereon

1. The parties stipulated as follows, and the ALJ finds: (1) should the esophageal rupture be determined to be a compensable component of the workers' compensation claim, the Claimant would be entitled to TTD benefits from January 6, 2018 to April 17, 2018 with a credit for temporary partial disability benefits paid during this time; and, (2) should Claimant fail to prove that the esophageal rupture is causally related to the Claimant's claim, the claim for TTD benefits from January 6, 2018 to April 17, 2018 would be denied and dismissed.

Preliminary Findings

2. The Claimant sustained an admitted work related injury, on November 6, 2017, to the left shoulder when she was assisting a patient in a home health care role. The Claimant was assisting a patient transfer to a toilet when the patient started falling. The Claimant caught the patient and felt pain in the left shoulder.

3. Ultimately, Respondents filed a General Admission of Liability (GAL), dated January 8, 2019, admitting for causally related and reasonably necessary medical benefits; a starting average weekly wage (AWW) of $861.15, raised to $1,027.94 for COBRA benefits; and, TTD benefits for the latest period of $685.29 from August 1, 2018 to "undetermined." The GAL remains in full force sand effect.

4. The Claimant sought treatment with Colorado Occupational Medical Partners on November 15, 2017, November 29, 2017, December 13, 2017, and

December 29, 2017. She completed the intake sheets and pain questionnaires for her treatment on each of these dates of service.

Chest Pain

5. On November 15, 2017, the Claimant mentioned chest pain, but she specifically attributed the cause of the chest pain to anxiety induced by a coworker. The ALJ finds that this mention of chest pain does not persuasively address the Claimant's subsequent esophageal rupture, but anxiety induced by a coworker, as outlined by the Claimant in the questionnaire and review of symptoms. On each of the subsequent intake sheets and pain questionnaire sheets, the Claimant did not list any chest pain, abdominal pain or other gastrointestinal issues.

6. According to the Claimant, she was instructed to not list the chest pain or intestinal issues when completing the intake sheets and questionnaire. The ALJ finds this testimony to fly in the face of reason and common sense for medical staffers to so advise a patient. This testimony is inherently incredible. The Claimant's own intake sheets, completed by her own hand, listed complaints and conditions not related to the left shoulder injury. These include the Claimant use of eye glasses, anxiety, blood pressure problems and sleep disorders. These listings internally contradict he Claimant's testimony that she was told not to list "chest pains."

7. According to the Claimant, she suffered chest pain from the date of injury forward. This testimony is not credible as the patient intake questionnaires and the review of systems forms completed by her for evaluation do not document the allegations of chest pain consistent with the esophageal rupture, although they document other un-related conditions.

8. Both Dr. Lugliani and Dr. Wenzel testified that the Claimant did not complain of chest pain during their evaluations of the Claimant, except the notation of chest pain on November 15, 2017, consistent with anxiety induced by a coworker.

9. Dr. Lugliani and Dr. Wenzel's narrative reports from the evaluations from the Claimant's allegation of a work-related esophageal rupture.

10. Dr. Lugliani testified that it is a "remote possibility" that Claimant's esophageal rupture is related to the work injury. This opinion is far short of an opinion "to a reasonable probability." Anything is possible but this opinion does **not** establish a causal relationship to the admitted work injury.

Independent Medical Examination (IME) by J. Tashof Bernton, M.D.

11. Respondents obtained an IME with Dr. Bernto, who reviewed the medical records, evaluated the Claimant, and rendered the opinion that Claimant's "abdominal complaints are unrelated to the occupational injury, both in terms of the mechanism of injury is (sic) not one which could reasonably be anticipated to result in that type of injury and, if that were the case, pain would've been immediate and significant, as noted

by Dr. Surfing. (sic)" The ALJ finds that Dr. Bernton's opinion that Claimant's esophageal rupture is not causally related to the work injury is credible and persuasive.

12. It is the Claimant's burden to prove that she is entitled to benefits, and this includes proving that the esophageal rupture is causally relate to the work injury. At best, the evidence shows that there is a **remote** possibility that Claimant's abdominal complaints, including the esophageal rupture, are related to the work-related injury. "Remote" does not even rise to the level of "reasonable suspicion," or "probable cause," much less "reasonable probability."

13. The ALJ finds that the Claimant did not suffer chest pain or gastrointestinal issues following the work-related left shoulder injury, and that the esophageal rupture is not a compensable condition under the present case.

Ultimate Findings

14. As found herein above, the Claimant's testimony that she was instructed by medical staff not to list chest pains in the intake forms and diagrams is not credible. At one point, the Claimant attributed her chest pain to "anxiety" caused by a co-worker, which is internally inconsistent with her attempt to make the "chest pains" part and parcel of her admitted left shoulder injury. Therefore, the ALJ infers and finds that the Claimant did not mention chest pains at various times because she either was not having chest pains, or she was having minor chest pains attributed to "anxiety," and not as a precursor to an esophageal rupture. Further, as found, the opinions of IME Dr. Bernton were highly credible and virtually dispositive of the lack of causal relatedness of the esophageal rupture. The Claimant's testimony, as found to lack credibility, was insufficient to overcome Dr. Bernton's opinion to the contrary.

15. The Claimant has failed to prove, by preponderant evidence that it is reasonably probable that her esophageal rupture is causally related to her admitted left shoulder injury of November 6, 2017.

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CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant's testimony that she was instructed by medical staff not to list chest pains in the intake forms and diagrams was not credible. At one point, she attributed her chest pain to "anxiety" caused by a co-worker, which is internally inconsistent with her attempt to make the "chest pains" part and parcel of her admitted left shoulder injury. Therefore, as found, the Claimant did not mention chest pains at various times because she either was not having them, or she was having minor chest pains attributed to "anxiety," and not as a precursor to an esophageal rupture. Further, as found, the opinions of IME Dr. Bernton were highly credible and virtually dispositive of the lack of causal relatedness of the esophageal rupture.

b. Compensation can be awarded where there is competent evidence other than expert opinion. *Martin Marietta Corp. v. Faulk*, 158 Colo. 441, 407 P.2d 348 (1965). Such competent evidence includes lay testimony. *See Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Colorado Fuel & Iron Corp. v. Alitto*, 130 Colo. 130, 273 P.2d 725 (1954). *Also see Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997). As found the Claimant's testimony lacked credibility and it was insufficient to overcome Dr. Bernton's opinion to the contrary.

Medical Benefits

c. A claimant must prove a causal relationship between the injury and the medical treatment for which the worker is seeking benefits. *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. App. 1997). Treatments for a condition not caused by employment are not compensable. *Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187, 1189 (Colo. App. 2002). An industrial accident is the proximate cause of a claimant's disability if it is the necessary precondition or trigger of the need for medical treatment. *Subsequent Injury Fund v. State Compensation Insurance Authority,* 768 P.2d 751 (Colo. App. 1988). In order to prove that an industrial injury was the proximate cause of the need for medical treatment, an injured worker must prove a causal nexus between the need for treatment and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). It is for the ALJ, as the fact-finder, to determine whether a need for medical treatment is caused by the industrial injury, or some other intervening injury. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). Respondents are only liable for the "direct and natural consequences" of a work-related injury, including consequential injuries caused by the original compensable injury. *See Travelers Ins. Co. v. Savio*, 806 P.2d 1258 (Colo. 1985). As found, the esophageal rupture is **not** causally related to the left shoulder injury of November 6, 2017.

Burden of Proof

d. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has failed to sustain her burden with respect to the causal relatedness of the esophageal rupture.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Any and all claims for medical benefits attributable to the Claimant's esophageal rupture are hereby denied and dismissed.

B. The General Admission of Liability, dated January 8, 2019, shall remain in full force and effect unless modification thereof is warranted by law.

DATED this 17th day of May 2019..

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

ISSUES

- Whether the respondents have demonstrated, by a preponderance of the evidence, that the claimant's claim is barred by the statute of limitations.

- If the claimant's claim is not barred, whether the claimant has demonstrated, by a preponderance of the evidence, that he suffered an occupational disease arising out of and in the course and scope of his employment with the employer.

- If the claimant proves a compensable occupational disease, whether the claimant has demonstrated, by a preponderance of the evidence, that the right shoulder surgery recommended by Dr. C. Kelly Bynum is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the occupational disease.

FINDINGS OF FACT

1. The claimant has worked for the employer for 17 years as a trash man. The claimant testified that it is a very physical job. The claimant's job duties include driving a large trash truck and lifting trash bags and bins to chest level to deposit the trash into the trash truck. The claimant also testified that he works in an area where he has to drive the truck up and down long driveways, and then make three point turns.

2. The claimant testified that the physical demands of his job have resulted in pain in both of his shoulders. In 2012, Dr. John Knutson performed surgery on the claimant's left shoulder.[1] In 2016, the claimant suffered a work related injury to his left elbow, that resulted in the need for surgery. The claimant testified that while his left elbow was in a brace, he compensated with his right arm. The claimant believes that this resulted in pain in the claimant's right shoulder. The claimant testified that six years ago his right shoulder pain was "mild"; four years ago it became more severe; and three years ago it was "hard pain".

3. The claimant testified that on September 7, 2018, he performed his normal job duties, and noticed that his right shoulder was painful. Over the weekend the claimant's right shoulder did not improve. By the following Monday, the claimant's pain was such that he was unable to raise his right arm above his chest and he was unable to toilet himself. The claimant also testified that given his level of pain, he did not believe he could pass a DOT physical. The claimant testified that although he had experienced pain in his right shoulder prior to that time, by September 2018, his right shoulder pain limited his ability to perform his job duties.

[1] However, that 2012 surgery was performed outside of the workers' compensation system.

4. On September 13, 2018, the employer completed a first report of injury. That report indicated that the claimant was injured on September 7, 2018 while he was engaged in the activity of "turning wheel in garbage truck". The claimant testified that turning the steering wheel on his trash truck caused him the most pain.

5. The employer provided the claimant with a list of designated medical providers. From that list, the claimant selected Dr. Terry Wade as his authorized treating physician (ATP). The claimant was first seen by Dr. Wade on September 19, 2018. On that date, the claimant reported that he had experienced right shoulder pain "for many years". Dr. Wade opined that the claimant's pain was caused by a rotator cuff tear. Dr. Wade also opined that the claimant's symptoms were secondary to "overuse/repetitive motion". Dr. Wade prescribed Norco and ordered a magnetic resonance image (MRI) of the claimant's right shoulder.

6. On September 28, 2018, an MRI of the claimant's right shoulder showed a probable tear of the superior posterior labrum with associated paralabral cysts. The MRI also showed tendinosis of the supraspinatus tendon and moderate degenerative change of the acromioclavicular (AC) joint.

7. Subsequently, the claimant was seen by Dr. C. Kelly Bynum for an orthopedic consultation. The claimant was first seen by Dr. Bynum on November 12, 2018. At that time, Dr. Bynum diagnosed "right shoulder pain and dysfunction with work injury with SLAP[2] tear with paralabral cyst". Dr. Bynum recommended that the claimant undergo right shoulder arthroscopic debridement, subacromial decompression, distal clavicle excision with release of the longhead of the biceps, and open subpec tenodesis.

8. On February 22, 2019, the claimant attended an independent medical examination (IME) with Dr. Mark Failinger. In connection with the IME, Dr. Failinger reviewed the claimant's medical records, obtained a history from the claimant, and completed a physical examination. Dr. Failinger reviewed the MRI images and noted a "very tiny distal insertional tear of the supraspinatus at the greater tuberosity". Dr. Failinger opined that the claimant does not have a significant rotator cuff tear, and the surgery recommended by Dr. Bynum is intended to address the claimant's labrum. Dr. Failinger also noted that the claimant has not undergone physical therapy or diagnostic injections. Dr. Failinger noted that the Colorado Medical Treatment Guidelines (MTGs) do not address an occupational cause of labral pathology. Finally, Dr. Failinger opined that the claimant's degenerative labrum and paralabral cyst were not caused by a work injury. Based upon the opinions of Dr. Failinger, the respondents denied liability for an injury to the claimant's right shoulder.

9. On March 26, 2019, Dr. Wade authored a letter in which he opined that the claimant's right shoulder pain is "work related due to seventeen years of overuse and repetitive movements". Dr. Wade also stated that he agreed with Dr. Bynum's surgical recommendation.

[2] Superior labral tear from anterior to posterior.

10. The claimant testified that his last day of work for the employer was September 28, 2018, and he has not worked since that date. The claimant also testified that he continues to experience right shoulder pain. The claimant testified that because of the pain in his right shoulder it is difficult to pour a cup of coffee, he is unable to lift a gallon of milk, and cannot pick up his baby.

11. The ALJ credits the claimant's testimony and the medical records and finds that the respondents' have failed to demonstrate that the claimant's claim should be barred by the statute of limitations. Although the claimant was experiencing right shoulder pain for many years, the ALJ finds as credible the claimant's testimony that in September 2018 his right shoulder pain had increased to the point that he was unable to perform his job duties. The claimant reported his right shoulder issues to the employer and a report was filed with the Colorado Department of Workers' Compensation on September 13, 2018. The ALJ finds that this report was made in a timely manner following the increase in the claimant's right shoulder pain.

12. The ALJ credits the medical records and the opinions of Dr. Failinger over the contrary opinions of Drs. Wade and Bynum. The ALJ is persuaded that the claimant has right labrum pathology. The ALJ credits the opinion of Dr. Failinger that the claimant's degenerative labrum and paralabral cyst were not caused by the claimant's job duties. Therefore, the ALJ finds that the claimant has failed to demonstrate that it is more likely than not that he suffered an occupational disease while working for the employer. Likewise, the claimant has failed to demonstrate that is it more likely than not that his need for right shoulder surgery is related to his employment with the employer.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2018).

3. Section 8-43-103(2), C.R.S., provides, in pertinent part:

> [T]he right to compensation and benefits provided by said articles shall be barred unless, within two years after the injury . . ., a notice claiming compensation is filed with the division. This limitation shall not apply to any claimant to whom compensation has been paid . . . and the furnishing of medical, surgical, or hospital treatment by the employer shall not be considered payment of compensation or benefits within the meaning of this section . . .

The statute of limitations begins to run when claimant, as a reasonable person, should have recognized the nature, seriousness, and probably compensable character of the industrial injury. *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967); *Intermountain Rubber Industries v. Valdez*, 688 P.2d 1133 (Colo. App. 1984).

4. As found, the respondents have failed to demonstrate by a preponderance of the evidence that the claimant's claim should be barred by the statute of limitations. As found, the claimant acted as a reasonable person in recognizing and notifying the employer of his right shoulder symptoms in September 2018. As found, the claimant's testimony and the medical records are credible and persuasive on this issue.

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

6. The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by Section 8-40-201(14), C.R.S. as:

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

7. A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, Section 8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

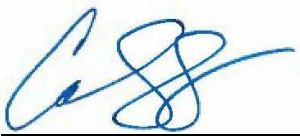
8. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the “logical and recurrent consequence” of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, April 10, 2008). Simply because a claimant’s symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. See *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, October 27, 2008).

9. As found, the claimant has failed to demonstrate by a preponderance of the evidence that he suffered an occupational disease while working for the employer. As found, the medical records and the opinions of Dr. Failinger are credible and persuasive, on this issue.

ORDER

It is therefore ordered that the claimant’s claim for workers’ compensation benefits and related medical treatment is denied and dismissed.

Dated this 20th day of May, 2019.



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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-078-769

ISSUES

- Whether Claimant proved by a preponderance of the evidence that he sustained a compensable lower back occupational disease arising out of and in the course and scope of his employment with Employer.

- Whether Claimant proved by a preponderance of the evidence that he is entitled to reasonably necessary medical benefits related to his occupational disease.

FINDINGS OF FACT

Based upon a complete review of the evidence the Judge enters the following Findings of Fact:

1. Claimant has worked for the Employer for approximately seven years, initially as a maintenance technician, and then as a senior technician.

2. Claimant's job duties included changing tires and checking brakes, balances, and alignments. A great majority of these duties required Claimant to remove and then replace each vehicles tires.

3. Claimant worked on different sizes of vehicles, primarily SUVs, trucks, and then larger sedans. Claimant testified that most SUV and truck tires weight more than 50 pounds and larger sedan tires weigh 40-50 pounds. Claimant testified that if he takes the tires off one vehicle, he lifts each of the tires twice, off and then back on the vehicle, so each vehicle requires eight tire lifts. Each lift requires bending, twisting, and squatting.

4. Claimant's written job description details his job duties and is consistent with Claimant's testimony. Claimant testified that the job description is somewhat out of date. Tire weights have all increased since the job description's May 2012 writing.

5. For the five years prior to seeking medical treatment for his low back, Claimant typically worked twelve-hour days, five or six days a week.

6. Claimant works on approximately ten to twenty-five vehicles per day. Employer encourages its employees to do a complete vehicle inspection (CVI) on every vehicle in the shop. Claimant testified that he does a CVI on 60-80% of the vehicles he services, and that a CVI requires him to take all the tires off a vehicle and then put them back on. Claimant testified that he removes and replaces the tires on approximately 80-90% of all the vehicles he worked on.

7. Claimant alleges he suffered an occupational disease while working for Respondent Employer with an onset date in December 2017. Because no specific event

caused Claimant's symptoms, he reported varying but generally consistent dates for the onset of his low back pain. For the same reason, he initially sought medical care using his private insurance.

8. On December 29, 2017, Claimant treated at Parker Adventist Hospital ED and reported a two-week history of lumbar back pain that had gradually worsened. Claimant denied any recent injury. Claimant reported increased pain with bending and lifting, and that the pain radiated to his left leg. On physical exam, the ED physician noted Claimant had lumbar paraspinal tenderness and a positive straight leg test bilaterally. The ED physician diagnosed Claimant with acute midline low back pain with left-sided sciatica. The ED physician recommended Claimant follow-up with his PCP for a possible lumbar MRI.

9. At Hearing, Claimant testified he went to the ED after having a few weeks of increased back pain. He testified he did not remember a specific incident at work. Claimant testified that prior to December 2017 he had some back soreness, but had never experienced symptoms like those that he did in December 2017. Claimant testified that in December 2017, he reported his back issues to his manager Dean G_____. Claimant testified that at that time he believed his back problems related to his work, and he reported this to the Employer.

10. On January 17, 2018, Claimant underwent a lumbar MRI, which revealed a L5-S1 shallow broad central protrusion that slightly indents the ventral thecal sac without overall stenosis and slight left-sided neuroforaminal narrowing and disc space degeneration.

11. On January 23, 2018, Claimant treated with Katarzyna Zofia Kocol, DO, at Centura Orthopedics – Castle Rock. He reported a sudden onset of back pain about 1-2 months prior, on or about December 10, 2017. Claimant reported his back pain was not the result of an injury or a work-related condition. Claimant reported 6/10 back pain that radiates to his left leg more than his right. Claimant denied any history of lower back issues. On physical exam, Dr. Kocol noted decreased lumbar range of motion, increased pain with range of motion testing, tenderness along the lower lumbar paraspinals and lumbar facet region, and positive left straight leg raise. Dr. Kocol diagnosed Claimant with left greater than right L5/S1 lumbar radiculitis. She recommended Claimant undergo a L5/S1 epidural steroid injection and physical therapy. Claimant testified he reported to his physicians the nature of his work duties and that he believed his back problem was related to work.

12. On February 2, 2018, Claimant treated with Dr. Kocol and underwent a L5-S1 epidural steroid injection.

13. Procedurally, Employer completed a First Report of Injury on February 7, 2018, detailing the nature of Claimant's injury. On February 19, 2018, Respondents filed a Notice of Contest.

14. On February 9, 2018, Claimant treated at Concentra with PA-C Gary Scofield and reported his work history with the Employer and that on the morning of December 20, 2017; he woke up with lower back pain. Claimant completed a questionnaire and noted that his back injury occurred at work. Claimant reported he did not remember a specific incident at work so he decided to seek medical treatment through his private medical insurance. Claimant reported he saw his PCP, who recommended a MRI and then referred Claimant to an orthopedic surgeon. Claimant reported he underwent a lumbar injection that helped. Claimant treated with the orthopedic surgeon, who recommended Claimant follow-up with work comp. On physical examination, PA Scofield noted lumbar tenderness, decreased range of motion, and positive straight leg raise test bilaterally. PA Scofield provided Claimant work restrictions and referred him to Michael Rauzzino, M.D., an orthopedic surgeon.

15. On February 20, 2018, Claimant treated with Dr. Kocol and reported approximately 50% pain relief following the injection and that his left leg symptoms were improved. Dr. Kocol noted the same findings on physical examination, including decreased range of motion and increased pain with the range of motion testing and a positive left-sided straight leg raise. Dr. Kocol continued to recommend physical therapy and medications and noted that Claimant may need lumbar surgery.

16. Also on February 20, 2018, Claimant treated with Dr. Rauzzino and reported the nature of his job duties; including lifting heavy tires and working around cars, and that in December 2017, he woke up one morning with back pain. Claimant denied any specific work injury. Claimant reported his medical history, the MRI, and treatment he had received to date. Dr. Rauzzino noted he reviewed the December 2017 ED report. Claimant denied any history of lower back injury or treatment. With respect to causation, Dr. Rauzzino stated:

> I do not see causation that will make this a worker's comp injury in the sense that while he does do physical labor, people who do not do physical labor also get similar findings and the ER reports, it is quite specific there is no [acute] trauma which occurred at work, which would lead him to have this disc herniation and degenerative disc disease.

17. The ALJ does not find Dr. Rauzzino's causation analysis persuasive for two reasons. First, that people who do not perform physical labor can have similar findings, does not mean that such findings in people who perform physical similar labor are not attributable to their physical labor. Second, there need not be an acute trauma because the claim concerns an occupational disease.

18. On February 28, 2018, Claimant treated with PA Scofield and reported that he treated with Dr. Rauzzino, who questioned whether Claimant's condition was work related. PA Scofield referred Claimant to John Aschberger, M.D., a physiatrist, for a possible injection.

19. On March 16, 2018, Claimant treated with Dr. Aschberger. Claimant reported that in December 2017, he had a week where he lifted "significantly heavy weight with truck tires." Claimant reported no specific trauma but aggravation of back pain with increasing symptoms. Claimant acknowledged prior low back pain and achiness but considered it part of the job due to the heavy nature of his work. Claimant reported that he had a good response to the lumbar injection. Dr. Aschberger noted positive findings on physical examination and that he lumbar injection was reasonable based on Claimant's symptoms.

20. With respect to causation, Dr. Aschberger stated:

> Regarding causation, [Claimant] denies any outside trauma or injury and denies any home activities that require significant physical exertion. Given the level of work as he reports it and the number of hours worked, I think likely that this is a work-related event, although [Claimant] is not able to identify any one specific occurrence that precipitated the symptoms.

21. The ALJ finds credible and persuasive Dr. Aschberger's opinion that Claimant's condition and need for treatment are work related. Again, Claimant need not establish a specific occurrence as Claimant is pursuing an occupational injury claim.

22. Procedurally, on December 13, 2018, Claimant filed an Application for Hearing on compensability and medical benefits, along with other issues that are not relevant for this decision. On January 14, 2019, Respondents filed a Response to Claimant's Application for Hearing.

23. On February 13, 2019, Allison Fall, M.D., Respondents' retained expert witness, performed an independent medical examination. Claimant reported his employment history and the nature of his work activities. Claimant reported that in November and December 2017 he was taking the tires off 10 vehicles on average per day and sometimes 15 vehicles per day. Claimant reported the tires weigh between 40-150 pounds and that he lifts the tires on his own. Claimant stated he did not remember a specific incident at work, but that his back started hurting more than normal and was progressively worsening.

24. Dr. Fall reviewed Claimant's medical records and performed a physical examination. She diagnosed Claimant with L5-S1 degenerative disc disease. Dr. Fall opined Claimant's diagnosis did not causally relate to an industrial injury. She opined Claimant's symptoms were inconsistent with an occupational disease. Dr. Fall stated that although Claimant is required to move heavy tires, "I agree with Dr. Rauzzino that these same findings are found in people that do not perform heavy lifting." Dr. Fall opined that it is unlikely Claimant sustained an acute disc herniation at work.

25. Respondents deposed Dr. Fall on March 1, 2019. The doctor testified as a Level II accredited medical expert. Regarding the nature and onset of Claimants' symptoms, Dr. Fall testified consistently with her RIME report. Dr. Fall found no medical

evidence to support Claimant having sustained a medically documented injury on December 22, 2017. Dr. Fall testified that no medically documented evidence supported Claimant having sustained a back injury based on his regular job duties. She testified that she understood Claimant was a master mechanic and assumed that he would not be doing much "hands-on" work.

26. The ALJ find's Dr. Fall's opinions on causation unpersuasive. Dr. Fall assumed that Claimant performed little "hands-on" work when Claimant actually performed significant and repetitive heavy lifting. Dr. Fall was unaware that Claimant's lifting involved flexion. Dr. Fall's analysis of whether Claimant sustained an acute injury on December 22, 2017 is inapposite to Claimant's claim.

27. On cross-examination, Dr. Fall agreed that Claimant does not allege he sustained an occupational injury. Dr. Fall testified Claimant is alleging his occupational exposure to prolonged heavy repetitive lifting caused his back problem. Dr. Fall is familiar with Workers' Compensation Rule of Procedure 17, Exhibit 1, concerning occupational disease back claims. However, she did not review WCRP 17 when reaching her ultimate opinion in Claimant's case. Dr. Fall admitted that WCRP 17 provides that lifting 50-55 pounds or more constitutes a risk factor for cumulative low back pain when combined with flexion and performed 10-15 times per day. Dr. Fall agreed that Claimant reported he lifts tires weighting 40-150 pounds upwards of 40 times per day. Dr. Fall admitted she did not ask – and does not know -- how many tires Claimant changes or the mechanics he uses to do so. Dr. Fall acknowledged that Claimant does not have a history of lower back injuries or treatment.

28. The ALJ finds Dr. Fall's opinions unpersuasive.

29. Claimant has no history of back complaints or treatment.

30. The ALJ finds that Claimant met his burden of proof. It is more probably true than not that Claimant sustained a compensable occupational disease as defined in section 8-40-201(14) C.R.S. Claimant proved by a preponderance of the evidence that he suffered a disease that resulted directly from the employment or the conditions under which the work was preformed, which can be seen as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can fairly be traced to the employment as a proximate cause.

CONCLUSIONS OF LAW

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

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

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

In deciding whether a party has met their burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002).

The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. *Section 8-41-301(1)(b), C.R.S.; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury "arises out of and in the course of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions to be considered part of the employee's services to the employer. *General Cable Co. v. Industrial Claim Appeals Office,* 878 P.2d 118 (Colo. App. 1994). The question of whether Claimant met his burden of proof to establish a compensable injury is one of fact for determination by the judge. *See Faulkner v. I.C.A.O.*, 12 P. 3d 844 (Colo. App. 2000).

"Occupational disease" as defined by section 8-40-201(14), C.R.S., "means a disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment."

The occupational disease statute imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test, which requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). Where there is no evidence that occupational exposure to a hazard is a necessary

precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id*. Where the disease for which a claimant is seeking compensation is produced solely by some extrinsic or independent cause, it is not compensable. *Anderson*, 859 P.2d at 824. The purpose of this rule "is to ensure that the disease results from the claimant's occupational exposure to hazards of the disease and not hazards to which the claimant is equally exposed outside of employment." *Saenz-Rico v. Yellow Freight System, Inc.,* W.C. No. 4-320-928 (January 20, 1998); *also see Stewart v. Dillon Co.,* W.C. No. 4-257-450 (November 20, 1996).

Once the claimant makes such a showing, the burden of establishing the existence of a nonindustrial cause and the extent of its contribution to the occupational disease shifts to the employer. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992). The hazardous conditions of employment need not be the sole cause of the disease. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Indus. Claim Apps. Office*, 21 P.3d 866 (Colo. App. 2001); *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990).

Pursuant to W.C. Rule of Procedure 17-2 (A), 7 Code Colo. Regs. 1101-3, health care practitioners are to use the Medical Treatment Guidelines referenced as Exhibits at W.C. Rule of Procedure 17-7, 7 Code Colo. Regs. 1101-3 (the "Medical Treatment Guidelines") when furnishing medical aid under the Act. The ALJ may also appropriately consider the Medical Treatment Guidelines as an evidentiary tool. *Logiudice v. Siemans Westinghouse*, W.C. 4-665-873 (ICAO January 25, 2011). The weight and credibility to be assigned expert testimony on the issue of causation is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Apps. Office*, 55 P.3d 186 (Colo. App. 2002).

Nevertheless, the ALJ is not required to grant or deny medical benefits based upon the Medical Treatment Guidelines. *Thomas v. Four Corners Health Care*, W.C. 4-484-220 (ICAO April 27, 2009). The Medical Treatment Guidelines are not definitive, but merely guidelines, and the ALJ has the discretion to make findings and orders which follow or deviate from the Medical Treatment Guidelines depending upon the evidence presented in a particular case. *Jones v. T.T.C. Illinois, Inc.*, W.C. 4-503-150 (ICAO May 5, 2006), *aff'd Jones v. Indus. Claim Apps. Office*, N. 06CA1053 (Colo. App. March 1, 2007) (not selected for official publication).

Rule 17, Exhibit 5 (D)(3) of the Medical Treatment Guidelines provides:

> The clinician must determine if it is medically probable (greater than 50% likely or more likely than not) that the need for treatment in a case is due to a work-related exposure or injury. Treatment for a work-related condition is covered when: 1) the work exposure causes a new condition; or 2) the work exposure causes the activation of a previously

> asymptomatic or latent medical condition; or 3) the work exposure combines with, accelerates, or aggravates a pre-existing symptomatic condition. In legal terms, the question that should be answered is: "Is it medically probable that the patient would need the treatment that the clinician is recommending if the work exposure had not taken place?" If the answer is “yes,” then the condition is not work-related. If the answer is “no,” then the condition is most likely work-related.

Additionally, WCRP 17, Exhibit 1 details the medical treatment guidelines regarding lower back pain and injury. WCRP 17, Exhibit 1, page 12 details that a work-related condition may occur when “a work-related exposure that renders a previously asymptomatic condition symptomatic and subsequently requires treatment. WCRP 17, Exhibit 1, page 13 provides:

> Applying the totality of the evidence, it would appear that heavier lifting, 25 kilograms or 50-55 pounds and higher, may be considered a risk factor for cumulative low back pain, when combined with flexion and performed 10-15 times per day over cumulative years of exposure.

As found, Claimant proved by a preponderance of the evidence that he sustained a compensable lower back condition because of his work activities. Claimant’s undisputed testimony establishes that for the five years leading up to his onset of lower back pain in December 2017, he worked approximately 60 hours per week for the Employer and lifted upwards of 20 tires per day (likely more) and that these tires weighed upwards of 50 pounds. Claimant’s job duties establish a causal connection between his lumbar condition and his employment. Claimant’s lumbar condition is causally related to his job duties while working for the Employer.

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. § 8-42-101, C.R.S. Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Indus. Comm’n*, 491 P.2d 106 (Colo. App. 1971). A causal connection may be established by circumstantial evidence, and expert medical testimony is not necessarily required. *Indus. Comm’n v. Jones*, 688 P.2d 1116 (Colo. 1984); *Indus. Comm’n v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970). As found, Claimant proved by a preponderance of the evidence that the medical treatment he has received through his authorized treating physicians is reasonable, necessary, and related to his compensable

occupational injury. Claimant proved by a preponderance of the evidence that he is entitled to reasonably necessary medical benefits related to his compensable, lower back occupational injury. Additionally, Claimant proved by a preponderance of the evidence that all the medical treatment, including February 2, 2018 lumbar injection, he has received related to his lower back is reasonable, necessary, and related to his compensable, occupational disease.

ORDER

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

A. Claimant sustained a compensable lower back injury related to his occupational exposure.

B. All medical treatment Claimant has received for his lumbar spine is reasonable, necessary, and related to his compensable, work-related condition.

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

DATED: May 21, 2019

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

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

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 1525 Sherman Street, 4th Floor, Denver, CO 80203	
In the Matter of the Workers' Compensation Claim of: **D,** Claimant, vs. **H,** Employer, **M,** Insurer Respondents.	▲ **COURT USE ONLY** ▲ **CASE NUMBER:** **WC 5-011-923-003**

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Hearing in this matter was held before Administrative Law Judge Margot W. Jones on March 3, 2019. Claimant was present and was represented by----------, Esq. Respondents were represented by _____, Esq. This matter was digitally recorded in Courtroom 3 at 8:30 am.

A Summary Order was issued on this matter on April 29, 2019. Respondents requested a Full Order on May 13, 2019.

In this order, D will be referred to as "Claimant;" H will be referred to as "Employer;" and M will be referred to as "Insurer." Insurer and Employer, collectively, will be referred to as "Respondents."

Also in this order, "ALJ" or "Judge" refers to the Administrative Law Judge, "C.R.S." refers to Colorado Revised Statutes, "OACRP" refers to the Office of Administrative Courts Rules of Procedure, 1 CCR 104-1, "the Act" refers to the Workers' Compensation Act of Colorado, Section 8-40-101, et seq., C.R.S and "WCRP" refers to Workers' Compensation Rules of Procedure, 7 CCR 1101-3.

1. Whether Respondents proved by clear and convincing evidence that the Division Independent Medical Examiner's (DIME) opinion was most probably incorrect; and

2. Whether Claimant proved by a preponderance of the evidence that her need for a total left knee replacement is reasonably necessary and related medical treatment.

FINDINGS OF FACT

1. Claimant sustained an admitted work related injury on February 17, 2016.

2. Claimant slipped and fell on ice in the parking lot of her employer while getting out of her car.

3. Claimant reported immediate pain in her left knee and was taken that day to the emergency room.

4. On October 18, 2016, Claimant received a left knee arthroscopy with partial meniscectomy performed by Dr. Repine.

5. Following her surgery, Claimant remained symptomatic. Claimant credibly testified that following her date of injury her knee never felt as it did prior to the injury as she remained functionally limited.

6. Claimant was placed at maximum medical improvement (MMI) on July 17, 2017, by Dr. Mars who states, "she is being sent in by the insurance carrier." (Claimant's Exhibit 2 Pg 7.)

7. Respondent's filed a Final Admission of Liability dated March 5, 2018. Claimant timely objected to the Final Admission and requested a Division Independent Medical Examination (DIME).

8. Physician Assistant Laura Kaiser's report of September 8, 2017, states, "right knee pain is compensatory from the L knee," and "She has failed surgery and Supartz injections." (Respondent's Exhibit F, Pg 81).

9. Dr. Repine's report of April 6, 2018 states, "left knee pain onset 26 months ago." Dr. Repine further explains, "The pain is sharp. Context there is an injury. Trauma 2 years 1 month 2 weeks 6 days ago on 2/17/2016. The pain is aggravated by walking and standing. Associated symptoms include joint instability, limping, numbness, tingling in the legs and weakness. Pertinent

negatives include decreased mobility, difficulty initiating sleep, joint tenderness, nocturnal awakening, nocturnal pain, spasms and swelling. Additional information, she has undergone L knee scope with lateral release, partial medial meniscectomy and chondroplasty, as well as PT, and Supartz injections. Patient states 7/10 on the pain scale." (Claimant's Exhibit 6, Pg 54).

10. On April 26, 2018 Dr. Repine recommended Claimant to receive a left total knee arthroplasty, also referred to as a total knee replacement.

11. Subsequent to the request for the total knee replacement, Respondents issued a corresponding denial based on an independent medical examination (IME) report from Dr. Douthit. In his IME report Dr. Douthit admitted that the total knee replacement was reasonable and necessary, but questioned the work related causation.

12. On June 12, 2018, Dr. Richard Gordon, M.D. submitted his DIME report. Dr. Gordon opined that "Based on medical record review and this examination, it is this examiner's opinion that [Claimant] has not reached maximum medical improvement. This is based on the extent of her left knee pain with commensurate findings on both MRI and physical examination. I agree with Dr. Repine's assessment that this patient is in need of a left total knee arthroplasty. Based on this assessment, she has not reached maximum medical improvement." (Claimant's Exhibit 6, Pg 79).

13. Claimant attended an IME with Dr. Peter Weingarten on August 22, 2018. In his corresponding report Dr. Weingarten states that Claimant was asymptomatic prior to her work related event and "absent the slip and fall accident, the patient would not require a total knee arthroplasty and would not have required arthroscopic surgery to the knee." (Claimant's Exhibit 4, Pg 28-29).

14. Dr. Weingarten concludes, "the only reasonable treatment at this time would be a total knee arthroplasty. The patient is eager to proceed with the surgery. The need for surgery is causally related to the work incident of 2/17/2016." (Claimant's Exhibit 6, Pg 29).

15. At Respondent's request Claimant attended an IME with Dr. Larson on October 22, 2018. Dr. Larson opined that the Claimant's need for the total knee arthroplasty is reasonable but is unrelated to her industrial injury. Dr. Larson concluded that it "appeared" that Claimant "has recovered from her work related injury." (Respondent's Exhibit G, Pg 7).

16. On March 13, 2019, Dr. Larson testified at a post hearing deposition. Dr. Larson testified consistent with his IME report. In his deposition Dr. Larson testified that from 1982 to the date of her injury Claimant received no treatment to her left knee, was asymptomatic and had no work restrictions.

17. Dr. Douthit testified at hearing consistent with his IME reports. Dr. Douthit also testified that from 1982 to the date of her injury Claimant received no treatment to her left knee, was asymptomatic and had no work restrictions.

18. At hearing Claimant credibly testified that from 1982 to the date of her injury she received no treatment to her left knee, was asymptomatic, was fully functional, and had no work restrictions. Claimant testified that her knee remained symptomatic following her initial surgery and subsequent injections. Her symptoms have remained consistent from her date of injury and she has never returned to her pre-injury function. Claimant stated that none of her current symptoms and functional limitations were present prior to her date of injury.

CONCLUSIONS OF LAW

General Legal Principles

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

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

Overcoming the DIME

Sections 8-42-107(8)(b)(III) and (c), C.R.S. provide that the finding of a DIME physician selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III); *Peregoy v. Indus. Claim Apps. Office*, 87 P.3d 261, 263 (Colo. App. 2004).

Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been

proved by clear and convincing evidence if, considering all the evidence, the trier-of-fact finds it to be highly probable and free from serious or substantial doubt. Id. The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO July 19, 2004); see *Shultz v. Anheuser Busch*, *Inc*., W.C. No. 4-380-560 (Nov. 17, 2000).

The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Indus. Claim Apps. Office*, 961 P.2d 590 (Colo. App. 1998). Since the DIME physician is required to identify and evaluate all losses and restrictions that result from the industrial injury as part of the diagnostic assessment process, the DIME physician's opinion regarding causation of those losses and restrictions is subject to the same enhanced burden of proof. *Id*.

Respondents failed to overcome the DIME opinions of Dr. Gordon by a clear and convincing standard. It has been determined that a mere difference of medical opinion does not constitute clear and convincing evidence. The opinions of Dr. Douthit and Dr. Larson only amount to a mere difference of opinion than that of Dr. Gordon. The medical record and the fact that since 1982 Claimant had no symptoms nor received any treatment to her left knee supports the opinions of Dr. Gordon.

The opinions of Dr. Gordon are supported by Dr. Weingarten, who opines that Claimant's recommended total knee arthroplasty is reasonable, necessary, and related to her industrial injury. The opinions of Dr. Weingarten are credible and persuasive.

In conclusion, the opinions of Dr. Larson and Dr. Douthit are found not to be credible or persuasive and do not meet the burden of proof to overcome the DIME's opinions by a clear and convincing standard.

Medical Benefits

If there is a compensable injury, the employer and its insurance carrier must provide all medical benefits, which are reasonably necessary to cure and relieve the work-related injury. Section 8-42-101 C.R.S.; *Owens v. Indus. Claim Appeals Office of State of Colo.,* 49 P.3d 1187, 1188 (Colo. Ct. App. 2002). The right to workers' compensation benefits, including medical payments, arises only when an injured employee initially establishes, by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-42-101, C.R.S.; See *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. Ct. App. 1997). Where liability for a particular medical benefit is contested, the claimant must prove that it is reasonably necessary to treat and is causally related to the industrial injury. *Id*.; See *Grover v. Industrial Commission,* 759 P2d 705 (Colo. 1988). The record must distinctly reflect that the medical treatment was necessary and designed to cure or relieve the effects of the work

injury. *Pub. Serv. Co. of Colorado v. Indus. Claim Appeals Office of State of Colo.,* 979 P.2d 584, 585 (Colo. Ct. App. 1999).

The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990). Factual determinations related to this issue must be supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. Substantial evidence is that quantum of probative evidence which a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411, 415 (Colo. App. 1995).

Claimant has proven by a preponderance of the evidence that the need for the left total knee arthroplasty is reasonable, necessary, and related to the compensable claim. Dr. Gordon's DIME opinions are credible and persuasive and were corroborated by those of Dr. Weingarten in that Claimant's need for the surgery is related to the injury of February 17, 2016. The opinions of Dr. Weingarten are found to be credible and persuasive. Claimant's testimony is credible and persuasive that from 1982 to the date of injury Claimant had never received any medical treatment for her left knee and was fully functional. The opinions of Dr. Douthit and Dr. Larson are found not to be credible or persuasive.

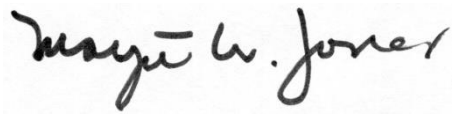
ORDER

It is therefore ordered that:

1. Respondents failed to sustain their burden of proof to establish that the DIME physician's opinion is most probably incorrect.

2. Claimant proved by a preponderance of the evidence that the recommended total left knee replacement procedure (TKR) is reasonably necessary and related medical benefits.

DATED: May 21, 2019



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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-857-829-002

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

DANIEL FRECKLETON,

Claimant,

v.

SKYWERXS INDUSTRY, LLC,

Employer,

and

FARMERS INSURANCE EXCHANGE,

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on May 1, 2019, in Denver, Colorado. The hearing was digitally recorded (reference: 5/1/19, Courtroom 1, beginning at 1:30 PM, and ending at 3:00 PM). No testimonial evidence was taken. The matter was submitted on the exhibits admitted into evidence.

The Claimant was not present in person but represented by [Redacted], Esq. Respondents were represented by [Redacted], Esq.

Hereinafter [Redacted], shall be referred to as the “Claimant." [Redacted], shall be referred to as the “Employer.” All other parties shall be referred to by name.

Claimant’s Exhibits 1 through 8 were admitted into evidence, without objection. Respondents’ Exhibits A through T were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ established a post-hearing briefing

schedule. Claimant's opening brief was filed on May 8, 2019. Respondents' answer brief was filed on May 15, 2019. Claimant's reply brief was filed on May 20, 2019, at which time the matter was deemed submitted for decision. The reply brief states the position that all of Respondents' arguments are moot, if the FAL is void *ab initio*.

ISSUES

A critical issue to be determined by this decision is whether the Final Admission of Liability (FAL), dated August 26, 2014, was *void ab initio* as to the admission for maximum medical improvement (MMI), permanent medical impairment, or both. The FAL admitted for causally related and reasonably necessary post-MMI) medical maintenance care; an average weekly wage of $575.61; temporary total disability (TTD) benefits through April 30, 2012; an MMI date of April 30, 2012, and permanent partial disability (PPD) benefits, based upon 23% of the whole person, with a $10,000.00 lump sum payment on October 4, 2012 and a final payout aggregating $37, 388.16, completed on February 11, 2015. The Claimant's contention is that the entire FAL is null and void because it was based on the opinion of Bart Fotheringham, M.D. Claimant's authorized treating physician (ATP) in the State of Utah, who conceded that he was not Level 2 Accredited in the State of Colorado. In rating permanent medical impairment, however, Dr. Fotheringham used the American Medical Association *Guides to the Evaluation of Permanent Medical Impairment,* 3rd Ed., Rev.(hereinafter "AMA Guides"), as required by § 8-42-107 (8) (c), C.R.S., in rating the degree of whole person permanent medical impairment.

Corollary issues are whether the Claimant is estopped from challenging the FAL at this time because he accepted and received all of the admitted permanent medical impairment benefits If the FAL is null and void, should the Claimant be obligated to repay Respondents the $55, 780.44 he received in permanent medical impairment benefits in order to prevent his unjust enrichment, pursuant to the case law dealing with overpayments.

The Claimant filed a Petition to Reopen one day before the 6-year statute of limitations took effect. The ostensible ground in the Petition to reopen is "change of condition." Medical reports supporting renewed urinary problems are attached to the Petition. As it relates to the contention that the FAL is null and void, is it sufficient to state the ground of "change of condition," based on a "substantial compliance-type argument, " when, in fact, the actual ground should be error or mistake in the FAL. If the Petition is to be literally construed, an alternative issue concerning whether it supports a "change of condition," in which case, the FAL and its sequelae remain unchanged and the case could be reopened from the time the condition changed.

The Claimant bears the burden of proof, by preponderant evidence on all issues, with the exception of "estoppel," in which case Respondents bear the burden of proof by a preponderance of the evidence.

FINDINGS OF FACT

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

Preliminary Findings

1. The Claimant was injured on June 7, 2011. A General Admission of Liability (GAL), admitting for temporary total disability (TTD) benefits was filed on June 14, 2011 (Respondents' Exhibit A-1). The Claimant received care initially at Craig Hospital, but eventually relocated to Salt Lake City, Utah.

2. On April 30, 2011 he received a release to full duty and was determined to be at maximum medical improvement (MMI). The insurance carrier filed a GAL terminating TTD benefits, pursuant to § 8-42-105(3), C.R.S., on May 1, 2011 (Respondents' Exhibit A 3-5). The Claimant received $17,981.96 in TTD benefits from the date of injury to that date.

Permanent Impairment Rating and Benefits

3. The Claimant underwent an impairment rating pursuant to the AMA Guides, performed by ATP Bart Fotheringham, M.D., in Murray, Utah. Dr. Fotheringham agreed that the Claimant was at MMI on April 30, 2012, and he assigned a 23% whole person impairment rating. Dr. Fotheringham admitted that he was **not** Level II Accredited in Colorado. Respondents filed an FAL, in accordance with Dr. Foteringham's rating, on June 8, 2012 (Respondents' Exhibit B 1-12)..Dr. Fotheringham is not Level 2 Accredited by the Colorado Division of Workers Compensation (DOWC), however, § 8-42-107 (8) (b.5) (I) (A), C.R.S., read *in pari material,* with the rest of Subsection (b.5), reveals that an out-of-state physician may determine MMI and degree of physical impairment and transmit the results to the Colorado insurance carrier, who may then appoint a Colorado Level II to determine the impairment rating. By its silence in the rest of the statutory provision, an insurance carrier may accept the out-of-state ATPs impairment rating and pay PPD benefits pursuant thereto, as is the case herein. By necessary implication, a claimant may either agree with the out-of-state physician's rating, or insist on the appointment of a Colorado Level II Accredited physician to do the rating.

4. The admitted 23% whole person rating totaled $55,780.44 in permanent medical impairment benefits, paid from the date of MMI to February 11, 2015. Attached to the FAL was "Notice to Claimant of Rights and Benefits." Dr. Fotheringham's report was also attached. Also attached is an Objection to the FAL and a Notice and

Proposal, which contains in bold print that if the Claimant had any issues with benefits admitted he needed to file an Objection and apply for a Division Independent medical Examination (DIME) or apply for Hearing within 30 calendar days of the filing of the FAL, July 8, 2012

5. The Claimant began collecting PPD on a bi-weekly basis. He did not file an Objection to the FAL or file an Application for Hearing (Respondents' Exhibit G-2). The Division of Workers Compensation (DOWC) reviewed the file and requested a Final Payment Notice on September 24, 2012 (Respondents' Exhibit E). Respondents filed the Final Payment Notice on October 22, 2012 (Respondents' Exhibit F).

6. On October 2, 2012 the Claimant contacted the DOWC and enquired about obtaining a $10,000.00 Lump Sum (Respondents' Exhibit G-1). The Claimant then contacted Respondents and made the request. Respondents issued this payment on October 4, 2012.

7. Due to this and a lump payment at the onset of PPD, all PPD benefits have been paid out as of August 21, 2014. Respondents filed a second FAL, based upon the completion of payment due to the change in the time period of benefits being owed. Again, Respondents attached the required notices to Claimant. Again, the Claimant did not file an Objection to the FAL and did not apply for hearing on any issues (Respondents' Exhibit B 13-18). The payment ledger was also attached to the FAL.

8. Claimant relocated again to Oregon. He did not treat with any physician in 2014. Again, the Claimant did not file an Application for Hearing on any issues surrounding his post-MMI maintenance care or anything else during this time period (Respondents' Exhibit G 1-2). Claimant eventually relocated to Alaska.

The Petition to Reopen

9. The Claimant filed a Petition to Re-Open on June 6, 2017. The alleged ground in the Petition to Re-Open is marked "Change in Condition". The Claimant did not mark Error or Mistake as a reason for Re-opening (Respondents' Exhibit. H). The attached medical reports were dated March 24, and May 17, 2017. The Petition and Application make no mention of any issues with the FALs. The Claimant's Application for Hearing in connection with the Petition, does not endorse PPD as issue. TPD from March 2013 to "ongoing" and TTD for the same time period were listed as issues. The Claimant later withdrew permanent total disability as an issue by motion. There is no endorsement of an issue concerning the FALs on this Application (Respondents' Exhibit H-7-8).

10. Hearing was set for October 3, 2017. Due to the Claimant not answering discovery and the A pre-hearing conference before the DOWC was held on November 6, 2017. Conference notations indicate that there was difficulty obtaining information

from the Claimant. Again, the Claimant did not provide answers to discovery and the hearing was vacated. The Pre-hearing Order allowed the Claimant to withdraw the Application for Hearing and refile it. There was no mention, nor was there a motion, of additional issues to be endorsed for the next Application (Respondents' Exhibit J).

11. The Claimant filed a new Application for Hearing on March 23, 2018 endorsing the same issues, this time omitting PTD. Again, there is no issue concerning the FAL endorsed and no endorsement of the claim not being closed, such an endorsement possibly being incomprehensible to a self-represent claimant (as the Claimant was at the time) Again due to discovery issues, the hearing was vacated. On August 30, 2018, the Claimant then filed his third Application now endorsing a penalty for alleged failure to involve a Level II provider and closure of claim. Claimant did not endorse the FAL as *void in ab initio* and did not endorse PPD. Claimant also did not file a motion to add the issue nor had there been any Notice that this was an issue until the third Application was filed.

Analysis of the Evidence

12. It is undisputed that at the time of the Petition to Re-open the Claimant did not assert that the claim was still open and that there was an issue with the FALs. It is also undisputed that the Claimant did not endorse PPD on any of his Applications for Hearing. It is undisputed that the Claimant did not Object to either of the FALS and did not apply for hearing within 30 days of their issuance of the FALs. It is undisputed that the Claimant collected over $55,000.00 in PPD and has not returned this sum to the Respondents. While his Petition to Re-Open based on change of condition was timely filed 1 day before the Statute ran, a Petition to Re-open based on Error or Mistake was never filed and the Application for Hearing was not filed until August 30, 2018, The Claimant has raised no issue with the impairment rating itself, and proffers no explanation as to why the DOWC closed the file, after reviewing the FALS. A Petition to Re-Open on Change of Condition is the next procedural step in this case.

13. The Claimant's argument at hearing, with regard to not objecting to the FALs was that he could have requested a DIME, and that he could have received additional indemnity because he was unaware of the law.

14. Claimant does **not** argue that he did not receive the FALs or that the FALs were untimely. He also does **not** argue that the FALs did not have the requisite Notice requirements and objection forms attached (Resp.ondents' Exhibit B). His argument that the FALs did not meet the requirements of § 8-42-107, C.R.S. is factually untimely. The Claimant accepted the PPD award made in the FALs in its entirety, made a lump sum request, which was granted, and the DOWC reviewed the file and requested a Final Payment Notice, thus, the DOWC closed the file and gave notice to the parties that the file was closed.

15. The Claimant argued at hearing that he was not given a right to a DIME to increase his indemnity award. This is not accurate. The insurance carrier sent the requisite Notice and forms to the Claimant in 2012 and 2014 and the Claimant chose to not pursue a DIME or file an Application for Hearing. The only impediment to the Claimant obtaining a DIME was his not requesting a DIME. By requesting the $10,000.00 Lump Sum, which the Claimant received, he demonstrated that he had the ability to contact the DOWC and make inquiries and that he had received the FAL. The ALJ finds that this establishes an acquiescence and acceptance of the FAL.

16. The DOWC received the first FAL on June 8, 2012 and found no errors contained in it. As was the required procedure at the time, when no Objection was filed, the DOWC requested the Final Payment Notice. Respondents fulfilled this request. In that the DOWC enacted the procedures to close the claim, accepted the FAL without issuance of a correction notice, and claimant's Lump Sum request.

17. The filing of the second FAL again afforded the Claimant the right to apply for Hearing on issues at that time. The Claimant again took no action. It is undisputed that Claimant did not timely give notice of the Error/Mistake. It is also undisputed that the last PPD payment was over two years prior to either June 6, 2017 or August 30, 2018. The purpose of a Petition to Re-open is to give Respondents notice that an award should be re-opened. The Claimant did not mark "Error or Mistake" on the June 6, 2017 Petition. The attached medical reports are dated in March and May of 2017. The Application for Hearing attached to the Petition did not endorse PPD or make mention of any issues with the FAL. Specifically, the Claimant did not assert that the FALs were *void ab initio*.

18. The Claimant states in his opening brief that the Petition to Re-Open was filed in a precautionary manner in that the case was still open due to the FALs being *void ab initio*. The Claimant gave no notice of any issues with the FALs until August 30, 2018.

19. The ALJ infers and finds that Respondents are prejudiced by Claimant's untimely raising of this issue (years after the last PPD payment was received by the Claimant) as throughout 2017 and the majority of 2018, Respondents proceeded defending the matter as a Petition to Re-open based on change of condition. This included not only discovery tailored to that issue but also the retaining of Stanley Ginsburg, M.D., to perform a chart review (Respondents' Exhibit K). The Claimant has not proffered a reasonable or persuasive excuse as to the untimely and lack of notice to this issue.

20. The Claimant not only achieved MMI on April 30, 2012, but he has worked for at least four employers since MMI. The case was closed by the FALs as the FALs were accepted and approved by the DOWC and Claimant accepted the award and did not timely Object. The last payout on the PPD award was August 21, 2014.

21. The Petition to Re-open, dated June 6, 2017, on the stated ground of "change of condition," was filed one day short of the expiration of the relevant statute of limitations provision. It was timely and attached to it were medical reports that support a prima facie case of worsening of condition beginning on March 24, 2017 (Respondents' Exhibit H). It creates a disputed factual issue concerning whether the 2017 medical condition was a natural progression of the sequelae of the June 7, 2011 injury, or whether a change or worsening began in March 2017. The Petition postures this issue.

DISCUSSION

The Claimant's principal thrust is that the FALs are null and void. If so, It follows that the $55,780.44 PPD award was a mistake due to clerical error, not fraud. Recovery of overpayments, based on mistake and on a retroactive basis, was prohibited by *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990). In 1997, the General Assembly amended the re-opening statute to include overpayments as a ground for re-opening as to overpayments only. § 8-43-303 (1) and (2) (a), C.R.S. Now, employers have a statutory right to review and recalculate payments if an insurance carrier made a mistake in previous payments. *Simpson v. Indus. Claim Appeals Office,* 2009 Colo. App. LEXIS 576 (No. 07CA1581, April 16, 2009) (NSOP). Previously, an admission of liability could only be withdrawn retroactively on the basis of fraud. *Vargo v. Indus. Comm'n,* 626 P.2d 1164 (Colo. App. 1981). To the extent that a case may be re-opened, based on mistake and not fraud, if there were overpayments, the *Vargo* grounds for retroactively modifying a previously admitted award has been altered to include employer mistakes in calculations.

If the Claimant's theory of the case, *i.e.,* that the FALs were *void ab initio*, prevailed, then the Respondents would be entitled to recoup overpayment of $55,780.44 in overpayments made due to the mistake that Dr. Fotheringham was not a Colorado Level II physician, thus, his rating was void. The fallacy with this argument is that the provisions of § 8-42-107 (8) (b.5) (I)(A), C.R.S., allows an out-of-state physician to determine MMI and rate permanent medical impairment provided that the AMA *Guides,* 3rd. Ed., Rev. are used. If a claimant is not satisfied with this proviso, the claimant may request an insurer to pay for the claimant to come to Colorado and be rated by a Colorado Level II Accredited physician. In the present case, both the Respondents and the Claimant accepted Utah ATP Dr. Fotheringham's MMI determination and rating—**End of Story** concerning the FALs. There is a time honored legal principle that the apple cart should not be disturbed unless it is absolutely necessary. in the present case, the statutory scheme on ratings, as referenced herein above, dictate that the FALs should be left well enough alone.

As found, the Petition to Re-open, dated June 6, 2017, on the stated ground of "change of condition," was filed one day short of the expiration of the relevant statute of limitations provision. It was timely and attached to it were medical reports that support a

prima facie case of worsening of condition beginning on March 24, 2017 (Respondents' Exhibit H). creates a disputed factual issue concerning whether the 2017 medical condition was a natural progression of the sequelae of the June 7, 2011 injury, or whether a change or worsening began in March 2017. The Petition postures the issue of "change in condition" for an evidentiary hearing..

CONCLUSIONS OF LAW

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

Final Admissions of Liability (FALs)

a. If the Claimant's theory of the case, *i.e.,* that the FALs were *void ab initio*, prevailed, then the Respondents would be entitled to recoup $55,780.44 in overpayments of PPD benefits made due to the mistake that Dr. Fotheringham was not a Colorado Level II physician, thus, his rating was void. The fallacy with this argument is that the provisions of § 8-42-107 (8) (b.5) (I)(A), C.R.S., allow an out-of-state physician to determine MMI and rate permanent medical impairment provided that the AMA *Guides,* 3rd. Ed., Rev. are used. As found, this occurred. If a claimant is not satisfied with this proviso, the claimant may request an insurer to pay for the claimant to come to Colorado and be rated by a Colorado Level II Accredited physician. In the present case, both the Respondents and the Claimant accepted Utah ATP Dr. Fotheringham's MMI determination and rating. This is dispositive concerning the FALs. There is a time honored legal principle that the apple cart should not be disturbed unless it is absolutely necessary. in the present case, the statutory scheme on ratings, as referenced herein above, dictate that the FALs should be left well enough alone. In light of these statutory provisions, it is unnecessary to deal with issues of estoppel, waiver and laches.

Petition to Re-open

b. A Petition to Re-open is required in this case because TTD was properly terminated claimant will still have to prove a change in condition and greater impact on earning capacity to prove entitlement of future indemnity. Claimant not only achieved MMI, but has worked for at least four employers since MMI. The case was closed by the FALS as the FALS were accepted and approved by the DOWC and claimant accepted the award and did not timely Object. Under § 8-43-303(1), C.R.S., after MMI and within six years of the date of injury, an ALJ may re-open a claim based on fraud, an overpayment, **an error, a mistake,** or a change in condition. See *El Paso County Department of Social Services v. Donn,* 865 P.2d 877 (Colo. App. 1993); *Burke v. Indus. Claim Appeals Office,* 905 P. 2d 1 (Colo. App. 1994); *Hanna v. Print Express, Inc.,* 77 P. 3d 863 (Colo. App. 2003); *Donohoe v. ENT Federal Credit Union,* W.C. No.

4-171-210 [Indus. Claim Appeals Office (ICAO) September 15, 1995]. This is so because MMI is the point in time when no further medical care is reasonably expected to improve the condition. § 8-40-101(11.5), C.R.S. (2009); *City of Colorado Springs v. Indus. Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Where a claimant seeks to re-open based on a changed condition, he must demonstrate a change in condition that is "causally connected to the original compensable injury." *Chavez v. Indus. Comm'n,* 714 P.2d 1328 (Colo. App. 1985). As found, the Claimant has made a prima facie case for re-opening. Endorsement of "petition to reopen" on an application for hearing or response to application for hearing sufficiently raises the issue for consideration. *See Cooper v. Indus. Claim Appeals Office,* 109 P.3d 1056 (Colo. App.2005). Collateral estoppel applies to all issues except "**error, mistake, or a change in condition."** *Cooper v. Indus. Claim Appeals Office,* 998 P.2d 5 (Colo. App. 1999). Consequently, as found, it is appropriate to grant the Claimant's Petition to re-open on the ground of "change of condition." It is not appropriate to grant it on the ground of error or mistake insofar as the FALs were allegedly *void ab initio* because they were **not** *void ab initio.*

Burden of Proof

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

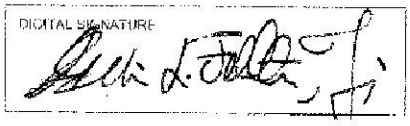
ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Claimant's request to have the previously filed Final Admissions of Liability declared null and void is hereby denied and dismissed. Also, Claimant's request to re-open based on this proposition is hereby denied and dismissed.

B. Claimant's Petition to re-open, based on "change of condition" is hereby granted.

DATED this 23rd day of May 2019..



_____
EDWIN L. FELTER, JR.
Administrative Law Judge

This decision of the administrative law judge does not grant or deny a benefit or a penalty and may not be subject to a Petition to Review. Parties should refer to § 8-43-301(2), C.R.S., and other applicable law regarding Petitions to Review. If a Petition to Review is filed, *see* Rule 26, OACRP, for further information regarding the procedure to be followed.

ISSUES

- What is the proper apportionment of death benefits between the Dependent Claimants?

- Who should be the payee?

FINDINGS OF FACT

1. The Deceased was involved in a fatal accident on March 23, 2018 while working as a roofer for Employer. A gust of wind caught a piece of sheet metal he was working with and caused him to fall from a roof. The accident occurred at approximately 8:33 AM and he was pronounced dead at 2:43 PM that same day. There is no dispute his death was a proximate result of the March 23, 2018 accident.

2. The parties stipulated to an average weekly wage (AWW) of $1,422.23. The parties also stipulated death benefits are payable at the maximum compensation rate of $948.15 in effect on the date of the Deceased's death.

3. Ms. Soto was not married to the Deceased at the time of his death and stipulated she is not entitled to death benefits.

4. The Deceased and Ms. Soto had two children together. J.D. is the Deceased's natural son. His date of birth is May 1, 2009. DNA testing confirmed the probability of paternity at 99.9997%. A.L. is the Deceased's natural daughter. Her date of birth is October 28, 2011. DNA testing confirmed the probability of paternity at 99.99998%. Respondents stipulated that J.D. and A.L. are the Deceased's son and daughter, respectively.

5. J.D. and A.L. are presumed wholly dependent on the Deceased, pursuant to § 8-41-501(1)(b), C.R.S. No evidence was presented to rebut the statutory presumption of dependency, and the ALJ finds J.D. and A.L. were actually dependent on the Deceased for support at the time of his death.

6. The Deceased was not married at the time of his death, and has no children other than J.D. and A.L. The ALJ finds J.D. and A.L. are the only persons eligible to receive workers' compensation death benefits in connection with this claim.

7. J.D. and A.L. are each entitled to death benefits until age 18, or until age 21 if engaged in courses of study as a full-time student in an accredited school.

8. J.D. and A.L. live with Ms. Soto on a full time basis and she is now solely responsible for their support. Ms. Soto is willing and able to apply the benefits in J.D. and

A.L.'s best interests. The ALJ finds Ms. Soto is the best person to act as payee for J.D. and A.L.'s workers' compensation benefits.

9. Ms. Soto requested the death benefits be apportioned "50/50" between J.D. and A.L., which the ALJ finds to be the most reasonable and appropriate apportionment of benefits in this case. The ALJ further finds that, when J.D. or A.L. ceases to be eligible for benefits, the death benefits shall be reallocated 100% to the remaining eligible child, if any.

CONCLUSIONS OF LAW

Death benefits are payable to the dependents of an employee who dies as a proximate result of a work-related accident. Section 8-42-115(1)(b), C.R.S. Dependents and the extent of dependency are determined "as of the date of the injury . . . and the right to death benefits shall become fixed as of said date irrespective of any subsequent change." Section 8-41-503(1), C.R.S. Children of the deceased under the age of 18 are presumed wholly dependent, and children between 18 and 21 years of age are presumed wholly dependent as long as they are engaged in courses of study as full-time students at any accredited school. Section 8-41-501(1)(b) and (c), C.R.S. As found, J.D. and A.L. are the Deceased's sole dependents, and were wholly dependent on the Deceased for support at the time of his injury and death.

Dependents are entitled to two-thirds of the deceased's AWW, subject to the maximum compensation rate in effect on the date of death. Section 8-42-114, C.R.S.; *Richards v. Richards & Richards*, 664 P.2d 254 (Colo. App. 1983). As found, the parties stipulated to an AWW of $1,422.23 and death benefits payable at the rate of $948.15 per week.

Death benefits shall be apportioned among multiple dependents in a manner the ALJ deems "just and equitable." Section 8-42-121, C.R.S. As found, the benefits should be apportioned equally between J.D. and A.L., as long as they are both eligible. When J.D. or A.L. ceases to be eligible for death benefits, the payment shall be reallocated 100% to the remaining eligible child, if any.

The surviving spouse or a friend may apply for death benefits on behalf of the deceased's minor children. Section 8-42-122, C.R.S. The ALJ has discretion to determine the manner and method of payment on behalf of minor children "in such manner as the [ALJ] sees fit." *Id*. As found, the benefits should be paid to Ms. Soto for J.D. and A.L.'s benefit. Ms. Soto is the full-time custodial parent. The ALJ concludes Ms. Soto is willing and able to apply the benefits in the best interests of J.D. and A.L.

ORDER

It is therefore ordered that:

1. Insurer shall pay death benefits of $948.15 per week commencing March 23, 2018 and continuing until terminated according to law.

2. The benefits shall be apportioned equally between J.D. and A.L. as long as both remain eligible. When J.D. or A.L. ceases to be eligible, the payment shall be reallocated 100% to the remaining eligible child, if any.

3. The benefits shall be paid to Ms. Soto as payee, and shall be applied for the benefit of J.D. and A.L.

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

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

DATED: May 24, 2019

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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that his scheduled 9% right upper extremity impairment should be converted to a whole person rating.

2. Whether Claimant is entitled to an additional disfigurement award pursuant to §8-42-108, C.R.S.

FINDINGS OF FACT

1. Claimant is a 35-year-old Plumber's Apprentice who began working for Employer on May 10, 2016. On June 2, 2016 Claimant sustained admitted industrial injuries. He was installing a drain in the attic of a home when he fell through the ceiling. Claimant attempted to arrest his fall by reaching out with both arms to grasp a 2x4, but was unable to adequately grab the wood and experienced a pulling sensation in both arms. He landed in a standing position on the floor.

2. On June 29, 2016 Claimant presented to the emergency department at the University of Colorado. He reported acute right shoulder pain after a work injury that had occurred 27 days earlier. Claimant underwent right shoulder and elbow x-rays. He was released with no treatment recommendations.

3. On July 1, 2016 Claimant was evaluated by Physician Assistant Kayla Marchesani. Because Claimant reported persistent right shoulder pain, PA Marchesani referred him for physical therapy. Claimant subsequently underwent physical therapy for several weeks outside of the Workers' Compensation system.

4. Claimant reported his June 2, 2016 injuries and received treatment from authorized provider Centura Centers for Occupational Medicine (CCOM). On August 31, 2016 Claimant was evaluated at CCOM by Physician Assistant Joseph Mullen. He reported continued right shoulder pain. PA Mullen recommended additional physical therapy and a right shoulder MRI if Claimant failed to improve.

5. Because Claimant's right shoulder condition did not improve he underwent an MRI on September 30, 2016. The imaging revealed severe supraspinatus tendinosis with a partial thickness articular surface tear of the distal insertion extending into the inferior infraspinatus tendon, mild acromioclavicular osteoarthritis and mild increased fluid in the subacromial, subdeltoid bursa consistent with bursitis. On October 5, 2016 Claimant returned to PA Mullen to review the results of his MRI. He reported persistent right shoulder pain. PA Mullen referred Claimant for an orthopedic surgical consultation with Ronald Royce, D.O. at the Colorado Center of Orthopaedic Excellence.

6. On October 24, 2016.Claimant visited Dr. Royce for an evaluation. Dr. Royce recommended a right shoulder rotator cuff repair. The surgery was approved and on January 12, 2017 Claimant underwent the procedure. Dr. Royce specifically performed an arthroscopic rotator cuff repair and subacromial decompression.

7. On January 27, 2017 Claimant returned to Dr. Royce for an examination. He reported that his shoulder was doing well. Claimant was released to begin physical therapy. By February 24, 2017 Claimant reported to Dr. Royce that his right shoulder continued to improve and his range of motion was increasing. Claimant reported pain ranging from 0/10 to 3/10. Dr. Royce directed Claimant to discontinue using a sling and return in three months.

8. On April 10, 2017 Claimant returned to Dr. Royce for an examination. Claimant reported no pain in his right shoulder. Dr. Royce noted that Claimant's cervical spine exhibited normal range of motion and he had completely regained strength in his right arm. He thus discharged Claimant from his care. All of Claimant's subsequent medical treatment was focused on his complaints of bilateral elbow pain.

9. On May 27, 2017 Claimant underwent an MRI of his right elbow that revealed mild tendinosis of the distal biceps tendon, partial tearing and mild bicipital radial bursitis. Based on the MRI results, PA Mullen referred Claimant for an evaluation with Karl Larsen, M.D.

10. On June 23, 2017 Claimant visited Dr. Larsen for an examination. Claimant reported right elbow pain with lifting. Based on Claimant's pain reports and the right elbow MRI, Dr. Larsen recommended surgery. On September 19, 2017 Dr. Larsen performed a distal tendon debridement and repair on Claimant's right elbow.

11. By January 16, 2018 Claimant reported no right shoulder pain and full range of motion to his medical providers at CCOM. He was able to put his arm behind his back for "lift-off testing" with minimal discomfort. In a pain diagram Claimant only reported aching and burning in his elbows. On January 31, 2018 Claimant reported 0/10 pain in his elbows and right shoulder. He stated that he felt very rare discomfort 10% of the time.

12. On February 21, 2018 Claimant underwent an evaluation at CCOM for the last time. He recounted that he had completed occupational therapy and been lifting 80 pounds, 40 pounds and 30 pounds with pulleys. Claimant noted discomfort but no pain when performing the preceding tasks.

13. From March 6, 2018 through May 29, 2018 Claimant was incarcerated and unable to attend his final medical appointments at CCOM. Respondents thus filed a Final Admission of Liability (FAL) pursuant to Rule 7-1(b) based on Claimant's abandonment of his claim. Claimant's attorney objected to the FAL and sought a Division Independent Medical Examination (DIME).

14. On September 5, 2018 Claimant underwent a DIME with Miguel Castrejon, M.D. Dr. Castrejon noted that the application for the DIME listed the

following specific body parts for evaluation: right shoulder; cervical spine; thoracic spine and left elbow. He remarked that there was no mention of the right elbow "though treatment to the right distal biceps tendon can be interpreted as involving the area of the right elbow." Claimant reported that he was experiencing a dull ache over the anterior aspect of his right shoulder down to his right elbow. He did not report any numbness, tingling or cervical spine issues. However, Claimant noted that he suffered some difficulties with forceful strength activities. He specifically commented that he felt generally improved, but continued to experience intermittent discomfort in both elbows that interfered with activities such as holding his daughter.

15. Dr. Castrejon reviewed Claimant's medical records and conducted a physical examination. He remarked that Claimant's cervical spine exhibited full functional range of motion with no midline tenderness. Dr. Castrejon commented that, although Claimant's elbows were tender, his condition had not worsened. He also noted that Claimant's right shoulder was stable. Dr. Castrejon determined that there were no new or worsening conditions that would require additional medical treatment. He thus concluded that Claimant had reached Maximum Medical Improvement (MMI). Relying on the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised) (AMA Guides*), Dr. Castrejon assigned Claimant a 7% upper extremity impairment rating for right shoulder range of motion deficits. He also assigned Claimant a 2% extremity rating for right elbow range of motion limitations. Combining the ratings yields a 9% upper extremity impairment that converts to a 5% whole person rating. Dr. Castrejon recommended maintenance medical benefits in the form of access to orthopedic follow-up over the ensuing six months and a six-month gym membership to allow Claimant to continue his independent exercise program.

16. On October 2, 2018 Respondents filed a FAL consistent with Dr. Castrejon's 9% right upper extremity impairment rating. Respondents also authorized a $1,000 payment to Claimant for disfigurement. Claimant timely objected to the FAL and filed an Application for Hearing seeking to convert his scheduled impairment to a whole person rating and increase his disfigurement award.

17. Claimant testified at the hearing in this matter. He explained that his scheduled impairment should be converted to a whole person rating because he has lost strength in his right arm. Claimant also suffers tightness and pain when repetitively using his right upper extremity. He noted that he has difficulty working with both arms over his head while carrying heavy objects. Finally, Claimant takes medications for his right upper extremity pain.

18. On cross-examination Claimant explained that he was able to put his right arm out in front of his body and raise it over his head. He remarked that he has full range of motion in his cervical spine. The parties reviewed video surveillance of Claimant from March 31, 2019. The video depicts Claimant pulling an approximately 12 foot ladder out of the back of a SUV, lifting it over his head and placing it onto the roof of another truck. Claimant then climbed up the back of the other truck and tied the ladder onto the roof. .He also rotated his head to the left and right with no evidence of

restricted movement or pain. Throughout the video Claimant moves fluidly and demonstrates no restrictions in the use of his right arm, right shoulder or cervical spine.

19. Claimant underwent a disfigurement evaluation at the hearing in this matter. As a result of his June 2, 2016 admitted industrial injuries, Claimant sustained permanent disfigurement to his right shoulder and right elbow areas. The disfigurement consists of four arthroscopic marks on his right shoulder. His right shoulder is also noticeably lower than his left shoulder. Claimant further exhibited an approximately three-inch long scar on the inside of his right elbow. The disfigurement is serious, permanent and normally exposed to public view. Claimant has already received disfigurement benefits in the amount of $1,000.00 for the preceding body parts pursuant to the October 2, 2018 FAL filed in this matter. Accordingly, Claimant is entitled to receive an additional disfigurement award in the amount of $500.00.

20. Claimant has failed to establish that it is more probably true than not that his scheduled 9% right upper extremity impairment rating should be converted to a whole person rating. Initially, on June 2, 2016 Claimant sustained admitted industrial injuries when he fell through a ceiling while installing a drain in an attic. On January 12, 2017 Claimant underwent an arthroscopic rotator cuff repair and subacromial decompression of his right shoulder. On September 19, 2017 Claimant underwent a distal tendon debridement and repair on his right elbow. By April 10, 2017 Dr. Royce noted that Claimant's cervical spine had normal range of motion and he had completely regained strength in his right arm. Dr. Royce thus discharged Claimant from his care. By January 16, 2018 Claimant reported no right shoulder pain and full range of motion to his medical providers at CCOM. He was able to put his arm behind his back for "lift-off testing" with minimal discomfort. In a pain diagram Claimant only noted aching and burning in his elbows. On January 31, 2018 Claimant reported no pain in his elbows and right shoulder. He felt very rare discomfort 10% of the time.

21. At Claimant's DIME with Dr. Castrejon on September 5, 2018 he reported a dull ache over the anterior aspect of his right shoulder into his right elbow but did not mention any numbness, tingling or cervical spine issues. However, Claimant noted that he experienced some difficulty with forceful strength activities. He specifically commented that he felt generally improved, but continued to suffer intermittent discomfort in both elbows that interfered with activities such as holding his daughter. Upon examination, Claimant's cervical spine exhibited full functional range of motion with no midline tenderness. Claimant's elbows were tender and his right shoulder was stable. Dr. Castrejon determined that there were no new or worsening conditions that required additional medical treatment. Relying on the *AMA Guides*, Dr. Castrejon assigned Claimant a 7% upper extremity impairment rating for right shoulder range of motion deficits. He also assigned Claimant a 2% extremity rating for right elbow range of motion limitations. Combining the ratings yields a 9% upper extremity impairment.

22. The preceding medical records reflect that Claimant's functional disability is limited to overhead lifting and arm movement. Furthermore, Claimant testified that he continues to experience pain in his right shoulder and right elbow. Claimant's right upper extremity symptoms are thus limited to his arm and do not extend into a portion of

his body beyond the schedule of impairments. Notably, the surveillance video reflects Claimant's ability to engage in overhead activities with no evidence of impairment or restricted range of motion. The situs of Claimant's functional impairment is thus in his right upper extremity and does not extend beyond the schedule of disabilities. Accordingly, Claimant's request to convert his 9% right upper extremity scheduled impairment rating to a whole person rating is denied and dismissed.

CONCLUSIONS OF LAW

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

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

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

Whole Person Conversion

4. Section 8-42-107(1)(a), C.R.S. limits medical impairment benefits to those provided in §8-42-107(2), C.R.S. when a claimant's injury is one enumerated in the schedule of impairments. The schedule includes the loss of the "arm at the shoulder." *See* §8-42-107(2)(a), C.R.S. However, the "shoulder" is not listed in the schedule of impairments. *See Bolin v. Wacholtz*, W.C. No. 4-240-315 (ICAO, June 11, 1998). When an injury results in a permanent medical impairment not set forth on a schedule of impairments, an employee is entitled to medical impairment benefits paid as a whole person. *See* §8-42-107(8)(c), C.R.S.

5. Because §8-42-107(2)(a), C.R.S. does not define a "shoulder" injury, the dispositive issue is whether a claimant has sustained a functional impairment to a

portion of the body listed on the schedule of impairments. *See Strauch v. PSL Swedish Healthcare*, 917 P.2d 366, 368 (Colo. App. 1996). Whether a claimant has suffered the loss of an arm at the shoulder under §8-42-107(2)(a), C.R.S., or a whole person medical impairment compensable under §8-42-107(8)(c), C.R.S., is determined on a case-by-case basis. *See DeLaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000).

6. The Judge must thus determine the situs of a claimant's "functional impairment." *Velasquez v. UPS,* W.C. No. 4-573-459 (ICAO Apr. 13, 2006). The situs of the functional impairment is not necessarily the site of the injury. *See In re Hamrick*, W.C. No. 4-868-996-01 (ICAO, Feb. 1, 2016); *In re Zimdars,* W.C. No. 4-922-066-04 (ICAO, Feb. 4, 2015). Pain and discomfort that limit a claimant's ability to use a portion of the body is considered functional impairment for purposes of determining whether an injury is off the schedule of impairments. *In re Johnson –Wood*, W.C. No. 4-536-198 (ICAO, June 20, 2005); *Vargas v. Excel Corp.,* W.C. 4-551-161 (ICAO, Apr. 21, 2005). However, the mere presence of pain in a portion of the body beyond the schedule does not require a finding that the pain represents a functional impairment. *Lovett v. Big Lots,* WC 4-657-285 (ICAO, Nov. 16, 2007); *O'Connell v. Don's Masonry,* W.C. 4-609-719 (ICAO, Dec. 28, 2006).

7. As found, Claimant has failed to establish by a preponderance of the evidence that his scheduled 9% right upper extremity impairment rating should be converted to a whole person rating. Initially, on June 2, 2016 Claimant sustained admitted industrial injuries when he fell through a ceiling while installing a drain in an attic. On January 12, 2017 Claimant underwent an arthroscopic rotator cuff repair and subacromial decompression of his right shoulder. On September 19, 2017 Claimant underwent a distal tendon debridement and repair on his right elbow. By April 10, 2017 Dr. Royce noted that Claimant's cervical spine had normal range of motion and he had completely regained strength in his right arm. Dr. Royce thus discharged Claimant from his care. By January 16, 2018 Claimant reported no right shoulder pain and full range of motion to his medical providers at CCOM. He was able to put his arm behind his back for "lift-off testing" with minimal discomfort. In a pain diagram Claimant only noted aching and burning in his elbows. On January 31, 2018 Claimant reported no pain in his elbows and right shoulder. He felt very rare discomfort 10% of the time.

8. As found, at Claimant's DIME with Dr. Castrejon on September 5, 2018 he reported a dull ache over the anterior aspect of his right shoulder into his right elbow but did not mention any numbness, tingling or cervical spine issues. However, Claimant noted that he experienced some difficulty with forceful strength activities. He specifically commented that he felt generally improved, but continued to suffer intermittent discomfort in both elbows that interfered with activities such as holding his daughter. Upon examination, Claimant's cervical spine exhibited full functional range of motion with no midline tenderness. Claimant's elbows were tender and his right shoulder was stable. Dr. Castrejon determined that there were no new or worsening conditions that required additional medical treatment. Relying on the *AMA Guides*, Dr. Castrejon assigned Claimant a 7% upper extremity impairment rating for right shoulder range of

motion deficits. He also assigned Claimant a 2% extremity rating for right elbow range of motion limitations. Combining the ratings yields a 9% upper extremity impairment.

9. As found, the preceding medical records reflect that Claimant's functional disability is limited to overhead lifting and arm movement. Furthermore, Claimant testified that he continues to experience pain in his right shoulder and right elbow. Claimant's right upper extremity symptoms are thus limited to his arm and do not extend into a portion of his body beyond the schedule of impairments. Notably, the surveillance video reflects Claimant's ability to engage in overhead activities with no evidence of impairment or restricted range of motion. The situs of Claimant's functional impairment is thus in his right upper extremity and does not extend beyond the schedule of disabilities. Accordingly, Claimant's request to convert his 9% right upper extremity scheduled impairment rating to a whole person rating is denied and dismissed.

Disfigurement

10. Section 8-42-108, C.R.S. provides that a claimant may obtain additional compensation if he is seriously disfigured as the result of an industrial injury. As found, Claimant underwent a disfigurement evaluation at the hearing in this matter. As a result of his June 2, 2016 admitted industrial injuries, Claimant sustained permanent disfigurement to his right shoulder and right elbow areas. The disfigurement consists of four arthroscopic marks on his right shoulder. Notably, his right shoulder is also noticeably lower than his left shoulder. Claimant further exhibited an approximately three-inch long scar on the inside of his right elbow. The disfigurement is serious, permanent and normally exposed to public view. Claimant has already received disfigurement benefits in the amount of $1,000.00 for the preceding body parts pursuant to the October 2, 2018 FAL filed in this matter. Accordingly, Claimant is entitled to receive an additional disfigurement award in the amount of $500.00.

ORDER

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

1. Claimant's request to convert his 9% right upper extremity scheduled impairment to a whole person rating is denied and dismissed.

2. Claimant shall receive an additional disfigurement award in the amount of $500.00.

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

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

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

DATED: May 24, 2019.

DIGITAL SIGNATURE:
Peter J. Cannici

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

STATE OF COLORADO **OFFICE OF ADMINISTRATIVE COURTS** 1525 Sherman Street, 4th Floor Denver, CO 80203	
In the Matter of the Workers' Compensation Claim of: **D,** **Claimant,** **vs.** **L** **Employer, and** **A,** **Insurer, Respondents.**	▲ **COURT USE ONLY** ▲ **CASE NUMBER:** **WC 5-084-486-001**
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER	

Administrative Law Judge Margot W. Jones presided at the hearing in this matter on March 22, 2019, in Greeley, Colorado. Claimant, Delynn Dudenhoeffer, was present at the hearing and represented by Regina M. Walsh Adams, Esq. Lisa Simons, Esq. represented Respondents, City of Loveland and Pinnacol Assurance. The parties' exhibits 1-11 and A,B,D,E,F,G,H,I,J,K,L,M,N.O,S,W,Y, Z were admitted into evidence. All other exhibits submitted on behalf of the Respondents are withdrawn. The Judge held the record open until May 6, 2019, for the parties' position statements.

In this order, D will be referred to as "Claimant," L will be referred to as "Employer" and A will be referred to as "Insurer." Employer and Insurer will be referred to collectively as "Respondents."

Also in this order, "Judge" or "ALJ" refers to the Administrative Law Judge, "C.R.S." refers to Colorado Revised Statutes, "OACRP" refers to the Office of Administrative Courts Rules of Procedure, 1 CCR 104-1, WCRP" refers to Workers' Compensation Rules of Procedure, 7 CCR 1101-3 and "the Act" refers to the Workers' Compensation Act of Colorado, Section 8-40-101, et seq., C.R.S.

ISSUE

The issue for consideration is whether Claimant sustained her burden of proof to establish by a preponderance of the evidence that the chiropractic treatment as ordered by Claimant's Authorized Treating Provider is reasonably necessary and related medical treatment.

FINDINGS OF FACT

1. Claimant worked as a sales tax auditor for the City of Loveland when on July 30, 2018, Claimant was descending stairs when she slipped down the stairs injuring her low back, neck, left wrist, left foot and knee and right foot and ankle.

2. Claimant had previous injuries with Employer where she slipped and fell on ice and injured her left wrist, neck and back on February 1, 2017, had an auto accident on March 27, 2017, injuring her head and neck and slipped on ice on February 5, 2018, injuring her left knee, right hand and low back.

3. Since the accident of July 30, 2018, Claimant's left wrist, left and right lower extremities have gotten better and she is no longer treating for these body parts. Claimant's back and neck were aggravated in the fall and she is still receiving treatment for these body parts.

4. While Claimant's neck and back injuries were aggravated by this accident, with treatment, the symptoms are not quite as severe as they were following the accident of July 30, 2018, due to treatment received to date.

5. Following her accident of July 30, 2018, Claimant went to Banner Occupational Medicine where she was seen by Bryan Copas, PA-C who then referred her to a physiatrist. Currently, Claimant's authorized treating provider is Greg Reichhardt, M.D., a physiatrist who was treating Claimant for her other workers' compensation claims. Claimant was given massage therapy with Mary Yosick, M.T. from October through November, 2018. She also had acupuncture. Neither of these modalities have resolved her back and neck injuries, however, they did help her pain to a certain degree.

6. On October 22, 2018, Dr. Reichhardt recommended chiropractic evaluation and treatment for eight visits for Claimant's neck and low back with no high velocity manipulation. The request for authorization was submitted on November 12, 2018, for the July 30, 2018 claim.

7. On November 16, 2018, Dr. Raschbacher performed an in-house review of some medical records regarding the current claim at Respondent/Insurer's location. He reports having seen records for the claim previously and suggested that Claimant have a fitness for duty evaluation by Employer since she had persistent falls. Dr. Raschbacher did not specifically deny chiropractic treatment at this time but rather recommended that no further care under this claim or any of Claimant's other claims be authorized.

8. Dr. Raschbacher's testimony at hearing indicated that he did not recall what specific medical records were shown to him when he performed an in-house evaluation of Claimant's request for authorization of chiropractic treatment nor did he recall which individual from Insurer was present when he evaluated the claim. He did not recall how many other claims that he evaluated that day and could not recall how long this evaluation took him. Dr. Raschbacher never examined Claimant.

9. Prior to any of the workers' compensation claims with the Employer, Claimant had chiropractic treatment for neck and back issues in 2009 through 2015. The treatment was not constant as Claimant had 9 treatments from August 3, 2009, through October 19, 2009, then 4 treatments from January 28, 2011, through February 16, 2011, and 10 treatments from February 27, 2012, through May 30, 2012. Then on January 13 and 24, 2013, Claimant returned for chiropractic treatment. Finally, she had 5 chiropractic treatments from July 28, 2015, through August 3, 2015.

10. From August 4, 2015, until Claimant's work injuries of 2017, she has not had any chiropractic treatment.

11. Following the accident of February 1, 2017, Claimant was sent to Cavallo Chiropractic for both chiropractic and massage therapy. There were approximately 15 chiropractic treatments during the time period between February 8, 2017, and June 25, 2018. These chiropractic treatments treated Claimant's back and/or neck injuries and/or aggravations through Claimant's three accidents.

12. Claimant testified that chiropractic treatment has helped improve her pain and function in the past. Dr. Raschbacher testified that he thought that the chiropractic treatment did not help improve Claimant's condition.

13. Dr. Raschbacher testified that Claimant had already had an abundance of chiropractic, massage and physical therapy for her injuries with no real improvement. Dr. Raschbacher could not give an exact number or chiropractic treatments that Claimant had since her first injury of February 2, 2017.

14. When asked about Claimant's ongoing need for chiropractic care due to her several re-injuries of her back and neck, Dr. Raschbacher responded that that was possible except that she had never gotten better from the accident back in 2009 and so it was his belief that chiropractic treatment did not help Claimant functionally.

15. There is no evidence that Claimant got better or did not get better from her accident in 2009 and there is only a long gap in treatment for several years for her neck and back injuries from 2015 to 2017.

16. Dr. Reichhardt, in a letter to Laura Harrington at Insurer, opined that the chiropractic treatment for her work related injury is reasonable and necessary and related to the July 30, 2018, injury. He noted that the recommendation is consistent with the Medical Treatment Guidelines. Dr. Reichhardt noted that the goal is to give Claimant

enough symptomatic relief that she can make further progress and advance her independent exercise program and core stabilization program.

CONCLUSIONS OF LAW

General Legal Principles

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

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

3. In this case, Claimant is seeking chiropractic treatment for injuries to her back and neck. This is based on the recommendation of her authorized treating provider, Greg Reichhardt, M.D. Claimant has had four separate work accidents since February 1, 2017. She has had chiropractic treatment in the past and it has helped her. Dr. Reichhardt has been Claimant's treating physician since her first injury of 2017. He has examined her and is aware of what treatments are going to work and what treatments will not work for her.

4. Dr. Raschbacher reviewed a portion of Claimant's file but cannot remember exactly what documents he has reviewed. Additionally, he never examined Claimant and has never taken a full history of Claimant's injuries from the past four workers' compensation accidents since February 1, 2017 through the current injury of July 30, 2018.

5. In this matter, the medical opinions of Dr. Reichhardt and Claimant are more persuasive than that of Dr. Raschbacher.

Medical Benefits

6. Claimant bears the burden of establishing entitlement to medical treatment. *See Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). Once a claimant has established a compensable work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary medical care to cure and relieve the effects of the work injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990).

7. Claimant has had four work accidents from February 1, 2017 through July 30, 2018. She received treatment as a result of each of the accidents. Unfortunately, each of the accidents represented an aggravation to her low back and/or neck. Thus she has had a series of setbacks.

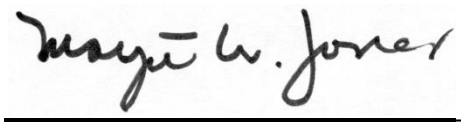
8. Even though Claimant has had chiropractic treatment for the February 1, 2017 injury, she has not had chiropractic treatment for this injury in question. As Dr. Reichhardt has stated, the chiropractic recommendation is consistent with the Medical Treatment Guidelines. Claimant is highly motivated to participate in her medical care and get better.

9. By a preponderance of the evidence, Claimant proved that the recommended chiropractic treatment is reasonable, necessary and related to her occupational injury of July 30, 2018.

ORDER

1. Respondents shall pay for chiropractic treatment as recommended by Dr. Reichhardt.

This 22nd day of May, 2019.



Margot W. Jones

Administrative Law Judge

Office of Administrative Court

1525 Sherman Street, 4th Floor

Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-377-675-001

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on May 21, 2019, in Denver, Colorado. The hearing was digitally recorded (reference: 5/21/19, Courtroom 2, beginning at 8:30 AM, and ending at 10:00 AM).

Claimant's Exhibit 1, pages 1 to 15 was admitted into evidence, without objection. Respondents' Exhibits A through C were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ took the matter under advisement and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern the Claimant's Petition to Re-open medical benefits for his right and left foot crush injuries of July 4, 1997. Respondents raised the affirmative defense of statute of limitations.

The Claimant has the burden of proof, by a preponderance of the evidence on the alleged change of condition of Claimant's feet and for subsequent medical benefits. Respondents bear the burden on the affirmative defense of statute of limitations.

FINDINGS OF FACT

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

Preliminary Findings

1. The Claimant sustained work-related forklift crush injuries to both feet on July 4, 1997.

2. Respondents ultimately filed a Final Admission of Liability (FAL), dated September 14, 2010, admitting for reasonably necessary post maximum medical improvement (MMI) [*Grover* medicals] medical maintenance benefits; an average weekly wage of $969.12; an MMI date of July 15, 2010; temporary total disability (TTD) benefits through June 26, 2010; permanent partial disability (PPD) benefits, based on 14% of the left foot (LUE) and 12% of the right foot (RUE); and, bodily disfigurement (Respondents' Exhibit B).

Procedural History

3. The Claimant was initially placed at MMI on May 12, 1998. His claim was reopened in 2006 due to ongoing pain and he underwent fusion surgery on his right big toe. After the surgery, he was placed back at MMI on November 14, 2006.

4. On November 21, 2006, Respondents filed a FAL, admitting for 11% right foot impairment, 2% left foot impairment, disfigurement, and maintenance medical benefits.

5. The case was reopened in 2010 after the condition of Claimant's right foot worsened. The Claimant underwent a hardware removal and fusion revision of the right big toe on February 19, 2010. Respondents filed a General Admission of Liability (GAL), admitting for TTD benefits, beginning February 18, 2010. The Claimant's authorized treating physician (ATP), John Sanidas, M.D., placed the Claimant at MMI as of July 15, 2010, and Respondents filed the FAL referenced in paragraph 2 above.

6. On November 30, 2018, the Claimant filed a Petition to Reopen and an Application for Hearing, seeking benefits for his left foot. This was approximately 21 years after the date of injury.

7. The last indemnity benefit was paid in 2010, at least seven years before the Petition to Reopen was filed.

8. On March 1, 2019, ALJ Kara Cayce granted Respondents' Motion for Partial Summary Judgment concerning indemnity benefits because reopening thereof was barred by the statute of limitations (Respondents' Exhibit B). ALJ Cayce's decision concerning indemnity benefits establishes the law of the case.

Scott G. Resig, M.D., Authorized Surgeon

9. On March 23, 2006, Dr. Resig implicitly was of the opinion that surgical correction was appropriate for both feet.

John Sanidas, M.D., ATP

10. On November 15, 2006, ATP Dr. Sanidas was of the opinion that when Claimant decided to have surgery on his left great toe, the Claimant should be allowed to reopen his case.

Respondents' Independent Medical Examiner (IME), F. Mark Paz, M.D.

11. Dr. Paz performed an IME on January 24, 2019, and issued a report dated February 18, 2019 (Respondents' Exhibit C).

12. Dr. Paz seemingly concedes that "the development of osteoarthritis of the MTP joint of the **left** (emphasis supplied) great toe may have been attributed to **trauma** (emphasis supplied) of the cartilage of the MTP joint of the left great toe." Ultimately, Dr. Paz is of the opinion that any worsening or change of condition in the feet is not attributable to a change or worsening of the original 1997 injuries.

13. Dr. Paz states the ultimate opinion that it is unlikely that the present condition of the Claimant's left toe is causally related to the 1997 injury. In his testimony at the hearing, Dr. Paz stated that it is not probable that the present condition of the Claimant's **left** foot is causally related to the 1997 injury.
‘

14. Dr. Paz defers to Dr. Resig with respect to treatment for the left foot great toe osteosarthritis.

15. Also,, in his report, Dr. Paz opines that if "surgical removal of the hardware in the right great toe is a consideration of Dr. Resig, the treatment would be reasonable, necessary and causally related to the July 4, 1997, incident." Dr. Paz re-affirmed this opinion in his testimony at the hearing.

The Claimant

16. According to the Claimant, Dr. Resig and Dr. Sanidas have caused him to feel that he would be more comfortable with less pain if the hardware were removed from his right foot. Ultimately, the advisability of this would be in the judgment of the Claimant's ATPs.

Ultimate Findings

17. The decision of ALJ Cayce, granting partial summary judgment in favor of the Respondents, which barred indemnity benefits by virtue of the statute of limitations established the law of the case.

18. After more than 10 years since the ATPs dealt with the Claimant's **left** foot, the ALJ finds the opinion of IME Dr. Paz relative thereto credible and persuasive. There are no recent opinions of Dr. Sanidas or Dr. Resig that refute Dr. Paz's opinion in this regard. Concerning the removal of the hardware in the Claimant's right foot, the ALJ finds Dr. Paz's opinion that it is causally related credible and persuasive.

19. The Claimant has failed to prove, by preponderant evidence that there has been a causally related worsening or change of condition of the left foot, however, the Claimant has proven, by a preponderance of the evidence that removal of the hardware in the right foot is causally related to the admitted 1997 injury and it is reasonably necessary to maintain the Claimant at MMI and to prevent deterioration of his condition.

CONCLUSIONS OF LAW

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

Law of the Case

a. ALJ Cayce granted Respondents' motion for partial summary judgment, determining that reopening of indemnity claims was barred by the relevant statute of limitations. § 8-43-303, C.R.S. ALJ Cayce, therefore, established the "law of the case," and this ALJ is bound by her determination, absent a clear error or changed circumstance, regardless of whether this ALJ disagrees with ALJ Cayce's' determination in this regard. This ALJ, however, does not disagree with her determination. *See Buckley Powder Co. v. State,* 70 P.3d 547 (Colo. App. 2002); *Giampapa v. American Family Mut. Ins. Co.,* 64 P.3d 230 (Colo. 2003); *Arizona v. California,* 460 U.S. 605, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983).

Credibility

b. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the medical evidence concerning removal of the hardware in the right foot is undisputed. *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As further found, after more than 10 years since the ATPs dealt with the Claimant's **left** foot, the ALJ found the opinion of IME Dr. Paz relative thereto credible and persuasive. There were no recent opinions of Dr. Sanidas or Dr. Resig that refute Dr. Paz's opinion in this regard. Concerning the removal of the hardware in the Claimant's right foot, Dr. Paz's opinion that it is causally related was credible and persuasive.

Reopening

c. Under § 8-43-303(1), C.R.S., after MMI and within six years of the date of injury, an ALJ may re-open a claim based on fraud, an overpayment, **an error, a mistake,** or a change in condition. See *El Paso County Department of Social Services*

v. Donn, 865 P.2d 877 (Colo. App. 1993); *Burke v. Indus. Claim Appeals Office,* 905 P. 2d 1 (Colo. App. 1994); *Hanna v. Print Express, Inc.,* 77 P. 3d 863 (Colo. App. 2003); *Donohoe v. ENT Federal Credit Union,* W.C. No. 4-171-210 [Indus. Claim Appeals Office (ICAO) September 15, 1995]. This is so because MMI is the point in time when no further medical care is reasonably expected to improve the condition. § 8-40-101(11.5), C.R.S. (2009); *City of Colorado Springs v. Indus. Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Where a claimant seeks to re-open based on a worsened condition, she must demonstrate a change in condition that is "causally connected to the original compensable injury." *Chavez v. Indus. Comm'n,* 714 P.2d 1328 (Colo. App. 1985). Endorsement of "petition to reopen" on an application for hearing or response to application for hearing sufficiently raises the issue for consideration. *See Cooper v. Indus. Claim Appeals Office,* 109 P.3d 1056 (Colo. App.2005). There is no restriction as to the number of times a case may be re-opened and when based upon new or different evidence no such limitation may be imposed by the courts, that being a matter for legislative expression. *Graden Coal Co. v. Ytoarralde,* 137 Colo. 527, 328 P.2d 105 (1958)

d. The ALJ notes and finds that the latest FAL admits for post-MMI medical maintenance benefits. Removal of the hardware in the right foot, depending on Dr. resig's determination, could be characterized as a post-MMI medical maintenance benefit. *See* An employee is entitled to continuing medical benefits after MMI if reasonably necessary to relieve the employee from the effects of an industrial injury. *See Grover v. Indus. Comm'n of Colorado*, 759 P.2d 705 (Colo. 1988). The record must contain substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve a claimant from the effects of an injury or to prevent further deterioration of his condition. *Stollmeyer v. Indus. Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995);*Grover v. Indus. Comm'n, supra*. Such evidence may take the form of a prescription or recommendation for a course of medical treatment necessary to relieve a claimant from the effects of the injury or to prevent further deterioration. *Stollmeyer v. Indus. Claim Appeals Office, supra*. **An injured worker is ordinarily entitled to a general award of future medical benefits, subject to an employer's right to contest causal relatedness and reasonable necessity.** *See Hanna v. Print Expediters,* 77 P.3d 863 (Colo. App. 2003). Treatment to **improve** a claimant's condition does **not** fall under the purview of *Grover* benefits. *Shalinbarger v. Colorado Kenworth, Inc.,* W.C. No. 4-364-466 [Indus. Claim Appeals Office (ICAO), March 12, 2001]. As found, Claimant is entitled to admitted maintenance medical care, which is reasonably necessary to address the injury. He has demonstrated that removal of the hardware in the right foot fits post-MMI medical maintenance criteria.

Medical/Causal Relatedness

d. The employee must prove a causal relationship between the injury and the medical treatment for which the worker is seeking benefits. *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. Ct. App. 1997). Treatments for a condition

not caused by employment are not compensable. *Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187, 1189 (Colo. Ct. App. 2002). An industrial accident is the proximate cause of a claimant's disability if it is the necessary precondition or trigger of the need for medical treatment. *Subsequent Injury Fund v. State Compensation Insurance Authority,* 768 P.2d 751 (Colo. App. 1988). In order to prove that an industrial injury was the proximate cause of the need for medical treatment, an injured worker must prove a causal nexus between the need for treatment and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). It is for the ALJ, as the fact-finder, to determine whether a need for medical treatment is caused by the industrial injury, or some other intervening injury. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). Respondents are liable for the "direct and natural consequences" of a work-related injury, including consequential injuries caused by the original compensable injury. *See Travelers Ins. Co. v. Savio*, 806 P.2d 1258 (Colo. 1985). The chain of causation, however, can be broken by the occurrence of an independent intervening injury. *See* 1 A. *Larson, Workers' Compensation Law,* section 13.00 (1997). As found, the Claimant has established the causal nexus of the removal of the right foot hardware to the admitted 1997 injury. He has failed to do so with respect to the left foot, unless an ATP subsequently opines that it is related.

Burden of Proof

e. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to reopening and additional benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Respondents proved their affirmative defense of statute of limitations with respect to reopening of indemnity claims. Also, Claimant has proven that a reopening is warranted with respect to removal of the hardware in the right foot. The Claimant has failed to prove that the present condition of his left foot is causally related to the 1997 injury.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant's case with respect to removal of the hardware in his right foot is hereby reopened.

B. A reopening of matters with respect to the left foot is hereby denied and dismissed without prejudice.

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

DATED this 28th day of May 2019.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-065-966-003

ISSUES

I. Whether Claimant established by a preponderance of the evidence that her influenza, which resulted in hospitalization for pneumonia, is compensable.

II. Temporary total disability benefits from December 27, 2019 to January 22, 2019.

STIPULATIONS

The parties reached the following stipulations:

1. Claimant's average weekly wage is $723.58.
2. If the claim is found compensable, Claimant is entitled to $1,791.72 in TTD benefits from December 27, 2017, through January 22, 2018.

FINDINGS OF FACT

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

1. Claimant is a registered nurse, who has worked for Employer for approximately the past 18 years.
2. In December 2017, Claimant worked at BCH Gunbarrel Family Practice. (*Hrg. Tr. pg. 12, lns 2-4*). The clinic treats a variety of medical conditions from wellness visits, diabetes, hypertension, as well as sick patients. (*Hrg. Tr. pg. 12, lns. 10-13*).
3. In 2017, Claimant worked on December 20th, December 21st, and December 22nd. Claimant did not work on December 23rd, December 24th, and December 25th. (*Ex. G, pg. 51*).
4. On December 26, 2017, claimant began to feel ill while at work. Claimant's husband, Dr. David Orgel, prescribed her Tamiflu on Wednesday, December 27, 2017. (*Resp. Ex. B, pg. 6*).
5. On December 31, 2017, Claimant presented to the emergency department. (*Resp. Ex. B. pg. 6*). Claimant tested positive for the flu. (*Resp. Ex. B, pg. 16*). Claimant was diagnosed with pneumonia. (*Resp. Ex. B, pg. 7*). Claimant was hospitalized on December 31, 2017, and discharged on January 2, 2018.
6. Claimant followed up with her primary care physician on January 4, 2018, and reported she was feeling better, but fatigued. (*Resp. Ex. D, pg. 19*). On January

12, 2018, Claimant returned to her primary care physician, reporting that she was no longer ill, but she was fatigued and had a cough. Claimant felt she could not go back to work. (Resp. Ex. D, pg. 23).

7. Claimant testified that as part of her job she escorts patients to the exam room and takes their vital signs and obtains a history. (*Hrg. Tr. pg. 30, lns. 7-19*). Claimant testified that she saw between twelve and fourteen patients a day. (*Hrg. Tr. pg. 17, ln. 1*). Claimant did not sit at her desk much during her shift. (*Hrg. Tr. pg. 29, lns. 21-25; pg. 30, lns. 1-3*).

8. Claimant testified that the urgent care facility is separated from the clinic. (*Hrg. Tr. pg. 29, lns. 5-6*). Claimant testified that the exam rooms are separated by a door from the waiting room. (*Hrg. Tr. pg. 30, lns. 17-20*). Claimant's potential exposure while at work was mostly limited to the patients she cared for and Claimant was not exposed to all patients at the clinic or the urgent care facility attached to the clinic.

9. Claimant testified that the nurse practitioner, a different employee, handled most of the urgent care type of cases and saw sick patients in order to take that workload off the physicians who saw regularly scheduled patients. (*Hrg. Tr. pg. 17, lns. 5-9*). Claimant testified the majority of the flu tests were ordered and performed by the nurse practitioner because she covered the "flu people." (*Hrg. Tr. pg. 18, lns. 10-12*). Claimant was not caring for ill patients as her primary responsibility because the ill patients were seen by the nurse practitioner.

10. Claimant testified that she could not recall interacting with any patients who showed signs or symptoms of the flu. (*Hrg. Tr. pg. 20, lns. 1-4*). Specifically, Claimant testified that she could not recall any contact with a patient that coughed or sneezed on her on either December 21, 2017, or December 22, 2017. (*Hrg. Tr. pg. 40, lns. 24-25; pg. 41, lns. 1-4*). Rather, Claimant could only state that she was merely in the proximity of people who showed influenza-like symptoms. (*Hrg. Tr. pg. 20, lns. 10-13*).

11. Claimant testified that during the three days she was off from work, December 23rd, 24th, and 25th, she did not go anywhere. (*Hrg. Tr. pg. 32, lns 10-11*). However, Claimant testified that she had family in town visiting. (*Hrg. Tr. pg. 32, lns. 21-25*). On December 25, 2017, Claimant had additional family over, including a two-year-old child. (*Hrg. Tr. pg. 33, ln. 14-23; pg. 34, ln. 1*). Claimant also admitted to having friends, a family of four, attend Christmas dinner. (*Hrg. Tr. pg. 34, lns 5-7*).

12. Claimant testified that when she began to feel ill and reported this to Employer, she did not report that she had a work-related injury. (*Hrg. Tr. pg. 36, lns. 8-15*).

13. Dr. Orgel testified that he completed the Workers' Claim for Compensation on behalf of his wife. (*Hrg. Tr. pg. 58, lns. 21-24*). It was not until Claimant was hospitalized and incurred hospital costs that Claimant's husband, a workers' compensation physician, helped Claimant file a claim.

14. Dr. Orgel provided an expert report on behalf of his wife on March 2, 2018. Dr. Orgel opined that transmission of the flu virus can occur through droplets, which

can remain suspended in the air and disseminated by air currents to susceptible hosts. Dr. Orgel also noted that influenza can survive on a variety of surfaces for 48 hours and can be "vectors of transmission." (*Clmt Ex. 4, pg. 43*). Dr. Orgel opined that the incubation period for influenza was one to four days. Dr. Orgel concluded, based on his wife's representations, that there was widespread influenza in her clinic with 14 confirmed cases of flu and many more patients presenting with influenza-like illnesses. Dr. Orgel attributed the cause of the spread of the influenza in his wife's office was the failure of the clinic's preventative measures. (*Clmt Ex. 4, pg. 44*).

15. Dr. Orgel also stated in the "Discussion" section of his March 2, 2018, report that:

> In the case of [Claimant] there was widespread influenza, with 14 confirmed cases [between December 19th and December 27th] and many more patients presenting with influenza-like-illness, with two of her coworkers coming down with influenza at the time of her illness. This included a coworker who on December 24 was diagnosed with influenza, and the physician that she worked with who was also diagnosed with influenza on December 27. (*Clmt Ex. 4, pg. 41 and 43*).

16. However, Respondents submitted a log of the flu tests that were ordered at the Gunbarrel Clinic from November 27th through December 29th. Contrary to Dr. Orgel's contention that there were 14 confirmed cases of the flu, the log only documents 1 positive flu test between December 19th and December 22nd, which is the last day Claimant worked before getting sick with the flu on the 26th. Moreover, the positive flu test was ordered on December 19, 2017, which predates the incubation period for such patient to have possibly transmitted the flu virus to Claimant.

17. Dr. Orgel also stated in his March 2, 2018, report that Claimant:

> [D]escribes exposures in the work environment that include coughing directly on her as well as ill patients and coworkers around her in the days before her illness.

18. Claimant, however, testified that she could not recall any contact with a patient that coughed or sneezed on her on either December 21, 2017, or December 22, 2017. (*Hrg. Tr. pg. 40, lns. 24-25; pg. 41, lns. 1-4*).

19. Dr. Orgel also stated in his report that transmission of the flu virus can be transmitted by droplets, which can remain suspended in the air and disseminated by air currents to susceptible hosts. He goes on to opine that this type of transmission:

> [I]s not always prevented by special air handling units, particularly in an outpatient setting where this sort of ventilation engineering control is typically not present. (*Id at pg. 43*).

20. Therefore, Dr. Orgel appears to be stating that the ventilation system at the clinic also acted as a conduit by which Claimant could have been inoculated with the flu virus while at work. However, there is no indication in his report that he has any personal knowledge as to the air handlers and/or filters in use at the clinic. There is also no indication that he has sufficient expertise in the transmission of influenza virus through ventilation systems. Therefore, such statement appears to be purely speculative.

21. Dr. Orgel also issued a supplemental report on August 21, 2018. In his report, he states that other than her family, Claimant had "minimal outside contacts." (Ex. 4., pg. 46.) This statement is contrary to Claimant's testimony that after she left work on December 22, 2017, she was only exposed to family members.

22. Dr. Orgel also stated in his report that with the incubation period being 1-4 days, Claimant was only exposed to other family members who did not come down with influenza in the 2 weeks before or 10 days after her illness.

23. Claimant also testified that after she left work on December 22, 2017, she did not have contact with anyone, except for family members, and none of them came down with the flu, and therefore, they could not have inoculated her with the virus. Such testimony, however, is not found to be credible or reliable for a number of reasons. First, as credibly and persuasively testified to by Dr. Roth, a person can be a carrier of the flu virus, be shedding the virus, and not be sick. Second, Claimant testified that she had company over Christmas Eve, for desert, and then had additional family members come over on Christmas. This included one of their sons, a two-year-old child, and another family of four. Despite having company over on Christmas Eve and Christmas, Claimant also testified that she did not go anywhere else, [not even the grocery store] after leaving work on December 22, 2017, until she returned to work on December 26, 2017.

24. Dr. Orgel also stated in his report and testimony that Claimant's asthma was an added risk factor for getting sick from the influenza virus. (Hrg. Tr. pg. 49.) However, a review of the medical records, and Claimant's testimony, indicates Claimant's asthma diagnosis was recent and that it did not seem to be that firm of a diagnosis since it was not being actively treated on a regular basis.

25. Dr. Orgel also cited numerous studies in his report, which he contends establishes healthcare workers have a higher incidence of getting the flu. However, based on his overall testimony, which the ALJ does not find persuasive, the ALJ does not credit the studies as being persuasive as applied to the facts of this case. For example, in this case, Claimant's employer required employees and patients to wear personal protection equipment (PPE) such as masks. And, although not all patients abided by the PPE rules, Claimant testified that she did. Therefore, it is not clear how Claimant's abidance to the PPE rules decreased the likelihood of her getting the flu if the health care workers in the studies did not use PPE, etc., such as Claimant.

26. Dr. Orgel testified that Dr. McCarty tested two patients, who Dr. McCarty suspected of having the flu. Based on these tests, Dr. Orgel testified Claimant was exposed to influenza-like illness. (*Hrg. Tr. pg. 54, lns. 9-15*). Dr. Orgel then

testified that Claimant could not have been exposed anywhere other than work. (*Hrg. Tr. pg. 55, lns. 6-9*).

27. Dr. Orgel testified that he performed a records review on his wife's claim and he did not charge for this opinion because they have joint finances. (*Hrg. Tr. pg. 57, ln. 11-14*). Dr. Orgel testified he would receive a financial benefit, if the claim were found compensable. (*Hrg. Tr. pg. 57, lns. 22-25; pg. 58, lns 1*). Thus, Dr. Orgel has a direct financial interest in the outcome of this litigation.

28. Dr. Orgel also stated in his report that another co-worker, as well as Dr. McCarty also came down with the flu. However, the testimony of Mr. Rippy, the Director of Ambulatory Services, did not support Dr. Orgel's contention.

29. Dr. Orgel testified that the flu was an epidemic that year, it is a ubiquitous condition each year it comes out, and that everyone can get the flu. (*Hrg. Tr. pg. 63, lns. 10-19*).

30. The December 2017 flu tests from the Gunbarrel clinic demonstrate Dr. McCarty, the physician with whom Claimant worked, only performed two flu tests on December 22, 2017. Both tests were negative. (*Resp. Ex. F, pg. 50*).

31. The flu tests from December 2017 also demonstrate that there were no positive flu tests during the incubation period during which Claimant could have been exposed. (*Resp. Ex. F, pg. 50*).

32. Dr. Henry Roth, a Level II accredited physician, issued a report and opined that it was impossible to specifically determine where and under what circumstances Claimant contracted influenza. (*Resp. Ex. A, pg. 4*). Dr. Roth noted that the Gunbarrel clinic flu tests showed Claimant's physician, Dr. McCarty, did not have any positive flu tests during December 21, 2017 and December 24, 2017.

33. Dr. Henry Roth testified that an individual contracts the flu through exposure to droplets or aerosolization. Dr. Roth testified that a person who is within six feet of an infected person could become inoculated with the flu virus. (*Hrg. Tr. pg. 79, lns. 7-11*). Dr. Roth testified that just because a person receives an inoculation does not mean that they will get sick. (*Hrg. Tr. pg. 79, lns. 12*). Dr. Roth further testified that if a person has influenza and shedding (which is only for a limited time) and a person is exposed and touches her eye, nose, or mouth, that person could contract the flu. (*Hrg. Tr. pg. 79, lns. 13-18*).

34. Dr. Roth testified that the only day in which Claimant could have contracted the flu while at work would have been December 22, 2017, and there was no documentation (i.e. flu tests) which showed that she engaged with someone who had the flu and could have made her sick. (*Hrg. Tr. pg. 80, lns. 2-7*).

35. Dr. Roth credibly testified that while Claimant and Dr. Orgel testified that Claimant had no other exposure to someone who had the flu, that assumption was not accurate. Dr. Roth persuasively testified that merely because a person was not showing signs of illness does not mean that person did not have the influenza infection and could have been shedding. (*Hrg. Tr. pg. 80, lns. 10-16*). Dr. Roth noted in his report that children shed virus for longer periods of time. (*Resp. Ex. A, pg. 4*). Therefore, a person can have the influenza infection and be

shedding, but not get sick. Therefore, someone does not have to be showing signs of having the flu, and be sick, to transmit the virus.

36. Dr. Roth credibly testified Claimant could not provide any exposure point with regards to a person or time or place. Dr. Roth testified that in this case it was merely the assumption that because Claimant was a healthcare worker and she became ill, it must have been work-related. (*Hrg. Tr. pg. 83, lns. 19-25*).

37. The ALJ finds Dr. Roth's opinions as set forth in his report and testimony to be credible and persuasive.

38. The Judge finds that the incubation period for influenza is one to four days, so Claimant's exposure period for influenza was December 22, 2017 through December 25, 2017. Claimant did not work from December 23, 2017 through December 25, 2017.

39. The Judge finds that the Gunbarrel clinic flu tests do not show any positive flu tests for December 22, 2017, and Claimant has not provided credible and persuasive evidence that she was exposed to an influenza positive individual on December 22, 2017, while at work.

40. The Judge finds the testimony of Dr. Roth to be credible and persuasive. The Judge finds that based on Dr. Roth's persuasive testimony, Claimant could have been exposed to influenza from her family and/or friends that were with her on December 23, 2017 through December 25, 2017, despite the fact that they did not show any symptoms of illness and did not become ill later.

41. The Judge finds that influenza is a ubiquitous condition and it is not possible to identify the cause of Claimant's exposure and development of the flu.

42. The Judge also finds that Claimant could have been exposed to influenza by other members of the public. As found above, the ALJ does not find it credible that Claimant was not around anyone else, other than family members, after she left work on December 22, 2017, and until December 26, 2017. And, even if she was not around anyone else, such factor does not require a finding that that it is more likely than not, that Claimant got the flu due to a work related exposure.

CONCLUSIONS OF LAW

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

General Legal Principles

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

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

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

I. Whether Claimant established by a preponderance of the evidence that her influenza, which resulted in hospitalization for pneumonia, was caused by an occupational exposure.

Claimant was required to prove by a preponderance of the evidence that at the time of the injury she was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The question of whether Claimant met her burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

As found, the Judge concludes that the incubation period for influenza is one to four days, which would put Claimant's potential exposure period between December 22, 2017, and December 25, 2017. Claimant did not work December 23, 2017, through December 25, 2017. The Judge concludes the only potential work exposure Claimant could have had was on December 22, 2017.

The log of the Gunbarrel clinic flu tests showed Dr. McCarty only performed two flu tests on December 22, 2017, and neither were positive for the flu. No other physician had a positive flu test on December 22, 2017. Moreover, Claimant could not identify any specific exposure to an influenza-infected individual. The Judge concludes that the Gunbarrel clinic flu tests are persuasive evidence in establishing that Claimant was not exposed at work on December 22, 2017. Moreover, Claimant argues that being a healthcare worker at this clinic increased her risk of developing the flu when compared to the general public, and that factor is strong evidence that she acquired the flu at work. However, the ALJ is not persuaded by such contention. According to Claimant's testimony, she worked for this clinic for approximately 16 years and this was the first time she got sick with the flu – despite her contention of the increased exposure to people with the flu when compared with the general public. Therefore, the fact that this is the first time she got sick with the flu undercuts her argument.

The ALJ has also considered the testimony of Dr. Orgel that the flu variant during 2017 and 2018 combined with the less effective flu vaccine increased the likelihood of getting sick from the flu. However, again, the ALJ does find this factor to make it more likely than not that Claimant's flu was contracted at work. As found, the testimony of Dr. Orgel was not found to be persuasive for a number of reasons. First, Dr. Orgel has a financial interest in the outcome of the litigation since he is the husband of Claimant and they combine their finances. Second, being the husband of Claimant, he may have either an intentional or an unintentional bias in favor of Claimant to emphasize the facts that support his theory compared to those that do not. Third, Dr. Orgel overstated the number of positive flu test results in the relevant incubation period. Dr. Orgel indicated in his report that there were 14 positive flu tests, which he implied were within the incubation period. However, based on the findings above, there were no positive flu tests within the incubation period. In addition, there were not 14 positive tests within the period identified by Dr. Orgel based upon the records submitted by Employer. Fourth, Dr. Orgel stated that because none of the people that were invited over to their house for Christmas either had the flu or came down with the flu, they could not have transmitted the virus to Claimant. However, based on the credible testimony of Dr. Roth, such people can still be transmitters of the virus. Fifth, Claimant testified that she abided by Employer's PPE requirements and wore a mask when required to do so. Therefore, the ALJ did not find Dr. Orgel's opinions to be credible or persuasive.

Dr. Roth persuasively maintained that just because an individual is not obviously ill or becomes ill, does not mean that an individual does not have the influenza infection and shedding the virus and infecting other people. Therefore, Claimant could have been exposed to influenza by her friends and family during December 23, 2017 and December 25, 2017, despite the fact that none of these individuals were showing signs of illness or became ill after the fact.

In addition, the ALJ does not credit Claimant's testimony that after she left work on December 22, 2017, she did not come into contact with anyone [who could have inoculated her with the flu virus] other than family members that came over to her house on Christmas Eve and Christmas. Again, the likelihood that Claimant, while preparing for Christmas, and to have company at their house, left work on December 22, 2017,

went straight home, and never left the house, and did not go somewhere where she could have been exposed to the flu virus is not found to be credible.

The ALJ is not requiring Claimant to establish the exact patient who inoculated her with the flu virus – or requiring an unattainable standard - to establish a compensable claim. There are a number of cases in Colorado where the development of a communicable disease by a healthcare worker has been found to be compensable even though the Claimant could not identify which patient transmitted the virus. For example, in *Industrial Commission v. Corwin Hospital*, 250 P.2d 135 (Colo. 1952), the Colorado Supreme Court held that where a nurse, who had been working exclusively in the hospital's polio ward and in close contact with polio patients under conditions which caused her to be overtired, contracted polio herself after two months on the job. The Court held that the disease and resulting disability was 'accidentally sustained' and compensable. Moreover, in another case, the Colorado Supreme Court held that where a nurse's job duties caused her to be in close physical contact with patients who were infected with beta streptococcus, her resulting infection with beta streptococcus, and development of generalized rheumatic fever, was compensable. See *City and County of Denver v. Pollard*, 417 P.2d 231 (Colo. 1966).

In this case, however, the ALJ is not persuaded that the evidence presented by Claimant established, by a preponderance, that her flu is compensable. Therefore, the ALJ concludes Claimant has failed to establish by a preponderance of the evidence that her influenza exposure and development of the flu was caused by her employment.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claim is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S.

For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 29, 2019.

/s/ Glen B. Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether the claimant has demonstrated by a preponderance of the evidence that certain recommended medical treatment is reasonable, necessary, and related to the admitted September 21, 2017 work injury. The specific medical treatments at issue are as follows:

1) Treatment of the claimant's cervical spine, including a cervical spine x-ray;

2) Audiology treatment;

3) Additional acupuncture treatment;

4) Listening and Communication Enhancement (LACE) Therapy;

5) Broadband Noise Therapy;

6) Eyeglasses with anti-reflecting lens coating and high index material;

7) Referral to Dr. Mistry;

8) Referral to a new psychological counselor; and

9) The medications mirtazapine and propranolol.

FINDINGS OF FACT

1. The claimant is employed with the employer's preschool, Landmark Christian Preschool. She has worked there since May 2017 as a lead teacher. On September 21, 2017, the claimant suffered an injury while at work. The claimant was outdoors with her students and was attempting to obtain a toy from a large toy box. While she had the toy box open, a gust of wind caused the lid to slam closed, striking the claimant on the top of her head. The claimant testified that the toy box lid, although plastic, had a protruding round piece that was not flush with the inside of the lid. This rounded piece struck the claimant on the head. The claimant testified that this caused a two inch "gash" on the top of her head. The claimant also testified that although she did not bleed, she immediately felt dizzy and sick to her stomach, with tenderness in the area that was struck by the lid.

2. On the date of the injury, the claimant sought medical treatment at Colorado Mesa University & Community Care of the Grand Valley. The claimant was seen at that facility by Dr. Bjorn Inon. The claimant reported that she had blurred vision, headache, nausea, dizziness, and photophobia. Dr. Inon diagnosed a concussion and

recommended mental and physical rest. In addition, Dr. Inon recommended Tylenol for headache.

3. On October 7, 2017, the claimant returned to Colorado Mesa University & Community Care of the Grand Valley and was seen by Kim Hoyt, PA-C. At that time, the claimant reported her symptoms as headache, neck pain, phonophobia, photophobia, anxiety, easily irritated, inability to concentrate, memory loss, and nervousness. Ms. Hoyt referred the claimant to neuropsychologist Dr. Christopher Young for evaluation.

4. On November 13, 2017, the claimant was seen by Dr. Young. At that time, Dr. Young noted that the claimant sustained a closed head injury on September 21, 2017. Dr. Young recorded the claimant's symptoms as: balance and coordination issues, visual problems, headache, sleep disturbance, photosensitivity, and phonosensitivity. Dr. Young recommended vestibular evaluation with a physical therapist and biofeedback therapy.

5. Subsequently, the claimant reported her injury to the employer. At that time, the employer provided the claimant with a list of designated medical providers. The claimant selected St. Mary's Occupational Health as her authorized treating provider (ATP).

6. On November 29, 2017, the claimant was first seen at St. Mary's Occupational Medicine by James Harkreader, NP. At that time, the claimant reported short term memory loss, photophobia, phonophobia, and daily headaches. Mr. Harkreader diagnosed post-concussion syndrome and ordered a magnetic resonance image (MRI) of the claimant's brain. Mr. Harkreader also made a referral to Dr. Young under the claimant's workers' compensation claim.

7. On December 17, 2017, the brain MRI was performed and showed no acute intercranial pathology.

8. On January 4, 2018, the claimant was seen by Kari Mullaney MS, PT for vestibular therapy. At that time, the claimant reported "feeling much better". The claimant also reported that she had a history of noise sensitivity and was "not looking for complete resolution" of her symptoms.

9. On January 14, 2018, Dr. Young noted "moderate worsening" of the claimant's symptoms. However, on January 30, 2018, the claimant returned to Mr. Harkreader and reported that she was improving and that physical therapy was helping. The claimant made similar statements of improved symptoms to Dr. Young on February 9, 2018. At that time, Dr. Young recommended the claimant seen Dennis Phelps, LPC for psychological counseling.

10. On February 12, 2018, the claimant returned to Ms. Mullaney and continued to report improvement, with her primary concern being her sensitivity to noise. Ms. Mullaney recommended the claimant see Dr. Bebee, an audiologist, to address this issue.

11. At an appointment with Mr. Harkreader on February 13, 2018, the claimant reported that Ms. Mullaney had recommended Dr. Bebee and Listening and Communication Enhancement (LACE) therapy. Mr. Harkreader agreed with Dr. Young's recommendation for psychological counseling and Ms. Mullaney's recommendation that the claimant see an audiologist.

12. The claimant testified that LACE therapy was a treatment option that had been researched by the claimant's mother. The claimant also testified that her mother researched the claimant's symptoms on the internet and discovered the diagnosis hyperacusis. From there, the claimant's mother researched treatment for hyperacusis, including LACE therapy. The claimant then presented information regarding hyperacusis and potential treatment to her medical providers.

13. On February 28, 2018, the respondents' physician advisor, Dr. Brain Mathwich, reviewed the request for audiology testing. Dr. Mathwich opined that any audiology treatment should be denied pending neuropsychological evaluation and testing. In support of this opinion, Dr. Mathwich noted that the claimant's medical records indicated continued improvement of her symptoms.

14. On March 2, 2018, the claimant returned to St. Mary's Occupational Health and was seen by Dr. James McLaughlin. At that time, Dr. McLaughlin conducted an audiometry. Dr. McLaughlin noted that the claimant's testing was normal and indicated that the claimant had "exceptional hearing". Dr. McLaughlin referred the claimant back to Dr. Young for the recommended neuropsychological evaluation and testing.

15. The claimant returned to vestibular therapy on March 6, 2018, and reported to Ms. Mullaney that a hearing test had been performed and she had "excellent hearing". Also on that date, the claimant told Ms. Mullaney about a diagnosis called vestibular hyperacusis that was found online by the claimant's spouse.

16. On March 14, 2018, Dr. Mathwich completed a physician advisor report regarding the recommendation that the claimant undergo a neurological evaluation. Dr. Mathwich agreed that the claimant should see a neurologist to determine the cause of the claimant's headaches.

17. The claimant returned to Mr. Harkreader on March 19, 2018. On that date, the claimant presented Mr. Harkreader with paperwork regarding vestibular hyperacusis. Mr. Harkreader indicated that the claimant may need to be seen by an ear, nose, and throat (ENT) specialist.

18. On March 29, 2018, the claimant was seen by neurologist, Dr. Joel Dean. Dr. Dean noted that because he could find no other cause for the claimant's headaches, he opined that the claimant's headaches are caused by her work injury. In addition, Dr. Dean recommended that that the claimant see an audiologist and continue with her vestibular therapy and psychotherapy.

19. On April 3, 2018, the claimant was seen by Mr. Harkreader. At that time, the claimant requested a referral to a different psychologist because "her belief system is a little bit different" from the psychologist. On that date, Mr. Harkreader referred the claimant to acupuncture, to a different psychologist (Dr. Melissa Carris), and to an ENT for an evaluation for hyperacusis. In addition, Mr. Harkreader ordered an x-ray of the claimant's cervical spine.

20. The claimant testified that she wants to see a new psychologist for two reasons. The first is that she and her counselor have different religious beliefs. The claimant testified that the second reason is that the homework given to her by her counselor, Mr. Phelps, made her symptoms worse.

21. On April 3, 2018, an x-ray of the claimant's cervical spine was read as normal with no fracture or alignment abnormality.

22. On April 11, 2018, Dr. Mathwich issued a report related to the recommended cervical spine x-ray and audiology referral. Dr. Mathwich opined that the claimant's phonophobia was not causally related to her headaches. Dr. Mathwich reiterated that neuropsychological testing should be completed before consideration of any further treatment. In addition, Dr. Mathwich opined that the cervical spine x-ray was not necessary. Based upon Dr. Mathwich's opinions, the respondents denied authorization for audiology and for the cervical spine x-ray.

23. On May 30, 2018, the claimant was seen by Dr. Michael Trowbridge, an ENT. On that date, Dr. Trowbridge performed an audiogram and noted that the results were normal. With regard to the claimant's symptoms Dr. Trowbridge opined that it could be a "central phenomena" based on the claimant's head injury as he found "no explanation based on ear findings." The claimant asked Dr. Trowbridge about LACE therapy, which he described in the medical record as "computer or internet programs to desensitize the ears". At that time, Dr. Trowbridge noted that an audiologist in his practice did not find these programs to be "medically based or proven to be effective." Despite these notations, on June 26, 2018, Dr. Trowbridge referred the claimant to LACE therapy for treatment of hyperacusis.

24. On June 4, 2018, the claimant was seen at St. Mary's Occupational Health by Dr. Craig Stagg. In the medical record of that date, Dr. Stagg lists the claimant's diagnoses as post concussive symptomology and hyperacusis.

25. On July 1, 2018, the claimant returned to Dr. Young who noted that the claimant was less symptomatic and experiencing progressive healing. At that time, Dr. Young opined that the claimant's symptoms were consistent with an injury to the frontal/parietal junction. Dr. Young indicated that LACE therapy would be "the best treatment" at that time, but he also discussed the possibility of the claimant undergoing speech therapy. On July 9, 2018, Dr. Stagg requested authorization for LACE therapy at Mile High Hearing.

26. Dr. Mathwich also reviewed the request for LACE therapy. On July 12, 2018, Dr. Mathwich recommended denial of LACE therapy. In support of his opinion, Dr. Mathwich noted that the claimant had a normal audiogram and there was no explanation regarding the diagnosis of hyperacusis. In addition, Dr. Mathwich noted that the Colorado Medical Treatment Guidelines (MTG) do not include LACE therapy as a treatment for hyperacusis.

27. On August 7, 2018, the claimant was seen by Dr. Stagg and reported visual disturbances when an object moves quickly toward her face. At that time, Dr. Stagg referred the claimant to an optometrist, Dr. Diane Reddin. Dr. Stagg listed the reason for the referral as treatment of the claimant's vertigo, dizziness, and visual disturbances.

28. On September 17, 2018, the claimant returned to Dr. Stagg and reported that the acupuncture treatment she received reduced the frequency of her headaches. Based upon this information, Dr. Stagg referred the claimant for four additional acupuncture treatments.

29. At the request of the respondents, on September 25, 2018, Dr. David Orgel reviewed the request for additional acupuncture. In his physician advisor report, Dr. Orgel recommended denial of additional acupuncture treatment. In support of his opinion, Dr. Orgel noted that the number of acupuncture treatments the claimant had received exceeded the MTG. In addition, Dr. Orgel noted that the acupuncture treatment the claimant had received did not improve her symptoms.

30. On October 9, 2018, Dr. Young authored a letter in which he recommended the claimant undergo Broadband Noise Therapy. Dr. Young identified this as the most common treatment for hyperacusis. In that same letter Dr. Young indicated his opinion that the claimant's work injury and related concussion are the cause of her audiological symptoms.

31. On October 19, 2018, the claimant was seen by Dr. Reddin. At that time, Dr. Reddin diagnosed post trauma vision syndrome which, the doctor opined, contributed to the claimant's dizziness, headaches, photosensitivity. Dr. Reddin recommended a number of changes to the claimant's eyeglasses to address these issues. Specifically, Dr. Reddin recommended prescription glasses with a therapeutic prism and gradient tint. On October 23, 2018, a letter from Dr. Reddin's practice clarified that the claimant's glasses would also need to be made from a high index material with an anti-reflecting coating. This same letter explained these additions were necessary because of the amount of prism in the prescription.

32. On November 9, 2018, Dr. Stagg made a note that the hyperacusis specialist, Dr. Phillips, recommended that the claimant see Dr. Mistry, a sports medicine specialist. On that date, Dr. Stagg referred the claimant to Dr. Mistry. The claimant testified that it was her understanding that the practice that would administer the LACE testing required an evaluation by a sports medicine physician prior to commencing LACE treatment.

33. On November 12, 2018, Dr. Mathwich reviewed the requests for 1) the claimant's glasses; 2) treatment for hyperacusis; and 3) the referral to a sports medicine physician. Dr. Mathwich recommended denial of all three requested treatments. In support of his opinion, Dr. Mathwich noted no correlation between the claimant's current symptoms and the minor closed head injury she suffered more than one year prior. Dr. Mathwich suggested that the claimant be placed at maximum medical improvement (MMI). Based upon Dr. Mathwich's report, the respondents denied the requests for new glasses, LACE treatment, and the referral to Dr. Mistry.

34. On November 27, 2018, the claimant attended an independent medical examination (IME) with Dr. John Raschbacher. In connection, with the IME, Dr. Raschbacher reviewed the claimant's medical records, obtained a history from the claimant, and completed a physical exam. In his IME report, Dr. Raschbacher noted that the claimant's symptoms of photophobia and phonophobia were not reported at her initial treatment. As a result, Dr. Raschbacher opined that those symptoms are not related to the concussion she suffered on September 21, 2017. In addition, Dr. Raschbacher indicated that the claimant's continued symptomology and delayed recovery, over a year after the injury, are inconsistent with a minor traumatic brain injury (MTBI). Dr. Raschbacher also opined that the claimant's neck pain is not related to the September 21, 2017 injury. Dr. Raschbacher stated in his report that the claimant reached MMI as of December 21, 2017. Dr. Raschbacher reached this MMI date as determined by the MTG for MTBI or concussion. Dr. Raschbacher did not recommend any further treatment related to the September 21, 2017 incident. Dr. Raschbacher's testimony at hearing was consistent with his written report.

35. On January 24, 2019, Dr. Stagg referred the claimant to Dr. Adam Hunninghake. Dr. Stagg noted in that record that the referral was for "a physical medicine rehabilitation specialist who is well versed in treatment and diagnosis of head injuries".

36. Although the respondent's physician advisor, Dr. Albert Hattem, recommended denial of the referral to Dr. Hunninghake, the claimant was seen by Dr. Hunninghake on April 10, 2019. On that date, Dr. Hunninghake diagnosed "other complicated headache syndrome, paresis of accommodation, unspecified laterality, cognitive change, and primary insomnia". Dr. Hunninghake opined that the claimant may be part of the five to ten percent of individuals who take longer to recover from MTBI than is typical. In addition, Dr. Hunninghake prescribed the medication propranolol for "prophylactic headache treatment" and the medication mirtazapine to treat the claimant's insomnia.

37. On April 16, 2019, Dr. Orgel reviewed the request for mirtazapine and propranolol. Dr. Orgel recommended denial of the medications given the minor nature of the claimant's mechanism of injury. Dr. Orgel agreed with Dr. Raschbacher that the claimant had reached MMI. Based upon Dr. Orgel's report, the respondents denied authorization for mirtazapine and propranolol.

38. The claimant testified that her current symptoms include difficulty sleeping, daily headaches, difficulty driving both during the daytime and at night, nausea with loud noises, nausea when things are close to her face, memory issues, concentration issues, and difficulty with writing and typing. With regard to writing and typing, the claimant explained that she will write the incorrect word. For example, she may type the word "wood" when she means "would". In addition, the claimant has difficulty with music, specifically singing while also playing the piano.

39. The ALJ credits the medical records and finds that the claimant suffered an MTBI as a result of the September 21, 2017 work injury. The ALJ credits the medical records and the opinions of Drs. Raschbacher, Mathwich, and Orgel over the contrary opinions of the claimant's medical providers with regard to a number of the requested medical treatments. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that the requested treatment of the claimant's cervical spine: a cervical spine x-ray; audiology treatment; additional acupuncture treatment; LACE Therapy; Broadband Noise Therapy; eyeglasses with anti-reflecting lens coating and high index material; and the referral to Dr. Mistry; are reasonable and necessary to cure and relieve the claimant from the effects of the work injury.

40. With regard to each individual requested medical treatment, the ALJ finds as follows. Treatment of the claimant's cervical spine is unrelated to the claimant's work injury, including the cervical spine x-ray. The claimant's hearing has been deemed "excellent" and all auditory testing has been found to be normal. Therefore, audiology treatment, LACE Therapy (including the prerequisite referral to Dr. Mistry), and Broadband Noise Therapy are unrelated to the treatment of the claimant's work related injury, and are also not reasonable or necessary. Additional acupuncture treatment is not reasonable or necessary given that the claimant has received acupuncture in excess of the MTG. The request for specific eyeglasses is also unrelated to the claimant's work injury, in that the ALJ is not persuaded that the claimant's vision complaints are related to the work injury.

41. The ALJ credits the medical records, the claimant's testimony, and the recommendations for Dr. Hunninghake and finds that the claimant has demonstrated that it is more likely than not at the referral to a new psychological counselor and the medications mirtazapine and propranolol are reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury.

42. The ALJ finds that the request for a different psychological counselor is due to the claimant's preference for a counselor with religious beliefs similar to her own. While the ALJ finds that to be a matter of personal preference, the ALJ recognizes that the effectiveness of counseling would be negatively impacted if the claimant continues to treat with a counselor with whom she is not compatible. Therefore, the ALJ finds that a referral to a different psychological counselor is reasonable and necessary to cure and relive the claimant from the effects of the work injury.

43. As for the recommended medications mirtazapine and propranolol, these medications are intended to treat symptoms (insomnia and headaches, respectively)

that the ALJ finds are related to the claimant's work injury. Therefore, these medications are reasonable and necessary to cure and relive the claimant from the effects of the work injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2017).

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

5. The Colorado Workers' Compensation Medical Treatment Guidelines (MTG) are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). The statement of purpose of the MTG is as follows: "In an effort to comply with its legislative charge to assure appropriate medical care at a reasonable cost, the director of the Division has promulgated these 'Medical Treatment Guidelines.' This rule provides a system of evaluation and treatment guidelines for high cost or high frequency categories of occupational injury or disease to assure appropriate medical care at a reasonable cost." WCRP 17-1(A). In addition, WCRP 17-5(C) provides that the MTG "set forth care that is generally considered reasonable for most injured workers.

However, the Division recognizes that reasonable medical practice may include deviations from these guidelines, as individual cases dictate."

6. While it is appropriate for an ALJ to consider the MTG while weighing evidence, the MTG are not definitive. *See Jones v. T.T.C. Illinois*, Inc., W.C. No. 4-503-150 (May 5, 2006); ***aff'd Jones v. Industrial Claim Appeals Office*** No. 06CA1053 (Colo. App. March 1, 2007) (not selected for publication) (it is appropriate for the ALJ to consider the MTG on questions such as diagnosis, but the MTG are not definitive); *see also Burchard v. Preferred Machining*, W.C. No. 4-652-824 (July 23, 2008) (declining to require application of the MTG for carpal tunnel syndrome in determining issue of PTD); *see also Stamey v. C2 Utility Contractors et al*, W.C. No. 4-503-974 (August 21, 2008) (even if specific indications for a cervical surgery under the MTG were not shown to be present, ICAO was not persuaded that such a determination would be definitive).

7. As found, the claimant has failed to demonstrate by a preponderance of the evidence that the requested medical treatment of the claimant's cervical spine, a cervical spine x-ray; audiology treatment; additional acupuncture treatment; LACE Therapy; Broadband Noise Therapy; eyeglasses with anti-reflecting lens coating and high index material; and the referral to Dr. Mistry; constitute reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury. As found, the medical records and the opinions of Drs. Raschbacher, Mathwich, and Orgel are credible and persuasive with regard to these medical treatments.

8. As found, the claimant has demonstrated by a preponderance of the evidence that the referral to a new psychological counselor and the medications mirtazapine and propranolol constitute reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury. As found, the medical records, the claimant's testimony, and the recommendations for Dr. Hunninghake are credible and persuasive with regard to these medical treatments.

ORDER

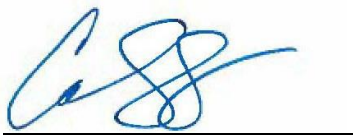
It is therefore ordered:

1. The claimant's requests for treatment of the claimant's cervical spine, a cervical spine x-ray; audiology treatment; additional acupuncture treatment; LACE Therapy; Broadband Noise Therapy; eyeglasses with anti-reflecting lens coating and high index material; and the referral to Dr. Mistry; are denied and dismissed.

2. The respondents shall authorize a different psychological counselor for the claimant, pursuant to the Colorado Medical Fee Schedule.

3. The respondents shall authorize the medications mirtazapine and propranolol, pursuant to the Colorado Medical Fee Schedule.

Dated this 31st day of May, 2019.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. **In addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

ISSUES

- Did Claimant prove a C5-6 fusion recommended by Dr. Roger Sung is reasonably necessary to cure and relieve the effects of her admitted injury?

FINDINGS OF FACT

1. Claimant worked for Employer as a landscaper laborer. She suffered admitted injuries on May 25, 2017 when she fell off a three-foot wall and landed on her back. She was taken by ambulance to the Memorial Hospital emergency department complaining of neck and low back pain. CT scans showed no fractures, and she was diagnosed with acute cervical and lumbar strains.

2. Employer referred Claimant to Concentra for authorized medical treatment. At the initial visit on May 26, 2017, she was primarily concerned about low back pain with radiating symptoms in the left leg and foot, and left shoulder pain.[1]

3. Dr. Miguel Castrejon took over as Claimant's primary ATP on June 20, 2017. Dr. Castrejon documented "immediately following the fall the patient recalled feeling pain all over that settled to her neck and lower back. She recalled pain at the posterior left shoulder that has gradually worsened." Claimant complained of constant pain in the left side of her neck extending into the left shoulder. The left shoulder felt weak and she had difficulty lifting her left arm. Physical examination showed tenderness of the left paraspinal muscles and painful facet loading on the left side. Left shoulder range of motion was decreased with positive impingement and empty can signs. Rotator cuff strength was 4/5. Dr. Castrejon's diagnoses included cervical strain with element of facet-mediated pain, and left shoulder rotator cuff strain with possible internal derangement. Dr. Castrejon ordered a left shoulder MRI to check for a rotator cuff tear.

4. The MRI was done on June 24, 2017 and showed only mild rotator cuff tendinosis.

5. Claimant continued to report pain and weakness in the left shoulder, so Dr. Castrejon referred her to Dr. Michael Simpson for an orthopedic evaluation.

6. Claimant saw Dr. Simpson on September 14, 2017. Her neck range of motion was limited by pain. She also complained of dysesthesias and radiating pain down the left arm into the thumb. Dr. Simpson administered a cortisone injection to the left shoulder. Left shoulder impingement test and Hawkins Kennedy test were positive. She was tender to palpation at the AC joint and around the shoulder girdle musculature. The

[1] Claimant received significant treatment directed at her low back in connection with this claim. This order includes minimal findings regarding low back because the sole issue for determination involves surgery for her cervical spine.

injection helped the shoulder pain briefly but the radiating arm pain and numbness got worse after the injection.

7. Dr. Simpson ordered an MR arthrogram of the left shoulder, which was completed on December 13, 2017 and showed no evidence of rotator cuff tear, tendinosis or labral damage.

8. Dr. Castrejon performed an upper extremity EMG on November 13, 2017, which was negative for a cervical radiculopathy or peripheral neuropathy. Dr. Castrejon opined, "I am not convinced that she has a cervical radicular condition and opine that the symptoms are [a] combination of myofascial on the basis of her left shoulder and straining injury to the cervical spine." Nevertheless, he referred Claimant to Dr. Roger Sung for a surgical consultation.

9. Dr. Sung evaluated Claimant on January 11, 2018. She described neck pain, left arm pain, and persistent headaches since the work accident. The headaches were associated with severe neck pain and muscle tightness radiating up to her head. She reported "electric, stabbing, and burning pain that radiates down to the left thumb," and weakness in her left hand. Dr. Sung noted, "Her daily activities have been significantly limited due to this weakness." She could not perform normal ADLs such as braiding her hair. On examination, Dr. Sung appreciated diffuse tenderness throughout the neck, trapezius, and paraspinal muscles. Left arm strength was decreased with 4/5 strength in the deltoid. She had decreased sensation of the left thumb and over the deltoid. Cervical range of motion was limited by pain. Dr. Sung diagnosed neck pain and left arm radiculopathy. He requested a cervical MRI to investigate the radicular arm pain, and physical therapy to address her "quite significant tenderness and spasm in her paraspinal muscles."

10. Claimant saw Dr. Castrejon later that day. She was "very depressed and anxious" about how the pain was impacting her life, so he referred her for counseling and biofeedback. He also recommended trigger point injections to help with the myofascial component of her pain.

11. The cervical MRI was done on January 29, 2018. The radiologist interpreted it as showing straightening of the cervical spine (due to position or muscle spasm), a small central disc protrusion at C5-6, and mild DJD of the C3-4 left facet articulation.

12. Claimant followed up with Dr. Sung on February 21, 2018 to review the MRI. Her physical examination was unchanged from the prior visit. Dr. Sung interpreted the MRI as showing a "disc bulge/herniation" at C5-6, and amended his diagnosis to "C5-6 disc bulge/herniation with intermittent left arm radiculopathy." He recommended a cervical epidural steroid injection (ESI).

13. Dr. Stephen Ford administered the cervical ESI on March 13, 2018. He noted the indications for the injection were "chronic left neck, HA, left arm pain/numbness to the thumb [after] a fall at work 5/2017."

14. Claimant followed up with Dr. Ford on April 3 and reported her neck and arm pain and numbness had decreased after the injection. She also experienced facial flushing and "hot flashes" and was hesitant to try additional injections until the hot flashes were worked up.

15. Dr. Sung re-evaluated Claimant on April 26, 2018. He documented, "For a few hours, she had complete relief of her arm pain and for 2 days her neck felt better and she did not have headaches. It has since returned." No further ESIs were planned because of her allergic reaction to the steroid. Dr. Sung opined, "She had a great response to the injection and she has not done well long-term. At this point I am recommending a C5-6 cervical discectomy and fusion."

16. Insurer denied the surgery and Claimant requested a hearing.

17. Claimant saw Dr. Simpson on May 7, 2018, who opined, "[I] personally think that her neck surgery should be performed first to see where her symptoms settle and then focus on arthroscopic evaluation of her shoulder at that time."

18. On August 30, 2018, Dr. Sung reiterated that Claimant's positive diagnostic response to the cervical ESI was a critical factor in his decision to recommend surgery.

19. On October 4, 2018, Dr. Sung noted Claimant was now having numbness down her left arm, which he opined, "certainly can be coming from C5-6." Surgery was "on hold" pending the hearing.

20. Claimant saw Dr. Brian Reiss for an IME at Respondents' request on October 10, 2018. On examination, she had decreased sensation in the left thumb and index finger. Left cervical rotation caused "shooting" pain to the left thumb. Dr. Reiss opined her pain was injury-related, but disagreed that surgery was warranted. Based on the MRI and EMG reports, he opined her pain is probably myofascial rather than discogenic. Therefore, he thought surgery would not likely decrease her pain or increase her function. He recommended more physical therapy and a psychological evaluation to assess possible somatization.

21. On December 11, 2018, Dr. Reiss issued a supplemental report after reviewing the cervical MRI images. He agreed with the radiologist's interpretation of a "mild central protrusion at C5-6" with no significant central or foraminal stenosis. He opined the disc protrusion "probably represents a pre-existing degenerative condition and is unlikely to be the source of the patient's pain." His ultimate opinions remained the same as set forth in his IME report.

22. While awaiting the hearing, Claimant continued to follow up with Dr. Castrejon regularly. His records from late 2018 into 2019 repeatedly document "worsening neck and upper limb pain." He noted massage therapy was somewhat helpful but only on a temporary basis. Eventually, he discontinued the massage therapy "due to limited temporary benefit in the face of a condition that is still requiring surgical treatment."

23. Dr. Reiss testified in a deposition on March 25, 2019, consistent with his IME report. Dr. Reiss acknowledged the C6 nerve root enervates the thumb and index finger, and C6 radiculopathy can produce neck pain radiating across the biceps, the radial aspect of the form, into the thumb and index finger. However, even though he agreed Claimant's symptoms are "suggestive" of C6 nerve root compression, he was confident there is no compression here based on his review of the MRI. He opined, "the proposed surgery is very useful for radicular pain, but she doesn't have radicular pain. This is not her problem. She has axial neck pain. So the surgery is very unlikely to be helpful to her."

24. The last available report from Dr. Castrejon is dated April 2, 2019. Dr. Castrejon noted continued worsening of "neck pain radiating to the left arm to the thumb with numbness and tingling in this distribution. He indicated Claimant, "continues to point out that rotation of her neck will reproduce a shooting sensation into the left upper limb." He acknowledged the MRI did not show compression, but noted it was "a static study" that cannot capture symptomatic stenosis caused by spinal movement. He referenced medical literature regarding "Kinematic MRIs" that can "demonstrate findings that were not apparent unconventional MRI," such as "changes in positions that provoked symptoms." He believes that is the situation here. He also argued the benefit Claimant received from the cervical ESI points to a problem other than mere myofascial pain, because an ESI is intended to relieve pain or inflammation around the spinal nerve roots or damaged nerves and "would have no therapeutic benefit on a myofascial (muscle) condition."

25. The ALJ finds the opinions and recommendations of Dr. Castrejon and Dr. Sung more persuasive than the contrary opinions offered by Dr. Reiss.

26. Claimant proved by a preponderance of the evidence the C5-6 fusion recommended by Dr. Sung is reasonably needed to cure and relieve the effects of her admitted industrial injury.

CONCLUSIONS OF LAW

The respondents are liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a). Even if the respondents admit liability, they retain the right to dispute the relatedness of any particular treatment, and the mere occurrence of a compensable injury does not compel the ALJ to find that all subsequent treatment was caused by the industrial accident. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). Where the respondents dispute the claimant's entitlement to medical benefits, the claimant must prove the treatment is reasonably necessary and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must prove entitlement to medical benefits by a preponderance of the evidence. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

As found, Claimant proved the C5-6 fusion surgery recommended by Dr. Sung is reasonably necessary to cure and relieve the effects of her admitted injury. The ALJ credits the opinions and recommendations of Dr. Castrejon and Dr. Sung over the

opinions of Dr. Reiss. Dr. Reiss agreed the proposed surgery “is very useful for radicular pain,” but stated Claimant “doesn’t have radicular pain.” Yet, the records repeatedly document upper extremity radicular symptoms consistent with C6 nerve root compression or irritation, including numbness and weakness. Admittedly, the MRI findings are not particularly impressive, and at first blush do not suggest a surgical solution. But Dr. Sung appears to have appreciated more significant findings on the MRI than Dr. Reiss, and believes the MRI supports his surgical recommendation. Furthermore, Dr. Castrejon is persuasive that the static MRI probably does not give a complete picture of Claimant's spinal pathology, because her most intense radicular symptoms typically occur when she moves her head. The MRI images were taken in a posture that does not produce her worst symptoms. In any event, the MRI is only part of the picture, and the more compelling evidence relates to Claimant's clinical findings. She has symptoms in a C6 distribution, which are reasonably amenable to surgery at the C5-6 level. Claimant had a “great” (albeit short lived) response to the cervical ESI, which further supports the surgery. She has failed conservative treatment and no realistic remaining options short of surgery. While this is a close call, on balance, the evidence persuades the ALJ the proposed surgery is more likely than not reasonably needed to treat the effects of her industrial injury.

ORDER

It is therefore ordered that:

1. Insurer shall cover the C5-6 fusion surgery recommended by Dr. Sung.

2. All issues not decided herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 31, 2019

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS

STATE OF COLORADO

W.C. No. 5-056-383-001

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENT TRAVELERS AND DENYING SUMMARY JUDGMENT FOR THE CLAIMANT.

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

v.

Employer,

and

Insurer/Respondents.

A hearing on the merits in the above-referenced matter is scheduled for June 26, 2019, in Denver, Colorado. On January 11, 2019, Administrative Law Judge (ALJ) Edwin L. Felter, Jr. issued Full Findings of Fact, Conclusions of Law and Order on Remand, holding the above-captioned insurance carrier solely liable for the compensability of the Claimant's occupational disease of carpal tunnel syndrome, and ordering Respondent Travelers, accordingly, to pay the Claimant medical and temporary indemnity benefits. Respondent Travelers filed a Petition to Review on the issues of compensability and which insurance carrier was liable, Travelers or New Hampshire Insurance Company.

On or about February 27, 2019, Claimant filed an Amended Application for Hearing, designating by attached letter, penalties versus Respondent Travelers for alleged failure to pay the Claimant benefits when it had allegedly filed a Petition to Review on the exclusive ground that it was not the carrier on the risk on the date of the alleged injury. Respondent Travelers filed a Response to Application for Hearing on March 4, 2019. A clear reading of Travelers Petition to Review reveals that it is also appealing the issue of compensability as it relates to Travelers.

On or about March 26, 2019, Respondent Travelers filed a Motion for Summary Judgment requesting that Claimant's request for penalties, stated in the Application for Hearing and attachment be denied because Respondent Travelers' was, in fact, appealing the issue of compensability and not obliged to pay benefits during the pendency of the appeal. On or about April 5, 2019, Claimant filed a "Response to Respondents' Motion for Summary Judgment and Cross-Motion for Partial Summary Judgment, requesting that Travelers be held liable for penalties. On the same date, Respondent Travelers filed an Objection to Claimant's Cross-Motion for Summary Judgment, accusing Claimant of "knowingly misleading the court," allegations hardly fitting of the high standards of conduct prevailing in the Workers' Compensation Bar. Nonetheless, the ALJ will be the judge of whether the Claimant is "knowingly misleading the court," an allegation of serious magnitude insofar as it alleges a violation of Rule 3.3 of the Colorado Rules of Professional Conduct. Indeed, this issue boils down to whether the Claimant has misguidedly interpreted the provisions of § 8-43-301 (13), C.R.S., regarding the obligation of a carrier found liable, as opposed to another carrier, to pay benefits during the pendency of a review when **compensability** is not an issue, or has "knowingly misled" with the requisite mens rea.

ISSUE FOR SUMMARY JUDGMENT

The sole issue to be determined by this decision concerns whether there is a genuine issue of disputed material fact concerning whether Respondent Travelers was obliged to pay workers' compensation benefits to the Claimant during the pendency of the review a determination that Travelers and not New Hampshire Insurance Company, was the carrier on the risk at the time of the Claimant's last injurious exposure to the occupational disease of carpal tunnel syndrome; and, as a corollary, is there a disputed issue concerning whether Travelers was also appealing compensability regarding its time on the risk.

FINDINGS OF FACT

Based on the undisputed evidence contained in the file, pleadings and exhibits, the ALJ makes the following Findings of Fact:

Undisputed Facts

1. On February 27, 2019, Claimant filed an Amended Application for Hearing on the issue of penalties versus Respondent Travelers for failure to pay the Claimant benefits during the pendency of a petition to review to determine which carrier was on the risk the time of the Claimant's last injurious exposure to the occupational disease of carpal tunnel syndrome. Attached to the Amended Application was the wording of § 8-43-301 (13), C.R.S:

> If the order which is under petition to review does not concern compensability, but concerns the respective liability of two or more employers or insurance carriers, and the injury or illness was found compensable in a hearing held pursuant to section **8-43-215**, the employer or insurance carrier found liable by the director or administrative law judge shall pay benefits in accordance with the order under review until the review process is completed, at which time it shall be reimbursed by the other employer or carrier if reimbursement is necessary to comply with the final order.

2. On March 4, 2019, Respondent Travelers filed a Response to Application for Hearing, indicating that it was appealing the ALJ's determination of compensability as it pertains to Travelers.

3. Respondent Travelers' Brief in Support of Petition to Review states: The other issues regarding **compensability** (emphasis supplied) finding of occupational disease…and finding Travelers was the responsible carrier, need to be considered…."

4. It is not for the present ALJ to determine how very thin Respondent Travelers' argument is --that the ALJ erred in finding a compensable occupational disease of carpal tunnel syndrome generally. Indeed, as found in the Full Findings, Respondent Travelers seems to be asking for a re-weighing of the evidence.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Summary Judgment

a. Pursuant to Office of Administrative Courts Rules of Procedure (OACP) Rule 17, 1 CCR 1101-3, "any party may file a motion for summary judgment seeking resolution of any endorsed issue for hearing." Summary judgment may be sought in a workers' compensation proceeding. *See Fera v. Indus. Claim Appeals Office,* 169 P.3d 231, 232 (Colo. App. 2007). The OAC Rule allows a party to support its Motion with affidavits, transcripts of testimony, medical reports, or employer records. A motion for summary judgment may be supported by pleadings, depositions, answers to interrogatories, and admissions on file. C.R.C.P. 56; *See also Nova v. Indus. Claim Appeals Office*, 754 P.2d 800 (Colo. App. 1988) [C.R.C.P. and C.R.E. apply insofar as they are not inconsistent with the procedural or statutory provisions of the Act]. As found, Respondent Travelers Motion for Summary Judgment is supported by documents in the official file. As further found, the Claimant's Cross Motion for Summary Judgment is supported by the same documents.

b. Summary judgment is appropriate when the pleadings show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c); *Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (Colo. 1988). This rule allows the parties to pierce the formal allegations of the pleadings and save the time and expense connected with trial when, as a matter of law, based on undisputed facts, one party could not prevail. See *Drake v. Tyner*, 914 P.2d 519 (Colo. Ct. App. 1996). As found, the documentary evidence establishes that the facts in the present case are undisputed.

c. Once the moving party shows specific facts probative of a right to judgment, it becomes necessary for the non-moving party to set forth facts showing that there is a genuine issue for hearing. *See Miller v. Van Newkirk*, 628 P.2d 143 (Colo. App. 1980). As found, Respondent Travelers' Motion raises no genuine issues of disputed, material fact; and, Claimant's Response and Cross Motion for Summary Judgment fail to set forth facts showing that there is a genuine issue of disputed fact.

d. As found, the gravamen of Claimant's request for penalties versus Respondent Travelers involves the wording of §8-43-301 (13), C.R.S.

> If the order which is under petition to review does not concern **compensability** (emphasis supplied), but concerns the respective liability of two or more employers or insurance carriers, and the injury or illness was found compensable in a hearing held pursuant to section **8-43-215**, the employer or insurance carrier found liable by the director or

> administrative law judge shall pay benefits in accordance with the order under review until the review process is completed, at which time it shall be reimbursed by the other employer or carrier if reimbursement is necessary to comply with the final order.

e. The plain wording of §8-43-301 (13) indicates that when the review does **not** involve compensability the first liable insurer shall continue the payment of benefits. When construing a statute, the ALJ must give effect to the General Assembly's purpose and intent as reflected in the plain language of the statute. *People v. Luther*, 58 P.3d 1013 (Colo.2002). The ALJ should not depart from the plain meaning unless it leads to an absurd result. *Colo. Dep't of Soc. Servs. v. Bd. of County Comm'rs*, 697 P.2d 1 (Colo.1985). As found, Respondent Travelers was, among other things, seeking review of the ALJ's determination of compensability regarding Travelers.

f. As found, it is not for the present ALJ to determine how thin Respondent Travelers' request for a re-weighing of the evidence is thin, based on Travelers assessment of the weight to be given certain evidence, as opposed to the ALJ's assessment. Ordinarily, a re-weighing of the evidence is appropriate only when there is newly discovered evidence, which could not have been discovered through the exercise of reasonable diligence and which likely would be outcome determinative. *See Holmes v. Young,* 885 P.2d 305 (Colo. App. 1994). Respondent Travelers makes no such allegation herein.

g. Summary judgment may be sought in a workers' compensation proceeding. OACRP Rule 17 allows an ALJ to enter summary judgment where there are no genuine disputed issues of material fact. *Lanza v. WalMart Stores, Inc*., W.C. 4-707-313 (ICAO, September 24, 2007). Summary judgment is a drastic remedy and is appropriate only if there is no disputed issue of material fact and the movant is entitled to judgment as a matter of law. *Van Alstyne v. Housing Authority of Pueblo*, 985 P. 2d 97 (Colo. App. 1999). Once a moving party establishes that no material fact is in dispute, the burden of proving the existence of a factual dispute shifts to the opposing party. *Lanza, supra.* As found, it is undisputed that there is no genuine issue of disputed material fact.

Burden of Proof

h. The burden of proof is placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P. 2d 535 (Colo. App. 1992). That burden is "preponderance of the evidence." A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274

F.3d 1361 (D.C. Cir. 2001). As found, Respondent Travelers has sustained its burden with respect to its Motion for Summary Judgment. The Claimant has failed to sustain his burden with respect to his Cross-Motion for Summary Judgment.

ORDER

IT IS, THEREFORE, ORDERED THAT:

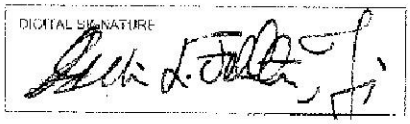
A. Respondent Travelers' Motion for Summary Judgment, requesting a denial of Claimant's request for penalties against Travelers is hereby granted..

B. Claimant's Cross-Motion for Summary Judgment is hereby denied and dismissed.

C. The hearing of June 26, 2019 is hereby vacated.

D. Any and all issues not determined herein are reserved for future decision.

DATED this 4th day of June 2019.



_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-095-747-001

ISSUES

I. Whether Claimant established by a preponderance of the evidence that he suffered a compensable knee injury during the course and scope of his employment on October 16, 2018.

II. Whether Claimant established by a preponderance of the evidence that medical treatment for his knee injury was reasonable, necessary, and causally related to an October 16, 2018 work injury.

III. Whether Claimant established by a preponderance of the evidence that Denver Health is an authorized medical provider.

IV. Claimant's Average weekly wage.

STIPULATION

The parties stipulated that Claimant is not entitled to temporary disability benefits from October 16, 2018, up to and including April 24, 2019.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant, a 56-year-old male, started work September 17, 2018 as a fabricator. Claimant helped build panels and his job duties included lifting parts, putting pieces together, drilling, standing, walking, and kneeling off and on during the workday.
2. Claimant lived in a half-way house and was required to work as part of his probation. Employer hired other half-way house employees.
3. Claimant earned an hourly rate of $16.75 per hour. Work hours varied week to week in large part due to Claimant's multiple absences from work. Wage records reflect that Claimant earned an average weekly wage of $283.08 prior to the alleged injury. (Exhibit J.)
4. On October 16, 2018, only one month after he started work with Employer, Claimant alleged he injured his right knee when he stood after kneeling and drilling screws into place on some panels. Claimant did not report an injury that day and there is no indication Claimant left work early or was unable to finish his shift due to his alleged knee injury. Claimant did, however, report his alleged injury the following day, October 17, 2018. (See Exhibits L, M.)

5. The day before Claimant's alleged injury, October 15, 2018, Claimant's supervisor, Steve Hodgkinson, disciplined Claimant following multiple unexcused absences. (Exhibit K p 40.)

6. After the alleged injury, Claimant's unexcused absences continued. On December 13, 2018, Employer prepared another infraction notice because Claimant failed to document his excuses and/or failed to call or show up at work. (Exhibit K p 41.) Claimant and the employer exchanged text messages on December 17, 2018 and December 18, 2018. Claimant asked if he had a job. Employer replied "Charles, why aren't you at work? You need to be at work from 6:30 AM to 3:00 PM every weekday. No one has told you otherwise." At 2:00 AM the next morning, Claimant responded he was not at work because he had a viral infection. "Sorry I know you're tired of this b*******". Claimant never returned to work or provided proof of his illness. (Exhibit K pp 42, 43.) On December 17, 2018, Employer prepared another infraction notice following Claimant's second no call no show violation. (Exhibit K p 44.)

7. Claimant filed a Workers' Claim for Compensation and acknowledged that he treated with Dr. David Orgel at Midtown Occupational Health. (Exhibit M.)

8. On October 18, 2018, Dr. David Orgel noted Claimant reported that:

> He works construction. He was kneeling placing nails and as he stood up he developed a pop and pain in his right knee.

   The report goes on to note that Claimant did not report the injury until the following day. Dr. Orgel's physical examination reflected bilateral knee pain with less tenderness and pain on the left. There was sub-patellar crepitation, left greater than right. There were also chronic changes of the right knee and some evidence of chronic instability. Dr. Orgel diagnosed right knee pain that could be from his chondromalacia and evidence of chronic instability. Dr. Orgel also concluded some of Claimant's condition may be related to squatting and kneeling which could lead to a meniscal tear. He did not, however, assign any work restrictions due to Claimant's complaints and his physical examination of Claimant. (Exhibit A.)

9. On November 10, 2018, an MRI of the right knee was performed and indicated a "probable medial meniscal tear." (Exhibit C.)

10. On November 16, 2019, Claimant returned to Dr. Orgel. At this visit, Dr. Orgel again noted the mechanism of injury as described by Claimant. The mechanism listed provides:

> He was kneeling and that as he came up from a squat he had immediate pain in his right knee.

He also noted Claimant had persistent discomfort in his right medial knee with the sensation of instability but without walking. He also indicated that Claimant stated his pain was unchanged with time.

Dr. Orgel's diagnosis at that time was: Right knee pain. He also stated that:

> The mechanism of injury would be consistent with a meniscal tear and the MRI suggests a possible meniscal tear but otherwise the knee is felt to be normal.

However, based on his overall assessment of Claimant's right knee, he again returned Claimant to full duty. (Exhibit 1, pg. 14.)

11. Moreover, on the same day, November 16, 2018, Dr. Orgel also completed a M164 form. The form contains a section that asks if the objective findings are consistent with the history and/or work related mechanism of injury. Dr. Orgel checked "yes" and "no" and the section that says "no" also includes the statement "to be determined." Therefore, Dr. Orgel did not conclude Claimant's right knee pain and need for medical treatment was caused by his work activities of standing up after kneeling. (Exhibit 1, pg. 14.)

12. On November 30, 2018, orthopedic specialist, Dr. Joseph Hsin, reported that the MRI was suggestive of a medial meniscal tear. Dr. Hsin did, however, considered Claimant's pain complaints to be out of proportion to the exam and his clinical findings. He noted in his report that they discussed a diagnostic arthroscopy as the next option. Therefore, the recommendation for a diagnostic arthroscopy indicates Dr. Hsin could not determine the cause of Claimant's right knee pain complaints. (Exhibit E.)

13. On December 17, 2018, Claimant sought treatment at Denver Health Emergency room. (See Exhibit F.) Claimant testified he decided to treat at Denver Health because Claimant's primary care physician worked at Denver Health and because Dr. Hsin did not get approval from the adjuster to proceed with the surgery that was for diagnostic purposes. Claimant did not attempt to return for medical care with Dr. Hsin or with Dr. Orgel or at Midtown Occupational Health Services.

14. On December 27, 2018, Dr Marshall at Denver Health noted that Claimant presented with normal right knee strength. X-rays showed no evidence of an acute fracture, no significant knee effusion, no significant joint space narrowing, no focal soft tissue abnormality, and knee alignment was anatomic. The note also indicate that: "Legal counsel suggests he have surgery done on his insurance." (Exhibit G.)

15. On February 15, 2019, physical therapy notes indicate Claimant had a good prognosis for recovery based on his age and high level of activity. The notes also indicate Claimant reported that his pain had decreased since his original injury but had not resolved. The notes further state that a corticosteroid shot Claimant had in December greatly decreased his pain. (Exhibit H.)

16. Dr. Linda Mitchell prepared an independent medical examination report dated April 2, 2019 (Exhibit I) and testified at the hearing. Dr. Mitchell is Board Certified in Occupational Medicine and Level II accredited. Dr. Mitchell diagnosed right knee arthropathy, or arthritis (degenerative joint disease), and a probable medial meniscus tear. Dr. Mitchell concluded that neither condition was related to Claimant's work activities. First, Claimant's arthritis of the right knee was not a work-related condition because the arthritis was a chronic problem in both knees that predated the October 16, 2018 work incident. Also, according to the Medical Treatment Guidelines, Claimant did not meet the criteria for an aggravation of arthritis due to a work incident. Second, the probable meniscus tear was not work-related because the mechanism of injury does not support work relatedness. The Medical Treatment Guidelines support that kneeling down may cause a meniscal tear but that rising from kneeling position, as in this case, will not cause a meniscal tear. Claimant did not bang his knee, twist his knee, or hyper extend his knee. Claimant reported that he rose from a kneeling position and felt a pop and that motion did not provide sufficient force to cause a meniscal tear or work injury. Also, Dr. Mitchell explained that Dr. Hsin noted that the MRI was inconclusive, and a meniscal tear was probable but not confirmed, because radiology protocol requires two levels of the MRI to show a tear and that did not exist in this case. Dr. Mitchell concluded that Claimant's probable meniscal tear was more likely due to the natural progression of his underlying degenerative condition because the degenerative condition was present in Claimant's left and right knees. Dr. Mitchell testified that it is only a matter of time before Claimant experiences similar problems/symptoms in his left knee. Dr. Mitchell concluded that Claimant's symptoms that allegedly occurred at work on October 16, 2018, did not equate to a work-related aggravation or acceleration of Claimant's underlying degenerative condition and work did not cause the need for medical treatment. Dr. Mitchell pointed out that other medical providers' records support her opinion. On October 18, 2018, Dr. Orgel noted Claimant reported bilateral knee pain, sub patellar crepitation left greater than right, evidence of chronic changes, and evidence of chronic instability. Dr. Hsin and Dr. Marshall noted Claimant's pain was out of proportion to their examinations. Dr. Mitchell considered arthroscopy for the meniscus tear unreasonable because she doubted the procedure will help Claimant given his symptom exaggeration and underlying degenerative changes. Dr. Mitchell recommended exercise and injections outside of the workers' compensation system.

17. Claimant testified at the hearing. Claimant stated that his right knee popped when he stood from a kneeling position and that he did not bang his knee, twist his knee, or hyperextend his knee. Claimant admitted that the day before his knee incident, Claimant was made aware of a written warning infraction notice because Claimant missed multiple days of work and that after the knee incident,

attendance problems continued. Claimant admitted he failed to return to work even after Mr. B_____ texted Claimant that he still had a job. Claimant admitted that he treated with Dr. Orgel at Midtown Occupational Health and he treated with an orthopedic specialist whose name he could not recall but may have been Dr. Hsin. Claimant testified that the orthopedic specialist tried to schedule knee surgery, but the insurance company denied authorization, and the specialist cancelled surgery. Claimant assumed that the insurance company denied all medical care when Dr. Hsin cancelled surgery. Claimant admitted, however, that he never attempted to return to Dr. Orgel, Midtown Occupational Health, or the specialist, and he never contacted the insurance company to learn if they denied all treatment. Instead, Claimant chose to resume treatment at Denver Health because his primary doctor worked at Denver Health.

18. Jake B_____, Employer's production engineer, testified at the hearing. Mr. B_____ was familiar with Claimant and with other half-way house employees. Mr. B_____ testified that Claimant had difficulty learning and performing his job. Mr. B_____ was aware of Claimant's attendance issues. Mr. Bechtoldt testified that half-way house employee attendance issues usually occurred because the employee was not allowed to leave the half-way house due to behavioral issues. Mr. B_____ testified that the company drove Claimant to and from his medical appointments to help Claimant attend his appointments because Claimant did not have his own transportation. Mr. B_____ considered Dr. Orgel and Midtown Occupational Health authorized providers. Mr. B_____ did not consider Denver Health an authorized provider. Claimant earned an hourly rate of $16.75 per hour. His hours varied due to attendance issues and the number of days he missed from work each week.

19. Jessica L_____, the claims adjuster, testified. Ms. L_____ testified that the Respondents denied surgery, in part, because they recently received the file and needed to gather medical records. Ms. L_____ did not deny treatment with Dr. Orgel or at Midtown Occupational health or with Dr. Hsin, other than surgery. Ms. L_____ did not authorize treatment at Denver Health.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence

is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

Compensability

A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. Section 8-41-301(1)(b), C.R.S.; *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). An accident "arises out of" employment when there is a causal connection between the work conditions and the injury. *In re Question Submitted by the United States Court of Appeals for the Tenth Circuit*, 759 P.2d 17 (Colo. 1988). The determination of whether there is a sufficient "nexus" or causal relationship between the claimant's employment and the injury is one of fact that the ALJ must determine based on a totality of the circumstances. *Moorhead Machinery & Boiler Co. v. DelValle*, 934 P.2d 861 (Colo. App. 1996). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is

awarded. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000); Singleton v. Kenya Corp., 961 P.2d 571, 574 (Colo. App. 1998).

A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. See *Cotts v. Exempla, Inc.*, W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. See *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.,* W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

In this case, Claimant failed to demonstrate by a preponderance of the evidence that he suffered a compensable knee injury during the course and scope of his employment on October 16, 2018. The ALJ credits the opinions expressed by Dr. Mitchell that Claimant's degenerative arthritis and probable medial meniscus tear were not causally related to Claimant's activities at work. Dr. Mitchell concluded that Claimant's symptoms which he alleges started at work on October 16, 2018, while standing up did not equate to a work-related aggravation or acceleration of Claimant's underlying degenerative condition and that work did not cause the need for Claimant's medical treatment. Specifically, Claimant's arthritis was not a work-related condition because the arthritis was a chronic problem in both knees that predated the onset of symptoms that Claimant alleged started while at work on October 16, 2018. Also, according to the Medical Treatment Guidelines, Claimant did not meet the criteria for an aggravation of arthritis due to a work incident. Next, Claimant's probable meniscus tear was not work-related. The Medical Treatment Guidelines support that repetitive squatting and kneeling could lead to a meniscus tear but not rising from a kneeling position. In this case, Claimant admitted that he felt a pop when he rose from a kneeling position and that he did not bang his knee, twist his knee, or hyper extend his knee. Dr. Mitchell credibly and persuasively concluded that Claimant's probable meniscal tear was more likely due to the natural progression of his underlying degenerative condition because the degenerative condition was present in Claimant's left knee as well as his right knee. Other medical providers supported Dr. Mitchell's opinion. On October 18, 2018, Dr. Orgel noted Claimant reported bilateral knee pain, sub patellar crepitation left greater than right, evidence of chronic changes, and

evidence of chronic instability. Dr. Orgel also failed to conclude that Claimant's right knee complaints were related to his job activities of standing up on October 16, 2018.

Dr. Hsin and Dr. Mitchell also noted Claimant's pain complaints were out of proportion to their physical examination and findings when they evaluated Claimant. Such evidence is found to be credible and persuasive. Therefore, since Drs. Hsin and Mitchell did not think Claimant was accurately representing the extent of his physical problems, such evidence diminishes the ability of the ALJ to rely on Claimant's contention regarding the time, place, and precipitating event of his right knee problems.

In addition, compensability is questionable when evaluating the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; and the Claimant's motives. Claimant was on probation and living in a half-way house at the time of his employment. A term or condition of his probation was to maintain employment. According to Mr. B_____, Claimant had difficulty learning and performing his job. Also, Claimant only worked for Employer for one month but was absent from work often. According to Mr. Bechtoldt, half-way house employee attendance issues usually occurred because the employee did something wrong and was not allowed to leave the half-way house due to behavioral issues. As a result, Claimant may have been nervous about losing his job when he alleged a work injury two days after the employer disciplined Claimant for excessive unexcused absences.

Therefore, based on the totality of the evidence, the ALJ finds and concludes that Claimant has failed to establish by a preponderance of the evidence that his October 16, 2018 work activities caused his right knee condition and necessitated the need for medical treatment. The ALJ also finds and concludes, based on the totality of the evidence, that Claimant has failed to establish by a preponderance of the evidence that his work activities on October 16, 2018, aggravated, accelerated or combined, with his pre-existing knee condition to produce the need for medical treatment for his right knee. Thus, the ALJ finds and concludes that Claimant has failed to establish by a preponderance of the evidence that he suffered a compensable injury.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claim for benefits is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed

it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 4, 2019.

/s/ Glen B. Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- What is the proper apportionment of death benefits between the Dependent Claimants?

- Who should be the payee?

FINDINGS OF FACT

1. The Deceased was involved in a fatal accident on March 23, 2018 while working as a roofer for Employer. A gust of wind caught a piece of sheet metal he was working with and caused him to fall from a roof. The accident occurred at approximately 8:33 AM and he was pronounced dead at 2:43 PM that same day. There is no dispute his death was a proximate result of the March 23, 2018 accident.

2. The parties stipulated to an average weekly wage (AWW) of $1,422.23. The parties also stipulated death benefits are payable at the maximum compensation rate of $948.15 in effect on the date of the Deceased's death.

3. Ms. S[Redacted] was not married to the Deceased at the time of his death and stipulated she is not entitled to death benefits.

4. The Deceased and Ms. S[Redacted] had two children together. J.D. is the Deceased's natural son. His date of birth is May 1, 2009. DNA testing confirmed the probability of paternity at 99.9997%. A.L. is the Deceased's natural daughter. Her date of birth is October 28, 2011. DNA testing confirmed the probability of paternity at 99.99998%. Respondents stipulated that J.D. and A.L. are the Deceased's son and daughter, respectively.

5. J.D. and A.L. are presumed wholly dependent on the Deceased, pursuant to § 8-41-501(1)(b), C.R.S. No evidence was presented to rebut the statutory presumption of dependency, and the ALJ finds J.D. and A.L. were actually dependent on the Deceased for support at the time of his death.

6. The Deceased was not married at the time of his death, and has no children other than J.D. and A.L. The ALJ finds J.D. and A.L. are the only persons eligible to receive workers' compensation death benefits in connection with this claim.

7. J.D. and A.L. are each entitled to death benefits until age 18, or until age 21 if engaged in courses of study as a full-time student in an accredited school.

8. J.D. and A.L. live with Ms. S[Redacted] on a full time basis and she is now solely responsible for their support. Ms. S[Redacted] is willing and able to apply the

benefits in J.D. and A.L.'s best interests. The ALJ finds Ms. S[Redacted] is the best person to act as payee for J.D. and A.L.'s workers' compensation benefits.

9. Ms. S[Redacted] requested the death benefits be apportioned "50/50" between J.D. and A.L., which the ALJ finds to be the most reasonable and appropriate apportionment of benefits in this case. The ALJ further finds that, when J.D. or A.L. ceases to be eligible for benefits, the death benefits shall be reallocated 100% to the remaining eligible child, if any.

CONCLUSIONS OF LAW

Death benefits are payable to the dependents of an employee who dies as a proximate result of a work-related accident. Section 8-42-115(1)(b), C.R.S. Dependents and the extent of dependency are determined "as of the date of the injury . . . and the right to death benefits shall become fixed as of said date irrespective of any subsequent change." Section 8-41-503(1), C.R.S. Children of the deceased under the age of 18 are presumed wholly dependent, and children between 18 and 21 years of age are presumed wholly dependent as long as they are engaged in courses of study as full-time students at any accredited school. Section 8-41-501(1)(b) and (c), C.R.S. As found, J.D. and A.L. are the Deceased's sole dependents, and were wholly dependent on the Deceased for support at the time of his injury and death.

Dependents are entitled to two-thirds of the deceased's AWW, subject to the maximum compensation rate in effect on the date of death. Section 8-42-114, C.R.S.; *Richards v. Richards & Richards*, 664 P.2d 254 (Colo. App. 1983). As found, the parties stipulated to an AWW of $1,422.23 and death benefits payable at the rate of $948.15 per week.

Death benefits shall be apportioned among multiple dependents in a manner the ALJ deems "just and equitable." Section 8-42-121, C.R.S. As found, the benefits should be apportioned equally between J.D. and A.L., as long as they are both eligible. When J.D. or A.L. ceases to be eligible for death benefits, the payment shall be reallocated 100% to the remaining eligible child, if any.

The surviving spouse or a friend may apply for death benefits on behalf of the deceased's minor children. Section 8-42-122, C.R.S. The ALJ has discretion to determine the manner and method of payment on behalf of minor children "in such manner as the [ALJ] sees fit." *Id*. As found, the benefits should be paid to Ms. S[Redacted] for J.D. and A.L.'s benefit. Ms. S[Redacted] is the full-time custodial parent. The ALJ concludes Ms. S[Redacted] is willing and able to apply the benefits in the best interests of J.D. and A.L.

ORDER

It is therefore ordered that:

1. Insurer shall pay death benefits of $948.15 per week commencing March 24, 2018 and continuing until terminated according to law.

2. The benefits shall be apportioned equally between J.D. and A.L. as long as both remain eligible. When J.D. or A.L. ceases to be eligible, the payment shall be reallocated 100% to the remaining eligible child.

3. The benefits shall be paid to Ms. S[Redacted] as payee, and shall be applied for the benefit of J.D. and A.L.

4. Insurer shall pay statutory interest at the rate of 8% per annum on all amounts not paid when due.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 4, 2019

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-857-829-002

CORRECTED FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

No further hearings have been held. On June 3, 2019 Respondents filed a Motion for Corrected Order, correctly averring that the Administrative Law Judge (ALJ) limited the issues concerning the viability of case closure and the Final Admission of Liability (FAL) at the hearing of May 1, 2019.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on May 1, 2019, in Denver, Colorado. The hearing was digitally recorded (reference: 5/1/19, Courtroom 1, beginning at 1:30 PM, and ending at 3:00 PM). No testimonial evidence was taken. The matter was submitted on the exhibits admitted into evidence.

The Claimant was not present in person but represented by [Redacted], Esq. Respondents were represented by [Redacted], Esq.

Hereinafter [Redacted] shall be referred to as the “Claimant." [Redacted] shall be referred to as the “Employer.” All other parties shall be referred to by name.

Claimant's Exhibits 1 through 8 were admitted into evidence, without objection. Respondents' Exhibits A through T were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ established a post-hearing briefing schedule. Claimant's opening brief was filed on May 8, 2019. Respondents' answer brief was filed on May 15, 2019. Claimant's reply brief was filed on May 20, 2019, at which time the matter was deemed submitted for decision. The reply brief states the position that all of Respondents' arguments are moot, if the FAL is void *ab initio*.

ISSUES

A critical issue to be determined by this decision is whether the Final Admission of Liability (FAL), dated August 26, 2014, was *void ab initio* as to the admission for maximum medical improvement (MMI), permanent medical impairment, or both. The FAL admitted for causally related and reasonably necessary post-MMI) medical maintenance care; an average weekly wage of $575.61; temporary total disability (TTD) benefits through April 30, 2012; an MMI date of April 30, 2012, and permanent partial disability (PPD) benefits, based upon 23% of the whole person, with a $10,000.00 lump sum payment on October 4, 2012 and a final payout aggregating $37, 388.16, completed on February 11, 2015. The Claimant's contention is that the entire FAL is null and void because it was based on the opinion of Bart Fotheringham, M.D. Claimant's authorized treating physician (ATP) in the State of Utah, who conceded that he was not Level 2 Accredited in the State of Colorado. In rating permanent medical impairment, however, Dr. Fotheringham used the American Medical Association *Guides to the Evaluation of Permanent Medical Impairment,* 3rd Ed., Rev.(hereinafter "AMA Guides"), as required by § 8-42-107 (8) (c), C.R.S., in rating the degree of whole person permanent medical impairment.

Corollary issues are whether the Claimant is estopped from challenging the FAL at this time because he accepted and received all of the admitted permanent medical impairment benefits If the FAL is null and void, should the Claimant be obligated to repay Respondents the $55, 780.44 he received in permanent medical impairment benefits in order to prevent his unjust enrichment, pursuant to the case law dealing with overpayments.

The Claimant filed a Petition to Reopen one day before the 6-year statute of limitations took effect. The ostensible ground in the Petition to Reopen is "change of condition." Medical reports supporting renewed urinary problems are attached to the Petition. As it relates to the contention that the FAL is null and void, is it sufficient to state the ground of "change of condition," based on a "substantial compliance-type argument, " when, in fact, the actual ground should be error or mistake in the FAL

The Claimant bears the burden of proof, by preponderant evidence on the issues of case closure and whether the FAL is null and void, with the exception of "estoppel," in which case Respondents bear the burden of proof by a preponderance of the evidence.

CORRECTED FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Corrected Findings of Fact:

Preliminary Findings

1. The Claimant was injured on June 7, 2011. A General Admission of Liability (GAL), admitting for temporary total disability (TTD) benefits was filed on June 14, 2011 (Respondents' Exhibit A-1). The Claimant received care initially at Craig Hospital, but eventually relocated to Salt Lake City, Utah.

2. On April 30, 2011, the Claimant received a release to full duty and was determined to be at maximum medical improvement (MMI). The insurance carrier filed a GAL terminating TTD benefits, pursuant to § 8-42-105(3), C.R.S., effective May 1, 2011 (Respondents' Exhibit A 3-5). The Claimant received $17,981.96 in TTD benefits from the date of injury to that date.

Permanent Impairment Rating and Benefits

3. The Claimant underwent an impairment rating pursuant to the AMA Guides, performed by ATP Bart Fotheringham, M.D., in Murray, Utah. Dr. Fotheringham agreed that the Claimant was at MMI on April 30, 2012, and he assigned a 23% whole person impairment rating. Dr. Fotheringham admitted that he was **not** Level II Accredited in Colorado. Respondents filed an FAL, in accordance with Dr. Foteringham's rating, on June 8, 2012 (Respondents' Exhibit B 1-12)..Dr. Fotheringham is not Level 2 Accredited by the Colorado Division of Workers Compensation (DOWC), however, § 8-42-107 (8) (b.5) (I) (A), C.R.S., read *in pari material,* with the rest of Subsection (b.5), reveals that an out-of-state physician may determine MMI and degree of physical impairment and transmit the results to the Colorado insurance carrier, who may then appoint a Colorado Level II accredited examiner to determine the impairment rating. By its silence in the rest of the statutory provision, an insurance carrier may accept the out-of-state ATPs impairment rating and pay PPD benefits pursuant thereto, as is the case herein. By necessary implication, a claimant may either agree with the out-of-state physician's rating, or insist on the appointment of a Colorado Level II Accredited physician to do the rating, in which case the insurance carrier is liable for the costs of the Colorado impairment rating, including a claimant's travel to Colorado.

4. The admitted 23% whole person rating totaled $55,780.44 in permanent medical impairment benefits, paid from the date of MMI to February 11, 2015. Attached to the FAL was "Notice to Claimant of Rights and Benefits." Dr. Fotheringham's report was also attached. Also attached is an Objection to the FAL and a Notice and Proposal, which contains in bold print that if the Claimant had any issues with benefits admitted he needed to file an Objection and apply for a Division Independent medical Examination (DIME) or apply for Hearing within 30 calendar days of the filing of the FAL, July 8, 2012

5. The Claimant began collecting PPD on a bi-weekly basis. He did not file an Objection to the FAL or file an Application for Hearing (Respondents' Exhibit G-2). The Division of Workers Compensation (DOWC) reviewed the file and requested a Final Payment Notice on September 24, 2012 (Respondents' Exhibit E). Respondents filed the Final Payment Notice on October 22, 2012 (Respondents' Exhibit F).

6. On October 2, 2012 the Claimant contacted the DOWC and enquired about obtaining a $10,000.00 Lump Sum (Respondents' Exhibit G-1). The Claimant then contacted Respondents and made the request. Respondents issued the lump sum payment on October 4, 2012.

7. Due to this and a lump payment at the onset of PPD, all PPD benefits had been paid out as of August 21, 2014. Respondents filed a second FAL, based upon the completion of payment due to the change in the time period of benefits being owed. Again, Respondents attached the required notices to Claimant. Again, the Claimant did not file an Objection to the FAL and did not apply for hearing on any issues (Respondents' Exhibit B 13-18). The payment ledger was also attached to the FAL.

8. Claimant relocated again to Oregon. He did not treat with any physician in 2014. Again, the Claimant did not file an Application for Hearing on any issues surrounding his post-MMI maintenance care or anything else during this time period (Respondents' Exhibit G 1-2). Claimant eventually relocated to Alaska.

The Petition to Reopen

9. The Claimant filed a Petition to Re-Open on June 6, 2017. The alleged ground in the Petition to Re-Open is marked "Change in Condition". The Claimant did not mark Error or Mistake as a reason for Re-opening (Respondents' Exhibit. H). The attached medical reports were dated March 24, and May 17, 2017. The Petition and Application make no mention of any issues with the FALs. The Claimant's Application for Hearing in connection with the Petition, does not endorse PPD as issue. TPD from March 2013 to "ongoing" and TTD for the same time period were listed as issues. The Claimant later withdrew permanent total disability as an issue by motion. There was no endorsement of an issue concerning the FALs on this Application (Respondents' Exhibit H-7-8). At the commencement of the may 1, 2019 hearing, the ALJ limited the

reopening issues to whether the latest FAL was null and void, which would result in the case continuing to be open.

10. Hearing was set for October 3, 2017. Due to the Claimant not answering discovery and the A pre-hearing conference before the DOWC was held on November 6, 2017. Conference notations indicate that there was difficulty obtaining information from the Claimant. Again, the Claimant did not provide answers to discovery and the hearing was vacated. The Pre-hearing Order allowed the Claimant to withdraw the Application for Hearing and refile it. There was no mention, nor was there a motion, of additional issues to be endorsed for the next Application (Respondents' Exhibit J).

11. The Claimant filed a new Application for Hearing on March 23, 2018 endorsing the same issues, this time omitting PTD. Again, there was no issue concerning the FAL endorsed and no endorsement of the claim not being closed, such an endorsement possibly being incomprehensible to a self-represent claimant (as the Claimant was at the time) Again due to discovery issues, the hearing was vacated. On August 30, 2018, the Claimant then filed his third Application now endorsing a penalty for alleged failure to involve a Level II provider and closure of claim. Claimant did not endorse the FAL as *void in ab initio* and did not endorse PPD. Claimant also did not file a motion to add the issue nor had there been any Notice that this was an issue until the third Application was filed.

Analysis of the Evidence

12. It is undisputed that at the time of the Petition to Re-open the Claimant did not assert that the claim was still open and that there was an issue with the FALs. It is also undisputed that the Claimant did not endorse PPD on any of his Applications for Hearing. It is undisputed that the Claimant did not Object to either of the FALS and did not apply for hearing within 30 days of their issuance of the FALs. It is undisputed that the Claimant collected over $55,000.00 in PPD and has not returned this sum to the Respondents. While his Petition to Re-Open based on change of condition was timely filed 1 day before the Statute ran, a Petition to Re-open based on Error or Mistake was never filed and the Application for Hearing was not filed until August 30, 2018, The Claimant has raised no issue with the impairment rating itself, and proffers no explanation as to why the DOWC closed the file, after reviewing the FALS. A Petition to Re-Open on Change of Condition is the next procedural step in this case.

13. The Claimant's argument at hearing, with regard to not objecting to the FALs was that he could have requested a DIME, and that he could have received additional indemnity because he was unaware of the law.

14. Claimant does **not** argue that he did not receive the FALs or that the FALs were untimely. He also does **not** argue that the FALs did not have the requisite Notice requirements and objection forms attached (Resp.ondents' Exhibit B). His argument

that the FALs did not meet the requirements of § 8-42-107, C.R.S. is factually untimely. The Claimant accepted the PPD award made in the FALs in its entirety, made a lump sum request, which was granted, and the DOWC reviewed the file and requested a Final Payment Notice, thus, the DOWC closed the file and gave notice to the parties that the file was closed.

15. The Claimant argued at hearing that he was not given a right to a DIME to increase his indemnity award. This is not accurate. The insurance carrier sent the requisite Notice and forms to the Claimant in 2012 and 2014 and the Claimant chose to not pursue a DIME or file an Application for Hearing. The only impediment to the Claimant obtaining a DIME was his not requesting a DIME. By requesting the $10,000.00 Lump Sum, which the Claimant received, he demonstrated that he had the ability to contact the DOWC and make inquiries and that he had received the FAL. The ALJ finds that this establishes an acquiescence and acceptance of the FAL.

16. The DOWC received the first FAL on June 8, 2012 and found no errors contained in it. As was the required procedure at the time, when no Objection was filed, the DOWC requested the Final Payment Notice. Respondents fulfilled this request. In that the DOWC enacted the procedures to close the claim, accepted the FAL without issuance of a correction notice, and Claimant's Lump Sum request.

17. The filing of the second FAL again afforded the Claimant the right to apply for Hearing on issues at that time. The Claimant again took no action. It is undisputed that Claimant did not timely give notice of the Error/Mistake. It is also undisputed that the last PPD payment was over two years prior to either June 6, 2017 or August 30, 2018. The purpose of a Petition to Re-open is to give Respondents notice that an award should be re-opened. The Claimant did not mark "Error or Mistake" on the June 6, 2017 Petition. The attached medical reports are dated in March and May of 2017. The Application for Hearing attached to the Petition did not endorse PPD or make mention of any issues with the FAL. Specifically, the Claimant did not assert that the FALs were *void ab initio*.

18. The Claimant states in his opening brief that the Petition to Re-Open was filed in a precautionary manner in that the case was still open due to the FALs being *void ab initio*. The Claimant gave no notice of any issues with the FALs until August 30, 2018.

19. The ALJ infers and finds that Respondents are prejudiced by Claimant's untimely raising of this issue (years after the last PPD payment was received by the Claimant) as throughout 2017 and the majority of 2018, Respondents proceeded defending the matter as a Petition to Re-open based on change of condition. This included not only discovery tailored to that issue but also the retaining of Stanley Ginsburg, M.D., to perform a chart review (Respondents' Exhibit K). The Claimant has

not proffered a reasonable or persuasive excuse as to the untimely and lack of notice to this issue.

20. The Claimant not only achieved MMI on April 30, 2012, but he has worked for at least four employers since MMI. The case was closed by the FALs as the FALs were accepted and approved by the DOWC and Claimant accepted the award and did not timely Object. The last payout on the PPD award was August 21, 2014.

21. The Petition to Re-open, dated June 6, 2017, on the stated ground of "change of condition," was filed one day short of the expiration of the relevant statute of limitations provision. It was timely and attached to it were medical reports that support a prima facie case of worsening of condition beginning on March 24, 2017 (Respondents' Exhibit H). It creates a disputed factual issue concerning whether the 2017 medical condition was a natural progression of the sequelae of the June 7, 2011 injury, or whether a change or worsening began in March 2017. The Petition to Reopen postures the issue of reopening on the ground of changer of condition for a future hearing..

DISCUSSION

The Claimant's principal thrust is that the FALs are null and void. If so, It follows that the $55,780.44 PPD award was a mistake due to clerical error, not fraud. Recovery of overpayments, based on mistake and on a retroactive basis, was prohibited by *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990). In 1997, the General Assembly amended the re-opening statute to include overpayments as a ground for re-opening as to overpayments only. § 8-43-303 (1) and (2) (a), C.R.S. Now, employers have a statutory right to review and recalculate payments if an insurance carrier made a mistake in previous payments. *Simpson v. Indus. Claim Appeals Office,* 2009 Colo. App. LEXIS 576 (No. 07CA1581, April 16, 2009) (NSOP). Previously, an admission of liability could only be withdrawn retroactively on the basis of fraud. *Vargo v. Indus. Comm'n,* 626 P.2d 1164 (Colo. App. 1981). To the extent that a case may be re-opened, based on mistake and not fraud, if there were overpayments, the *Vargo* grounds for retroactively modifying a previously admitted award has been altered to include employer mistakes in calculations.

If the Claimant's theory of the case, *i.e.,* that the FALs were *void ab initio*, prevailed, then the Respondents would be entitled to recoup overpayment of $55,780.44 in overpayments made due to the mistake that Dr. Fotheringham was not a Colorado Level II physician, thus, his rating was void. The fallacy with this argument is that the provisions of § 8-42-107 (8) (b.5) (I)(A), C.R.S., allows an out-of-state physician to determine MMI and rate permanent medical impairment provided that the AMA *Guides,* 3rd. Ed., Rev. are used. If a claimant is not satisfied with this proviso, the claimant may request an insurer to pay for the claimant to come to Colorado and be rated by a Colorado Level II Accredited physician. In the present case, both the Respondents and the Claimant accepted Utah ATP Dr. Fotheringham's MMI

determination and rating—**End of Story** concerning the FALs. There is a time honored legal principle that the apple cart should not be disturbed unless it is absolutely necessary. in the present case, the statutory scheme on ratings, as referenced herein above, dictate that the FALs should be left well enough alone.

As found, the Petition to Re-open, dated June 6, 2017, on the stated ground of "change of condition," was filed one day short of the expiration of the relevant statute of limitations provision. It was timely and attached to it were medical reports that support a prima facie case of worsening of condition beginning on March 24, 2017 (Respondents' Exhibit H). creates a disputed factual issue concerning whether the 2017 medical condition was a natural progression of the sequelae of the June 7, 2011 injury, or whether a change or worsening began in March 2017. The Petition postures the issue of "change in condition" for an evidentiary hearing..

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Final Admissions of Liability (FALs)

a. If the Claimant's theory of the case, *i.e.,* that the FALs were *void ab initio*, prevailed, then the Respondents would be entitled to recoup $55,780.44 in overpayments of PPD benefits made due to the mistake that Dr. Fotheringham was not a Colorado Level II physician, thus, his rating was void. The fallacy with this argument is that the provisions of § 8-42-107 (8) (b.5) (I)(A), C.R.S., allow an out-of-state physician to determine MMI and rate permanent medical impairment provided that the AMA *Guides,* 3rd. Ed., Rev. are used. As found, this occurred. If a claimant is not satisfied with this proviso, the claimant may request an insurer to pay for the claimant to come to Colorado and be rated by a Colorado Level II Accredited physician. In the present case, both the Respondents and the Claimant accepted Utah ATP Dr. Fotheringham's MMI determination and rating. This is dispositive concerning the FALs. There is a time honored legal principle that the apple cart should not be disturbed unless it is absolutely necessary. in the present case, the statutory scheme on ratings, as referenced herein above, dictate that the FALs should be left well enough alone. In light of these statutory provisions, it is unnecessary to deal with issues of estoppel, waiver and laches.

Petition to Re-open

b. Regardless of the stated ground, the Petition to Reopen was timely. A Petition to Re-open is required in this case because TTD was properly terminated. The Claimant not only reached MMI, but he has worked for at least four employers since MMI. The case was closed by the FALS as the FALS were accepted and approved by the DOWC and the Claimant accepted the award and did not timely Object. Under § 8-43-303(1), C.R.S., after MMI and within six years of the date of injury, an ALJ may re-open a claim based on fraud, an overpayment, **an error, a mistake,** or a change in condition. See *El Paso County Department of Social Services v. Donn,* 865 P.2d 877 (Colo. App. 1993); *Burke v. Indus. Claim Appeals Office,* 905 P. 2d 1 (Colo. App. 1994); *Hanna v. Print Express, Inc.,* 77 P. 3d 863 (Colo. App. 2003); *Donohoe v. ENT Federal Credit Union,* W.C. No. 4-171-210 [Indus. Claim Appeals Office (ICAO) September 15, 1995]. This is so because MMI is the point in time when no further medical care is reasonably expected to improve the condition. § 8-40-101(11.5), C.R.S. (2009); *City of Colorado Springs v. Indus. Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Where a claimant seeks to re-open based on a changed condition, he must demonstrate a change in condition that is "causally connected to the original compensable injury." *Chavez v. Indus. Comm'n,* 714 P.2d 1328 (Colo. App. 1985). As found, the Claimant has made a prima facie case for re-opening. Endorsement of "petition to reopen" on an application for hearing or response to application for hearing sufficiently raises the issue for consideration. *See Cooper v. Indus. Claim Appeals Office,* 109 P.3d 1056 (Colo. App.2005). Collateral estoppel applies to all issues except "**error, mistake, or a change in condition."** *Cooper v. Indus. Claim Appeals Office,* 998 P.2d 5 (Colo. App. 1999). Consequently, as found, it is appropriate to grant the Claimant's Petition to re-open on the ground of "change of condition." It is not appropriate to grant it on the ground of error or mistake insofar as the FALs were allegedly *void ab initio* because they were **not** *void ab initio.*

Burden of Proof

c. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits, beyond those previously admitted. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has

failed to sustain his burden with respect to error and mistake, specifically, that the FALs were *void ab initio.* Consequently, the issue of re-opening based on change of condition remains to be heard at a future time.

CORRECTED ORDER

IT IS, THEREFORE, ORDERED THAT:

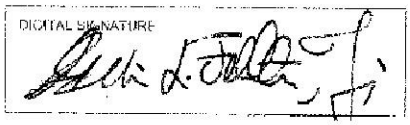
A. Respondents' Motion for Corrected Order is hereby granted.

B. Claimant's request to have the previously filed Final Admissions of Liability declared null and void is hereby denied and dismissed. Also, Claimant's request to re-open based on this proposition is hereby denied and dismissed.

C. Claimant's Petition to re-open, based on "change of condition" is hereby deferred, pending a future evidentiary hearing.

D. Any and all issues not determined herein, including re-openuing, are reserved for future decision..

DATED this 5th day of June 2019..



EDWIN L. FELTER, JR.
Administrative Law Judge

This decision of the administrative law judge does not grant or deny a benefit or a penalty and may not be subject to a Petition to Review. Parties should refer to § 8-43-301(2), C.R.S., and other applicable law regarding Petitions to Review. If a Petition to Review is filed, *see* Rule 26, OACRP, for further information regarding the procedure to be followed.

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that her cervical spine condition and a three level cervical fusion is causally related to her November 6, 2014 work injury.

FINDINGS OF FACT

1. Claimant was employed by Employer as a team leader and content manipulator. Employer is a restoration company that restores fire and flood damaged businesses and homes. Claimant's duties included working with a crew to pack and clean damaged businesses and homes. Her duties often required lifting and moving heavy furniture items.

2. On November 6, 2014, while so employed, Claimant sustained an admitted work related injury. On that date, Claimant was lifting a large desk in a commercial office building with three other coworkers. As she lifted the corner of the desk up, Claimant felt immediate pain.

3. Claimant testified that the immediate pain she felt was in her shoulder and the right side of her neck.

4. Claimant reported the injury to her supervisor and was referred for treatment.

5. On November 11, 2014, Stephen Danahey, M.D. evaluated Claimant. Claimant reported that she had been lifting a large heavy desk with other employees when she felt a pulling sensation in the right shoulder. Claimant reported that she had continued to work, but had increasing pain in her right shoulder with radiation to the right lateral neck and the right arm. Dr. Danahey assessed right shoulder strain and recommended physical therapy and ibuprofen. Dr. Danahey noted that the examination was concerning for a rotator cuff tear and that if there was no improvement in a week or so, an MRI would be needed for the shoulder. *See* Exhibits 3, A.

6. On November 14, 2014, Claimant underwent physical therapy with PT William Widdison. Claimant reported that her chief complaint was right cervical shoulder pain. PT Widdison noted that Claimant was there for therapy for a right shoulder strain. PT Widdison evaluated the right shoulder strain, issued Claimant a cold pack and point relief for use at home and work, and instructed Claimant in therapeutic exercises. PT Widdison instructed on exercises that included cervical rotation and side bending stretches and instructed Claimant in sitting posture and its importance to Claimant's neck and shoulder pain. *See* Exhibit B.

7. On November 19, 2014, PT Widdison noted that Claimant had the same complaints of right shoulder pain and loss of motion. *See* Exhibit B.

8. On November 20, 2014, Dr. Danahey evaluated Claimant. Claimant reported right shoulder pain and that it hurt to move the shoulder. On exam, Dr. Danahey found the right shoulder abduction and flexion to be very limited. He continued to asses right shoulder strain. *See* Exhibit A.

9. Claimant also underwent physical therapy on November 20, 2014. Claimant reported that her shoulder was feeling the same overall with symptoms aggravated with active abduction and with raising the arm in general. Claimant reported pain at the anterior shoulder joint and the right upper trapezius region. *See* Exhibit B.

10. On December 5, 2014, Elizabeth Palmer, PA evaluated Claimant. Claimant reported that she was still having pain in her right shoulder. PA Palmer noted that the pain was located over the right AC joint as well as in the right trapezius and that it radiated up the right neck. Claimant reported mild improvement of symptoms with physical therapy. PA Palmer assessed strain of right shoulder, right shoulder joint pain, and ordered an MRI of Claimant's right shoulder. *See* Exhibit A.

11. Claimant underwent an MRI of her right shoulder on December 16, 2014. It showed oblique tearing of the supraspinatus tendon at its confluence with the infraspinatus. *See* Exhibits 4, D.

12. On December 19, 2014, Miriam Halazon, NP evaluated Claimant. Claimant's right shoulder was found to have limited range of motion in all planes and was painful in all planes. The right shoulder had a positive Hawkins test, positive empty can test, and positive lift off test. On examination of the cervical spine, NP Halazon found normal lordosis, no tenderness, and full range of motion with normal sensation. NP Halazon assessed shoulder joint pain, strain of right shoulder, and tear of right supraspinatus tendon. She referred Claimant to an orthopedic consultation. *See* Exhibit A.

13. On December 19, 2014, Claimant was involved in a non-work related motor vehicle accident. Claimant was on Santa Fe Boulevard stopped at a red light when a sports utility vehicle hit another sports utility vehicle that was pushed into Claimant's car. The speed limit on Santa Fe Boulevard was 45 miles per hour and Claimant had minor damage to her vehicle. Claimant did not seek immediate medical care following the motor vehicle accident.

14. On December 30, 2014, Claimant was evaluated at Southwest Emergency Room by Gregory Burcham, M.D. Claimant reported she was rear ended on December 19 while wearing her seatbelt and that no airbags deployed. Claimant reported worsening neck pain, thoracic back pain, right wrist pain, and left hip pain since her motor vehicle collision. On examination, Claimant's neck was found to have full range of motion, no

midline tenderness, and mild left lateral tenderness. Dr. Burcham doubted fracture or dislocation and opined there was no evidence of spine injury. He opined that Claimant may be developing radicular pain and that Claimant may need an MRI if her symptoms progressed. Dr. Burcham referred Claimant to orthopedics and provided a primary impression of cervical strain. Claimant was discharged to home. *See* Exhibits 5, F.

15. On January 20, 2015, orthopedic surgeon Craig Davis, M.D. evaluated Claimant. Claimant reported that on November 6 she was helping with a desk at work when she felt a pop and pain in her right shoulder and reported that she had significant pain since with any sort of reaching or lifting. Dr. Davis reviewed Claimant's right shoulder MRI. On exam, Dr. Davis found a strongly positive impingement test and provided the impression of right rotator cuff tear. He opined that Claimant was a good surgical candidate. Claimant indicated that she wanted to think about the surgery. Claimant did not report a neck injury to Dr. Davis and did not report the motor vehicle accident she had been involved in less than one month prior. *See* Exhibits 6, G.

16. On February 18, 2015, Claimant provided a recorded statement to an insurance carrier involving her motor vehicle accident. Claimant described the motor vehicle accident and her motor vehicle accident related injuries in detail. Claimant indicated that her injuries from the motor vehicle accident included a neck injury and reported ongoing symptoms including neck popping and pain across her neck and shoulders. Claimant reported pain levels at 6.5 to 7.5/10. Claimant denied having any prior neck injuries, reported that she was still hurting, and reported that she wanted medical care for her motor vehicle accident injuries. *See* Exhibit I.

17. On April 7, 2015, Dr. Davis evaluated Claimant. He again went over surgical treatment and told Claimant that the longer she waited, the larger her rotator cuff tear was likely to be and the worse the result of the repair. Claimant again stated she wanted to think about things and wanted to make arrangements with work. Claimant did not mention neck issues or her motor vehicle accident at this visit. *See* Exhibit G.

18. On April 15, 2015, Claimant's personal care provider Gregory Glick, PA evaluated Claimant. Claimant reported chronic neck pain, left hip pain, and right hand pain after a December motor vehicle accident. Claimant reported that when she turned her head, it sometimes got stuck and she needed to jar her neck to get it unstuck. Claimant reported that the pain was in her right shoulder and right side of her neck primarily and that she now had a grinding/popping noise in her neck when she moved it. On exam, Claimant's neck motion was noted to be limited. Cervical spine x-rays were performed and compared to June 2009 x-rays. They showed that Claimant's grade 1 retrolisthesis of C5 on C6 from 2009 was unchanged, that there was a new minor grade 1 anterolisthesis of C4 on C5, that there was stable moderate to severe degenerative disc disease at C5-6, and that there was mild cervical facet hypertrophy. *See* Exhibits 5, J, K.

19. On October 7, 2015, Claimant underwent right shoulder arthroscopy with labral debridement, arthroscopic double row repair of the rotator cuff, and subacromial decompression. *See* Exhibits 7, G.

20. On October 21, 2015, Timothy Abbott, PA for Dr. Davis, evaluated Claimant. Claimant reported that she had been compliant with her sling and denied any new injury. X-rays showed good hardware placement and soft underside of the acromion. PA Abbott opined that Claimant appeared to be healing well and understood the risk of re-tear and would continue to avoid any active use of the shoulder. *See* Exhibit G.

21. On November 18, 2015, Dr. Davis evaluated Claimant. Claimant reported she had been using the sling and doing physical therapy. Claimant reported quite a bit of trapezial and neck pain as well as headaches. Dr. Davis opined that Claimant was doing well following rotator cuff repair and recommended discontinuing the sling and continuing physical therapy to progress to active motion and eventually to strengthening. *See* Exhibit G.

22. On December 16, 2015, Dr. Davis evaluated Claimant. Dr. Davis noted that Claimant was now 10 weeks from the right rotator cuff repair and was compliant with her 2 pound restriction and able to work without difficulty with no new strain or injury to the shoulder. Claimant reported that she still had pain in her neck and trapezius but that it seemed to be improving gradually with massage and since she had discontinued her sling. On examination, Dr. Davis found slight tenderness to palpation along the trapezius into the neck. He found good neck range of motion with only mild pain at extremes. Dr. Davis provided the impression of post right shoulder scope with rotator cuff repair and postoperative neck and trapezial pain. He allowed Claimant to increase her lifting to 5 pounds as tolerated and recommended continued physical therapy as well as continued massage therapy for the neck and trapezius. *See* Exhibit G.

23. On January 13, 2016, Dr. Davis evaluated Claimant. Claimant reported she was making progress in physical therapy but continued to have a lot of soreness around the right side of her neck and trapezial area. Dr. Davis noted that claimant had apparently not had any massage despite his last request. He opined that Claimant was making gradual progress. On exam, Claimant reported significant tenderness on the right side of her neck and trapezial area as well as pain with range of motion of her neck that radiated to the right side. Dr. Davis noted that Claimant continued to have a lot of myofascial pain on the right side of the neck and trapezial area. *See* Exhibits 6, G.

24. On March 9, 2016, Dr. Davis evaluated Claimant. Claimant reported she began massage therapy, which helped but continued to have significant activity related pain around the right trapezial area as well as the lateral acromial area. On exam, Claimant had some tenderness in the trapezial area and parascapular area as well as over the lateral acromion. Dr. Davis opined that Claimant was having more pain than he would normally expect at this point and ordered an MRI to evaluate the shoulder repair. *See* Exhibit G.

25. On April 27, 2016, after an updated right shoulder MRI, Dr. Davis noted that Claimant had a partial re-tear of the rotator cuff. He opined that recurrent tears happen approximately 20% of the time after a tear of her size and that it was sometimes

unavoidable since they had to do physical therapy starting right after surgery to avoid postoperative stiffness. He recommended a second opinion with Dr. Faulkner and opined it might be necessary to use a graft in repeat surgery. *See* Exhibit G.

26. On July 18, 2016, Nathan Faulkner, M.D. evaluated Claimant. Claimant reported doing well for approximately two months post surgery but then developing worsening pain in her right shoulder. Dr. Faulkner opined that Claimant would be a good candidate for a revision rotator cuff repair with possible allograft augmentation and Claimant indicated she wanted to think about her options. *See* Exhibit G.

27. On January 12, 2017, Claimant underwent another right shoulder surgery, this one performed by Dr. Faulkner. The procedures performed included: right shoulder arthroscopy with debridement of the superior and posterosuperior labrum as well as synovitis in the glenohumeral; arthroscopic rotator cuff repair with allograft augmentation, and subscapularis repair. *See* Exhibits 12, G.

28. On January 23, 2017, Dr. Faulkner evaluated Claimant. Claimant reported her pain was mildly improved since surgery. Claimant reported pain in her upper arm and neck and that she had been wearing her sling as instructed. Dr. Faulkner recommended continuing the sling when ambulating and at night. *See* Exhibit G.

29. On February 20, 2017, Dr. Faulkner evaluated Claimant. Claimant reported that her pain continued to slowly improve and that the pain was localized to her neck, upper arm, and lateral shoulder. Claimant reported wearing her sling as instructed. Dr. Faulkner recommended discontinuing the sling and performing physical therapy. *See* Exhibit G.

30. On April 3, 2017, Dr. Faulkner evaluated Claimant. Claimant reported she continued to have generalized shoulder pain that radiated into her biceps and anterior chest. Dr. Faulkner noted that an MRI showed the graft and cuff to be intact. He recommended continued physical therapy. *See* Exhibit G.

31. On June 5, 2017, Dr. Faulkner evaluated Claimant. Claimant reported that her pain and range of motion had been improving but had gotten worse since her last physical therapy appointment. Claimant reported that she still could not ride her motorcycle. *See* Exhibit G.

32. On September 11, 2017, Dr. Faulkner evaluated Claimant. Claimant reported muscle tightness and intermittent catching in her shoulder with pain at a 6/10. Dr. Faulkner noted another MRI showed again that the rotator cuff and graft were intact. Dr. Faulkner ordered an intra articular steroid injection. *See* Exhibit G.

33. On November 14, 2017, Christopher Isaacs, D.O. provided a second surgical opinion. Claimant reported that she had suffered a shoulder injury while lifting a desk at work. Claimant did not report a neck injury during her work accident and also did

not report her motor vehicle accident. Dr. Isaacs recommended a right shoulder injection followed by an arthroscopic lysis of adhesions. *See* Exhibit O.

34. On December 15, 2017, Alexander Zimmer, M.D. evaluated Claimant. Claimant reported that she injured her right shoulder on November 6, 2014 when lifting a heavy desk. Claimant reported having two rotator cuff surgeries on her right shoulder and that she continued to have pain from the right shoulder area extending across the upper trapezius to the right posterior neck. Claimant also reported a loss of feeling over the tips of her second through fifth digits on the right hand. Claimant denied any next or upper extremity problems prior to her work injury. Dr. Zimmer performed a nerve conduction-emg study that was entirely normal. His impression noted no objective evidence of neuropathy on examination or nerve conduction testing including cervical radiculopathy. Dr. Zimmer opined that Claimant's symptoms may be related to musculoskeletal factors producing pain in the shoulder girdle then causing more distal sensory symptoms. *See* Exhibit P.

35. On December 18, 2018, Dr. Faulkner provided a shoulder injection and recommended more shoulder surgery to include a manipulation under anesthesia with diagnostic arthroscopy, lysis of adhesions, subacromial bursectomy, and possible biceps tenodesis. *See* Exhibit G.

36. On January 25, 2018, John Burris, M.D. evaluated Claimant. Claimant reported developing right shoulder pain after lifting tables at work. Claimant did not report neck pain during the lifting event and did not report her motor vehicle accident. Dr. Burris planned to obtain Dr. Faulkner's noted and then decide how to proceed. Around this time, Claimant requested a change of physician to someone closer to home which was granted and she began treatment with Brian Beatty, D.O.

37. On January 29, 2018, Dr. Faulkner evaluated Claimant. Claimant reported that the intra articular steroid injection only provided 2 hours of pain relief. Claimant also reported that a recent EMG was normal. Claimant continued to reported muscle tightness and intermittent painful catching in the shoulder. Claimant also reported continued numbness in her fingertips since the surgery. Dr. Faulkner recommended another MRI to evaluate. *See* Exhibit G.

38. On February 21, 2018, Dr. Faulkner called Clamant to review the recent right shoulder MRI. Dr. Faulkner opined that it showed some adhesive capsulitis and residual subacromial bursitis and he recommended proceeding with examination/manipulation under anesthesia with diagnostic arthroscopy, lysis of adhesions, subacromial bursectomy, and possible biceps tenodesis. Claimant wanted to think about her options and get back to him. *See* Exhibit G.

39. On April 5, 2018, Dr. Beatty evaluated Claimant. Claimant reported that she was injured while at work and lifting a desk and that she felt a pull in her right shoulder. Claimant again did not report a neck injury or the motor vehicle accident. Claimant was referred for chiropractic care. On April 25, 2018, Dr. Beatty evaluated Claimant again

and referred Claimant for an MRI of her cervical spine to rule out the neck as a contributing factor. *See* Exhibit Q.

40. On April 30, 2018, Claimant underwent a cervical MRI. The results showed zygopophyseal joint arthritis worse on the right side at C4-5; spondylolisthesis at C4-5, moderate right foraminal stenosis at C4-5, small protrusions at C3-4; protrusions and osteophytes at C5-6, C6-7, and C7-T1; moderate canal and severe bilateral foraminal stenosis at C5-6; and mild canal stenosis and mild right foraminal narrowing at C6-7. Dr. Beatty referred Claimant to Hugh McPherson, M.D. after reviewing the cervical spine MRI results. *See* Exhibit Q.

41. On June 13, 2018, Dr. McPherson evaluated Claimant. Claimant reported immediate pain in her neck when lifting the desk at work. Claimant failed to report her motor vehicle accident. Dr. McPherson diagnosed probable C5 radiculopathy, C4-5 instability with anterolisthesis, C5-6 retrolisthesis, and C4 through C7 degeneration. He opined that a C4-C7 anterior posterior fusion should be considered and Claimant wanted to think about it. *See* Exhibit T.

42. On July 11, 2018, Dr. McPherson evaluated Claimant. Dr. McPherson recommended obtaining a cervical injection to isolate where claimant's symptoms were coming from. On August 7, 2018, Barry Ogin, M.D. administered a right C6 transforaminal epidural steroid injection. Dr. Ogin's post procedure impressions were advanced cervical spondylosis, cervical degenerative disc disease, and right upper extremity radiculopathy. On August 27, 2018, Dr. McPherson noted that the injection helped delineate Claimant's pathology, as the injection provided 70% relief. Dr. McPherson concluded the cervical spine was now the primary pain generator, and recommended to moving forth with a C4-C7 fusion.

43. David Orgel, M.D. reviewed Dr. McPherson's recommendation for a three level cervical fusion and issued a report on September 11, 2018. Dr. Orgel opined that the relatedness of the need for fusion was suspect and recommended denying surgery until an independent medical examination was completed by Dr. Hattem. *See* Exhibit V.

44. On September 18, 2018, Albert Hattem, M.D. performed an independent medical examination. Claimant reported that she lifted a u shaped desk estimated to weigh 200 pounds with two men and one woman and that while she was pulling on the right side of the desk and lifting slightly, she felt immediate pain in her right shoulder. Claimant did not describe immediate neck pain or neck popping. Dr. Hattem asked Claimant about subsequent injuries and Claimant denied any neck injuries. Dr. Hattem reviewed medical records and performed a physical examination. *See* Exhibit W.

45. Dr. Hattem opined that Claimant's cervical condition and need for a three level fusion was not causally related to her work injury. He opined that the history of mechanism of injury was unlikely to result in cervical spine injury and that the records supported that Claimant had only intermittent cervical myofascial pain following the work injury radiating up from her acute rotator cuff tear not unexpected given such a large

rotator cuff tear. Dr. Hattem also opined that Claimant's December 19, 2014 negative cervical examination suggested the myofascial pain had resolved by that date and that the cervical MRI showed only age related chronic degenerative changes and no evidence of an acute cervical spine injury. Dr. Hattem opined that considering the significant degenerative findings identified on the cervical MRI, Claimant was likely to be experiencing the same cervical spine symptoms regardless of her work injury. *See* Exhibit W.

46. On November 26, 2018, Dr. Faulkner evaluated Claimant. Claimant reported that since she was seen in January, she had gone to Dr. McPherson and was found to have some central and foraminal stenosis that was likely contributing to her right shoulder and lateral neck pain and that Dr. McPherson was recommending a C4-7 fusion. Claimant reported continued muscle tightness and intermittent catching in the shoulder as well as numbness in her fingertips since surgery. Dr. Faulkner noted that Claimant had persistent pain, stiffness, and significantly limited function of her shoulder despite articular steroid injection, anti-inflammatory pain medication, and extensive physical therapy. Dr. Faulkner noted that Claimant's foraminal and central stenosis was likely contributing to Claimant's ongoing pain. Dr. Faulkner opined that given that Claimant's pain started at her job and had never resolved despite two shoulder surgeries, it was as likely as not that the work injury exacerbated Claimant's underlying cervical degenerative disc disease. He therefore recommended the cervical spine treatment be covered by workers' compensation. Dr. Faulkner was not aware of Claimant's motor vehicle accident. *See* Exhibits 11, G.

47. On December 6, 2018, Dr. McPherson reviewed Dr. Hattem's IME report. Dr. McPherson relied on Dr. Hattem's report for the medical records. Dr. McPherson disagreed with Dr. Hattem and believed the mechanism of injury of lifting a desk was substantial enough to cause a neck injury. Dr. McPherson opined that Claimant's cervical complaints were consistent since the point of initial complaint and he opined that Claimant had no prior active need for treatment in her cervical spine prior to her work injury. Dr. McPherson opined that Claimant had degenerative changes in her cervical spine that were likely pre-existing but asymptomatic, thus making the wakened area of her spine more susceptible to injury. Dr. McPherson had a history from Claimant of immediate pain in her neck when lifting the desk. Dr. McPherson was not aware of Claimant's motor vehicle accident. *See* Exhibit 17.

48. On April 10, 2019, Dr. Faulkner issued an updated report. Dr. Faulkner opined that there was a causal relationship between Claimant's work injury and her complaints of neck pain because Claimant indicated some pain in her neck that radiated into her arm at her initial visit. Dr. Faulkner opined that the neck pain started at work from the injury lifting a desk causing strain on the neck and shoulder. Dr. Faulkner noted that reviewing additional medical records did not change his opinion that the work injury is more likely than not to have exacerbated Claimant's neck condition and cervical degenerative disk disease. Dr. Faulkner opined that degenerative disc disease of the cervical spine can often manifest as shoulder pain due to referred pain from pinched nerves in the neck and that there was a high probability that is what was the case for

Claimant since she had two prior shoulder surgeries resulting in healing of the rotator cuff injury but yet continued right shoulder and radiating arm pain. Dr. Faulkner recommended continued definitive management of the neck before considering any additional shoulder treatment. *See* Exhibit 18.

49. Dr. Hattem testified at hearing. He continued to opine that Claimant's cervical MRI findings were chronic degenerative changes and that nothing on the cervical MRI could be identified as acute. Dr. Hattem also noted that after his independent medical examination, he was given additional records including a 2009 cervical x-ray report and records related to the motor vehicle accident, and the recorded statement made to an insurance company regarding the motor vehicle accident. He also noted that he received physical therapy records. Dr. Hattem testified and opined that the intermittent myofascial neck pain reported after the work injury and before the motor vehicle accident was not pain related to a cervical spine injury.

50. Dr. Hattem opined that after reviewing the additional records, he believed Claimant's testimony that she did not injure her neck in the motor vehicle accident and that her neck was exactly the same before and after the motor vehicle accident to be inconsistent. Dr. Hattem again opined that Claimant would have the same cervical condition and need for care regardless of the work injury. He opined that the work related mechanism of injury was not one expected to cause a cervical spine injury but opined that a whiplash type injury from the motor vehicle accident is a more injurious mechanism of injury. He opined that if any event aggravated or accelerated Claimant's pre existing condition it was the motor vehicle accident.

51. Dr. Hattem's opinions are found credible and persuasive. Dr. Hattem's causation opinion is consistent with the overall weight of the evidence.

52. Claimant testified at hearing. Overall, she is not found credible or persuasive. Her testimony that her neck pain was the exact same before and after her motor vehicle accident is inconsistent with her reports to the insurance provider regarding the motor vehicle accident and is inconsistent with medical records. Her explanation for failing to report her motor vehicle accident to her workers' compensation providers is not persuasive. Her testimony that after significant findings in 2009 x-rays of her cervical spine she was not told or did not know she had a degenerative condition in her neck is not persuasive. Claimant's testimony that she did not recall telling the motor vehicle accident insurance provider that she had injured her neck in the motor vehicle accident is also not persuasive.

53. Many providers relied on Claimant's subjective reports indicating immediate pain in her neck at the time she lifted the desk. They also relied on subjective reports made by Claimant indicating that she had no prior neck problems, when 2009 x-rays show clear evidence of degenerative disk disease. Further, Claimant also reported subjectively and inaccurately that she had no subsequent neck injuries after her work injury when she in fact was treated for and reported a neck injury with the motor vehicle accident. Any

opinions based on Claimant's inaccurate subjective reports cannot be relied upon to any degree of certainty.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo.App. 2000).

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d

1192 (Colo. App. 2002).). Again, the claimant bears the burden of proof of showing that medical benefits are causally related to his work-related injury or condition, by a preponderance of the evidence. *Ashburn v. La Plata School District 9R,* W.C. No. 3-062-779 (ICAO May 4, 2007); C.R.S. §8-43-201, *HLJ Management Group, Inc. v. Kim,* 804 P. 2d 250(Colo. App. 1990).; *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915, 918 (Colo. App. 1993).

Claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970); § *8-41-301(1)(c), C.R.S.* Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of employment. *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, *supra*.

It is well settled that any natural development of an intervening, nonindustrial injury, which is separate from and uninfluenced by an earlier industrial injury, is not compensated as part of the original industrial injury. *Post Printing & Publishing Co. v. Erickson,* 94 Colo. 382, 30 P.2d 327 (1934) Stated another way, the causation chain and the right to medical benefits may be severed by an efficient intervening event or aggravation. As stated in *Baer v. Sherwin Williams*, W.C. No. 4-217-692 (ICAO March 7, 1996), an efficient intervening injury which causes claimant's subsequent disability and need for further treatment supports the denial of benefits. *See* also *Metz v. Cornerstone Care Center,* W.C. No. 4-151-534 (ICAO March 7, 1994) (claimant's right knee condition which pre-existed an admitted work injury was worsened in an injury on the weekend after the work injury); In *Baer v. Sherwin Williams,* supra, after the occurrence of an admitted low back injury, claimant suffered a subsequent, intervening, back injury while installing a sprinkler system at home which necessitated surgical repair of a herniated disc that was denied as not causally related to the admitted injury. In *Kowal v. JVK Enterprises, Inc.*, W.C. No. 4-271-333 (ICAO September 20, 1996), claimant injured his neck while wrestling his manager at work, but did not lose any time from work until he experienced severe neck pain while reaching across a restaurant table while away from work, the herniated disc found unrelated to this claim's injury as it was caused by this subsequent unrelated event. Whether a particular condition is the result of an independent intervening cause is a question of fact for resolution by the ALJ. *Owens v. ICAO*, 49 P.3d 1187 (Colo. App. 2002).

Claimant has failed to establish, by a preponderance of the evidence that the three level surgical fusion recommended by Dr. McPherson is causally related to her November 6, 2014 work injury. Although Claimant sustained an acute right rotator cuff tear on that date and had myofascial pain radiating from her shoulder into her right upper trapezius and neck area, Claimant has failed to establish that the incident caused a cervical spine injury or the need for a three level surgical spine fusion.

As noted above, Claimant had significant pre-existing degenerative disease in her cervical spine prior to the work injury. This included retrolisthesis at C5-6, degenerative disk disease at C4-5, minor grade 1 anterolisthesis of C4 on C5, moderate to severe degenerative disc disease at C5-6, and mild cervical facet hypertrophy. None of these conditions are related to Claimant's work injury. The significant degenerative disease process was present in her cervical spine as far back as 2009 and is naturally expected to progress. Claimant has failed to establish that the work injury accelerated the natural degenerative process. As found above, there were no acute findings on the cervical spine MRI. Claimant is not credible that she experienced an acute pop in her neck on the date of injury.

Additionally, as found above, Claimant was involved in a motor vehicle accident on December 19, 2014. Claimant failed to report this motor vehicle accident to multiple providers who were treating her workers' compensation right shoulder injury. Claimant did report to an insurance provider that she had acutely hurt her neck in this motor vehicle accident. Claimant's symptoms after the motor vehicle accident changed from pain radiating from her shoulder into her neck to symptoms not previously present including locking, clicking, grinding, and range of motion deficits. Providers gave opinions on causation without the a history and based on Claimant's subjective reports. The opinions that were made without all the information cannot be relied upon to any degree of certainty.

Claimant has failed to establish, more likely than not, that the November 6, 2014 work injury caused her need for a three level cervical fusion. Rather, the credible evidence and testimony establishes it to be more likely needed due to the natural progression of her pre-existing degenerative disease or due to her intervening motor vehicle accident. Claimant has failed to meet her burden.

ORDER

It is therefore ordered that:

1. The request for further medical treatment of claimant's neck is denied and dismissed including, but not limited to, the C4-7 cervical fusion recommended by Dr. McPherson. Further treatment of claimant's neck is not reasonable, necessary, or related to her November 6, 2014 injury.

2. Any issued not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or

service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 5, 2019

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

I. Is Claimant entitled to Temporary Total Disability ("TTD") benefits?

II. Are Respondents entitled to withdraw their Final Admission of Liability ("FAL"), dated 12/21/2018?

III. If Respondents all allowed to withdraw their FAL, which party's DIME application will take precedence?

STIPULATIONS

The parties agreed that the issue of Permanent Total Disability will be held in abeyance. The ALJ accepted this stipulation.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Claimant was a delivery driver at Lowe's Home Center. On February 19, 2018, he was moving a refrigerator when he suffered an injury to his thoracic and lumbar spine. A General Admission of Liability was filed on 4/18/2018. (Ex. 3).

2. Claimant treated with Dr. Autumn Dean as his authorized treating physician (ATP). Claimant's first appointment with Dr. Dean was on February 22, 2018. Dr. Dean's report was sent to the Lowe's Human Resources manager, Jill Roudebush. A First Report of Injury was promptly filed. (Ex. 28, pp. 293-295).

3. After the Claimant's initial medical appointment, Ms. Roudebush and the Claimant reviewed his restrictions on 2/24/18 when he returned to work. They both signed the "Transitional Work Employee Acknowledgement" (Ex. 26, p. 98) form for Sedgwick confirming his work restrictions which were: No lifting/carrying/pushing/pulling more than 5 lbs., no crawling/squatting/kneeling/climbing. At hearing, Ms. Roudebush testified that she was aware of Claimant's work restrictions, and that Claimant was therefore offered a modified job at Lowe's. She described the light job duty as working in the delivery office where he was notifying customers of the deliveries and taking incoming calls. He was basically providing customer service. She described the job as a seated position. She testified that his job was working in an office, not on the floor.

4. The Claimant returned to work performing the modified job and his regular 40 hour per week shift. He had his second appointment with Dr. Dean on March 1, 2018. Dr. Dean wrote:

> Today, he says he is doing a little better, but still having a lot of muscle pain and spasms. He says that he has a lot of pain with walking on the concrete at work, has been walking most of his shifts and not allowed to sit much. No new symptoms." (Ex. 27, p. 264).

The physician's restrictions on the WC 164 form for that appointment included a 5 pound lifting restriction (with the new addition of)

> No bending. Sedentary duties, stand as needed for comfort, Sit in chair with back (no stools). No driving if taking sedation medications". (Ex. 27, p. 272)

At hearing, Ms. Roudebush testified that she did not meet with the Claimant to discuss these new restrictions. She did indicate that the Claimant was able to stand and sit as needed for his light duty job as an appliance locator. The claims adjuster Megan Tharp testified that she received these new restrictions from the ATP on March 2.

5. Jill Roudebush testified about conversations she had with the Claimant about potentially going to another position. He eventually told her on March 6, that he wanted to resign his position as a delivery driver and that he did not want to return as a driver. There was a discussion about other positions made available but he was not interested in those positions, despite their encouragement to apply for other positions within the company.

6. Claimant's next medical follow up was March 22, 2018. Claimant was still working the same modified duty job. Dr. Dean's comments from that appointment include, "He denies any new symptoms today, still has pain with certain motions and after standing on concrete floor for 5-6 hours." He was referred to chiropractic treatment. (Ex. 27, pp. 245, 242.)

7. Also on March 22, Claimant exchanged text messages with his Lowe's supervisor Larry Wright. He wrote,

> I will not be in today due to my back issues. And after what you said about no place for me I am going to HR to consider resigning. No need to text back I will see you and management face to face on Friday. Sorry about all this. I have a doctors appointment today." (Ex. J)

8. Claimant testified that he was spending about half of his 8 hour shift on his feet, while checking the items in the warehouse. He testified that walking the warehouse aisles on the cement floor "destroys me". He also said he had pain from looking upwards for the items on the shelves when he was locating them.

9. Later in the text message exchange, Larry Wright wrote:

> "We would find a spot for you, all I was saying is that it probably wouldn't be deliveries after the delivery coordinator spot was filled-but we're still a ways out on that. (Ex. J)

At hearing Mr. Wright testified that the delivery coordinator spot was not actually available. Mr. Wright testified that the warehouse was approximately 60 X 100 feet, containing "several aisles".

10. Jason Taylor, the Operations Manager for Lowe's, testified at hearing. He was the Claimant's manager. He testified that the modified job the Claimant was performing involved him taking phone calls, and then walking the warehouse floor and locating the appliances that needed to be delivered. The items were stored up high on shelves in the warehouse. Claimant would be required to locate the items in the warehouse and then mark down on the delivery notes where the item was in the warehouse.

11. Mr. Taylor testified that the other jobs that were available for the Claimant were floor sales, which was working in the store helping customers, or a cashier job. Both of these jobs would involve standing. Mr. Taylor also described several conversations he has with Claimant during this time period:

> A: ….it was probably several times a week where we would have conversations and stuff like that. And there were a lot of times when, you know, Ben [Claimant] would make a comment that would say, you know, I've never done this before, I've always been a worker. I feel bad, you know, doing this. And we – we had offered him to move to the sales floor, we had offered him to do cashier work, and that never really come to fruition.
>
> Q. Okay. So did you ever tell him at any time that there was not light-duty available?
>
> A. No

12. The Claimant attended a meeting with Jill Roudebush of Human Resources on March 24 and signed the Employee Notice of Resignation form. The form stated that Claimant certified that his resignation was voluntary. (Ex. J, p. 37). Jill Roudebush testified that at the time, the Claimant resigned, there was still light duty work available under the doctor's restrictions.

13. The Claimant continued in treatment for his work injury, and at some point retained counsel. Through his counsel, he filed a Worker's Claim for Compensation to the Division. (Ex. 2). On April 3, 2018 Claimant's counsel sent a letter to Insurer's adjuster, alleging that the Claimant had been informed by Lowe's management that there was no more modified duty for him to perform within his restrictions, and that the Claimant had been encouraged to resign so that he did not have to be fired. The letter stated that the Claimant retracted his resignation. (Ex. 28, p. 299)

14. At hearing, Claims adjuster Megan Tharp testified that after receiving this letter, she discussed the Claimant's job with Jill Roudebush at Lowe's. Then on April 18, 2018 Ms. Tharp filed a General Admission of Liability ("GAL"), denying temporary disability benefits. This was filed 46 days after Lowe's created their injury report, which had not been turned in to the Division.

15. The Claimant did not return to work, but continued his medical treatment for the injury under his GAL. The ATP, Dr. Dean, placed the Claimant at MMI on September 20, 2018. Dr. Dean determined that the Claimant had an 11% Whole Person rating from Table 53II B for specific disorders of the spine. Insurer's adjuster, Megan Tharp, received official notice of this impairment rating by fax from Dr. Dean's office on October 2, 2018, and mailed a copy of the fax to Claimant's counsel's office on October 9, 2018. (Ex. 28, p. 300)

16. On October 24, the parties attended a settlement conference with a PALJ conducted through the Pre Hearing Unit on the case, but did not arrive at a settlement.

17. On November 16, 2018 Claimant's counsel mailed Dr. Dean a letter inquiring if she would review her impairment rating, as Claimant had his own Functional Capacity Evaluation ("FCE") performed, which had shown significant loss of range of motion. Dr. Dean had not included range of motion in her impairment rating. The letter was copied to Respondents' counsel. (Ex. B). Ms. Tharp testified that she received a copy of that letter, and then became aware that Dr. Dean did not include a range of motion in her initial impairment rating.

18. After receiving the initial impairment rating provided by the ATP, Respondents did not file a Final Admission of Liability. Neither did they file a Notice and Proposal for a DIME within 30 days as required by WCRP Rule 5-5 (E). Counsel for the Claimant sent a letter by fax to the Respondent counsel on December 11, 2018, referring to a December 4 telephone call, and inquiring why there was still not a FAL "Claimant was placed at MMI on September 20"**…[**and].. **"**Megan [Tharp] STILL has not filed a Final Admission"…(Ex. 19, p. 103).

19. Megan Tharp testified there was a delay in filing the Final Admission of Liability due to her confusion over whether she had actually received a Form 164 and there was a Settlement Conference which had been scheduled. Ms. Tharp testified that she received the letter from Ms. Roepke indicating that the rating report was missing range of motion and also information that the Claimant's attorney was contacting her attorney requesting why a Final Admission of Liability had not been filed.

20. Despite having received the impairment rating reports and worksheets on October 2, Respondents failed to take any action until December 21, 2018, at which time the adjuster Megan Tharp filed a FAL, admitting to Dr. Dean's 11% WP rating, and a payment of $16,409.36 to Claimant. Ms. Tharp attached a WC 164 report from the September 20 appointment; however, she did not attach the rating sheets or the written impairment report from Dr. Dean. (Ex.5). The FAL, therefore, was filed 80 days after the Claimant's MMI report had been faxed to the adjuster by Dr. Dean's office. At hearing, Ms. Tharp confirmed that she did not file the FAL within the proper deadlines.

21. When questioned as to why she did not check with Dr. Dean to see if the missing range of motion was an error, Ms. Tharp testified that she did not check herself, "…because I figured if she felt that there was a range of motion, she would respond to your [Attorney

Roepke's] letter." Ms. Tharp did not take any steps to check with the doctor about the rating, she said, because she thought the 11% rating was correct.

22. On December 21, the Claimant's counsel filed a Notice of Deposition of ATP Dr. Dean, to be held on January 7, 2019. (Ex. 6) Later, Dr. Dean's office cancelled the deposition, which was later rescheduled.

23. On December 26, 2018, at the request of ATP Dr. Dean, Excel Physical Therapy performed a lumbar range of motion measurement. (Ex. 26) This evaluation found a lumbar range of motion deficit of 26%.

24. Based on the new range of motion testing which indicated there would be a higher impairment rating, Ms. Tharp testified:

> I knew we were going want to rescind the General…Final Admission and request a DIME.

25. With the completed range of motion measurements from Excel Physical Therapy, the parties conducted a second settlement conference with a PALJ from the Pre Hearing unit. They did not arrive at a settlement.

26. On January 10, 2019, the Claimant filed a timely Objection to the FAL and submitted a DIME Application. (Ex. 5) The newly-adopted (as of January 2019) DIME form has a heading which reads, "Medical Reason for DIME 2. A) The Physician will consider the issues of Maximum Medical Improvement, Permanent Impairment, and Apportionment." Claimant seeks the DIME examination to address the issues of Maximum Medical Improvement, and the Claimant's Permanent Impairment rating.

27. On January 22, 2019 the Respondents filed an Application for Hearing, requesting the sole issue of withdrawal of the Final Admission of Liability of December 21, 2018, stating it was "incomplete" with regard to Dr. Dean's MMI report. (Ex. 6). Claimant timely filed a Response to this Application on February 21, 2019, endorsing Medical Benefits, and Temporary Benefits (along with PTD, which is not ripe at this time, but was pled to preserve the issue). (Ex. 7).

28. On January 30, 2019, Claimant's counsel filed another Motion for an Order to take the evidentiary deposition of Dr. Dean, which was again granted. (Ex. 9)

29. On February 22, 2019, the DIME panel under Claimant's DIME request was issued and the parties proceeded through the selection process. During that process, Respondents objected, but filed a provisional strike. Dr. Jack Rook was selected as the DIME physician. (Ex. 7)

30. Dr. Dean's evidentiary deposition was taken on March 4, 2019. Dr. Dean testified that she gave the Claimant an 11% whole person rating based upon a Table 53 rating for his lumbar spine injury, which involved 5 different lumbar levels. (Ex.17). Through the course of his treatment she did not refer Claimant for a consult with a spinal specialist

such as an orthopedic surgeon; however, she did refer him to a physiatrist for pain management.

31. Dr. Dean provided permanent work restrictions of no lifting, carrying, pushing, or pulling greater than 20 pounds, and no repeated bending. Dr. Dean acknowledged then that she had later changed her final rating after the range of motion was taken, and she combined the 26% rating for the loss of range of motion with the 11% specific disorders rating for a final combined rating of 34% whole person.

32. Dr. Dean explained that, "I was previously misinformed as far as including that range of motion due to some of the chronic nature. I then realized that with a Table 53 or 54 diagnosis, you have to have a range of motion done in order to submit that, so I ordered him to have that done, and he was found to have a 26 percent impairment due to the range of motion testing." (Dean depo, p. 10).

33. According to testimony, Respondents received the full written narrative of Dr. Dean's revised impairment rating on March 19, 2019—although the ALJ notes that her impairment rating was discussed in detail at the March 4, 2019 deposition.

34. Respondents have objected to setting the DIME under Claimant's request, and requested a Pre Hearing on their Motion to hold the DIME in abeyance until such time as their hearing (on withdrawing the FAL) could be held. PALJ Gallivan issued a Pre Hearing Order on March 5, 2019, granting the Motion to hold the DIME in abeyance, pending the hearing. (Ex. 9), pursuant to the "1-DIME per case" policy of the Division.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado is to assure quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1).* Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the

case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as the fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990) Moreover, the ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion).

C. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Was Claimant Responsible for his own Termination?

D. The termination statutes, § 8-42-103(g) and § 8-42-105(4)(a) C.R.S., provide: In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury. The employer must prove by a preponderance of the evidence that a Claimant was terminated for cause or was responsible for the separation from employment. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). To establish that a Claimant was responsible for termination, the Respondents must show the Claimant performed a volitional act or otherwise exercised "some degree of control over the circumstances which led to the termination." *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 5 P.3d 1061, 1062 (Colo. App. 2002); *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1995); *Velo v. Employment Solutions Personnel*, 988 P.2d 1139 (Colo. App. 1988). Whether the Claimant acted volitionally or exercised control over the circumstances of the termination is a question of fact, which must be evaluated based on the totality of circumstances. *Knepfler v. Kenton Manor*, W.C. No. 4-557-781 (March 17, 2004).

E. A Claimant who voluntarily resigns her job is "responsible for termination" unless the resignation was prompted by the injury. *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2008); W.C. No. 4-492-753 (ICAO, May 11, 2004). The term "responsible," as used in the termination statutes, may not be construed in a fashion which undermines the "overall scheme of the Act." *Colorado Springs Disposal v. Industrial Claim Appeals Office*, supra, In *Colorado Springs Disposal* the court held the "word 'responsible' does not refer to an employee's injury or injury-producing activity." The court reasoned that treating a Claimant as "responsible" for the loss of employment caused by physical limitations resulting from the compensable injury itself would significantly alter fundamental principles of the Act. Hence, a Claimant does not act "volitionally" or exercise control over the circumstances leading to the termination if the

effects of the injury ultimately lead to her termination. E.g., *Kauffman v. Noffsinger*, W. C. No. 4-608- 836 (ICAO, April 18, 2005); *Blair v. Art C. Klein Construction, Inc.*, W.C. No. 4-556-576 (ICAO, November 3, 2003); *Bonney v. Pueblo Youth Service Bureau*, W.C. No. 4-485- 720 (ICAO, April 24, 2002).

F. Respondents have shown, by a preponderance of the evidence, that Claimant was responsible for the termination of his employment within the meaning of the termination statutes. Claimant voluntarily resigned his employment, which establishes a prima facie case that he was responsible for termination. See *Coleman v. Wellbridge/Starmark Holdings*, W.C. No. 4- 969-560-02 (ICAO, January 13, 2017). As such, it is incumbent upon Claimant to show that his resignation was triggered by the effects of his industrial injury, rather than personal issues. Claimant continued working after the injury, even according to his own testimony. There is no evidence of more than three days of lost time which would entitle the Claimant to start TTD benefits. Light duty was offered consistent with the doctor's restrictions by the Employer per the testimony of Jill Roudebush and Jason Taylor. The ALJ finds these witnesses to be credible. While Claimant testified that he had difficulty performing his modified job, he never testified that he was asked to do anything outside the work restrictions of his ATP. Per Jill Roudebush, he was permitted to sit and stand as needed with the light duty job.

G. As the Claimant told Jason Taylor, he had never done that type of light duty work before and he felt bad doing that type of work. He was not interested in any of the potential jobs that might have been available to him and decided to resign. He initially told Jill Roudebush that he wanted to resign on March 6, and then confirmed that by signing the Resignation form on March 24. To the extent that Claimant testified that modified duty was never discussed, the ALJ finds this unpersuasive. Claimant was understandably frustrated with his injuries, and unfamiliar with the Workers Compensation process. While the ALJ is empathetic with Claimant's situation at the time, the fact remains that he voluntarily left his employment, and it was not as a direct result of his work injuries. He had options to stay, consistent with his work restrictions, but decided to leave anyway. Once he did, despite the best efforts of his attorney, Lowes was not obligated to re-hire him. They moved on.

H. Further, while Claimant may have sincerely, subjectively, felt he could not work effectively at the modified duty which was offered, it was not his unilateral decision to make. See *Willhoit v. Maggie's Farm*, WC No. 5-054-125-01 (ICAO, July 23, 2018).

I. Claimant's Exhibit 4 was admitted without objection by Respondents. The ALJ accepts it as a genuine copy of a Notice of Decision by the Colorado Department of Labor, mailed 5/4/2019. In this decision, Claimant was awarded Unemployment benefits, finding that Claimant separated from employment [from Lowes] because he was 'physically unable to perform the work'. However, (and as noted by Respondents) this is a totally different forum, with different procedures, differing burdens of proof, and quite possibly, differing motivations of the parties involved. The Decision, (all 46 words of it-with no exhibits in support) notes that it is "*Based on information received*." As such, despite its admission, the ALJ can place very little weight on this document.

Instead, this decision must be based upon the evidence received at this Workers Compensation hearing.

J. Claimant performed a volitional act exercising control over the circumstances of his termination. Therefore, the Claimant is responsible for his termination and not entitled to Temporary Total Disability benefits.

May Respondents Withdraw their 12/21/2018 FAL?

What did Respondents Know, and When did they Know it?

K. Respondents' adjuster, Megan Tharp, received Dr. Dean's impairment rating (sans range-of-motion figures) and WC-164 on October 2, 2018. Despite her years of experience as an adjuster, she testified that she did not realize that the ROM measurements were missing until it was called to her attention by Claimant's counsel. That occurred on November 16, 2018. The ALJ finds that November 16, 2018 is the very latest date at which Respondents had *actual knowledge* that there was a serious issue with the initial impairment rating. Further, Respondents were on *constructive notice* on October 2, 2018 of this same issue. Once in receipt of the WC-164 and impairment ratings (complete or not), Respondents were obligated, within 30 days to 1) File a FAL, 2) Request a DIME, or, 3) File an Application for Hearing. None occurred, in part because the adjuster apparently believed this case might settle later on in October.

L. The adjuster further testified that she could not recall a similar scenario where a Table 53 rating was given, but without ROM figures being part of the calculation. Despite these issues, the adjuster testified at hearing that she thought the 11% whole person impairment rating was *correct* after all, so she went ahead and filed the FAL on 12/21/18. The ALJ notes that even this date (12/21/18) was more than 30 days past the date (11/16/18) that Ms. Tharp was placed on *actual notice* that ROM figures were not part of the ATP's ratings.

M. Claimant then underwent a FCE, the results of which were prepared on 12/26/18, and which showed a lumbar ROM loss of 26%. According to testimony, these results were received by the adjuster on 1/7/19. Two days later, the adjuster went on an unexpected medical leave, not returning until 3/12/19. Her files were then assigned to a backup and a supervising adjuster. In any event, instead of amending the FAL within 30 days, as permitted by WCRP 5-9(A), the file languished. While it is duly noted that these ROM figures were not prepared by the ATP, it provides further evidence that something was amiss, and known to all parties.

N. Claimant (despite all good-faith efforts to have the ATP include ROM in the impairment rating) then timely filed an objection to the FAL, and requested a DIME on 1/10/19. Respondents responded by filing their own Application for Hearing on 1/22/19, wishing, on that date, to withdraw the 12/21/18 FAL, *based on **reliance** on an **incomplete** MMI report from Dr. Dean.* As noted by Claimant, were this so, what

changed between the FAL and 1/22/19- except Claimant's own diligence and the DIME request?

O. The fact that Dr. Dean admitted her rating was wrong her 3/4/19 deposition testimony has no bearing on the timing of the Respondents' late filing of the Final Admission of Liability. Respondents now allege they were not aware that a Table 53 rating should be accompanied by ROM figures. Dr. Dean indicates she was "misinformed" on including ROM figures with a Table 53 rating. Even after reading the deposition, the ALJ does not understand how Dr. Dean was "misinformed", or when, or by whom.

P. Deciding whether or not to object to an impairment rating is the job of the adjuster. The adjuster gets the first opportunity to object if the rating is wrong. Ms. Tharp testified that, if she has questions, she can consult with her supervisor. In this case, the adjuster had the additional benefit of legal counsel. If Ms. Tharp believed the rating was "incomplete", she could have discussed this with her supervisors or legal counsel prior to filing the FAL. Respondents then could have taken steps to clarify the rating, or file the paperwork to object. Respondents have not presented sufficient evidence to support their position that they should get a second chance to evaluate the ATP's rating that did not exist between the time that they received the rating and filed the Final Admission of Liability. Claimant diligently called this to everyone's attention the entire time.

Whose DIME is it Anyway?

Q. Respondents rely upon *Fausnacht v Inflated Dough, Inc. d/b/a Domino's Pizza et al.,* (ICAP July 20, 1999) in support of their position that they can withdraw their 12/21/18 FAL in this fashion. The ALJ does not concur. As noted in *Fausnacht,* and the Rule then in effect, "The insurance carrier may modify an existing admission regarding medical impairment, whenever the medical impairment rating is changed pursuant to a *binding IME, a division IME, or an order"* (emphasis added). Here, the impairment rating was not changed pursuant to a *binding IME*, a *division IME*, or an *order*. It was changed because the ATP said, without further foundation, that she had been "misinformed."

R. More importantly, while *Fausnacht* notes that Claimant filed a timely objection to the incomplete impairment rating, <u>there is nothing in that case to suggest that Ms. Fausnacht had moved for a DIME.</u> Claimant herein timely moved for a DIME on 1/20/19. Claimant herein has now incurred a DIME fee in the process. Claimant has acted diligently, and in a timely fashion throughout the entire process-in sharp contrast to Respondents. Despite having been placed at MMI on 9/20/18, Claimant's reward to date has been late responses by Respondents, a cancelled deposition by his ATP which resumed weeks later, and now a request that Respondents select the location and composition of the DIME panel, once they got an ATP impairment rating they didn't like.

S Respondents complain of their dilemma posed by the pressure to file an FAL back in December when they were aware that there were issues with the ROM. They further argue that if the FAL is withdrawn, the new triggering date for Claimant to ask for a DIME would now be 30 days from Dr. Dean's 3/4/19 deposition. Conveniently, Respondents have now filed their own DIME request on more favorable terms, after disagreeing with Dr. Dean's revised figures.

T. But what of *Claimant's* dilemma, once the FAL was eventually filed? Which was, it appears, to either:

> 1) Not contest the FAL within 30 days, anticipating that, someday, Dr. Dean's would admit her mistake, and adopt the 26% ROM figures from the FCE. And then hope that through the good graces of Respondents, despite their late FAL in December, they would file a new 34% WP FAL in March, and not bind Claimant to the 11% rating for his failure to timely object, *or*
>
> 2) Timely contest it, and move for a DIME within 30 days, pay the fee, and select a physician, only to have it all nullified by Respondents withdrawing their FAL in March. Respondents then request their own DIME on more favorable terms. This, despite all parties being on actual notice that ROM was an issue since November, 2018 at the latest.

U. Surely this is not contemplated by the statute. One of the reasons the adjuster must comply with the guidelines for filing the Final Admission of Liability, is to assure there will be timely payment of benefits to the Claimant. Benefits for permanent impairment are due when the FAL is filed. Claimant, who was not receiving any TTD, was forced to wait for 92 days between his MMI date and the date the FAL was finally filed to receive any compensation at all for his work injury. Respondents asserted that they filed the FAL under pressure from the Claimant's counsel. Yes, they were, and rightfully so. At all times, Claimant, through counsel, acted with due diligence to process the case in a timely and accurate fashion. Claimant was under medical restrictions, had unwisely left his job, and therefore was not receiving any TTD payments. For Respondents to now be rewarded for this comedy of errors would be unconscionable.

V. Respondents have not shown, by a preponderance of the evidence, that they should now be allowed to withdraw the FAL which was filed on December 21, 2018. A DIME in this case was all but inevitable. Claimant didn't like (and with good reason), the 11% originally provided by Dr. Dean. He timely filed an objection, and requested a DIME. Respondents then didn't like the revised 34% WP rating by Dr. Dean. So they moved for their own DIME. (The record is unclear if Claimant would have been satisfied with Dr. Dean's revised rating or not). Either way, a DIME was going to occur. Respondents will now get a DIME, just as they say they want. And there has been absolutely no evidence to suggest that more than one DIME physician is needed here. Judicial economy, and Division guidelines dictate there will be but one. Dr. Rook was selected according to protocol, under Claimant's timely application.

Respondents' objections are duly noted, but Dr. Rook will remain the DIME physician for Claimant's injuries.

ORDER

It is therefore Ordered that:

1. Claimant's claim for Temporary Total Disability benefits is denied and dismissed.

2. Respondents may not withdraw their Final Admission of Liability dated 12/21/2018.

3. Dr. Rook will remain the DIME physician.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 5, 2019

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she sustained a compensable work related injury to her right shoulder on October 25, 2018.

2. If compensable, whether Claimant has established by a preponderance of the evidence that right shoulder surgery recommended by William Ciccone, M.D. is reasonable, necessary, and causally related to her October 25, 2018 injury.

STIPULATIONS

1. Claimant's average weekly wage at the time of injury is $374.59.

2. If the claim is found compensable, Claimant is not entitled to temporary total disability (TTD) or temporary partial disability (TPD).

3. If the claim is found compensable, the treatment received to date from Respondents' designated medical providers is authorized treatment.

4. One reusable nylon bag weighs one pound.

FINDINGS OF FACT

1. Claimant is a 50 year old woman who is employed by Employer as a small sorting package handler. Claimant has been so employed since May 20, 2018.

2. Claimant's duties include taking bags off a conveyer belt, reviewing destination labels, and moving the bags to a secondary conveyer belt.

3. On September 24, 2018, Claimant sustained an admitted work related injury to her left elbow while working for Employer. Claimant was placed on restrictions that basically required no use of her left upper extremity. She initially was assigned to two weeks of office work and filing following her left elbow injury. She was then reassigned to a light duty position that involved moving nylon bags that contained empty nylon bags. Claimant had no restrictions regarding her right upper extremity.

4. The light duty position was located in the D-bag area. In this light duty position, Claimant was required to move the bags that contained empty bags from a table/platform to a bin/cart. Claimant is approximately 5 feet 5 inches tall and the work

station as well as the bins were both approximately waist high to her and were between 3 and 3.5 feet tall.

5. Claimant testified that she was not trained for the light duty position in the D-bag area and that she was not instructed on how to do the job of transferring bags from the table/platform into the bins/carts. She testified that the nylon bags would come with other nylon bags folded inside and that she would lift the nylon bags up over the bins and empty out any of the other bags that were inside. The nylon bags, as viewed in court, are approximately 3 feet by 3 feet and the parties stipulated that they each weigh approximately 1 pound.

6. Claimant was doing this job with her right arm, given her restrictions on the left side as a result of her left elbow injury. Employer supervisor Ms. O_____ testified that Claimant was not required as a part of this job to empty the nylon bags that contained other nylon bags, but Claimant testified she was doing so regularly. The maximum number of bags that can fit inside a bag is approximately 20.

7. Claimant testified that on October 25, 2018 while lifting a nylon bag that contained other empty nylon bags to empty out the other empty bags into the cart, she felt acute and immediate sharp pain in her right shoulder and reported an injury to Employer.

8. On November 1, 2018, Julie Parsons M.D. evaluated Claimant. Dr. Parsons was also treating Claimant's left elbow injury. Claimant reported that on October 25, 2018 she was emptying bundles of bags into bins and felt a sharp pain in her right shoulder. On review of symptoms, Dr. Parsons noted pulling bags and hurt right shoulder. On examination, Dr. Parsons found tenderness and limited range of motion insertion SS and proximal biceps insertion. Dr. Parsons assessed shoulder strain noting strain of unspecified muscle, fascia, and tendon at shoulder and upper arm level right arm and rhomboid muscle strain. Dr. Parsons recommended physical therapy referral to treat the right shoulder with a total of 8 visits recommended. On instructions, Dr. Parsons noted add physical therapy for right shoulder, 10-pound lift pull push carry, and no overhead work right arm. Dr. Parsons filled out a WC164 form indicating the objective findings were consistent with history and/or work related mechanism of injury/illness and listed a work related medical diagnosis of right shoulder strain. *See* Exhibit 5.

9. On November 6, 2018, Brittney Blanchard, PA evaluated Claimant. Claimant reported muscle aches in the right shoulder. Claimant reported sharp pain with stabbing radiating into the neck and shoulder blades at a pain level of 8/10. Claimant reported her right shoulder pain was worse and she felt she needed a break from repetitive lifting. On examination, PA Blanchard found diffuse tenderness of the AC joint, bicipital groove, and rhomboids. PA Blanchard found full range of motion with pain at all ranges. PA Blanchard continued the assessment of right shoulder strain and added the restrictions of taking a 15-minute break every hour from repetitive activity. *See* Exhibit 5.

10. On November 13, 2018, Claimant underwent physical therapy at MVP Physical Therapy. Claimant reported that while on light duty for her elbow injury, she went to work with bags and while using only the right arm her shoulder started to hurt. Claimant reported that she tried to alter her mechanics but was unable to without causing pain. Claimant reported that it happened on October 25 and that she worked bags for the next 4 days, had increasing pain, and then went to the doctor. Claimant reported some recent pops with discomfort. Claimant reported difficulty with lifting the arm above the head and reaching forward. Claimant provided a medical history of osteoarthritis (body, feet, knees, right hand, neck) and of carpal tunnel. The therapist noted that Claimant had an ace wrap on her right shoulder and was holding her arm very guarded. The therapist noted that the testing was very limited due to Claimant's elevated pain levels with any movement or palpation of the shoulder. The therapist noted that Claimant had reduced discomfort following treatment and may be able to have further evaluation at the next visit. *See* Exhibits 6, C.

11. On November 19, 2018, Dr. Parsons evaluated Claimant. Dr. Parsons referred Claimant for an orthopedic surgery evaluation with Dr. Ciccone for the right shoulder strain. *See* Exhibit 5.

12. On December 11, 2018, William Ciccone, M.D. evaluated Claimant. Claimant reported that she injured her shoulder on October 25, 2018 when moving bag bundles that could be of varying weights. Claimant reported that while moving the bundles, she had increased pain in her right shoulder and felt like she was overusing her right arm due to a previous left arm injury. Claimant reported pain over the anteromedial aspect of the right shoulder and pain with reaching and lifting. Claimant reported 8 physical therapy visits were of some help. Claimant reported no prior shoulder injuries. On examination, Dr. Ciccone found positive Hawkins and Neer impingement signs and mild pain at the AC joint and SC joint as well as along the clavicle. Dr. Ciccone noted fluctuating problem of right shoulder pain. Claimant was noted to be 5'5" with a weight of 215 pounds and a body mass index of 35.78. Claimant's blood pressure was noted to be 152/83 and was notified of the elevated blood pressure level and referred to her primary care provider for the elevated blood pressure. Dr. Ciccone assessed acute pain of right shoulder and he ordered an MRI of the right shoulder. He also assessed body mass index of 35.0 to 35.9, adult. Dr. Ciccone noted Claimant's report of increased pain while moving heavy bag bundles with persistent pain and symptoms over the past 6 weeks. He noted that he would re-evaluate her after the MRI scan. *See* Exhibits 8, D.

13. On December 20, 2018, Hanna Bodkin, PA, evaluated Claimant at Concentra. Claimant reported that while working light duty on October 25, 2018, she was moving heavy empty canvas bags into wheeled baskets and began having right shoulder pain. Claimant felt the symptoms started due to over compensation with the right arm due to restrictions on the left. Claimant reported that she had 8/10 pain in her right shoulder and had a pop in the shoulder around November 12 when walking into work and taking off her coat. Claimant reported that her shoulder began freezing on November 14 and that she went and got a brace on her own. Claimant reported that she had pain in the right neck, back, chest, and under the armpit as well as tenderness in the anterior and

posterior shoulder into the shoulder blade. Claimant reported that her claim was denied on November 16. On examination, Claimant had tenderness in the rhomboids, the scapula, and the anterior shoulder but had near full range of motion in all planes. *See* Exhibit 10.

14. On December 24, 2018, Carrie Burns, M.D. evaluated Claimant. Dr. Burns noted that the right shoulder claim had been denied and was set for hearing. Dr. Burns noted that if the shoulder is not compensable, they should stop seeing Claimant for the shoulder and no longer address it in restrictions but would wait for the legal matters to settle. *See* Exhibit 10.

15. On December 27, 2018, Claimant was noted to have had some improvement with range of motion and strength over her 8 physical therapy visits. Claimant was noted to continue to be limited with the shoulders due to pain and weakness. The therapist noted some neurological signs and that the clinical presentation was evolving with changing characteristics. *See* Exhibits 6, C.

16. On December 31, 2018, Claimant underwent a right shoulder MRI. The impression was diffuse rotator cuff tendinosis, overall moderate, with multifocal partial tearing. A high grade partial tearing of the superior subscapularis tendon was found along the long head biceps location. Narrower delamination type tears were also found at the anterior supraspinatus and infraspinatus tendons. No muscle atrophy was found. Mild acromioclavicular osteoarthritis was found. Mild subacromial subdeltoid bursitis was noted as well as a remote sprain of the inferior glenohumeral ligament. *See* Exhibits 9, D.

17. On January 4, 2018, Dr. Ciccone evaluated Claimant. Claimant reported persistent pain in the right shoulder. Dr. Ciccone reviewed the right shoulder MRI and noted that it showed long head biceps tendon subluxation at the bicipital groove with partial-thickness injury of the subscapularis and remainder of the rotator cuff with subacromial impingement. Dr. Ciccone assessed right shoulder pain with biceps subluxation and partial-thickness rotator cuff tearing. Claimant reported that her claim had been denied and that she was scheduled for an independent medical examination. Dr. Ciccone recommended she continue working with a home exercise program. Dr. Ciccone noted that if Claimant had persistent pain or symptoms, the possibilities for shoulder arthroscopy with biceps tenodesis and rotator cuff repair existed but noted they would see how Claimant did. He encouraged Claimant to exercise. *See* Exhibits 8, D.

18. Dr. Ciccone requested authorization from Insurer for a right shoulder arthroscopy, subacromial decompression, rotator cuff repair, and possible biceps tenodesis. The notes indicated the procedure date was February 14, 2019 with a diagnosis of traumatic complete tear of right rotator cuff, subacromial impingement of right shoulder, and biceps tendinitis on right. *See* Exhibit 8.

19. On January 28, 2019 Claimant underwent an independent medical evaluation (IME) performed by F. Mark Paz, M.D. Claimant reported working with empty

bags that are bundled and when filled with 10 bags, the bundle weighs approximately 20 to 30 pounds. Claimant reported that she empties the bundled bags and puts the empty bags in a bin. Claimant reported they measure approximately 3 feet by 3 feet. Claimant reported that she was only using her right arm to complete work due to a left elbow injury and that during her first week of light duty in the empty bag area, she exclusively used her right arm. Claimant reported that after about a week of working in that area dumping and processing the bundled bags, she was emptying a set of bundled bags into a bin when she felt an extreme sharp pain in the right shoulder, neck, and across the front of the right shoulder down the posterior right side of her back. Claimant associate the onset of symptoms with the lifting of a single bundle bag. Claimant reported that she did not remember any popping in the shoulder, just a lot of pain. Claimant reported the weight of the bag bundles was 34 to 45 pounds. *See* Exhibits 12, B.

20. Dr. Paz reviewed medical records and performed a physical examination. Dr. Paz opined that pain behaviors were evident during physical examination with most appearing exaggerated. Dr. Paz assessed: right shoulder pain; right upper extremity parasthesias; right lower extremity parasthesias; left lateral epicondylitis; left upper extremity paresthesias; right upper extremity parasthesias; bilateral knee osteoarthritis; right ankle/foot osteoarthritis; obesity; and left radial tunnel syndrome. Dr. Paz opined that it was not medically probable that the right shoulder rotator cuff tendinosis/tendon tears of the subscapularis, infraspinatus, and supraspinatus were causally related to the October 25, 2018 incident. He opined that based on the history of the mechanism of injury and transferring bundled bags from a waist level platform into a waist level bin, the activity did not involve lifting overhead or above chest height. Considering the mechanism of injury, he opined it was not medically probable that the rotator cuff tears were causally related. He also opined that it was not medically probable that the right shoulder rotator cuff tendinosis was aggravated or accelerated as part of the October 25, 2018 incident. *See* Exhibits 12, B.

21. Dr. Paz opined that the rotator cuff captures the lifting load across the shoulder through the range of motion of 60 to 120 degrees. Dr. Paz opined that the direct history provided by Claimant did not include lifting above chest level with filled bundle bags. Dr. Paz also opined that there were inconsistencies regarding the history Claimant provided at his examination of acute pain and discomfort versus the initial physical therapy assessment documenting symptoms that were progressive over the following four shifts Claimant worked. He also opined that prior records did not document the right upper extremity, right lower extremity, back, and neck pain. *See* Exhibits 12, B.

22. On January 29, 2019, Insurer issued a letter through counsel that denied Dr. Ciccone's request indicating they were not authorizing it, as compensability of the claim had not been established. *See* Exhibit 8.

23. Claimant testified that the empty nylon bags could come down empty or with other empty bags inside. She testified that if they were super full, they could contain up to 40 empty bags inside. Claimant reported that while she was emptying a bag that had many bags inside she felt extreme pain. Claimant testified that she had to shake the bags

to empty the other bags out of it. Claimant was not aware of a rule that only 9 bags are supposed to be folded inside 1 bag. Claimant acknowledges that she could have put the bags that had empty bags inside them directly into the cart without shaking them to empty them, but that she would take them out and unbundle them to make it easier down the line for processing.

24. Claimant also testified that she is a caretaker for her disabled husband and helped him in all personal care and with mobility. She testified that after her elbow injury, she could no longer help him stand/transfer and her son took over that part of the care.

25. Ms. O_____ testified at hearing. Ms. O_____ has extensive experience working in the D-Bag area and is a part time supervisor for Employer. Ms. O_____ did not supervise Claimant and was not present at the time of the alleged injury. Ms. O_____ testified that sometimes the job involves getting empty bags off a belt and putting them into a cart and that sometimes they are bundled with other bags inside and sometimes they are not bundled. Ms. O_____ testified that they are shipped from other hubs and are supposed to have 9 empty bags inside 1 bag and that each bag weighs 1 pound. Ms. O_____ estimated that at most you could fit 20 empty bags inside 1 bag.

26. Dr. Paz also testified at hearing. He testified that Claimant's demonstration to him at the IME of how she emptied the bags involved lifting with both hands to chest height over the bin, whereas in court she demonstrated fully extending her arm over her head to empty the bags. Dr. Paz opined that the right shoulder MRI demonstrated that the tendon's in Claimant's right rotator cuff were affected and showed degenerative changes and there was no way to assess if any of the tears were acute. Dr. Paz reiterated that the load is on the rotator cuff primarily when between 60 and 120 degrees. He testified that at the IME, Claimant did not demonstrate movements above 60 degrees and opined there was no stress on the rotator cuff. Dr. Paz also testified that a load of 10 to 20 pounds was not a load expected to tear the rotator cuff or aggravate a rotator cuff. Dr. Paz testified that it was confusing to appreciate how many bags were actually inside a bag and what the weight was. Dr. Paz again opined that the exposure was insufficient to cause rotator cuff pathology or to aggravate/accelerate pre-existing pathology and he opined that the requested right shoulder surgery was not causally related. Dr. Paz testified the surgery was reasonable and necessary but not work related and was due to a degenerative condition.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence,

to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo.App. 2000).

Compensability

Where a Claimant's entitlement to benefits is disputed, the Claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Whether the Claimant sustained her burden of proof and whether a compensable injury has been sustained is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997); *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. Div. 5 2009). To recover benefits under the Worker's Compensation Act, the Claimant's injury must both occur "in the course of" employment and "arise out of" employment. *See* § 8-41-301, C.R.S.

A pre-existing condition "does not disqualify a Claimant from receiving workers' compensation benefits." *Duncan v. ICAO*, 107 P.3d 999 (Colo. App. 2004). Further, if a pre-existing condition is stable but is aggravated by an occupational injury the resulting occupational injury is still compensable because the incident caused the dormant condition to become disabling. *Siefried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986). Thus, if an industrial injury aggravates, accelerates, or combines with a pre-existing condition so as to produce disability and need for treatment, the claim is

compensable. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Indus. Comm'n v. Newton Lumber & Mfg. Co.,* 314 P.2d 297 (Colo. 1957). Additionally, if the industrial injury aggravates, accelerates, or combines with a pre-existing disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Duncan v. ICAO, supra.*

Claimant has met her burden to show by a preponderance of the evidence that she sustained a compensable right shoulder injury on October 25, 2018. Claimant has shown, more likely than not, that her right shoulder was injured while she was emptying bags into a bin on that date. As found above, Claimant is a 50 year old obese and de-conditioned woman with degenerative changes in her right shoulder and known arthritis throughout her body. The ALJ finds it credible and persuasive that she, in that condition, had immediate pain, disability, and the need for treatment for her right shoulder acutely on October 25, 2018 due to her work emptying bags that weighed between 1 and 20 pounds.

Claimant has established by preponderant evidence that emptying bags at work caused an acute injury or an acute aggravation/acceleration of the degenerative condition in her right shoulder. Claimant had no limitations with her right shoulder prior to October 25, 2018 nor was it mentioned in any treatment prior to that date. As found above, Dr. Paz noted that the rotator cuff is engaged between 60 and 120 degrees. Claimant is credible and persuasive that she had to lift the bags over the bin to empty them out, which necessarily put her arm into the 60-120 range engaging the rotator cuff, given the height of the bin and Claimant's height. Although Claimant displayed some pain behaviors, expanding symptoms, and exaggerated the weight of the empty bags, Claimant's description of how the work is performed is credible and consistent with an activation of the rotator cuff.

Respondents' argument that Claimant's right shoulder pain is unrelated to her job duties and is simply the natural progression of Claimant's pre-existing degenerative shoulder condition is not found persuasive. Rather, it is more likely that emptying the bags at work caused an acute injury or acute aggravation and the need for medical treatment. Claimant is credible that she was not experiencing or suffering from any right shoulder limitations leading up to October 25, 2018. Examinations of Claimant noted tenderness in the shoulder area and pain with range of motion. Further, Claimant's treating provider at Advanced Urgent Care has opined that the objective findings are consistent with the work related mechanism of injury. Claimant has shown that emptying bags caused an immediate onset of right shoulder pain that did not exist prior to October 25, 2018, objective findings including tears shown by MRI in the right shoulder support Claimant's subjective pain complaints, that emptying bags was the direct cause of her need for treatment.

The opinion of Dr. Paz is based heavily on the lack of activation of the rotator cuff given Claimant's demonstration to him at IME of how she emptied the bags. Her explanation of how she lifted the bags to do that job that was testified to and explained at hearing is found persuasive and puts her right shoulder into the range of 60 to 120

degrees. Further, although Dr. Paz testified that a 20-pound load or less would not be expected to injure a rotator cuff, Claimant is credible that she had acute pain and injury on that date. Claimant's right shoulder and her overall body habitus is not that of a healthy individual. On October 25, 2018, Claimant was 50 years old, obese, deconditioned, and had pre-existing degenerative changes including osteoarthritis throughout her body and pre-existing degeneration in her right shoulder. Putting someone with that body habitus into a position where she would have to activate her rotator cuff to repetitively lift bags even if they only weighed between 1 and 20 pounds is found more likely than not to be the cause of an acute injury or acute aggravation/acceleration of her degenerative shoulder condition on October 25, 2018.

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Claimant has met her burden to show that the right shoulder arthroscopy subacromial decompression, rotator cuff repair and possible bicep tendinosis is reasonable, necessary, and causally related to her October 25, 2018 work injury. The surgery is specifically intended to address the symptoms and right shoulder pain that Claimant developed while emptying a bag containing empty bags at work. Claimant did not have pain in her right shoulder prior to October 25, 2018 and although Claimant may have had preexisting degenerative changes, as shown by MRI, the work of emptying the bag containing empty bags caused or accelerated Claimant's need for treatment, as she was otherwise was asymptomatic prior to that event. The surgery recommended is causally related to the emptying of bags. As found above, Dr. Ciccone requested the surgery in January of 2018. He noted at that time that they would see how Claimant did but recommended surgery if Claimant's pain and symptoms were persistent. The pain and symptoms have been persistent since, and although they have slightly improved, they have not gone away. Claimant has thus met her burden to establish that the surgery is reasonable, necessary, and causally related to her injury.

ORDER

It is, therefore, ordered that:

1. Claimant has established by a preponderance of the evidence she suffered a compensable injury to her right shoulder on October 25, 2018.

2. Medical care rendered at Advanced Urgent Care, Cornerstone Orthopaedics and Concentra Medical Centers and their referrals are reasonable, necessary, related and authorized treatments.

3. The right shoulder arthroscopy, subacromial decompression, rotator cuff repair and possible bicep tendinosis recommended by Dr. Ciccone is reasonable and necessary to cure and relieve the effects of Claimant's industrial injury and Claimant is entitled to this medical benefit.

4. Claimant's average weekly wage is $374,59.

5. Claimant is not currently entitled to temporary partial disability ("TPD") or temporary total disability ("TTD") benefits.

6. Any issues not determined in this decision are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 6, 2019

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

STATE OF COLORADO **OFFICE OF ADMINISTRATIVE COURTS** 1525 Sherman Street, 4th Floor Denver, CO 80203	
In the Matter of the Workers' Compensation Claim of: **,** Claimant, vs. **,** Self-Insured-Employer, Respondent.	▲ **COURT USE ONLY** ▲ **CASE NUMBER:** **WC 5-020-103-002**

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Hearing in this matter was held on February 12, 2019, before Margot W. Jones, Administrative Law Judge. Claimant was present and was represented by _____, Esq. _____, Esq. represented Respondent. This matter was digitally recorded in Courtroom 4 convening at 1:30 pm. in Denver, CO The parties' exhibits 1-9 and A-G were admitted into evidence.

In this order, _____ referred to as "Claimant" and Respondent-Employer _____ is referred to as "Employer" or "Respondent."

Also in this order, "ALJ" or "Judge" refers to the Administrative Law Judge, "C.R.S." refers to Colorado Revised Statutes, "OACRP" refers to the Office of Administrative Courts Rules of Procedure, 1 CCR 104-1, WCRP" refers to Workers' Compensation Rules of Procedure, 7 CCR 1101-3 and "the Act" refers to the Workers' Compensation Act of Colorado, Section 8-40-101, et seq., C.R.S.

ISSUE

Whether Respondent overcame the opinion of the Division independent medical examiner (DIME) by clear and convincing evidence with regard to his opinion on maximum medical improvement (MMI).

FINDINGS OF FACT

1. Claimant is 58 years of age. He has worked for Employer for the past nineteen years delivering and picking up materials.

2. On April 14, 2014, Claimant had been assigned to deliver a double-door refrigerator to a contractor. He was unloading it while standing on the bed of the truck and using a dolly. Another worker was on the ground below the refrigerator for the purpose of helping lower the refrigerator to the ground. Without warning, the worker on the ground stepped away from the refrigerator, leaving the Claimant to hold the entire load. As a result, Claimant was pulled out of the back of the truck on to the top of the refrigerator and then to the ground. The refrigerator pulled Claimant's arm and shoulder downward.

3. At that time, Claimant felt a pop in his shoulder. He was able to complete the delivery and returned back to Employer. When he arrived, he reported his injury to two managers. Claimant did not see a doctor at that time and he thought he would get better without medical treatment.

4. Claimant continued to work; however, he experienced pain when he lifted anything with his right arm or lifted anything overhead. In order to still do his job, Claimant transported lumber and other items off the truck and into carts by only using the forklift.

5. Claimant's shoulder continued to hurt and became worse so he again told Employer who then sent him to Concentra, Employer's-designated provider.

6. Claimant's first appointment was with Dr. Katheryn Bird on August 6, 2014. Dr. Bird noticed significant popping in Claimant's shoulder with abduction. Dr. Bird diagnosed Claimant as having shoulder impingement and shoulder pain. She stated that Claimant could do regular duty and prescribed physical therapy. Dr. Bird stated that the objective findings were consistent with the history and the work-related mechanism of injury.

7. On August 11, 2014, Claimant returned to see Dr. Bird. Dr. Bird found no significant change in Claimant's condition. Claimant reported his pain as a 4/10. She also noted Claimant was working regular duty.

8. After five session of physical therapy, Dr. Bird first put Claimant at MMI on September 15, 2014. Dr. Bird noted that Claimant's right shoulder was slightly better. Claimant reported his pain as a 2/10, but found relief by taking Naproxen and from his home exercise program. Dr. Bird did not assign any permanent impairment nor did Dr. Bird assign any work restrictions.

9. Between September 15, 2014, and May 5, 2016, Claimant was able to work full duty even though some movements caused pain. On May 5, 2016, Claimant returned to see Dr. Bird. Dr. Bird noted that, since his original date of MMI, Claimant continued to deal with aching in his right shoulder including pain with external rotation and popping. Dr. Bird also noted Claimant having difficulty playing golf. He reported his pain as 2/10. Dr. Bird requested an MRI of Claimant's right shoulder.

10. Claimant's received an MRI of his right shoulder on May 13, 2016. The MRI found 1) a more than 50% loss Claimant's supraspinatus tendon; 2) interstitial particle tear along the infraspinatus myotendinous; 3) fibrous delamination of the upper subscapularis; 4) subluxation/dislocation or longitudinal spitting rotator interval and biceps tendon; 5) and moderate clavicular joint arthritic findings.

11. Claimant returned to Dr. Bird on May 17, 2016. Claimant reported continued popping in his arm stating that "it feels like something is moving out of place." In reviewing the MRI results, Dr. Bird noted a "partial tear of supraspinatus and infraspinatus, subluxation/dislocation of bicep tendon, AC arthritis." At this time, Dr. Bird restricted Claimant from lifting, pushing, or pulling over 25 lbs.

12. Claimant was referred to Dr. Mark Failinger who practices orthopedic medicine. Dr. Failinger noted that Claimant's right shoulder had poor strength, poor range of motion, and would pop out of place. After reviewing the MRI, Dr. Failinger diagnosed Claimant with 1) a right shoulder dislocating biceps tendon; 2) right shoulder partial-thickness supraspinatus tear; 3) a right shoulder partial subscapularis tear. In discussing his findings, Dr. Failinger stated that Claimant had a "classic story" for a dislocated biceps tendon. Dr. Failinger noted the problematic consequences of Claimant's continued popping explaining that Claimant "is doing well with the biceps in the grove, but he tore the transverse ligament and when it pops out of the groove, it disables him. He cannot really use him arm until it pops back in. (Ex. 3, Bates 111-112).

13. Dr. Failinger also noted a "high-grade partial tear that needed to be fixed." In discussing treatment options, Dr. Failinger explained that there was a "75% to 85%" that surgery would help with the pain. In support of recommendation for surgery, Dr. Failinger stated "[h]e has not done well for two years. There are no other options that therapy should not help this and injection should not help this. So, there are really two options. He should live with this [or] pushing on with the surgery." (Ex. 3, Bates 112).

14. On July 28, 2016, Claimant reported that his right shoulder was throbbing and stated that his pain was now 5/10. Dr. Bird noted that Dr. Failinger had recommended surgery and to stop physical therapy because it was hurting the shoulder. At this time, Dr. Bird restricted Claimant from lifting over 10 lbs., pushing or pulling over 15 lbs., and from overhead lifting. Dr. Bird did not restrict Claimant from operating a forklift.

15. Claimant saw Dr. Bird on August 18, 2016. Dr. Bird noted that Claimant's right shoulder was getting worse. Claimant reported his pain at 3-5/10. Dr. Bird diagnosed

Claimant with rotator cuff tear arthropathy and tendinopathy of the right bicep tendon. At this time Claimant was taking Advil to deal with his shoulder pain.

16. On September 15, 2016, Claimant again reported increasing pain in his right shoulder. Dr. Bird diagnosed Claimant with a rotator cuff tear arthropathy and tendinopathy of the right bicep tendon. At this time, Claimant reported that Advil and Meloxicam was no longer as helpful in treating his shoulder pain.

17. On October 13, 2016, Dr. Bird noted that Claimant's pain "is not getting better and seems to be getting worse." Claimant reported sharp shooting pains that would increase at night. At this time, Claimant reported his pain as a 5/10.

18. On November 10, 2016, Claimant reported having lots of pain to the point of "keeping his wife up at night because he is moving around so much." Dr. Bird diagnosed Claimant with a right shoulder strain, rotator cuff arthropathy, shoulder impingement, shoulder pain, and tendinopathy of the right bicep tendon.

19. On November 21, 2016, Claimant then saw Dr. Michael Hewitt, who also specializes in orthopedic medicine. Dr. Hewitt diagnosed Claimant with a right shoulder rotator cuff tear finding that the described mechanism of injury was consistent with his findings. "The current clinical complaints and MRI findings would be attributable to the work injury described two and a half years prior." Dr. Hewitt agreed with Dr. Failinger that Claimant was an appropriate candidate for surgery."

20. Hearing was held on January 25, 2017, on the relatedness of the shoulder surgery. The ALJ found that Claimant's need for right shoulder surgery did not relate to his April 14, 2014, industrial injury.

21. On August 25, 2017, Dr. Hewitt reiterated his prior diagnosis stating that "[p]atient has undergone extensive conservative management without improvement. His mechanism, namely forcible traction to the extremity, is consistent with his injuries. He reiterates his desire to proceed with surgery. I do feel this is most appropriate." (Ex. 5, Bates 127).

22. On March 20, 2017, Dr. Bird put Claimant again at MMI. Dr. Bird assigned a 15% upper extremity rating. Dr. Bird also restricted Claimant from lifting over 10 lbs., pushing or pulling over 15 lbs. and from lifting overhead with his right arm.

23. Dr. Alison Fall performed an Independent Medical Evaluation (IME) for Respondents on November 3, 2016. In examining Claimant's right shoulder, Dr. Fall noted tenderness of the bicipital groove, pain with internal rotation, range abduction, and flexion. In examining the left shoulder, Dr. Fall noted that Claimant had no complaints of pain with range of motion, nor did she note any signs of impingement, instability, or tenderness. Dr. Fall concluded that, due to a lack of documentation of ongoing shoulder complaints, it was not possible to determine the exact status of the shoulder. Dr. Fall recommended a subacromial injection for Claimant's right shoulder and further opined

that the right shoulder surgery recommended by Dr. Failinger "cannot be determined to be related back to the initial injury." (Ex. A, Bates 6).

24. Another MRI of Claimant's right shoulder was done on September 12, 2018. The MRI revealed Claimant's rotator cuff had a greater than 50% partial articular side tear of the supraspinatus tendon "reaching 11.5 x 17 mm." (Ex. B, Bates 15).

25. An MRI of Claimant's left shoulder was performed on November 17, 2018. The MRI showed an estimated 50% partial thickness tear of the supraspinatus tendon retracted 1.3 cm. In interpreting the left shoulder MRI, Dr. Brendar Essary stated that the "findings are similar although to a lesser degree compared to the right shoulder." (Ex. B, Bates 17-18).

26. After reviewing the MRI of the left shoulder, Dr. Fall agreed with Dr. Essary that the "findings are similar, although to a lesser degree, compared to the right shoulder." (Ex. A, Bates 12).

27. Dr. J. Stephen Gray performed a Division Sponsored Independent Medical Examination (DIME) on May 22, 2018. Claimant reported to Dr. Gray that his right shoulder pain did not resolve after his original date of injury. However, Claimant was able to avoid certain activities that caused discomfort and "'toughed through'' the pain. (Ex. 6, Bates 142). During his physical examination of Claimant, Dr. Gray noted Claimant experiencing popping in his right shoulder. In further examining Claimant's right shoulder, Dr. Gray noted that "impingent signs were present and biceps provocation maneuvers were also positive." (Ex. 6, Bates 146). In examining Claimant's left shoulder, Dr. Gray noted 90-degree external rotation and no impairment.

28. Dr. Gray diagnosed Claimant with a work-related partial total cuff year of Claimant's right shoulder and a work-related biceps tendon dislocation, which was cumulatively aggravated with unrestricted work activities. In support of his diagnosis, Dr. Gray pointed to the Claimant had documented crepitus of his right shoulder prior to his first MMI date of September 15, 2014. Dr. Gray also noted that no imaging or orthopedic evaluation was done prior to Claimant's first MMI date. Additionally, Dr. Gray relied on the opinions Claimant's treating providers including Dr. Failinger and Dr. Hewitt.

29. Dr. Gray assigned Claimant a 9% impairment rating of Claimant's right upper extremity. Dr. Gray further found that Claimant was not MMI until he had the recommended right shoulder surgery, which he found to be work-related.

30. Dr. Fall testified that Dr. Gray's DIME opinion is incorrect because of the MRI of the left shoulder, which indicated a biceps tendon dislocation on his left arm. From this, Dr. Fall stated that it is clear Claimant did not have a traumatic biceps tendon dislocation in 2014.

31. On cross-examination, Dr. Fall acknowledged that no other treating providers found it necessary to order an MRI of the left shoulder before diagnosing Claimant's right

shoulder because these providers were only providing treatment and not looking to causation. Dr. Fall also acknowledged that, when examining Claimant's right and left shoulder, she noted a difference in Claimant's symptomology and pathology. Dr. Fall further acknowledged that the findings in the right shoulder MRI are more severe than the findings in the MRI of the left shoulder.

32. Claimant is on a ten-pound lifting restriction. He feels pain when he jerks his right arm too quick. His right arm also continues to keep him up at night.

33. Claimant has not missed a day of work due to his injury.

34. Prior to April 14, 2014, Claimant had never experienced popping in his right arm. He has yet to experience popping or any symptoms in his left arm.

35. Outside of work, Claimant fishes, camps and golfs. Claimant says that these activities are his livelihood, and while he had to adjust the ways in which he performs these activities, he did not want to give them up completely on account of his injury. Prior to April 14, 2014, Claimant did not experience pain when performing these activities.

36. Claimant's job with Employer requires him to do heavy lifting. He had no issues performing his job duties prior to April 14, 2014. Claimant had never had work restrictions prior to April 14, 2014. Claimant did not have pain or discomfort in his right shoulder prior to April 14, 2014.

37. During his deposition, Dr. Gray was endorsed as Level II accredited and a specialist in occupational medicine. In support of his DIME opinion, Dr. Gray found that Claimant's pain threshold and stoic nature in handling his symptoms allowed him to work full duty after his date of injury and to participate in hobbies outside of work.

38. Dr. Gray acknowledged that Claimant's right and left shoulder both revealed signs of degenerative changes, but that the April 2014 event aggravated Claimant's right shoulder.

39. Dr. Gray's opinion was not swayed by the fact that Claimant did not receive treatment until four months after his original date of injury. Nor was Dr. Gray's opinion swayed by the 18-month gap between Claimant's first date of MMI and when his case was reopened.

CONCLUSIONS OF LAW

General Principles

The purpose of the Act is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v.*

Clark, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensee v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968). The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Overcoming the DIME

Overcoming the DIME on MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. Under the statute MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office***,** 128 P.3d 270 (Colo. App. 2005); *Monforte Transportation v. Industrial Claim Appeals Office*, 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007). A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office*, 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office*, 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.*, W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging

the DIME physician's finding must produce evidence showing it highly probable the DIME physician's finding concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gusset,* 914 P.2d 411 (Colo. App. 1995). Where the evidence is subject to conflicting inferences a mere difference of opinion between qualified medical experts does not necessarily rise to the level of clear and convincing evidence. Rather it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Industries*, WC 4-712- 812 (ICAO November 21, 2008). The ultimate question of whether the party challenging the DIME physician's finding of MMI has overcome it by clear and convincing evidence is one of fact for the ALJ. *Metro Moving and Storage Co. v. Gusset, supra.*

Respondent relies on Dr. Fall's IME report and hearing testimony that the gaps in Claimant's treatment supports the argument that it is highly probable that the DIME opinion is incorrect. Drs. Bird, Hewitt, Failinger and Gray reviewed the same medical records as Dr. Fall. These doctors were aware of the four-month delay from the original date of injury and the eighteen months delay after Claimant's first MMI date. Despite these gaps in treatment, these doctors did not alter their opinion that the need for right shoulder surgery was work-related. Each doctor found Claimant's participation in sports as a non-factor in their determination that Claimant's need for shoulder surgery is work- related.

Dr. Fall erroneously opined that the doctors only provided treatment and did not address causation. However, to the contrary, Dr. Bird noted in his first appointment Claimant's work-related mechanism of injury. Then, Dr. Bird treated Claimant for three years and did not change her opinion that Claimant's right shoulder symptoms related to his work-injury.

Dr. Failinger's opinion on the work relatedness of Claimant's injury was not swayed by Claimant's ability to continue working despite having pain nor was his opinion swayed by the gaps in treatment between Claimant's date of injury, first date of MMI, and date of reopening his case.

Dr. Hewitt opined that Claimant's right shoulder injury was work related and he is an appropriate candidate for surgery.

In his DIME report, Dr. Gray thoroughly examined Claimant's symptoms and medical records, acknowledging the gaps in treatment, and did not alter his opinion that Claimant's need for right shoulder surgery is work-related.

Drs. Bird, Failinger, Hewitt, and Gray also noted that Claimant's described mechanism of injury ultimately caused the tear to his bicep and rotator cuff, which led to the need for surgery.

Furthermore, Respondent's use of the left shoulder MRI to try and overcome the DIME is unpersuasive and speculative. No treatment provider found it necessary to compare an MRI of Claimant's left shoulder with an MRI of Claimant's right shoulder in order to determine causation. Thus, there is little support from any treating providers as to the probative value of the left shoulder MRI as it relates to Claimant's need for right shouldersurgery.

The ALJ is unable to rely on the left shoulder MRI alone to make a finding to overcome the DIME. In using the left shoulder MRI, Respondents have failed to extract any clear and substantiated evidence other than to show that Claimant's shoulders both shows signs of degeneration. Even with the similarities in the two MRIs, Dr. Fall failed to consider the documented symptoms and physical limitations in Claimant's right arm compared to his left. For instance, popping and a lack of range of motion in the right shoulder were present while there were no signs of popping or range of motion issues in the left shoulder. Dr. Fall did not make a solid or clear distinction between the two MRIs by which it can be concluded that the DIME physician's opinion on MMI has been overcome by clear and convincing evidence.

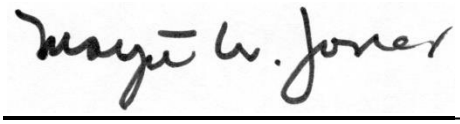
Dr. Gray credibly testified that Claimant appears to have a high tolerance for pain such that he was able to do his job despite his right shoulder symptoms. Claimant credibly testified that he is able get around his physical limitations as a skilled forklift operator with nineteen years of experience. While opinions to the contrary may exist, these opinions are not held by Claimant's treating providers and are not persuasive as it relates to overcoming the DIME. Respondent's use of Dr. Fall's expertise amounts only to a difference of opinion and conflicting inferences, which ultimately fails to overcome the DIME.

ORDER

1. Respondents failed to overcome Dr. Gray's DIME opinion that Claimant is not at MMI by clear and convincing evidence.

2. All matters not determined herein are reserved for future determination.

This 6th day of June, 2019.



Margot W. Jones

Administrative Law Judge

Office of Administrative Court

1525 Sherman Street, 4th Floor

Denver, CO 80203

ISSUES

I. Whether Claimant proved by a preponderance of the evidence he suffered a compensable injury while working for Respondents on March 13, 2018 or March 14, 2018.

II. If Claimant proved he suffered a compensable injury, whether Claimant proved by a preponderance of the evidence he is entitled to temporary total disability (TTD).

III. If Claimant proved he suffered a compensable injury, whether Claimant proved by a preponderance of the evidence he is entitled to a change of physician.

IV. If Claimant proved he suffered a compensable injury, determination of Claimant's average weekly wage (AWW).

FINDINGS OF FACT

1. Claimant is a 44-year-old man who worked for Employer from January 9, 2018 to September 9, 2018 performing fracking duties.

2. Claimant alleges he sustained a work injury on March 13, 2018 or March 14, 2018 after being physically assaulted by a co-worker. Claimant estimates the co-worker is 19 years old, approximately 5'11'' and weighs a little over 210 lbs. Claimant is approximately 5'4'' tall and weighs around 170 lbs. Claimant worked with this co-worker as his main partner for approximately four to five weeks prior to the alleged incident. He testified that, prior to the alleged incident, he and the co-worker were involved in verbal arguments but never got physical.

3. Claimant testified that, on the day of the alleged incident, the co-worker flipped Claimant's helmet off of his head as he was walking by. Claimant testified he put his helmet back on, asked the co-worker why he did that, and then proceeded to begin performing a work task. Claimant testified the co-worker then approached Claimant and struck him with a right hook to the left side of his forehead, causing Claimant to fall backwards into a tanker. Claimant testified his respirator mask moved slightly, scratching the left side of his nose. Claimant stated that immediately after the alleged punch he was startled, saw "little stars," and had a "little headache," but did not experience any significant symptoms. He testified he did not respond in any physical manner and merely resumed performing his work activities, finishing the remainder of his shift working with the co-worker. No other individuals observed the alleged incident.

4. Claimant did not immediately report the alleged incident to Employer or immediately seek medical treatment. Claimant testified he delayed reporting the incident

because he did not want to create any problems. Claimant continued working his scheduled shifts with the co-worker and was able to perform his job duties over the next few days. Claimant testified he felt nauseous and fatigued in the two to three days following the alleged incident, experiencing a few headaches and ringing in his ears. He stated that the "complete onset" of symptoms occurred on March 18, 2018, as he was being driven back to the yard after being removed from the pad by his supervisor, Daniel Gordon. Claimant testified Mr. Gordon retrieved him during his shift and informed him it was because he was being "picked on." Claimant testified that as he was being driven back to the yard by Mr. Gordon he felt very nauseous, weak and dizzy. Claimant did not inform Mr. Gordon of these alleged symptoms. Claimant testified he then attempted to drive himself home, but "lost track of space and time" and decided to drive himself to the emergency room.

5. Claimant presented to the emergency department at North Colorado Medical Center at approximately 6:45 p.m. on March 18, 2018 with complaints of right-sided neck pain for five days. He reported that, on March 14, 2018, a co-worker hit him in the face while he was wearing a respirator, causing his head to snap back. Shelley Anne O'Neil, PA noted,

> Pt. claims that the person has been interacting with him in a negative manner and almost likely a bully. During the altercation patient had his hat tipped then hit in the face, upper left side which caused his respirator to shift and his head was snapped back and to the right. No falling to the ground. No lesions or cuts or bruising. Since the patient has developed some pain of the muscles of the neck making it hard to turn head and painful to sleep do (*sic*) to the stiffness.

Claimant denied any recent vision problems, headache, dizziness, altered level of consciousness, numbness, tingling or weakness, as well as any hematomas, lacerations, abrasions, bruises or lesions. On exam, PA O'Neil noted some tightness along the cervical spine, but full and active cervical range of motion without pain. No lacerations or abrasions were noted. X-rays were negative for acute abnormality in the cervical spine. PA O'Neil gave the following impression: alleged assault, muscle pain, neck pain on right side. She prescribed Claimant Flexeril, took Claimant off of work for one day, and recommended Claimant follow up with a workers' compensation clinic.

6. As Claimant reported to the hospital staff he suffered an assault, the Weld County Sheriff's department was contacted and an officer came to speak with Claimant at the hospital. Officer Rougier conducted an investigation. Claimant testified his understanding was that the co-worker denied the alleged incident occurred, and Officer Rougier determined the alleged incident was unfounded.

7. Officer Rougier took photographs of Claimant at the hospital on March 18, 2018 (Claimant's Exhibit 10). Claimant purports that the photographs show a scratch on the left side of his nose that resulted from the alleged punch. The photographs show a very small, minimally perceptible mark on the left side of Claimant's nose.

8. Mr. Gordon testified at hearing on behalf of Respondents. Mr. Gordon testified that a few days after the alleged incident Claimant told him he was hit by the particular co-worker and was experiencing neck pain. Mr. Gordon stated Claimant would not provide further details of the incident despite his questioning. Mr. Gordon testified that he did not observe any physical altercation between the Claimant and the co-worker. He stated that, on previous occasions, he had personally observed Claimant instigate arguments with co-workers and get upset and storm off. Mr. Gordon testified that he did not tell Claimant he was being removed from the pac because he was being picked on. Mr. Gordon testified that he was interviewed by Officer Rougier.

9. On March 23, 2018, Claimant presented to Carolyn Douglas, PA-C at Employer's authorized provider, Advanced Urgent Care. Claimant testified he was instructed to go to Advanced Urgent Care by Employer and was not provided a list of providers. Claimant complained of 3/10 neck pain and right head pain since March 13, 2018, along with mild headaches, fatigue, poor concentration, and nausea with exertion. He denied vision changes, hearing loss, or skin lesions. On physical exam, PA-C Douglas noted Claimant's head was normocephalic and atraumatic, limited cervical range of motion and tenderness, and no neurological deficits or lesions. She assessed Claimant with a concussion with no loss of consciousness and neck pain. The medical note indicates Claimant was to be taken off of work until March 27, 2018 due to medication given to him at his emergency department visit, although the WC-164 form completed by PA-C Douglas notes Claimant was released to full duty with no restrictions.

10. Claimant returned to Advanced Urgent Care for follow-up on March 26, 2018. Claimant reported no vision changes, nose problems, loss of hearing, muscle aches, headaches, dizziness or skin lesions. On physical exam, Claimant's head was again normocephalic and atraumatic and his neck was supple with full range of motion and no cervical spine tenderness. Claimant was assessed with post-concussion syndrome and cleared to return back to work without restrictions. No further treatment was prescribed.

11. Claimant returned to working his regular duties. He subsequently received disciplinary write-ups on April 18, 2018 for an attendance issue and April 19, 2018 for sleeping in the safety shower.

12. Claimant sought no healthcare treatment between March 27, 2018 and April 29, 2018. On April 30, 2018, Claimant sought treatment on his own accord with his primary care physician at SCHC Loveland Community Health Center reporting headaches, dizziness, difficulty concentrating, and fatigue. Claimant reported that he had been diagnosed with concussion syndrome. Physical examination was normal. Jennifer Smith, PA-C assessed Claimant with a concussion without loss of consciousness, approved Claimant to return to work with restrictions of no DOT driving and no safety-sensitive work, and instructed him to return if his condition failed to improve or worsened. Employer was unable to accommodate the restrictions.

13. On June 8, 2018, Claimant was evaluated by Jason Valderrama, PA-C at SCHC Loveland Community Health Center. Claimant complained of headaches and ringing in his ears that had been improving. Claimant also complained of some light

sensitivity on occasion and posterior scalp pain, as well as some dizziness and fatigue. Claimant was given a hearing test, which he failed. A brain MRI was ordered, which Claimant underwent on June 16, 2018. The MRI was normal, with no evidence of an intracranial mass, hemorrhage or acute ischemia.

14. At a return visit to SCHC Loveland Community Health Center on July 19, 2018, Claimant reported he would like to transition back to work. He complained of some residual ringing in his left ear and fogginess. Claimant passed a hearing test on both sides. He was released to return to work.

15. Claimant returned to Advanced Urgent Care on August 6, 2018 for a return-to-work evaluation. Claimant reported no issues or symptoms and was released to return to work without restrictions. Claimant also underwent a Department of Transportation evaluation on August 8, 2018 and was cleared to return to work.

16. Claimant returned to performing his regular duties and subsequently resigned on September 10, 2018. Claimant completed a separation checklist stating his reason for termination of his employment was dissatisfaction with type of work. He further reported to Employer that the crew was not working as a team, crew members were "snippy" to him when giving instructions, and safety concerns for the speed at which tasks were performed.

17. Claimant testified that he resigned from this employment because he no longer trusted Employer and did not want to again end up in a similar situation with the particular co-worker. Claimant testified that since his resignation from Employer, he has worked a few different jobs and is currently employed as a machine operator. Claimant stated his last doctor's appointment was in October 2018. He testified he continues to experience ringing in his left ear and dizziness with extreme heat or over-exertion.

18. Dustin Pennell testified at hearing on behalf of Respondents. Mr. Pennell worked for Employer as a Servicer Specialist and is familiar with both Claimant and the co-worker, who were on his crew. Mr. Pennell testified he did not personally see the co-worker hit Claimant. He testified that both Claimant and the co-worker would express their frustrations with each other over the work radio, and that he had previously spoken to both Claimant and the co-worker about their radio communication and instructed them to stop. Mr. Pennell testified that he was also interviewed by Officer Rougier, whom he told of his belief that Claimant was not being truthful about the alleged incident.

19. Tony Euser, D.O. testified on behalf of Respondents by pre-hearing deposition. Dr. Euser reviewed Claimant's records and testified there was no objective evidence of trauma to Claimant's head. He testified merely because a physical examination shows "some deficit" that does not mean it was caused by what the patient alleges. Dr. Euser explained that the March 23, 2018 chart note did not support, objectively, that Claimant was injured as claimed, and that the March 26, 2018 chart note does not support any objective medical evidence that Claimant was continuing to have any sequalae from the alleged incident. Dr. Euser agreed with the claimant's release to regular duty.

20. Per the wage records, Claimant earned the following wages during the following time period:

Pay period	**Amount**
1/9/2018 – 1/21/2018	$1,784.00
1/22/2018 – 2/4/2018	$3,952.00
2/5/2018 – 2/18/2018	$2,736.00
2/19/2018 – 3/4/2018	$2,640.00

21. Claimant's testimony is not found credible or persuasive.

22. The ALJ credits the testimony of Dr. Euser, Mr. Gordon, and Mr. Pennell.

23. Claimant failed to prove by a preponderance of the evidence he sustained a compensable injury.

24. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or

improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

The claimant was required to prove by a preponderance of the evidence that at the time of the injury she was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

As found, Claimant failed to meet his burden to prove he sustained a compensable injury. The ALJ is persuaded Claimant and this particular co-worker had a contentious professional relationship. However, the ALJ is not persuaded Claimant was punched by the co-worker, causing any disability or need for treatment. Claimant alleges he was struck by a much larger man and the blow was severe enough to, at the time, cause him to stumble backwards into a tanker and see stars and and, later, experience headaches, nausea, fatigue and ringing in his ears. Claimant's allegations regarding the incident and the severity of the incident are inconsistent with Claimant's actions and complaints in the medical records. Claimant failed to immediately report the alleged incident or seek medical treatment, continuing to perform his job duties and work with the particular co-worker. The ALJ is not persuaded by Claimant's explanation that he delayed reporting the incident to avoid causing problems, as Mr. Gordon credibly testified he had personally observed Claimant on prior occasions instigating arguments with co-workers and storming off of the job.

Claimant's testimony that he experienced a complete onset of symptoms, including weakness, nausea, dizziness and losing "track of space and time" is inconsistent with the complaints noted in emergency room records, which note Claimant solely reported neck pain. The March 18, 2018 medical record documents Claimant specifically denied any recent vision problems, headache, dizziness, altered level of consciousness, weakness, as well as any hematomas, lacerations, abrasions, bruises

or lesions. The miniscule mark on the left side of Claimant's nose seen in the photographs taken by Officer Rugier do not support Claimant's contention that he was struck in the face by a much larger man, causing an abrasion and concussive symptoms. Claimant's credibility is further called into question as, after reporting on March 26, 2018 no hearing issues, headaches, or dizziness, he did not seek further medical treatment until he received two disciplinary write-ups from Employer. Dr. Euser credibly testified the objective evidence does not support Claimant's contentions. The record contains insufficient credible and persuasive objective evidence Claimant sustained an acute injury. Based on the totality of the evidence, Claimant failed to prove he sustained a compensable injury arising out of and in the course of his employment for Employer on March 13 or March 14, 2018.

As Claimant failed to prove he sustained a compensable injury, the remaining issues of TTD, AWW and authorized physician are moot.

ORDER

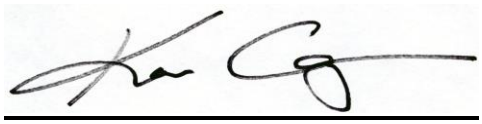
It is therefore ordered that:

1. Claimant failed to prove he sustained a compensable injury arising out of and in the course of his employment for Employer on March 13 or March 14, 2018. Claimant's claim for benefits is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 7, 2019



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Did Claimant prove repeat lumbar rhizotomies, an inversion table, and facet injections are reasonably necessary and causally related post-MMI medical treatment?

FINDINGS OF FACT

1. Claimant has worked for Employer for approximately 32 years, the last 18 years as a sprinkler backflow technician. The job is physically demanding and regularly requires lifting fifty pounds or more.

2. Claimant suffered an admitted low back injury on May 28, 2015 while lifting a 100-pound backflow machine onto a truck.

3. A lumbar MRI on June 18, 2015 showed a large left disc extrusion at L4-5 causing severe central canal stenosis, severe impingement of exiting L4 nerve roots, and severe left neural foraminal narrowing. There was also a disc bulge and central disc protrusion at L5-S1, causing mild central canal stenosis and severe bilateral neural foraminal narrowing. The radiologist considered the findings degenerative rather than acute.

4. Employer referred Claimant to Emergicare for authorized treatment, but eventually, he transferred to Southern Colorado Clinic, where he treated with Dr. Terrence Lakin and PA-C Terry Schwartz. At the initial visit with Dr. Lakin on August 25, 2015, Claimant reported 8/10 back pain with weakness and dragging his left leg. He was still working his regular job, but struggling with it. He reported a remote history of low back problems and treatment in 1996 but stated he "has been well since then." Claimant had difficulty tolerating NSAIDs due to stomach discomfort. Dr. Lakin imposed work restrictions and referred Claimant to Dr. Michael Sparr for consideration of injections.

5. Claimant saw Dr. Sparr on September 23, 2015. He described constant 7/10 low back pain around the belt line with occasional radiation into his left buttock. He also reported "heaviness" in his left leg, and "[it] sometimes feels as if he's dragging his left leg." He walked with an antalgic gait favoring his left leg, and had difficulty walking on his heels because of left leg weakness. Physical examination showed "profound" myofascial tightness of the lumbar paraspinals and gluteal musculature. Facet loading was positive at L4-5 and L5-S1. Lasegue maneuver was markedly positive, and straight leg raising was positive bilaterally at approximately 30°. Lower extremity strength was normal except ankle dorsiflexion and extensor hallucis longus were graded 5-/5. Dr. Sparr opined,

> Severe lumbosacral pain is likely related to the L4-L5 disc extrusion noted on MRI or facetogenic pain and profound myofascitis, also some element of sacroiliitis. Radiculopathy was present initially, but now has lessened substantially. He seems to have some left-sided weakness in an L5 myotome distribution which may be the result of the above-noted disc herniation.

6. Dr. Sparr prescribed a prednisone burst and encouraged Claimant to try Celebrex, which should be easier on his stomach than ibuprofen.

7. Claimant returned to Dr. Sparr on October 28, 2015 and reported the prednisone was "extremely beneficial in substantially decreasing his pain." Claimant had also responded well to chiropractic treatment with Dr. Young. The physical examination findings were improved; Lasegue test and straight leg raising were now negative. The primary significant finding was "exquisite tenderness" to palpation of the bilateral L4-5 and L5-S1 facets, worse on the right. Dr. Sparr opined his pain appeared to be primarily related to facet dysfunction and arthralgias, and recommended facet injections.

8. Claimant had right L4-5 and L5-S1 facet injections on November 16, 2015 with Dr. Stephen Scheper.

9. On December 9, Dr. Sparr documented the injections immediately decreased Claimant's pain from 7/10 to 0/10 and gradually returned to 5/10 by the time of the appointment. Dr. Sparr considered this "an excellent diagnostic response." He decided to start trigger point injections combined with additional chiropractic treatment.

10. On December 30, 2015, Dr. Sparr noted the combination of trigger point injections and chiropractic were "quite beneficial."

11. Dr. Sparr administered another set of trigger point injections on January 27, 2016. Unfortunately, that round of injections was not as helpful as the first set. Eventually, Dr. Sparr recommended medial branch blocks ("MBBs") "with an eye toward radiofrequency rhizotomy."

12. Dr. Scheper performed MBBs at L3, L4, and L5 on March 21, 2016.

13. At Claimant's follow up appointment on March 30, 2016, Dr. Sparr documented,

> Prior to the injection his pain was graded as 6-7/10. Immediately following the injection his pain diminished to 1/10. It was 0/10 for the next 3-4 hours, gradually increase[ing] thereafter. It is intermittently 7/10 at this point. This is an excellent diagnostic response to the medial branch blocks.

14. Based on Claimant's response to the MBBs, Dr. Sparr recommended rhizotomy at L4-5 and L5-S1.

15. Dr. Scheper performed the rhizotomies on June 13, 2016.

16. Dr. Sparr's June 29, 2016 note states,

> He's extremely pleased [with the rhizotomies], reporting almost no pain in his back. His pain has averaged 1/10 in the past week. Immediately following the procedure the pain was much improved. He has been able to lift, stand and walk without significant problem.

The physical examination was much improved too, showing only "minimal tenderness" to direct palpation over the lumbar paraspinals and facet joints, and negative facet loading. Because of Claimant's "excellent response" to the rhizotomy, Dr. Sparr opined he "does not need further treatment in the way of injections," but recommended a possible repeat rhizotomy as "maintenance treatment" if the pain returned after six months.

17. On July 7, 2016, Dr. Lakin noted claimant "appears to be doing well," with "just tightness" in his back but minimal pain. He released Claimant to a trial of regular work on July 7, 2016.

18. Claimant tolerated the return to work reasonably well, except for some mild pain while bending forward. On July 19, 2016, PA Schwartz noted, "it appears the radiofrequency helped reduce radicular pain and severity of the specific back pain. It also increased functional capacities to near previous baseline."

19. Dr. Lakin put Claimant at MMI on August 25, 2016. His report states, "He has completed extensive conservative care, benefited from radiofrequency ablation and plateaued in his recovery." He recommended maintenance treatment of periodic follow-up with Dr. Sparr and a repeat rhizotomy "as needed in the next 2 years." Dr. Lakin released Claimant to regular duty.

20. Respondent filed a Final Admission of Liability admitting for reasonably necessary injury-related medical treatment after MMI.

21. Claimant worked without difficulty after MMI for approximately nine months. On May 17, 2017, he returned to Dr. Lakin's office and reported "increasing discomfort" and a "recurrence of low back pain." Dr. Lakin opined Claimant might need a repeat rhizotomy. He imposed no work restrictions, and Claimant continued working despite the worsening pain.

22. Claimant saw Dr. Sparr on April 30, 2018. Dr. Sparr recalled when he released Claimant in 2016, he reported "substantial benefit with almost no pain in his back." Dr. Sparr noted,

> He returns reporting rather severe increased pain in the central lumbar and lower extremity regions. The symptoms have been worse over the past week. Prior to that he was not experiencing severe back pain. He did not change his routine in any way. He denies any specific trauma or significant change in activities. He scheduled today's visit and is reporting 8/10 intensity near constantly in the central lumbar region of the belt line with radiation into both buttocks.

23. The physical examination was very similar to Claimant's presentation at the first appointment with Dr. Sparr in 2015. Claimant had an antalgic gait favoring the left leg, "exquisite tenderness" to palpation over the right side L4-5 and L5-S1 facets, and "markedly positive" facet loading on the right. Dr. Sparr opined Claimant had "responded exceptionally well" to the prior rhizotomy and chiropractic treatment but "has recently experienced a rather severe flareup. I'm concerned that the disc extrusion has worsened. He also seems to have recurrent right-sided L4-L5 and L5-S1 facet arthralgias." Dr. Sparr ordered a lumbar MRI and prescribed a prednisone burst. He stated, "Rhizotomy was extremely beneficial in the past. A repeat rhizotomy of the L4-L5 and L5-S1 facets will be requested. This will not be scheduled until he has had some time to determine medication effect. . . . If his pain subsides then a rhizotomy will not be necessary."

24. Dr. Sparr's May 16, 2018 note documents, "The patient had good response to [the] prednisone burst and paper but continues to have rather severe Central back pain. Lumbar facet injections and been considered as he has an excellent response to previous rhizotomy." A final decision was deferred pending the MRI.

25. Claimant had the MRI on May 17, 2018. The radiologist did not have the prior images available for comparison, but the results appear very similar to the June 2015 MRI.

26. The last note from Dr. Sparr is dated June 8, 2018, which states,

> In the past he had excellent response to radiofrequency ablation . . . . He would like to avoid further injections as he hates needles. I do think an epidural steroid injection would be extremely beneficial. This will be considered in the future should he have worsening pain. He responded exceptionally well to steroid burst and taper. If he has worsening pain, an additional burst would be appropriate. Surgical intervention would certainly be an option given the severity of findings. He would like to avoid this at all costs. . . . Chiropractic treatment has been extremely beneficial in the past. Dr. Young is aware of his situation and will use disc precautions. I will order 6-8 such treatment hoping to further alleviate his pain.

27. In his July 24, 2018 report, Dr. Young noted,

> I have reviewed his prior response to interventional management; unfortunately, [Claimant] has a fear of needles and does not wish to pursue this at this time. I have consulted with Dr. Sparr regarding additional management options to include an inversion table for home use, this has been requested, however, there has been no indication of authorization or denial at this time.

28. Claimant saw Dr. Frank Polanco for an IME at Respondent's request on September 11, 2018. Dr. Polanco documented a largely benign physical examination, with only "generalized lumbar paraspinal tenderness" and limited range of motion. He appreciated no muscle spasm or trigger points, no facet tenderness on deep palpation,

and no leg weakness. He described Claimant's gait as "normal." Dr. Polanco said Claimant told him the rhizotomy "did not offer any significant benefit" and only reduced his pain from 9/10 to 7/10 "for a little while." Dr. Polanco opined, "In reviewing the effects of his prior rhizotomy procedure there is no indication of a substantial decrease in pain or significant improvement in functional status." He opined additional chiropractic treatment and epidural injections were "outside the medical treatment guidelines," and therefore not reasonably necessary.

29. Dr. Polanco issued a supplemental report on November 15, 2018 to address the medical necessity of a repeat rhizotomy. He reiterated the findings and opinions from his previous IME report and added,

> As [Claimant] has noted, the prior rhizotomy procedure did not provide any significant pain relief or functional improvement. The guidelines support rhizotomy procedures with objective documentation of sustained and substantial relief for six to eighteen months. Thus, the request is not supported as it does not meet guideline criteria.

30. At hearing, Claimant disputed Dr. Polanco's assessment that the prior rhizotomies were unhelpful. He believes the pain relief and functional improvement described in Dr. Sparr and Dr. Lakin's records accurately depicts the benefit he perceived from the previous rhizotomy. He credibly testified the rhizotomies decreased his pain substantially and allowed him to return to his physically demanding job. Claimant testified he now wishes to pursue repeat rhizotomies, despite his fear of needles, because it is getting increasingly difficult to work and engage in other activities.

31. Dr. Polanco testified at hearing. He stated Claimant's accident aggravated his pre-existing multilevel degenerative disc disease but he improved with treatment and resumed full duties with no permanent restrictions. Dr. Polanco opined Claimant's current symptoms are due to the natural progression of his underlying pre-existing condition and not the work injury.

32. Claimant's testimony at hearing was generally credible.

33. Dr. Sparr's reports and opinions regarding the utility of rhizotomies are credible and more persuasive than the contrary opinions offered by Dr. Polanco.

34. Claimant proved repeat rhizotomies are reasonably necessary to relieve the effects of his injury and prevent further deterioration of his injury-related condition.

35. Claimant failed to prove an inversion table or facet injections are reasonably necessary.

CONCLUSIONS OF LAW

The respondents are liable for medical treatment after MMI reasonably necessary to relieve the effects of the injury or prevent deterioration of the claimant's condition. Section 8-42-101; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Even if

the respondents admit liability for post-MMI treatment, they retain the right to dispute the reasonable necessity or relatedness of any particular treatment. *Hanna v. Print Expediters Inc*., 77 P.3d 863 (Colo. App. 2003). The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). Where the respondents dispute the claimant's entitlement to medical benefits, the claimant must prove the treatment is reasonably necessary and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must prove entitlement to medical benefits by a preponderance of the evidence. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

As found, the repeat rhizotomies recommended by Dr. Sparr are reasonably necessary to relieve the effects of Claimant's injury and prevent further deterioration of his injury-related condition. The persuasive evidence shows Claimant had an excellent response to the first rhizotomy, with a lengthy period of sustained pain relief that allowed him to resume his regular work. Dr. Polanco's opinion that "there is no indication of a substantial decrease in pain or significant improvement in functional status" is convincingly refuted by the medical records and Claimant's credible testimony. In fact, Claimant's pain almost completely resolved and he returned to a manual labor job without restrictions. Nor is the ALJ persuaded by Dr. Polanco's opinion that Claimant's recurrent symptoms merely reflect the natural progression of his pre-existing condition. Claimant's current facet pain is a continuation of the aggravation set in motion by the May 2015 work accident.

Claimant failed to prove additional facet injections or an inversion table are reasonably necessary. Facet injections are primarily diagnostic, and we already know Claimant has facetogenic pain based on his response to previous injections and rhizotomies. The Chronic Pain MTGs suggest repeat MBBs "if the patient's pain pattern presents differently than the initial evaluation." But that consideration does not apply here, because Claimant's current condition closely mirrors his presentation before the previous facet blocks and rhizotomies. Claimant conceded in his brief that if the repeat rhizotomy is approved, the facet injections are moot.

The inversion table was recommended as an alternative to rhizotomies because Claimant fears needles. Claimant has now indicated a willingness and desire to pursue additional rhizotomies. Given his positive response to the previous rhizotomies, the inversion table will be superfluous if he has a similarly good result this time. Of course, Dr. Sparr may make any other treatment recommendations he deems appropriate (if any) after assessing the efficacy of the repeat rhizotomies. But the ALJ is not persuaded the inversion table is reasonably needed at this time.

ORDER

It is therefore ordered that:

1. Insurer shall cover the repeat rhizotomies recommended by Dr. Sparr.

2. All issues not decided herein, or otherwise closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 7, 2019

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

The issues set for determination included:

- Did Claimant meet her burden of proof to reopen the claim for a worsening of condition?

- Were Claimant's current symptoms related to or caused by her work injury?

PROCEDURAL HISTORY

The ALJ issued a Summary Order on May 8, 2019, which was served on May 9, 2019. Respondents requested Specific Findings of Fact and Conclusions of Law on May 17, 2019. This Order follows.

FINDINGS OF FACT

1. Claimant's medical history was significant in that she was previously was evaluated on May 30, 2000 at Alpine Urology with a complaint of urinary frequency, hesitancy, urgency and incontinence. The impression was: urge incontinence, 2+ plus cystocele and 1+ rectocele; low back pain. There was no evidence in the record Claimant required prescription medication to treat urinary incontinence before August 23, 2010.

2. Claimant injured her low back in a motor vehicle accident in approximately 1983. The medical records specified Claimant had residual problems for this injury. There was no evidence in the record Claimant required surgery for her low back, nor was there evidence of a permanent medical impairment for the low back or permanent work restrictions related to the motor vehicle accident.

3. On June 30, 2010, Claimant was evaluated by Sarah Bell, M.D. at Kaiser Permanente when she walked into the garage, fell and hit a table. Her back was painful, with no radiation of pain. There was no evidence in the record Claimant required treatment for her back at this time after this incident.

4. Claimant suffered an admitted industrial injury on August 23, 2010 when she fell down stairs while working for Employer.

5. After her fall, Claimant was transported by ambulance to Exempla Good Samaritan Center, where Julie Seaman, M.D. evaluated her. Her medical history included osteoporosis, esophagitis, anxiety, and depression. Dr. Seaman's impression was: left pubis and inferior pubic rami fracture, mechanical fall, osteoporosis, hypoxia secondary to narcotics. Claimant was admitted for pain control and Dr. Seaman

concluded Claimant would need PT/OT. Claimant initially received treatment for her work injuries though Kaiser Permanente.

6. On November 15, 2010, Claimant was evaluated by Sander Orent, M.D. Dr. Orent noted Claimant was tender over the pubic ramus. Dr. Orent's impression was pelvic fracture, with ongoing urinary incontinence. Dr. Orent also took Claimant off work, prescribed Celebrex and said they would attempt to take her off Percocet. Dr. Orent referred Claimant to William Ciccone II, M.D. (orthopedic surgeon) and for pain management.

7. David Schneider, M.D./Dr. Ciccone evaluated Claimant on November 17, 2010, at which time she was noted to be doing reasonably well. The diagnosis was: bilateral pubic ramus fracture. Dr. Ciccone restricted her ambulation and driving, with a follow-up in four weeks.

8. Claimant returned to Dr. Orent at regular intervals in November 2010 through December 2010. On November 22, 2010, Dr. Orent's impression was: pelvic fracture, with ongoing urinary incontinence; ongoing pain, requiring narcotics. Claimant received physical therapy ("PT") and her medications were monitored.

9. Dr. Ciccone evaluated Claimant on four occasions from December 2010 through January 10, 2011, including appointments on December 6, 16, 30, 2010. In the follow-up evaluation on January 10, 2011, Dr. Orent noted Claimant was getting progressively better. She was still experiencing incontinence and had seen an urologist (C. Cragin Anderson, M.D.), who wanted to perform an urodynamic study to rule out neurologic incontinence. Dr. Orent opined this condition was directly related to the work-related multiple pelvic fractures and this opinion was persuasive to the ALJ.

10. Claimant returned to Dr. Orent on February 3, 10, and 17, 2011, as well as March 3, 10, 17, 28, 20111 and April, 11, 2011. At that examination, Dr. Orent's assessment was: left pubic ramus fracture, with persistent pain. Claimant's fractures were healing, but not completely healed.

11. Urodynamic testing was completed on March 22, 2011 by Dr. Anderson. In a follow-up evaluation of Claimant on April 14, 2011, Dr. Anderson stated Claimant had an exacerbation of voiding dysfunction as a result of the work injury on August 23, 2010. Dr. Anderson observed that prior to the accident, she had some symptoms common for a woman of her age, with minor stress urinary incontinence. Subsequent to the accident, she had severe urinary urge incontinence, requiring the use of a protective pad, using 3-4 pads daily. Dr. Anderson noted Claimant had been undergoing PT and started anti-cholinergic therapy with some mild improvement.[1] The ALJ credited Dr. Anderson's opinion that the work injury caused Claimant's severe urinary incontinence.

12. Claimant returned to Dr. Ciccone on April 13, 2011. She reported left hip pain, with minimal pain. A review of the CT scan showed no acute abnormality, but

[1] Exhibit 6, pp. 260-262.

incomplete healing of the bilateral sacroiliac fractures, as well as the ramus fractures. Dr. Ciccone recommended Claimant to continue to be weight-bearing, as tolerated and continue with a home exercise program. Dr. Ciccone said no orthopedic follow-up was necessary.

13. On May 4, 2011, Claimant underwent a psychological evaluation performed by Ronald Carbaugh, Psy.D. Dr. Carbaugh's diagnostic impressions were: pain disorder associated with psychological factors and general medical condition; history of post-traumatic stress disorder; adjustment disorder, with depressed mood; other diagnoses deferred. Dr. Carbaugh said Claimant had a history of significant physical and sexual abuse, which can be a factor in the development of chronic pain disorders. Claimant appropriately entered psychotherapy for the prior abuse issues and functioned well. However, Dr. Carbaugh noted past abuse could lead to heightened pain sensitivity. Dr. Carbaugh opined Claimant would likely benefit from a course of pain and adjustment counseling.

14. Claimant completed eight (8) pain and adjustment counseling sessions, provided by Jane Cameron MS in Dr. Carbaugh's office. In the psychological discharge summary on August 9, 2011, Dr. Carbaugh's diagnostic impressions were the same as on May 4, 2011. Claimant's mood had stabilized. Claimant was encouraged to apply strategies taught during treatment to enhance her pain coping skills. No further sessions were scheduled or recommended at that time.

15. On August 25, 2011, Dr. Orent evaluated Claimant, at which time he noted she suffered a setback of the urinary incontinence condition. Dr. Orent increased her Vesicare prescription. Claimant was taking Vicodin twice a day and tolerating it well. Dr. Orent noted Claimant had a total of four fractures and secondary urinary incontinence. Claimant's recovery was slow, but Dr. Orent opined she reached MMI as of July 28, 2011.

16. Dr. Orent assigned a 21% whole person impairment-for the pelvis fracture, with displacement residuals; a bilateral pubic rami fracture; a sacral fracture; and a coccyx fracture. Claimant's impairment for the fractures totaled 15%. Claimant also had a medical impairment for urinary bladder function, and impairment in the form of urgency with frank incontinence, for an additional 7%. Dr. Orent recommended continuing medical treatment for Claimant.

17. For maintenance treatment, Dr. Orent stated if the urinary incontinence worsened, Claimant may need to revisit the neurologist. Dr. Orent also noted Dr. Ciccone opined it was possible Claimant will need surgery on her hip because of the injury, which should be considered a part of potential maintenance care. Dr. Orent stated maintenance care also included prescriptions for Vicodin and Vesicare.

18. On September 15, 2011, a Final Admission of Liability ("FAL") was filed on behalf of Respondents based upon Dr. Orent's August 25, 2011 report, which was the date of MMI. The FAL admitted for a 21% whole person impairment, which included a

medical impairment rating for the pelvis, hip and urinary incontinence. The FAL admitted for medical treatment that was reasonable, necessary and directly related to the industrial "injury of August 23, 2010 only". Treatment was limited to the "pelvic fracture to include the hip, as recommended by Dr. Sander Orent and Dr. Ciccone".

19. Dr. Anderson performed a transvaginal tape procedure and cystoscopy for the stress urinary incontinence issue on May 30, 2012. The ALJ inferred Claimant's urinary incontinence symptoms following the work injury necessitated this surgery. Claimant returned to Dr. Orent on June 14, 2012, at which time she reported the bladder suspension surgery was very successful. Although she had what was described as a chronic ache in the pelvic area, this was the first time she had not had to use incontinence pads in two years.

20. On September 27, 2012, Dr. Orent referred Claimant to Lief Sorenson, M.D. for continued low back and right SI joint tenderness. Dr. Sorenson evulated Claimant and his diagnoses were: chronic pain; lumbar spondylosis; muscle pain; sacroiliac joint inflammation. Dr. Sorenson administered SI joint injections on October 10, 2012 and November 3, 2012; both of which provided pain relief to Claimant. This was confirmed when Claimant returned to Dr. Orent for evaluation on October 11, 2012 and November 26, 2012, respectively.

21. Claimant returned to Dr. Orent on December 13, 2012, at which time a minor flare-up was noted. Claimant was doing well in the follow-up-a visit on December 27, 2012. Dr. Orent reevaluated Claimant for maintenance visits in 2013, including on April 4, June 6, October 3, November 7, 2013 and January 9, 2014. At the January 9, 2014 exam, Dr. Orent said the SI joint injection had no efficacy and referred Claimant to see Dr. Sorenson as soon as possible. Dr. Sorenson administered an SI joint injection on January 15, 2014. Dr. Orent evaluated Claimant on January 16, February 6, March 13, 2014. He noted Claimant was having nonoccupational issues at the March 13, 2014 appointment. When Claimant was evaluated on April 17, 2014 and July 10, 2014, Dr. Orent stated Claimant was doing quite well. When Claimant returned on November 6, 2014, Dr. Orent documented a worsening in her condition.

22. Dr. Orent referred Claimant to B. Andrew Castro, M.D., who evaluated her on November 21, 2014. Claimant was experiencing pain with increased activities, including bending and getting up. On examination, she had a reasonably good ROM on flexion, extension, lateral bending and rotation. Dr. Castro discussed treatment options with Claimant, specifically a SI joint fusion. He was concerned because of the poor bone density of the SI joints, specifically the sacral ala. Dr. Castro opined that surgery may not improve Claimant's symptoms and can actually make it worse. The ALJ noted Dr. Orent incorporated Dr. Castro's conclusions when deciding on treatment options for Claimant.

23. Dr. Orent ordered an MRI of Claimant's lumbar spine, which was performed on November 26, 2014. Todd Greenberg, M.D. read the films and noted

minimal displacement at L5-S1, with no stenosis. Mild disc height loss was noted at L4-5 and Dr. Greenberg concluded this was an unremarkable lumbar spine study.

24. On December 11, 2014, Claimant was re-evaluated by Dr. Orent. Claimant walked with an antalgic gait, was having pain, numbness in the legs/feet and was using a cane. Dr. Orent opined that her symptoms were directly related to her original SI joint injury. Dr. Orent took Claimant off work, because she was taking narcotics and was in a great deal of pain.

25. Claimant received an SI joint injection on December 31, 2014. On January 7, 2015, Dr. Orent evaluated Claimant, after she had completed an injection. The injection was characterized as very helpful in reducing her pain. Claimant reported she was still having issues with incontinence, which Dr. Orent discussed at length with her. He did not believe this was related to any *cauda equina* type syndrome. Dr. Orent ordered a short course of therapy to increase the efficacy of the injection and scheduled for a follow-up after that. Dr. Orent noted Claimant's left SI joint had worsened in a follow-up evaluation on January 22, 2015. He recommended either doing a reopening or continuing the maintenance care in a different direction, specifically with a focus on the facets just above the SI joint.

26. J. Trevor McNutt, M.D. (neurologist) evaluated Claimant on March 19, 2015. Dr. McNutt opined that Claimant's numbness from the pelvic fractures and urinary incontinence would likely not improve.

27. Dr. Sorenson performed a radiofrequency ablation (L5, S1, S2 and S3) on March 25, 2015. Dr. Sorenson administered a trigger point injection on April 28, 2015, a left trochanteric bursa injection on August 3, 2015 and caudal epidural steroid injection on August 31, 2015. Claimant reported this last injection provided the best functional relief when she returned to Dr. Sorensen on September 14, 2015. This treatment was for continued pain in the low back and hip area. The treatment notes admitted into evidence reflected Claimant reported improvement after she received injections in this timeframe. The ALJ inferred that this maintenance treatment and resultant pain relief was necessary to maintain MMI.

28. On May 22, 2015, Claimant underwent an MRI of the pelvis and the films were read by Steven Pomeranz, M.D. Dr. Pomeranz' conclusion was: no major internal derangement or skeletal abnormality noted; mild anterosuperolateral osteoarthritic change consistent for age, with labral degeneration; symphysis pubis arthrosis, with suspected fracture bony remodeling.

29. On November 3, 2015, Claimant returned to Dr. Anderson. She had stress and urge-related incontinence. Her previous treatment was initially effective, but the symptoms returned. Dr. Anderson noted improvement with PT and recommended continuing with that until improvement was no longer achieved. He also recommended

a neurological evaluation. The ALJ noted there was no evidence of a worsening of the urinary incontinence symptoms in the record after this time.

30. Throughout the treatment Claimant received in 2015, Dr. Orent opined she remained at MMI. Dr. Orent evaluated Claimant at regular intervals, including after the injections she received. At the September 24, 2015 evaluation, Dr. Orent noted Claimant felt much after the caudal epidural she underwent.

31. Claimant returned to Dr. Orent on February 11, 2016, she was having a substantial flair of back pain after PT was re-started. On examination, Dr. Orent found a positive straight leg raising test, with radiation way down into the foot of the left leg. The right leg caused pain in the back. Tenderness was found around the paraspinous musculature, but there was no muscle weakness. Dr. Orent noted Claimant's incontinence continued and there was nothing that could be done with it, as there was nerve damage. Dr. Orent recommended a repeat epidural, without reinstituting PT.

32. Dr. Sorenson administered a caudal epidural steroid injection on January 6, 2016, which provided functional relief. On March 3, 2016, Claimant returned to Dr. Orent. Claimant had undergone an injection the day before and was doing extremely well. Dr. Orent's impression was back pain, status post injection; post-injection headaches; urologic incontinence due to his back injury, which was worked up thoroughly. Dr. Orent noted the straight leg raising test was negative and there was no motor weakness. No unusual pain behaviors were present. Claimant's headaches were present in the occipital area. Dr. Orent recommended therapeutic dry needling and massage, as well as PT. Dr. Orent stated this was maintenance care and Claimant had already been rated. The ALJ inferred Dr. Orent was of the opinion Claimant sustained no additional medical impairment and the treatment was necessary to maintain MMI.

33. Dr. Orent examined Claimant on March 31, 2016. No paraspinous spasm was found, nor was there tenderness throughout the SI joint area. Range of motion ("ROM") for flexion was excellent, with extension somewhat limited. Dr. Orent's impression was: SI joint issue, chronic occupationally related. Dr. Orent stated Claimant needed to come back for a repeat injection if she had a flare. Dr. Orent opined this was maintenance treatment Claimant would need for the rest of her life.[2] The ALJ credited this opinion on relatedness and the need for maintenance treatment.

34. Respondents filed a FAL on April 15, 2016, based upon Dr. Orent's March 31, 2016 report. Claimant was at MMI as of March 31, 2016 and no additional medical impairment was assigned. The FAL did not state a position as to maintenance medical benefits.

35. David Orgel, M.D. evaluated Claimant on May 25, 2016. Dr. Orgel noted he reviewed Claimant's history, but it was not clear that he reviewed the entirety of the chart. Claimant's symptoms included: psychological symptoms, ongoing incontinence

[2] Exhibit 3, p.195.

and joint pain. Tenderness was discerned in the sacrum and into the right greater than left sacral iliac region, but no synovial swelling was noted. Dr. Orgel commented that Claimant received seven years of treatment and should have exhausted maintenance treatment years ago. The ALJ noted this reference to seven years of treatment was inaccurate. Dr. Orgel's assessment was chronic pain. He thought it was best for Claimant to return to Dr. Sorenson for maintenance treatment, including the Percocet prescription, as well as for any recurrent injections. Dr. Orgel did not rule out further treatment to be provided by Dr. Sorenson.

36. Claimant was evaluated by Dr. Orent on July 27, 2016 and he noted she fell two weeks ago. Claimant was complaining of pain in the coccyx, as well as her left hip, which radiated all the way down to her calf. Tenderness was noted in this region, as well as the greater trochanteric bursa, with inferior radiation. Dr. Orent's impression was coccygeal contusion or fracture; greater trochanteric bursitis with neuropathic pain component and SI joint dysfunction. He stated all of these conditions were occupationally-related and were very responsive to cortisone in the past. Dr. Orent opined that this was maintenance care and if the carrier balked, Claimant would be taken off MMI and her active treatment resumed.

37. On August 26, 2016, an Amended FAL was filed to reflect the correct amount of TTD benefits, which were paid through March 30, 2016. The Amended FAL did not state a position on maintenance medical benefits.

38. Dr. Sorenson administered caudal epidural steroid injections on June 15, 2016 and August 24, 2016. In a follow-up evaluation which took place on November 18, 2016, Dr. Sorenson documented Claimant's back pain was worsening. Associated symptoms included headaches, leg pain, pelvic pain, tingling and weakness. Dr. Sorenson administered a caudal epidural steroid injections on December 29, 2016. Claimant reported relief and increased ability to function when Dr. Sorenson evaluated her on January 12, 2017. Claimant received another total epidural steroid injection on March 27, 2017. The records of Dr. Sorenson during 2015-16 documented continued pain in Claimant's low back, SI joint trochanteric bursa.

39. On March 29, 2017, Claimant underwent an independent medical examination, which was performed by Douglas Scott, M.D.[3] At that time, Claimant reported pain over her left pubic ramus, right iliac crest, tailbone and left hip. She also reported urinary incontinence. On examination, Claimant's lumbar range of motion was reduced to an estimated forward flexion of 60°, with extension back limited secondary to feeling lightheaded. Bilateral lateral flexion was 15° and equal. She had negative straight leg raise in a sitting position.

40. Dr. Scott's diagnoses were: status post trip and fall with resulting fractures of the pubis and left pubic rami. These fractures had healed. Claimant had chronic pain with chronic pain complaints in the right sacroiliac joint, left hip, and left pubic

[3] This evaluation was performed at the request of the disability insurer and not directly in connection with the instant workers' compensation claim.

ramis. Claimant had a history of stress urinary incontinence with exacerbation after the August 28, 2010 work injury. Claimant had chronic low back pain, pain syndrome and opiate pain medication use. Dr. Scott issued physical restrictions and opined Claimant could function eight hours per day/40 hours per week. The ALJ noted this evaluation did not address Claimant's need for continuing medical treatment or the efficacy of said treatment.

41. On April 24, 2017, Claimant underwent an IME with Carlos Cebrian, M.D. at the request of Respondents. Claimant complained of pain, loss of stamina, incontinence, and depression. She also told Dr. Cebrian she was not as active as in the past distances and was not able to drive long distances. Dr. Cebrian reviewed Claimant's treatment records and noted that Claimant complained of incontinence since 2000. The ALJ noted Dr. Cebrian prepared a lengthy and detailed review of Claimant's course of treatment. However, no detail was provided in his report regarding the findings he made on examination, including ROM measurements. Dr. Cebrian stated Claimant's claim-related diagnoses were: multiple pelvic fractures that were treated non-operatively; urinary incontinence secondary to the public fractures; SI joint dysfunction secondary to the pelvic fractures.

42. Dr. Cebrian agreed Claimant reached MMI as of December 27, 2012. Dr. Cebrian concluded Claimant's pelvic fractures and urinary incontinence were managed, with improvement noted. He opined Claimant had an expansion of her original complaints. Claimant had a history of chronic low back pain, and a history of intermittent vertigo, all predating her 2010 injury. Dr. Cebrian stated Claimant's lumbar radiculopathy was not related to the 2010 injury, given that her radicular symptoms did not manifest until nearly five years after the date of injury. Dr. Cebrian further opined that Claimant's subjective complaints of pain were not supported by any objective evidence. He noted EMG testing was negative and CT and MRIs of the lumbar spine and pelvis showed no abnormality.

43. Dr. Cebrian stated Claimant suffered from a chronic pain disorder unrelated to her 2010 injury. Dr. Cebrian stated no further medical maintenance care was indicated, as there was no objective injury of mechanical lesions which supported her subjective complaints. He said no further opioid medications should be prescribed pursuant to the Colorado Medical Treatment guidelines. He also said no further anti-inflammatory should be prescribed and Claimant should not receive additional injections. The ALJ was not persuaded by Dr. Cebrian's opinion concerning the urinary incontinence condition, as that opinion did not address whether the work injury worsened Claimant's urinary incontinence. The ALJ found Dr. Cebrian's opinion regarding the cause of the hip and SI joint symptoms to be less persuasive than Claimant's ATPs, especially given the lack of specific findings related to his examination.

44. Claimant returned to Dr. Sorensen on June 6, 2017, at which time he noted the relief from the last caudal injection was not as great as the prior injection. Dr. Sorenson said a left greater trochanteric bursa injection might be considered, as well as

lumbar MRI. The recommendation for this type of injection appears to remain a viable treatment option.

45. On December 19, 2017, Claimant was examined by Patrick Russell, M.D. (Kaiser Permanente), at which time she was complaining of weakness in the left leg, pain in the low back, bilateral groin and leg pain. Dr. Russell noted a slow gait and a Trendelenburg gait with weakness on the left lower extremity. Claimant's right hemipelvis was dropped and she had tenderness along the PSIS, left greater than right. There was also tenderness along the left greater trochanteric bursa, as well as the IT band. Dr. Russell found Claimant had weakness throughout the left lower extremity on motor examination, diminished sensation and weakness on hip flexion in the left lateral leg.[4] The ALJ inferred the IT band tenderness, as well as weakness supported the conclusion that Claimant's condition had worsened.

46. Dr. Russell recommended PT, which Claimant declined because therapy previously made her symptoms worse. She opined Claimant could also consider a trial of acupuncture. Claimant wished to resume caudal injections and Dr. Russell said a SI joint injection would also be considered. Dr. Russell recommended a lumbar MRI, which took place on January 8, 2018. The ALJ credited Dr. Russell's opinion regarding Claimant's need for treatment and diagnostic testing.

47. On May 18, 2018, John Burris M.D. evaluated Claimant, at the request of Respondents. At that time, she was complaining of low back and left thigh pain, right leg shooting pain, and bladder incontinence. On examination, Dr. Burris said Claimant's lumbar spine/pelvis were normal to visual inspection, with no swelling, or deformities. Equal leg lengths were present, with normal pelvic alignment. Diffuse tenderness over the right gluteal region was found, without localization. ROM was full for extension and lateral bending bilaterally, with restrictions on forward flexion. Dr. Burris' assessment was: pelvic fractures consisting of left superior pubic ramus fracture, right ramus fracture, and sacral insufficiency fracture.

48. Dr. Burris stated Claimant suffered pelvic fractures, as noted above. Follow-up diagnostic testing revealed these fractures healed completely without complication. He said Claimant had no objective findings of worsening at her examination or in the records of diagnostic testing. Dr. Burris opined Claimant's work-related conditions had not objectively worsened since reaching MMI. He also concluded Claimant had no current physical restrictions.

49. Dr. Burris testified as an expert in Physical Medicine and Rehabilitation at hearing. He is Level II accredited, pursuant to the WCRP. Dr. Burris reviewed his findings made on the examination of Claimant and reiterated his opinion that Claimant's condition had not objectively worsened since the last time she was placed at MMI. Dr. Burris stated Claimant suffered from chronic pain and because of the nature of that condition, her symptoms would wax and wane. He testified that diagnostic testing did not show abnormalities and much of the treatment was based upon Claimant's

[4] Exhibit 19, pp. 824-825.

subjective complaints, which was the basis for his opinion her condition had not worsened. The ALJ found Dr. Burris to be a credible witness, as Dr. Burris did not posit that all of Claimant's previous maintenance treatment was unreasonable.

50. Dr. Burris opined that Claimant did not continue to need treatment. Dr. Burris did not address the specific recommendations made by Dr. Russell at Kaiser, although he noted that in general, the effect of the injections was short-term. Also, he stated the MRI showed what would be expected in terms of degenerative changes. In addition, Dr. Burris did not specifically address the current status of Claimant's urinary incontinence and the ALJ found Dr. Anderson's opinions to be persuasive with respect to this condition.

51. Dr. Orent treated Claimant for almost six (6) years. The ALJ credited Dr. Orent's opinions with regard to Claimant's continuing treatment needs. He evaluated Claimant on multiple occasions, made the referrals to specialists and oversaw her treatment, including key recommendations as to her maintenance treatment needs.

52. Claimant testified she has been paying for everything for her urinary incontinence since 2017.[5] Most recently, she has treated with physicians at Kaiser. Claimant testified the pain in her hip has been getting worse. Walking is painful and pain in her hip wakes her up at night. She also said her gait was worse. Claimant said she received caudal injections and these injections helped her pain. Claimant was a credible witness, particularly when describing that her symptoms were worse.

53. Claimant proved the condition of her hip and SI joint has worsened.

54. Claimant failed to prove that her urinary incontinence condition worsened.

55. Testimony and evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

[5] There is a dearth of evidence in the record, which would explain why Respondents have not provided those medical benefits as *Grover* medical benefits. This is especially true given the conclusions of Drs. Orent and Anderson that this condition was worsened by the industrial accident. However, the issue of medical benefits was not before the Court at this hearing.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). In this case, the ALJ evaluated Claimant's credibility as a witness, as well as the credibility of various medical opinions.

Reopening

§ 8-43-303(1), C.R.S. authorizes an ALJ to reopen any award within six years after the date of injury on a number of grounds, including error, mistake, or a change in condition. *Heinicke v. Industrial Claim Appeals Office*, 197 P.3d 220 (Colo. App. 2008); *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). A change in condition refers either "to a change in the condition of the original compensable injury or to a change in Claimant's physical or mental condition which can be causally connected to the original compensable injury". *Chavez v. Industrial Comm'n*, 714 P.2d 1328, 1330 (Colo. App. 1985).

The reopening authority granted ALJs by § 8-43-303, C.R.S. "is permissive, and whether to reopen a prior award when the statutory criteria have been met is left to the sound discretion of the ALJ". *Cordova v. Industrial Claim Appeals Office*, *supra,* 55 P.3d at 189. The party seeking reopening bears "the burden of proof as to any issue sought to be reopened". § 8-43-303(4), C.R.S. In the case at bench, Claimant asserted her urinary incontinence condition, as well as symptoms related to the hip and SI joint had worsened since she was placed at MMI. Claimant referenced her most treatment records from Kaiser Permanente in support of this argument. Respondents averred Claimant failed to prove her condition worsened. Respondents attributed the increase in symptoms to Claimant's chronic pain condition and relied upon the IME reports of Dr. Cebrian and Dr. Burris, as well as the expert testimony of Dr. Burris to support their contention.

The ALJ credited Dr. Anderson's and Dr. Orent's opinions with regard to the cause of this condition and Claimant's need for maintenance treatment for her urinary incontinence. (Finding of Fact 9, 11, 17, and 51). Although Claimant had symptoms prior to the injury, the symptoms were exacerbated by Claimant's fall. *Id.* After the injury, she required surgery, as well as prescription medications to treat her urinary incontinence. Based upon the medical evidence before the Court, the ALJ was unable to conclude that Claimant's urinary incontinence had worsened since the last time Dr. Anderson evaluated her. (Finding of Fact 54). Since Claimant was placed at MMI,

there was no medical documentation in the record, which showed this condition worsened. As found, Claimant continued to experience symptoms of urinary incontinence. This was consistently documented when she was evaluated. (Finding of Fact 29, 31, 35, 39, 41, 47). However, on balance, the ALJ determined this condition has remained relatively stable since 2015-16. (Finding of Fact 29).

The ALJ concluded the condition of Claimant's hip and SI joint had worsened. This was a close question, as Dr. Burris was a credible witness, particularly when describing the phenomenon of chronic pain and the waxing/waiting of symptoms. (Finding of Fact 49). However, that was not dispositive. As determined in Findings of Fact 45-46, the most recent medical evidence demonstrated an increase in symptoms, particularly with respect to the trochanteric bursa. The ALJ credited Dr. Russell's opinions regarding the need for treatment, along with Claimant's testimony that her symptoms had worsened over time. *Id.* Additional support for the conclusion that her condition worsened came from Claimant herself, who testified as to specific symptoms, which were worse. (Finding of Fact 52). As the Colorado Supreme Court held in *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984), Claimant's lay testimony can provide evidentiary support for a Petition to Reopen. More recently, the Industrial Claims Appeals Office affirmed this principle in *Loy v. City Market*, W.C. 4-972-625-03 (ICAO October 12, 2018), citing *Savio House v. Dennis, 665 P.2d 141,* (Colo. App. 1983). The *Savio House* Court stated at 665 P.2d 142:

> "Whether the claimant has established causation is a question of fact, the determination of which is within the determination of the fact finder. If the findings are supported by substantial evidence, they are binding upon appellate review. Contrary to the assertions of petitioners, substantial evidence of causation is not restricted to credible medical testimony. Claimant's testimony was sufficient to establish with reasonable probability that her condition had worsened, and that the worsening was attributable to the accident. (Internal citations omitted.)"

On this issue, the ALJ considered Respondents' contentions that objective medical tests did not show a basis for a worsening of condition or the need for treatment. Respondents also argued Claimant received extensive treatment and had not shown a great deal of improvement. After considering the totality of the evidence, the ALJ was convinced by both the Claimant's testimony, as well as medical evidence in the record that the low back, hip and SI joint condition had worsened. The ALJ further determined that the worsening of this condition was directly attributable to Claimant's work injury, as her symptoms and need for treatment resulted from the pelvic fractures she suffered in August 2010. There was direct evidence in the form of medical opinions that established this. The ALJ was persuaded by Dr. Orent's consistent opinions that Claimant would continue to require treatment for her hip/ SI joint and this was directly related to her work injury. In fact, Dr. Orent consistently opined Claimant would continue to need maintenance treatment throughout her lifetime and her need for treatment was caused by the work injury. (Findings of Fact 32, 33 and 36).

Accordingly, the ALJ determined Claimant met her burden of proof on the Petition to Reopen. Although Claimant has received extensive treatment for her low back, hip and SI joint, her ATPs (including Dr. Orent) recommended continuing treatment. The physicians at Kaiser who evaluated her most recently also recommended treatment and diagnostic testing. These medical opinions were persuasive to the ALJ.

ORDER

It is therefore ordered:

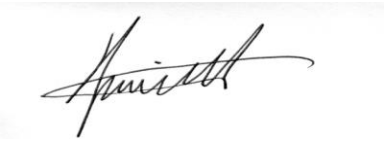
1. Claimant failed to meet her burden of proof to show her urinary incontinence condition worsened. The Petition to Reopen is denied and dismissed as to that condition.

2. Claimant met her burden of proof to show the condition of her hip and SI joint worsened.

3. All matters not determined herein are reserved for future determination.

DATED: June 7, 2019

STATE OF COLORADO



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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

- Whether Claimant proved by a preponderance of the evidence that he suffered a compensable work-related injury to his right knee on August 6, 2017?
- Whether Claimant proved by a preponderance of the evidence entitlement to a general award of medical benefits, and specifically the surgery on his right knee performed on May 29, 2018?
- Whether Claimant proved by a preponderance of the evidence entitlement to temporary total disability benefits from May 29, 2018 to July 8, 2018?

STIPULATIONS

Respondent withdrew the issue of a late reporting penalty against Claimant.

FINDINGS OF FACT

1. Claimant works for Employer as a correctional trade supervisor Level I at a women's correctional facility in Denver. Claimant manages the kitchen and supervises female offenders in the kitchen. Claimant is a full time sergeant and has worked for Employer for 6 years.

2. Claimant testified that he was working his regular job in the kitchen on August 6, 2017. Claimant was attempting to remove shelves from an oven and place them on an adjacent table. The space was tight and as he was bending to place the trays on to the bottom shelf of the steel table, his right knee popped. Claimant felt immediate pain and burning in his right kneecap. Claimant testified, "right away, I was limping."

3. Prior to August 6, 2017, Claimant had no prior problems or medical treatment to his right knee.

4. Claimant immediately reported his knee injury to his supervisor, Lieutenant P_____. Claimant reported that he was pulling shelves out of the oven when his knee popped. Claimant testified that Lt. P_____ wrote an incident report but did not send him to a doctor. The report provided:

> On 8-6-2017 a Kitchen staff member, [Claimant], was working in the [facility] when he informed me, LL P_____ #19960, that his knee cap "popped" out of place while walking and performing regular job duties. The staff member informed me that this has happened in the past and that this was a pre-existing condition. The staff member continued to

work and complete his shift as he will seek medical attention. Shift commander notified and report submitted.

5. Lt. P_____ testified at hearing that on August 6, 2017, he noticed Claimant limping coming out from the kitchen. Lt. P_____ testified that he asked Claimant what happened and that Claimant reported that he injured himself in the facility's kitchen.

6. Claimant finished his shift on August 6, 2017, but his knee pain worsened. When he woke the next day, he experienced difficulty walk. Claimant saw his family physician at Family Medicine Clinic and called Lt. P_____ to inform them that he would not be in because he was seeking treatment for his knee injury.

7. Lt. P_____ testified that he was experienced with processing work injury reports. He testified that Claimant reported that his knee injury was preexisting, so P_____ chose not to initiate a workers' compensation claim.

8. On August 7, 2017, Claimant sought treatment at Family Medicine Clinic. The notes indicate that Claimant presented with knee pain, which followed a specific injury to his right knee that occurred when "I was picking something up at work yesterday and I pulled something in my right knee." The report notes that the onset of symptoms was immediate after the injury. The provider noted a positive McMurry test, recommended an MRI, and noted "highly suspicious for medial Meniscus/MCL injury."

9. On August 27, 2017, Claimant underwent an MRI of his right knee, which showed a "displaced bucket handle tear medial meniscus."

10. Claimant's family physician referred Claimant to orthopedic surgeon Dr. John Reister. Dr. Reister noted acute right knee pain and diagnosed a bucket handle tear of the right knee meniscus, consistent with the MRI findings. The doctor opined that "without question" Claimant needed surgery.

11. On December 27, 2017, the warden's assistant asked Lt. P_____ to recreate the August 2017 incident report. P_____ testified that he was not involved in Employer's investigation.

12. On December 27, 2017, Lt. P_____ filed the following injury report:

> On 8-6-2017 Sgt. L_____was working in [Employer's] kitchen on the PM shift. While performing his regular job duties as he was working near the ovens when he incurred his injury. I noticed Sgt. L_____was limping and he informed me that same instant that he had turned his body while working near the ovens and "popped" his knee out of place. I had asked him if he needed to go seek medical attention and he stated no that he would be fine and did not want to go to the doctor as this has happened to him in the past and was a re-occurring injury. I completed an incident

> report (#1040362) and contacted the Shift Commander [ ] who advised me that I did not need to complete any other paperwork since this was a pre-existing condition and all I needed to do was just complete the incident report since Sgt. L_____was not going to seek medical attention. The following day August 7, 2017, Sgt. L_____had called into work stating he was not going to make it in and he was going to see the doctor about his knee injury. This was the last time that I had dealt with this incident until now on December 27, 2017.

13. On May 29, 2018, Claimant underwent a partial medial meniscectomy performed by Dr. Reister. The doctor placed Claimant on restrictions of "limited ability to bear weight. Limited mobility" post-surgery.

14. Claimant returned to work full duty and full time on July 8, 2018.

15. While Claimant testified that he took "sick leave" during his recovery, Exhibits 13 and 14 establish that Claimant took unpaid time off under the FMLA.

16. Claimant's IME, Dr. Caroline M. Gellrick, opined that Claimant sustained an on-the-job injury to his right knee with no evidence of a prior chronic condition in medical records. The doctor opined that Claimant had been working full duty prior to his injury on August 6, 2017 and that the medical records do not support that Claimant had any pre-existing, symptomatic knee condition.

17. Claimant credibly testified that he delayed the surgery hoping that his symptoms would resolve, and in order to build up enough sick leave to cover his recovery. Claimant's testimony is consistent with what he reported to Dr. Gellrick, that he delayed in getting the surgery due to scheduling issues and so that he could build up enough sick leave to cover it.

18. The ALJ finds Dr. Gelrick's causation opinion to be credible and persuasive.

- It is consistent with the fact that Claimant was working full duty with Employer without reporting symptoms, seeking treatment, or needing restrictions for a six-year period.

- It is consistent with Claimant's credible testimony.

- It is not inconsistent with Dr. Henke's acknowledgment that a knee becomes functional when the bucket handle flips back into place, and that Claimant's symptoms would wax and wane.

19. Respondent retained Dr. Gwendolyn Henke, M.D., an expert in both orthopedics of the knee and occupational medicine, to review Claimant's medical records and opine on causation. Dr. Henke reviewed medical records, including the

MRI scan. However, she did not examine or speak with Claimant. Dr. Henke opined that the MRI imaging revealed no findings suggestive of acute trauma and noted that the MRI confirmed no range of motion deficit. Dr. Henke explained that a forceful twisting of a flexed knee under load causes a bucket handle meniscus tear, accompanied by immediate swelling and an inability to bear weight. She found that Claimant's decision not to seek immediate medical care to be inconsistent with an acute bucket handle meniscus tear.

20. Prior to hearing, the parties took Dr. Henke's evidentiary deposition. She opined that Claimant's knee condition was chronic for the following four reasons:

- Claimant's MRI revealed a popliteal cyst which occurs after an extended period of waxing and waning swelling, and that it must have been present before August 6, 2017.

- The mechanism of injury from August 6, 2017 as described by the Claimant is not consistent with the type of force required to cause an acute bucket handle meniscus tear.

- She would not expect such a simple mechanism to cause this type of injury unless there was a carried load involved of approximately fifty pounds or more.

- An acute bucket handle meniscus tear is a debilitating injury.

21. However, Dr. Henke acknowledged that a day or two after an acute bucket handle meniscus tear, the swelling can go down and the knee can be functional if the displaced "bucket handle" flips back into place.

22. Dr. Henke also acknowledged that after an acute bucket handle meniscus tear, there are intermittent episodes of popping, locking and pain that wax and wane as the "bucket handle" periodically flips back and forth.

23. The ALJ finds that Claimant met his burden of proving by a preponderance of the evidence that he suffered a compensable work-related injury to his right knee on August 6, 2017.

24. The ALJ finds that Claimant met his burden of proving by a preponderance of the evidence that he is entitled to a general award of medical benefits and specifically the surgery on his right knee performed on May 29, 2018.

25. The ALJ finds that Claimant met his burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits from May 29, 2018 to July 8, 2018.

CONCLUSIONS OF LAW

This ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved. The ALJ is not bound to address every piece of evidence or every inference that might lead to conflicting conclusions, and has rejected evidence contrary to his findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Furthermore, the relative weight and credibility to be assigned expert opinions is the ALJ's province as fact-finder. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d186 (Colo. App. 2002). To the extent expert opinions are subject to conflicting interpretations, the ALJ resolves the conflict by crediting part or none of the opinions. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

To receive compensation or medical benefits, a claimant must prove that he or she suffered an injury arising out of and in the course of his employment. Section 8-41-301(1), C.R.S.; *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000).

A claimant must prove entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S.

A claimant must prove a causal nexus between his claimed disability and the work-related incident. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a new disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990).

The ALJ concludes that Claimant proved that he injured his right knee on August 6, 2017 while in the course and scope of his employment. The ALJ credits Claimant's testimony regarding how the incident occurred, the immediate onset of symptoms, and the absence of problems or medical treatment to his knee prior to that date. Claimant's testimony is also consistent with the medical records.

Respondent's expert Dr. Henke did not evaluate Claimant. Her opinion that Claimant simply experienced a temporary exacerbation of his pre-existing condition is not persuasive. Prior to Claimant's injury on August 6, 2017, Claimant's knee was asymptomatic. Even if Claimant had a pre-existing bucket handle tear that was non-displaced, it was also asymptomatic and required no medical care. Claimant's actions on August 6, 2017, either caused the tear or caused the preexisting tear to become

displaced requiring medical treatment and surgery. In either event, the claim is compensable.

Dr. Henke's opinion is outweighed by the opinion of Dr. Gellrick who opined that Claimant's knee injury and need for surgery is directly related to his work related injury sustained on August 6, 2017. Dr. Gellrick opined that claimant was working full duty on August 6, 2017 when he injured his right knee. Dr. Gellrick noted, as does the ALJ, that no persuasive evidence supports a chronic preexisting right knee condition as speculated by Dr. Henke.

The respondent is liable for medical treatment which is reasonably necessary to cure and relieve the effects of the industrial injury. See § 8-42-101 (1)(a), C.R.S.; Snyder v. Industrial Claim Appeals Office, 942 P .2d 1337 (Colo. App. 1997); Country Squire Kennels v. Tarshis, 899 P.2d 362 (Colo. App. 1995). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. WalMart Stores, Inc. v. Industrial Claim Appeals Office, 989 P.2d 251 (Colo. App. 1999); Snyder v. Industrial Claim Appeals Office, 942 P.2d 1337 (Colo. App. 1997), cert. denied September 15, 1997. Where a Claimant's entitlement to benefits is disputed, the Claimant has the burden to prove a causal relationship between a work related injury and the condition for which benefits or compensation are sought. Snyder v. Industrial Claim Appeals Office, 942 P .2d 1337 (Colo. App. 1997). Whether the claimant sustained his burden of proof is generally a factual question for resolution by the ALJ. City of Durango v. Dunagan, 939 P .2d 496 (Colo. App. 1997).

Claimant has established that he sustained a work related injury to his right knee on August 6, 2017. Respondents filed an incident report but failed to send claimant to a physician or provide claimant a provider list. Claimant has established that all treatment to date, including the surgery recommended and performed by Dr. Reister is both reasonable and necessary to cure and relieve the effects of his injury. Any aftercare, if prescribed by Dr. Reister, including physical therapy or rehabilitation from this injury is also reasonable and necessary.

To prove entitlement to temporary total disability ("TTD") benefits, the Claimant must prove: that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. PDM Molding, Inc. v. Stanberg, 898 P.2d 542 (Colo. 1995); City of Colorado Springs v. Industrial Claim Appeals Office, 954 P.2d 637 (Colo. App. 1997). C.R.S. § 8- 42-103(1)(a), requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. PDM Molding, Inc. v. Stanberg, supra. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. Culver v. Ace Electric, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. Ortiz v. Charles J. Murphy & Co., 964 P.2d 595 (Colo. App. 1998).

TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; City of Colorado Springs v. Industrial Claim Appeals Office, supra.

In this case, the Claimant established that he suffered a compensable work injury on August 6, 2017. Claimant worked full time and did not suffer a wage loss until claimant underwent surgery on his right knee on 5/29/2018. Claimant established that he suffered a wage loss subsequent to that time up through July 8, 2018 when claimant returned to work full time. As such he is entitled to temporary total disability benefits from 5/29/2018 through July 8, 2018.

ORDER

It is therefore ordered that:

1. Claimant suffered a compensable injury on August 6, 2017 to his right knee.

2. Claimant is entitled to a general award of medical benefits and specifically the surgery on his right knee performed on May 29, 2018.

3. Claimant is entitled to TTD benefits from May 29, 2018 through July 8, 2018.

4. All matters not determined are reserved for future determination.

Dated this 11th day of June, 2019.

/s/ Kimberly Turnbow
Kimberly Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

- Did Claimant prove that an orthopedic evaluation of his right knee with Dr. Michael Simpson is causally related to his admitted April 14, 2018 industrial accident?

FINDINGS OF FACT

1. Claimant has worked for Employer as a paramedic for over 20 years. He suffered admitted injuries on April 14, 2019 when he slipped and fell on an icy concrete stairway at a fire station. He fell awkwardly and landed on his back. At hearing, Claimant described it as "a really bizarre position," with his right leg somewhat behind him.

2. Claimant immediately felt pain in multiple areas of his body, including his head, back, neck, right elbow, right hip, right knee, and right foot.

3. Claimant hobbled into the firehouse and called his supervisor, Robert G[Redacted]. Claimant told Mr. G[Redacted] he hurt his head, neck, back, right leg, right knee, and right elbow. Respondents offered no testimony or other evidence from Mr. G[Redacted] to dispute that Claimant mentioned his right knee during the call.

4. Mr. G[Redacted] asked if Claimant needed immediate medical attention, but Claimant stated he just wanted go home and lie down.

5. Claimant hoped the pain would subside, but it intensified over the next day. Claimant contacted Mr. G[Redacted] and was referred to Concentra. Mr. G[Redacted] told Claimant he needed to send an incident report to the workers' compensation supervisor, Bobby W[Redacted], and get approval before he could go to Concentra.

6. Claimant tried unsuccessfully to email Mr. W[Redacted] a few times over the next several days. After learning he was using an incorrect email address, he sent the following report to Mr. W[Redacted]:

> While on duty at Wescott Fire Department working my 24hr shift approximately 7:10am slipped and fell on steps due to icy conditions. I fell onto concrete steps landing on my right elbow, back and ankle awkwardly. I felt immediate pain to right ankle, knee, elbow, and lower back. I went into station and immediately took some ibuprofen and began icing my back and elbow and finished my shift. I went home and kept treating elbow, back, and ankle with ice due to swelling and severe pain to elbow. Later that day I began having increased pain, swelling, and numbness to right hand and was having problems grabbing or holding objects in hand.

7. Claimant saw Dr. Randall Jones at his first appointment at Concentra on April 19, 2018. The WC164 form describes the accident/injury as "Patient states, I slipped

on icy steps and fell on concrete. Injured right elbow, right knee, right ankle/foot, and low [back.]"

8. Dr. Jones' accompanying narrative report does not mention the right knee. The history documented by Dr. Jones was,

> He was going down icy/snowy steps and slipped falling backwards. He landed on his [b]ack with pain right elbow. He does not if he extended arms or not. He did not hit his head. He had immediate pain/swelling right elbow. He had some increase in his chronic back pain. No increase in his neck pain chronic. . . . He states 2-3 days of several episodes slight urinary incontinence. Also now has occ[asional] vague sciatica to knee with paresthesias to feet more left than right.

9. The musculoskeletal examination portion of the exam is documented as, "Normal gait. No tenderness or swelling of extremities." Dr. Jones diagnosed right elbow sprain and contusion, and lumbosacral strain and contusion.

10. At hearing, Claimant disputed the history documented in Dr. Jones' April 19 report. Claimant testified he mentioned of the right knee during the appointment as evidenced by the injury description on the WC164 form.

11. Claimant subsequently received treatment directed to his right elbow, low back, and lower extremity radiculopathy. None of the treatment records reference any right knee issues for several months after the accident.

12. Claimant submitted a Worker's Claim for Compensation form on June 26, 2018. He listed the injured body parts as "neck, mid-lower back, right hip, right elbow, head contusion." There was no mention of his right knee.

13. Claimant underwent a C4-C7 fusion with Dr. Paul Stanton on July 30, 2018.

14. The first mention of right knee issues after the initial WC164 form is found in the August 16, 2018 Concentra report, which states "also c/o R knee pain."

15. Claimant subsequently obtained a change of physician to Dr. Pia Schalin. At the initial appointment on September 17, 2018, Dr. Schalin documented,

> DOI 4/14/18 – INJURY TO RIGHT ELBOW, NECK & LOWER BACK with right elbow (50% tear of 1 ligament), pain both hips, right knee pain, right big toe . . . .

16. Claimant told Dr. Schalin his low back was the worst problem, and the neck was the second worst.

17. The next reference to Claimant's right knee is in a September 24, 2018 report from physical therapy for his neck. Claimant told the therapist "he was working as a paramedic on 3/14/18 [sic] and he fell on ice injuring his neck, back, R elbow and R

knee. . . . He thinks he may have torn something in the R knee. This has not been addressed yet. He was told he had to pick the top two injuries to address." The therapist further noted, "R KNEE: feels like something is torn and it gives way sometimes."

18. On October 1, 2018, Dr. Schalin documented, "He also c/o pain in RIGHT KNEE, which he states he has had all along since the injury, but which has never been evaluated."

19. Claimant again discussed the right knee with Dr. Schalin on October 15, 2018. She noted, "[It] continues hurting and he says there is something seriously wrong with it, because when he kneels or squats, he is unable to put any pressure on it trying to get up. This has not been evaluated so far." Dr. Schalin's exam focused primarily on Claimant's significant low back pain and lower extremity radiculopathy, including sensory and motor deficits. Claimant was having difficulty walking due to the severe radicular symptoms and reported several falls due to leg weakness.

20. On October 29, 2018, Claimant reported his right knee "is still horrible." Dr. Schalin noted the right knee "continues hurting and he says there is something seriously wrong with it . . . . There is no change in this so far." Examination of the knee showed tenderness to palpation and pain with flexion and extension. McMurray's test was difficult to perform "due to the severity of the lower back pain and the bilateral sciatica."

21. At his November 19, 2018 appointment with Dr. Schalin, Claimant stated the knee pain was making it "hard to get up from the floor." Dr. Schalin noted, "The [right knee] problem continues and is not getting better." She diagnosed, "RIGHT KNEE PAIN with FUNCTIONAL LIMITATIONS since the 4/14/18 fall." She referred Claimant for an MRI of the right knee.

22. Dr. Stanton performed a multilevel lumbar fusion on December 12, 2018.

23. On January 29, 2019, Dr. Schalin noted Claimant had fallen in a hotel bathtub. She indicated the right leg showed no sign of acute injury from the fall. At hearing, Claimant confirmed that none of his falls injured or aggravated the right knee.

24. Claimant had a right knee MRI on February 5, 2019. The indication for the MRI was described as "persistent pain since fall at work on April 14, 2018." The MRI showed a large medial meniscus tear.

25. After reviewing the MRI, Dr. Schalin referred Claimant to Dr. Michael Simpson, an orthopedic surgeon. Respondents denied the referral as unrelated to the industrial accident.

26. Dr. Robert W[Redacted] performed a Rule 16 record review for Respondents on April 24, 2019. Dr. W[Redacted] opined Claimant's right knee issues are not work-related and stated:

> When [Claimant] was injured, he reported a number of injuries primarily related to his low back and right elbow. The first mention of any knee pain

was on 8/16/2018 at which time he told Dr. Johnson that his right knee hurts. Prior to this visit there was no discussion from any of his providers regarding problems specifically related to his right knee. He did report radicular symptoms to Dr. Stanton, Dr. Jones and Dr. Johnson, which improved following an epidural steroid injection. However, there was no mention specifically related to his right knee. The first mention of a specific right knee injury was made to one of the physical therapist on 9/24/2018, 5 months after the work injury.

27. There is no persuasive evidence Claimant had any issues with his right knee before the work accident on April 14, 2018. Nor is there any persuasive evidence of any post-accident trauma or incident that could have caused a meniscal tear.

28. Claimant proved by a preponderance of the evidence he injured his right knee in the April 14, 2018 industrial accident.

CONCLUSIONS OF LAW

The respondents are liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. Even if the respondents admit liability an accident, they retain the right to dispute the reasonable necessity or relatedness of any particular treatment, and the mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). Where the respondents dispute the claimant's entitlement to medical benefits, the claimant must prove the treatment is reasonably necessary and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must prove entitlement to medical benefits by a preponderance of the evidence. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

As found, Claimant proved he injured his right knee in the April 14, 2018 accident. Claimant had no known problems with his knee before the work accident. The work accident provides a plausible mechanism for a torn meniscus, and there is no persuasive evidence of any other accidents or potentially injurious events. Claimant told Mr. G[Redacted] he injured his right knee during their telephone conversation the morning of the accident, and listed the right knee among the injured body parts in the email he sent to Mr. W[Redacted]. The ALJ credits Claimant's testimony he mentioned the right knee at the first appointment with Concentra because it was contemporaneously documented on the WC164 form. Dr. Jones' failure to address or document the knee at that appointment is puzzling, but the content of Dr. Jones' report was not within Claimant's control.

Admittedly, Claimant did not press the issue for several months after the accident. But the knee problems were probably overshadowed by his severe neck and back issues, which ultimately resulted in two multi-level spinal fusions less than six months apart. The knee symptoms were also probably masked or confounded somewhat by the radiculopathy and progressive neurological deficits affecting his legs. Claimant has

consistently attributed the right knee symptoms to the accident. Dr. W[Redacted]'s opinions are unpersuasive because he was unaware of the initial statement to Mr. G[Redacted], the email to Mr. W[Redacted], and the WC164 that accompanied the first visit to Concentra. If Dr. W[Redacted] were correct that the first mention of the right knee injury was not until August or September 2018, the ALJ's conclusion might have been different. But after reviewing all the available evidence, the scale tips in favor of finding the right knee a compensable consequence of the April 14, 2018 accident.

ORDER

It is therefore ordered that:

1. Insurer shall cover the orthopedic evaluation of Claimant's right knee with Dr. Simpson as recommended by Dr. Schalin.

2. All issues not decided herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 11, 2019

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that his admitted Average Weekly Wage (AWW) of $456.08 should be increased based on his concurrent employment with ACE Car Rental.

2. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Partial Disability (TPD) benefits for the period May 5, 2017 through December 20, 2017.

3. Whether Claimant has established by a preponderance of the evidence that his emergency treatment at the UC Health Emergency Room on July 22, 2017 constituted an emergency that was reasonable, necessary and causally related to his April 5, 2017 admitted industrial injuries.

FINDINGS OF FACT

1. Claimant worked for Employer as a Car Wash Driver at its Denver International Airport (DIA) location. His job duties involved driving and cleaning rental cars.

2. On April 5, 2017 Claimant suffered admitted industrial injuries to his neck and chest area while working for Employer. Claimant was involved in a motor vehicle accident while performing his job duties.

3. While working for Employer, Claimant was also employed by ACE Car Rental at DIA. His job duties involved driving and cleaning rental cars. Claimant remarked that he began working for ACE Car Rental in February 2017. He worked for 6.5 hours each day for 32.5 hours each week and earned $11.00 per hour for an Average Weekly Wage (AWW) of $357.50. Claimant explained that he would work from 8:00 a.m. until 2:30 p.m. for ACE Car Rental and then work for Employer until 11:00 p.m.

4. Claimant received treatment for his April 5, 2017 industrial injuries through Concentra Medical Centers. At his first visit to Concentra on May 4, 2017 Claimant was diagnosed with muscle spasms of the neck and thoracic back muscle. Physicians released Claimant to regular duty and referred him for physical therapy.

5. In a Physician's Report of Workers' Compensation Injury dated June 22, 2017 Daniel M. Peterson, M.D. noted that his objective findings were consistent with a work-related mechanism of injury from a May 4, 2017 visit. Dr. Peterson determined that Claimant had not reached Maximum Medical Improvement (MMI). He remarked that Claimant could return to regular duty on May 4, 2017, but he noted a follow-up appointment scheduled for May 5, 2017.

6. On May 5, 2017 Claimant returned to Concentra for an evaluation. He reported that he had tried to return to work but suffered worsening muscle pain in his chest, the left side of neck and his left shoulder area. Physicians diagnosed Claimant with a cervical strain, a chest wall muscle strain and a left trapezius muscle strain. Claimant received work restrictions that he "may not drive company vehicle due to functional limitations."

7. On July 22, 2017 Claimant visited the UC Health Emergency Room for neck pain. Based on Claimant's history, physical examination and diagnostic testing, physicians determined that Claimant's condition was caused by muscle pain following a motor vehicle accident.

8. On December 21, 2017 Claimant visited Authorized Treating Physician (ATP) Kristin D. Mason, M.D. for an examination. After reviewing Claimant's medical records and conducting a physical examination, Dr. Mason diagnosed Claimant with a "cervical sprain/strain with definite involvement of the trapezius muscle and levator scapula, [with] possible underlying facet arthropathy." She recommended chiropractic treatment and medications. Dr. Mason also released Claimant to return to work without restrictions.

9. After additional follow-up treatment, Claimant returned to Dr. Mason for an evaluation on April 26, 2018. Dr. Mason diagnosed Claimant with a cervical strain and "probable facet mediated pain." She determined that he had reached MMI and assigned a 9% whole person impairment rating for Claimant's cervical spine injuries.

10. On June 22, 2018 Respondents' filed a Final Admission of Liability (FAL) consistent with Dr. Mason's April 26, 2018 date of MMI and 9% whole person impairment rating. The FAL also acknowledged an AWW of $456.08 based on Claimant's employment with Employer.

11. Claimant testified at the hearing in this matter. He explained that his May 5, 2017 restriction preventing him from driving company vehicles rendered him unable to perform his job duties for both Employer and ACE Car Rental. However, Employer accommodated his restrictions by permitting him to scan vehicles and earn regular wages. In contrast, ACE Car Rental was unable to accommodate Claimant's work restrictions and terminated him in May 2017 because of his inability to perform his job duties. Claimant also noted that he visited the UC Health Emergency Room on July 22, 2017 because of increasing chest and neck pain related to his April 5, 2017 industrial injuries.

12. Claimant's wage records from ACE Car Rental for the period April 16, 2017 through April 30, 2017 reflect that he earned $11.00 per hour over 71.70 hours for a total gross pay of $788.70 or $344.35 per week. Moreover, subtracting Claimant's earnings of $788.70 from his year to date earnings of $4383.50 on his April 16-30, 2017 pay stub yields total earnings of $3594.80 as of April 15, 2017. Utilizing a start date of February 1, 2017 for Claimant's employment with ACE Car Rental, he worked for 74 days until April

15, 2017 and earned $3594.80. Dividing $3594.80 by 74 days times seven yields an AWW of $340.05 for the period February 1, 2017 through April 15, 2017.

13. Claimant has demonstrated that it is more probably true than not that his admitted AWW of $456.08 should be increased based on his concurrent employment with ACE Car Rental. Claimant worked for ACE Car Rental for 6.5 hours each day for 32.5 hours each week and earned $11.00 per hour for an AWW of $357.50. Moreover, Claimant's wage records from ACE Car Rental for the period April 16, 2017 through April 30, 2017 reflect that he earned $11.00 per hour over 71.70 hours for a total gross pay of $788.70 or $344.35 per week. Moreover, subtracting Claimant's earnings of $788.70 from his year to date earnings of $4383.50 on his April 16-30, 2017 pay stub yields total earnings of $3594.80 as of April 15, 2017. Utilizing a start date of February 1, 2017 for Claimant's employment with ACE Car Rental, he worked for 74 days until April 15, 2017 and earned $3594.80. Dividing $3594.80 by 74 days times seven yields an AWW of $340.05 for the period February 1, 2017 through April 15, 2017. Although there are some slight variations in Claimant's AWW from ACE Car Rental based on his testimony and the wage records, $350.00 constitutes a fair approximation of his wage loss and diminished earning capacity from his concurrent employment. Adding $350.00 to Claimant's admitted AWW of $456.08 while working for Employer yields a total AWW of $806.08. An AWW of $806.08 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

14. Claimant has proven that it is more probably true than not that he is entitled to receive Temporary Partial Disability (TPD) benefits for the period May 5, 2017 through December 20, 2017. Initially, on April 5, 2017 Claimant suffered admitted industrial injuries to his neck and chest area while working for Employer. At his first visit to Concentra on May 4, 2017 Claimant was diagnosed with muscle spasms of the neck and thoracic back muscle. Physicians released Claimant to regular duty and referred him for physical therapy. In a Physician's Report of Workers' Compensation Injury dated June 22, 2017 Dr. Peterson noted that his objective findings were consistent with a work-related mechanism of injury from a May 4, 2017 visit and Claimant had not reached MMI. He remarked that Claimant could return to regular duty on May 4, 2017, but he noted a follow-up appointment scheduled for May 5, 2017. Although the report is dated June 22, 2017, it pertains to Claimant's May 4, 2017 Concentra visit. The report thus does not demonstrate that Claimant was released to full duty without restrictions on June 22, 2017.

15. On May 5, 2017 Claimant returned to Concentra for an evaluation. He reported that he had tried to return to work but suffered worsening muscle pain in his chest, the left side of neck and his left shoulder area. Physicians diagnosed Claimant with a cervical strain, a chest wall muscle strain and a left trapezius muscle strain. Claimant received work restrictions that he "may not drive company vehicle due to functional limitations." Claimant explained that his May 5, 2017 restriction preventing him from driving company vehicles rendered him unable to perform his job duties for both Employer and ACE Car Rental. However, Employer accommodated his restrictions by permitting him to scan vehicles and earn regular wages. In contrast, ACE Car Rental was unable to accommodate Claimant's work restrictions and terminated him in May 2017

because of his inability to perform his job duties. Claimant's work restrictions continued until Dr. Mason released him to full duty employment on December 20, 2017.

16. Based on an AWW of $806.08 Claimant sustained wage loss commencing May 5, 2017. For the 27 day period from May 5, 2017 through May 31, 2017 Claimant should have earned $3,109.17 in wages ($806.08 / 7 x 27 days = $3,109.17) based on the AWW for both jobs. He earned $1,759.16 from Employer ($456.08 / 7 x 27 days). However, from ACE Car Rental Claimant earned $405.75 for the period May 5, 2017 through May 31, 2017. The combined wages earned from both Employer and ACE Car Rental is thus $2,164.91. Subtracting $2,164.91 from $3,109.17 demonstrates that Claimant suffered a wage loss of $944.26 for the period May 5, 2017 through May 31, 2017.

17. For the 202 day period from June 1, 2017 to December 20, 2017 Claimant should have earned $23,261.17 at an AWW of $806.08 ($806.08 / 7 x 202 days = $23,261.17). However, Claimant actually earned $13,161.16 ($456.08 / 7 x 202 days = $13,161.16). Subtracting $13,161.16 from $23,261.17 yields a total wage loss of $10,100.01 for the 202 day period from June 1, 2017 to December 20, 2017. Adding the wage loss of $944.26 for the period May 5, 2017 through May 31, 2017 yields a total wage loss of $11,044.27 for the period May 5, 2017 through December 20, 2017.

18. Claimant has established that it is more probably true than not that his treatment at the UC Health Emergency Room on July 22, 2017 constituted an emergency that was reasonable, necessary and causally related to his April 5, 2017 admitted industrial injuries. Initially, on July 22, 2017 Claimant visited the UC Health Emergency Room for neck pain. Based on Claimant's history, physical examination and diagnostic testing, physicians determined that Claimant's condition was caused by muscle pain following a motor vehicle accident. Furthermore, Claimant credibly explained that he visited the UC Health Emergency Room because of increasing chest and neck pain related to his April 5, 2017 industrial injuries. A review of the specific facts and circumstances of Claimant's visit to the UC Health Emergency Room reveals that he made a reasonable decision to obtain emergency treatment related to his April 5, 2017 industrial injuries without the delay of notifying Employer to obtain a referral or approval. Accordingly, Respondents are financially responsible for Claimant's visit to the UC Health Emergency Room on July 22, 2017.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the

rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Average Weekly Wage

4. Section 8-42-102(2), C.R.S. requires the Judge to determine a claimant's AWW based on his earnings at the time of injury. The Judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001). However, §8-42-102(3), C.R.S. authorizes a Judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed methods will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App. 1993). The overall objective in calculating an AWW is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO, May 7, 1997). Therefore, §8-42-102(3), C.R.S. grants an ALJ substantial discretion to modify the AWW if the statutorily prescribed method will not fairly compute a claimant's wages based on the particular circumstances of the case. *In Re Broomfield,* W.C. No. 4-651-471 (ICAO, Mar. 5, 2007).

5. When a worker is concurrently employed the ALJ may, in order to achieve fairness, include all wages in the computation of the AWW. *Broadmoor Hotel and Continental Ins. Co. v. Industrial Claim Appeals Office*, 939 P.2d 460 (Colo. App. 1996); *Guerrero Barrio v. GCA Services Group, Inc.*, W.C. No. 4-813-965 (ICAO, July 28, 2010); *see Miranda v. ISS Prudential Services, Inc. and/or Denver Public Schools,* W.C. Nos. 3-833-976, 3-908-234 and 4-105-113 (ICAO, Feb. 28, 1994) (where the claimant holds concurrent employment at the time of the injury, the ALJ has discretion to calculate the AWW to include the total income from the multiple employers). However, there is no mandate that wages from concurrent employment must be included in the AWW. *Coleman v. National Produce Service,* W.C. No. 4-601-676 (ICAO, July 12, 2005).

6. As found, Claimant has demonstrated that it is more probably true than not that his admitted AWW of $456.08 should be increased based on his concurrent employment with ACE Car Rental. Claimant worked for ACE Car Rental for 6.5 hours

each day for 32.5 hours each week and earned $11.00 per hour for an AWW of $357.50. Moreover, Claimant's wage records from ACE Car Rental for the period April 16, 2017 through April 30, 2017 reflect that he earned $11.00 per hour over 71.70 hours for a total gross pay of $788.70 or $344.35 per week. Moreover, subtracting Claimant's earnings of $788.70 from his year to date earnings of $4383.50 on his April 16-30, 2017 pay stub yields total earnings of $3594.80 as of April 15, 2017. Utilizing a start date of February 1, 2017 for Claimant's employment with ACE Car Rental, he worked for 74 days until April 15, 2017 and earned $3594.80. Dividing $3594.80 by 74 days times seven yields an AWW of $340.05 for the period February 1, 2017 through April 15, 2017. Although there are some slight variations in Claimant's AWW from ACE Car Rental based on his testimony and the wage records, $350.00 constitutes a fair approximation of his wage loss and diminished earning capacity from his concurrent employment. Adding $350.00 to Claimant's admitted AWW of $456.08 while working for Employer yields a total AWW of $806.08. An AWW of $806.08 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

Temporary Partial Disability Benefits

7. Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). The term "disability," connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by the claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). A claimant suffers from an impairment of earning capacity when he has a complete inability to work or there are restrictions that impair his ability to effectively and properly perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997).

8. As found, Claimant has proven by a preponderance of the evidence that he is entitled to receive TPD benefits for the period May 5, 2017 through December 20, 2017. Initially, on April 5, 2017 Claimant suffered admitted industrial injuries to his neck and chest area while working for Employer. At his first visit to Concentra on May 4, 2017 Claimant was diagnosed with muscle spasms of the neck and thoracic back muscle. Physicians released Claimant to regular duty and referred him for physical therapy. In a Physician's Report of Workers' Compensation Injury dated June 22, 2017 Dr. Peterson noted that his objective findings were consistent with a work-related mechanism of injury from a May 4, 2017 visit and Claimant had not reached MMI. He remarked that Claimant could return to regular duty on May 4, 2017, but he noted a follow-up appointment scheduled for May 5, 2017. Although the report is dated June 22, 2017, it pertains to Claimant's May 4, 2017 Concentra visit. The report thus does not demonstrate that Claimant was released to full duty without restrictions on June 22, 2017.

9. As found, on May 5, 2017 Claimant returned to Concentra for an evaluation. He reported that he had tried to return to work but suffered worsening muscle pain in his chest, the left side of neck and his left shoulder area. Physicians diagnosed Claimant with a cervical strain, a chest wall muscle strain and a left trapezius muscle strain. Claimant received work restrictions that he "may not drive company vehicle due to functional limitations." Claimant explained that his May 5, 2017 restriction preventing him from driving company vehicles rendered him unable to perform his job duties for both Employer and ACE Car Rental. However, Employer accommodated his restrictions by permitting him to scan vehicles and earn regular wages. In contrast, ACE Car Rental was unable to accommodate Claimant's work restrictions and terminated him in May 2017 because of his inability to perform his job duties. Claimant's work restrictions continued until Dr. Mason released him to full duty employment on December 20, 2017.

10. As found, based on an AWW of $806.08 Claimant sustained wage loss commencing May 5, 2017. For the 27 day period from May 5, 2017 through May 31, 2017 Claimant should have earned $3,109.17 in wages ($806.08 / 7 x 27 days = $3,109.17) based on the AWW for both jobs. He earned $1,759.16 from Employer ($456.08 / 7 x 27 days). However, from ACE Car Rental Claimant earned $405.75 for the period May 5, 2017 through May 31, 2017. The combined wages earned from both Employer and ACE Car Rental is thus $2,164.91. Subtracting $2,164.91 from $3,109.17 demonstrates that Claimant suffered a wage loss of $944.26 for the period May 5, 2017 through May 31, 2017.

11. As found, for the 202 day period from June 1, 2017 to December 20, 2017 Claimant should have earned $23,261.17 at an AWW of $806.08 ($806.08 / 7 x 202 days = $23,261.17). However, Claimant actually earned $13,161.16 ($456.08 / 7 x 202 days = $13,161.16). Subtracting $13,161.16 from $23,261.17 yields a total wage loss of $10,100.01 for the 202 day period from June 1, 2017 to December 20, 2017. Adding the wage loss of $944.26 for the period May 5, 2017 through May 31, 2017 yields a total wage loss of $11,044.27 for the period May 5, 2017 through December 20, 2017.

Emergency Medical Care

12. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The claimant bears the burden of demonstrating a causal connection between his industrial injuries and the need for additional medical treatment. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

13. Section 8-43-404(5)(a), C.R.S. grants employers the initial authority to select the ATP. However, in a medical emergency a claimant need not seek authorization from his employer or insurer before seeking medical treatment from an unauthorized medical provider. *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777, 781 (Colo. App. 1990). A medical emergency affords an injured worker the right to obtain immediate treatment without the delay of notifying the employer to obtain a referral or approval. *In Re Gant*, W.C. No. 4-586-030 (ICAO, Sept. 17, 2004). Because there is no precise legal test for determining the existence of a medical emergency, the issue is dependent on the particular facts and circumstances of the claim. *In re Timko,* W.C. No. 3-969-031 (ICAO, June 29, 2005).

14. As found, Claimant has established by a preponderance of the evidence that his treatment at the UC Health Emergency Room on July 22, 2017 constituted an emergency that was reasonable, necessary and causally related to his April 5, 2017 admitted industrial injuries. Initially, on July 22, 2017 Claimant visited the UC Health Emergency Room for neck pain. Based on Claimant's history, physical examination and diagnostic testing, physicians determined that Claimant's condition was caused by muscle pain following a motor vehicle accident. Furthermore, Claimant credibly explained that he visited the UC Health Emergency Room because of increasing chest and neck pain related to his April 5, 2017 industrial injuries. A review of the specific facts and circumstances of Claimant's visit to the UC Health Emergency Room reveals that he made a reasonable decision to obtain emergency treatment related to his April 5, 2017 industrial injuries without the delay of notifying Employer to obtain a referral or approval. Accordingly, Respondents are financially responsible for Claimant's visit to the UC Health Emergency Room on July 22, 2017.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant earned an AWW of $806.08.

2. Claimant shall receive TPD benefits based on a total wage loss of $11,044.27 for the period May 5, 2017 through December 20, 2017.

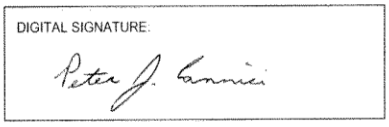
3. Respondents are financially responsible for Claimant's visit to the UC Health Emergency Room on July 22, 2017.

4. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it

within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: June 11, 2019.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-017-566-001 & 5-042-920-001

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

SELF-INSURED,

Self-Insured Respondent.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on May 29, 2019, in Denver, Colorado. The hearing was digitally recorded (reference: 5/29/19, Courtroom 1, beginning at 1:30 PM, and ending at 3:00 PM).

Claimant's Exhibits 1 through 6 were admitted into evidence, without objection. Respondent's Exhibits A through D, G and H, and K through R were admitted into evidence, without objection. Respondent's Exhibits E, F, I and J were admitted into evidence over Claimant's objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of portions of a proposed decision to both counsel. Claimant's counsel was to prepare a proposed decision on the issue of permanent partial disability (PPD); and, Respondent's counsel was to prepare a proposed decision on the issues of reopening and temporary total disability (TTD) benefits. Claimant filed her proposed decision, electronically, on June 4, 2019. Respondent filed its proposed decision on the same date. There were no timely objections to either proposal. After a consideration of the proposed decisions, the ALJ has modified them and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern Respondent's Petition to Reopen on the ground of error or mistake and Claimant's Petition to Reopen on the ground of change of condition. Specifically, Respondent alleges error in the previous Full Findings, dated June 27, 2018 insofar as the award of temporary total disability (TTD) benefits was inconsistent with the Stipulation of the parties and the Findings as to TTD went beyond the undisputed date of maximum medical improvement (MMI); and, ambiguity in the Final Admission of Liability (FAL), which admitted to 12% whole person permanent partial disability (PPD), based on the subsequent deposition opinion of Scott J. Primack, D.O., who in his report of February 21, 2018, indicated that his first rating of 20% included loss of range of motion (ROM). After seeing surveillance film of the Clamant, Dr. Primack modified his PPD rating by subtracting the ROM component, thus, modifying his PPD opinion to 12% whole person upon which Respondent filed the FAL Claimant contends that the Respondent is required to admit to the impairment rating of 20% first determined by Dr. Primack, in the medical report of February 21, 2018 upon which Respondent is obliged to admit.

The Respondent bears the burden of proof, by a preponderance of the evidence on the issue of reopening based on error or mistake. The Claimant bears the burden on the issue of increased PPD.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. On June 1, 2016, the Claimant suffered an admitted, work related injury to her low back when she bent over a produce ben to lift out a watermelon. She felt immediate pain in her low back. She was treated conservatively for less than two months. She was placed at MMI on September 15, 2016, with no permanent impairment and no permanent work restrictions.

2. Respondent filed a FAL on February 17, 2017, admitting for zero PPD.

3. The Claimant suffered a worsening of her condition at the beginning of February 2017. She was doing her regular job duties that included lifting heavy boxes. She suffered an increase in low back pain and an increase in right radicular pain. Her pain was so severe that she sought medical treatment on February 8, 2017 from her primary care physician, Dr. Baker.

4. On March 28, 2017, the Claimant was examined by a workers'

compensation physician, Robert Broghammer, M.D.

5. Dr. Broghammer referred the Claimant to Scott Primack, D.O., who examined the Claimant on April 26, 2017 and found she was a reasonable candidate for surgical intervention.

6. May 13, 2017, the Claimant's pain became so extreme that she reported to the emergency room (ER). She underwent a surgical repair on May 13, 2017, performed by Michael Rauzzino, M.D. Despite the surgical intervention, the Claimant continued to have back pain and it was determined she had a recurrent disc herniation. The Claimant had a second surgery on June 7, 2017, again performed by Dr. Rauzzino.

7. The Clamant requested a hearing on a Petition to Reopen W.C. No. 5-017-566-01 or in the alternative a determination that the Claimant suffered a new work related injury on February 6, 2017. The matter proceeded to hearing on April 24, 2018 and June 4, 2018 before the undersigned ALJ. The ALJ ordered W.C. No. 5-017-566-001 re-opened by decision of Jne 27, 2018.

8. Respondent appealed the Findings of Fact, Conclusions of Law and Order entered June 27, 2018. The ALJ's Order was affirmed by The Industrial Claim Appeals Office (ICAO) on December 20, 2018.

Respondent's Petition to Reopen

9. At the commencement of the hearing on April 24, 2018, the parties entered three stipulations on the record: (1) Claimant's average weekly wage (AWW) was $616.70 from June 1, 2016 through May 31, 2017; (2) Claimant's AWW is $871.24 beginning June 1, 2017; and (3) If it is determined that the claim should be reopened, then Claimant is owed temporary disability benefits from March 28, 2017, and continuing.

10. At the conclusion of the hearing on June 4, 2018, this Administrative Law Judge entered an oral ruling from the bench, finding that:

> "[t]he claimant has proven by a preponderance of the evidence that her condition has worsened in the original 5-017-566. And she's failed to prove by a preponderance of the evidence that she sustained a new injury on February 6, 2017. . . And based on the stipulations to reopen the claimant's -- average weekly wage, well, I'll pinpoint that the worsening is at February 6, 2017, that's a transition point. So the claimant's average weekly wage was 616.70 from February 6, 2017 until May 31st, 2017, and then it went up to 871.24. The claimant I have, and correct me if I'm wrong here because it's been a while, claimant was temporarily and totally disabled from March 28, 2017 and continuing. And

there's a variable temporary total rate because of increased average weekly wage."

[Exhibit B, pp. 20-21].

11. The ALJ requested that Claimant's counsel prepare proposed Full Findings of Fact, Conclusions of Law and Order, which Claimant's counsel submitted on June 11, 2018 [Exhibit B, p. 73]. Claimant's Proposed Findings of Fact, Conclusions of Law and Order included a section entitled "Stipulations," in which Claimant's counsel re-iterated three stipulations entered in the record at the hearing on April 24, 2018

12. The ALJ issued Full Findings of Fact, Conclusions of Law and Order on June 28, 2018, which reiterated the parties' three stipulations as the first three Findings of Fact:

> ¶ 1 The Claimant's AWW was $616.70 from June 1, 2016 through May 31, 2017;
>
> ¶ 2 The Claimant's AWW is $871.24 beginning June 1, 2017; and
>
> ¶ 3 If it is determined that the claim should be reopened, the Claimant is owed TTD benefits from March 28, 2017 and continuing.

[Exhibit D, p. 38].

13. In ¶ 21 of the "Findings of Fact", the Administrative Law Judge found that "[t]he Claimant has proven, by a preponderance of the evidence that she experienced a worsening (change) of her condition, related to the admitted injury of June 1, 2016, after the finality of the FAL therein. Therefore, she has proven that a reopening of W.C. No. 5-017-566-01 is warranted." [Exhibit D, p. 41]. Although the Administrative Law Judge did not provide a specific date for reopening, he stated it was "after the finality of the FAL", which became final on March 20, 2018. Finding of Fact ¶ 23 then stated that "based on the stipulations of the parties … Claimant was and is temporarily and totally disabled from March 28, 2017 and continuing..." [Exhibit D, p. 41].

14. Paragraph f of the "Conclusions of Law" section of the Full Findings of Fact, Conclusions of Law and Order starts by stating that "the Claimant was and is temporarily and totally disabled from March 28, 2017 and continuing." [Exhibit F, p. 44]. However, the paragraph then goes on to state "[t]he period from June 1, 2016, through May 31, 2017, both dates inclusive, equals 365 days. The period from June 1, 2017, through the hearing date, June 4, 2018, both dates inclusive, equals 368 days. Based on the AWW through May 31, 2017, retroactive, past due TTD benefits in the aggregate amount of $21,436.45. Based on the AWW from June 1, 2017, through the hearing date, June 4, 2018, retroactive, past due TTD benefits in the aggregate amount of

$30,536.64, are due." [*Id*.]. Thus, the Administrative Law Judge entered contradictory conclusions, as he first stated that Temporary Total Disability benefits begin on March 28, 2017, but then calculated Temporary Total Disability benefits beginning June 1, 2016.

15. Paragraph D of the "Order" section of the Full Findings of Fact, Conclusions of Law and Order states "For the period from June 1, 2016, through May 31, 2017, both dates inclusive, equals 365 days, Respondent shall pay the Claimant retroactive, past due temporary total disability benefits in the aggregate subtotal amount of $21,436.45. For the period from June 1, 2017, through the hearing date, June 4, 2018, both dates inclusive, equals 368 days, Respondent shall pay the Claimant retroactive, past due temporary total disability benefits in the aggregate subtotal amount of $30,536.64. Respondent shall pay the Claimant a grand total of retroactive, past due temporary total disability benefits of $51,973.09, which is payable retroactively and forthwith." [Exhibit D, p. 45].

16. Paragraph F of the "Conclusions of Law" and paragraph D of the "Order" sections of the Full Findings of Fact, Conclusions of Law and Order was an error and mistake, as the parties clearly stipulated that temporary total disability benefits would begin on March 28, 2017, if the claim was reopened pursuant to Claimant's request.

Temporary Total Disability Benefits

17. The Full Findings of Fact, Conclusions of Law and Order dated June 28, 2018, which awarded TTD benefits retroactive to June 1, 2017, is reopened. Consistent with the parties' stipulations, which the ALJ found as fact in the Full Findings of Fact, Conclusions of Law and Order dated June 28, 2018, the Claimant is entitled to TTD benefits beginning on March 28, 2017, through May 31, 2017, both dates inclusive, a total of 65 days. For that period of time, Claimant's Average Weekly Wage (AWW) was $616.70, resulting in a TTD benefit rate of $411.13 per week. Thus, the Claimant is entitled to $3,817.67 in TTD benefits from March 28, 2017, through May 31, 2017, both dates inclusive.

18. The parties stipulated that the Claimant's AWW increased to $871.21 effective June 1, 2017, resulting in a TTD benefits rate of 580.81 per week. Claimant's authorized treating physician (ATP), Scott J. Primack, D.O., placed the Claimant at maximum medical improvement (MMI) on February 21, 2018. The period from June 1, 2017, through February 21, 2018, both dates inclusive, is 266 days. Thus, Claimant is entitled to TTTD benefits in the amount of $22,070.65 for the period from June 1, 2017, through February 21, 2018, both dates inclusive.

19. Therefore, from the date the claim was reopened on Claimant's petition to reopen, she is entitled to TTD benefits in the grand total amount of $25,888.32.

Permanent Partial Disability

20. Respondent filed a FAL, dated January 11, 2019. The FAL admitted to a 12% whole person impairment rating. Under the Remarks and basis for permanent

disability award it states, “Pursuant to Dr. Primack’s deposition taken 4/16/2018, and his report dated February 21, 2018, Claimant sustained a 12% whole person impairment rating for specific disorder.” The ALJ finds that the FAL was based on Dr. Primack’s changed opinion of 12% whole person, expressed in his evidentiary deposition, which excluded a rating for ROM, when his report rated PPD at 20% whole person and included a rating for ROM. Claimant contends that the first 20% PPD rating is the appropriate rating because it was based on Dr. Primack’s examination of the Claimant. Dr. Primack changed his rating by subtracting the ROM component after watching surveillance videos. The question is: which rating is more reliable and credible.

Ultimate Findings

21. The official and first opinion of Dr. Primack on PPD, expressed in his report, of 20% whole person is more credible and persuasive than his spontaneous declaration at the evidentiary deposition, deducting the range-of-motion portion (ROM) and reducing his PPD rating to 12% because it is more thoroughly and objectively explained. His subsequent reduction to 12% is based upon Dr. Primack’s subjective viewing of surveillance film and is entitled to little, if any, weight.

22. Between internally conflicting opinions of Dr. Primack, the ALJ makes a rational choice, based on substantial evidence, to accept Dr. Primack’s official report opinion of 20% whole person rating, and to reject his second rating of 12% whole person.

23. The ALJ finds that the Claimant has proven, by a preponderance of the evidence that Dr. Primack’s first rating of 20% whole person is more reliable and credible because it was based on an objective examination of the Claimant for purposes of a permanent medical impairment rating. The second rating of 12%, expressed in Dr. Primack’s evidentiary deposition was subjectively based on his eyeball viewing surveillance film, which had no persuasive indicia of objective criteria upon which the changed opinion was based.

24. The ALJ’s award of TTD benefits retroactive to June 1, 2017, was an error or mistake because the parties had stipulated that if the claim was reopened pursuant to Claimant’s request TTD benefits would begin on March 28, 2017. Therefore, Respondent sustained its burden of proving an error or mistake, in the Findings of Fact, Conclusions of Law and Order dated June 28, 2018, and the case should be reopened to correct that error and mistake.

25. The Respondent’s Petition to Reopen on the ground of error or mistake should be granted, but not for the outcome desired by the Respondent. The error was the admission of 12% whole person when, in fact, it should have been 20%.

26. Respondent alleges an error that could not have been addressed by following Division Independent Medical Examination (DIME) procedures in a timely fashion. Consequently, the only avenue open was a Petition to Reopen, based on error or mistake. The ALJ finds that reopening is appropriate and the outcome sought by the

Claimant is appropriate.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, Dr. Primack's first rating of 20% whole person was more reliable and credible because it was based on an objective examination of the Claimant for purposes of a permanent medical impairment rating. The second rating of 12%, expressed in Dr. Primack's evidentiary deposition was subjectively based on his eyeball viewing surveillance film, which had no persuasive indicia of objective criteria upon which the changed opinion was based. As found, The official and first opinion of Dr. Primack on PPD, expressed in his report, of 20% whole person is more credible and persuasive than his spontaneous declaration at the evidentiary deposition, deducting the range-of-motion portion (ROM) and reducing his PPD rating to 12% because it is more thoroughly and objectively explained. His subsequent reduction to 12% is based upon Dr. Primack's subjective viewing of surveillance film and is entitled to little, if any, weight.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between internally conflicting opinions of Dr. Primack, the ALJ made a rational choice, based on substantial evidence, to accept Dr. Primack's first opinion of 20% whole person PPD, and to reject his second opinion of 12% whole person PPD.

Petition to Reopen

c. Under § 8-43-303(1), C.R.S., after MMI and within six years of the date of injury, an ALJ may re-open a claim based on fraud, an overpayment, **an error, a mistake,** or a change in condition. See *El Paso County Department of Social Services v. Donn,* 865 P.2d 877 (Colo. App. 1993); *Burke v. Indus. Claim Appeals Office,* 905 P. 2d 1 (Colo. App. 1994); *Hanna v. Print Express, Inc.,* 77 P. 3d 863 (Colo. App. 2003); *Donohoe v. ENT Federal Credit Union,* W.C. No. 4-171-210 [Indus. Claim Appeals Office (ICAO) September 15, 1995]. This is so because MMI is the point in time when no further medical care is reasonably expected to improve the condition. § 8-40-101(11.5), C.R.S. (2009); *City of Colorado Springs v. Indus. Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). As found, Respondent alleged an error that could not have been addressed by following Division Independent Medical Examination (DIME) procedures in a timely fashion. Consequently, the only avenue open was a Petition to Reopen, based on error or mistake. As found, reopening is appropriate and the PPD outcome sought by the Claimant is appropriate.

Burden of Proof

d The burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). A

"preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (CIAO), March 20, 2002]. *Also see Ortiz v. Principe,* 274 Ph.D. 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 Pd.D. 1116 (Colo. 1984). As found, Respondent has satisfied its burden with respect to reopening; and TTD. Claimant has satisfied her burden with respect to degree of PPD, *i.e.,* 20% whole person.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. W.C. No. 5-017-566-001 is hereby reopened, based on error or mistake.

B. The Claimant sustained permanent medical impairment of 20% whole person, and Respondent shall accordingly pay the Claimant additional permanent medical impairment benefits, based on 20% whole person.

C. Respondent shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

DATED this 13th day of June 2019.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she sustained a compensable work related injury on May 30, 2016.

2. Whether Claimant has established by a preponderance of the evidence that the November 18, 2016 MRI was reasonable, necessary, and causally related to her May 30, 2016 work injury.

FINDINGS OF FACT

1. Claimant was employed by Employer as a housekeeper and was so employed for approximately 7 years.

2. On May 30, 2016, while so employed, Claimant was in the housekeeping closet when a towel and toilet paper roll fell off her cleaning cart. Claimant bent over to pick up the items. When Claimant stood up, a fellow employee ran into Claimant with her cleaning cart.

3. The fellow employee, Ms. O_____, acknowledged running her cleaning cart into Claimant. Ms. O_____ indicated that she was pushing her cart out of the closet, going slow and just getting moving, when she bumped her cart into Claimant. Ms. O_____ apologized and noted that it sounded like Claimant was hurt but that Claimant stretched and continued pushing her cart away. *See* Exhibits 8, K.

4. Claimant testified that the cleaning carts are about 4-5 feet tall and weigh approximately 350 pounds when fully loaded. Claimant testified that when she was hit, her chest was pushed into her cart, and Ms. O_____'s cart hit her in the back. Claimant is approximately 5'7" tall.

5. Claimant testified that she tried to continue working that day and tried to work through the pain, but couldn't finish work and went to the emergency room.

6. On May 30, 2016 at the Yampa Valley Medical Center Claimant reported that she had increased low back pain and that she hurt from her head to her low back after being hit from behind by a large housekeeping cart that morning at 9:00 a.m. Claimant reported pain at a 10/10. Claimant reported a history of chronic low back pain. Claimant underwent x-rays of the cervical spine, thoracic spine, and lumbar spine. The cervical spine x-rays showed mild cervical degenerative disc disease most severe at C5-6 and no sign of traumatic injury. Claimant was given pain medications and flexeril. Codes indicate possible diagnoses of strain of muscle, fascia, and tendon at the neck, back wall of thorax, and lower back. *See* Exhibits 10, 11, P, T.

7. On May 31, 2016, Frederick Scherr, M.D. evaluated Claimant. Claimant reported low back pain and cervical pain. Claimant reported that she was hit in her lower back with a housekeeping cart and that she did not feel immediate pain but had increasing low back pain and neck pain as the day went on. Dr. Scherr noted a complicated history with Claimant having chronic issues with low back pain and having treated with pain management and physical therapy since 2011. Claimant reported that her pain was similar somewhat to her pain in the past. Claimant reported low back pain across the lower lumbar spine and some cervical pain and pain across the trapezius bilaterally. On physical examination, Dr. Scherr found no tenderness over the cervical spine spinous processes but some bilateral paraspinal muscle tenderness and trapezius muscle tenderness bilaterally with some guarding. He found some difficulty in extension on cervical spine range of motion. Dr. Scherr found some rhomboid tenderness and maybe mid thoracic spine paraspinal muscle tenderness. In the lumbar spine, Claimant had some bilateral paraspinal muscle tenderness with the left greater than the right and some left iliac crest tenderness that gave Claimant some radiating pain to the left lateral thigh. Dr. Scherr found difficulty in range of motion of the lumbar spine during rotation and flexion. Dr. Scherr assessed low back pain with left radiculopathy and cervical sprain. He noted that Claimant already had a physical therapy appointment the next day for her prior back injury and he told her to keep that appointment. He also gave her a renewed physical therapy for the new problems. He provided her with valium. Dr. Scherr provided reduced work restrictions and limited her lifting, carrying, and repetitive lifting to 5 pounds and provided a restriction of standing and sitting as needed. *See* Exhibits 11, P.

8. On June 1, 2016, Claimant returned to the medical center as a walk in and asked to be taken off work. Linda Boylan-Starks, NP, evaluated Claimant. NP Boylan-Starks noted that she spoke to the physical therapist who stated that Claimant's symptoms were similar to the symptoms Claimant had prior to the event with the housekeeping cart but that the symptoms just may be a little bit more severe. NP Boylan-Starks noted that the pain through the neck and shoulder region was new. Claimant reported pain primarily in the low back radiating to her buttocks as well as tightness in her neck and shoulder region. Claimant reported her pain was at an 8/10. NP Boylan-Starks opined that Claimant's behaviors did not necessarily support that pain rating. Claimant was noted to move easily fully from a sitting to standing position and noted that during distraction Claimant was able to move her neck more freely than on examination. NP Boylan-Starks provided the impression of thoracolumbar strain. She opined that the work restrictions given the day prior were appropriate for the nature of the injury and opined that the mechanism of injury was relatively minor. NP Boylan-Starks noted that Claimant became more stiff and didn't feel pain initially which was consistent with musculoskeletal tightness. *See* Exhibits 11, P.

9. On June 6, 2016, Dr. Scherr evaluated Claimant. Dr. Scherr noted that Claimant's x-rays at the emergency department showed essentially no acute findings but some degenerative changes and no signs of traumatic injuries. Dr. Scherr provided a diagnostic impression of mild cervical strain and thoracolumbar strain in the face of degenerative disk disease. Dr. Scherr estimated maximum medical improvement at four

to six weeks and recommended continued physical therapy and deep tissue massage. *See* Exhibits 11, P.

10. On June 21, 2016, Dr. Scherr evaluated Claimant. Claimant reported mild low back pain and more significant trapezius musculature pain and right sided SCM pain. Claimant reported that the pain in her neck radiated into her jaw and became more severe over the past week. Dr. Scherr noted that Claimant had been in physical therapy but was failing to progress and had been in some sort of physical therapy since approximately 2011 with her chronic back pain. Dr. Scherr noted that they would reassess Claimant in two weeks and perhaps move her to full duty work if they had success with new treatment modalities including acupuncture and massage. *See* Exhibits 11, P.

11. On June 21, 2016, Claimant was also evaluated by Brian Harrington, M.D. Claimant reported that after last seeing Dr. Harrington in April of 2016, she had gone home to Jamaica and had relaxed without working and reported that her back pain got a lot better. Claimant reported that she returned to Colorado May 25 and was hit from behind while working housekeeping on May 30 and now had burning low back pain especially in the left low back area and upper buttocks. Claimant reported that she was better that day than a couple of months ago and that the month off from work seemed to especially help. Dr. Harrington noted that he still believed Claimant had muscular low back pain exacerbated by a depressed mood. He noted that she had visit earlier that day with a WC164 form indicating diagnosis of sprain lumbar region. He discussed that it did not make sense for Claimant to see two providers for work comp issues especially if they were for the same problem. Dr. Harrington opined that clearly mental health issued played into Claimant's injury and pain experience. *See* Exhibit O.

12. On July 5, 2016, Dr. Scherr evaluated Claimant. Claimant reported that she was doing much better and that she felt like her back pain was at baseline. Claimant felt that she was moving better and could return to full duty work. Claimant wanted to complete the course of physical therapy. On examination, Dr. Scherr found no pain with palpation of the cervical, thoracic, or lumbar spine and found full range of motion of the neck without pain. Claimant also reported no pain on lumbar range of motion. Dr. Scherr opined that Claimant was doing the best that he had seen since this encounter and appeared very comfortable. Dr. Scherr discussed with Claimant that her pain appeared to be at baseline with the chronic lumbar spine pain that she suffered from and noted that Claimant agreed. Dr. Scherr recommended maintenance therapy of six physical therapy visits to complete the PT course. Dr. Scherr opined that Claimant was at MMI. *See* Exhibit 11.

13. On August 16, 2016, Dr. Harrington evaluated Claimant. Claimant reported her lower back had been generally okay but her neck was bothering her a lot now and that she attributed the neck pain to an accident that occurred around the beginning of July where she was hit from behind. Dr. Harrington noted that he was confused about what issues he should be addressing but noted that he saw Claimant early in the year for a low back pain claim that got better when Claimant was not working and back home in Jamaica. He opined that it sounded like she may have been at MMI but that he did not

see him for follow-up until she had a new injury. Dr. Harrington opined that Claimant's stated degree of pain and disability for both the back and neck was in excess of objective findings. He discussed Claimant may need to not do physical work. He opined that Claimant's job description for Employer continued physical work beyond what Claimant could tolerate and noted Claimant's struggle with chronic back pain issues. He noted that her symptoms mostly resolve when she is home in Jamaica and not working but that lifting, carrying, pushing, and repetitive back bending all seemed to aggravate her condition. *See* Exhibit 11.

14. Dr. Harrington noted on September 6, 2016 that he had been seeing Claimant for low back pain since January of 2016 and that her pain had improved when Claimant was home in Jamaica and not working. Dr. Harrington noted that Claimant returned to the area and began working in late May and that before working was at MMI effective May 25, 2016. He noted that because she had greater than 6 months of pain and rigidity he would have recommended an impairment rating but that unfortunately Claimant never followed up before starting a new job. Dr. Harrington noted that apparently, on May 30, Claimant suffered a new injury with a new ongoing case which would cloud interpretation of her condition and proper allocation of signs/symptoms to the correct work comp case and opined it made doing an impairment rating difficult since he could not easily determine to what degree her current signs/symptoms were due to the old back complaint work comp case or to the new injury. *See* Exhibits 11, O.

15. On September 22, 2016, Dr. Scherr evaluated Claimant. Claimant reported that her back pain was worse and that she was having trouble with urination, felt like her feet were weak, and had a myriad of numerous complaints. Claimant reported that her neck had pain and that her left arm was numb. Claimant was vague about when this started and said she always had the pain. Dr. Scherr opined that it was very difficult to understand what was really going on with Claimant. He opined that Claimant had severe pain behaviors with some exaggerated movements. Dr. Scherr opined that none of the current symptoms were related to the May 30, 2016 incident based on the mechanism of injury and her current complaints and symptoms plus documentation from July 5, 2016 noting that she was back to baseline. Dr. Scherr opined that, if anything, the new symptoms were related to her chronic history of low back issues and not the minor May 30, 2016 incident. He encouraged her to continue to see Dr. Harrington for her ongoing chronic symptoms and opined that she remained at MMI with no restrictions for the May 40, 2016 incident. *See* Exhibits 11, P.

16. On September 23, 2016, Claimant returned to Dr. Harrington's office and was evaluated by Michelle Jimerson, M.D. Claimant reported that she had worsening of her back pain beginning on September 18, 2016 with no injury. Claimant reported she was doing laundry and light duty work. Dr. Jimerson opined that Claimant had an acute exacerbation of her long-standing issues with no injury but exacerbated by work in laundry. Dr. Jimerson also opined that the injury over the summer contributed as well. Dr. Jimerson recommended speaking with Dr. Harrington to decide on next steps. *See* Exhibit O.

17. On October 7, 2016, Dr. Harrington evaluated Claimant. Claimant reported continued low back pain that was the same back pain she had since 2011. Dr. Harrington noted that in contrast to his prior commentary, he would accept Claimant's back pain as related to her 2011 work comp claim. He still believed it was time to move Claimant to MMI but felt he needed to lay to rest her current complaints and concerns about cord compression or radiculopathy. Dr. Harrington ordered a new lumbar spine MRI. *See* Exhibit O.

18. On November 18, 2016, Claimant underwent an MRI of her lumbar spine. The impression was moderate narrowing of the left L3 neural foramen due to broad based left posterolateral disc protrusion compressing the exiting L3 nerve root and at L4-5 a broad based right posterolateral disc protrusion causing moderate narrowing of the right L4 foramen with the exiting nerve root not appearing compressed. The right lateral recess at L4-5 was found to be mildly narrowed with disc material abutting though not visibly compressing or displacing the descending right L5 nerve root and left neural foramen mildly narrowed without signs of nerve root compromise. An annular tear at L5-S1 was noted without significant disc bulge or protrusion and with moderate right foraminal narrowing. *See* Exhibits 10, T.

19. On November 28, 2016, Dr. Harrington evaluated Claimant. He reviewed an October 7, 2014 MRI of the lumbar spine, a February 17, 2015 note from Dr. Corenman, and a November 18, 2016 lumbar MRI. He noted that the October 2014 MRI showed degenerative disc disease and facet joint arthropathy in the mid to lower lumbar spine, showed a broad based left lateral disc protrusion at L3-4 contacting the exiting left L3 nerve root, and showed a circumferential broad based annular disc bulging at L4-5 contacting the exiting right L4 nerve root and both descending L5 nerve roots. He noted it showed several foraminal stenosis including at left L3-4, right L4-5, and right L5-S1 as well as central spinal canal stenosis at L4-5. Dr. Harrington noted that Dr. Corenman recommended less physical work in February of 2015. Dr. Harrington noted that the November 2016 MRI again showed a left disc protrusion at L3 impinging on a nerve root. Dr. Harrington opined that the L3 disc protrusion was new since February 20, 2013 where an MRI did not show the protrusion and thus the L3 finding was relatively new and not related to Claimant's August 2011 workers' compensation claim. Dr. Harrington opined that the non-work related disc protrusion affected Claimant's assessment for an impairment rating and opined that Claimant should get her disc protrusion evaluated and treated as necessary first and then afterwards do an impairment rating for her August 2011 workers' compensation claim. *See* Exhibits 11, O.

20. On December 6, 2016, Dr. Harrington performed an impairment rating examination for the August 2011 work injury. He reviewed medical records that noted Claimant's low back pain usually at a 7/10 to 10/10 with numbness running down her left foot in January of 2016. He also noted that Claimant reported her regular housework made her back pain worse and continued to have burning pain in her feet and was tearful in March of 2016. Medical records he reviewed noted no change in symptoms on April 1, 2016. Dr. Harrington noted in his medical records review that after April 1, 2016, the ski season ended and Claimant returned to her native Jamaica. The next entry was May

30, 2016. Dr. Harrington noted that Claimant reported that she had returned to Jamaica in the spring after the ski season ended and returned on May 25, 2016. Claimant reported that while back home in Jamaica and not working, her back pain had improved and was really not bothering her much but flared up again with the new injury on May 30, 2016. *See* Exhibits 11, O.

21. Dr. Harrington noted that in March of 2016, Claimant would take a pain pill in the morning and then could go to work but would have low back pain on both sides of her low back on busy days. Claimant also reported that she had frequent numbness in her left leg down to her foot and sometimes had pain in the back of her left calf. When working she would avoid stretching overhead, avoid bending, and was okay if she pushed a cart slowly. Dr. Harrington provided the impression of work related low back strain and exacerbation of underlying degenerative disc and joint disease of the lumbar spine in 2011 with persistent pain and rigidity. He opined that Claimant was at MMI, effective May 26, 2016. *See* Exhibits 11, O.

22. Dr. Harrington opined that Claimant had an unusually long course of treatment for an injury from August of 2011. He noted that no surgical intervention is indicated and that injections and nerve blocks did not provide lasting benefit. Dr. Harrington opined that a February 2013 lumbar MRI showed preexisting degenerative disc disease and degenerative arthritis but no nerve root compromise. He opined that Claimant's symptoms had varied overtime, had been inconsistent, had been in excess of objective findings on examination, and had not always followed clear anatomic pathways. He also opined that Claimant's stated symptoms had been compounded by depression and anxiety. Dr. Harrington noted that the most recent MRI showed left L3 nerve root compromise that could be causing some left lower extremity symptoms but that it was a new finding that likely represented the natural progression of Claimant's underlying and chronic degenerative arthritis. Dr. Harrington opined that Claimant could have been declared at MMI perhaps several years ago but he listed MMI as May 25, 2016 based on Claimant's stated improvement when she was home in Jamaica and not working and before she started working again. Dr. Harrington provided permanent work restrictions, recommended maintenance care, and opined that Claimant had a 7% whole person impairment rating from the August 2011 injury. *See* Exhibits 11, O.

23. On January 24, 2017, Henry Fabian, M.D. issued a report. Dr. Fabian noted that an MRI done on November 18, 2016 showed L3-4 foraminal stenosis. He compared it to the February 2013 MRI and noted that the only new things showing progression were degenerative changes at L3-4 that were now with foraminal stenosis at L3 and an L3 impingement. Dr. Fabian opined that unfortunately, an L3 impingement did not totally match Claimant's symptoms. Dr. Fabian opined that in terms of causality, the injury pattern would be challenging to totally attribute to what happened. He opined that it sounded like Claimant would have had an acute hyperextension injury to the lumbar spine and that if she had underlying foraminal stenosis and lateral recess stenosis, it could have certainly been aggravated by acute extension. He recommended based on the only thing that had changed since the index February 2013 MRI was the L3-4 foraminal stenosis,

that Claimant have a transforaminal left L3-4 block to see if it helped with her symptoms. *See* Exhibits 12, Q.

24. Apparently, Dr. Fabian was not provided the October 7, 2014 MRI. Dr. Fabian does not note it in his report at any place nor does he comment on the findings in that report of disc protrusion contacting the exiting left L3 nerve root that existed in October of 2014.

25. On September 16, 2017, S.D. Lindenbaum, M.D. performed an independent medical evaluation. Dr. Lindenbaum took a history from Claimant, reviewed medical records, and performed a physical examination. On the cervical spine exam, he found Claimant to have multiple positive Waddell's signs. Dr. Lindenbaum also noted that when he took a history from Claimant her motion was extremely full and free in the cervical spine, but was markedly limited when he examined her. On lumbar exam, he also found some Waddell signs. Dr. Lindenbaum opined that Claimant had residual problems from her 2011 injury with a total of 20% whole person impairment for the 2011 injury. Dr. Lindenbaum opined that Claimant did not have a new acute injury on May 30, 2016 when she bumped her back. He opined that although Claimant had an underlying disc injury from 2011 she did not have any new injury in either the cervical or lumbar spines from May of 2016. He opined that Claimant needed no further treatment for the most recent injury but needed maintenance treatment and limitations or lighter work related to her 2011 injury. *See* Exhibit N.

26. On February 20, 2018, Claimant underwent an MRI of her cervical spine. The impression was Grade 1 C5-6 and C6-7 disc protrusions with mild spinal stenosis at both levels and mild cord abutment at C6-7. Bilateral mild C6 and moderate C7 foraminal narrowing was also noted. A mild nonspecific lymphadenopathy of the left neck, possibly necrotic level 1B lymph node was also noted and an ENT evaluation for oral pharyngeal pathology was recommended. *See* Exhibits 16, T.

27. Claimant also underwent a thoracic MRI on February 20, 2018 that was read as normal. *See* Exhibits 16, T.

28. On November 15, 2018, Carlos Cebrian, M.D. performed an independent medical evaluation. Claimant reported cervical spine pain, lumbar spine pain, pain in the left buttock, pain in the left forearm, thoracic spine pain, pain in the left hand, leg weakness, leg and hand numbness, and pain at the back of the head. Claimant reported that on May 30, 2016 in the morning while getting her housekeeping cart from a closet, she was bumped into by another employee with her cart and hit the mid part of her back, which caused her chest to hit her own cart. Claimant reported that she felt pain in her mid-back and had shoulder pain into her low back, that she sat down for a period of time, and that when she got up she felt pain in her neck. Dr. Cebrian reviewed medical records and performed a physical examination. Apparently, Dr. Cebrian was not provided the October 7, 2014 MRI and did not note it in his records review. *See* Exhibits 13, M.

29. Dr. Cebrian opined that Claimant's work diagnosis related to the May 30, 2016 work incident was a lumbar spine contusion/strain. He opined that no further medical care was medically reasonable, necessary, or related to the claim. He opined that Claimant was appropriately placed at MMI on July 5, 2016 by Dr. Scherr. Dr. Cebrian opined that the mechanism of injury was very mild and not of sufficient force to cause and injury to the cervical spine or shoulders and that at most there would have been some localized tissue damage in the lumbar spine area where the cart contacted Claimant. He opined that this would have improved with or without medical treatment. Dr. Cebrian opined that from the beginning, Claimant's subjective pain complaints had been out of proportion to the objective evidence and mechanism of injury. Dr. Cebrian opined that Claimant had an extensive pre-existing medical history of pain complaints in her lumbar spine and that her acute contusion/strain of her chronic underlying condition was a medical event of limited duration that did not change her underlying chronic problem. *See* Exhibits 13, M.

30. Dr. Cebrian opined that the event of May 30, 2016 provided no specific opportunity to change Claimant's anatomy and opined there was no diagnostically demonstrated change in her anatomy. Dr. Cebrian opined that the physical examination at his IME indicated non-physiologic/non-organic conditions. He ultimately opined that the ongoing complaints were causally related to pre-existing lumbar spine complaints and chronic pain disorder and that there were no restrictions and no permanent impairment related to the May 30, 2016 claim. *See* Exhibits 13, M.

31. On November 12, 2018, Clint Devin, M.D. evaluated Claimant for her neck and left upper extremity pain and paresthesias. Dr. Devin noted Claimant's reports of neck and left upper extremity pain and paresthesias that began months ago and had gotten worse over time. Dr. Devin opined that it appeared to be in the C5-C6 distribution. Dr. Devin reviewed the February 2018 MRI and noted degenerative changes with no appreciable stenosis. He opined that Claimant had degenerative changes, which explained her neck pain. *See* Exhibit Q.

32. As noted in the medical records, at the time of the May 30, 2016 incident with the cleaning cart, Claimant had recently been undergoing physical therapy and taking pain medications for her August 2011 injury. Just prior to the May 30, 2016 injury, Claimant had approximately 1.5 months off work and returned to Jamaica. Claimant reported feeling better after no work for that vacation time and she returned on May 25, 2016 to Colorado.

33. As noted in the medical records, there were several diagnostic tests performed prior to the May 30, 2016 incident. Claimant also was undergoing treatment in early 2016 for an August 2011 injury.

34. On February 20, 2013, Claimant underwent a lumbar spine MRI that showed multilevel degenerative disc disease and hypertrophic facet arthropathy. Claimant had mild degenerative foraminal stenosis at L3-4 through L5-S1 levels. The findings were most pronounced on the left at L3-4 and on the right at L4-5 where small

far lateral disc bulges were suggested. No evidence of central stenosis was found. *See* Exhibits 9, T.

35. On October 7, 2014, Claimant underwent an MRI of her lumbar spine that showed degenerative disc disease and facet joint arthropathy in the mid to lower lumbar spine. The findings included a broad based left lateral disc protrusion at L3-4 that contacted the exiting left L3 nerve root. The findings also included a circumferential broad based annular disc bulge at L4-5 that contacted the exiting right L4 nerve root and contacted both descending L5 nerve roots. Claimant had several foraminal stenosis including moderate left L3-4, moderate right L4-5, and moderate right L5-S1. Claimant had mild central spinal canal stenosis at L4-5. *See* Exhibits 9, T.

36. On March 1, 2016, Katie Liefer, RN evaluated Claimant in follow up for low back pain. Claimant reported that she got off and on stabbing pain in her low mid back that sometimes involved the left side of her low back. Claimant reported that her back pain was worse in the mornings and evening and reported her pain that day at 8/10. Dr. Harrington also evaluated Claimant and noted chronic low back pain, facet arhropathy, and chronic depression. *See* Exhibit O.

37. On April 1, 2016, Dr. Harrington evaluated Claimant. Claimant reported sharp daily pains in her low back with lifting and bending with a pain level of 8/10 with pain sometimes spreading across both buttocks and especially her left posterior buttocks. Claimant reported that she wakes up at night sometimes and ices her back. *See* Exhibit O.

38. On April 15, 2019, Dr. Cebrian testified by deposition. Dr. Cebrian opined that based on the May 30, 2016 mechanism of injury it was not biologically plausible that Claimant would have had the widespread pain complaints that she had over a period of 2.5 years. Dr. Cebrian pointed out that Dr. Lindenbaum's opinion was similar to his and that Dr. Harrington noted subjective complaints out of proportion to objective findings. Dr. Cebrian testified that Claimant had extensive treatment from 2011 through 2016 for her chronic pain. He testified that her pre-existing complaints in the low back were basically the same. He testified that although Claimant didn't have cervical spine complaints before the May 30, 2016 incident, it would not be the type of incident that would lead to any kind of cervical spine complaints or injury. Dr. Cebrian opined there was insufficient force with the mechanism of injury to cause any kind of injury to the cervical spine and he noted there were no objective findings supporting an acute injury. Dr. Cebrian also opined that the mechanism of injury was not enough to exacerbate or aggravate Claimant's pre-existing condition in the lumbar spine and wouldn't have changed her underlying disc pathology or chronic pain. Dr. Cebrian opined that the majority of the symptoms that Claimant was having when treating under the May 30, 2016 claim weren't related to the May 30 incident but were related to her pre-existing condition and chronic pain disorder. Dr. Cebrian opined that it wasn't really reasonable or necessary to provide any kind of treatment to Claimant for the May 30, 2016 claim and that if the providers had all the pre-existing records, they probably wouldn't have provided treatment.

39. Dr. Cebrian opined that the L3 disc protrusion shown on the 2016 MRI was not related to the May 30, 2016 incident and that the protrusion was related to the underlying natural history of degenerative disc disease. Dr. Cebrian opined that the mechanism of injury was minor, the symptoms and findings were non-physiologic and did not correlate with an L3 disc protrusion with nerve contact, and thus it was medically probable the L3 disc protrusion had nothing to do with the 2016 claim. Dr. Cebrian opined that Claimant had a minor contusion and treatment was not necessary for the May 30, 2016 incident.

40. Claimant overall is not credible or persuasive. Multiple inconsistencies and exaggerated pain behaviors and/or non-physiologic findings exist throughout the records

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo.App. 2000).

Compensability

The claimant was required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of the employment, and that the alleged injury was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The question of whether the claimant met the burden of proof to establish a compensable injury is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

The Act creates a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" contemplates the physical or emotional trauma caused by an "accident." An "accident" is the cause and an "injury" is the result. No benefits flow to the victim of an industrial accident unless the accident causes a compensable "injury." A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.,* W.C. No. 4-650-711 (ICAO February 15, 2007).

Claimant has failed to meet her burden to establish that she sustained a compensable work related injury on May 30, 2016. Although she was bumped by a co-worker's cleaning cart on that day, the accident did not create disability or the need for medical treatment. Rather, Claimant had ongoing disability and need for medical treatment dating back to 2011 for chronic pain in her lumbar spine. Claimant had severe degeneration in both her cervical spine and lumbar spine that pre dated the incident on May 30, 2016. Although Claimant had been out of the country on vacation and resting for approximately 1.5 months before this incident, records show that prior to her vacation, and in April of 2016 Claimant had significant ongoing pain and issues. Claimant tolerated the pain and went to the emergency room when it got bad over the years as shown by the medical records. Here, after being back in state for 5 days, Claimant naturally was again feeling the persistent and chronic back pain that she has reported to have suffered from on and off since 2011. Claimant's prior back issues had not resolved as argued by Claimant.

Further, the opinions of Dr. Scherr, Dr. Lindenbaum, Dr. Devin, and Dr. Cebrian are all found credible and persuasive. It is not surprising that Claimant's back began to hurt again after returning to work following a 1.5 month vacation. It had hurt at a rating of

8/10 just prior to her vacation. As noted by Dr. Harrington, in March of 2016 Claimant was able to get through a day of work by taking a pain pill in the morning, pushing her cart slowly, and avoiding certain movements. Claimant argues that the 2016 MRI shows a "new" L3 disc protrusion. However, the credible reports show that her symptoms do not entirely correlate with an L3 distribution and the protrusion is "new" compared to the 2013 MRI but not new compared to the 2014 MRI. The 2014 MRI shows the L3 protrusion with compression existed long before May 30, 2016. Dr. Cebrian, Dr. Devin, and the reports are also credible that the cervical spine complaints are degenerative and not the result of an acute injury when bumped in the back by a cleaning cart.

Although Claimant may have continued pain and changes in her lumbar spine requiring treatment and degenerative changes in her cervical spine requiring treatment, she has failed to establish that these are causally related to the May 30, 2016 incident. Claimant did not sustain an acute injury on that date. Claimant did not aggravate or accelerate her ongoing condition in either the lumbar spine or cervical spine on that date. Rather, as noted above by multiple providers, the mechanism of injury was minor and did not likely cause any acute injury. Claimant has failed to meet her burden to show by preponderant evidence that she sustained a compensable work related injury on May 30, 2016. Her claim is denied and dismissed.

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).). Again, the claimant bears the burden of proof of showing that medical benefits are causally related to his work-related injury or condition, by a preponderance of the evidence. *Ashburn v. La Plata School District 9R,* W.C. No. 3-062-779 (ICAO May 4, 2007); C.R.S. §8-43-201, *HLJ Management Group, Inc. v. Kim,* 804 P. 2d 250(Colo. App. 1990).; *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915, 918 (Colo. App. 1993).

Claimant has failed to establish that the November 18, 2016 MRI was reasonable, necessary, and causally related to her May 30, 2016 incident at work. On that date, Claimant did not sustain an acute injury nor did she aggravate or accelerate her underlying conditions to require treatment. Claimant has failed to show that the November 18, 2016 MRI was reasonable or necessary to cure and relieve her from the May 30, 2016 incident. Rather, it was much more likely needed to cure and relieve the effects of her underlying degenerative condition and/or her 2011 injury.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by a preponderance of the evidence that she sustained a compensable work related injury on May 30, 2016.

2. Claimant has failed to establish by a preponderance of the evidence that the November 18, 2016 MRI was reasonable, necessary, and causally related to a May 30, 2016 work injury.

3. Any issues not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 13, 2019

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 1525 Sherman Street, 4th Floor, Denver, CO 80203	
In the Matter of the Workers' Compensation Claim of: **S** Claimant, vs. **H** Employer, AND **P,** Insurer, Respondents	▲ **COURT USE ONLY** ▲ **CASE NUMBER:** **WC 5-070-200-002**

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Hearing in this matter was held on March 26, 2019, before Margot W. Jones, Administrative Law Judge. The post hearing deposition of Paul A_____ dated April 19, 2019, was made part of the record. The parties' exhibits A through P and 1 through 18 were admitted into evidence. The record remained open to May 21, 2019, for submission of the parties' post hearing position statements. The ALJ entered a Summary Order on May 29, 2019 which was served on May 30, 2019. Claimant requested a full order on June 3, 2019.

Claimant was present and represented by _____, Esq. Respondents were represented by _____, Esq. This matter was digitally recorded in Courtroom 3 convening at 8:30 a.m. in Denver, Colorado.

In this order, S will be referred to as "Claimant," H, will be referred to as "Employer" and P will be referred to as "Insurer." The Insurer and Employer, collectively, will be referred to as "Respondents."

Also in this order, "ALJ" or "Judge" refers to the Administrative Law Judge, "C.R.S." refers to Colorado Revised Statutes (2018), "OACRP" refers to the Office of Administrative Courts Rules of Procedure, 1 CCR 104-1, "the Act" refers to the Workers' Compensation Act of Colorado, Section 8-40-101, et seq., C.R.S. and "WCRP" refers to Workers' Compensation Rules of Procedure, 7 CCR 1101-3.

Issues

1. Whether Claimant proved by a preponderance of the evidence that he sustained a compensable injury in the course and scope of his employment with Employer;

2. Whether Claimant proved by a preponderance of the evidence that he is entitled to an award of medical benefits that are reasonable, necessary and related to a workplace injury;

3. Whether Claimant proved by a preponderance of the evidence that he is entitled to an award of indemnity benefits;

4. What is Claimant's average weekly wage; and

5. Whether Respondents proved by a preponderance of the evidence that Claimant was responsible for the termination of his employment with Employer.

FINDINGS OF FACT

1. Claimant worked as a marijuana harvester and trimmer for Employer. He made $15.00 per hour, and worked 40 – 48 hours per week. Employer is a supplemental staffing agency for licensed marijuana facilities in Colorado. Claimant alleges that he sustained a head injury in the course and scope of his employment on February 19, 2018.

2. Claimant has a history of irritable bowel syndrome (IBS) that predates his alleged industrial injury. Claimant treated at Mercy Medical Group in Sacramento in 2014. He endorsed symptoms including insomnia, abdominal cramping, and pain. On August 12, 2014, Dr. Kamyar Farhangfar strongly recommended that Claimant stop using marijuana, as it could be contributing to his IBS symptoms.

3. After moving to Colorado, Claimant began treating with Clinica Family Health on October 27, 2016. On that date, he complained of an earache. Claimant stated that he had dizziness, ear pressure and popping, and hot flashes. Under the "Review of Symptoms" section, symptoms including vision changes, dizziness, headache, memory impairment, depression and hopelessness were endorsed. He was diagnosed with otalgia of the right ear, which may have been related to bruxism.

4. Claimant returned to Clinica Family Health on November 1, 2016, again noting that he had diminished hearing, vertigo, memory loss, headache and confusion. He stated that his balance was "a little off" sometimes. He complained of IBS-related symptoms on February 22, 2017.

5. Claimant presented at Clinica Family Health on October 11, 2017 with a cough. He complained that he felt disoriented, dizzy and that his brain was “misfiring.” He stated that he had been coughing so hard that he had strained his neck.

6. Claimant began treating for the alleged work injury in this matter with Dr. Felix Meza at Concentra on February 21, 2018. Claimant complained of headache, dizziness and memory loss. There were no endorsed neck symptoms. Dr. Meza diagnosed Claimant with a concussion with loss of consciousness of unspecified duration. Dr. Meza placed Claimant on restricted duty. On February 27, 2018, Claimant was diagnosed with a neck strain. On March 13, 2018, Claimant reported personality change but denied having seizures.

7. Claimant began physical therapy at Concentra on February 28, 2018. The therapist noted that Claimant was struck on the cranium “causing a whiplash like motion and onset of headache and tightness.” His pain was at a six to seven out of ten. By March 7, 2018, Claimant’s pain level was at a two out of ten.

8. Claimant returned to Clinica Family Health on April 3, 2018. Erin Atkinson, NP, recommended MRIs of the brain and cervical spine due to continued complaints. MRIs of the brain and cervical spine were taken on April 24, 2018 and were normal.

9. On May 7, 2018, Claimant complained to Ms. Atkinson that IBS was triggering his migraines.

10. Claimant began treating at Mental Health Partners on May 11, 2018. Claimant noted past trauma relating to witnessing domestic abuse. Endorsed symptoms included nightmares, psychological reactivity, somatic complaints, hypervigilance, rage, diminished interest, issues with attention and concentration, as well as mild paranoia. He noted that he has had these symptoms since childhood. Peter Lear diagnosed him with acute stress disorder, generalized anxiety disorder, ADHD and tobacco use.

11. At a visit at Clinica Family Health on May 21, 2018, Claimant stated that he was trying to find work in the marijuana industry but felt discriminated against due to mental illness. On June 7, 2018, Claimant began complaining of seizures. Ms. Atkinson noted that Claimant’s symptoms were not consistent with epileptic seizures. At this appointment, Claimant was diagnosed with PTSD, complaining of symptoms including anxious/fearful thoughts, depressed mood, difficulty concentrating, excessive worry and racing thoughts. Claimant noted that functioning was extremely difficult. On June 27, 2018, Ms. Atkinson remarked that Claimant’s PTSD was associated with headache. Claimant told Ms. Atkinson that he was having migraines due to overheating at work.

12. Claimant was transported by ambulance to Boulder Community Health on September 17, 2018 for alleged seizures. Claimant alleged that his IBS was

acting up in a Safeway Grocery Store, so he took some marijuana before going outside to wait for a bus. He felt lightheaded. He further alleged that Gabapentin had given him a stroke or aneurysm previously. Dr. Dale Wang's assessment was that Claimant's condition was multifactorial, "including pain from his IBS as well as marijuana medication." Claimant was hospitalized with similar complaints on October 29, 2018 after being exposed to clapping. No provider diagnosed him with a seizure.

13. On November 13, 2018, Claimant was evaluated by Dr. Matthew Kidd at Associated Neurologists. Claimant alleged that he suffered from seizure like spells which included total body paralysis, total body pain, passing out, dizziness and lightheadedness. Claimant oscillated between crying and hysterical laughter. Claimant thought he may have been experiencing one of his spells during the appointment, which Dr. Kidd did not assess as a seizure. He diagnosed Claimant with recurrent spells and bipolar disorder. He could not determine the nature of Claimant's spells. An EEG performed at UC Health on January 11, 2019 revealed no abnormalities or patterns suggestive of seizures.

14. Claimant acknowledged that he brought marijuana edibles to the place where he was employed in the marijuana industry, hereinafter referred to as _____ or Employer, but alleged that he had permission to do so. He testified that other employees of Employer used marijuana at work. Claimant testified that he received a "bo staff" from an individual named Donnie. Claimant's bo staff was brought to hearing. It is approximately a 7 foot long, carved wooden stick with ornately carved tip. Claimant testified that he used the staff to practice his "fire spinning techniques" on break or before work, and as a walking aid due to damaged cartilage in his knee.

15. Claimant testified that he worked three or four jobs after being terminated from his employment with Employer. Claimant attributed his inability to hold a job to his alleged work injury, stating that his disabilities affected his memory and mood. He alleged that following his workplace incident, he had to relearn how to live. Claimant testified that he had seizures at his jobs after being terminated by Employer. He worked for Gr_____ from April 29, 2018 to May 3, 2018, before being terminated. He claimed that he worked for T_____ from June 19, 2018 to July 28, 2018 before being terminated. Wage record from this Employer reflect that he worked there from at least June 9, 2018 through August of 2018. He then worked at C_____ in November of 2018.

16. Claimant testified concerning his employers prior to working for Employer. His testimony concerning his employers reflects that he had short tenures with numerous employers, typically ending with his termination.

17. Claimant testified that he suffers from IBS, ADHD and PTSD. Claimant testified concerning the kinds of symptoms that he experiences as a result of IBS. He stated that he gets cranky and irritable, and that his head "gets funky." Claimant

stated that following his alleged work injury, he experienced a seizure as a result of his IBS. He testified that a medication, Gabapentin, gave him a seizure as well. For this reason, Claimant testified that he treats his symptoms with marijuana on a daily basis. He testified that he uses the marijuana to treat his IBS, ADHD and PTSD.

18. Claimant testified that on the morning of February 19, 2018, he had an incident with the bo staff that he was using. Claimant testified that he showed up early at S_____ for the purpose of showing two other individuals his techniques with respect to the spinning of the staff. He testified that he struck himself in the head with the staff. He testified that the incident with the staff occurred approximately four hours prior to the alleged work injury.

19. Claimant testified that he worked the rest of his shift on February 19, 2018 and arrived at work to perform his duties on February 20, 2018.

20. Two of Claimant's co-worker testified credibly at hearing, Ms. Heather R_____ and Mr. Joshua B_____. Both of these co-workers testified that they were working close by when they heard a commotion in the area where Claimant claimed he was struck by falling polls. They testified credibly that Claimant did not complain of being struck or that he was hurt. Claimant did not appear to his co-workers to have been injured.

21. Mr. Paul A_____ credibly testified via post-hearing deposition that he is the owner and operator of Employer. He testified that he was not informed of any workplace injury by Claimant or anybody else on the date of the alleged work injury. Subsequently, Mr A_____ investigated Claimant's claim of injury and the allegation that Claimant brought outside product to a client's grow operation, which is prohibited, and could present a threat to the license status of his business and his clients' businesses. Mr. A_____ testified that he discussed the possibility of Claimant bringing marijuana product to work with other employees and later the same day Claimant approached Mr. A_____ alleging that he had been hit on the head by a metal pole. This was the first time that Mr. A_____ learned of any allegation of a workplace injury. Mr. A_____ provided Claimant with a designated provider list.

22. Video of the February 19, 2018 incident was entered into evidence. The video does not corroborate Claimant's claim of work related injury.

CONCLUSIONS OF LAW

General Legal Principles

1. The purpose of the Act is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the

necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a workers' compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is evidence that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Ins. Co. v. Cline,* 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

Compensability

3. Pursuant to Section 8-41-301(1) (c), C.R.S., a disability is compensable if it is shown that it was "proximately caused by an injury ... arising out of and in the course of the employee's employment." See also, Section 8-41-301(1) (b), C.R.S. "It is not sufficient for the claimant simply to show that an incident or accident occurred. It is the claimant's initial burden to prove a compensable injury." *Asfaw v. King Soopers*, W.C. No. 5-006-280 (ICAO, February 10, 2017). An "accident" is defined under the Act as an "unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual or undesigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident. *City of Boulder v. Payne*, 426 P.2d 194, 196 (Colo. 1967). Consequently, a compensable injury is one which requires medical treatment or causes disability. Id.; *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981); *Aragon v. CHIMR, et al.,* W.C. No. 4-543-782 (ICAO, Sept. 24, 2004). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." *Asfaw, supra*; Section 8-41-301, C.R.S.

4. In this case, Claimant failed to establish by a preponderance of the evidence that he suffers from a concussive condition caused by a February 19, 2018 work injury. The alleged work related incident in question occurred on video. While the view of Claimant's head is partially obscured, the falling poles are visible. A metal pole fell down to the ground. A wooden pole fell into Claimant's left hand. Its course does not appear to have been diverted or altered by any object, including any part of Claimant's body. The video evidence does not support the position that Claimant sustained a compensable injury. The video footage does not show Claimant flinch or engage in any other movement that would be consistent with a body blow causing injury or trauma.

Claimant's testimony concerning where he was struck with the pole was inconsistent. Furthermore, the immediate aftermath of the incident was witnessed. Two of Claimant's co-workers in the vicinity of the incident credibly testified that Claimant denied being struck in the head, and that he did not exhibit behavior consistent with being struck in the head or suffering any injury.

5. As Claimant failed to prove that he sustained a compensable injury, his request for medical and indemnity benefits is denied and dismissed. Respondents' issue of termination for cause is not addressed as Claimant did not prove a compensable injury.

.

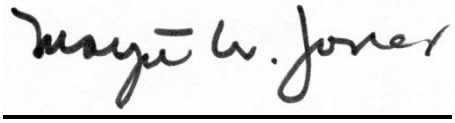
ORDER

It is therefore ordered that:

1. Claimant's claim for compensation is denied and dismissed.

2. Claimant's requests for medical and indemnity benefits are denied.

DATED: June 13, 2019



MARGOT W. JONES
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that she is entitled to post-MMI medical maintenance care, as a result of a work injury which occurred on January 9, 2017?

STIPULATIONS

I. Respondents have agreed to pay Claimant $5,000 in TTD/TPD benefits. No further indemnity benefits are owed.

II. The date of MMI shall be July 6, 2018 (as per the DIME report).

III. On January 27, 2017, Respondents filed a Notice of Contest in this matter. Shortly thereafter, the ATPs in this case refused to provide further treatment, stating that the claim had been denied. Claimant then sought medical treatment on her own, with treatment paid for by Medicaid. Consistent therewith, Medicaid now has a lien in this matter. The parties have stipulated that Respondents shall reimburse Medicaid for all treatment from the date of injury to the date of MMI for any treatment which was reasonable, necessary, and claim related. Respondents are currently working with Medicaid on this reimbursement issue, but have not completed the process as of the date of this Order.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Claimant is employed as a merchandise stocker with Employer's location on Dillon Drive in Pueblo, Colorado. Claimant's job duties include stocking boxes on shelves, loading merchandise, walking, bending, and climbing ladders as part of the overnight shift. Claimant continues to work her job as a stocker in a full duty capacity following MMI.

2. Claimant sustained a compensable injury to her low back on January 9, 2017. Claimant was helping to stock boxes in the back room. She was bent over at the waist, when a box fell on her low back from above her. At her 12/14/2017 hearing on compensability, Claimant testified that the box weighed approximately ten pounds and fell from a height of approximately 7-8 feet from the ground. Claimant then testified that she felt the immediate onset of pain in her low back, but was able to finish her shift.

3. Claimant has a pre-existing history of low back pain dating to 2012. (Ex. A) On October 15, 2012, Claimant noted to her primary care physicians in a patient

questionnaire that she had been experiencing back pain for approximately two years, and had also been involved in a car accident in 2005. *Id.* Following conservative treatment with her chiropractor, Claimant discontinued further care, noting that the treatment modalities were "not helping her." *Id. at 5* Claimant also noted to her primary care physician that her left leg would 'give out' on her due to her ongoing low back pain. (Ex. B, p. 6)

4. On April 24, 2014, Claimant again presented to her primary care physicians, noting worsening back pain for the past couple of weeks. (Ex. B, p. 16) Claimant again noted low back pain directly over the lumbar spine, with *ongoing radiculopathy* in the left leg. *Id.* Claimant detailed a history in which her *left leg would go numb* and had falls resulting from the radiculopathy. *Id.* Claimant was referred for an MRI of the lumbar spine.

5. Claimant underwent an MRI of the lumbar spine on April 30, 2014. The MRI Impression notes the following:

> 1. L5-S1 left lateral disc protrusion which at least abuts and may partially compress the left L5 nerve, with additional mild left foraminal narrowing.
>
> 2. No significant lumbar spinal stenosis or additional neural foraminal narrowing. (Ex. C, p. 23).

6. Claimant returned for a follow-up visit with her PCP on May 6, 2014, and to discuss her MRI results. (Ex. B, p. 19). Claimant's PCP noted ongoing back pain that was "intermittent for many years" and recommended a trial of physical therapy, injections, and possible surgery based on the MRI results. *Id. at 19-21* Claimant was given a referral for physical therapy, and advised to contact her insurance company to establish an in-network provider. *Id. at 21.*

7. Throughout 2015 and 2016, Claimant sustained multiple work-related injuries to various body parts, and sought treatment with the authorized treating physicians for those claims. (Ex. E, pp. 53-58, Ex. J). Claimant's complaints were noted by several physicians to be out of proportion to the objective findings. *Id.* Claimant was noted to have myofascial pain complaints throughout parts of her body. *Id.*

8. According to the records review portion of an IME performed by Dr. Eric Ridings, MD, Claimant presented to Joel Cohen, PhD., for a psychological evaluation on January 13, 2016. (Ex. E, p. 56, Ex. J, p. 152). Dr. Cohen noted that Claimant has a

> "tendency, as in often the case with many of my clients, to assume that it is the escalating pain that is producing the emotional distress I see today, but as pointed out to her, it is equally likely that her frustration and distress with aspects of the work system and her interactions with management

may well be an active contributor to the myofascial elements of her pain complaints." (Id.)

9. On January 11, 2017, Claimant presented to Southern Colorado Clinic for an initial evaluation regarding the January 9, 2017 work injury. (Ex. D, p. 24) Claimant was evaluated by physicians' assistant Terry Schwartz. Claimant described her mechanism of injury regarding a box that fell from a height of 8 feet, but she was unable to indicate how much the box weighed. Claimant described ongoing low back pain that was stabbing in nature. PA Schwartz performed a physical examination, and was unable to identify a contusion, although Claimant reported subjective pain complaints and tenderness. *Id. at 29.*

10. Claimant attended a follow-up visit to PA Schwartz on January 18, 2017. Claimant indicated that she was having ongoing back pain after last night "while folding clothes" and that her back "really got hurting," and needing to sit down frequently. (Ex. D at 36). PA Schwartz noted that he was having difficulty connecting the alleged mechanism of injury to Claimant's ongoing pain complaints. *Id. at 36,37.*

11. On January 25, 2017, Claimant returned to PA Swartz regarding her low back pain. (Ex. D, p. 51). PA Schwartz noted that Claimant had a dramatic response to palpation of the lumbar spine, and reported complaints of "severe pain" throughout the L3-L5 region. *Id*.

12. On March 20, 2017, Claimant underwent an Independent Medical Examination ("IME") with Eric Ridings, M.D. at the request of Respondents. (Ex. E) Dr. Ridings performed a physical examination, and reviewed claimant's medical records. Dr. Ridings obtained information regarding the height from which the box allegedly fell. He also tried to ascertain the weight of the box as described by Claimant and Employer. Dr. Ridings concluded that the alleged mechanism of injury resulted in a contusion to Claimant's lumbar spine, assuming Claimant's statements regarding the incident were accurate. If the box fell from a shorter distance, or weighted significantly less, the mechanism of injury would not produce the need for medical treatment. Dr. Ridings noted that there was no objective evidence of a contusion or abrasions to Claimant's low back following this incident. Dr. Ridings noted a history of Claimant's psychological overlay, with no objective findings, and her history of her prior claims with other providers.

13. Following the IME with Dr. Ridings, Claimant underwent another MRI on 4/14/2017 for her lumbar spine. (Ex. F, p. 66) The MRI revealed the following Impression:

> An eccentric left disc osteophyte complex at L5-S1 moderately narrows the left neural foramen and likely abuts and displaces the exiting left L5 nerve. There is an additional small central disc protrusion with annular tearing at this level resulting in no significant spinal canal stenosis. *Id.*

14. Claimant continued to treat for her low back pain with her Primary Care Physician throughout the remainder of 2017. (Ex. G) On August 2, 2017 Claimant presented to her physical therapist ("PT"), Barry Brown, and noted that she had "gone to the doctor on Monday 7/31 and stated she kept pushing on my back and it has been hurting ever since." *Id. at 72.* On August 9, 2017, Claimant noted to PT Brown that she was feeling "ok" and that her back pain had subsided after walking for a period of time. *Id. at 78*.

15. Claimant underwent a second IME with Miguel Castrejon, M.D. at her own request. (Ex. 9, p. 265). Dr. Castrejon noted a prior medical history in which Claimant noted a bulging disc and prior back pain that she believed was related to lifting boxes at work. *Id. at 265.* Claimant reported ongoing back pain just above her left buttock and extending down in to her left leg and into her left foot and toe. *Id. at 267.* Dr. Castrejon noted that "these subjective complaints were not present prior to the event of January 9, 2017 and deserve additional testing and treatment." *Id. at 270.*

16. In reviewing this report, the ALJ notes that in his IME report, Dr. Castrejon only received medical reports from the date of injury forward. He did not review any of Claimant's medical records regarding her back issues dating to 2012, her MRI from 2104, or her psychological history. He even notes that "The patient's past medical history is negative for any other prior injuries to the above-mentioned areas [such 'areas' being left lumbar region down to left toe] (Ex. 9, p. 267). Despite this lack of records, Dr. Castrejon concluded that the alleged mechanism of injury resulted in a straining type injury to Claimant's low back, and that Claimant was not at MMI. He opined that further treatment is needed, including injections, to help alleviate Claimant's low back pain. *Id.*

17. A Hearing took place in this matter on the issue of compensability on December 14, 2017. (Ex. 2, pp. 31-41). ALJ Spencer issued his Order on February 22, 2018, finding the claim compensable, since a compensable claim had been met. ALJ Spencer concluded that:

> As found, Claimant proved she suffered a compensable injury on January 9, 2017. The persuasive evidence demonstrates a box of product fell from a shelf directly onto Claimant's back while she was stooped over. The shelf was 7'4" high, and the box that fell was most likely stacked on top of at least one other box. Even if the forces involved were relatively minor, they were sufficient to evoke symptoms in Claimant's low back. When the pain persisted, Claimant reasonably requested medical treatment and Employer obliged. Her clinical presentation at the initial visit was consistent with an acute episode of low back pain. Although PA-C Schwartz saw no obvious contusion, he noted she was "quite tender" where the box struck her and concluded the incident likely "set off' back spasms. PA-C Schwartz diagnosed "acute" low back pain and reasonably prescribed conservative measures including diagnostic imaging, medication and physical therapy. (Ex. 2, p. 39).

> Although Claimant had a history of low back problems with episodes of similar symptoms in 2012 and 2014, there is no persuasive evidence that she was pursuing or needed any treatment for those issues immediately before the incident in January 2017. The last documented treatment for the preexisting condition was in June 2014, nearly two and one-half years before the work accident. The ALJ finds it unlikely that Claimant was having significant symptoms during that interval, particularly since she has not otherwise been reticent to pursue treatment when she feels it warranted. Furthermore, Claimant would not likely have been able to maintain her relatively physically demanding job had her back been symptomatic. The most likely scenario is Claimant suffered a reoccurrence of back pain as a direct and proximate result of the incident on January 9, 2017. *Id.*

18. ALJ Spencer noted that his issues were limited to compensability, and that he did not have jurisdiction to rule on the issue of MMI.

> Respondents have raised legitimate questions regarding the full extent of Claimant's injury and whether her ongoing need for treatment is related to the compensable injury. This order does not address those issues….*Id at 40.*

19. Following that hearing, Respondents sent correspondence to Dr. Terrence Lakin, DO, inquiring about MMI. (Ex. H) Dr. Lakin opined that Claimant had reached MMI on January 25, 2017. *Id. at 95.* Dr. Lakin further noted in a separate narrative that Claimant may have obtained minor soft tissue injuries as a lumbar strain with this claim. *Id. at 101*. However, Dr. Lakin opined that this injury would have resolved back to baseline within weeks with conservative care.

20. In response to Dr. Lakin's opinions, Respondents filed a Final Admission of Liability ("FAL") on March 21, 2018. (Ex. 2, p. 42). Claimant timely objected to the FAL and requested a Division IME.

21 In May 2018, Claimant presented to her primary care physicians for her ongoing low back pain. (Ex. 6) Claimant noted ongoing severe low back pain that was not improving. (Id. at pg. 125) Claimant noted that her pain was a 5 out of 10 at best and 7 out of 10 at worst. *Id.*

22. On May 29, 2018, Claimant noted to PT Barry Brown that she had been receiving trigger point injections for her low back pain. (Ex. 6, p. 163) However, she still had moderate pain levels and a burning sensation in her left low back that would radiate down her left foot despite the injections.

23. On July 6, 2018, Anjmun Sharma, M.D. performed a Division IME. Dr. Sharma agreed that Claimant was at MMI, but opined that MMI had been reached on

July 6, 2018. He assigned this date on the basis that this was when the Division IME took place. (Ex. I, p. 125) Dr. Sharma opined that Claimant had a mild lumbar strain with contusion, and that she could benefit from trigger point injections. *Id. at 124-126.* Dr. Sharma assigned a Table 53 impairment rating of 7%, and range of motion deficit of 7%, consistent with the *AMA Guides Third Edition* revised.

24. Regarding maintenance care, Dr. Sharma felt that Claimant should have a series of three trigger point injections spaced, every two months until six months' time had elapsed. He did not indicate that any other maintenance care was needed. The ALJ notes however, that Dr. Sharma was not in possession of Claimant's medical records from the Institute for Total Rehabilitation from May of 2018, which indicate that Claimant had already received several trigger point injections, occurring just prior to this Division IME appointment with Dr. Sharma.

25. In response to the Division IME findings, Respondents filed a Final Admission of Liability. (Ex.2, p. 43) They admitted to an MMI date of 1/25/17 (proposed by Dr. Lakin), as opposed to the DIME's MMI date of 7/6/18. Claimant objected and endorsed the issue of maintenance care benefits and temporary disability benefits.

26. On March 4, 2019, Carlos Cebrian, M.D. performed an IME at the request of Respondents. (Ex. J). Dr. Cebrian performed a physical examination, and noted that Claimant was tender to extremely light touch, and recoiled away from her when he tried to lightly palpate her. *Id at 179.* Dr. Cebrian reviewed the medical records, and noted that Claimant's diagnosis was a lumbar strain/contusion. He opined that Claimant had a temporary aggravation of her underlying degenerative condition which had resolved. *Id at 182.*

27. Dr. Cebrian opined that Claimant did not need any additional medical care, as it related to her claim. *Id at 182.* He noted that Claimant had several different modalities of conservative care that were not beneficial to her. He noted that Claimant had physical therapy, trigger point injections, epidural steroid injections, and medications, all without significant benefit. Dr. Cebrian opined that Claimant's current complaints were due to the natural progression of her underlying degenerative disc disease and prior disc bulge pathology. *Id. at 184.*

28. Claimant testified at hearing. Claimant described being in the backroom stocking boxes in a shelving unit which had three levels. She recounted how she was bent over at the waist, organizing boxes, when she felt a box fall on her low back from above her. She testified that she jolted forward, and felt immediate pain in her low back.

29. Claimant testified as to her physical condition as is existed prior to the injury in this case. Claimant testified at as of January 9, 2017, she had not sought medical care for her low back in approximately two and a half years, that she was not having any significant symptoms. She was working unrestricted fully duty, in a physically demanding job. Claimant testified that at no time since January 9, 2017 has

her low back condition returned to this baseline. Claimant testified that she has pain every day, that she has constantly been in medical treatment, and that she is severely limited in her ability to perform her job and her activities of daily living.

30. Dr. Cebrian testified at hearing in this matter. Dr. Cebrian detailed the mechanism of injury and noted the lack of objective findings initially from PA-C Schwarz. He also noted that Claimant has a pre-existing history of low back pain, with positive findings of a bulging disc dating from 2014. Claimant had treated for ongoing low back pain as early as 2012. Dr. Cebrian testified that Claimant described intermittent low back pain in the years prior.

31. Dr. Cebrian reviewed the MRI from April of 2017, and noted that the MRI findings from April 2014 and April 2017 were unchanged. Dr. Cebrian noted that the two MRIs showed evidence of a chronic degenerative condition, without evidence of acute trauma. He opined that the findings on the MRI were not aggravated, accelerated, or exacerbated by the mechanism of injury described by the claimant. Dr. Cebrian agreed with Dr. Lakin that Claimant had a mild strain and contusion to her lumbar spine as a result of the injury, but that ongoing maintenance care was not related to the claim. Dr. Cebrian explained that Claimant's need for ongoing care was due to the natural progression of her underling condition, and not the original injury.

32. Dr. Cebrian agreed with Dr. Lakin and Dr. Sharma that the nature of the injury, as well as its consequences, had resolved. He differed with Dr. Sharma regarding maintenance care and Claimant's need for trigger point injections, noting that Claimant had the injections in May of 2018 without benefit. Dr. Cebrian noted that Dr. Sharma was not in possession of those trigger point records during his examination.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40- 101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of Claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

B. Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence.

C. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

D. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Grover Medical Benefits

E. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The need for medical treatment may extend beyond the point of maximum medical improvement where Claimant requires periodic maintenance care to prevent further deterioration of his physical condition. The need for maintenance care is based on whether any additional treatment is reasonable and necessary to maintain the Claimant's condition at MMI. The treatment must be casually related to the original injury. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that Claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999); *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). Section 8-42-101, C.R.S., thus authorizes the ALJ to enter an order for future treatment if supported by substantial evidence of the need for such treatment. *Grover v. Industrial Commission*, *supra.*

F. Claimant has a pre-existing history of ongoing low back pain that comes and goes. Claimant first noted ongoing back pain to her PCP in 2012. At that time, Claimant noted that she had been involved in a car accident in 2005, and had ongoing low back pain for two years before she first presented for treatment. Claimant's back pain was sufficiently severe that she was having ongoing symptoms and pain down her left leg and into her left foot. These same subjective complaints were described to the physicians following her January 9, 2017 injury.

G. Claimant specifically described the same type of pain and radiculopathy to her physicians as a result of possible nerve impingement confirmed by separate MRI findings in 2014 and 2017. Dr. Cebrian opined that the findings are unchanged, and are the result of ongoing chronic degenerative back pain. The ALJ finds persuasive Dr. Cebrian's testimony and opinions regarding the MRIs, and the objective findings three years apart.

H. The ALJ also finds persuasive the opinions from Dr. Lakin. Claimant's physicians diagnosed her with a lumbar strain and contusion. Dr. Sharma, the Division IME physician, agreed with these conclusions further noting a "mild" injury. PA Schwartz noted early in this claim that he had difficulty connecting the mechanism of injury to the subjective complaints of Claimant. He also noted the lack of objective findings.

I. Further, while Claimant presents as sincere, there is an abundance of evidence in the record to suggest that there is a psychological component to this case, highly suggestive of symptom magnification. The ALJ also notes that Dr. Castrejon's IME opinions are less persuasive than Dr. Cebrian's in this instance. Dr. Castrejon not only did not review any of Claimant's medical records pre-dating her injury (perhaps most significantly, her 2014 MRI); this fact appeared not to concern him.

J. The ALJ further notes that Claimant has already obtained the trigger point injections noted by Dr. Sharma as the only medical maintenance care needed. Claimant testified that the injections took place prior to the Division IME. Medical records from Claimant's PCPs confirm that the injections took place in May of 2018. The ALJ finds no evidence that Dr. Sharma was in possession of the Claimant's medical records from May, 2018, or he was aware that Claimant had already obtained the trigger point injections.

K. The ALJ finds it more probable that Claimant's ongoing need for medical treatment is related to the natural progression of her degenerative and pre-existing condition, and not due to the temporary aggravation which occurred as a result of her minor, albeit compensable, work injury. Her request for post-MMI medical treatment, therefore, is denied.

ORDER

It is therefore Ordered that:

1. Claimant's claim for post-MMI medical maintenance benefits ("Grover Medical Benefits") is denied and dismissed.

2. Respondents will pay Claimant $5000 as settlement in full for her TTD/TPD indemnity benefits.

3. As noted in the Stipulation, Respondents shall reimburse Medicaid for all treatment from the date of injury, to the date of MMI, for any treatment which was reasonable, necessary, and claim related.

4. Claimant's date of MMI is July 6, 2018.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 13, 2019

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. NO. 5-005-672-001

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

,

Employer,

and

SELF-INSURED
Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on May 29, 2019, in Denver, Colorado. The hearing was digitally recorded (reference: 5/29/19, Courtroom 1, beginning at 8:30 AM, and ending at 10:32 AM).

Claimant's Exhibit 1-8, were admitted into evidence, without objection. Respondents' Exhibits A- CCC were admitted into evidence, without objection.

At the conclusion. of the hearing, the ALJ established a post-hearing briefing schedule. The Claimant's opening brief was filed, electronically, on May 31, 2019. The Respondent's answer brief was filed on June 4, 2019. Claimant waived the prerogative of filing a reply brief. Consequently, the matter was submitted for decision on June 4, 2019.

ISSUES

The issues to be determined by this decision concern: (1) whether Respondent established that the Claimant waived the right to seek medical benefits for treatment to

the L5-S1 disc through an approved Stipulation; and,. whether the right L5-S1 RF Neurotomy recommended by authorized treating provider (ATP) Rick D. Zimmerman, D.O., to address the Claimant's increasing low back pain is causally related to an aggravation/acceleration of the Claimants admitted low back injury of December 14, 2015, and is it reasonably necessary to cure and relieve the proximate effects of the compensable injury.

The Respondent bears the burden of the proof, by a preponderance of the evidence on the alleged waiver by the Claimant of the right to seek medical benefits for treatment to L5-S1 disc because of an approved Stipulation. The Claimant has the burden of proof, by a preponderance of the evidence on the alleged causal relationship between the Claimant's increasing low back pain and the admitted aggravation/acceleration of the admitted low back injury of December 14, 2015.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Procedural History Findings

1. Respondent filed a Final Admission of Liability (FAL), dated April 13, 2017 ultimately admitting for a date of maximum medical improvement (MMI) of March 13, 2017; permanent medical impairment (PPD) of 18% whole person for the Claimant's low back injury of December 14, 2015; and post-MMI medical maintenance benefits.

2. Attached to the FAL, the parties entered into a Stipulation ("Parties Joint Stipulation"), dated June 10, 2016. The Stipulation stated, in relevant part, "The parties agree that the compensable injury involved in this claim is limited to the herniated disc at L4-L5" (Claimant's Exhibit 1, BS 4). The Claimant agreed at hearing that he read and understood the Stipulation. As determined herein below, the Stipulation failed to waive the Claimant's right to further treatment in the area of L4-L5.

3. On December 4, 2018, Respondent, by letter, informed authorized treating physician (ATP) Rick Zimmerman, D.O. that the requested L4-S1 RF neurotomy was denied, as the Claimant was not entitled to the proposed treatment pursuant to statute or settlement (Parties Joint Stipulation). The matter was heard on May 29, 2019.

Preliminary Findings

4. On December 14, 2015, the Claimant, the Principal of an elementary school, injured his lower back (which was an aggravation of a pre-existing back injury) while removing a disruptive student to a safe room with another teacher.

5. The Claimant's medical records show a persistent pre-existing history of lower back problems with lower extremity radiculopathy. Medical records support that he experienced pain on both the left and right sides.

6. On January 22, 2016, the Claimant received an MRI (magnetic resonance imaging) of his lumbar spine to evaluate "left sided sciatica." The MRI showed a left sided disc protrusion at L4-L5.

7. On January 27, 2016, the Claimant **was diagnosed with left sided radiculopathy stemming from the L4-L5 disc herniation. Bryan Reiss, M.D. recommended a L4-L5 microdiscectomy.**

Independent Medical Exam (IME) by Carlos Cebrian, M.D.

8. On April 14, 2016, Dr. Cebrian, at the request of the Respondent, performed an IME. Dr. Cebrian was of the opinion that the disc herniation was a new finding that was not causally related to the December 14, 2015 industrial event.

9. Dr. Cebrian also found that a microdiscectomy at L4-L5 should occur because a causal connection existed between the need for the surgery and the industrial event.

10. On June 7, 2016, the Claimant received the L4-L5 microdiscectomy by Bryan Reiss, M.D. The Claimant experienced relief of left sided symptoms, post-surgery.

11. On March 13, 2017, the Claimant was placed at MMI by ATP Tomm VanderHorst, M.D. Dr. VanderHorst documented that although the Claimant had prior L5-S1 discectomy and subsequent interbody fusion, he had "no previously documented range of motion and, as such, there was no designated apportionment" (Claimant's Exhibit 10, bate stamp (BS) 52).

12. On June 28, 2017, ATP VanderHorst performed the Claimant's post MMI maintenance evaluation. ATP Dr. VanderHorst placed the Claimant back on Gabapentin to treat the Claimant's left calf pain.

The Motor Vehicle Accident (MVA)

13. On the advice of his automobile insurance company. the Claimant saw his private physician at Kaiser, for back pain concerns following a motor vehicle accident (MVA)-- on November 20, 2017.

14. The Claimant's medical records from the November 20, 2017 visit show no acute injury to the low back and the accident required no new care to the low back.

15. On March 27, 2018, the Claimant returned to his private physician at Kaiser, complaining of right sided low back pain. He was referred for PT (physical therapy) and a neurosurgery evaluation.

16. On May 21, 2018, the Claimant reported to his private physician at Kaiser, that his back pain had worsen and was now present in his right hip.

17. On June 11, 2018, the Claimant saw ATP Dr. VanderHorst, reporting 5 to 6 months increasing pain and stiffness, specifically in the morning. The Claimant also stated that for the last 2.5 months, symptoms had become right sided.

18. At June 11 visit, ATP Dr. VanderHorst was of the opinion: "I believe his current symptoms continue to be primarily at the L4-L5 level, the level of his work related injury and thus compatible with his injury of 12/15/15." ATP VanderHorst referred the Claimant for possible epidural injections. Claimant's Exhibit 10, BS 60).

19. The ALJ draws a plausible inference that ATP Dr. VanderHorst was considering an aggravation/acceleration of the Claimant's low back condition, as work-related, based on his causality statement herein above illustrated.

20. On June 25, 2018, the Claimant saw ATP Dr. Zimmerman for a discussion on the proposed injections. ATP Dr. Zimmerman noted, "… As part of medical maintenance for the next five years, he (Claimant) is allowed reevaluation, chiropractic, and epidural steroid injections or other procedures as needed." Claimant's Exhibit 7, BS 128-129).

21. ATP Dr. Zimmerman also noted, "Diagnostic medial branch blocks are recommended at the bilateral L4-L5 levels. This will then be staged at the right sacroiliac joint for diagnostic purposes of the facet joints and potentially diagnostic and therapeutic relief or SI joint related symptoms." Claimant's Exhibit 7, BS 128-129).

22. On July 3, 2018, the Claimant underwent bilateral L4-L5 medial branch blocks provided by ATP Dr. Zimmerman. The Claimant reported a positive result, having total pain relief for 20 hours.

23. On August 1, 2018 ATP Dr. VanderHorst noted at the Claimant's follow-up that, after the first 16-20 hours, he felt total pain relief. The pain then returned and is now a 7/10. ATP Dr. VanderHorst then diagnosed the Claimant as having right sacroiliac dysfunction and suggested the rhizotomy procedure.

24. On August 6, 2018, the Claimant underwent repeat/confirmatory bilateral

L4-L5 medial branch blocks at the facet joints by ATP Dr. Zimmerman. The Claimant reported significant pain relief for 36 hours. ATP Dr. Zimmerman recommended the Claimant for radiofrequency (RF) neurotomy at the same location.

25. On September 5, 2018, the Claimant underwent a bilateral L4-L5 RF neurotomy performed by ATP Dr. Zimmerman. The Claimant reported relief in 3 of 4 spots.

26. On September 10, 2018 ,ATP Dr. VanderHorst reported pain relief in 3 of 4 locations after the L4-L5 (RF) neurotomy.

27. On October 15, 2018, ATP Dr. Zimmerman made note of the same pain issues as stated by ATP Dr. VanderHorst and the Claimant. ATP Dr. Zimmerman indicated that a L5-S1 medial branch block for final diagnostic purposes should be scheduled.

28. On October 24, 2018 and November 14, 2018, the Claimant underwent medial branch blocks at L5-S1 by ATP Dr. Zimmerman. The Claimant had diagnostic responses. ATP Dr. Zimmerman recommended a right sided L5-S1 RF neurotomy.

29. On April 30, 2019, ATP Dr. VanderHorst stated the following opinion: "I believe it is reasonable to have him [Claimant] reassessed by Dr. Reiss to further clarify his symptomatic level. His symptoms are most compatible with an S1 radiculopathy though his MRI shows only postsurgical changes at L5-S1 and some persistent disc changes at L4-L5" (Claimant's Submission Exhibit 5, BS 71).

Respondents' Independent Medical Examiner (IME) Carlos Cebrian, M.D.

30. On April 14, 2016, Dr. Cebrian, at the request of the Respondent, performed an IME.

31. In a report dated May 8, 2019, Dr. Cebrian issued a report based on a records review rather than a physical examination of the Claimant.

32. Dr. Cebrian ultimately stated the opinion that the L5-S1 neurotomy was not causally related to the December 14, 2015 industrial event, disagreeing with other doctors and the Claimant. Dr. Cebrian stated that it was more likely causally related to pre-existing facet surgery and that no further treatment should be provided to the L5-S1 level under this claim. he ALJ finds that Dr. Cebrian's opinion in this regard is speculative, inadequately founded and contrary to the weight of the evidence.

33. Dr. Cebrian also testified about the Claimant's November, 2017 motor vehicle accident (MVA) speculating that MVA's can cause or aggravate facet pathology. He stated he believed that the MVA is an intervening cause of the need for an L5-S1 procedure. The ALJ finds this "opinion'" speculative and contrary to the actual facts

concerning the MVA. The ALJ finds that this speculation significantly undermines Dr. Cebrian's opinions.

34. Dr. Cebrian conceded, however, on cross-examination that different physicians could have different opinions, that there were nerves in the spine that branched out including anterior, posterior, inferior, and superior. Under the circumstances, the ALJ infers and finds that the other physicians in this case have opinions different than Dr. Cebrian and their opinions are more credible and persuasive.

The Claimant

35. Before the admitted industrial injury, the Claimant only had episodes of back pain, nothing constant. The Claimant also credibly testified that since the industrial injury he has had constant back pain. The pain averaged 2 out of 3 on a scale of 1 to 10.

36. The Claimant additionally and credibly testified about the MVA in November 2017, where the he stated that he rear-ended another vehicle and was ticketed. He saw his private physician at Kaiser, and was informed, consistent with the medical reports, that he had not suffered an acute low back injury in the MVA and that no further care was required for the accident.

37. The Claimant testified in detail about the procedures performed by ATP Dr. Zimmerman, including both injections and RF neurotomy which gave the Claimant relief in 3 of 4 areas in his back.

38. On cross examination, the Claimant agreed that that he did not have right leg pain and right sided low back pain again until around March, 2018 and that he was not having any left sided pain during the spring of 2018.

39. The Claimant believes the ALJ can draw a plausible inference and find that the profession and aggravation/acceleration of his low back condition provides sufficient circumstantial evidence to prove that the proposed L5-S1 RF neurotomy is causally connected to the admitted December 14, 2015 industrial injury.

Ultimate Findings

40. The ALJ finds the Claimant's testimony to be credible and supported by the weight of persuasive medical evidence. For the reasons herein above stated, the ALJ finds the opinions of ATPs VanderHorst and Zimmerman, as well as the other treating and consulting medical providers credible and persuasive as supported by the

totality of the medical evidence in the record. Additionally, the ALJ finds Respondent's IME Dr. Cebrian's opinion lacking in credibility and persuasiveness.

41. Between conflicting medical opinions, the ALJ made a rational choice, based on substantial evidence, including circumstantial evidence created by the Claimant's lay testimony, to accept the opinions of the treating doctors and the plausible inferences derived from the Claimant's testimony and to reject Dr. Cebrian's ultimate IME opinion on the causal relatedness of the L5-S1 injection to the admitted industrial injury.

42. The Claimant's "signing of the Parties Joint Stipulation" did not factually waive his right to seek medical benefits for treatment to the L5-S1 level. Respondent's strained interpretation of the Stipulation would defeat the underlying purposes of the Workers' Compensation Act, would be against public policy, and it would be reminiscent of the agreement between Shylock and Antonio in the Merchant of Venice.

43. The Claimant's RF neurotomy recommended by ATP Zimmerman at L5-S1 is reasonably necessary due to an aggravation/acceleration of the Claimant's low back injury which is causally related to the Claimant's admitted industrial injury of December 12, 2015.

44. The Claimant has proven his designated issues by a preponderance of the evidence.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply

to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995).). Moreover, the ALJ, as the fact finder, is allowed to use reason and common sense in drawing inferences from other facts that have been proved. *Venetucci v. City of Colorado Springs*, 99 Colo. 389, 63 P.2d 462 (1936); *Independence Coffee & Spice Co. v. Kalkman*, 61 Colo. 98, 156 P. 135 (1916). *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). As found, the Claimant's testimony was credible and supported by the weight of the persuasive medical evidence. Additionally, the opinions of ATPs VanderHorst and Zimmerman regarding the Claimant's L5-S1 treatment needs being causally related to the December 14, 2015 industrial injury were highly credible and supported by the totality of medical evidence in the record. On the other hand, the opinion of Respondent's IME Dr. Cebrian lacked underlying persuasive explanations and overall credibility.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** that would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting

medical opinions, the ALJ made a rational choice, based on substantial evidence, including circumstantial evidence from the Claimant's lay testimony, to accept the opinions of ATPs VanderHorst and Zimmerman, and to reject the opinions of Respondent's IME Dr. Cebrian and any other contrary opinions.

Effects of the Claimant's Lay Testimony

c. Compensation can be awarded where there is competent evidence other than expert opinion. *Martin Marietta Corp. v. Faulk*, 158 Colo. 441, 407 P.2d 348 (1965). Such competent evidence includes lay testimony. *See Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Colorado Fuel & Iron Corp. v. Alitto*, 130 Colo. 130, 273 P.2d 725 (1954). *Also see Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997). As found, the Claimant's lay testimony alone created credible circumstantial evidence, backed by the opinions of ATPs VanderHorst and Zimmerman that the recommended RF procedure at L5-S1 is attributable to an aggravation/acceleration of a preexisting low back condition, which is causally connected to the admitted December 14, 2015 admitted industrial injury.

Medical/Causal Relatedness/Reasonable Necessity of Medical Treatment

d. The employee must prove a causal relationship between the injury and the medical treatment for which the worker is seeking benefits. *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. Ct. App. 1997). An employer must also provide an injured employee with reasonably necessary medical treatments to "cure and relieve the employee from the effect of the injury." § 842-101(1) (a), C.R.S. Treatments for a condition not caused by employment are not compensable. *Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187, 1189 (Colo. Ct. App. 2002). An industrial accident is the proximate cause of a claimant's disability if it is the necessary precondition or trigger of the need for medical treatment. *Subsequent Injury Fund v. State Compensation Insurance Authority,* 768 P.2d 751 (Colo. App. 1988). In order to prove that an industrial injury was the proximate cause of the need for medical treatment, an injured worker must prove a causal nexus between the need for treatment and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). It is for the ALJ, as the fact-finder, to determine whether a need for medical treatment is caused by the industrial injury, or some other intervening injury. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). Respondents are liable for the "direct and natural consequences" of a work-related injury, including consequential injuries caused by the original compensable injury. *See Travelers Ins. Co. v. Savio*, 806 P.2d 1258 (Colo. 1985). The chain of causation, however, can be broken by the occurrence of an independent intervening injury. *See* 1 A. *Larson, Workers' Compensation Law,* section 13.00 (1997). As found, the Claimant has established the causal nexus (the L5-S1 RF procedure) to the admitted December 14, 2015 industrial injury. Further, ATP Zimmerman's

recommended RF neurotomy at L5-S1 is reasonably necessary to cure and relieve the effects of the December 14, 2015 admitted industrial injury.

Intervening Cause

e. An intervening event which severs the causal connection between the injury and a subsequent injury and causes subsequent disability is an "efficient, intervening cause," which cuts off entitlement to benefits. *Schlage Locik v. Lahr,* 870 P.2d 615 (Colo. App. 1993). Where an employee had returned to work after a compensable injury and sustained a subsequent injury to the same body part and there was no proof that the previous injury contributed to the disability after the subsequent injury, the subsequent injury constituted "an efficient intervening injury." *Post Printing & Publishing Co. v. Erickson,* 94 Colo. 382, 30 P.2d 327 (1934). As found, Respondent has not established that the Claimant's November 2017 MVA was an effective, efficient intervening cause. Only the discredited opinion of Respondent's IME would tend to support this proposition, however, as found, the opinion was based on speculation.

Pre-Existing Condition

f. A compensable injury is one that arises out of and in the course of employment. Section 8-41-301(1) (b), C.R.S. The "arising out of" test is one of causation. If an industrial injury aggravates or accelerates a preexisting condition, the resulting disability and need for treatment is a compensable consequence of the industrial injury. Thus, a claimant's personal susceptibility or predisposition to injury does not disqualify the claimant from receiving benefits. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). An injured worker has a compensable new injury **if the employment-related activities aggravate, accelerate, or combine with the pre-existing condition to cause a need for medical treatment or produce the disability for which benefits are sought.** § 8-41-301(1) (c), C.R.S. *See Merriman v. Indus. Comm'n,* 120 Colo. 400, 210 P.2d 448 (1949); *Anderson v. Brinkoff,* 859 P.2d 819 (Colo. 1993); *National Health Laboratories v. Indus. Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992); *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). An injury resulting from the concurrence of a preexisting condition and a hazard of employment is compensable. *H & H Warehouse v. Vicory*, *supra*. *Duncan v. Indus. Claims App. Office*, 107 P.3d 999 (Colo. App. 2004). Even where the direct cause of an accident is the employee's preexisting disease or condition, the resulting disability is compensable where the conditions or circumstances of employment have contributed to the injuries sustained by the employee. *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989). *Also see* § 8-41-301(1) (c), C.R.S; *Parra v. Ideal Concrete,* W.C. No. 4-179-455 [Indus. Claim Appeals Office (ICAO), April 8, 1998]; *Witt v. James J. Keil Jr.,* W.C. No. 4-225-334 (ICAO, April 7, 1998). As found, the Claimant's back surgery due to the admitted December 14, 2015 injury aggravated and accelerated his low back pain to the point where ATP Zimmerman recommended a RF neurology at L5-S1.

Maintenance Medical Care/Treatment of Related Conditions to Treat the Effects of the Admitted Injury

g. An employee is entitled to continuing medical benefits after MMI if reasonably necessary to relieve the employee from the effects of an industrial injury. *See Grover v. Indus. Comm'n of Colorado*, 759 P.2d 705 (Colo. 1988). The record must contain substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve a claimant from the effects of an injury or to prevent further deterioration of his condition. *Stollmeyer v. Indus. Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995); *Grover*, 759 P.2d 705. Such evidence may take the form of a prescription or recommendation for a course of medical treatment necessary to relieve a claimant from the effects of the injury or to prevent further deterioration. *Stollmeyer*, 916 P.2d 609. Services that are "medical in nature" include home health services in the nature of "attendant care," if reasonable needed to cure or relieve the effects of the industrial injury. *Atencio v. Quality Care, Inc.*, 791 P.2d 7 (Colo. Ct. App. 1990). As found, the recommended RF neurotomy procedure at L5-S1 is reasonably necessary and causally related to the December 14, 2015 admitted industrial injury. Further, the recommended procedure targets a preexisting low back condition, the procedure is reasonably necessary to address the Claimant's back pain which was proximately caused by the admitted December 14, 2015 industrial injury.

Waiver of Right to Seek Treatment beyond Stipulated Injury

h. Waiver constitutes an intentional relinquishment of a known right. Waiver may be explicit, or it may be implied where a party engages "in conduct which manifests an intent to relinquish the right or privilege or acts inconsistently with its assertion." *Johnson v. Industrial Commission*, 761 P.2d 1140, 1147 (Colo. 1988). A waiver must be made with full knowledge of the relevant facts, and the conduct should be free from ambiguity and clearly manifest the intention not to assert the right. *Id*.; *Department of Health v. Donahue*, 690 P.2d 243 (Colo. 1984). The question as to whether a party waived a right is one of fact for determination by the ALJ. *See Johnson v. Industrial Commission, supra.* As found, the Claimant's signing of the Parties Joint Stipulation does not constitute a waiver of his right to seek medical treatment beyond the stipulated injury (in this case the stipulation was for an L4-L5 aggravation/acceleration). Further, the Claimant has shown by the preponderance of the evidence that the RF neurotomy is reasonably necessary to "cure and relieve" him from the effect of the admitted industrial injury.

Burden of Proof

i. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to reopening and additional benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985);

Faulkner v. Indus. Claim Appeals Office, 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant had proven, by the preponderance of the evidence that the right L5-S1 RF neurotomy recommended by ATP Zimmerman is causally related to the Claimant's aggravation/acceleration of the admitted industrial injury and is reasonably necessary to cure and relieve the effects of that injury. Respondents failed to prove, by the preponderance of the evidence that Claimant, by signing the Parties Joint Stipulation, limited the injury and treatment area to the L4-L5 level of the low back.

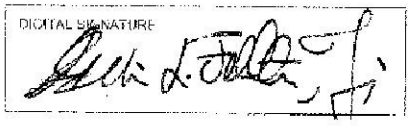
ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondent shall pay the costs of the treatment recommended by ATP Rick Zimmerman, ,D.O., subject to the Division of Workers Compensation Medical Fee Schedule.

B. Any and all issues not determined herein are reserved for future decision.

DATED this 14th day of June 2019.



EDWIN L. FELTER, JR.
Administrative Law Judge

ISSUES

I. Whether Claimant proved by a preponderance of the evidence she suffered a compensable occupational disease with a date of onset of November 16, 2016.

II. If Claimant proved she suffered a compensable occupational disease, whether Claimant has proven by a preponderance of the evidence that she is entitled to temporary partial disability (TPD) and temporary total disability (TTD) from November 16, 2016 and ongoing.

III. If Claimant proved she suffered a compensable occupational disease, determination of Claimant's average weekly wage (AWW).

IV. If Claimant proved she suffered a compensable occupational disease and entitlement to temporary indemnity benefits, whether Claimant was responsible for termination of employment.

Claimant endorsed the issue of disfigurement on her Application for Hearing. As Claimant appeared for the hearing by telephone, the issue of disfigurement was withdrawn, without prejudice.

FINDINGS OF FACT

1. Claimant is a 52-year-old woman with a prior history of cervical pain and radiculopathy. Claimant sustained a cervical injury in 2004 and underwent an anterior cervical discectomy and fusion (ACDF).

2. Claimant alleges she suffered cumulative trauma injuries to her neck and right upper extremity as a result of the work she performed for Employer. Claimant alleges a date of onset of November 16, 2016. Claimant worked for Employer, a grocery store chain, in different capacities at various locations for approximately nine years. At the time of the alleged date of onset, Claimant had been working at one particular store for approximately 1.5 years as an all-purpose clerk, performing customer service, desk operator and cashier duties. Claimant began working at this particular store in approximately June 2015, and initially performed stocking duties. In approximately December 2015 Claimant began performing more cashiering duties.

3. In January 29, 2016, Claimant presented to Kathy Vidlock, M.D. at Colorado Orthopaedics with complaints of right elbow pain that began one or two months prior. Claimant reported the pain was to the point she could not sleep. She also complained of numbness and stiffness on the right side. An ultrasound of the right lateral elbow showed fluid and swelling consistent with tendinosis. Dr. Vidlock assessed Claimant with lateral epicondylitis of the right elbow. She was prescribed Tramadol and referred

for physical therapy and taken off work. Claimant participated in physical therapy and subsequently underwent a percutaneous tenotomy on March 4, 2016. A work disability form completed by Dr. Vidlock on March 5, 2016 indicated Claimant's right elbow lateral epicondylitis was not due to her employment. Claimant was taken off of work from March 4, 2016 to March 21, 2016. At a follow-up appointment with Dr. Vidlock on April 6, 2016, Claimant reported improvement in her right elbow symptoms but increased pain in her right wrist. Claimant then underwent some physical therapy for the right wrist.

4. Claimant testified that, on November 16, 2016, she began experiencing pain in her right arm towards the end of her shift after ringing up several customers. Claimant testified she went home after her shift and took some ibuprofen. Claimant was not scheduled to work the following two days.

5. On November 18, 2016, Claimant sought chiropractic treatment at Denver Integrated Spine Center. Claimant complained to Michael Schnider, D.C. of continuous 8/10 pain in the back of her neck, which she described as a sharp, burning, and aching. Dr. Schnider assessed Claimant with cervical, thoracic and lumbar joint dysfunction with associated myospasms. Claimant underwent manipulation, manual therapy and mechanical traction. Dr. Schnider issued a letter removing Claimant from work from November 21, 2016 to November 25, 2016.

6. Claimant returned for chiropractic treatment on November 21, 2016 with complaints of continuous burning, aching and sharp pain in the back of her right shoulder.

7. Claimant testified that, after her appointment with Dr. Schnider on November 18, 2016, she made multiple attempts to speak to a manager by phone that same day to notify Employer of her upcoming absences. She testified she sent Dr. Schnider's note to Employer by fax and confirmed the receipt of the fax with a co-worker, Colin Gleason. Claimant testified she personally went to the store on November 21, 2016, saw her supervisor, Carol Mulligan, at a cash register, and asked to speak with her. Claimant testified she then went to talk to another co-worker and to Jim, an administrative assistant, whom she asked for medical leave paperwork. Claimant testified she retrieved the medical leave paperwork from Jim's office and then waited to speak to Ms. Mulligan. Claimant testified she left the store before speaking to Ms. Mulligan because she did not feel well and her daughter was waiting for her.

8. Ms. Mulligan testified at hearing that she did not recall seeing Claimant on November 21, 2016. She testified Claimant ceased appearing for scheduled work shifts after November 16, 2016 and did not notify Employer of her absences. Employer policy requires employees to immediately call and notify a member of management of any absences. On November, 22, 2016, Ms. Mulligan sent Claimant a letter stating Claimant had been absent without leave for four days. In the letter, Ms. Mulligan instructed Claimant to contact her no later than three days from the date of the letter to discuss Claimant's status, noting failure to do so would result in termination of employment. The letter was returned to sender. Claimant was terminated on November 25, 2016 for being

absent without leave since November 19, 2016 and for failing to contact Employer regarding her absences per Employer policy. Ms. Mulligan sent Claimant a letter dated November 25, 2016 notifying Claimant of her termination. This letter was also returned to sender. Ms. Mulligan testified Claimant had not reported any work injury to Employer prior to being terminated.

9. On November 28, 2016, Dr. Schnider diagnosed Claimant with post-surgical cervical radiculopathy with numbness and tingling and motor weakness and sensory deficits. He removed Claimant from work through December 2, 2016 and referred her to a neurologist. Dr. Schnider's medical notes do not include an opinion on the work-relatedness of Claimant's condition.

10. Claimant presented to Adam Seidl, M.D. at UC Health on December 1, 2016 with complaints of right shoulder pain since January 2016, now radiating into her arm and fingers. She reported neck spasms as well as pain and a burning sensation in both hands. X-rays of Claimant's right elbow and shoulder were negative for fracture or malalignment. Dr. Seidl diagnosed Claimant with cervical radiculopathy and lateral epicondylitis and performed an injection of Claimant's right elbow. He referred Claimant for occupational therapy and a neck evaluation given Claimant's previous spinal fusion and continued radicular symptoms. There is no reference in Dr. Seidl's medical note regarding the work-relatedness of Claimant's condition.

11. On January 12, 2017, Claimant presented to Stephen Pehler, M.D. at Colorado Orthopedic Consultants with neck pain. Dr. Pehler noted Claimant had a prior ACDF and initially did well but developed increasing right arm pain and bilateral shoulder pain. Dr. Pehler noted Claimant described right upper extremity symptoms and a C6-type distribution with some C7. Dr. Pehler assessed Claimant with bilateral upper extremity cervical radiculopathy and possible adjacent segment disease. He prescribed Claimant a Medrol Dosepak and ordered a cervical MRI.

12. Claimant underwent the cervical MRI on January 19, 2017, which revealed degenerative disc and joint changes with mild dural sac indentation without cord deformity and moderate right foraminal narrowing at C6-7, and a healed fusion at C5-6.

13. Claimant returned to Dr. Pehler on January 23, 2017. He noted that Claimant's cervical MRI showed left-sided adjacent segment disease at C4-5 and right-sided adjacent segment disease at C6-7. Dr. Pehler prescribed Claimant Gabapentin and ordered an EMG.

14. Claimant filed a claim for workers compensation in approximately mid-to-late January 2017. She testified she filed a claim after Dr. Pehler informed her of her condition.

15. Respondent filed a Notice of Contest on February 1, 2017.

16. Claimant underwent an EMG on February 3, 2017, performed by Simon Oh, M.D. The EMG revealed mild chronic bilateral radiculopathies, with no electrodiagnostic

evidence of any focal neuropathy, brachial plexopathy, or other cervical radiculopathy in the upper extremities.

17. Dr. Pehler reviewed Claimant's EMG findings at a follow-up appointment on February 6, 2017, noting bilateral C7 radiculopathies. His final assessment was adjacent segment disease of cervical spine with cervical radiculopathy. Dr. Pehler opined Claimant's progressive symptoms failed conservative treatment and recommended Claimant undergo adjacent segment disease decompression at C4-5 and C6-7. Dr. Pehler did not opine as to the work-relatedness of Claimant's condition in his medical notes.

18. On February 21, 2017, Claimant presented to Kathryn Bird, D.O. at Employer's authorized provider Concentra. Claimant reported she began having burning pain in her left shoulder and right forearm after cashiering on November 16, 2016. Claimant complained of 8/10 neck, wrist and elbow pain, as well as numbness and tingling in her fingers. Dr. Bird assessed Claimant with tendonitis of the left and right elbows and chronic left and right wrist pain. She noted it was possible Claimant's elbow and wrist conditions were work-related, and requested a work-site analysis. She believed Claimant also had cervical radiculopathy, which was not work-related. Dr. Bird advised Claimant to treat with ice, ibuprofen and a bandit brace, and released Claimant to full duty.

19. Claimant returned to Dr. Bird on March 7, 2017 with complaints of left shoulder and bilateral arm pain. Dr. Bird noted Claimant's workers' compensation claim was denied and released Claimant from her care.

20. A job demands analysis was performed on March 29, 2017. Claimant was not present for the evaluation. It was determined Claimant's position fell into the light-medium category in terms of physical demands of the job. Per the analysis, Claimant's position consisted of 70% customer service duties, 20-25% desk operator duties, and 5-10% cashier duties. No primary or secondary risks factors, as outlined in the Colorado Medical Treatment Guidelines, were identified.

21. Claimant disagrees her position consisted of 70% customer service duties and only 5-10% cashier duties. Claimant testified she only performed customer service duties for approximately two months, staring in August 2016, while she was training as a front end supervisor, and that most of her time was spent cashiering. Claimant did not further testify regarding the details of her position.

22. On April 11, 2017, Sean M. Griggs, M.D. performed an independent medical examination (IME) at the request of Respondent. Claimant reported having a prior history of right arm pain in January 2016, for which she underwent treatment and improved until November 2016. Claimant alleged to Dr. Griggs that the repetitive activity she performed as a cashier caused her symptoms to reoccur. Dr. Griggs performed a physical exam and reviewed Claimant's medical records, including the cervical spine MRI and EMG. He diagnosed Claimant with possible lateral epicondylitis and cervical radiculopathy. Dr. Griggs noted Claimant was no longer working yet continued to have

pain, which he remarked would typically resolve with rest if the condition was actually caused by repetitive work. Dr. Griggs recommended Claimant undergo an MRI to confirm lateral epicondylitis. He stated there was a possibility Claimant could have developed such condition from repetitive work, but that he could not make a determination absent a job description or further job details.

23. Claimant attended a follow-up appointment with Dr. Pehler on April 24, 2017. He noted Claimant continued to suffer from left-sided cervical radiculopathy related to her adjacent segment disease from her prior ACDF. He recommended Claimant undergo an anterior cervical discectomy and fusion at C4-5 and C6-7.

24. Dr. Griggs issued an addendum IME report on May 9, 2017 after reviewing the job demands analysis. Dr. Griggs opined that Claimant's lateral epicondylitis was not work-related, as cashiering duties were only 5-10% of Claimant's position, and she did not meet the criteria for any primary or secondary risk factors.

25. Dr. Griggs issued a second addendum on July 29, 2017 after reviewing additional records. He again noted Claimant's lateral epicondylitis was not work-related, as there were no primary or secondary risk factors. He reviewed Dr. Vidlock's notes and opined that Claimant underwent appropriate treatment for lateral epicondylitis prior to the claim, and her residual elbow issues were not work-related. He referenced Dr. Pehler's opinion that Claimant's ongoing bilateral upper extremity pain, neck pain and radiating pain and associated numbness were related to cervical spine disease and radiculopathy. Dr. Griggs opined that any relationship between Claimant's cervical spine issues and her work would be need to be addressed by a specialist.

26. Claimant testified she was determined disabled by the Social Security Administration in December 2018, and has since received $1,018 per month in social security disability benefits.

27. On May 9, 2019, B. Andrew Castro, M.D. performed an IME at the request of Respondent. Dr. Castro did not physically examine Claimant. He reviewed Claimant's medical records, including the cervical MRI and EMG. He noted that the EMG highlighted chronic radiculopathy at C7 likely consistent with chronic degenerative changes in Claimant's neck. Dr. Castro noted Claimant had extensive complaints of elbow and right upper extremity pain several months prior to the claimed injury, which was diagnosed as epicondylitis, and underwent treatment. His impression was: upper extremity pain vaguely in the right and left upper extremities. He opined that Claimant's symptoms were not consistent with an overuse injury, noting Claimant's job description did not involve substantial heavy lifting or repetitive awkward motions of the upper extremities. Dr. Castro agreed with Dr. Griggs that Claimant's worsening pain after being taken off of work for a period of time was inconsistent with a chronic overuse injury. He opined that Claimant's neck, shoulder and arm symptoms, as well as the need for any surgical intervention for adjacent segment degeneration, were not work-related.

28. Claimant testified that, despite her prior cervical fusion, she had been feeling fine and prior to November 16, 2016, was not having the problems she is currently experiencing.

29. The ALJ finds the opinions of Drs. Griggs, Castro, Vidlock, Schnider, Seidl, Pehler and Bird, and the testimony of Ms. Mulligan credible and persuasive.

30. Claimant failed to prove by a preponderance of the evidence she sustained a compensable occupational disease as a result of this employment.

31. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

The claimant was required to prove by a preponderance of the evidence that at the time of the injury she was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by § 8-40-201(14), C.R.S., as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

This section imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). However, the existence of a preexisting condition does not defeat a claim for an occupational disease. *Id.* A claimant is entitled to recovery if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

The claimant bears the burden to prove by a preponderance of the evidence that the hazards of the employment caused, intensified or aggravated the disease for which compensation is sought. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999). The question of whether the claimant has proven causation is one of fact for the ALJ. *Faulkner v. Industrial Claim Appeals Office, supra*. In this regard the

mere occurrence of symptoms in the workplace does not require the conclusion that the conditions of the employment were the cause of the symptoms, or that such symptoms represent an aggravation of a preexisting condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (I.C.A.O. August 18, 2005). Once a claimant makes such a showing, the burden shifts to respondents to establish both the existence of a non-industrial cause and the extent of its contribution to the occupational disease. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

As found, Claimant failed to meet her burden to prove she suffered a compensable occupational disease. It is undisputed Claimant suffers from cervical radiculopathy and lateral epicondylitis of the right elbow. Nonetheless, there is insufficient credible and persuasive evidence establishing Claimant's conditions were proximately caused by this employment. Claimant suffered from prior cervical issues, including undergoing a cervical fusion in 2004. Claimant's cervical MRI and EMG revealed chronic degenerative findings. The record is devoid of any medical opinion asserting that Claimant's cervical radiculopathy and associated symptoms were caused, aggravated, or intensified by the hazards of Claimant's employment. Dr. Bird, Castro and Griggs credibly and persuasively opined Claimant's cervical radiculopathy is not work-related. While Dr. Pehler recommends treatment for Claimant's cervical condition, his recommendation is based on a diagnosis of cervical radiculopathy related to adjacent segment disease from a prior ACDF. As such, there is insufficient record support indicating Claimant's cervical condition is related to this employment.

Similarly, there is insufficient record support that Claimant's lateral epicondylitis is work-related. Claimant was diagnosed with lateral epicondylitis in January 2016, which Dr. Vidlock noted was not work-related, and underwent appropriate treatment for the condition. Although Dr. Bird stated it was possible Claimant's lateral epicondylitis could be work-related, she requested a worksite evaluation in order to make such determination. Claimant was released from Dr. Bird's care prior to Dr. Bird making such determination; however, Dr. Griggs and Dr. Castro reviewed the job demands analysis and both credibly and persuasively opined Claimant's lateral epicondylitis and right upper extremity symptoms were not caused by Claimant's employment. The job demands analysis does not identify any primary or secondary risks factors for the development of lateral epicondylitis. While Claimant disagrees with the characterization of her duties in the job demands analysis, she failed to offer sufficient evidence to the contrary.

Based on the totality of the credible and persuasive evidence, Claimant failed to prove it is more probable than not she sustained a compensable occupational disease. As Claimant failed to prove he sustained a compensable occupational disease or industrial injury, the remaining issues of TTD, TPD, AWW and responsibility for termination are moot.

ORDER

It is therefore ordered that:

1. Claimant failed to prove she suffered a compensable occupational disease. Claimant's claim for benefits is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 14, 2019

Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Does Colorado have jurisdiction over injuries Claimant suffered in Tennessee on July 15, 2017?

- If Colorado has jurisdiction, did Claimant prove a compensable injury?

FINDINGS OF FACT

1. Claimant works for Employer as a flight attendant. Her claim arises out of an incident on July 15, 2017 at the airport in Nashville, Tennessee. The flight she was working was grounded at the gate waiting for a lightning storm to clear. Lightning struck the jet bridge that was connected to the aircraft. At the time of the lightning strike, Claimant standing in the aisle at the front of the plane approximately 3 to 4 feet from the main cabin door. The passengers were deplaned and the flight attendants were checked on-site by EMTs. Claimant was subsequently transported by ambulance to a local hospital.

2. At the time of the accident, Claimant was living in Florida and was based out of Orlando. Employer opened a workers' compensation claim under Florida law and provided medical benefits.

3. Employer's corporate headquarters is in Denver.

4. Claimant was hired as a flight attendant by Employer on October 20, 2014. At that time, she was living in Colorado. Claimant was hired in Denver and did her initial training in Denver.

5. After finishing her training, Claimant moved to Chicago and was based out of O'Hare. The exact date she moved to Chicago is unclear, but the evidence shows it was in late 2014. In 2015, she was reassigned to the Orlando hub and moved to Florida.

6. Claimant moved back to Colorado in July 2018 and now resides in Pueblo West. Her current base is Las Vegas. Claimant has never been stationed or based in Colorado since she started working for Employer.

7. Claimant filed a Colorado claim on September 10, 2018. Respondents denied the claim on the theory Colorado lacks jurisdiction.

8. No persuasive evidence was presented that Claimant was ever in Colorado for any work-related purpose after she moved to Chicago in 2014 until she moved back to Colorado in July 2018.

9. There is no persuasive evidence Employer ever filed an election with the Division to extend the default six-month extraterritorial jurisdictional time limit.

10. Colorado lacks jurisdiction over Claimant's injuries because the accident occurred more than six months after Claimant left Colorado.

CONCLUSIONS OF LAW

Compensation for injuries occurring outside Colorado is governed by the so-called "extraterritorial provision" codified at § 8-41-204. This section provides:

> If an employee who has been hired or is regularly employed in this state receives personal injuries in an accident or an occupational disease arising out of and in the course of such employment outside of this state, the employee, or such employee's dependents in case of death, shall be entitled to compensation according to the law of this state. *This provision shall apply only to those injuries received by the employee within six months after leaving the state*, unless, prior to the expiration of such six-month period, the employer has filed with the division notice that the employer has elected to extend such coverage for a greater period of time. (Emphasis added).

Colorado's power to cover out-of-state injuries is based on its interest in the welfare and protection of its citizens and their dependents. *Hathaway Lighting, Inc. v. Industrial Claim Appeals Office*, 143 P.3d 1187 (Colo. App. 2006). The extraterritorial provision is "meant to protect the employee who may be sent out of state . . . for temporary or occasional work." *State Compensation Insurance Fund v. Howington*, 298 P.2d 963, 968 (Colo. 1956). Section 8-41-204 provides the "exclusive grounds" under which Colorado may take jurisdiction of an injury that occurs outside the state. *Rodenbaugh v. DEA Construction*, W.C. No. 4-523-336 (December 20, 2002). Accordingly, the claimant must either be hired in Colorado and suffer an injury within six months of leaving the state, or be regularly employed in Colorado and injured within six months of leaving the state. *Id*. The six-month period runs from the most recent employment-related visit to Colorado. *Employer's Liability Assurance Corporation v. Industrial Commission*, 363 P.2d 646 (Colo. 1961).

As found, Colorado lacks jurisdiction over any injuries Claimant sustained at the Nashville airport in July 2017. It is undisputed Claimant moved away from Colorado at the end of 2014. There is no persuasive evidence she returned to Colorado for any work-related purpose before July 2018. Thus, the six-month period began to run in late 2014 and expired by July 1, 2015 at the very latest. It necessarily follows that the July 15, 2017 accident occurred after Colorado lost jurisdiction over any injuries she received in another state. The fact that Employer's corporate headquarters is in Denver is immaterial because the extraterritorial provision focuses solely on the injured worker's presence or absence from the state, not the employer's location.

[ORDER CONTINUES NEXT PAGE]

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 14, 2019

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-090-215-001

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

And

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on June 4, 2019 in Denver, Colorado. The hearing was digitally recorded (reference: 06/4/2019, Courtroom 5, beginning at 8:30 AM and ending at 11:30 AM)

Claimant's Exhibits 1 and 2 were admitted into evidence without objection. Respondents' Exhibits A through L were admitted into evidence without objection.

At the Conclusion of the Hearing, the ALJ took the matter under advisement and hereby issues the following decision.

ISSUE

The sole issue to be determined by this decision concerns compensability of the Claimant's injury of August 8, 2018. The issue is whether the Claimant suffered an injury legally sufficient enough to be compensable on that date-- at Employer's place of business.

The Claimant bears the burden of proof on all issues by a preponderance of the evidence.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ makes to following Findings of Fact:

Preliminary Findings

1. The Claimant and Respondents agree that an incident occurred in the Employer's warehouse on or about August 8, 2018.

2. The incident in question arose between the Claimant and one of her co-workers in the Employer's warehouse at Zone H5.

3. The incident was never officially reported to any of Employer's personnel but was self-reported to both Allison M. Fall , M.D., an authorized treating physician (ATP) on September 4, 2018 and Atoosa Etminani Amoli , M.D. (a subsequent ATP) on November 5, 2018 (Respondents' Exhibits A, bates stamp (BS) 0004- 0006, and Exhibit B, BS 0007-0009)..

4. Dr. Fall listed the reason for the Claimant's visit as being follow-up maintenance care, but noted that Claimant stated she was at work and somebody punched her left arm as it was her birthday, leading to a bruise and concern from Claimant as to how this would affect her shoulder (Respondents' Exhibit A, BS 0001 to 0002).

5. The Claimant had shoulder surgery for a rotator cuff injury in 2013 (Respondents' Exhibits C-BS 0026).

The Incident

6. The Employer's employee who struck the Claimant disputes that it was due to it being her birthday, and instead contends that it was because she was 'slapped' in the face with a shipping label by the Claimant, after asking the Claimant to assist in filing of an order, and that this was not malicious but instead part of warehouse horseplay.

7. A disputed fact concerns the cause of.Leann L_____ striking the Claimant. It is not of great significance, but rather what is important to the issue of compensability is that such action took place at the Employer's place of business. Whether L_____ struck the Claimant with a closed fist or an open hand to the Claimant's left arm; whether it was a reaction to actions of the Claimant; whether it was general warehouse horseplay, or in relation to Claimant's birthday, are of minimal import on a credibility determination regarding Claimant's testimony.

8. The ALJ finds that the striking incident by L_____ was generally accepted horseplay and not outside the course and scope of employment.

Medical

9. The Claimant then saw Dr. Amoli at Concentra on November 5, 2018 for a Division of Worker's Compensation Exam for the injury resulting from the August 8, 2018 incident (Respondents' Exhibit B, BS 0007).

10. At this time of the exam,, Dr. Amoli and Ron Rasis, PA-C (certified physician's assistant) suggested a treatment plan relating to her S40.022A work related medical diagnosis. For the contusion of her left upper arm and or shoulder area as well as the traumatic hematoma of her left upper arm, Dr. Amoli and Mr. Rasis recommended that the Claimant attend physical therapy (PT) to improve her ROM.

11. The PT sessions were included in the treatment plan from Dr. Amoli and PT was suggested for three session a week for two weeks (Respondents' Exhibit A, BS 0007.

12. This PT was ordered for the Claimant's traumatic hematoma of her left upper arm (Respondents' Exhibits A, BS 0007).

13. The Claimant attended PT at Concentra Medical Centers on November 7, 2018; November 9, 2018; and November 16, 2018 (Respondents' Exhibit C, BS 0026-0035).

14. On December 28, 2018, the Claimant was placed at maximum medical improvement (MMI) by Dr. Amoli of Concentra Medical Center (Respondents' Exhibit B, BS 0022).

Horseplay

15. The deviation between the Claimant and the other employees of the Employer was for a brief period on August 8, 2018. The ALJ finds that the deviation did not last longer than approximately one minute. The severity of the deviation was part of a generally tolerated level of horseplay in the workplace of Employer. The deviation was comingled with the performance of the Claimant's and the other employee's daily job task, specifically the request and filling of a 'will-call order' in Claimant's zone. Based on the testimony of both Respondent's witnesses and Claimant, the practice of horseplay, at least in terms of the warehouse at Employer's place of business, has become accepted as part of the employment. Several of Respondent's witnesses made reference to horseplay in their direct examinations and mentioned that employees in the warehouse "joked all the time." Because there was no evidence of any policy or provision maintained or enforced by the Employer in regard to disciplining such horseplayers, the ALJ finds that the practice of horseplay is an accepted part of the employment within the warehouse.

16. Respondent's contend that the assault that caused the alleged injury was personal, and therefore did not create a compensable injury. Because the assault between the two employees had an inherent connection with the employment, mainly the filling of an order and discussion of such activity between the employees, the incident satisfies the "arising out of employment" requirement of compensability.

Ultimate Findings

17. The ALJ finds the Claimant's testimony concerning her injury, resulting from the incident on August 8, 2018 was credible and dispositive.

18. The ALJ finds that the incident of August 8, 2018 was part of a pattern of tolerated horseplay and the incident was, therefore, within the course and cope of employment.

19. Regardless of the tolerated horseplay, the Claimant sustained a contusion to the left upper arm and this injury was sufficient to require medical treatment.

20. Based on the totality of the evidence, the ALJ finds that the Claimant sustained a compensable injury, consisting of a contusion to the left upper arm on August 8, 2018.

21. The Claimant has sustained her burden of proof by a preponderance of the evidence on the issue of compensability.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered to "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull*, 802 P.2d 1182, 1183 (Colo. App 1990); *Penasquito Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. *Arena v. Indus. Claim Appeals Office,* 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned to evidence is a

matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office*, 297 P.3d 964, 2012 COA 85. The fact finder should consider, among other things, the consistency or inconsistency of a witness; testimony and/ or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/ or actions; the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil, 3:16 (2005); *One Hour Cleaners v. Indus. Claim Appeals Office*, 914 P.2d 501 (Colo. App. 1995). As found, the Claimant's testimony concerning the injury of August 8, 2018 was credible, despite being disputed by the testimony of Respondents' witness Leann L_____.

Compensability

b. An "injury" referred to in § 8-41-301, C.R.S., contemplates a disabling injury to a claimant's person, not merely a coincidental and non-disabling insult to the body. *See Henderson v. RSI, Inc.,* 824 P.2d 91 (Colo. App. 1991). *Also see Gaudett v. Stationers Distributing Company*, W.C No. 4-135-027 [Indus. Claim Appeals Office (ICAO), April 5, 1993}. A priori, the consequences of a work-related incident must require medical treatment **or** be disabling in order to be sufficient. The claimant must prove by a preponderance of the evidence that her injury was proximately caused by an injury arising out of and in the course of her employment with employer. § 8-41-301(1)(b) & (c), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). As found, the Claimant's injury required medical attention and was, therefore, sufficient to be compensable.

c. An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of her employment and during an activity that had some connection with her work-related functions. *See Triad Painting Co. v. Blair,* 812 P.2d 638 (Colo. 1991); *Hubbard v. City Market,* W.C No. 4-934-689-01 (ICAO, November 21, 2014). It was not disputed that the injury alleged by the Claimant occurred "in the course of" employment in the present circumstance. The Claimant was in the warehouse of the Employer on August 8, 2018, at a time when she was intended to be there. One work-related activity that brought about the injury was the request of another employee directed at the Claimant to assist in the filling of a "will-call order'" within the Claimant's zone of the Employer's warehouse. Therefore, the activity that brought about the injury was connected to the Claimant's work-related functions.

d. The "arising out of" element is narrower and requires an injured worker to show a causal connection between the employment and the injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those function to be considered part of the employment contract. *See Triad Painting Co. v. Blair, supra.; City of Brighton v Rodriguez,* 318 P.3d 496, 502 (Colo. 2014). It is not essential to compensability that an employee's activity at the time of the injury result from a job duty if the activity is sufficiently incidental to the work to be properly

considered as arising out of and in the course of employment. *Panera Bread, LLC v. Indus. Claim Appeals Office,* 141 P.3d 970 (Colo. App. 2006); *Rodriguez v. Pueblo County,* W.C No. 4-911-673-01 (ICAO. August 2, 2016). As found, the Claimant's injury arose out of her job duties.

e. If a claimant's activity at the time of the injury constituted such a substantial deviation from the circumstances and conditions of the claimant's employment that the activity is for the claimant's sole benefit, the injury does not arise out of or occur in the course of employment. *Kater v. Indus. Commission,* 728 P.2d 746 (Colo. App. 1986); *Laroc v. Labor Ready, Inc.*, W.C No. 4-783-889 (ICAO ,February 1, 2010). The activity that led up to the Claimant's injury was a deviation in the sense that it was horseplay, as claimed by Respondents' witness, L_____. Where the alleged deviation from employment involves "horseplay," the courts apply a four-part test to determine whether the resulting injury is compensable. In *Lori's Family Dining v. Indus. Claim Appeals Office,* 907 P.2d 715, 718 (Colo. App 1995), the Court of Appeals held that the relevant factors are:

> (1) The extent and seriousness of the deviation; (2) the completeness of the deviation, i.e., whether it was commingled with the performance of a duty or involved an abandonment of duty; (3) the extent to which the practice of horseplay had become an accepted part of the employment; and (4) the extent to which the nature of the employment may be expected to include some horseplay. *Orist v. G4s Secure Solutions (USA), Inc.*, W.C No. 4-886-126-01 (ICAO. August. 17, 2012).

No single factor is determinative, and the claimant need not prove the existence of every factor in order to establish compensability. Ultimately, resolution of the issue is one of fact for determination by the ALJ. *Panera Bread, LLC v. Indus. Claim Appeals Office, supra.* As found, the deviation between the Claimant and the other employee of Employer was for a brief period on August 8, 2018. From the facts before the ALJ, it appears that said deviation did not last longer than approximately one minute. The severity of the deviation remains open to interpretation but appears to have been part of a generally tolerated level of horseplay in the workplace of Employer. As for factor (2) above, the deviation was comingled with the performance of Claimant's and the other employee's daily job task, specifically the request and filling of a 'will-call order' in Claimant's zone. Based on the testimony of both Respondent's witnesses and Claimant, factor (3) above has been satisfied. The practice of horseplay, at least in terms of the warehouse at Employer's place of business, has become accepted as part of the employment. Several of Respondent's witnesses made reference to horseplay in their direct examinations and mentioned that employees in the warehouse "joked all the time." Because the ALJ is unaware of any policy or provision maintained or enforced by Employer in regard to disciplining such horseplay, the ALJ finds that the practice of horseplay has become accepted as part of the employment within the warehouse.

f. Respondent's also contend that the assault that caused the alleged injury was personal, and therefore did not create a compensable injury. Several Colorado cases have dealt with this issue and developed a test for determining if an assault arises out of employment for the purposes of compensability. "Under the test, willful assaults by co-employees are divided into three categories: (1) those assaults that have an inherent connection with the employment; (2) those assaults that are inherently private; and (3) those assaults that are neutral. *Horodyskyj v. Karanian,* 32 P.3d 470, 475 (Colo. 2001) *see Popovich,* 811 P.2d at 383 (explaining the test as established in *Tolbert,* 759 P.2d at 23–24). "Both the first and third categories of assaults arise out of the employment for the purposes of the Workers' Compensation Act and therefore prevent an employee from suing his or her employer in tort for injuries based on such assaults." *Id.* Because the assault between the two employees had an inherent connection with employment, mainly the filling of an order and discussion of such activity between the employees, the incident falls within the first category and satisfies the arising out of employment requirement of compensability.

Burden of Proof.

g. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained her burden on compensability.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant sustained a compensable injury on August 8, 2018.

B. Any and all issues not determined herein ae reserved for future decision.

DATED this 17th day of June 2019.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

This decision of the administrative law judge does not grant or deny a benefit or a penalty and may not be subject to a Petition to Review. Parties should refer to § 8-43-301(2), C.R.S., and other applicable law regarding Petitions to Review. If a petition to Review is filed, *see* Rule 26, OACRP, for further information regarding the procedure to be followed.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-047-379-003

ISSUES

I. Whether Claimant has overcome the Division Independent Medical Examination ("DIME") physician's opinion that he reached MMI on April 27, 2017.

II. Whether Claimant has established that additional medical treatment is reasonable and necessary to reach MMI.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant is a 51-year-old man. He was employed as an auto painter with the Employer, Auto Collision Specialists, from October 2014 to approximately August 2017. The Claimant has worked as an auto painter for the last 30 years.
2. Claimant testified that prior to April 27, 2017, he worked overtime hours nearly every week and that, outside of his work activities, he was not participating in any sports or hobbies in which he repetitively used his body. Claimant also testified that prior to April 27, 2017, he did not have lower back pain, right radicular symptoms, or right groin pain.
3. Claimant testified that, at the time of the injury, he was painting a "monster truck." He described the height of the truck by stating that the lift was so high on the truck, he had to let air out of the tires in order to be able to lean over the truck and reach the top of the truck while using a ladder and platform. Claimant also testified that this portion of the paint job took approximately one week.
4. Claimant also testified that due to the height of the truck, he had to constantly move up and down a ladder with his equipment and work on a narrow platform that was only about 9-10 inches wide. Claimant also said that due to the height of the truck, he would have to stand on the tips of his toes, while standing on the ladder and/or the narrow platform, and try to keep his balance while leaning/bending forward and twisting to paint the truck with a paint gun that was attached to an air hose. Claimant also had to perform these physical tasks while balancing and using the paint gun and sander over his head. Claimant further stated that at times he would have to contort his body and lean/bend over the truck with his equipment to reach the center of the roof, but keep himself from brushing up against that portion of the truck that had already been painted. Claimant reported that while completing this work on April 27, 2017, which required him to paint in an awkward position that was atypical, he began to experience severe low back pain as well as right sided leg, buttock, and foot pain.

5. Claimant reported the injury to Employer the same day, April 27, 2017. Claimant further testified that Employer did not want to file a workers' compensation claim and first directed him to a chiropractor. Claimant went to the chiropractor twice, but the treatment did not improve his back pain or his radicular symptoms.

6. Thereafter, Claimant sought medical care with his primary care physician, Dr. Greg Tjossem, on May 9, 2019, at Kaiser Permanente.

7. Dr. Tjossem diagnosed Claimant with lumbar radiculopathy and advised Claimant that he should not work on ladders or lift/push/pull more than 20 lbs. until he was evaluated by a worker's compensation physician. (*Exhibit A*)

8. Claimant was subsequently evaluated by Colleen August, PA-C, at UC Health – Poudre Valley Hospital ER on May 10, 2017. PA-C August noted that Claimant's objective findings were consistent with his history and/or the work related mechanism of injury/illness. She further described his injury as, "pain coming from carrying paint gun up and down stairs" and recommended that the Claimant remain off work for 1-2 days as well as further evaluation. (*Exhibit 7, p. 37 and 46*)

9. On May 11, 2017, Claimant was referred to Dr. Robert Nystrom at Concentra Medical Center. Dr. Nystrom noted Claimant was experiencing issues from his lower back into his right lower extremity to the bottom of his foot and that, most recently, developed pain into his groin area. He recommended an immediate lumbar MRI and work restrictions to include no trunk rotation and no lifting more than 10 pounds. With regards to injury history, Dr. Nystrom documented the following:

> This injury is the result of **twisting** (Pt was painting a large truck with a lift and was climbing up on the truck and up and down a step ladder for 3-4 hours which included the prep prior to painting and toward the end of the job felt significant pain in his low back. Pt states he has been painting for 30 years and has been working for this company for the last 3 and has never had a back injury…(*Emphasis added)*

(*Hearing Exhibit 8, pp. 89 and 95-98*)

10. Claimant underwent a lumbar MRI the following day, May 12, 2017. The MRI revealed multilevel disc and facet changes with the greatest and most significant canal narrowing at the L4-5 level where it was moderate. (*Exhibit 9, p. 100*)

11. On May 16, 2017, Claimant returned to Concentra. Amber Payne, PA-C, noted that Claimant's lumbar and lumbar radicular symptoms were somewhat improved but continued to recommend work restrictions and physical therapy. (*Exhibit 8, pp. 84-87*)

12. Due to his work injury, Claimant was restricted from performing his regular job duties. Due to his work restrictions, Respondents admitted for temporary total disability benefits as of May 13, 2017.

13. Claimant returned to Concentra on May 23, 2017. Amber Payne, PA-C, continued to note improvement with physical therapy and that Claimant's radicular symptoms

were improving, but yet increased Claimant's work restrictions. (*Exhibit 8, pp. 80-83*)

14. On May 25, 2019, Respondents filed a General Admission of Liability admitting to medical and temporary total disability benefits. (*Exhibit 2*)

15. On June 6, 2017, Claimant was again evaluated by Dr. Nystrom. He noted that Claimant had recently finished physical therapy and that his low back symptoms had improved. Dr. Nystrom recommended massage therapy and that Claimant return to full duty at work. (*Exhibit 8, pp. 77-79*)

16. Claimant continued to treat with Dr. Nystrom at Concentra, when evaluated on July 10, 2017, Dr. Nystrom noted Claimant continued to improve, but required additional massage and chiropractic care, and was approaching MMI. (*Exhibit 8, pp. 73-75*)

17. On July 31, 2017, Dr. Nystrom placed Claimant at MMI. No impairment was assigned and Claimant was directed to continue with chiropractic care and massage therapy.

18. On August 14, 2017, Respondents filed a Final Admission of Liability admitting to Dr. Nystrom's findings of MMI. (*Exhibit 3*)

19. Claimant timely filed an Objection to Respondents' August 14, 2017, Final Admission of Liability and requested a Division IME. Dr. Wallace Larson was selected to serve as the DIME physician and the DIME was scheduled for January 9, 2018.

20. Claimant commenced chiropractic care with Dr. Scott Parker on August 9, 2017, Dr. Parker noted ongoing right sacroiliac dysfunction with thoracic region tightness. He recommended 3-5 chiropractic treatments. Claimant returned for chiropractic care with Dr. Parker on August 11, 16 and 18, 2017. During that time, Claimant advised Dr. Parker that he was experiencing bouts of sharp pain in the right piriformis muscle region and that he felt he may need to see Dr. Nystrom again. Dr. Parker indicated that he would speak to Dr. Nystrom if the issues failed to improve. (*Exhibit 11, pp. 116-126*)

21. Claimant underwent additional chiropractic treatments with Dr. Parker on August 22, 24 and 29, 2017 as well as September 7 and 13, 2017. Dr. Parker continued to note issues with ongoing right radicular pinching and cramping and spoke to Dr. Nystrom about the Claimant returning for an evaluation and medical care. Claimant returned to Dr. Nystrom on September 13, 2017. (*Exhibit 11, pp. 110-115*)

22. On September 13, 2017, Claimant returned to Dr. Nystrom for additional evaluation and treatment. Dr. Nystrom concluded Claimant's case needed to be re-opened and referred Claimant to Dr. Shimon Blau for an evaluation for injections. (*Exhibit 8, pp. 55-60*)

23. Claimant was evaluated by Dr. Blau on September 18, 2017. Dr. Blau noted Claimant had a work-related injury, occurring on April 27, 2017, resulting from painting a car while working on a step stool over a 3-4 day period. He noted that Claimant continued to have ongoing complaints of a deep pinching pain in his right buttock that was constant in nature, increased with repetitive motion, and walking.

He noted that Claimant also, at times, had pain radiating down his right leg to the bottom of his foot. Dr. Blau recommended an ultrasound-guided right piriformis muscle steroid/lidocaine injection. (*Exhibit 10, pp. 107-109*)

24. On September 25, 2017, Claimant underwent a right piriformis muscle ultrasound-guided steroid/lidocaine injection with Dr. Blau. (*Exhibit 10, pp. 106-108*)

25. On October 10, 2017, Claimant returned to Dr. Blau and told him the injection, which he had on September 25, 2017, did not help reduce his symptoms. He also indicated that he continued to have the feeling of a knot in his right buttock as well as tingling going down his right posterior lower extremity and numbness in this bottom of his right foot. Dr. Blau diagnosed lumbar radiculopathy and recommended a right L4-5 interlaminar epidural steroid injection. (*Exhibit 10, pp. 104-105*)

26. On November 20, 2017, Claimant underwent an Independent Medical Examination with Dr. Jeffrey Wunder. Dr. Wunder noted the following in his report:

    - Mr. Munoz presented at a 49-year-old, right-hand-dominant male. His chief complaint was "pressure in my right buttock." He was employed as an auto painter for Specialty Auto Body. He was hired there in October of 2014 and terminated in August 2017. At this point in time he reported that he is doing some subcontracting work now, working only 9-10 hours per week.
    - Mr. Munoz reported no previous history of low back pain.
    - The current work-related injury occurred on 04/27/17. He reported that he had been working for four weeks on a monster truck that was elevated. In order to get to this vehicle, he had to climb up a stepladder to a platform where he prepped and painted the vehicle. This included sanding. He carried multiple objects up his stepladder including hose, paint gun, and sander and then worked on painting the truck. He reported that going up and down the ladder occurred for about one week. He then began to experience gradual onset of right buttock more than low back pain. He reported that he felt a shocking feeling down his right lower extremity to the plantar surface of his foot extending into his first three toes.
    - Lumbar range of motion was reduced with pain in the low back with flexion which reproduced his right buttock pain…Sensation to pin was decreased in the right L5 distribution, ie., dorsum of the foot. Manual muscle testing was normal, except for right great toe extension which was grade 4/5.
    - IMPRESSION: 1. Right L5 radiculopathy 2. Lumbar degenerative disc disease with lateral recess stenosis at L4-5.
    - DISCUSSION: It is my opinion that Mr. Munoz has a right L5 radiculopathy which would be related to his work-related activities on date of injury 04/27/17. He was initially diagnosed with lumbar

radiculopathy by his physician at Kaiser Permanente and even at his initial visits at Concentra. His initial treatment was conservative, but he continued to have fluctuating pain symptoms. It is unclear why Dr. Nystrom placed him at maximum medical improvement on 08/02/17…Mr. Munoz stated that he continued to have symptoms and finally returned for reevaluation on 09/13/17. He was not doing well at that point. Dr. Nystrom at that time recommended reopening the case…he was given a whole new line of therapy including guided injections for the diagnosis of lumbar radiculopathy.

- I do not believe that he has reached maximum medical improvement. I believe he has always had symptoms of lumbar radiculopathy which were not addressed.
- He was never symptom free when he was placed at MMI without impairment or restrictions, and Dr. Nystrom's request to begin treatment and reopen the claim have not been honored. Mr. Munoz at this point in time continues to work 9-10 hours per week doing the best he can but still has symptoms of radiculopathy and as noted today findings of right L5 radiculopathy.
- I believe that Mr. Munoz needs to undergo a right L5 transforaminal epidural steroid injection (TFESI).
- I think he should be restarted in physical therapy. If he continues to have recurrent symptoms, then I would recommend surgical evaluation.

(*Exhibit 5, pp. 25-28*)

27. On December 11, 2017, Claimant returned to Dr. Blau for a right L4-5 interlaminar epidural steroid injection. However, due to issues with high blood pressure, Claimant was referred to the ER and the injection was not performed. Claimant returned to Dr. Blau on or about December 29, 2017, for the injection and reported a dramatic decrease in symptoms for several days thereafter. (*Exhibit 10 pp. 102-103*)

28. On January 9, 2018, Claimant underwent a Division IME that was performed by Dr. Wallace Larson. Dr. Larson concluded Claimant suffers from degenerative disc disease and foraminal narrowing and that such conditions were not caused by Claimant's work. He then summarily concluded Claimant's symptoms and need for medical treatment, which includes a surgical evaluation, are due to the natural progression of Claimant's degenerative disc disease and not from his work activities.

29. A review of Dr. Larson's report reveals Dr. Larson obtained very little information regarding the exact physical requirements of Claimant's job duties and the alleged cause of Claimant's work injury. As set forth in his DIME report, Dr. Larson merely described Claimant's job duties as follows:

> He reports that his occupation involves painting cars. He reports that he spent one week straight painting a large crew cab type of monster truck. He did that for 1 week straight and following that began to notice right lower back pain. He had been working on an adjustable platform and needed to climb up and down from a platform.

(*Exhibit 12, pg. 130*)

30. There is no indication in his report that Dr. Larson actively tried to obtain more details from Claimant regarding the physical requirements of his job. For example, there is no indication Dr. Larson tried to determine whether painting the large "monster truck" was more physically demanding than Claimant's regular job duties, required additional bending, twisting and being in awkward positions, and whether those activities resulted in more stress being placed on his low back. In his report, Dr. Larson merely listed some of the medical records he reviewed, a brief summary of what the records provided, and then summarily concluded Claimant did not sustain a work injury on April 27, 2017. His conclusion is as follows:

> The patient has right-sided sciatica which has not responded to conservative treatment. The patient does have multilevel degenerative disc disease and foraminal narrowing. It would be appropriate to consult a spine surgeon. The patient does not have a work-related disorder of his lumbar spine. He has a degenerative condition in his lumbar spine. He does not have specific history of trauma at work. By history it appears that he noticed his symptoms after work but there was no work-related injury and his work does not appear to have caused this as a result of repetitive use disorder. His spine surgical consultation would therefore be for a nonwork related condition.

(*Exhibit 12, p. 133*)

31. Dr. Larson also concluded Claimant was at MMI on April 27, 2017, the date of injury.

32. Therefore, Dr. Larson concluded Claimant suffered from degenerative disc disease and foraminal narrowing and that his symptoms and need for further treatment, which included a surgical evaluation, were due to the natural progression of Claimant's degenerative disc disease.

33. Respondents filed a second Final Admission of Liability on April 26, 2018 admitting to the findings of the DIME physician, Dr. Larson. (*Exhibit 4*)

34. On March 29, 2018, Dr. Rebekah Martin performed a Rule 16 review of a request for Dr. Blau to perform a L5 selective nerve root block. It is not clear which medical records Dr. Martin was provided and reviewed before rendering her opinion. In her report, she discusses only the May 11, 2017, report from Concentra, the MRI, and Dr. Larson's DIME report, which references additional medical records. She then concluded that:

> The requested right L5 transforaminal epidural steroid injection is not medically indicated or appropriate for a specific work-related incident. The patient did not have any specific occupational injury or incident that clearly caused the changes noted on the lumbar spine MRI. In addition, the changes on the lumbar spine MRI should be considered degenerative in nature, without findings suggestive of any acute trauma or change that would result in nerve root compression and symptoms of radiculopathy/radiculitis. (*Exhibit D*)

35. The ALJ does not find Dr. Martin's opinion and conclusion as set forth in her March 29, 2018, report, to be credible or persuasive. For example, Dr. Martin reframes the issue in a manner that precludes her, or anyone else, from finding the injection to be appropriate under the facts of this case. Dr. Martin reframes the issue to be:

    - Whether the injection is appropriate due to a specific work-related incident that clearly caused the changes noted on the lumbar MRI.

    In essence, Dr. Martin sets an unattainable standard for Claimant to meet. The real issue is whether Claimant's underlying degenerative disc disease was aggravated by his work activities and resulted in a L5 nerve root irritation for which the injection has been prescribed. Dr. Martin, however, has reframed the issue in a manner that requires Claimant to establish:

    i. That his injury is the result of a specific and isolated incident - which it was not; and

    ii. That the incident clearly caused the changes on the MRI – which he cannot - because the MRI findings are degenerative, and by definition are not due to an acute and specific incident.

36. Dr. Martin also stated Claimant's symptoms are suggestive of a S1 nerve root irritation instead of L5. However, Dr. Martin did not physically examine Claimant and does not appear to have all of his medical records from this claim. Therefore, her opinions and conclusions do not appear to be well founded when compared to Dr. Blau who determined an injection at the L5 level was appropriate in this case after physically examining Claimant.

37. On April 10, 2018, another physician from Concentra, possibly Dr. Blau, ordered an MRI of Claimant's right hip to assist in diagnosing the cause of Claimant's right groin pain. On April 16, 2018, Dr. Martin issued a second Rule 16 Report. Dr. Martin concluded the MRI was not reasonable or medically necessary because the medical records provided to her do not show Claimant reported symptoms consistent with intra-articular hip pathology on the right side directly after the incident. Again, the ALJ does not find Dr. Martin's conclusions to be credible or persuasive for the following reasons. First, there is no indication in her second report that she reviewed all of the relevant medical records. Second, there is no discussion in her report why Claimant's groin pain, which is noted in the record from the first physician he saw at Concentra, would not support performing an MRI for diagnostic purposes. Third, it does not appear Dr. Martin is aware of the physical requirements of

Claimant's job when he was painting the "monster truck." Consequently, it does not appear she had sufficient information to render a credible and persuasive opinion.

38. Dr. Wunder, an expert in Physical Medicine and Rehabilitation and a physician with Level II Accreditation, testified consistent with his November 20, 2017 IME report. Dr. Wunder stated that he had often performed causation analysis of injuries and that it was his opinion that Claimant's job duties of painting the "monster truck, which included the repetitive activity of carrying and managing items while going up and down a ladder, caused irritation around the L5 nerve root on the Claimant's right side and therefore, like his authorized treating providers, believed Claimant sustained a work related injury on April 27, 2017. He testified that the specific finding of right L5 nerve root irritation was born from the Claimant's significant pain relief following the transforaminal steroid injection and the fact that he had pain and symptoms in the first three toes of his right foot.

39. Dr. Wunder also testified consistent with Claimant's medical providers that Claimant was not at MMI. Dr. Wunder stated that since the Claimant had a positive response to the injection, that a repeat injection would be reasonable and that if it only provides temporary relief that a surgical consultation and repeat MRI scan would be warranted.

40. Concerning his opinions of Dr. Larson's causation analysis, Dr. Wunder testified that Dr. Larson's description was very brief and flawed in its assessments that the Claimant's pain started after work. As noted by Dr. Wunder, and Claimant, his pain started while at work. He also testified that Dr. Larson indicated Claimant alleged his back pain was caused from walking up and down a ladder. However, and as testified to by Claimant and Dr. Wunder, Claimant's job duties were much more physically demanding than just casually climbing up and down a ladder or standing on a platform. Dr. Wunder also testified that Claimant's job tasks could and did result in a compensable, occupationally related, lower back injury, for which Claimant still needs treatment before Claimant can be placed at MMI.

41. Dr. Wunder further explained that a causation analysis requires an accurate diagnosis and then a determination as to whether or not the work-related activities would be consistent with the diagnosis. In this case, Dr. Wunder opined that the low back treatment guidelines have some conflicting information with regard to an occupational/repetitive motion back injury. However, Dr. Wunder clearly and convincingly concluded that the fact that Claimant had no lower back or radicular symptoms before working on the large truck and then developed pain and radicular symptoms while working on the large truck, which required twisting and bending, such factors lead to a finding of work relatedness, in the form of an aggravation of an asymptomatic preexisting condition. Dr. Wunder clarified that while he disagreed with Dr. Larson's causation analysis, many of their diagnostic findings were similar and that he agreed with Dr. Larson that Claimant should be referred for a surgical evaluation.

42. Dr. Larson testified consistent with his Division IME report. He did not think Claimant suffered a compensable work injury because no singular traumatic event occurred that could explain Claimant's back pain.

43. Dr. Larson also indicated that he did not believe Claimant's line of work was repetitive for lifting and twisting significant amounts of weight in sufficient amounts to have caused an occupational disease in the form of the degenerative disc disease and foraminal narrowing shown on the MRI. In essence, Dr. Larson concluded that based on the MRI findings, Claimant suffers from degenerative disc disease with foraminal narrowing and that his back pain and radicular symptoms were inevitable and unrelated to his work activities. However, such analysis is in direct conflict with the Medical Treatment Guidelines referenced by Dr. Wunder. The *Guidelines* specifically state that degenerative findings on an MRI cannot be used to justify an argument that back pain in a specific individual was inevitable and not due to work related exposures.[1]

44. Moreover, Dr. Larson failed to analyze all of the job duties Claimant performed while painting the "monster truck" and which he alleges caused his injury. Dr. Larson focused only on Claimant's job activities of climbing up and down a ladder to, and from, a platform, in perfect form, without any equipment. Dr. Larson also failed to analyze the physical requirements involved in painting the truck once Claimant had climbed up the ladder and was on the platform. Again, Dr. Larson's methodology is inconsistent with the *Guidelines*. The *Guidelines* require the physician to obtain a detailed history and job description in order to assess causation. This includes inquiring about the common positioning of the Claimant's body during the workday – such as bending and twisting – as well as the frequency and physical requirements of lifting, pushing, and pulling. [2]

45. Therefore, without a clear understanding of the physical requirements of Claimant's job duties, i.e., relevant facts, Dr. Larson analyzed causation. Moreover, when additional relevant facts regarding Claimant's job duties were brought to his attention during the hearing, he declined to consider the additional information and held on to his prior conclusions.

46. The *Guidelines* also set forth what constitutes a compensable injury. The *Guidelines* indicate that work-related conditions may occur from "a work-related exposure that renders a previously asymptomatic condition symptomatic and subsequently requires treatment." [3] Dr. Larson, however, failed to analyze in his DIME report whether Claimant's work activities, even as he understood them and as set forth in the DIME, aggravated Claimant's preexisting asymptomatic degenerative disc disease and foraminal narrowing and caused the need for medical treatment.

47. The ALJ finds Dr. Wunder's opinions and testimony to be highly credible and very persuasive.

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[1] *See* Medical Treatment Guidelines, Rule 17, Exhibit 1, Low Back Pain, D(1)(d).(Clinicians should be well versed on the non-predictive value of degenerative imaging findings as noted in section E.1. Imaging Studies. Numerous studies have validated the finding of degenerative changes in older asymptomatic individuals. The presence of these findings cannot be used to justify an argument that back pain in a specific individual was inevitable and not due to work related exposures.)

[2] *See* Medical Treatment Guidelines, Rule 17, Exhibit 1, Low Back Pain, D(1)(a)(i).

[3] *Id*. at pg. 12.

48. Claimant was not exposed to the same physical demands required by his job when he was not working.

49. Based on the above findings, the ALJ finds, by clear and convincing evidence that Dr. Larson erred in his analysis and conclusion that Claimant did not suffer a compensable injury and was therefore at MMI as of the date of the alleged injury.

50. During rebuttal, Claimant again testified that painting the roof of the monster truck, which was approximately 8 feet high, required him to twist, turn, stretch, and lean over the truck. As aptly stated by Claimant, "you're not a robot" performing the job.

51. The ALJ agrees that the description of what Claimant was doing at work when he developed his symptoms, as noted by various providers, is not a model of precision and consistency. The medical records contain various fragmented statements regarding Claimant's job duties, what he was doing when his symptoms developed, and where he was when his symptoms developed. However, Claimant's testimony filled in the gaps, corrected any errors, and provided context to the fragmented statements contained in the medical records. Therefore, the ALJ finds Claimant's testimony to be highly credible, very persuasive, and consistent with the record.

52. The causation analyses of Drs. Wunder, Nystrom, Blau, Tjossem and PA-C August and Payne support the findings of a compensable work related injury occurring on April 27, 2017, and that Claimant is not at MMI, and is need of additional treatment to cure and improve his symptoms that were caused by his work injury.

53. The ALJ finds that the L5 injection and right hip MRI recommended by Dr. Blau is reasonable and necessary to determine the extent of Claimant's injuries as well as the type and extent of future treatment. The ALJ further finds that such treatment is reasonable and necessary to cure Claimant from the effects of his work injury.

54. The ALJ finds Claimant has established by clear and convincing evidence that he is not at MMI for his compensable work injury.

55. The ALJ further finds that Claimant has established by clear and convincing evidence that he is entitled to reasonably necessary and causally related medical treatment to cure him from the effects of the April 27, 2017, industrial injury.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). The facts in a workers' compensation case must be interpreted neutrally;

neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. **Whether Claimant has overcome the Division Independent Medical Examination ("DIME") physician's opinion that he reached MMI on April 27, 2017.**

a. Whether Claimant suffered a compensable injury.

The threshold question of whether Claimant sustained a compensable injury in the first instance is one of fact that the ALJ must determine, if contested, under the preponderance of the evidence standard. *See Leprino Foods Co. v. Industrial Claim Appeals Office of State*, 134 P.3d 475, 483 (Colo. App. 2005) (citing *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001). Consequently, the DIME physician's opinion on this issue is not entitled to special or presumptive weight. *See Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000).

A claimant is required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S.

A preexisting disease or susceptibility to injury does not disqualify a claim if the injury aggravates, accelerates, or combines with the preexisting disease or infirmity to

produce the need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The ICAO has noted that pain is "a typical symptom from the aggravation of a pre-existing condition" and a claimant is entitled to medical treatment for pain as long as the pain was proximately caused by the injury and is not attributable to an underlying preexisting condition. *Rodriguez v. Hertz Corp.,* WC 3-998-279 (ICAO February 16, 2001).

However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any preexisting condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a preexisting condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether Claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

In this case, Respondents filed a General Admission of Liability on May 25, 2017, and admitted liability for Claimant's industrial injury. Then, upon receipt of the Division Examiner's opinion, they filed a second Final Admission of Liability on April 26, 2018. Consequently, this is an admitted claim.

Moreover, Respondents did not move to withdraw their admission. Therefore, whether Claimant suffered a compensable injury is not before the ALJ because Respondents have admitted that he did. However, to the extent that such issue is inextricably intertwined with the issue of MMI based on the facts of this case, the ALJ finds and concludes, based on the foregoing findings above and subsequent conclusions set forth below that Claimant has established by clear and convincing evidence, that he suffered a compensable injury and is not at MMI. [4]

[4] The threshold question of whether Claimant sustained a compensable injury in the first instance is one of fact that the ALJ must determine, if contested, under the preponderance of the evidence standard. *See Leprino Foods Co. v. Industrial Claim Appeals Office of State*, 134 P.3d 475, 483 (Colo. App. 2005) (citing *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001). Consequently, the DIME physician's opinion on this issue is not entitled to special or presumptive weight. *See Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). However, due to the facts of this case, the ALJ has found Claimant met the higher burden of proof as to the compensability of his industrial injury/occupational disease, even though the clear and convincing burden is not applicable to such issue.

b. Whether Claimant has overcome the Division Independent Medical Examination ("DIME") physician's opinion that he reached MMI on April 27, 2017.

Maximum medical improvement exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. A DIME physician's finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

"Clear and convincing" evidence has been defined as evidence which demonstrates that it is highly probable the DIME physician's opinion is incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Under the statute, MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office*, 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office*, 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of Claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007). A finding that Claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office*, 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office*, 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining Claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Patterson v. Comfort Dental East Aurora*, WC 4-874-745-01 (ICAO February 14, 2014); *Hatch v. John H. Garland Co*., W.C. No. 4-638-712 (ICAO August 11, 2000).

Claimant established by clear and convincing evidence that he suffered a compensable injury on April 27, 2017. The credible and persuasive testimony of Claimant and Dr. Wunder, combined with the medical record, established Claimant suffered a compensable injury on April 27, 2017, due to painting a "monster truck" at work. Prior to April 27, 2017, Claimant worked overtime hours nearly every week and that, outside of his work activities, he was not participating in any sports or hobbies in which he repetitively used his body in a manner that was consistent with his work duties. In addition, prior to April 27, 2017, he did not have lower back pain, right radicular symptoms and right groin pain.

At the time of the injury, Claimant was painting a "monster truck." The truck was so tall, Claimant had to let air out of the tires in order to be able to lean over the truck and reach the top of the truck while using a ladder and a narrow platform. This portion of the paint job took Claimant approximately one week. The physical requirements of painting the monster truck required Claimant to repetitively climb up and down a ladder with his equipment and work on a narrow platform that was only 9-10 inches wide. He

also had to stand on the tips of his toes, while standing on the ladder and/or the narrow platform, try to keep his balance, lean/bend forward, and twist to paint the truck. Claimant had to do this with a paint gun that was attached to an air hose. Moreover, Claimant also performed these physical tasks while using the paint gun and sander over his head so he could reach the very top of the truck and while not leaning against those portions of the truck that had already been painted. This placed additional demands on Claimant's lower back in comparison to his regular painting duties.

While completing this work on April 27, 2017, Claimant began to experience severe low back pain as well as right sided leg, buttock, and foot pain. In addition, when Claimant ultimately saw a physician at Concentra, it was noted that he was also having right groin pain. Due to his pain complaints, Claimant underwent an MRI of his lumbar spine. The MRI showed Claimant had degenerative disc disease and foraminal narrowing involving his lumbar spine.

Dr. Wunder credibly testified that Claimant's job duties of painting the "monster truck" resulted in a compensable injury in the form of an aggravation of Claimant's preexisting and asymptomatic degenerative disc disease. Dr. Wunder further testified that such aggravation necessitated the need for medical treatment and that Claimant is in need of additional medical treatment before he can be placed at MMI.

Claimant established that Dr. Larson erred in his assessment of this matter. As found, Dr. Larson failed to obtain and analyze the physical requirements of Claimant's job duties, in general, and while Claimant was painting the "monster truck." As found, Dr. Larson failed to consider the bending, twisting, leaning, and atypical body postures necessary for Claimant to climb up and down the ladder, get on the platform, and paint the "monster truck." The ALJ finds and concludes that such failure is a clear error in his assessment of this matter and establishes that it is highly probable that his opinion regarding whether Claimant suffered a compensable injury and is at MMI is incorrect.

Dr. Larson also failed to consider whether Claimant's job duties resulted in an aggravation of his preexisting degenerative disc disease and foraminal narrowing. Dr. Larson concluded Claimant's work activities did not cause the degenerative findings demonstrated on the MRI. He also concluded Claimant's pain complaints and radicular symptoms were due to the degenerative findings noted on Claimant's MRI. He did not, however, consider and evaluate whether Claimant's job duties aggravated Claimant's underlying condition and necessitated the need for medical treatment and caused Claimant's disability.

Dr. Larson did recommend Claimant see a spinal surgeon to assess whether Claimant is a surgical candidate based on his symptoms and the findings on his MRI. Such recommendation supports a finding that Claimant is not at MMI.

Moreover, Dr. Blau, an authorized treating physician, has recommended another spinal injection at the L5 level. Dr. Wunder concurred with this recommendation. Dr. Blau also recommended an MRI of Claimant's right hip to assess whether Claimant also suffered an injury to his hip joint at the same time and is causing Claimant's right groin pain. Since the treatment recommended by Dr. Blau is to cure Claimant from the effects of his injury and to determine the extent of his work injury, such treatment is inconsistent with a finding of MMI.

Moreover, the ALJ also finds that the L5 injection prescribed by Dr. Blau and the right hip MRI are reasonable, necessary and related to Claimant's work injury. The injection is to help reduce Claimant's radicular symptoms and/or define the pain generator. The right hip MRI is to determine the extent of Claimant's work injury and whether painting the truck also caused or aggravated an intra-articular hip condition and is causing his groin pain.

The quality of an expert's opinion is only as good as the data upon which it relies. In this case, Dr. Larson had insufficient data regarding the physical requirements of Claimant's job while painting the large truck. "Like a house built on sand, the expert's opinion is no better than the facts on which it is based." *See Kennemur v. State of California*, 184 Cal. Rptr. 393, 402 (Cal. Ct. App. 1982).

Therefore, the ALJ finds and concludes Claimant has overcome the opinion of the Division Examiner by clear and convincing evidence. Claimant is not at MMI.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant is not at MMI.
2. Respondents shall provide reasonable and necessary medical treatment to cure Claimant from the effects of his industrial injury.
3. Respondents shall pay, subject to the Colorado Medical Fee Schedule, for Claimant to have the L5 injection and right hip MRI that were prescribed by Dr. Blau, an authorized treating physician.
4. Although Dr. Wunder and Dr. Larson both recommend a surgical evaluation, the ALJ cannot order Respondents to pay for the evaluation at this time because an authorized treating physician has yet to recommend or prescribe a surgical evaluation.
5. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding

procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 17, 2019

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The issues raised for consideration are:

- Whether Claimant proved by a preponderance of the evidence that she sustained a compensable injury in the course and scope of employment on March 13, 2017.

- Whether Claimant proved by a preponderance of the evidence that she is entitled to an order awarding authorized, reasonably necessary and related medical benefits.

- Whether Claimant established by a preponderance of the evidence that she was disabled from her usual employment commencing May 7, 2018 through October 25, 2018 and is therefore entitled to an order awarding indemnity benefits.

FINDINGS OF FACT

Based on the testimony and evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. Claimant alleges injuries to her right shoulder as a result of throwing a trash bag into a dumpster on March 13, 2017. Based on these Findings of Fact, Claimant failed to establish that she sustained a compensable work-related injury on March 13, 2017.

2. At the time of the alleged incident, Claimant worked as a cook for Employer and her duties included cleaning and closing down the kitchen at the end of her night shift.

3. Claimant testified at hearing that she immediately reported the incident to a co-worker, and she verbally informed her supervisor a few days later. At hearing, Ms. H_____ corroborated Claimant's report that she had complained about her right shoulder after taking out the trash in March 2017. Ms. H_____ could not recall the specific date of the complaint and could not recall if Claimant complained about her shoulder after that day.

4. Claimant testified that her shoulder was "sore and it hurt" in the days following the incident, but "it wasn't severe." Claimant testified that she never asked for medical treatment throughout her employment at Employer, which ended in March 2018.

5. Claimant testified that she completed the Workers' Claim for Compensation fifteen months after the alleged date of injury. On her Workers' Claim for Compensation,

Claimant listed her "last day worked" as May 1, 2018. However, Claimant clarified at hearing that May 1, 2018 was the last date she worked for her subsequent employer, The Universal.

6. During the summer after Claimant's alleged injury, she participated in several activities inconsistent with an acute injury.

- Three months after the alleged work-related injury on March 13, 2017, Claimant played in a golf tournament in June 2017, winning the "longest putt" award.
- Claimant testified that she performed industrial sewing for her spouse's archery business two days a week throughout the summer following the alleged work injury.
- Claimant testified that she rode her motorcycle to work at least once following the March 13, 2017 incident. She later testified that, between March 13, 2017 and her surgery in May 2018, she rode her motorcycle "not once." Despite reportedly experiencing pain after riding her motorcycle to work following the March 13, 2017 incident, Claimant did not seek medical treatment for her right shoulder.

7. Claimant testified that she was still working for Employer in February 2018, and her right shoulder pain was worse at that time than it was initially following the March 13, 2017 incident.

8. On February 14, 2018, Claimant sought medical treatment for a concussion, neck pain, and upper back pain. Claimant testified that she was using a hot tub to "try and rehab [her] shoulder" when the hot tub cover fell on her head. While she testified that she disclosed her right shoulder condition to the medical provider, there is no mention of her right shoulder complaints in the medical record, and her extremity examination was reportedly normal.

9. Claimant testified that she sought treatment for her neck at the February 14, 2018, appointment and never sought any additional treatment for her neck after that date, which is inconsistent with records from Dr. Seidl in May 2018, when he referred her to a specialist for cervical radiculopathy.

10. Claimant and Employer amicably parted ways in March 2018, and Claimant was given a letter of recommendation, which she used to secure a position at The Universal in March 2018.

11. Claimant testified that her job duties were more physically demanding at The Universal than they had been for Employer. Claimant testified that there was "a huge difference" in her job duties for Employer compared to The Universal. She testified that The Universal was "busy and booming and fast-paced" and had "a much higher volume of clientele…"

12. Claimant testified that her right shoulder pain "became worse the longer I worked [at The Universal]." She further testified, "I think that's what made my pain worse in my shoulder."

13. Claimant reportedly complained to the chef at The Universal about her right shoulder pain and eventually called-in sick due to pain. She sought treatment on May 3, 2018. Claimant did not return to work at The Universal after calling-in sick on May 3, 2018.

14. Claimant testified that she did not miss any shifts at either Employer or The Universal due to right shoulder pain from March 13, 2017 until May 3, 2018. She further testified that she did not seek any medical treatment for her right shoulder from March 13, 2017 through May 2, 2018.

15. Claimant presented to Metro Urgent Care on May 3, 2018, reporting right shoulder pain with no known injury or trauma. The medical record contains the following history:

> States her right shoulder started bothering her about nine months ago. Denies known injury or other etiology for shoulder pain. States her pain got more acute over the last week or so, and she's having trouble sleeping due to the pain. States she can't think of anything different she did around the time her shoulder became more acutely uncomfortable.

16. At hearing, Claimant testified that she told the staff at Metro Urgent Care that her right shoulder complaints were "likely a workmen's [sic] compensation claim" but did not provide the name of any employer and could not recall if she had provided the exact date of injury, as the May 3, 2018 appointment was "a long time ago."

17. Claimant was referred by Metro Urgent Care to UC Health ER the evening of May 3, 2018. UC Health medical records indicate: "No injury mechanism." Claimant reported that she was unable to fold clothes that day due to pain. There is no mention of a work, lifting, or throwing incident that caused her right shoulder symptoms.

18. The first mention in any medical record of a trash throwing incident is from Claimant's May 10, 2018, appointment with Adam Seidl, M.D. Claimant reported that, nine months prior, "she felt something pull in her shoulder when she was throwing a bag into the dumpster." She complained of right shoulder and neck pain. At hearing, Claimant denied telling Dr. Seidl that the throwing incident occurred nine months prior.

19. Dr. Seidl recommended an MRI and referred her to a spine clinic for evaluation of cervical radiculopathy symptoms and neck pain. Dr. Seidl ultimately performed surgery

to repair a right rotator cuff tear on May 16, 2018. Claimant recovered from surgery and Dr. Seidl released her to full duty on October 25, 2018.

20. Several weeks following the May 16, 2018 surgery, Claimant filed a Workers' Claim for Compensation initiating this claim. Claimant first filed a claim with Pinnacol Assurance, who denied the claim based on insurance coverage, as their policy went into effect on March 14, 2017. Claimant then pursued benefits from Auto Owners Insurance Company. At hearing, the ALJ took judicial notice of the fact that Auto Owners Insurance Company's policy expired as of March 14, 2017, and Pinnacol Assurance was on the risk for any injuries occurring from March 14, 2017 through August 2017 (9 months pre-surgery).

21. L. Barton Goldman, M.D. testified at hearing as an expert in physical medicine and rehabilitation and medical causation. Dr. Goldman opined that, if the March 13, 2017 incident had caused the MRI findings apparent in May 2018, Claimant would have required surgery much sooner, such symptoms would have been documented in the medical records leading up to May 2018, and she would not have been able to participate in a golf tournament, ride her motorcycle, or do industrial sewing, which Claimant testified to performing in the summer of 2017. He further opined that, had the March 13, 2017 incident not occurred as alleged, Claimant would have nonetheless likely required the surgery performed by Dr. Seidl on May 16, 2018.

22. Dr. Goldman performed an independent medical examination of Claimant on February 21, 2019. Claimant recounted to Dr. Goldman that she immediately felt right lateral shoulder pain after throwing a trash bag into the dumpster on March 13, 2017. Claimant recounted to Dr. Goldman that she had difficulty mopping, scrubbing, and taking out the garbage and requested a shift change in the summer of 2017. Claimant told Dr. Goldman that her employment at The Universal resulted in a substantial workload increase from 30 plates to 200 to 300 plates per shift. She reported that her right shoulder pain was 6/10 while working for Employer and 4/10 when off work. Claimant told Dr. Goldman that, after she started work at The Universal, her pain levels rose to 6-7/10 when off work and 9/10 more frequently while at work.

23. Claimant reportedly told Dr. Goldman that she filed her Workers Claim for Compensation with Pinnacol before her surgery occurred and, after the claim was denied, she refiled the claim with Auto Owners two and half weeks after the surgery. Claimant's recollection is inaccurate, as she filed her Workers' Claim for Compensation on June 4, 2018 (having undergone surgery on May 16, 2018).

24. Dr. Goldman noted that, if Claimant's MRI findings in May 2018 had been even "mildly caused" by a March 13, 2017 incident:

> …it would have been…a really dramatic injury, and the patient would have had what we call a drop sign…because it wasn't just the supraspinatus muscle that was torn and retracted, she had the subscapularis muscle

> was torn, which is—that's a much more significant and harder muscle to hurt—it's underneath the shoulder blade—and she [has] got an involvement of all of her muscles and tendons. If that had happened back in March 2017…she would not have been able to do very much.

25. Claimant acknowledged to Dr. Goldman that she played two or three rounds of golf in the summer of 2017 and that she won a "longest putt" award at a golf tournament that summer. Claimant further told Dr. Goldman that she would help her wife by performing industrial sewing two times per week during the summer of 2017 which involved repetitive rotation of her right shoulder. She recalled taking two motorcycle trips in the summer of 2017.

26. Dr. Goldman noted that, "…even if the patient's participation in [industrial sewing, motorcycle riding, and golfing] was limited during 2017, she nevertheless was able to do so, which would make the alleged injury of March 2017 a very minor event..." Rather, Dr. Goldman opined, if the March 13, 2017 incident resulted in "a significant injury, one would have anticipated substantial deterioration in a fairly steady fashion within a couple of weeks of said injury with a persistent and declining presentation that would have necessitated surgical intervention much earlier in this case."

27. Dr. Goldman testified that it is common for injured workers to reflect back on musculoskeletal injuries and perceive that one event led to a progressive worsening of a condition, but most injuries are not "a straight line" but rather symptoms wax and wane, which in this case "makes more sense in terms of why this went on for so long." Claimant's perception, through her testimony, that the March 13, 2017 incident ultimately caused the need for surgery in May 2018 is medically improbable, considering all other available evidence.

28. Concerning the lack of medical documentation of the March 13, 2017 incident, even as Claimant started receiving treatment for her right shoulder in May 2018, Dr. Goldman stated:

> I'm well aware that documentation can vary in quality, but we have such consistency of lack of documentation of this incident up until around the time of the surgery, and there's opportunities for this to be raised within the records where it's not…it's not any one document—or even…Ms. Renslow's recollection, or lack thereof, it's the overall pattern and my understanding of the underlying pathophysiology that supported my conclusion…

Dr. Goldman opined that, even if the March 13, 2017 incident "had not occurred, she clearly was exposed to other…stressors to the shoulder and other reasons, both traumatic and non-traumatic that would have likely led to the surgery that occurred in May…"

29. In terms of the other stressors that likely led to her need for shoulder surgery, Dr. Goldman testified that, while Claimant's employment period at The Universal was relatively short (1-2 months), "her exposure volume, which is what we look at when we're looking at degenerative issues,…went up…like hundreds of percentage points." If Claimant's need for surgery was related to a work-related exposure, Dr. Goldman opined that the "volume exposure at Universal" would be the most likely culprit, although he clarified that he would consider The Universal exposure to be "contributory."

30. Claimant submitted into evidence medical reports from Dr. Seidl and responses to questions posed by Claimant's attorney to support that her need for surgery was caused by the March 13, 2017 incident. Claimant asks the ALJ to rely on an unsigned response by her surgeon, Dr. Seidl, to a letter from her attorney to support that her MRI findings in May 2018 and need for surgery was caused by the March 13, 2017 incident. At face value, Dr. Seidl's responses do not support that the March 13, 2017 incident caused her need for surgery.

31. Dr. Seidl noted that, "based upon the history given, it is highly likely that this injury was caused by the described event 9 months prior to her presentation in my clinic." Based on this response, the March 13, 2017 incident could not have caused her injury, because 9 months prior to her May 2018 presentation was August 2017—when Pinnacol Assurance provided coverage for Employer. It is possible Dr. Seidl was mistaken as to the date, but assuming the date listed was a typo, Dr. Seidl further supported his conclusion based on Claimant's report of "significant pain and loss of function after the [March 13, 2017] event."

32. Based on Claimant's testimony at hearing, she did not have significant pain, nor loss of function after the event. Claimant testified that she did not miss any work from the date of the injury through when she stopped working for Employer approximately a year later. In fact, she was able to perform work that was more physically demanding for 1-2 months over a year after the alleged March 2017 incident. Claimant further failed to obtain any medical treatment for her right shoulder until May 2018. In fact, Claimant went to an urgent care in February 2018 for neck and head pain, and failed to report any right shoulder symptoms, including weakness, which was specifically noted by Dr. Seidl in May 2018.

33. In response to this contradictory evidence, Claimant asserts that the ALJ should disregard the lack of documentation in the medical records as clerical errors by multiple providers on multiple dates, and attribute the fact that Claimant did not miss any work throughout this time—in fact, throughout the entire time she worked for Employer and over a month of more physically-demanding work for a subsequent employer—as evidence of Claimant's character and willingness to work through pain, and not as objective evidence of an absence of "significant pain and loss of function" noted by Dr. Seidl as a basis for his opinion.

34. Dr. Seidl further relied on Claimant's MRI findings to support that Claimant sustained an "acute injury." He noted that the finding of a "full thickness rotator cuff tear without severe atrophy of the muscles makes it unlikely that this tear is chronic." Dr. Goldman testified that he reviewed the MRI images and report and disagreed with Dr. Seidl's interpretations. Dr. Goldman testified that he would expect to see "atrophy in the rotator cuff…within weeks [of an injury], depending on the age of the patient, but generally within one to three months [the atrophy is] substantial." The fact that Dr. Seidl notes no significant atrophy on the MRI supports that the rotator cuff tear did not occur more than a year prior.

35. The MRI report itself further supports that the surgery-inducing event did not occur more than 1-3 months prior to the MRI, based on Dr. Goldman's testimony. The MRI report showed "low-grade atrophy…of the supraspinatus tendon." The low-grade nature of the atrophy suggests that the tear occurred recently—perhaps weeks prior, as opposed to months prior—and almost certainly not over a year prior. This, combined with Claimant's testimony that her pain substantially worsened while working at The Universal, suggests that an injury occurred—either at work or not—while she was employed by The Universal.

36. Dr. Goldman's conclusions are supported by Claimant's testimony at hearing that, immediately after the March 13, 2017 incident, she did not think her injuries were "severe." Her testimony that she never missed any time from work for Employer or sought medical treatment for her right shoulder before May 3, 2018 further support that the March 13, 2017 incident resulted in, at most, a mild strain that resolved with time but nevertheless resides in the context of waxing and waning progressively worsening right shoulder symptoms that eventually necessitated surgery, which would have been medically necessary even in the absence of the March 13, 2017 incident.

CONCLUSIONS OF LAW

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceedings is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App.

2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

The ALJ finds the testimony of Claimant to be credible insofar as she testified consistent with her recollection of the progression of her condition. However, the ALJ credits Dr. Goldman's opinions concerning the medical probability of the accuracy of Claimant's recollections and finds Dr. Goldman's testimony concerning medical causation more persuasive than Claimant's. The ALJ finds Dr. Seidl's opinions unpersuasive.

A claim is compensable if it is shown that the injury was proximately caused by an event arising out of and in the course of the employee's employment. C.R.S. § 8-41-301(1)(c). A pre-existing condition does not disqualify a claimant from receiving workers' compensation benefits. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004). A claimant may be compensated if his or her employment "aggravates, accelerates, or combines with" a worker's pre-existing infirmity or disease "to produce the disability for which workers' compensation is sought." *H&H Warehouse v. Vicory,* 805 P.2d 1167, 1169 (Colo. App. 1990).

There is a distinction between the terms "accident" and "injury." The term "accident" refers to "an unexpected, unusual or undesigned occurrence." C.R.S. § 8-42-201(1). In contrast, an "injury" refers to the physical trauma caused by the accident. Under the Workers' Compensation Act, disability and medical benefits do not flow simply because an accident occurred while the claimant was in the course and scope of employment. Compensable injuries involve an accident that requires medical treatment or causes disability. *Vicory,* supra. Pursuant to *Wherry v. City and County of Denver,* W.C. No. 4-475-818 (ICAO March 7, 2002), if an incident is not a significant event resulting in an injury, the claimant is not entitled to benefits. A compensable injury does not exist simply because something occurred, even if such "something" could have

caused pain and the need for treatment but did not. See *e.g.*, *Montgomery v. HSS*, W.C. No. 4-989-682 (ICAO, August 17, 2016)(no dispute that the claimant was hit on the head with a gate, but ALJ rightfully finds that no "injury" resulted from such event; the fact that respondents' medical expert testified that the event "may" have caused injury is insufficient, and claimant must sustain burden to establish that injury did, in fact, occur).

The ALJ finds that, while an accident may have occurred on March 13, 2017, such did not necessitate medical treatment, which is supported by the medical records and Claimant's testimony. Even if Claimant reported that an accident occurred on March 13, 2017, she consistently testified that she did not seek medical treatment because her shoulder pain was not "severe." That testimony confirms that it is unlikely that Claimant sustained a rotator cuff tear requiring surgery in March 13, 2017, especially when coupled with her testimony that she was able to participate in multiple avocational activities in the year following that incident, including motorcycling, golfing, and industrial sewing.

The ALJ finds that Claimant did not sustain a compensable injury requiring medical treatment or causing disability on March 13, 2017. At most, Claimant experienced a work-related accident that resulted in a muscle strain, which is supported by Claimant's testimony that she was "sore" after the incident, and repeatedly testified that she did not think her injury was "severe." The mild nature of Claimant's strain is supported by the fact that she was able to participate in a golf tournament in June 2017 and play well enough that she won "longest putt." As Dr. Goldman credibly and persuasively testified, if Claimant had sustained a rotator cuff tear as demonstrated in her May 2018 MRI in March 2017, it is highly unlikely that she would have been physically able to play golf, perform industrial sewing, or ride a motorcycle without debilitating pain that would have caused disability, which would be reflected in missed time or medical treatment documentation in the weeks following the incident.

The ALJ finds the fact that Claimant did not raise any complaints or symptoms concerning her right shoulder at her February 2018 urgent care visit inconsistent with sustaining an injury that required medical treatment on March 2017. Claimant's failure to report any symptoms or complaints concerning her right shoulder suggests that any injury necessitating surgery must have occurred in the 3 months prior to her May 3, 2018 presentation.

The ALJ finds Dr. Goldman's testimony credible and persuasive, insofar as he concluded that, even if Claimant's activities in summer 2017 were limited, she was still able to perform them (golfing, motorcycle, industrial sewing) and, if she had MRI findings as found in May 2018, it is highly unlikely that she would have been able to physically perform those tasks, much less work at a new job in a more physically demanding position on a full time basis for over a month.

The ALJ further finds Dr. Goldman's testimony concerning the May 2018 MRI findings persuasive to support that Claimant's injuries were likely sustained in the months leading up to her presentation to Dr. Seidl, and it is highly unlikely that her work

for Employer, which ceased more than a year prior, was the proximate cause of her need for surgery and disability.

The ALJ finds that Claimant did not sustain a work-related injury on March 13, 2017.

ORDER

It is therefore ordered that:

Claimant's claim for benefits is denied and dismissed.

DATED: June 17, 2019

/s/ Kimberly Turnbow
Kimberly J. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

- Whether claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment with employer?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that the medical treatment he received was reasonable and necessary to cure and relieve claimant from the effects of the work injury?

- The issues of temporary total disability and temporary partial disability and average weekly wage were preserved for later determination.

FINDINGS OF FACT

1. Claimant was employed with employer as a ranch hand. Claimant testified his job duties included fence building and ditch cleaning. Additionally, claimant would spray the plants when he was out in the field.

2. Claimant testified he worked for employer approximately ninety (90) days. Claimant testified he was not told by employer what personal protection devices he should wear when he was in the field spraying. Claimant testified he son worked for employer and was provided with personal protective devices including gloves, a respirator, and long sleeve shirt and pants. However, claimant was not provided with this same equipment.

3. Claimant testified that that on May 23, 2018, he was mixing chemicals to spray on the plants. According to the evidence, claimant was mixing Eco-Hydro Fish Fertilizer nor the EcoNereo Kelp Plant Food.. Claimant testified he would put the material in tanks and add water to top off the drums. Claimant testified that on May 23, 2018, he spilled the material on himself and was drenched from the waist down. Claimant testified he reported the spill to his supervisor. Claimant testified he continued to work in the field with the wet clothes for one hour.

4. Following the spill, claimant was called to the office and was advised by employer that he was being let go by employer. Claimant was not terminated due to the spill, but was not retained after completing his probationary period of employment. Claimant testified he then called his wife to give him a ride from work and went immediately to the public library to use the computer to look for additional employment. Claimant testified he was in his wet clothes for approximately four hours before getting home and changing.

5. Claimant testified that he got home at approximately 7:00 p.m. and took a shower and noticed a rash developing on his feet. Claimant testified that the rash started progressing and spread up his body to his hands and thumb. Claimant testified the rash was red and irritating and described by claimant as being like chicken pox.

6. Claimant testified that the rash continued to get worse, including the formation of blood blisters on his feet. Claimant testified the blisters remained present for 4-6 months. Claimant presented photographs at hearing depicting the nature of the rash. Claimant further demonstrated at the hearing that remnants of the rash remained even at the date of the hearing.

7. Claimant testified his rash got bad enough that he contacted poison control on March 28, 2018, five days after the spill.

8. Claimant sought medical treatment with Grand Valley Hospital and Medical Center on May 30, 2018 and was examined by Nurse Practitioner ("NP") Steinbach. Claimant reported to NP Steinbach that he experienced a rash and swelling that started after having chemicals fish emulsion, humic acid and kelp and irrigation water spill on him six day ago. Claimant reported the rash first presented on his feet and had progressed up both legs and started to spread to his back, abdomen and arms a few days ago. NP Steinbach ordered blood work and other lab testing to determine the cause of claimant's condition. NP Steinbach noted that Dr. Wright was consulted and provided a diagnosis of wide spread vasculitis caused by exposure to chemicals at work. Claimant was prescribed a 14 day taper of prednisone and instructed to follow up with Dr. Wright in four weeks.

9. Claimant was examined at the Battlement Mesa Medical Center on June 8, 2018. Claimant reported he still had the rash and swelling to his bilateral feet and lower extremities, with the rash to his arms resolved. Claimant reported he still had some blisters on his feet that were popping and peeling. The lab results were reviewed and it was noted that claimant had elevated liver enzymes. Claimant was diagnosed with vasculitis, hypertension and hyperlipidemia.

10. Claimant testified at hearing that he was prescribed a steroid (prednisone) with kept the rash from spreading, but blood blisters started forming after he began taking the steroid. Claimant testified he began feeling better around August, but would still get pain in his feet.

11. Claimant was evaluated by Dr. Wright on August 1, 2018. Dr. Wright noted that claimant's wife had brought pictures of the original blistering reaction three months ago and the diagnosis of vasculitis. Dr. Wright examined claimant and reviewed the results of his lab testing. Dr. Wright diagnosed a lichen planus, which was described as an idiopathic autoimmune hypersensitivity reaction for which the cause is found in less than 3% of cases. Dr. Wright noted that the microbiome of the gut is

sometimes to blame, and recommended a three month trial of a probiotic to help with the condition. Claimant testified he began to take the probiotic on August 2, 2018.

12. Respondents obtained a record review independent medical examination ("IME") with Dr. Jacobs on March 31, 2019. Dr. Jacobs reviewed claimant's medical records, including his pre-existing medical records, and the Occupational Health and Safety Association ("OSHA") hazard forms for the Eco-Hydro Fish Fertilizer and the EcoNereo Kelp Plant Food. Dr. Jacobs noted that the OSHA literature suggests that both of the materials are not a health hazard nor a physical hazard.

13. Dr. Jacobs noted that claimant was diagnosed with lichen planus, which is considered an autoimmune disease. Dr. Jacobs opined that it was not unusual to trigger lichen planus with certain medications, including hydrochlorothiazide, Lisinopril, ibuprofen and proton pump inhibitors. Dr. Jacobs noted that claimant was exposed to these medications prior to his date of injury. Dr. Jacobs opined that claimant's exposure to the fertilizer at work was not related in a causal fashion to the rash he developed and its natural history as described in the medical records.

14. The ALJ credits the reports and opinions of Dr. Wright and Dr. Jacobs and finds that claimant was likely experiencing lichen planus that was idiopathic in its manifestation. The ALJ has found insufficient credible evidence to associate that lichen planus with his exposure to the Eco-Hydro Fish Fertilizer nor the EcoNereo Kelp Plant Food.

15. The ALJ concludes that claimant has failed to demonstrated that it is more probable than not that his lichen planus developed as a result of his exposure to chemicals at work. The ALJ notes that Dr. Wright's report indicates that the development of the lichen planus was of an idiopathic nature and finds this opinion to be credible and persuasive with regard to the issue of compensability.

16. Due to the fact that claimant has failed to establish that it is more probable than not that his lichen planus was related to his employment with employer, claimant's claim for benefits must be denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the

employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. There is no requirement that a claimant present medical evidence to prove the cause of an injury. *See Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997); *Apache Corp. v. Industrial Commission*, 717 P.2d 1000 (Colo. App. 1986). Similarly, the claimant is not required to prove the cause of his injuries by "medical certainty." *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968). To the contrary, the claimant's testimony, if credited, may be sufficient to establish the requisite nexus between an industrial injury and the disability for which benefits are sought. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983). However, to the extent expert medical testimony is presented, it is the ALJ's sole prerogative to assess its weight and sufficiency. *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990).

5. The determination of whether there is a sufficient "nexus" or causal relationship between the claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *Moorhead Machinery and Boiler Co. v. Del Valle*, 934 P.2d 861 (Colo. App. 1996). As found, claimant has failed to prove by a preponderance that he suffered compensable injury arising out of and in the course of his employment with employer on May 23, 2018 when he was allegedly exposed to chemicals at work.

6.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment with employer. Claimant's claim for benefits is denied and dismissed.

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DATED: June 18, 2019

Keith E. Mottram

Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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ISSUES

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10. Claimant testified at hearing that he was prescribed a steroid (prednisone) with kept the rash from spreading, but blood blisters started forming after he began taking the steroid. Claimant testified he began feeling better around August, but would still get pain in his feet.

11. Claimant was evaluated by Dr. Wright on August 1, 2018. Dr. Wright noted that claimant's wife had brought pictures of the original blistering reaction three months ago and the diagnosis of vasculitis. Dr. Wright examined claimant and reviewed the results of his lab testing. Dr. Wright diagnosed a lichen planus, which was described as an idiopathic autoimmune hypersensitivity reaction for which the cause is found in less than 3% of cases. Dr. Wright noted that the microbiome of the gut is sometimes to blame, and recommended a three month trial of a probiotic to help with the condition. Claimant testified he began to take the probiotic on August 2, 2018.

12. Respondents obtained a record review independent medical examination ("IME") with Dr. Jacobs on March 31, 2019. Dr. Jacobs reviewed claimant's medical records, including his pre-existing medical records, and the Occupational Health and Safety Association ("OSHA") hazard forms for the Eco-Hydro Fish Fertilizer and the EcoNereo Kelp Plant Food. Dr. Jacobs noted that the OSHA literature suggests that both of the materials are not a health hazard nor a physical hazard.

13. Dr. Jacobs noted that claimant was diagnosed with lichen planus, which is considered an autoimmune disease. Dr. Jacobs opined that it was not unusual to trigger lichen planus with certain medications, including hydrochlorothiazide, Lisinopril, ibuprofen and proton pump inhibitors. Dr. Jacobs noted that claimant was exposed to these medications prior to his date of injury. Dr. Jacobs opined that claimant's exposure to the fertilizer at work was not related in a causal fashion to the rash he developed and its natural history as described in the medical records.

14. The ALJ credits the reports and opinions of Dr. Wright and Dr. Jacobs and finds that claimant was likely experiencing lichen planus that was idiopathic in its manifestation. The ALJ has found insufficient credible evidence to associate that lichen planus with his exposure to the Eco-Hydro Fish Fertilizer nor the EcoNereo Kelp Plant Food.

15. The ALJ concludes that claimant has failed to demonstrated that it is more probable than not that his lichen planus developed as a result of his exposure to chemicals at work. The ALJ notes that Dr. Wright's report indicates that the development of the lichen planus was of an idiopathic nature and finds this opinion to be credible and persuasive with regard to the issue of compensability.

16. Due to the fact that claimant has failed to establish that it is more probable than not that his lichen planus was related to his employment with employer, claimant's claim for benefits must be denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. There is no requirement that a claimant present medical evidence to prove the cause of an injury. *See Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997); *Apache Corp. v. Industrial Commission*, 717 P.2d 1000 (Colo. App. 1986). Similarly, the claimant is not required to prove the cause of his injuries by "medical certainty." *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968). To the contrary, the claimant's testimony, if credited, may be sufficient to establish the requisite nexus between an industrial injury and the disability for which benefits are sought. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983). However, to the extent expert medical testimony is presented, it is the ALJ's sole prerogative to assess its weight and sufficiency. *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990).

5. The determination of whether there is a sufficient "nexus" or causal relationship between the claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *Moorhead Machinery and Boiler Co. v. Del Valle*, 934 P.2d 861 (Colo. App. 1996). As found, claimant has failed to prove by a preponderance that he suffered compensable injury arising out of and in the course of his employment with employer on May 23, 2018 when he was allegedly exposed to chemicals at work.

6.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment with employer. Claimant's claim for benefits is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 18, 2019

Keith E. Mottram

Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-017-566-001 & 5-042-920-001

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

,

Claimant,

v.

,

Employer,

and

,

Self-Insured Respondent.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on May 29, 2019, in Denver, Colorado. The hearing was digitally recorded (reference: 5/29/19, Courtroom 1, beginning at 1:30 PM, and ending at 3:00 PM).

The Claimant was not present. She was represented by [Redacted], Esq. The Self-Insured Respondent was represented by [Redacted], Esq.

Hereinafter [Redacted] shall be referred to as the “Claimant." [Redacted] shall be referred to as the “Employer.” All other parties shall be referred to by name.

Claimant’s Exhibits 1 through 6 were admitted into evidence, without objection. Respondent’s Exhibits A through D, G and H, and K through R were admitted into evidence, without objection. Respondent’s Exhibits E, F, I and J were admitted into evidence over Claimant’s objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of portions of a proposed decision to both counsel. Claimant’s counsel was

to prepare a proposed decision on the issue of permanent partial disability (PPD); and, Respondent's counsel was to prepare a proposed decision on the issues of reopening and temporary total disability (TTD) benefits. Claimant filed her proposed decision, electronically, on June 4, 2019. Respondent filed its proposed decision on the same date. There were no timely objections to either proposal. After a consideration of the proposed decisions, the ALJ has modified them and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern Respondent's Petition to Reopen on the ground of error or mistake and Claimant's Petition to Reopen on the ground of change of condition. Specifically, Respondent alleges error in the previous Full Findings, dated June 27, 2018 insofar as the award of temporary total disability (TTD) benefits was inconsistent with the Stipulation of the parties and the Findings as to TTD went beyond the undisputed date of maximum medical improvement (MMI); and, ambiguity in the Final Admission of Liability (FAL), which admitted to 12% whole person permanent partial disability (PPD), based on the subsequent deposition opinion of Scott J. Primack, D.O., who in his report of February 21, 2018, indicated that his first rating of 20% included loss of range of motion (ROM). After seeing surveillance film of the Clamant, Dr. Primack modified his PPD rating by subtracting the ROM component, thus, modifying his PPD opinion to 12% whole person upon which Respondent filed the FAL Claimant contends that the Respondent is required to admit to the impairment rating of 20% first determined by Dr. Primack, in the medical report of February 21, 2018 upon which Respondent is obliged to admit.

The Respondent bears the burden of proof, by a preponderance of the evidence on the issue of reopening based on error or mistake. The Claimant bears the burden on the issue of increased PPD.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. On June 1, 2016, the Claimant suffered an admitted, work related injury to her low back when she bent over a produce ben to lift out a watermelon. She felt immediate pain in her low back. She was treated conservatively for less than two months. She was placed at MMI on September 15, 2016, with no permanent impairment and no permanent work restrictions.

2. Respondent filed a FAL on February 17, 2017, admitting for zero PPD.

3. The Claimant suffered a worsening of her condition at the beginning of February 2017. She was doing her regular job duties that included lifting heavy boxes. She suffered an increase in low back pain and an increase in right radicular pain. Her pain was so severe that she sought medical treatment on February 8, 2017 from her primary care physician, Dr. Baker.

4. On March 28, 2017, the Claimant was examined by a workers' compensation physician, Robert Broghammer, M.D.

5. Dr. Broghammer referred the Claimant to Scott Primack, D.O., who examined the Claimant on April 26, 2017 and found she was a reasonable candidate for surgical intervention.

6. May 13, 2017, the Claimant's pain became so extreme that she reported to the emergency room (ER). She underwent a surgical repair on May 13, 2017, performed by Michael Rauzzino, M.D. Despite the surgical intervention, the Claimant continued to have back pain and it was determined she had a recurrent disc herniation. The Claimant had a second surgery on June 7, 2017, again performed by Dr. Rauzzino.

7. The Clamant requested a hearing on a Petition to Reopen W.C. No. 5-017-566-01 or in the alternative a determination that the Claimant suffered a new work related injury on February 6, 2017. The matter proceeded to hearing on April 24, 2018 and June 4, 2018 before the undersigned ALJ. The ALJ ordered W.C. No. 5-017-566-001 re-opened by decision of Jne 27, 2018.

8. Respondent appealed the Findings of Fact, Conclusions of Law and Order entered June 27, 2018. The ALJ's Order was affirmed by The Industrial Claim Appeals Office (ICAO) on December 20, 2018.

Respondent's Petition to Reopen

9. At the commencement of the hearing on April 24, 2018, the parties entered three stipulations on the record: (1) Claimant's average weekly wage (AWW) was $616.70 from June 1, 2016 through May 31, 2017; (2) Claimant's AWW is $871.24 beginning June 1, 2017; and (3) If it is determined that the claim should be reopened, then Claimant is owed temporary disability benefits from March 28, 2017, and continuing.

10. At the conclusion of the hearing on June 4, 2018, this Administrative Law Judge entered an oral ruling from the bench, finding that:

> "[t]he claimant has proven by a preponderance of the evidence that her condition has worsened in the original 5-017-566. And she's failed to prove by a preponderance of the evidence that she sustained a new injury on February 6, 2017. . . And based on the stipulations to reopen the

> claimant’s -- average weekly wage, well, I'll pinpoint that the worsening is at February 6, 2017, that's a transition point. So the claimant's average weekly wage was 616.70 from February 6, 2017 until May 31st, 2017, and then it went up to 871.24. The claimant I have, and correct me if I'm wrong here because it's been a while, claimant was temporarily and totally disabled from March 28, 2017 and continuing. And there's a variable temporary total rate because of increased average weekly wage.”

[Exhibit B, pp. 20-21].

11. The ALJ requested that Claimant’s counsel prepare proposed Full Findings of Fact, Conclusions of Law and Order, which Claimant’s counsel submitted on June 11, 2018 [Exhibit B, p. 73]. Claimant’s Proposed Findings of Fact, Conclusions of Law and Order included a section entitled “Stipulations,” in which Claimant’s counsel re-iterated three stipulations entered in the record at the hearing on April 24, 2018

12. The ALJ issued Full Findings of Fact, Conclusions of Law and Order on June 28, 2018, which reiterated the parties’ three stipulations as the first three Findings of Fact:

> ¶ 1 The Claimant's AWW was $616.70 from June 1, 2016 through May 31, 2017;
>
> ¶ 2 The Claimant's AWW is $871.24 beginning June 1, 2017; and
>
> ¶ 3 If it is determined that the claim should be reopened, the Claimant is owed TTD benefits from March 28, 2017 and continuing.

[Exhibit D, p. 38].

13. In ¶ 21 of the “Findings of Fact”, the Administrative Law Judge found that “[t]he Claimant has proven, by a preponderance of the evidence that she experienced a worsening (change) of her condition, related to the admitted injury of June 1, 2016, after the finality of the FAL therein. Therefore, she has proven that a reopening of W.C. No. 5-017-566-01 is warranted.” [Exhibit D, p. 41]. Although the Administrative Law Judge did not provide a specific date for reopening, he stated it was “after the finality of the FAL”, which became final on March 20, 2018. Finding of Fact ¶ 23 then stated that “based on the stipulations of the parties … Claimant was and is temporarily and totally disabled from March 28, 2017 and continuing...” [Exhibit D, p. 41].

14. Paragraph f of the “Conclusions of Law” section of the Full Findings of Fact, Conclusions of Law and Order starts by stating that “the Claimant was and is

temporarily and totally disabled from March 28, 2017 and continuing." [Exhibit F, p. 44]. However, the paragraph then goes on to state "[t]he period from June 1, 2016, through May 31, 2017, both dates inclusive, equals 365 days. The period from June 1, 2017, through the hearing date, June 4, 2018, both dates inclusive, equals 368 days. Based on the AWW through May 31, 2017, retroactive, past due TTD benefits in the aggregate amount of $21,436.45. Based on the AWW from June 1, 2017, through the hearing date, June 4, 2018, retroactive, past due TTD benefits in the aggregate amount of $30,536.64, are due." [*Id*.]. Thus, the Administrative Law Judge entered contradictory conclusions, as he first stated that Temporary Total Disability benefits begin on March 28, 2017, but then calculated Temporary Total Disability benefits beginning June 1, 2016.

15. Paragraph D of the "Order" section of the Full Findings of Fact, Conclusions of Law and Order states "For the period from June 1, 2016, through May 31, 2017, both dates inclusive, equals 365 days, Respondent shall pay the Claimant retroactive, past due temporary total disability benefits in the aggregate subtotal amount of $21,436.45. For the period from June 1, 2017, through the hearing date, June 4, 2018, both dates inclusive, equals 368 days, Respondent shall pay the Claimant retroactive, past due temporary total disability benefits in the aggregate subtotal amount of $30,536.64. Respondent shall pay the Claimant a grand total of retroactive, past due temporary total disability benefits of $51,973.09, which is payable retroactively and forthwith." [Exhibit D, p. 45].

16. Paragraph F of the "Conclusions of Law" and paragraph D of the "Order" sections of the Full Findings of Fact, Conclusions of Law and Order was an error and mistake, as the parties clearly stipulated that temporary total disability benefits would begin on March 28, 2017, if the claim was reopened pursuant to Claimant's request.

Temporary Total Disability Benefits

17. The Full Findings of Fact, Conclusions of Law and Order dated June 28, 2018, which awarded TTD benefits retroactive to June 1, 2017, is reopened. Consistent with the parties' stipulations, which the ALJ found as fact in the Full Findings of Fact, Conclusions of Law and Order dated June 28, 2018, the Claimant is entitled to TTD benefits beginning on March 28, 2017, through May 31, 2017, both dates inclusive, a total of 65 days. For that period of time, Claimant's Average Weekly Wage (AWW) was $616.70, resulting in a TTD benefit rate of $411.13 per week. Thus, the Claimant is entitled to $3,817.67 in TTD benefits from March 28, 2017, through May 31, 2017, both dates inclusive.

18. The parties stipulated that the Claimant's AWW increased to $871.21 effective June 1, 2017, resulting in a TTD benefits rate of 580.81 per week. Claimant's authorized treating physician (ATP), Scott J. Primack, D.O., placed the Claimant at maximum medical improvement (MMI) on February 21, 2018. The period from June 1, 2017, through February 21, 2018, both dates inclusive, is 266 days. Thus, Claimant is

entitled to TTTD benefits in the amount of $22,070.65 for the period from June 1, 2017, through February 21, 2018, both dates inclusive.

19. Therefore, from the date the claim was reopened on Claimant's petition to reopen, she is entitled to TTD benefits in the grand total amount of $25,888.32.

Permanent Partial Disability

20. Respondent filed a FAL, dated January 11, 2019. The FAL admitted to a 12% whole person impairment rating. Under the Remarks and basis for permanent disability award it states, "Pursuant to Dr. Primack's deposition taken 4/16/2018, and his report dated February 21, 2018, Claimant sustained a 12% whole person impairment rating for specific disorder." The ALJ finds that the FAL was based on Dr. Primack's changed opinion of 12% whole person, expressed in his evidentiary deposition, which excluded a rating for ROM, when his report rated PPD at 20% whole person and included a rating for ROM. Claimant contends that the first 20% PPD rating is the appropriate rating because it was based on Dr. Primack's examination of the Claimant. Dr. Primack changed his rating by subtracting the ROM component after watching surveillance videos. The question is: which rating is more reliable and credible.

Ultimate Findings

21. The official and first opinion of Dr. Primack on PPD, expressed in his report, of 20% whole person is more credible and persuasive than his spontaneous declaration at the evidentiary deposition, deducting the range-of-motion portion (ROM) and reducing his PPD rating to 12% because it is more thoroughly and objectively explained. His subsequent reduction to 12% is based upon Dr. Primack's subjective viewing of surveillance film and is entitled to little, if any, weight.

22. Between internally conflicting opinions of Dr. Primack, the ALJ makes a rational choice, based on substantial evidence, to accept Dr. Primack's official report opinion of 20% whole person rating, and to reject his second rating of 12% whole person.

23. The ALJ finds that the Claimant has proven, by a preponderance of the evidence that Dr. Primack's first rating of 20% whole person is more reliable and credible because it was based on an objective examination of the Claimant for purposes of a permanent medical impairment rating. The second rating of 12%, expressed in Dr. Primack's evidentiary deposition was subjectively based on his eyeball viewing surveillance film, which had no persuasive indicia of objective criteria upon which the changed opinion was based.

24. The ALJ's award of TTD benefits retroactive to June 1, 2017, was an error or mistake because the parties had stipulated that if the claim was reopened pursuant to Claimant's request TTD benefits would begin on March 28, 2017. Therefore, Respondent sustained its burden of proving an error or mistake, in the Findings of Fact, Conclusions of Law and Order dated June 28, 2018, and the case should be reopened

to correct that error and mistake.

25. The Respondent's Petition to Reopen on the ground of error or mistake should be granted, but not for the outcome desired by the Respondent. The error was the admission of 12% whole person when, in fact, it should have been 20%.

26. Respondent alleges an error that could not have been addressed by following Division Independent Medical Examination (DIME) procedures in a timely fashion. Consequently, the only avenue open was a Petition to Reopen, based on error or mistake. The ALJ finds that reopening is appropriate and the outcome sought by the Claimant is appropriate.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, Dr.

Primack's first rating of 20% whole person was more reliable and credible because it was based on an objective examination of the Claimant for purposes of a permanent medical impairment rating. The second rating of 12%, expressed in Dr. Primack's evidentiary deposition was subjectively based on his eyeball viewing surveillance film, which had no persuasive indicia of objective criteria upon which the changed opinion was based. As found, The official and first opinion of Dr. Primack on PPD, expressed in his report, of 20% whole person is more credible and persuasive than his spontaneous declaration at the evidentiary deposition, deducting the range-of-motion portion (ROM) and reducing his PPD rating to 12% because it is more thoroughly and objectively explained. His subsequent reduction to 12% is based upon Dr. Primack's subjective viewing of surveillance film and is entitled to little, if any, weight.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between internally conflicting opinions of Dr. Primack, the ALJ made a rational choice, based on substantial evidence, to accept Dr. Primack's first opinion of 20% whole person PPD, and to reject his second opinion of 12% whole person PPD.

Petition to Reopen

c. Under § 8-43-303(1), C.R.S., after MMI and within six years of the date of injury, an ALJ may re-open a claim based on fraud, an overpayment, **an error, a mistake,** or a change in condition. See *El Paso County Department of Social Services v. Donn,* 865 P.2d 877 (Colo. App. 1993); *Burke v. Indus. Claim Appeals Office,* 905 P. 2d 1 (Colo. App. 1994); *Hanna v. Print Express, Inc.,* 77 P. 3d 863 (Colo. App. 2003); *Donohoe v. ENT Federal Credit Union,* W.C. No. 4-171-210 [Indus. Claim Appeals Office (ICAO) September 15, 1995]. This is so because MMI is the point in time when no further medical care is reasonably expected to improve the condition. § 8-40-101(11.5), C.R.S. (2009); *City of Colorado Springs v. Indus. Claim Appeals Office,* 954

P.2d 637 (Colo. App. 1997). As found, Respondent alleged an error that could not have been addressed by following Division Independent Medical Examination (DIME) procedures in a timely fashion. Consequently, the only avenue open was a Petition to Reopen, based on error or mistake. As found, reopening is appropriate and the PPD outcome sought by the Claimant is appropriate.

Burden of Proof

d The burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (CIAO), March 20, 2002]. *Also see Ortiz v. Principe,* 274 Ph.D. 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 Pd.D. 1116 (Colo. 1984). As found, Respondent has satisfied its burden with respect to reopening; and TTD. Claimant has satisfied her burden with respect to degree of PPD, *i.e.,* 20% whole person.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. W.C. No. 5-017-566-001 is hereby reopened, based on error or mistake.

B. The Claimant sustained permanent medical impairment of 20% whole person, and Respondent shall accordingly pay the Claimant additional permanent medical impairment benefits, based on 20% whole person.

C. Respondent shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

DATED this 13th day of June 2019.

EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm.*

STATE OF COLORADO **OFFICE OF ADMINISTRATIVE COURTS** **1525 Sherman Street, 4th Floor, Denver, CO 80203**	
In the Matter of the Workers' Compensation Claim of: **M** Claimant, vs. **D,** Employer, AND **C,** Insurer, Respondents	▲ **COURT USE ONLY** ▲ **CASE NUMBER:** **WC 5-081-669-002**

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Hearing in this matter was held on May 16, 2019, before Administrative Law Judge Margot Jones. Claimant was present and was represented by _____, Esq. Respondents were represented by _____, Esq. The hearing was digitally recorded beginning at 1:30 p.m. IN Courtroom 3. The parties' exhibits 1-8 and A-M were made part of the record.

In this order, the Judge refers to M as Claimant, to Respondent Employer D as Employer, and to Respondent-Insurer C as Insurer. The Judge may refer to Employer and Insurer collectively as Respondents.

Also in this order, the Judge may use the following acronyms: C.R.S. refers to Colorado Revised Statutes (2018); the Workers' Compensation Act refers to the Workers' Compensation Act of Colorado, §§8-40-101, et seq., supra; OAC refers to the Office of Administrative Courts; OACRP refers to the Office of Administrative Courts Rules of Procedure, 1 CCR 104-1; and WCRP refers to Workers' Compensation Rules of Procedure, 7 Code Colo. Reg. 1101-3.

ISSUES

Whether claimant sustained a compensable injury on June 21, 2018, arising out of and in the course and scope of his employment?

FINDINGS OF FACT

1. Claimant is employed as a locomotive engineer for Employer.

2. Claimant alleges that he sustained an injury to his left shoulder while pulling a train horn lever on June 21, 2018.

3. Claimant stipulated at hearing that he is not alleging a cumulative trauma injury, but rather an isolated injury which occurred on June 21, 2018.

4. Claimant was required to pull a train horn lever four times at each highway grade crossing. The sequence is two long pulls, one short pull, and one long pull.

5. Pursuant to a Job Demands Analysis and Risk Factor Analysis completed by Genex on April 27, 2018, the force required to pull a train horn is three to five pounds.

6. Pursuant to the Pull Force Study of Denver Transit Train Horns completed by Genex on October 31, 2018, the force required to pull a train horn varies from 14 pounds to 20 pounds depending on the train.

7. At approximately 3:30 a.m. on June 21, 2018, Claimant was operating a train which was traveling from Union Station to Denver International Airport. As Claimant crossed Chambers Road and operating the train horn consistent with his responsibilities as a train engineer, he allegedly experienced a pop in his left shoulder followed by immediate pain.

8. Claimant stopped the train and called dispatch. He testified that he told the dispatcher that he was able to operate the train until he reached the airport, but that he would not be able to operate the train on its return trip to Union Station.

9. Upon arrival at Denver International Airport, a transportation supervisor drove Claimant back to Union Station to obtain his belonging and then to St. Anthony Hospital. Claimant was given pain medications and discharged with instructions to follow-up on an outpatient basis.

10. After he was discharged from the hospital, Claimant sought treatment with Dr. Kern and later Dr. Williams. He was referred for an MRI of the left shoulder.

11. Claimant underwent an MRI of the left shoulder on July 2, 2018. It revealed a minimal area of near full-thickness articular sided tearing of the posterior fibers of the

supraspinatus just proximal to the footprint measuring 2 mm in AP dimensions and a diminutive anterior/inferior labrum which may have been related to old partial labral tearing. With regards to the biceps and labrum, mild long head biceps tendinopathy is noted. The distal tendon was well seated in the bicipital groove. The superior labrum was intact.

12. Respondents' expert, Timothy O'Brien, M.D. credibly testified at hearing that the MRI findings were not acute and were the opposite of what would be expected with an acute injury. He noted age related desiccation. He further noted that the biceps tendon appeared normal and there were no objective findings either degenerative or acute. Dr. O'Brien testified that the MRI is the most accurate diagnostic available.

13. Claimant treated with Rajesh Bazaz, M.D. on August 24, 2018. Dr. Bazaz noted that Claimant had failed to improve with conservative treatment. He recommended a left shoulder arthroscopy with subacromial decompression and a rotator cuff debridement. He noted depending on the percentage thickness, a rotator cuff repair may be indicated which would be an intraoperative decision.

14. Claimant underwent surgery performed by Dr. Bazaz on December 27, 2018. During the surgery, Dr. Bazaz found no evidence of partial-thickness or full thickness tearing of the rotator cuff. He noted irregularities of the biceps insertion on the superior labrum and performed a biceps tenodesis along with a subacromial decompression.

15. Dr. O'Brien evaluated Claimant for an independent medical examination (IME) on November 8, 2018.

16. Dr. O'Brien opined that Claimant "did not sustain an isolated injury to his shoulder on June 21, 2018 while employed as a train driver."

17. Dr. O'Brien explained that the MRI findings related to personal health issues, were age appropriate, and were biomechanically insignificant. Dr. O'Brien opined that, "A vast majority of people in Mr. Spector's age group have similar MRI scan findings and yet have no shoulder pain."

18. Dr. O'Brien noted, "[w]hile partial thickness rotator cuff tears can intermittently be painful and while partial thickness labral tears can also intermittently be painful, the likelihood that those MRI scan changes could have resulted in 10/10 pain that required immobilization and resulted in such significant disability that [Claimant] had to be helped from the train to his car, is nearly impossible. In my opinion, [Claimant's] behavior following an innocuous activity such as pulling on a brake lever with one's arm positioned at the level of the abdomen/chest have no physiologic or anatomic explanation. Certainly, the MRI scan demonstrates no bleeding, accumulation of inflammatory fluid, and no significant pathoanatomy that might explain this level of pain and dysfunction as that complained of by [Claimant] on June 21, 2018." (Ex. J, p.152)

19. Dr. O'Brien testified that interoperatively, Dr. Bazaz observed an injured biceps tendon with a normal rotator cuff.

20. Dr. O'Brien testified that the biceps tendon was normal when the MRI was obtained on July 2, 2018. He indicated that the biceps tendon injury reported by Dr. Bazaz was not observed on the MRI. Dr. O'Brien noted that the MRI showed that the internal portion of the bicep was normal. He testified that any incident on June 21, 2018 did not cause the injury reported by Dr. Bazaz. If a biceps tendon injury was present, it would have been observed on the MRI. Dr. O'Brien testified that the MRI appearance was the opposite of what would be observed if Claimant suffered an acute injury.

21. Claimant offered no explanation for the absence of a biceps tendon injury on the MRI. As Dr. O'Brien testified, if the biceps tendon was injured on June 21, 2018, it would have appeared on the July 2, 2018 MRI.

22. Dr. O'Brien testified that the mechanism of injury for a biceps tendon injury, a rotator cuff injury, or labral injury are similar and what injures one will frequently injure another. While he examined Claimant under the assumption of an alleged rotator cuff injury, he testified that the analysis would be the same for a biceps tendon injury.

23. Dr. O'Brien testified that the position Claimant was in at the time of the alleged injury was a safe position for the rotator cuff. The mechanism of injury did not engage the rotator cuff or biceps tendon to any extent, but rather engaged the deltoid. The movement in question was a deltoid muscle force and not a rotator cuff muscle force.

24. When Dr. O'Brien examined claimant, the October 31, 2018 Pull Force Study was not available. However, Dr. O'Brien testified the difference in pull force noted on the April 27, 2018 Job Demands Analysis and Risk Factor Analysis and the pull force noted on the October 31, 2018 Pull Force Study does not make any difference in his analysis.

25. Dr. O'Brien testified that the popping Claimant heard did not correlate with a new onset of injury when there were no objective findings.

26. Dr. O'Brien testified that feeling pain does not correlate with an objective finding of injury. There was simply no evidence of tissue breakage or yielding.

27. Dr. O'Brien testified Dr. Williams and Dr. Bazaz did not perform a Level II causation analysis.

28. Dr. O'Brien opined, "[w]hen there is no correlation between the level of pain of which a person is complaining and the level of disability it is causing relative to the objective findings that are observed at the time of the onset of those complaints, in my opinion have to be considered nonorganically based." (Ex. J, p. 153)

29. Dr. O'Brien continued, ""[w]hen I look back at [Claimant's] records and consider the fact that he was merely pulling on a lever (with negligible amounts of

energy or force required to do so) with his left arm positioned at nipple height – an essentially innocuous and non-injurious activity – and then try to reconcile his complaints of 10/10 pain that prevented him from walking independently to his car, I am unable to do so." (Ex. J, p. 153) 30. Dr. O'Brien opined, "I believe [Claimant's] complaints of pain are nonorganically based and they are being generated by secondary gain issues." (Ex. J, p.153)

CONCLUSIONS OF LAW

1. The purpose of the Act is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. A claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

3. In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO,* 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ*. Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S.

4. With regard to compensability, Section 8-43-201 states, "A claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence." The claimant always carries the initial burden of

proof in a workers' compensation case." *DiCamillo v. Gosney & Sons, Inc*., W.C. No. 4-328-945 (I.C.A.O. May 21, 1998).

5. Black's Law Dictionary (9th Ed. 2009) defines "burden of proof" as follows: "A party's duty to prove a disputed assertion. The burden of proof includes both the burden of persuasion and the burden of production."

6. The preponderance standard is met when "the existence of a contested fact is more probable than its nonexistence*." Industrial Com. of Colorado v. Jones,* 688 P.2d 1116 (Colo. 1984); *People v. Taylor*, 618 P.2d 1127 (Colo. 1980).

7. The question of whether Claimant met his burden of proof to establish a compensable injury is one of fact for determination by the judge. *See Faulkner v. I.C.A.O*., 12 P. 3d 844 (Colo. App. 2000).

8. If a party has the burden of proof by a preponderance of the evidence, and the evidence presented weighs evenly on both sides, the finder of fact must resolve the question against the party having the burden of proof. *Town of Castle Rock v. I.C.A.O*., 2013 COA 109 (Colo. App. 2013); *Schocke v. State*, 719 P.2d 361 (Colo. App. 1986).

9. A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. Section 8-41-301(1)(b), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury "arises out of and in the course of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions to be considered part of the employee's services to the employer. *General Cable Co. v. Industrial Claim Appeals Office,* 878 P.2d 118 (Colo. App. 1994).

10. Merely feeling pain at work in and of itself is not "compensable." *See Miranda v. Best Western Rio Grande Inn,* W.C. No. 4-663-169 (I.C.A.O. April 11, 2007). "An incident which merely elicits pain symptoms caused by a preexisting condition does not compel a finding that the claimant has sustained a compensable injury." *See also F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App 1995).

11. Claimant failed to meet his burden of proving that it is more probably true than not that he suffered an injury to his left shoulder either to the rotator cuff or the biceps tendon in the course and scope of his employment on June 21, 2018. The persuasive and credible evidence shows that Claimant's symptoms are degenerative age related conditions.

12. Claimant did not sustain any injury to his left shoulder in the course and scope of his employment on June 21, 2018.

13. The ALJ finds the testimony of Dr. O'Brien as to the issue of causation of the left shoulder symptoms to be credible and persuasive.

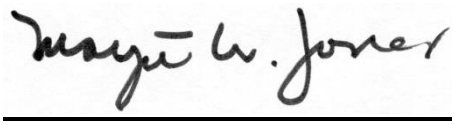
14. The ALJ rejects the opinions of Dr. Williams and Dr. Bazaz. Neither physician performed a Level II Causation Analysis. Neither physician offered an explanation for the lack of correlation of findings between the MRI and the operative report.

ORDER

Claimant's claim for workers' compensation benefits arising out of the alleged June 21, 2018 injury is hereby denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 19, 2019



MARGOT W. JONES
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-086-536-001

ISSUES

- Whether claimant has proven by a preponderance of the evidence that the reverse total shoulder replacement surgery recommended by Dr. Knackendoffel is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury?

FINDINGS OF FACT

1. Claimant sustained an admitted injury on August 27, 2018 when he tripped over rebar while walking on a job site and fell onto his right shoulder. Claimant testified he was carrying a piece of equipment (a splicer) in one hand and a tool bag in his other hand when he fell. Claimant testified he landed on his right shoulder and his right hand went numb including his right thumb and forefinger.

2. Claimant testified he reported his injury to employer immediately and sought medical treatment at Paonia Hospital on the day of the injury. Claimant was initially seen at West Elk Walk-In clinic before being instructed to go to the emergency room ("ER"). Claimant was evaluated at the Delta County Memorial Hospital ER on August 27, 2018. Claimant reported a history of falling onto his right shoulder and noted significant limitation in his range of motion. Claimant reported a distant history of a glenoid labrum tear that was surgically treated. Claimant was referred for x-rays. The x-rays revealed severe arthritic changes in the right shoulder predominantly within the glenohumeral articulation. No acute fracture was noted. Claimant was instructed to follow up with a workers' compensation physician or an orthopedic surgeon.

3. Claimant was evaluated by Dr. Wade on August 28, 2018. Dr. Wade noted claimant was continuing to complain of sever right shoulder pain since his fall the previous day. Claimant reported to Dr. Wade a history of right shoulder pain approximately 19 years ago which required rotator cuff surgery. Dr. Wade evaluated claimant and referred him for a magnetic resonance image ("MRI") of the right shoulder.

4. The MRI was performed on September 4, 2018. The MRI demonstrated marked arthrosis of the glenohumeral joint for a patient of claimant's age. The MRI also showed a large mulilocculated cystic lesion residing with the muscle belly of the supraspinatus. The MRI also revealed advanced acromioclavicular ("AC") joint degeneratve changes, tendinosis subscaularis witout tear and tendinosis biceps tendon.

5. Claimant returned to Dr. Wade on September 11, 2018 after the MRI. Dr. Wade reviewed the results of the MRI and recommended claimant continue with the shoulder immobilizer and referred claimant to Rocky Mountain Orthopedics for evaluation.

6. Respondents obtained a physician advisor report from Dr. Erickson on September 14, 2018. Dr. Erickson reviewed the medical records and opined that claimant did not report a significant blow to the right shoulder in the fall and opined claimant likely suffered a minor contusion or a sprain or strain of the right shoulder in the fall. Dr. Erickson noted that claimant's MRI showed advanced arthritis of the AC joint, some mild rotator cuff tendinopathy, and impingement findings along with some cysts in the muscle belly of the supraspinatus, but the major issue was the marked arthrosis of the glenohumeral joint. Dr. Erickson opined that if claimant continued to have difficulties with his shoulder, it was not because of the fall, but instead due to the advanced glenohumeral arthrosis with was a pre-existing condition. Dr. Erickson also opined that there was no evidence of aggravation or worsening and the fall did not accelerate the disease process.

7. Claimant was examined by Dr. Knackendoffel on September 19, 2018. Claimant reported to Dr. Knackendoffel a consistent accident history of falling while at work leading to his current symptoms of pain, numbness, tingling, locking, swelling, weakness, and decreased range of motion. Claimant also reported numbness and tingli9g in the median distribution of the right hand. Dr. Knackedoffel reviewed claimant's MRI exam and performed a physical evaluation and diagnosed claimant with severe glenohumeral arthritis of the right shoulder, which was noted to be chronic. Dr. Knackendoffel further opined that the claimant's osteoarthritis was acutely aggravated by the fall. Dr. Knackendoffel diagnosed claimant with severe tendinopathy of the distal supraspinatus and severe cystic degeneration of the muscle belly of the supraspinatus.

8. Dr. Knackendoffel noted claimant's prior surgical history involving the shoulder and acknowledged the chronic arthritis of the shoulder. Dr. Knackendoffel opined, however, that claimant's condition was severely aggravated by the recent fall. Dr. Knackendoffel recommended a computed tomography ("CT") scan of the right shoulder with extraction of the humeral head. Dr. Knackendoffel opined that the optimal surgical procedure would be a reverse total shoulder arthroplasty, but noted that claimant would be young for this type of procedure. Dr. Knackendoffel noted that a conventional total shoulder arthroplasty would probably not facilitate adequate active flexion of the right shoulder and noted that given claimant's significant injury to his right shoulder superimposed upon the chronic glenohumeral degeneration, claimant would be unlikely to return to active physical labor. Dr. Knackendoffel also recommended physical therapy.

9. The CT scan was performed on September 26, 2018. The CT scan demonstrated severe right glenohumeral osteroarthritis with mild right acromioclavicular arthritis.

10. Claimant returned to Dr. Knackendoffel on September 27, 2018. Dr. Knackendoffel reviewed the results of the CT scan and noted that the CT scan demonstrated severe osteoarthritis of the glenohumeral joint with prominence cysts within the superior glenoid. Dr. Knackendoffel again recommended the reverse total shoulder arthroplasty.

11. Respondents obtained a second physician advisor opinion from Dr. Erickson on October 12, 2018. Dr. Erickson noted the recommendations by Dr. Knackendoffel and opined that it was inappropriate to make a recommendation for a reverse arthroplasty based on a CT scan and physical examination. Dr. Erickson recommended an MRI arthrogram to adequately assess the status of the rotator cuff. Dr. Erickson further opined that the fall did not cause claimant's significant degenerative arthritis, nor did it aggravate of worsen claimant's pre-existing condition.

12. Claimant continued to treat with Dr. Wade pending the surgical recommendation. Claimant also continued to participate in physical therapy.

13. Claimant returned to Dr. Knackendoffel on November 15, 2018. Dr. Knackendoffel noted that claimant's surgery was denied and recommended a cortisone and steroid injection in the shoulder. The injection was performed by Dr. Knackendoffel on that day. Claimant followed up with Dr. Wade on November 19, 2018 and reported that the injection did not help at all. Dr. Wade recommended claimant continue physical therapy.

14. Claimant returned to Dr. Wade on December 11, 2018. Dr. Wade noted claimant continued with his physical therapy which was helping. Claimant again returned to Dr. Wade on January 14, 2019. Dr. Wade noted that claimant's range of motion of his shoulder was getting worse.

15. Respondents referred claimant for an independent medical examination ("IME") of claimant on January 19, 2019 with Dr. Failinger. Dr. Failinger reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME.

16. Claimant reported a consistent accident history to Dr. Failinger of falling when he tripped over rebar and hitting his right side on the rocks on the ground as he held on to the splicer. Dr. Failinger noted limited range of motion on examination with no obvious rupture of the long head of the biceps. Dr. Failinger noted that claimant's right shoulder condition appeared to be an exacerbation of the severe pre-existing glenohumeral degenerative joint disease following his previous shoulder surgery in 1999. Dr. Failinger noted that claimant reported at the IME that he fell with a direct blow to the shoulder and the intake clinic note on August 27, 2018 reports that claimant fell with injury to the shoulder and no description of the actual impact area. Dr. Failinger opined that the cause of the shoulder condition would be severe degenerative joint disease which appeared to have been exacerbated by the fall on August 27, 2018. Dr. Failinger recommended reviewing the films that had been taken to determine if there was an actual change in the patient's pathology.

17. Claimant returned to Dr. Knackendoffel on February 13, 2019. Dr. Knackendoffel noted claimant was unable to perform work with his right arm above chest level. Dr. Knackendoffel again recommended the reverse total shoulder replacement surgery with the understanding that claimant would be unable to return ot heavy labor employment following the surgery.

18. Claimant again returned to Dr. Knackendoffel on March 7, 2019. Dr. Knackendoffel noted claimant continued to have pain in his right shoulder which had become more bothersome. Dr. Knackendoffel opined that the claimant's rotator cuff was not functional and probably had significant fatty degeneration. Dr. Knackendoffel opined that a standard shoulder replacement would not be likely to be stable secondary to rotator cuff weakness. Dr. Knackendoffel recommended an MRI arthrogram of the right shoulder.

19. Dr. Failinger issued an addendum to his report on March 15, 2019 after reviewing the imaging studies, including the x-rays from 2012 and 2015 along with the x-ray from August 27, 2018 and MRI from September 4, 2018. Dr. Failinger opined after reviewing the x-rays that there was no new pathology created by the fall and that the rotator cuff appeared to be intact. Dr. Failinger opined that the fall could cause a contusion only and any ongoing pain after a 6-8 week period would be due to the pre-existing arthritis which is incredibly severe.

20. Claimant testified at hearing regarding the condition of his shoulder prior to his work injury. Claimant testified he had a prior injury to his right shoulder associated with coal mining. Claimant testified he had surgery on his shoulder and the problems with his shoulder resolved. Claimant testified that after he recovered from the shoulder surgery he was able to perform his work duties for employer without restriction up until his August 27, 2018 work injury. The ALJ finds claimant's testimony regarding the physical condition of his right shoulder to be credible.

21. Dr. Knackendoffel testified at hearing in this matter. Dr. Knackendoffel testified that based on his physical examination of claimant, claimant had stiffness of the right shoulder with extreme weakness of the rotator cuff musculature. Dr. Knackendoffel testified that the MRI exams showed an extremely arthritic joint with the findings appearing to be longstanding problems. Dr. Knackendoffel testified that there were no findings on either MRI exam that represented acute findings related to the fall at work.

22. Dr. Knackendoffel opined at hearing that the fall claimant sustained on August 27, 2018 exacerbated claimants underlying shoulder condition and permanently aggravated the shoulder condition. Dr. Knackendoffel testified that this opinion was based on claimant's statements to him during the examination process. Dr. Knackendoffel testified that if claimant did not experience the fall at work on August 27, 2018, claimant would have likely eventually still needed a reverse total shoulder replacement surgery, but not yet.

23. Dr. Failinger testified at hearing in this matter. Dr. Failinger testified that the multiloculated cysts in the supraspinatus that were present on the MRI film are chronic in nature and would not develop in the weeks between the injury and the MRI film. Dr. Failinger testified that the nature of the changes in claimant's shoulder demonstrated in the x-rays and MRI were chronic in nature and represented severe pre-existing arthritis. Dr. Failinger testified that the chronic nature of claimant's shoulder

condition would have warranted surgery if claimant's symptoms correlated with the pathology.

24. Dr. Failinger testified that the recommended reverse shoulder arthroplasty was developed for situations in which the patient does not have a functioning rotator cuff and abnormal motion mechanics from the lack of a functioning rotator cuff. Dr. Failinger testified he agreed with Dr. Erickson that in claimant's case, he did not appear to have a significant rotator cuff tear. Dr. Failinger testified that the x-rays and MRI films demonstrated the severity of the arthritis and there were no signs of anything acute involving the shoulder, or that the shoulder was affected at all by the fall. Dr. Failinger opined that the fall did not accelerate, change, or alter claimant's disease process at all. Dr. Failinger testified that it would be highly improbable that claimant would have had no problems with his shoulder.

25. Dr. Failinger testified on cross-examination that there was no medical evidence indicating that claimant was symptomatic in the months or years before his fall. Dr. Failinger also testified that, according to claimant's reports, he was capable of working fully duty prior to his fall. Dr. Failinger Dr. Failinger further agreed that according to medical records, after the fall, claimant's symptoms involving his shoulder changed.

26. The ALJ credits the testimony of Dr. Knackendoffel along with claimant's testimony at hearing, and finds that claimant has demonstrated that it is more probable than not that the recommended reverse total shoulder arthroplasty is reasonable medical treatment necessary to cure and relieve claimant from the effects of the work injury. The ALJ credits claimant's testimony that his onset of symptoms involving pain and restricted range of motion developed following the fall on August 27, 2018. The ALJ further credits the testimony of Dr. Knackendoffel that the surgery in this case was accelerated by the fall that resulted in the development of symptoms.

27. The ALJ notes that the degenerative nature of claimant's shoulder condition, but the testimony and medical records entered into evidence in this case demonstrate that it is more probable than not that the fall resulted in the development of symptoms that accelerated the need for the recommended total reverse arthroplasty in this case.

28. The ALJ further credits the testimony and opinions expressed by Dr. Knackendoffel in his report and finds that claimant has demonstrated that it is more probable than not that the appropriate surgery in this case is the reverse total shoulder arthroplasty. The ALJ credits the opinions expressed by Dr. Knackendoffel regarding the condition of claimant's rotator cuff tendon and finds Dr. Knackendoffel's testimony on the necessity of the reverse total shoulder arthroplasty surgery to be credible and persuasive.

29. The ALJ further finds that claimant's testimony regarding the nature of his symptoms prior to his work injury is corroborated by the medical records that do not document claimant having ongoing problems for his right shoulder following the surgery

performed in 1999. Therefore, the ALJ finds claimant's testimony on this issue to be credible.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990).

4. As found, claimant has established by a preponderance of the evidence that the recommended revers total shoulder replacement surgery is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury. As found, the opinions expressed by Dr. Knackendoffel along with claimant's testimony at hearing are found to be credible and persuasive regarding this issue.

5. As found, the opinions presented by Dr. Knackendoffel regarding the necessity of the reverse shoulder arthroplasty are found to be credible and persuasive. As found, claimant has proven by a preponderance of the evidence that the

recommended reverse total should arthroplasty is reasonable and necessary medical treatment related to claimant's August 27, 2018 work injury.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve claimant from the effects of the August 27, 2018 work injury including the surgery recommended by Dr. Knackendoffel.

2. All issues not determined herein are reserved for further determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 20, 2019

Keith E. Mottram

_____

Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that vascular surgery for her right leg is causally related to her April 13, 2018 work injury.

FINDINGS OF FACT

1. Claimant is a 39-year-old female employed by Employer as a ramp agent. Claimant's duties include loading cargo, bags, mail, and other items on and off airplanes.

2. On April 13, 2018, Claimant was so employed and was working with bags when she felt a pop in her right leg. Claimant was immediately unable to put pressure on her right leg. Claimant testified that her leg was so swollen that she was packed with ice at a visit that day.

3. On April 13, 2018, Claimant was evaluated at Concentra by physical therapist Abigail Burger. Claimant reported that she was pulling a bag off a cart, stepped back, and felt immediate pain in the right gastroc. Claimant reported that the pain was sharp and that she was unable to bear weight. PT Burger noted no functional restrictions prior and that Claimant's reason for therapy was gastroc strain. PT Burger noted that Claimant had been placed off work and was unable to participate in any essential job functions. Claimant was noted to be using two crutches and to be non-weight bearing. *See* Exhibit G.

4. Employer filled out a first report of injury form on April 13, 2018. The form indicated that Claimant was reaching the top shelf in a baggage cart to unload a bag and was on her tippy toes and that as she grabbed a bag to bring it towards her she felt her right knee pop. *See* Exhibit A.

5. On April 24, 2018, Nickolas Curcija, PA evaluated Claimant at Concentra. Claimant was noted to be 5'4" and to weigh 250 pounds. PA Curcija's notes indicated that Claimant was there for recheck of right knee and follow up on right calf strain. Claimant reported that her symptoms had not changed and that she was still having trouble bearing weight. Claimant reported intermittent swelling that was worse in the morning and improved during the day. Claimant reported that her toes felt tingly when the leg was swollen. Claimant reported increased pain in her knee with bending. On examination, PA Curcija found tenderness diffusely over the anteromedial aspect of the right knee and diffusely over the posterior knee. He found circumference at the mid-calf to be equal on both legs and no visible swelling or edema was found in the right lower leg. PA Curcija noted posterior tenderness in the right lower leg. He also found tenderness in the Achilles musculotendinous junction and limited range of motion in all planes with pain in the right ankle. He assessed muscle strain of the right lower leg. PA

Curcija recommended an MRI of the right knee and an MRI of the right lower extremity. He also recommended lidocaine patches. *See* Exhibit 5.

6. On May 2, 2018, Jenelle Tittelfitz, PA evaluated Claimant at Concentra. Claimant reported some improvement but that she was still having a hard time putting weight on her right knee. She was noted to be there for a follow up of her right knee and calf strain. Claimant reported that the day prior, she was standing and ambulating with her crutches and when she got home her right calf was swollen, warm, and very tender to light touch. Claimant applied ice, elevated her leg, and felt like the swelling had improved but was still very tender in the right calf. Claimant reported that the lidocaine patches did not significantly improve the pain in her calf or her knee. On examination, PA Tittelfitz noted the right calf circumference was slightly greater than the left calf, by .5 cm. She also noted swelling and posterior tenderness on the right lower leg and calf. PA Tittelfitz assessed muscle strain of the right lower leg and planned to do a venus flow ultrasound of the right lower extremity. It was noted that the ultrasound was to rule out deep vein thrombosis given the worsening of swelling, warmth, and muscle cramping of the right calf. *See* Exhibits 5, H.

7. On May 7, 2018, Claimant underwent an MRI of her right lower leg. The impression was no muscle strain, tendon tear, or focal hematoma. The impression also found some nonspecific periosteal edema about the medial tibia shaft, unlikely to reflect stress related change, with no intramedullary edema or acute bone lesion identified. The radiologist found mild increased signal within the superficial posterior compartment musculature and opined the increased signal was unlikely to reflect a strain, however he opined that an overuse type of injury/delayed onset muscle soreness was conceivable. *See* Exhibit I.

8. On May 9, 2018, PA Tittelfitz evaluated Claimant. She noted that the recent ultrasound was negative for deep vein thrombosis. Claimant reported that she went to a pool and felt improved range of motion after moving her right leg a little in the pool. PA Tittelfitz noted that an MRI of the lower leg was performed and was negative for tendon or muscle tear. She noted that the right knee MRI, however, showed a full thickness radial tear through the posterior horn of the medial meniscus with a gap of absent meniscus spanning about 4 mm. Claimant was assessed with medial meniscus tear and surgery was recommended. *See* Exhibit 5.

9. On June 4, 2018, Claimant underwent right knee surgery with Cary Motz, M.D. Dr. Motz performed a right knee arthroscopy with partial medial meniscectomy and chondroplasty of the medial femoral condyle. *See* Exhibits 6, J.

10. On June 14, 2018, Angelina Waller, PA evaluated Claimant. Claimant reported that she developed bilateral lower extremity swelling and increased right calf pain after surgery. Claimant's knee pain was noted to be improved from pre surgery. PA Waller noted that an ultrasound the week prior was negative for deep vein thrombosis and that Claimant had a gastroc injury at the time of the initial knee injury. PA Waller expected Claimant's pain to continue to improve over the next several weeks. *See* Exhibit 6.

11. On June 14, 2018, Amanda Cava, M.D. evaluated Claimant. Claimant reported that 4 days after her surgery she had severe bilateral swelling in her lower extremities, a fever, and marks on her legs. Claimant reported having a venous Doppler to rule out deep vein thrombosis that was negative and blood work to rule out infection that was also negative. Claimant reported that she gets cramping in her right calf with walking so was using a single crutch. The review of systems noted joint pain, muscle pain, joint swelling, joint stiffness, limping, and night pain. Dr. Cava assessed tear of medial meniscus status post arthroscopic surgery and muscle strain of right lower leg. Dr. Cava recommended physical therapy and pool therapy. Dr. Cava noted that Claimant would start the post op physical therapy and could resume pool therapy for a few visits, which may benefit Claimant due to the gastroc injury. Dr. Cava noted moderate level of pain and swelling in the knee. *See* Exhibit 5.

12. On July 12, 2018, Dr. Motz evaluated Claimant. Dr. Motz noted that Claimant's pain was improved and that Claimant would continue home exercise and physical therapy. He discussed that she may have chronic knee pain given chondromalacia in the knee. Dr. Motz noted that Claimant had a prior gastroc injury and had some persistent pain. *See* Exhibit 6.

13. On July 13, 2018, PA Tittelfitz evaluated Claimant. Claimant reported that she did not start pool therapy as the therapist felt she needed to strengthen her knee first. Claimant reported that she had improvement in her knee strength and was now using a cane to ambulate and was off the crutches. Claimant reported continued muscle tension/trigger points in the gastrocnemius and reported that physical therapy was treating the gastroc with deep massage and kinesiology taping. On examination of the right lower leg, PA Tittelfitz found medial, posterior, and proximal tenderness. She assessed muscle strain of the right lower leg and tear of the medial meniscus status post arthroscopic surgery. *See* Exhibit 5.

14. On August 15, 2018, PA Tittelfitz evaluated Claimant. Claimant reported her knee was feeling better and that her calf was still spasming but was healing. Claimant reported falling the week prior on her stairs due to weakness in her knee and that she did not hit her knees. Claimant reported that she still had not started pool therapy, as the physical therapist didn't feel she was strong enough yet. Claimant reported that the physical therapist recommended calf compression stockings. Claimant had kinesiology tape on her calf. PA Tittelfitz provided a prescription for calf sleeves. *See* Exhibit 5.

15. On September 6, 2018, Dr. Motz evaluated Claimant. Claimant reported continued pain in her calf with swelling. Dr. Motz noted that a deep vein thrombosis ultrasound was negative and that an MRI of the calf done in May showed some mild periosteal reaction but no muscle strain. Dr. Motz opined that it would be reasonable to repeat the calf MRI to look for any muscle edema or continued periosteal reaction. Dr. Motz opined that Claimant should wear the TED hose they provided after surgery to see if that helped with swelling and discomfort. Dr. Motz opined that it was possibly a vascular issue. *See* Exhibits 6, J.

16. On September 10, 2018, Claimant underwent a second MRI of her right lower leg. The increased signal within the superficial posterior compartment muscles from her prior MRI in May was found to be less conspicuous but still present. The radiologist found no acute abnormality, and found the subtle high T2 signals from the anteromedial tibial shaft periosteal region and the subtle high T2 signal within the superficial posterior compartment muscles to be less conspicuous than what showed in the May study. *See* Exhibit I.

17. On September 20, 2018, Dr. Motz evaluated Claimant. Dr. Motz noted that the repeat MRI of the lower leg showed near resolution of the periostitis and showed no muscle herniation or tear. Claimant reported her pain had improved with the compression stocking. Claimant reported that her knee was back to normal but reported continued calf pain. Dr. Motz opined that they could not explain the calf pain and that the MRI showed no pathology, a repeat deep vein thrombosis was negative, and that he was hoping with compression stockings it would eventually resolve. Dr. Motz opined that he had no further treatment options but noted a vascular consultation could be considered. *See* Exhibits 6, J.

18. On September 24, 2018, Dr. Cava evaluated Claimant. Claimant reported that her right knee pain was improving but that her calf pain, calf swelling, and calf muscle cramping was persistent. Claimant reported that using compression stockings helped. Dr. Cava noted that Claimant was released from orthopedic care with Dr. Motz. On exam, Dr. Cava found trace swelling in Claimant's right calf along with posterior tenderness. Dr. Cava opined that Claimant's knee was doing well but that they were still working on the lower leg/calf muscle. *See* Exhibit 5.

19. On October 17, 2018, PA Tittelfitz evaluated Claimant. Claimant reported being sore from physical therapy and dry needling and that she had pain in her right leg from her right calf down to her ankle. Claimant was limping. PA Tittelfitz found no swelling in the right lower leg but found lateral and posterior tenderness. PA Tittelfitz noted slow progress and recommended continued dry needling and physical therapy. *See* Exhibit 5.

20. On November 7, 2018, PA Tittelfitz evaluated Claimant. Claimant reported having more better days than bad days and that her calf pain comes and goes. Claimant reported that a physical therapist had pin pointed an area of her posterior lower leg where there was supposed scar tissue built up from a missed calf tear. PA Tittelfitz opined that treatment would remain the same and recommended continued physical therapy and pool therapy. *See* Exhibit 5.

21. On December 5, 2018, PA Tittelfitz evaluated Claimant. Claimant reported having some swelling, stiffness, and limping after trying to walk around for maybe half an hour. Claimant also reported an echhymotic area on the posterior right calf the week prior that felt like the leg was wet and that he noted a weeping of the skin. PA Tittelfitz reviewed physical therapy notes that noted Claimant was making good progress. On examination, PA Tittelfitz found swelling in the right lower leg with shiny and taut skin. She also found lateral and posterior tenderness and tenderness to palpation along the gastrocnemius. She assessed swelling of lower leg, muscle strain of right lower leg, and status post

arthroscopic surgery of the right knee. PA Tittelfitz also referred Claimant to a vascular surgeon for the right lower leg swelling. Under discussion, PA Tittelfitz noted that Claimant had chronic unilateral leg swelling with a previous negative ultrasound, antiembolism stockings without resolution, and a prior MRI of the right lower extremity showing red marrow in distal femur and fibula with suggestion for CBC. *See* Exhibit 5.

22. On December 20, 2018, Dr. Cava evaluated Claimant. Claimant reported her right leg was sore and she continued to have some swelling. Claimant reported that her right knee felt great but that her right calf was very painful with cramping and swelling. Dr. Cava noted mild swelling in the right lower leg and diffuse tenderness to palpation. Dr. Cava assessed muscle strain of the right lower leg and periostitis of the lower leg. Dr. Cava noted that Claimant was stable but still having significant pain and swelling in the right calf/lower leg. *See* Exhibit 5.

23. On December 26, 2018, Omar Mubarek, M.D. evaluated Claimant. Claimant reported that she had been symptomatic with right lower extremity swelling after trauma in the workplace. Claimant reported that her right leg is often 2-3 inches larger in circumference than her left when she stands for prolonged periods of time. Claimant reported that this only occurred after her work accident. Dr. Mubarek performed an ultrasound that showed deep venous insufficiency involving the common femoral vein and superficial venous insufficiency of the great saphenous vein. Dr. Mubarek believed that multiple factors were contributing to the right lower extremity swelling and he assessed chronic venous insufficiency, swelling of right lower extremity, and lymphedema. Dr. Mubarek recommended addressing all the issues that might be worsening the situation. He advised Claimant to wear compression therapy, to elevate her leg, to use jobst pumps, to diet and exercise, and he recommended a right greater saphenous vein ablation. Dr. Mubarek noted that Claimant was morbidly obese and that weight loss would help with the leg swelling. *See* Exhibits 8, L.

24. On January 18, 2019, PA Tittelfitz evaluated Claimant. Claimant reported feeling the same. PA Tittelfitz noted that a vascular consult and ultrasound showed an incompetent greater saphenous vein and that surgery for ablation was recommended. Claimant was instructed to wear calf compression stockings and to lose 20 pounds before surgery. Claimant reported that Respondent had denied the surgery and that she felt frustrated since she did not have leg cramping or swelling before her injury and had been consistently reporting her ongoing calf tenderness, swelling, and pain. PA Tittelfitz noted that MRI of the lower leg and Doppler ultrasounds done pre and post operatively for Claimant did not show incompetence of the vein and that ultrasounds in both May and September of 2018 did not document any venous insufficiency although he greater saphenous was not mentioned in either study. PA Tittelfitz also noted that the MRI would not have been specific for greater saphenous vein insufficiency, as MR venography was not performed. PA Tittelfitz noted that a deep vein thrombosis can contribute to venous incompetence if veno occlusive. PA Tittelfitz assessed swelling of lower leg, muscle strain of right lower leg, and injury of saphenous vein of the right lower extremity, sequela. PA Tittelfitz opined that unfortunately the referral for vascular ablation was being denied and that Claimant may need an IME to better determine causality. *See* Exhibits 5, H.

25. On February 8, 2019, Dr. Cava evaluated Claimant. Claimant reported she felt worse in the right leg since her last visit with 5-6/10 pain. Claimant reported swelling. Dr. Cava noted that Claimant was discharged from physical therapy and from the orthopedic specialist. Dr. Cava assessed only the right knee tear and noted that she would call vascular specialist Dr. Mubarek to discuss causality. Dr. Cava noted that if Dr. Mubarek felt relatable, then she could appeal the denied procedure, but if not then she would close the case with an impairment rating of the knee. *See* Exhibit 5.

26. On March 22, 2019, Dr. Cava evaluated Claimant. Claimant reported that nothing had changed and that her swelling had not gone down. Dr. Cava noted the right knee injury and surgery with complicated recovery due to a painful right lower extremity with swelling. Dr. Cava noted the insurance denial of liability for the lower extremity vein treatment for venous insufficiency. Dr. Cava noted there was a hearing scheduled for June 4. On exam, Dr. Cava found trace lower leg edema. Dr. Cava opined that Claimant was at maximum medical improvement for the tear of the medial meniscus and would have permanent restrictions. Dr. Cava noted that she left a detailed message for Dr. Mubarek that morning regarding his opinion on causality of the lower leg/calf. Dr. Cava noted that for now, Claimant would be at MMI unless the hearing recommended reopening her case/treatment for venous insufficiency. Dr. Cava opined that Claimant had a 12% lower extremity impairment. *See* Exhibits 5, H.

27. On March 25, 2019, Dr. Mubarek's medical assistant called Dr. Cava and noted that Dr. Mubarek was out of town for the next week and a half but that she would discuss his opinion of causality on the swelling with him upon his return. *See* Exhibits 5, H.

28. On April 11, 2019, Tashof Bernton, M.D. performed an independent medical evaluation. Claimant reported that on April 13, 2018 she was working on the ramp when she went to pull a bag from a bag cart and as she reached upward felt her leg pop. Claimant reported feeling it in the knee down her right side and that she couldn't put any pressure on the right leg, people helped her to the car, and she went for evaluation. Dr. Bernton noted a medical report from April 13 indicating Claimant had pain radiating into the calf more localized on the top of the calf and an assessment of muscle strain of lower right leg. Mild tenderness and mild swelling and ecchymosis at the anterior inferior aspect of the knee and at the anterior proximal lower leg were noted on April 13 as well. Dr. Bernton reviewed additional medical records. He noted that Dr. Mubarek never opined whether or not the venous insufficiency was work related. Dr. Bernton also performed a physical exam, noting Claimant to have a body mass index of 47 with a weight of 282 pounds and a height of 5 feet 5 inches. *See* Exhibits 10, M.

29. Dr. Bernton opined that the diagnosis was clear and that Claimant had a right medial meniscal tear with some osteoarthritis of the right knee and that Claimant had venous insufficiency with symptoms of swelling bilaterally, although significantly greater on the right than the left. Dr. Bernton noted that the venous insufficiency on the right involved both the deep venous system and the superficial venous system. He noted that the history reported of onset of venous insufficiency was with the medial meniscal tear. Dr. Bernton noted that the history as given by Claimant indicates a temporal sequence that was present in that the onset of right calf symptoms occurred at the same

time as the occupational injury. However, he opined that temporal sequence alone did not establish causation. *See* Exhibits 10, M.

30. Dr. Bernton opined that although the MRI of Claimant's lower right leg showed some evidence of mild strain, no clear abnormalities were present. Dr. Bernton opined that Claimant clearly did not have secondary venous disease due to trauma as multiple ultrasounds demonstrated the absence of a clot/deep vein thrombosis and there was clearly no arteriovenous fistula. He opined that secondary venous disease is caused by either a thrombotic event with a deep vein thrombosis or through an arteriovenous fistula that occurs after trauma. He noted that the ultrasounds showed neither. Therefore, he opined and testified that Claimant had primary venous disease, which he opined was more common than secondary venous disease. He testified that primary venous disease is related to obesity and has risk factors including age, family history, female gender, history of deep vein thrombosis, and obesity. Dr. Bernton opined that Claimant's weight and severe obesity represented a significant risk factor. *See* Exhibits 10, M.

31. Dr. Bernton opined that there was no known mechanism for the trauma, as described by Claimant, to have resulted in venous insufficiency. He opined that the occupational injury had no basis to have resulted in the causation or exacerbation of venous insufficiency. Dr. Bernton opined that the ablation recommendation was medically appropriate but was not work related. *See* Exhibits 10, M.

32. On April 29, 2019, Respondents filed a final admission of liability admitting to a 12% permanent partial disability rating for Claimant's right leg. Respondent admitted to maintenance medical care pursuant to Dr. Cava's March 30, 2019 report. *See* Exhibits 3, D.

33. Dr. Bernton testified at hearing. He testified that there are two types of venous insufficiency and that Claimant has primary venous insufficiency. He opined that the other type, secondary venous insufficiency, could be related to trauma like a penetrating wound or a blood clot/thrombosis. However, he noted that post operatively, Claimant had an ultrasound and venogram that showed no clots and no fistula and that she had primary venous insufficiency and not secondary insufficiency. He opined that primary insufficiency happens when a vein becomes weak and opined that it can happen as a gradual process due to increased pressure (weight primarily). He testified that over time it reaches a tipping point where the veins can no longer close smoothly as they should. He opined and noted that Claimant's deep vein was incompetent. Dr. Bernton noted that the MRI of the right leg had no significant findings and would have shown a traumatic muscle injury if one had occurred. Dr. Bernton noted Claimant's body mass index of 47 and opined that at 40, a person is considered morbidly obese and he noted that the risk factor of weight affects both sides. Dr. Bernton opined that the venous insufficiency couldn't have been and wasn't caused by the work injury or the work related right knee surgery. He testified that despite the temporal relationship, there was no causal relationship.

31. Claimant also testified at hearing. Claimant testified that she has had pain in her right calf since the injury and that she never had problems in her right or left leg prior to the injury. Claimant testified that she has calf spasms that never existed before the injury. Claimant noted that even with physical therapy, her calf symptoms had not gone away since the injury. Claimant's testimony is credible, persuasive, and consistent with the medical records.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo.App. 2000).

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). The claimant is required to prove by a preponderance of the evidence that the conditions for which she seeks medical treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has established, by a preponderance of the evidence, that the right leg ablation vascular surgery is reasonable, necessary, and causally related to her April 13, 2018 work injury. As noted above, there is an acute temporal relationship between the injury and the onset of symptoms in Claimant's right calf. As found above, Claimant reported immediate pain in her right calf. On April 13, 2018 the date of injury, Claimant reported pain radiating into the calf more localized on the top of the calf and an assessment of muscle strain of lower right leg was given. On that same date, the physical therapist who evaluated Claimant assessed gastroc strain. On April 24, Claimant was assessed as having a right calf strain and muscle strain of the right lower leg. On May 2, Claimant was found to have swelling and posterior tenderness in her right lower leg and calf. The MRI of her right lower leg performed on May 7 showed mild increased signal in the superficial posterior compartment musculature, the exact area that Claimant had acute symptoms and tenderness beginning on April 13. Although the radiologist noted the findings were unlikely to reflect a strain, the clinical findings and diagnosis at that exact time included gastroc strain, muscle strain of right lower leg, and right calf strain. After the MRI, Dr. Cava assessed gastroc injury and muscle strain of the right lower leg, continuing to believe there was an injury and strain to the right calf area. On September 10, another right leg MRI showed, again, increased signal in the superficial posterior compartment musculature. This MRI showed the increased signal to be less than what showed up in May, but still showed it present in the area where Claimant had clinical symptoms of strain.

Dr. Bernton acknowledges the temporal relationship of the Claimant's symptoms in the right calf/right lower leg with the work injury on April 13, 2018. However, he opines that physiologically the event/incident couldn't have caused the need for the recommended surgery. Dr. Bernton points out the lack of trauma to the area and he noted that Claimant was shown by tests to not have deep vein thrombosis or an acute traumatic muscle injury. Dr. Bernton opined that the MRI of the right lower extremity showed some evidence of mild strain but had no clear abnormalities or significant findings. Dr. Bernton opined that if there had been a traumatic muscle injury on April 13, 2018, it would have shown on MRI.

The ALJ finds Claimant's testimony credible and persuasive that she had new, acute, painful, and limiting symptoms in her right calf/right lower leg on April 13, 2018 at the time she sustained a work related injury. The ALJ rejects the argument that there was no traumatic muscle injury on that date to the right lower leg. Rather, the increased

signal on MRI in the superficial posterior compartment musculature correlates with the clinical diagnosis, symptoms, and tenderness Claimant had in her right lower leg beginning April 13, 2018. It is more likely than not that Claimant sustained an acute traumatic injury to her right lower leg on April 13, 2018 that led her ongoing symptoms of deep venous insufficiency requiring a right greater saphenous vein ablation. Claimant is credible and persuasive that she did not have symptoms of deep venous insufficiency prior to April 13, 2018. Claimant has shown, more likely than not, that the recommended right greater saphenous vein ablation is casually related to her April 13, 2018 work injury.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that right greater saphenous vein ablation vascular surgery is causally related to her April 13, 2018 injury.

2. Any issues not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 20, 2019 /s/ Michelle E. Jones

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Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-086-536-001

ISSUES

- Whether claimant has proven by a preponderance of the evidence that the reverse total shoulder replacement surgery recommended by Dr. Knackendoffel is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury?

FINDINGS OF FACT

1. Claimant sustained an admitted injury on August 27, 2018 when he tripped over rebar while walking on a job site and fell onto his right shoulder. Claimant testified he was carrying a piece of equipment (a splicer) in one hand and a tool bag in his other hand when he fell. Claimant testified he landed on his right shoulder and his right hand went numb including his right thumb and forefinger.

2. Claimant testified he reported his injury to employer immediately and sought medical treatment at Paonia Hospital on the day of the injury. Claimant was initially seen at West Elk Walk-In clinic before being instructed to go to the emergency room ("ER"). Claimant was evaluated at the Delta County Memorial Hospital ER on August 27, 2018. Claimant reported a history of falling onto his right shoulder and noted significant limitation in his range of motion. Claimant reported a distant history of a glenoid labrum tear that was surgically treated. Claimant was referred for x-rays. The x-rays revealed severe arthritic changes in the right shoulder predominantly within the glenohumeral articulation. No acute fracture was noted. Claimant was instructed to follow up with a workers' compensation physician or an orthopedic surgeon.

3. Claimant was evaluated by Dr. Wade on August 28, 2018. Dr. Wade noted claimant was continuing to complain of sever right shoulder pain since his fall the previous day. Claimant reported to Dr. Wade a history of right shoulder pain approximately 19 years ago which required rotator cuff surgery. Dr. Wade evaluated claimant and referred him for a magnetic resonance image ("MRI") of the right shoulder.

4. The MRI was performed on September 4, 2018. The MRI demonstrated marked arthrosis of the glenohumeral joint for a patient of claimant's age. The MRI also showed a large mulilocculated cystic lesion residing with the muscle belly of the supraspinatus. The MRI also revealed advanced acromioclavicular ("AC") joint degeneratve changes, tendinosis subscaularis witout tear and tendinosis biceps tendon.

5. Claimant returned to Dr. Wade on September 11, 2018 after the MRI. Dr. Wade reviewed the results of the MRI and recommended claimant continue with the shoulder immobilizer and referred claimant to Rocky Mountain Orthopedics for evaluation.

6. Respondents obtained a physician advisor report from Dr. Erickson on September 14, 2018. Dr. Erickson reviewed the medical records and opined that claimant did not report a significant blow to the right shoulder in the fall and opined claimant likely suffered a minor contusion or a sprain or strain of the right shoulder in the fall. Dr. Erickson noted that claimant's MRI showed advanced arthritis of the AC joint, some mild rotator cuff tendinopathy, and impingement findings along with some cysts in the muscle belly of the supraspinatus, but the major issue was the marked arthrosis of the glenohumeral joint. Dr. Erickson opined that if claimant continued to have difficulties with his shoulder, it was not because of the fall, but instead due to the advanced glenohumeral arthrosis with was a pre-existing condition. Dr. Erickson also opined that there was no evidence of aggravation or worsening and the fall did not accelerate the disease process.

7. Claimant was examined by Dr. Knackendoffel on September 19, 2018. Claimant reported to Dr. Knackendoffel a consistent accident history of falling while at work leading to his current symptoms of pain, numbness, tingling, locking, swelling, weakness, and decreased range of motion. Claimant also reported numbness and tingli9g in the median distribution of the right hand. Dr. Knackedoffel reviewed claimant's MRI exam and performed a physical evaluation and diagnosed claimant with severe glenohumeral arthritis of the right shoulder, which was noted to be chronic. Dr. Knackendoffel further opined that the claimant's osteoarthritis was acutely aggravated by the fall. Dr. Knackendoffel diagnosed claimant with severe tendinopathy of the distal supraspinatus and severe cystic degeneration of the muscle belly of the supraspinatus.

8. Dr. Knackendoffel noted claimant's prior surgical history involving the shoulder and acknowledged the chronic arthritis of the shoulder. Dr. Knackendoffel opined, however, that claimant's condition was severely aggravated by the recent fall. Dr. Knackendoffel recommended a computed tomography ("CT") scan of the right shoulder with extraction of the humeral head. Dr. Knackendoffel opined that the optimal surgical procedure would be a reverse total shoulder arthroplasty, but noted that claimant would be young for this type of procedure. Dr. Knackendoffel noted that a conventional total shoulder arthroplasty would probably not facilitate adequate active flexion of the right shoulder and noted that given claimant's significant injury to his right shoulder superimposed upon the chronic glenohumeral degeneration, claimant would be unlikely to return to active physical labor. Dr. Knackendoffel also recommended physical therapy.

9. The CT scan was performed on September 26, 2018. The CT scan demonstrated severe right glenohumeral osteroarthritis with mild right acromioclavicular arthritis.

10. Claimant returned to Dr. Knackendoffel on September 27, 2018. Dr. Knackendoffel reviewed the results of the CT scan and noted that the CT scan demonstrated severe osteoarthritis of the glenohumeral joint with prominence cysts within the superior glenoid. Dr. Knackendoffel again recommended the reverse total shoulder arthroplasty.

11. Respondents obtained a second physician advisor opinion from Dr. Erickson on October 12, 2018. Dr. Erickson noted the recommendations by Dr. Knackendoffel and opined that it was inappropriate to make a recommendation for a reverse arthroplasty based on a CT scan and physical examination. Dr. Erickson recommended an MRI arthrogram to adequately assess the status of the rotator cuff. Dr. Erickson further opined that the fall did not cause claimant's significant degenerative arthritis, nor did it aggravate of worsen claimant's pre-existing condition.

12. Claimant continued to treat with Dr. Wade pending the surgical recommendation. Claimant also continued to participate in physical therapy.

13. Claimant returned to Dr. Knackendoffel on November 15, 2018. Dr. Knackendoffel noted that claimant's surgery was denied and recommended a cortisone and steroid injection in the shoulder. The injection was performed by Dr. Knackendoffel on that day. Claimant followed up with Dr. Wade on November 19, 2018 and reported that the injection did not help at all. Dr. Wade recommended claimant continue physical therapy.

14. Claimant returned to Dr. Wade on December 11, 2018. Dr. Wade noted claimant continued with his physical therapy which was helping. Claimant again returned to Dr. Wade on January 14, 2019. Dr. Wade noted that claimant's range of motion of his shoulder was getting worse.

15. Respondents referred claimant for an independent medical examination ("IME") of claimant on January 19, 2019 with Dr. Failinger. Dr. Failinger reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME.

16. Claimant reported a consistent accident history to Dr. Failinger of falling when he tripped over rebar and hitting his right side on the rocks on the ground as he held on to the splicer. Dr. Failinger noted limited range of motion on examination with no obvious rupture of the long head of the biceps. Dr. Failinger noted that claimant's right shoulder condition appeared to be an exacerbation of the severe pre-existing glenohumeral degenerative joint disease following his previous shoulder surgery in 1999. Dr. Failinger noted that claimant reported at the IME that he fell with a direct blow to the shoulder and the intake clinic note on August 27, 2018 reports that claimant fell with injury to the shoulder and no description of the actual impact area. Dr. Failinger opined that the cause of the shoulder condition would be severe degenerative joint disease which appeared to have been exacerbated by the fall on August 27, 2018. Dr. Failinger recommended reviewing the films that had been taken to determine if there was an actual change in the patient's pathology.

17. Claimant returned to Dr. Knackendoffel on February 13, 2019. Dr. Knackendoffel noted claimant was unable to perform work with his right arm above chest level. Dr. Knackendoffel again recommended the reverse total shoulder replacement surgery with the understanding that claimant would be unable to return ot heavy labor employment following the surgery.

18. Claimant again returned to Dr. Knackendoffel on March 7, 2019. Dr. Knackendoffel noted claimant continued to have pain in his right shoulder which had become more bothersome. Dr. Knackendoffel opined that the claimant's rotator cuff was not functional and probably had significant fatty degeneration. Dr. Knackendoffel opined that a standard shoulder replacement would not be likely to be stable secondary to rotator cuff weakness. Dr. Knackendoffel recommended an MRI arthrogram of the right shoulder.

19. Dr. Failinger issued an addendum to his report on March 15, 2019 after reviewing the imaging studies, including the x-rays from 2012 and 2015 along with the x-ray from August 27, 2018 and MRI from September 4, 2018. Dr. Failinger opined after reviewing the x-rays that there was no new pathology created by the fall and that the rotator cuff appeared to be intact. Dr. Failinger opined that the fall could cause a contusion only and any ongoing pain after a 6-8 week period would be due to the pre-existing arthritis which is incredibly severe.

20. Claimant testified at hearing regarding the condition of his shoulder prior to his work injury. Claimant testified he had a prior injury to his right shoulder associated with coal mining. Claimant testified he had surgery on his shoulder and the problems with his shoulder resolved. Claimant testified that after he recovered from the shoulder surgery he was able to perform his work duties for employer without restriction up until his August 27, 2018 work injury. The ALJ finds claimant's testimony regarding the physical condition of his right shoulder to be credible.

21. Dr. Knackendoffel testified at hearing in this matter. Dr. Knackendoffel testified that based on his physical examination of claimant, claimant had stiffness of the right shoulder with extreme weakness of the rotator cuff musculature. Dr. Knackendoffel testified that the MRI exams showed an extremely arthritic joint with the findings appearing to be longstanding problems. Dr. Knackendoffel testified that there were no findings on either MRI exam that represented acute findings related to the fall at work.

22. Dr. Knackendoffel opined at hearing that the fall claimant sustained on August 27, 2018 exacerbated claimants underlying shoulder condition and permanently aggravated the shoulder condition. Dr. Knackendoffel testified that this opinion was based on claimant's statements to him during the examination process. Dr. Knackendoffel testified that if claimant did not experience the fall at work on August 27, 2018, claimant would have likely eventually still needed a reverse total shoulder replacement surgery, but not yet.

23. Dr. Failinger testified at hearing in this matter. Dr. Failinger testified that the multiloculated cysts in the supraspinatus that were present on the MRI film are chronic in nature and would not develop in the weeks between the injury and the MRI film. Dr. Failinger testified that the nature of the changes in claimant's shoulder demonstrated in the x-rays and MRI were chronic in nature and represented severe pre-existing arthritis. Dr. Failinger testified that the chronic nature of claimant's shoulder

condition would have warranted surgery if claimant's symptoms correlated with the pathology.

24. Dr. Failinger testified that the recommended reverse shoulder arthroplasty was developed for situations in which the patient does not have a functioning rotator cuff and abnormal motion mechanics from the lack of a functioning rotator cuff. Dr. Failinger testified he agreed with Dr. Erickson that in claimant's case, he did not appear to have a significant rotator cuff tear. Dr. Failinger testified that the x-rays and MRI films demonstrated the severity of the arthritis and there were no signs of anything acute involving the shoulder, or that the shoulder was affected at all by the fall. Dr. Failinger opined that the fall did not accelerate, change, or alter claimant's disease process at all. Dr. Failinger testified that it would be highly improbable that claimant would have had no problems with his shoulder.

25. Dr. Failinger testified on cross-examination that there was no medical evidence indicating that claimant was symptomatic in the months or years before his fall. Dr. Failinger also testified that, according to claimant's reports, he was capable of working fully duty prior to his fall. Dr. Failinger Dr. Failinger further agreed that according to medical records, after the fall, claimant's symptoms involving his shoulder changed.

26. The ALJ credits the testimony of Dr. Knackendoffel along with claimant's testimony at hearing, and finds that claimant has demonstrated that it is more probable than not that the recommended reverse total shoulder arthroplasty is reasonable medical treatment necessary to cure and relieve claimant from the effects of the work injury. The ALJ credits claimant's testimony that his onset of symptoms involving pain and restricted range of motion developed following the fall on August 27, 2018. The ALJ further credits the testimony of Dr. Knackendoffel that the surgery in this case was accelerated by the fall that resulted in the development of symptoms.

27. The ALJ notes that the degenerative nature of claimant's shoulder condition, but the testimony and medical records entered into evidence in this case demonstrate that it is more probable than not that the fall resulted in the development of symptoms that accelerated the need for the recommended total reverse arthroplasty in this case.

28. The ALJ further credits the testimony and opinions expressed by Dr. Knackendoffel in his report and finds that claimant has demonstrated that it is more probable than not that the appropriate surgery in this case is the reverse total shoulder arthroplasty. The ALJ credits the opinions expressed by Dr. Knackendoffel regarding the condition of claimant's rotator cuff tendon and finds Dr. Knackendoffel's testimony on the necessity of the reverse total shoulder arthroplasty surgery to be credible and persuasive.

29. The ALJ further finds that claimant's testimony regarding the nature of his symptoms prior to his work injury is corroborated by the medical records that do not document claimant having ongoing problems for his right shoulder following the surgery

performed in 1999. Therefore, the ALJ finds claimant's testimony on this issue to be credible.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990).

4. As found, claimant has established by a preponderance of the evidence that the recommended revers total shoulder replacement surgery is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury. As found, the opinions expressed by Dr. Knackendoffel along with claimant's testimony at hearing are found to be credible and persuasive regarding this issue.

5. As found, the opinions presented by Dr. Knackendoffel regarding the necessity of the reverse shoulder arthroplasty are found to be credible and persuasive. As found, claimant has proven by a preponderance of the evidence that the

recommended reverse total should arthroplasty is reasonable and necessary medical treatment related to claimant's August 27, 2018 work injury.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve claimant from the effects of the August 27, 2018 work injury including the surgery recommended by Dr. Knackendoffel.

2. All issues not determined herein are reserved for further determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 21, 2019

Keith E. Mottram

_____

Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUE ON REMAND

I. Have Respondents overcome, by clear and convincing evidence, the DIME opinion of Dr. Higginbotham on Claimant's Whole Person Impairment Rating? Specifically, did the evidence establish a specific diagnosis, objective pathology, and six months of medically documented pain and rigidity?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact (unchanged from the original Order, but with the addition of 21A) :

1. Claimant suffered admitted work related injuries when he rolled the cement mixer he was operating for employer on September 11, 2017. (Ex. A). At the time of the accident Claimant was treated for a laceration over his eye and complaints of wrist pain. (Ex. 4, p. 21).

2. Claimant's accident was described in Dr. Higginbotham's DIME report as follows, "the force of the rollover caused him to be thrown against the passenger door and window. He denies loss of consciousness. He hit his head against the cabin, causing an abrasion on the top of his head and a laceration above his left eye." (Ex. H, p. 55).

3. Claimant's initial visit to CCOM occurred on the date of the incident and he was seen by Steven Byrne, PA-C. (Ex. 4, p. 21). Little detail was provided in the First Report of Injury besides the diagnoses of "laceration left eyelid" and "laceration left hand".

4. On September 13, 2017, two days later, Claimant reported to the emergency room complaining of neck pain, although his range of motion in the neck was described as "normal". Imaging was taken which showed no acute abnormalities and conservative care was recommended. Intake reports from the ER note that at the time of the rollover, Claimant was unrestrained. (Ex. D, pp. 15-17).

5. Upon his return to CCOM on September 18, 2017, Claimant was reporting that he was "feeling much better but still having considerable amount discomfort through the left cervical paraspinal and posterior shoulder girdle." (Ex. 4, p. 22).

6. Claimant's initial visit with his ATP, Dr. Neubauer was September 25, 2017 (Ex. 4, pp. 26-29). At this visit, it was noted that he reported lower back and left leg pain. Claimant's neck paraspinals were tender to palpation, with pain in all planes upon range of motion. The paraspinals were tender in his lower and upper back. Physical therapy continued to be recommended.

7. Medical records indicate that Claimant improved from his diagnosed strain injuries. By October 23, 2017, Claimant was reporting 2-3 of 10 pain, reported by him as "mild", and consisting of mostly aching/stiffness/tightness. (Ex. F, p. 31).

8. In the interim, Respondents filed a General Admission of Liability ("GAL") on October 18, 2017 admitting for medical benefits, but denying Temporary Total Disability ("TTD") benefits as "*claimant was responsible for his own termination."* It is unclear from the record if Claimant was terminated for failure to wear his seat belt, or simply from rolling a full cement truck.

9. Claimant also underwent a short course of physical therapy between September 20 and October 16, 2017. (Ex. E, Ex. 6). Claimant reported having cervical pain, pain in both shoulders, and lower back pain. *Id.* As of his physical therapy visit on October 6, 2017, Claimant was still reporting a high level of pain with end range cervical motion and difficulty sleeping due to the neck pain. Claimant also reported that he continued to have low back pain and stiffness. *Id.* at 79.

10. Claimant returned to Dr. Neubauer on October 9, 2017, still complaining of ongoing neck and back pain. (Ex. 4, p. 30). It was noted that Claimant was having pain with activity and movement of his back and his neck, and the back was specifically described in this note as being *tight. (emphasis added).* Physical exam documented pain in the neck with all planes of motion. Examination of the back documented tenderness to palpation in the low back and buttocks and decreased/painful forward flexion, extension, rotation, and lateral flexion; the mid-back symptoms were no longer noted.

11. Dr. Neubauer recommended continued therapy, heat to the back and the neck, and also referred Claimant to Dr. Chad Abercrombie for chiropractic care. *Id.* at 32. Prior to his first appointment with Dr. Abercrombie, Claimant had another visit at CCOM with Dr. Neubauer on October 23, 2017 that documented ongoing complaints of back and neck pain that was described as "*aching/stiffness/tightness"* and that he was having *pain/stiffness* with activity and movement of the back and the neck. *Id.* at 35. (emphasis added).

12. Chiropractic care began on October 26, 2017, with Dr. Chad Abercrombie. At the initial visit, he reported overall improvement, but still had "some lower back, neck and left shoulder pain." (Ex. G, p. 50, Ex. 7, pp. 86-88). "Moderately" reduced range of motion was noted in his lumbar and cervical regions. A medical history noting a 2014 lower back lifting injury which "stabilized" and a 1993 motor vehicle accident with residual left shoulder injuries is noted on the initial chiropractic intake. *Id.*

13. On November 29, 2017, Dr. Neubauer documented that Claimant was still reporting 3 out of 10 neck and low back pain and that "He continues to have *stiffness* with motion of the neck and low back…." (Ex. F, p. 40). When Dr. Neubauer placed Claimant at MMI on January 4, 2018, it was again noted that Claimant was reporting low back pain and tightness. *Id.* at 54. His closing comments indicated that Claimant still had neck and low back tightness, but he released Claimant at MMI with no impairment and instruction to finish his

chiropractic care. *Id.* at 56. Dr. Abercrombie's final note from January 24, 2018 indicates that Claimant was greatly improved, but that he continued to have *minimal objective residual* problems as noted in his report. (Ex. 7, p. 89) (emphasis added).

14. By December 14, 2017, Claimant was reporting pain of 1 out of 10, reported as "mild" and intermittent, and noted increased pain in his lower back when lifting over 100 pounds. At the same time, Claimant reported he was not talking pain medications and was sleeping ok. (Ex. E, p. 45). Though Claimant by this time had been terminated by Employer, he was released to work without restrictions on December 14, 2017. (Ex. E. p. 47.)

15. On January 4, 2018, after completing a course of physical therapy, and continued conservative care, Claimant was released at MMI by Dr. Jay Neubauer at CCOM. Dr. Neubauer's report indicates that Claimant was reporting slight tightness in his neck and back which Claimant described as "infrequent," and therefore released Claimant at MMI with no impairment rating, but with a recommendation to continue chiropractic care under maintenance treatment. (Ex. C. pp. 12-14).

16. After his release at MMI, Claimant's chiropractor, Dr. Abercrombie released Claimant on January 24, 2018. (Ex. G. p. 53). At this time Dr. Abercrombie noted:

> Overall, he has responded very well to treatment noting very minimal symptoms at this time. He had some lower back stiffness this past week of unknown cause however denies pain, and the stiffness resolved. Otherwise, he denies neck or mid back symptoms. He is performing at this time all activities of daily living without difficulty.
>
> Examination on today's visit reveals normal spinal/paraspinal symmetry. Range of motion is full and all cervical, thoracic and lumbar planes and *without symptoms*. . . .

Id, (emphasis added).

17. In accordance with Dr. Neubauer's release at MMI, Respondents submitted a **Final** Admission of Liability, admitting for 0% impairment on January 25, 2018. The Final Admission indicates that Claimant received $11,565.48 in TTD from September 12, 2017, through December 13, 2017, the date he was released to work without restrictions. (Ex. C). This FAL made no mention of any alleged violation of a safety rule. For reasons unclear from the record, this FAL appears to be a reversal of Respondents' prior position in the GAL, wherein all TTD had been denied due to his termination for cause.

18. The Final Admission of Liability admitted to a general award of maintenance care and the attached MMI report from Claimant's ATP indicated the claim related diagnoses were: 1.) laceration of the left eyelid; 2.) laceration of the left wrist; 3.)

strain of muscle, fascia, and tendon at the neck; 4.) strain of muscle and tendon at the back wall of the thorax; 5.) strain of muscle, fascia, and tendon of the lower back, and; 6) sprain of interphalangeal joint of right middle finger. (Ex. 3, p. 14).

19. Claimant promptly objected and sought a DIME. The DIME exam occurred with Dr. Thomas Higginbotham on April 24, 2018. (Ex. H). At the time of the DIME, Claimant reported that he had been employed with Safeco, which contracted with Comcast placing underground digital cable. This full-time work required him to use a shovel and pick frequently. (Ex. H, p. 55). Dr. Higginbotham cites Claimant's subjective symptom checklist, which includes, "Clicking and popping and pain of the jaw; asthma with shortness of breath; muscle cramps; joint swelling, pain, and *stiffness*; depression and nervousness." (Ex. H, p. 59). Claimant also reported, "nausea, blurred vision, tingling of the hands and feet; swelling of the feet; trouble falling asleep and staying asleep; and mood swings;" in addition to *stiffness* in his lower back and a sharp pull in the left side of his *neck and back* when he increases his physical activity." *Id.* at p. 60.

20. Claimant's lack of a use of seatbelt was discussed with Dr. Higginbotham:

> He was the driver of a large cement truck, not wearing seatbelt and shoulder harness. He relates that the seatbelt mechanism was not functional. He had the intent of reporting the malfunction the morning he had his incident. However, he got busy with getting his vehicle prepped and then was assigned a delivery route. He was pressed to get his work down [done] and forgot about recording the seatbelt mechanism malfunction.

21. Dr. Higginbotham provided impairment ratings of 7% for the cervical spine resulting from 3% range of motion deficit, combined with 4% from Table 53IIB. He also assigned 10% for the lumbar spine, noting 5% from Table 53IIB and 5% range of motion deficit. These two ratings combined for a 16% impairment rating of the whole person. (Ex. H, pp. 62-63). This impairment rating was made in agreement the ATP, Dr. Neubauer, that Claimant had reached MMI on January 4, 2018. (Ex. H. p. 62).

21A. Under "ASSESSMENTS", Dr. Higginbotham issued two pertinent specific diagnoses:

Cervical strain without discogenic disease or radiculopathy

Lumbar strain without discogenic disease or radiculopathy

22. Dr. Higginbotham's narrative of his physical exam makes several references to *tenderness* in the lumbar and cervical regions. At no point in his physical examination does Dr. Higginbotham refer to any symptom which would constitute *rigidity.* No observed stiffness, trigger points, spasm are noted anywhere in the report. On Page 8 of his report (Ex. 9, p. 97) he states "There is <u>no</u> *muscle tone asymmetry or spasm*." It is unclear to the ALJ where the lack of spasm is noted to be *absent.*

23. Dr. Higginbotham further noted: “A TENS unit would be appropriate to *decrease discomfort and decrease spasm and assist with range of motion* as needed. (Ex. 8, p. 99) (emphasis added). At no point in his DIME exam does he indicate what *spasm* he is now referring to, its location, or duration.

24. In response to Dr. Higginbotham’s report, on June 13, 2018, Respondents filed an Application for Hearing endorsing the issues of ”Overcoming Division IME; and Failure to Utilize Safety Device/Violation of a Safety Rule; Causation; and Set-offs.” (Ex. 1, p. 1).

25. In advance of the hearing, Respondents obtained a Medical Record Review from Dr. Kathy Fine McCranie. (Ex. 9). Respondents also obtained and disclosed a video demonstrating the functionality of the vehicle’s seat-belt. (Ex. K).

26. Claimant also obtained an IME with Dr. Jack Rook. In his report dated September 3, 2018, Dr. Rook states that upon rolling his cement truck, Claimant fell 6 feet from the driver’s seat to the passenger door, rotating as he fell and striking the back side of the passenger side door. Though Claimant denied loss of consciousness throughout the treatment records and his DIME with Dr. Higginbotham, Claimant reported to Dr. Rook that he probably did have a loss of consciousness. (Ex. 10, p. 111).

27. Dr. Rook’s report also contains an opinion that Claimant’s post-MMI job at Safeco was “more physically demanding than his cement truck driving job.” (Ex. 10, p. 116). However, he further noted that although Claimant was able to lift 130 pounds at MMI, he was able to deadlift over 450 pounds prior to the accident, indicating a severe drop in functionality from his baseline. *Id*

28. On physical examination of the neck, Dr. Rook found moderate to severe tenderness associated with *increased muscle tone* on palpation of the left sternocleidomastoid muscle. *Id.* at 117. Evaluation of the lower back documented *increased muscle tone* with moderate tenderness of the left-sided lower paralumbar musculature overlying the L4, L5, and S1 facet joints. Back pain was increased when elicited with spinal extension and bending to the left. The same maneuver was negative on the right.

29. Dr. Rook also addressed the final chiropractic report from Dr. Abercrombie from January 24, 2018. He explained how Dr. Abercrombie’s report documented increased muscle tone in the same muscles that Dr. Rook had identified eight months later. Dr. Abercrombie also found problems with the left-sided facet joints based on provocative testing at that visit. Dr. Rook identified those same findings on his examination. (Ex. 10, p. 118). “These constitute *objective findings* and therefore Dr. Higginbotham was correct in providing the patient with a table 53 rating.” Dr. Rook disagreed with Dr. McCranie regarding her opinion on a lack of objective findings, and her opinion was just that: a mere difference of opinion with the DIME physician.

30. Dr. McCranie testified at hearing. Dr. McCranie explained that Dr. Higginbotham’s DIME report did not comply with the AMA Guides and Level II

training, which require "objective" findings in order to provide an impairment rating. "Specifically, 'Impairment Ratings are given when a specific diagnosis and objective pathology is identified.'" (Ex. 9, p. 109, citing the Rating Tips found at Desk Aid 11, https://www.colorado.gov/pacific/cdle/workers-compensation-document-library-desk-aids-0).

31. In explaining her position, Dr. McCranie noted that the Claimant's records were devoid of any objective findings of pathology, and only reflected Claimant's *subjective* complaints of pain and occasional stiffness.

32. In noting a lack of objective support for Claimant's impairment rating, Dr. McCranie found that Claimant's sole diagnoses, which were echoed by Dr. Higginbotham, were muscular strains. She opined that, by their nature, muscle strains were temporary. (Ex. 9 p. 110).

33. After her medical records in this matter, Dr. McCranie testified at hearing that the records demonstrated what should be expected from diagnosed muscular strains, with a progression of conservative care to a release at MMI, but without any residual range of motion deficits. The lack of residual range of motion deficits are echoed in the January 4, 2018, MMI report of Dr. Neubauer, finding full range of motion in the back and noting *"The condition has resolved,"* (Ex. C, pp. 12-14) (emphasis added). Further the post-MMI release report of Dr. Abercrombie indicated transient low back stiffness "of unknown cause," with a complete resolution of symptoms and full range of motion in the lumbar, thoracic and cervical spines. (Ex. G, p. 53). Dr. McCranie opined that findings of mild tenderness and tightness on palpation are not objective findings that would support a rating under the AMA Guides or Level II training.

34. Dr. McCranie concluded her testimony by noting that available medical records, including Dr. Higginbotham's report, were devoid of objective evidence to support an impairment rating in accordance with the AMA guides and Level II training. Dr. McCranie clarified that Claimant's subjective complaints of stiffness and pain, coupled with the diagnoses of muscular strain injuries were insufficient to support a Table 53 rating.

35. Dr. McCranie also found that if Claimant was not entitled to a Table 53 rating, a range of motion rating would be inapplicable. [The ALJ notes that this statement is correctly supported by Desk Aid 11's tips on Spinal Rating, "Spinal range of motion impairment must be completed and applied to the impairment rating only when a corresponding Table 53 diagnosis has been established. (References: Spine section of the *AMA Guides, 3rd Edition (rev.)*; Level II Accreditation Curriculum, Spine and Pelvis Impairment)."]

36. Jason Gordon also testified at hearing. Mr. Gordon is the Human Resources and Payroll manager for Transit Mix Concrete. Mr. Gordon testified that the safety policies found at Exhibits I and J, contain numerous requirements concerning the consistent use of seat-belts. These requirements and safety procedures are consistently reinforced in regular driver training. Mr. Gordon noted that seatbelt use is specifically required in p. 109, and p. 111 of Exhibit J.

37. Mr. Gordon noted that if a seatbelt was not working at the time of pre-trip inspection, a vehicle would be deemed unsafe to operate and a driver would not be expected to utilize the vehicle.

38. Mr. Gordon further noted that Claimant never reported a seatbelt malfunction. Mr. Gordon indicated that drivers become very familiar with their vehicles through regular use. Though a pre-trip inspection has many small points, a driver should be able to complete the pre-trip inspection to ensure their vehicle was safe.

39. Respondents also presented the testimony of Curt Young. Mr. Young is a maintenance technician with Transit Mix. Mr. Young explained that Respondents' Exhibit K (video) demonstrates his opinion that the seatbelt was functional at the time of his inspection-months after the accident. This video was taken in June of 2018. Considerable effort was initially required to move this belt from its retracted position. Mr. Young indicated that no repairs had been conducted on the vehicle since Claimant's workplace accident.

40. Mr. Young testified that he was directed to assess the functionality of the seatbelt at the time he made the video, and that no one had touched the truck prior to that time.

41. Mr. Young noted that the air-supported driver's seat had lost all of its air, resulting in a fully lowered position. Mr. Young noted that because the pneumatic seat had dropped completely, the seatbelt was fully tensioned. Also, Mr. Young testified that the seatbelt was completely retracted and in the locked position when he inspected it. This, he opined, indicated that it was in a retracted, non-used, position when the accident occurred.

42. Mr. Young clarified that upon lifting the seat to relieve tension on the seatbelt, he was able to free the seatbelt from the locked position, and thus demonstrated that the seatbelt was functional. Mr. Young concluded that the seatbelt was fully functional at the time of the incident.

43. Claimant testified on his own behalf. Claimant testified that he had incurred multiple small cuts and bruises. He described his whole body as being sore after the accident. Claimant testified that he continues to experience neck and lower back symptoms that he attributes to the motor vehicle accident. Regarding the neck, Claimant continues to experience tightness and a pulling sensation in his neck when he attempts to turn to the right, indicating both ongoing tightness and pain.

44. Claimant reported ongoing tightness in his lower back throughout the day, and reported discomfort with prolonged sitting. Claimant testified that he continued to have pain in his neck and back to this day. He has not sustained any new injuries to his neck or back since his work accident. Claimant testified that he never had problems with his neck or back prior to this incident. Moreover, although Claimant was limited to lifting up to 130 pounds, that remains functionally limiting to him. as he used to work out daily and was able to deadlift 455 pounds and squat 450 pounds.

45. At hearing, Claimant testified that he found the seatbelt "difficult to put on." Claimant admitted that he was not wearing a seatbelt at the time of the incident. Claimant stated that he noticed the seatbelt was more difficult to pull, requiring more force than usual, on Friday afternoon before the Monday accident. He assumed it would be easier to have it repaired the following Monday.

46. Before Claimant exited the yard that morning, he was already running late by about ten to fifteen minutes due to complications at the plant and having to wash excess concrete mix off his truck. Claimant then called dispatch to let them know he was running late. He testified that he wrestled with the seatbelt to put it on before leaving the facility. He then drove to his destination and stopped about five to eight miles from the destination to stop and check the consistency of the "slump"[1] to make sure it was exactly what the customer had ordered, which is required by the Employer. Claimant had to exit the vehicle to do this. If the slump is not correct, the purchaser is likely to reject it, which could result in a write up for the employee. Claimant checked the slump and it was still the proper consistency. He then, in the interest of time, proceeded towards his destination, without taking the time to struggle with the seat belt further. It was Claimant's intention to report the malfunctioning seatbelt after he returned to the yard from this visit.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ, on Remand, draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case are not interpreted liberally in favor of either party. Section 8-43-201, C.R.S. (2016).

B. A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. Pursuant to Section 8-43-215, C.R.S., the decision of the ALJ contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has discretion to make credibility determinations, draw plausible inferences from the record, and resolve conflicts in the evidence. *Davison v. Indus. Claim Apps. Office*, 84 P.3d 1023, 1025 (Colo. 2004). This decision does not address every item contained in the record, and incredible or implausible testimony or unpersuasive inferences that have not been specifically addressed have been implicitly rejected. *Magnetic Eng'ng, Inc. v. Indus. Claim Apps. Office*, 5 P.3d 385, 389 (Colo. App. 2000).

C. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation,

consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. Colorado Jury Instructions, Civil, 3:16 (2018). The ALJ, as fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull*, 802 P.2d 1182, 1183 (Colo. App. 1990). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968); see also *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion). To summarize, the ALJ finds the witnesses, including Claimant, to have testified sincerely and credibly at the hearing.

Overcoming a DIME Opinion, Generally

D. A DIME physician's findings of causation, MMI and whole person impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning impairment is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

E. Stated differently, to overcome a DIME physician's opinion regarding impairment, the party challenging the DIME must demonstrate that the physicians' determinations in these regards are highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.* Proof of a deviation from the rating protocols provides some evidence from which the ALJ may infer that the DIME physician's rating has been overcome*. Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117 (Colo. App. 2003).

F. In resolving the question of whether the DIME physician's opinions have been overcome, the ALJ may consider a variety of factors including whether the DIME physician properly applied the AMA Guides. *See Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo. App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO August 18, 2004). The ALJ should also consider all of the DIME physician's written and oral testimony. *Lambert and Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998).

Dr. Higginbotham's Application of Table 53IIB

G. Desk Aid 11, paragraph 1 states, "Impairment ratings are given when a specific diagnosis and objective pathology is identified. *(Reference: C.R.S. §8-42-107(8)(c)*. Further, when addressing Spinal Ratings, Desk Aid 11 states:

> In order to be assigned a spinal rating, the patient must have objective pathology and impairment that qualifies for a numerical impairment rating of greater than zero under Table 53. Spinal range of motion impairment must be completed and applied to the impairment rating only when a corresponding Table 53 diagnosis has been established.

Thus, under Table 53(II)(B) of the AMA Guides and Desk Aid #11, the DIME examiner may assign an impairment value for impairment or a specific disorder of the lumbar or cervical regions of the spine, so long as the medical evidence establishes the presence of a specific diagnosis, objective pathology, and six months of *medically documented* pain and rigidity. In this instance, the ALJ now concludes that Dr. Higginbotham's *Assessments,* both for Claimant's cervical and lumbar spine, were sufficient to constitute a specific diagnosis, coupled with objective pathology, to warrant a Table 53(II)(B) impairment rating. In light of the ICAO's Remand, the ALJ is not persuaded by Dr. McCranie's analysis that the six months of rigidity must be documented objectively by a medical provider.

Six Months of Medically Documented Pain and Rigidity

H. The medical records reviewed by the DIME examiner contain sufficient references to pain-*and rigidity*- of both Claimant's neck and back - from the date of the accident, up through Claimant's final visit with his chiropractor on January 24, 2018-a period of just over 4 months. The DIME exam itself occurred just over 7 months after the accident. While Dr. Higginbotham did not document any *objective* findings of rigidity in his DIME exam, he did note Claimant's self-reported complaints of "*stiffness* of his *lower back* and a *sharp pull* in the left side of his *neck and back* when he increases his physical activity." Under the guidance provided by the ICAO on remand, the ALJ now concludes that this provides *sufficient, medically documented evidence of at least 6 months of pain and rigidity* to qualify for a Table 53(II)(B) diagnosis.

I. While Dr. Rook purports to have noted some objective evidence of rigidity at his IME months later, this was not known to Dr. Higginbotham at his DIME exam, since Dr. Rook's report didn't yet exist. There is no evidence that Dr. Higginbotham supplemented his findings based upon what Dr. Rook may have observed. Therefore, while Dr. Rook's observations of rigidity after the time are duly noted, they are not part of Dr. Higginbotham's calculus. Independent of what Dr. Rook observed, however, there was sufficient, *medically documented* evidence available to Dr. Higginbotham to support a finding of at least 6 months of pain and *rigidity* to warrant an impairment rating under Table 53(II)(B).

J. There is no allegation (nor does the ALJ find) that Dr. Higginbotham's methodology in performing his range-of-motion measurements was deficient. Nor in the soundness of his medical conclusions, his physical exam, or his review of the medical records. The ALJ, therefore, concludes that the DIME physician's opinion has not been overcome with clear and convincing evidence.

ORDER

It is therefore Ordered that:

1. The DIME report of Dr. Higginbotham has not been overcome. Claimant's Impairment Rating of the Whole Person is 16% of the whole person.

2. All other Orders issued in connection with this case remain in full force and effect.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 21, 2019

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-003-379-001

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on June 11, 2019, in Denver, Colorado. The hearing was digitally recorded (reference: 6/11/19, Courtroom 2, beginning at 8:30 AM, and ending at 12:00 PM).

Claimant's Exhibits 1 through 14 were admitted into evidence, without objection. Respondents' Exhibits C through E, G through L, and DD through QQ were admitted into evidence, without objection. Respondents removed Exhibits BB and CC and did not seek their admission. Claimant objected to Respondents' Exhibits A, B and M through AA as not relevant to any hearing issue. The ALJ admitted those Exhibits over the Claimant's standing objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, which was filed filed, electronically, on June 18, 2019. On June 19, 2019, Respondents filed comments, electronically, concerning paragraph 13 of the findings and paragraph D of the order portion of the proposed decision. After a consideration of the proposed decision and the Respondents' comments thereon, the ALJ has modified the proposal and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern the Claimant's average weekly wage (AWW); and, the causal relatedness of the Claimant's recent TMJ (tempomandibular joint) surgeries and temporary disability benefits arising from those surgeries, if causally related.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant sustained an admitted work-related injury on December 17, 2015.

2. The latest General Admission of Liability (GAL), dated June 21, 2019, admits for causally related medical benefits; an AWW of $1,143.79, and variable temporary partial disability (TPD) and total (TTD) benefits; the latest period of TPD being from March 18, 2019 through "Undet." I remains in full forcer and effect.

The Injury of December 17, 2015

3. On the day of the injury, the Claimant slipped and fell on patch of ice. Both feet slipped out from under her. She landed squarely on her buttocks. She extended her right upper extremity (RUE) to break the fall. She had wrist discomfort initially and developed right elbow pain throughout the day. She developed a headache as well as spine pain. (Claimant's Exhibit 8, p. 42).

4. The ALJ finds that the Claimant's fall was a substantial slip and fall, which resulted in numerous injuries as more fully described in the Division Independent Medical Examination (DIME) report of Jonathan Bloch., D.O (Claimant's Exhibit 8, pp. 55-56, 58-67).

Dr. Bloch –TMJ

5. As pertinent to the issues for hearing, Dr. Bloch determined that the Claimant was not at maximum medical improvement (MMI) based on a specific need for treatment of her bilateral TMJ joints. Dr. Bloch found and concluded "with regard to her jaw, that **it is medically probable that none of her current jaw issues would be deteriorated if it wasn't for her injury and it would only be appropriate that the proposed bilateral TMJ arthroplasty fall under workers' compensation at this time…**(emphasis supplied). I agree with her doctors at Kaiser, that the TMJ surgery needs to be done bilaterally." (*Id.* at 59). The ALJ finds that this causality opinion is

inextricably tied into Dr. Bloch's determination that Claimant is not at MMI, an integral part of the DIME process.

6. Dr. Bloch continued: "The TMJs are supported under workers' compensation and I would start there…I would also anticipate the TMJs are also exacerbating some of her other concussive effects as well as neck pain by way of sympathetic mediation, which could explain the partial or temporary responses to prior therapies or treatments. Bilateral TMJ arthroplasty is the current proposed definitive treatment, which will better kickstart new stages of recovery." (*Id.* at 64*).*

7. Dr. Bloch was aware of the Claimant's past history of problems with her TMJ joints, including a prior prosthetic reconstruction on the left TMJ. (*Id.* at 55). Dr. Bloch was of the opinion that the work-related slip and fall exacerbated and accelerated her bilateral TMJ deterioration resulting in the need for bilateral surgeries. (*Id.* at 55, 59, 64).

8. Dr. Bloch issued his DIME report on September 9, 2017. He specifically determined that the Claimant was not at MMI because of the need for bilateral TMJ surgeries. (*Id.* at 36, 55, 59, 64).

9. The DIME Unit of the Division of Workers' Compensation (DOWC) issued a NOTICE--Report "Not at MMI" on September 15, 2017. The DIME with Dr. Bloch remains open (Claimant's Exhibit 9, p. 69).

10. Respondents took no steps in response to the Notice from the DIME Unit until filing a GAL on November 13, 2017 (Claimant's Exhibit 10, pp. 71 and 73). Specifically, Respondents did not file an Application for Hearing within 2 Instead, Respondents later affirmatively admitted that the Claimant was not at MMI based on the DIME report from Dr. Bloch (*Id.* at 73) ("Per the attached DIME report the IW (Claimant) is not at MMI, amend[ing] the admission to place back on a GAL.").

Aaron T. Liddell, M.S., D.M.D.

11. Dr. Liddell is the treating and attending surgeon for the Claimant's bilateral TMJ surgeries. Dr. Liddell submitted a request for prior authorization of those surgical procedures to Pinnacol on July 31, 2018 (Claimant's Exhibit 11, pp. 114-118). The request specifically tied the Claimant's TMJ pain to her fall at work in 2015. (*Id.* at 116). The ALJ finds and infers that Dr. Liddell would not have submitted that request to Pinnacol for authorization (and ultimately payment) unless he believed that the surgeries in question were reasonably necessary, and causally related to the work injury.

12. Pinnacol responded to the request for prior authorization on August 1, 2018. Pinnacol wrote to Dr. Liddell and approved his requested authorization for "prosthetic TMJ joint with interdental wiring, arthroplasty TMJ joint with prosthetic joint replacement, bilateral, with associated procedures." (Claimant's Ex. 12, pg. 119). The

ALJ finds and infers that Pinnacol would not have approved that request unless it was reasonable, necessary, and related to the work injury. While Pinnacol **may** have retained the right to challenge that particular prior authorization request from Dr. Liddell when it was submitted, it chose not to and instead approved and authorized the bilateral surgeries.

The Claimant

13. The Claimant testified credibly at hearing. Here testimony supports the fact that the work-related slip and fall exacerbated and worsened her bilateral TMJ and the ALJ so finds. The Claimant confirmed that none of her current treating medical providers have placed her at MMI following the bilateral TMJ surgeries on February 7, 2019. Her main gatekeeper for treatment is David Reinhard, M.D. Dr. Reinhard has specifically rendered the opinion that the Claimant is not at MMI. The Claimant continues to need PT, massage therapy and pain management until she fully recovers from the TMJ surgeries. She is anticipated to reach MMI in the next 2 to 3 months, at which time she can return to Dr. Bloch for completion of the DIME with a final impairment rating (Claimant's Exhibit 14, pp. 124-25). Pinnacol remains subject to the February 8, 2019 GAL as it relates to temporary disability benefits. The Respondents did not seek to withdraw that admission as part of the present hearing.

Respondents' Independent Medical Examiner (IME), Curtis Hayes, D.D.S.

14. Respondents presented the testimony of Dr. Hayes, at hearing. Dr. Hayes only performed a medical records review. He has never examined or treated the Claimant, nor taken a history from her.

15. Dr. Hayes confirmed that the ["I agree with Dr. Bloch…that the surgery needed to be completed bilaterally."]. Dr. Hayes disagreed that the surgery was causally related to the work injury. (*See id.*). As discussed in more detail below, there is a significant question of whether the Respondents are able to challenge the causal relatedness of the TMJ surgeries to the work injury in light of Dr. Bloch's unchallenged DIME opinion on "not at MMI." Without reference to that legal issue, the ALJ finds as a matter of fact that the bilateral TMJ surgeries were reasonable, necessary, **and causally related** to the work injury. The ALJ credits the more credible and persuasive opinions of Dr. Bloch on this issue. Further, the ALJ finds and infers that the bilateral surgeries were reasonably necessary **and causally related,** based on the insurance carrier's decision to authorize the surgeries and to admit for temporary disability benefits following the surgeries.

16. Dr. Hayes' opinion was based substantially on his view that the Claimant's prior symptoms were similar to the symptoms she was experiencing prior to the work injury. Dr. Hayes' own report, however, undermines this opinion. His report shows that the Claimant did not have any TMJ treatments in 2014. Prior to the injury in 2015, the Claimant only had two appointments that year. Following the injury late in 2015, the Claimant had multiple visits for TMJ problems with much more extensive problems and

treatments listed throughout 2016. The same is also true for 2017. The ALJ infers and finds that Dr. Hayes is not Level II certified by the DOWC, and he did not appreciate the concept of aggravation/acceleration in the workers' compensation context. Indeed, he indicated that this was the firs time he testified in a workers' compensation case. The records support the finding that the Claimant (Respondents' Exhibit A, pp. 006-008). The ALJ finds the medical opinions of Dr. Bloch and Der. Liddell, M.D., D.D.S., significantly more persuasive and credible than the opinions of Dr. Hayes.and the ALJ rejects Dr. Hayes' non work-related opinions as not credible or persuasive.

Average Weekly Wage

17. The Claimant's W-2 for 2015 presents the most comprehensive picture of her AWW at the time of the injury (Claimant's Exhibit 1, p. 1). Her gross earnings for that year were $67,757.39. Dividing that gross amount by 52 weeks results in an AWW of $1,303.03. The ALJ finds that this AWW is the most accurate reflection of her earnings at the time of the injury. The Claimant's attorney made a judicial admission at the hearing accepting the AWW as of the date of injury, and withdrawing any request for an increased AWW for missed time after the surgeries in 2019.

Temporary Disability

18. The Claimant was disabled from her regular work following the surgeries on February 7, 2019. She remains at least partially disabled at this time. Under the GAL of February 8, 2019, the Claimant has established that the Respondents owe her additional TPD benefits for the past periods of TPD admitted in that GAL based on her increased AWW. Further, the Claimant has established that the Respondents are liable for the differential between the admitted temporary disability benefits from February 7, 2019 and continuing based on the re-determined AWW.

Ultimate Findings

19. For the reasons specified herein above, the ALJ finds the medical opinions of Dr. Bloch and Der. Liddell, M.D., D.D.S., significantly more persuasive and credible than the opinions of Dr. Hayes. and the ALJ rejects Dr. Hayes' non work-related opinions as not credible or persuasive. Further, the ALJ finds the Claimant's testimony credible insofar as it supports the causal relatedness of the agfgravation/acceleration of her TMJ Joints.

20. Between conflicting opinions, the ALJ makes a rational choice, based on substantial evidence, to accept the opinions of DIME Dr. Bloch and authorized treating surgeon (ATP) Dr. Liddell, and to reject the opinion of IME Dr. Hayes.

21. Although DIME Dr. Bloch's opinion on the causal relatedness of the aggravation/acceleration of the Claimant's TMJ problems is inextricably bound into his determination that the Claimant is not at MMI, the ALJ hereby applies the "preponderance" standard of proof because the Claimant has established that it is more

likely than not, based on the totality of the evidence, that the aggravation/acceleration of the Claimant TMP problems and consequent need for surgery is causally linked to the admitted injury of December 17, 2015.

22. Although Respondents make a compelling argument that it would be inappropriate to increase the Claimant's AWW, based on increased earnings as of February 7, 2019, the evidence thereof was murky and Claimant made a judicial admission to relinquish her request for an increased AWW as of February 7, 2019. Instead, Claimant requested an increased AWW based on an erroneous computation of AWW as of the date of injury. Consequently ,based on a correct computation of AWW as of December 17, 2015. Claimant's AWW should be $1,303.03, which should drive an increase in temporary disability benefits from the start.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour*

Cleaners v. Indus. Claim Appeals Office, 914 P.2d 501 (Colo. App. 1995). As found, the medical opinions of Dr. Bloch and Der. Liddell, M.D., D.D.S. As further found, the ALJ rejected Dr. Hayes' non work-related opinions as not credible or persuasive. Additionally, the ALJ found the Claimant's testimony credible insofar as it supported the causal relatedness of the aggravation/acceleration of her TMJ Joints.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting opinions, the ALJ made a rational choice, based on substantial evidence, to accept the opinions of DIME Dr. Bloch and authorized treating surgeon (ATP) Dr. Liddell, and to reject the opinion of IME Dr. Hayes. Also, as found, the Claimant's testimony was credible.

Dr. Bloch's DIME Opinion of "not at MMI" Is Binding on the Parties and the ALJ

c. Under § 8-42-107(8), C.R.S., a DIME physician's opinions concerning MMI and permanent medical impairment are binding unless overcome by clear and convincing evidence. Both determinations require the DIME physician to assess, as a matter of diagnosis, whether the various components of the claimant's medical condition are causally related to the industrial injury. *E.g. Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). Consequently, when a party challenges the DIME physician's determination of MMI, the Court has recognized that a DIME physician's determination on causation is also entitled to presumptive weight. *Id.; Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998). The DIME doctor's opinion on the cause of a claimant's disability is an inherent part of the diagnostic assessment, which comprises the DIME process involved in determining MMI. *Bekkouche v. Riviera Electric*, W.C. No. 4-514-998 (December 30, 2008).

d. The Colorado Supreme Court held in *Williams v. Kunau*, 147 P.3d 33 (Colo. 2006) that "once a claimant has successfully challenged a finding of MMI

through the DIME process, the DIME process remains open and, when the treating physician makes a second finding of MMI, the employer or insurer may not file an FAL to close the case prior to returning the claimant to the independent medical examiner for a follow-up examination and determination of MMI." Id. at 36. Further, where a DIME physician and an authorized treating physician (ATP) agree that a workers' compensation claimant is not at MMI, an ALJ cannot determine MMI as a matter of fact, and treatment should continue until either the DIME or the ATP places the claimant at MMI. Colo. Rev. Stat. § 8-42-107(8)(b)(II); *Burren v. Indus. Claim Appeals Office*, 2019 COA 37, ¶ 17, *reh'g denied* (Apr. 4, 2019). Here it is undisputed and found that neither the DIME doctor nor any of the Claimant's treating physicians have placed her at MMI following the bilateral TMJ surgeries on February 7, 2019.

e. In addition, the Respondents' failure to contest the DIME physician's findings precludes them from challenging Dr. Bloch's findings concerning the cause of the Claimant's TMJ complaints and the need for surgery. *Leprino Foods Co. v. Industrial Claim Appeals Office*, 134 P.3d 475 (Colo. App. 2005); *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med*, 961 P.2d at 590.

f. In essence this case involves a constructive challenge to Dr. Bloch's opinion of "not at MMI." Dr. Bloch's unchallenged and binding opinion concerning not at MMI was inextricably intertwined with his opinion that the Claimant needed bilateral TMJ surgeries as a result of the work injury. That was the reason Dr. Bloch concluded that the Claimant was not at MMI for the work injury; she needed the bilateral TMJ surgeries as result of the work injury to reach MMI. The MMI determination inherently required the DIME physician to assess, as a matter of diagnosis, whether the various components of the Claimant's medical condition were causally related to the industrial injury. Respondents' failure to dispute the DIME's not at MMI finding within 20 days as required by § 8-42-107.2(4)(c) rendered the components of the DIME opinion binding not only as to the not at MMI finding, but also the DIME's determination of causation of the aggravation/acceleration of the MT condition. *See Leprino Foods*, 134 P.3d at 482-83.

g. As a consequence, the DIME's findfing pertinent to causation as an inherent part of his "not at MMI" finding is no longer subject to dispute, even to the extent of clear and convincing evidence. The DIME physician's determination is therefore binding on the parties and the ALJ because the Respondents did not timely act to contest it. Accordingly, jurisdiction to hear such a contest has now been lost. *Leprino Foods*, 134 P.3d at 482.

Medical Treatment

h. In order to prove that an industrial injury was the proximate cause of the need for medical treatment, an injured worker must prove a causal nexus between the need for treatment and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). It is for the ALJ, as the fact-finder, to determine whether a need for medical treatment is caused by the industrial injury, or some other intervening injury.

F.R. Orr Construction v. Rinta, 717 P.2d 965 (Colo. App. 1985). Respondents are liable for the "direct and natural consequences" of a work-related injury, including consequential injuries caused by the original compensable injury. *See Travelers Ins. Co. v. Savio*, 806 P.2d 1258 (Colo. 1985). As found, the Claimant has established that it is more likely than not, based on the totality of the evidence, that the aggravation/acceleration of the Claimant TMJ problems and consequent need for surgery is causally linked to the admitted injury of December 17, 2015. Although DIME Dr. Bloch's opinion on the causal relatedness of the aggravation/acceleration of the Claimant's TMJ problems is inextricably bound into his determination that the Claimant is not at MMI, the ALJ hereby applies the "preponderance" standard of proof because of the potential import of a recent Court of Appeals opinion in *Yeutter v. Indus. Claim Appeals Office,* **2019 COA 53** (April 11, 2019) [holding that the standard of proof in a DIME's determination of causation can be subject to the "preponderance standard").

Average Weekly Wage

i. An AWW calculation is designed to compensate for **total** temporary wage loss. *Pizza Hut v. Indus. Claim Appeals Office,* 18 P. 3d 867 (Colo. App. 2001). *See* § 8-42-102, C.R.S. As found, although Respondents make a compelling argument that it would be inappropriate to increase the Claimant's AWW, based on increased earnings as of February 7, 2019, the evidence thereof was murky and Claimant made a judicial admission to relinquish her request for an increased AWW as of February 7, 2019. Instead, Claimant requested an increased AWW based on an erroneous computation of AWW as of the date of injury. Consequently ,based on a correct computation of AWW as of December 17, 2015. Claimant's AWW was $1,303.03, which should drive an increase in temporary disability benefits from the start.

Judicial Admission

j. A judicial admission is defined as a "formal, deliberate declaration that a party or his or her counsel makes in a judicial proceeding for the purpose of dispensing with proof of formal matters or facts about which there is no real dispute." *Kempter v. Hurd,* 713 P.2d 1274 (Colo. App. 1986); *Gen. Steel Domestic Sales, LLC v. Hogan & Hartson, LLP,* 230 P.3d 1275, 1283 (Colo. App. 2010). Judicial admissions must be unequivocal but become binding once they are made. *Salazar v. American Sterilizer Co.,* 5 P.3d 357 (Colo. App. 2000). *Also see Valdez v. Texas Roadhouse,* W.C. No. 4-366-133 [Industrial Claim Appeals Office (ICAO), January 25, 2001]. Stipulations are a form of judicial admission and are binding on the party who makes them. *Maloney v, Brassfield,* 251 P.3d 1097, 1108 (Colo. App. 2010). As found herein above, Claimant's counsel made a judicial admission tjhat Claimant was only seeking an increased AWW, based on an erroneous computation as of the date of injury.

Burden of Proof

f. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S.

See City of Boulder v. Streeb, 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained her burden of proof on the designated issues.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents shall pay the costs of the bilateral TMJ surgeries and the additional medical treatment related to those TMJ surgeries as prescribed by the authorized treating physicians, subject to the Division of Workers' Compensation Medical Fee Schedule.

B. The Claimant's average weekly wage is re-established at $1, 303.03 from the beginning of the claim forward.

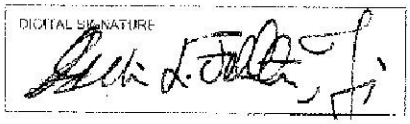
C. Respondents shall pay the Claimant the differential between the previously admitted temporary partial sand temporary total disability benefits for the admitted periods, subject to the new average weekly wage.

D. Subject to the differential in average weekly wage, the latest General Admission of Liability remains in full force and effect.

E. Respondents shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

F. Any and all issues not determined herein are reserved for future decision.

DATED this 24th day of June 2019.



EDWIN L. FELTER, JR.
Administrative Law Judge

ISSUES

1. Whether Respondent has overcome, by clear and convincing evidence, the opinion of division independent medical examination (DIME) physician Frederick Scherr, M.D. that Claimant is not at maximum medical improvement (MMI).

2. If Respondents overcome DIME physician Dr. Scherr's opinion, and establish that Claimant is at MMI, whether Claimant has established by a preponderance of the evidence an entitlement to a general award of medical maintenance benefits.

STIPULATIONS

1. If Respondent overcomes DIME physician Dr. Scherr's opinion, and establish that Claimant is at MMI, Claimant is not entitled to any permanent partial disability (PPD) benefits for his October 8, 2015 right shoulder injury due to a prior injury, impairment rating, and complete apportionment.

2. Claimant is seeking a general award of maintenance benefits and is not specifically seeking right total shoulder replacement as no treating physician has specifically requested that procedure.

FINDINGS OF FACT

1. Claimant is a 69-year-old male employed by Employer as a ramp agent. Claimant's duties include loading cargo, bags, mail, and other items on and off airplanes. Claimant has been so employed for approximately 24 years.

2. On October 8, 2015, Claimant reported that he was directing an airplane with lighted wands and that when he raised his arms up to cross them overhead, he felt a pop and immediate pain in his right shoulder, causing his right arm to drop.

3. Claimant also reported that a few days prior to the October 8, 2015 incident, he was loading heavy military bags onto an airplane. Claimant reported that after loading approximately 150 of these heavy bags onto the plane, his shoulder was sore for the next few days.

4. Respondent admitted liability for the incident, and therefore, Claimant treated his right shoulder under workers' compensation as a work related injury.

5. On October 30, 2015, Clamant underwent an MRI of his right shoulder that was compared to a prior MRI of the right shoulder from October of 2010. The impression

provided was full thickness re-tear of the rotator cuff involving the posterior supraspinatus and the majority of the infraspinatus measuring 3.4 cm with retraction of the torn fibers approximately 5.4 cm to the level of the glenoid, and interval progression of intrasubstance split tearing of the subscapularis tendon and partial thickness tearing of the undersurface fibers. The findings also included interval biceps tenodesis, stable fraying and fissuring of the labrum with interval development of a posterosuperior labral tear, mild glenohumeral arthropathy with superior sublation of the humeral head likely due to loss of the depressor mechanism, and distension of the joint capsule by intraarticular contrast with synovial debris and hypertrophy layering along the axillary recess. *See* Exhibit C.

6. On November 30, 2015, Sean Griggs, M.D. evaluated Claimant. Claimant reported that he was bringing a plane into the gait utilizing signaling flashlights and that when he raised his arm above his head he felt a pop and then developed pain and weakness. Claimant reported a prior rotator cuff tear that was repaired in 2010, that was large, and that after surgery he did well. Claimant reported pain and weakness. On examination, Dr. Griggs noted weakness of the rotator cuff on the right and an internal rotation lag on the right. He also found limited strength in the right shoulder. Dr. Griggs diagnosed right shoulder rotator cuff tear. Dr. Griggs noted that based on the history and relatively normal function before the event on October 8, 2015, he recommended surgical exploration with rotator cuff repair. Dr. Griggs told Claimant there was a possibility that there was a portion of the previous repair that did not heal and that Claimant had gone on to tear further into that area. Dr. Griggs noted that, by MRI, there was a tear of the subscapularis that appeared to be worse than prior examinations. Dr. Griggs opined that the need for surgery related to the October 8, 2015 injury. *See* Exhibit F.

7. On December 23, 2015, Claimant underwent right shoulder surgery performed by Dr. Griggs. Dr. Griggs performed a right arthroscopic partial rotator cuff repair and a right shoulder subacromial bursectomy. Dr. Griggs noted in surgery that the rotator cuff tear was massive and that the posterior cuff including the infraspinatus and teres minor were unable to be repaired. Dr. Griggs noted that he was able to repair the supraspinatus tendon and opined that appeared to be the only portion of the tear that was fresh and appeared more recent. Dr. Griggs noted some mild glenohumeral joint arthritis and evidence of a previous biceps tenotomy. *See* Exhibit F.

8. On January 11, 2016, Dr. Griggs evaluated Claimant. Dr. Griggs noted that Claimant was 19 days post surgery where he had an acute on chronic massive rotator cuff tear. Dr. Griggs indicated that the infraspinatus and a portion of the teres minor were found chronically detached and were not able to be repaired but that he was able to fully flex the supraspinatus anterior edge and partially repair the rotator cuff. Claimant remained on restrictions of no use of the right upper extremity at this visit. *See* Exhibit F.

9. On February 23, 2016, Dr. Griggs evaluated Claimant. Dr. Griggs noted that Claimant was doing well 8 weeks post surgery where they were able to repair a portion of the supraspinatus. Dr. Griggs opined that the partial repair appeared to be intact and that Claimant could begin with strengthening at therapy but should continue

with sling immobilization while out and about. Dr. Griggs recommended compliance so that Claimant did not re-injure himself. *See* Exhibit F.

10. On March 22, 2016, Dr. Griggs evaluated Claimant. Dr. Griggs found some limitation in motion of the right shoulder compared to the left and opined that Claimant's right rotator cuff was functioning but was weak. By April 19, 2016, Dr. Griggs found continued weakness of the rotator cuff on the right, but Claimant reported he was feeling better. Dr. Griggs noted that at the time of surgery, Claimant could only have a partial repair and because of that Dr. Griggs recommended Claimant consider permanent restrictions. *See* Exhibit F.

11. Claimant continued therapy and treatment for both his right shoulder and for an unrelated knee injury. Ultimately, in December of 2017, he was sent for an impairment rating.

12. On December 21, 2017, John Aschberger, M.D. performed an impairment assessment. Claimant reported suffering a shoulder injury when signaling a plane as it was coming in and feeling a pop in the arm. Claimant reported that he was identified as having a rotator cuff tear and that he underwent surgery and overall had a good recovery. Dr. Aschberger noted some persistent difficulty and that the surgeon was unable to reconnect the infraspinatus. Claimant reported that he was working but not lifting bags and was tolerating work well. Dr. Aschberger performed a physical examination with range of motion measurements. Dr. Aschberger assessed status post right rotator cuff tear and surgical repair, right knee meniscectomy, and right knee total arthroplasty. Dr. Aschberger opined that the strength and motion of the right shoulder were overall good but noted some weakness in external rotation. Dr. Aschberger found Claimant to have a 5% upper extremity impairment due to Claimant's range of motion limitations in the right upper extremity. *See* Exhibit G.

13. On October 15, 2018, Frederick Scherr, M.D. performed a DIME. Claimant reported right shoulder ache and lack of strength. Claimant reported that on October 8, 2015, he was working as a baggage handler and was loading 150 military bags weighting between 50-75 pounds and that he was in the cargo bay on his knees as the bags came up a conveyer belt. Claimant reported that he took each bag and stacked them to chest height and that he loaded all 150 bags. Claimant reported some soreness in his right shoulder at the end of the day but noted no specific incident or trauma to the right shoulder. Claimant reported that he went home, iced his right shoulder, and took some ibuprofen. Claimant reported that the next day at work he was assisting to park a jet and when raising his arms with the light sticks, was unable to raise his right arm up to form an "X" to indicate to the plane it should stop. Claimant reported he had to use his left arm to pick up his right arm to form an "X." Claimant reported that he sought treatment, had an MRI, and underwent surgery on December 23, 2015 to repair his rotator cuff. Claimant reported that the surgeon was able to repair the supraspinatus but not the remaining rotator cuff injuries. Claimant reported that he had progressed slowly, felt like his impairment rating was low, and wondered if there was anything else that could be done for his right shoulder because his function and strength were limited. *See* Exhibits 3, A.

14. Dr. Scherr reviewed medical records and performed a physical examination. Dr. Scherr provided an assessment of severe right shoulder rotator cuff pathology, post rotator cuff repair, possible adhesive capsulitis of right shoulder, degenerative right shoulder, and right shoulder pain. Dr. Scherr opined that Claimant had a work related injury on October 8, 2015 not due to specific trauma or a specific incident but because Claimant had done overhead work for 23 years that qualified as likely to contribute to shoulder disorders. Dr. Scherr noted that both the surgeon and the authorized treating provider told Claimant nothing else could be done. Claimant reported that he had deteriorated since his impairment rating with Dr. Aschberger. Dr. Scherr opined that Claimant was not at MMI and needed further work up including MRI or MRI arthrogram depending upon the second opinion from an orthopedic shoulder specialist. Dr. Scherr noted the possibility that Claimant may need a shoulder replacement surgery in order to correct his right shoulder and Dr. Scherr noted that there would be a question whether a shoulder replacement is more likely due to degenerative issues and the process of aging or due to one incident on October 8, 2015. Dr. Scherr opined that Claimant was not at MMI, should see an orthopedic shoulder specialist to determine next steps including possible repeat MRI/MRA and/or additional surgery. Dr. Scherr opined that if no surgery was offered, Claimant would be at MMI. *See* Exhibits 3, A.

15. On January 15, 2019, Dr. Aschberger evaluated Claimant. He noted that he had seen Claimant once prior on December 21, 2017 for an impairment rating. Dr. Aschberger noted that Claimant had a pretty good recovery overall from a shoulder injury and had an impairment of 5% of the upper extremity from the last evaluation. Claimant reported worsening since December 2017 with increasing pain and decreasing range of motion. Dr. Aschberger reviewed previous evaluations of Claimant previously Claimant's pain level and range of motion findings would not be indicative of an aggressive procedure, but noted that Claimant reported significant deterioration in terms of range of motion. On exam, Dr. Aschberger noted markedly restricted shoulder range of motion. Dr. Aschberger assessed status post right rotator cuff repair with original good improvement, subsequent decreasing range of motion, and mild increased pain as well as possible adhesive capsulitis. Dr. Aschberger opined that the deterioration appeared to be related to the original injury. Dr. Aschberger referred Claimant back to orthopedic surgeon Dr. Griggs for evaluation and noted it was likely Claimant warranted repeat MRI but that he would leave that to Dr. Griggs' determination. *See* Exhibits 10, G.

16. On February 14, 2019, Sean Griggs, M.D. evaluated Claimant. Dr. Griggs noted he last treated Claimant in 2016 when Claimant had a massive acute on chronic rotator cuff tear and underwent surgical management. Dr. Griggs noted that he was able to repair the supraspinatus at that time and by May of 2016, Claimant had near normal range of motion but limited strength. Claimant reported that he had trouble with raising his arm above his head that gradually happened again after surgery and return to activities. Dr. Griggs diagnosed right shoulder massive rotator cuff tear with recurrent tearing following repair of a massive acute on chronic tear where only a portion of the cuff was repairable. Dr. Griggs opined that Claimant likely had a recurrent tear not due to trauma but due to the status of Claimant's rotator cuff. Dr. Griggs recommended an MRI

to evaluate the size of the cuff tear and amount of atrophy present. Dr. Griggs opined that if Claimant had ongoing pain and weakness and desired surgical management, he would likely require a reverse prosthesis. *See* Exhibits 12, F.

17. On February 28, 2019, Timothy O'Brien, M.D. performed an independent medical evaluation. Claimant reported his recent injury as repetitive overuse and that his right shoulder felt weak and sore after loading 135 military bags. Claimant reported that a few days later, he was bringing in a plane and as he was crossing his hands with the lighted wands, his right arm dropped because of pain and weakness. Claimant indicated that he reported the injury and was treated including surgery that failed. Claimant reported continued pain and weakness. Dr. O'Brien reviewed medical records and performed a physical examination. *See* Exhibits 13, B.

18. Dr. O'Brien opined that Claimant's onset of right shoulder pain on October 8, 2015 was a manifestation of Claimant's personal health and was in no way causally related to a specific or isolated work event. Dr. O'Brien opined that lifting one's arm overhead with a lightweight illumination device is not an injury mechanism but a daily activity. He opined that the lighted wands were not heavy and that lifting them is not traumatic and could not have generated enough energy to result in any new tissue breakage or yielding of the right shoulder. Dr. O'Brien opined that Claimant felt pain because Claimant had a pre-existing and long-standing rotator cuff tear of the right shoulder with a non-work related massive tear in 2011 with surgery and likelihood that the 2011 repair failed. Dr. O'Brien opined that due to the ongoing attrition and degeneration, and desiccation that occurred at the repair site after 2011, it was predictable that the rotator cuff tear repair in 2011 was going to fail and he opined it was medically probable that the repair failed quite rapidly. Dr. O'Brien opined that as there was no new injury on October 8, 2015, Claimant did not require ongoing care. Dr. O'Brien opined that the MRI supported his opinion, as it showed no new tear of the rotator cuff and showed retraction and substantial atrophy, which are findings that take years to become evident. Dr. O'Brien opined that there was no bleeding, evidence of acute injury, or evidence of new tissue breakage or yielding indicative of a "new" tear. Dr. O'Brien opined that all the findings on MRI were chronic, longstanding, and consistent with the failure of the 2011 tear to heal. *See* Exhibits 13, B.

19. Dr. O'Brien attached a medical study to his report indicating that large rotator cuff repairs can fail to heal greater than 50% of the time. Dr. O'Brien opined that it was not unusual that Claimant could be able to continue functioning nearly normally even though his 2011 massive rotator cuff tear repair failed to heal. Dr. O'Brien disagreed with Dr. Griggs' decision to perform surgery to repair Claimant's irreparable rotator cuff and noted that the failure of the 2011 surgery proved that the surgery recommended by Dr. Griggs had no hope of healing. Dr. O'Brien indicated that subjecting Claimant to another surgery that was going to predictably fail was poor clinical decision making. Dr. O'Brien opined that the current recommended surgery of reverse shoulder arthroplasty was not causally related to the occupational exposure of October 8, 2015 and that Claimant had a need for that surgical intervention long prior to the October 8, 2015 work activity. Dr. O'Brien noted that after the 2011 surgery predictably failed, Claimant had

substantial retraction of the rotator cuff and had progressive apparent chondromalacia and was a candidate long before October 8, 2015. *See* Exhibits 13, B.

20. On March 8, 2019, Claimant underwent a right shoulder MRI. The impression provided was postoperative shoulder with full thickness tears of the supraspinatus and infraspinatus tendons, moderate grade partial thickness tear of the subscapularis tendon, chronic appearing tear of the posterior labrum, and mild to moderate osteoarthritis and chondromalacia of the glenohumeral joint. The radiologist noted full thickness tears of the supraspinatus and infraspinatus tendons with medial tendon retraction estimated at 5.4 cm and a tear estimated at 3.9 cm and accompanied with severe corresponding muscle atrophy. *See* Exhibits 11, C.

21. Dr. O'Brien testified by deposition. Dr. O'Brien noted that Claimant had a massive rotator cuff tear in 2010 that involved both the supra and infraspinatus and noted that the MRI read showed chronic labral tearing or degeneration, involvement of the subscapularis, and osteoarthritis of the glenohumeral joint. Dr. O'Brien compared the MRI read from 2010 to the MRI read from 2015 and testified that when comparing the two, there were massive tears on both with the 2015 one showing 5.4 cm of retraction compared to 2-3.5 cm of retraction in 2010. Dr. O'Brien testified that the rotator cuff was still massive on the 2015 MRI and even though there was attempted treatment prior, the rotator cuff didn't heal and continued to retract and continued to atrophy. Dr. O'Brien testified that the findings referred to rotator cuff arthropathy and showed a very predictable course of ongoing degeneration. Dr. O'Brien testified that well over 50% of massive rotator cuff repairs fail. Dr. O'Brien testified that the mechanism of injury of lifting a flashlight type device could not cause a rotator cuff tear, and that raising one's arm overhead is not an injury mechanism and is a daily activity.

22. Dr. O'Brien testified that Claimant experienced pain because he had a pre-existing rotator cuff tear and a failed pre-existing rotator cuff repair. Dr. O'Brien testified that after the failed repair, Claimant was left with a massive rotator cuff tear and underlying arthritis. He opined those are incurable, relentlessly progressive conditions and it would be expected that Claimant would have intermittent pain even with daily activities that are not injurious. Dr. O'Brien testified that Claimant had a manifestation of a personal patho anatomy. Dr. O'Brien pointed out that in the 2010 surgical repair, the tear was so chronic and the tendon was so retracted, the surgeon couldn't completely put the whole tendon back into its footprint and could only get part of it reattached.

23. Claimant had previous treatment involving his right shoulder.

24. On September 9, 2010, Stuart Greer, M.D. evaluated Claimant. Claimant reported a football injury with a direct blow right shoulder to ground 9 days prior. Claimant reported old right ac surgery and Dr. Greer found that consistent with findings on x-ray. Dr. Greer diagnosed rotator cuff syndrome. By September 23, 2010, Claimant reported continued and somewhat worsened right shoulder pain and that he was unable to work. Claimant was later assessed with possible rotator cuff tear due to the marked weakness in external rotation and an MRI was ordered. *See* Exhibit D.

25. Claimant's previous medical records show that in October of 2010, a right shoulder MRI showed a very large full thickness rotator cuff tear involving the mid to posterior supraspinatus, entire infraspinatus with some thinned degenerated anterior supraspinatus remaining intact, retraction of the supraspinatus tendon by 2.8 cm and retraction of the infraspinatus tendon by 3.3 cm, and a 3.4 cm anteroposterior dimension of the tear. Claimant had mild atrophy of the infraspinatus and to a lesser extent, the supraspinatus muscle bellies. Claimant also had a high grade partial tear of the long head biceps tendon lateral rotator interval segment and labral degeneration. See Exhibit D.

26. On November 2, 2010, Michael Gallagher, M.D. evaluated Claimant. Claimant reported that on August 17, 2010 he tripped going up the stairs at work while carrying a stroller and reached out with his right arm to grab onto the railing. Claimant reported that he had pain and weakness in his shoulder. Claimant also reported the day prior to that, he had a slight strain of his shoulder while lifting a motorized wheelchair. Claimant noted afterwards that he had a difficult time raising his arm up over his head while trying to assist in the arrival of a plane. Dr. Gallagher noted that the MRI images and report showed massive rotator cuff tearing, biceps fraying, and some longitudinal tearing of the subscapularis. Dr. Gallagher discussed extensively with Claimant the nature of rotator cuff repair and that his massive rotator cuff tear may be irreparable. *See* Exhibit D.

27. Claimant underwent right shoulder arthroscopy with biceps tenotomy and repair of massive rotator cuff repair with Dr. Gallagher on December 20, 2010. After surgery, Claimant underwent physical therapy. *See* Exhibits D, E.

28. On September 13, 2011, Dr. Gallagher evaluated Claimant and noted that he was 9 months out from surgery and was requesting to return to work. Claimant reported no pain in the shoulder but reported mild loss of strength. Claimant felt, overall, that he was very close to being ready to go back to work. Dr. Gallagher found continued limitations in external rotation to 50 degrees but opined that Claimant appeared to be doing very well with controlled pain and significant return of strength. Dr. Gallagher noted the mild residual strength deficit from the massive rotator cuff tear that remained, but opined that Claimant could return to work in October. Dr. Gallagher wanted Claimant to continue working on strengthening and gave Claimant recommendations for proper lifting techniques. *See* Exhibit D.

29. Claimant testified at hearing that after his surgery and 2011 treatment, he had no problems in his right shoulder and no job modifications. Claimant testified that one week prior to October 8, 2015 he had a heavy week at work with a lot of lifting. Claimant testified that now he doesn't lift anything chest height or higher and has pain lifting his arm over his head and has a lack of strength. Claimant testified that he does not think his shoulder is back to its normal condition and that he requested a DIME because he didn't think his shoulder was okay, it was still hurting, and he had a lack of strength.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo.App. 2000).

DIME opinion on MMI

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. A DIME physician's finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.;

Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5 P.3d 385 (Colo. App. 2000).

Under the statute MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007). A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Construction Management,* W.C. No. 4-356-512 (ICAO May 20, 2004); *Hatch v. John H. Garland Co.,* W.C. No. 4-638-712 (ICAO August 11, 2000). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. Therefore, the DIME physician's opinions on these issues are binding unless overcome by clear and convincing evidence. *See Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician's finding concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). The question of whether the party challenging the DIME physician's finding regarding MMI has overcome the finding by clear and convincing evidence is one of fact for the ALJ.

Respondents have established by clear and convincing evidence that DIME physician Dr. Scherr's determination that Claimant was not at MMI was incorrect. It is highly probable and free from serious or substantial doubt that Claimant is at MMI for his work related injury and requires no additional medical treatment or diagnostic procedures to improve or define his injury related medical condition.

As found above, Claimant had massive rotator cuff tearing in 2010 prior to this work related injury. Despite undergoing treatment and therapy, including surgery, in 2010 and 2011, Claimant was left with limitations in his right upper extremity that included weakness. Dr. O'Brien is credible and persuasive that Claimant's rotator cuff was

irreparable back in 2010 and that between 2010 and 2015, the rotator cuff continued to retract. It is credible, persuasive, and highly probable and free from doubt that Claimant had a failed rotator cuff repair in 2010. Claimant's symptoms and findings are consistent with the progression of a torn rotator cuff. Claimant, as found above, had a loss of strength and limitations in external rotation in 2011 when he returned to work full duty. Claimant is not persuasive that he had no problems after his 2011 treatment in his right shoulder. The degree of tearing, retraction, atrophy, and arthritis in his right shoulder demonstrate that his problems have been ongoing for a significant amount of time. As found above, Claimant has similar limitations in strength and range of motion now as he had in 2011 when he stopped treatment following his 2010 injury. Dr. Griggs based his opinion, in part, on Claimant's report that he had mostly normal function before October 8, 2015. However, this report is not credible or persuasive given the limitations Claimant had in 2011 and the imaging in 2015 showing significant retraction, atrophy, and arthritis in the right shoulder.

Although Dr. Griggs attempted to repair the right shoulder on December 23, 2015, it was a futile attempt given the status of Claimant's right rotator cuff that had been irreparable since his massive rotator cuff tear in 2010. Dr. Griggs, as found above, acknowledged that in the 2015 surgery he couldn't repair a lot of the structures and was only able to repair one portion, the supraspinatus tendon. Claimant, at this time, has loss of strength and loss of range of motion similar to what he had in 2011. Respondent has demonstrated that Claimant is back to baseline and that no further treatment is reasonably expected to improve Claimant's work related condition. Claimant's condition Claimant has no new impairment.

Dr. Scherr appears to lack reports showing that Claimant had loss of range of motion and loss of strength in 2011 when he discontinued treatment for his prior right shoulder injury. Dr. O'Brien, overall, is found credible and persuasive. His opinions are consistent with the weight of the medical reports and evidence. There is no further treatment reasonably expected to improve Claimant's work related injury condition and Respondent has established by clear and convincing evidence that Claimant is at MMI for his October 8, 2015 injury.

Medical Maintenance Benefits

The respondents are liable to provide such medical treatment as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury. Section 8-42-101(1)(a), C.R.S. Colorado courts have ruled that the need for medical treatment may extend beyond the point of MMI where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or prevent further deterioration of her condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995).

Claimant has failed to establish by a preponderance of the evidence an entitlement to medical treatment beyond MMI. He has failed to show that future medical treatment is

reasonably necessary to relieve the effects of his work related injury or to prevent further deterioration of his work related injury. As found above, his right shoulder condition now includes pain, weakness, and lack of range of motion. This is similar to the condition of his right shoulder in 2011 before this new incident/injury. Although Claimant may wish to pursue additional surgery, this would not be necessary to relieve of the effects of the October 8, 2015 injury but would be necessary to relieve the ongoing effects of the massive and irreparable rotator cuff injury he sustained in 2010. Claimant has failed to establish the need for any future treatment to relieve the effects or to prevent the deterioration of his condition.

ORDER

It is therefore ordered that:

1. Respondent has established by clear and convincing evidence that DIME physician Dr. Scherr erred. Claimant is at MMI for his October 8, 2015 injury.

2. Claimant has failed to establish by a preponderance of the evidence a need for future medical treatment to relieve the effects of or to prevent the deterioration of his October 8, 2015 injury.

3. Any issues not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 26, 2019 /s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that the loss of his teeth #24 and #25 (and prospective loss of #23 and #26) is due to a compensable work injury that occurred in August of 2016?

II. If found compensable, what are the reasonable, necessary, and related medical expenses to cure Claimant of his work injury?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Claimant is a long-term employee of Lowe's, performing various tasks, to include returning items which customers have returned back into store inventory. He remains employed as of this time.

2. Claimant was hurt at work sometime in August of 2016 [Claimant's written material state it was August 18, while a calendar Claimant supplied suggests it occurred August 16] while restocking boards back into inventory. He was tossing a two-by-four board into a bin, apparently near shoulder height, when the board struck a support beam and bounced back unexpectedly. Claimant was then struck on the lower part of his mouth by the end of the board. Claimant reported no bleeding or bruising following the injury. There were no witnesses, and Claimant did not tell his coworkers or supervisor at the time of injury. He continued working.

3. Claimant testified at hearing. He did not seek treatment for his this injury at the time, nor for over two years following the incident. He testified that he had no symptoms for five months following the incident. His symptoms started in January 2017, and included pain and loose teeth. However, he did not seek treatment at his dentist, since he had gone from full-time to part-time work at Lowes, and had let his dental insurance lapse. Claimant testified that he lost two bottom teeth (noted to be teeth #24 and #25, the two lower front teeth in the center) on August 9, 2018 while eating some meat.

4. Claimant first reported to Respondents after he lost his teeth on August 9, 2018. [This is noted to be barely within two years of the initial incident].

5. After the claim was denied, Claimant sought treatment from his personal dentist, Dr. Matthew Lovato, DDS, on November 15, 2018. Prior to this visit, Claimant had not been to this dentist since October of 2014. At this 2014 visit, Claimant was noted to have some bone loss in the anterior portion of his lower jaw, specifically #s, 23, 24, 25, 26. (#23 being to the immediate left of #24, and #26 being to the immediate right of #25).

6. In a letter dated 11/16/2018, Dr. Lavato noted that not only were #24 and #25 missing, but #23 and #26 were suffering from severe bone loss, and would soon likely need to be extracted. He concluded this letter thusly:

> There are times when trauma to a tooth *can* lead to the pulp of the tooth going bad, leading to infection and the teeth loosening. I would say that, considering Mr. Ralph's previous condition, his accident *may have contributed* to him losing teeth #24 and 25, and the future loss of teeth #23 and 26. (Ex. B) (emphasis added).

7. A deposition of Dr. Lovato was taken on January 15, 2019. Claimant had originally seen Dr. Lovato as a patient in 2012, suffering from bone loss which resulted in extraction of tooth #15. The cause of Claimant's tooth loss was discussed at length, with trauma resulting in tooth death and periodontal disease offered as possible causes. Dr. Lovato said that as of 2018, there was gum and bone loss in the areas surrounding the two lost teeth. Dr. Lovato ultimately concluded that he could not say within reasonable degree of medical certainty what caused Claimant's tooth loss.

> Q. …Within a reasonable degree of medical certainty, you are unable today to say definitively that the tooth loss at 24 and 25 are due to trauma? There are other mechanisms that it could be due to, like periodontal disease?
>
> A. Correct. I couldn't say that it was due to a periodontal issue either. You know, one way or the other, I can't say that it was this or that. Those are probably the two things, though.

8. He noted that the most common reason for teeth simply 'falling out' was probably periodontal disease:

> Q. Based on your practice, would you say it's [periodontal disease] the *most common reason* why you just get spontaneous tooth loss in adults?
>
> A. Yes. Probably. (emphasis added).

9. Dr. Lovato also noted that one would expect pain to accompany tooth trauma leading to tooth death:

> Q. So in a case of pulp death due to trauma, what would you expect a patient to experience prior to the tooth just falling out? I mean, there are warning signs, right?
>
> A. *Yes. I would think so.* Everybody is a little different.
>
> Q. What would you expect in a typical case of trauma leading to pulp death?
>
> A. At some point, you would *expect* it to get an abscess, like I said.
>
> Q. And would an abscess be something that's painful?

A. *Most of the time*…..You would think it would hurt, but not always. (emphasis added)

10. An Independent Medical Examination (IME) was performed on January 17, 2019 by James E. Berwick, D.D.S. (Ex. A). The ALJ notes that the history of the injury as described by Claimant, and the symptoms Claimant noted, are reasonably consistent with Claimant's testimony at trial, and the chronology he outlined in his written materials tendered at hearing.

11. In reviewing the dental records, Dr. Berwick notes that Claimant's previous dental history showed a history of bone loss, suggestive of periodontal disease, with other teeth requiring extraction (#15 in 2012, and #2 in 2014). He also noted that Dr. Lovato had documented bone loss of Claimant's teeth #s 22 through 27 as far back as 2013.

12. In his report, Dr. Berwick opined that Claimant's #24 and 25 suffered a fate similar to #15 and #2:

> The patient's history and complaints as well as his present condition are consistent with loss of teeth #s 24 and 25 form periodontitis or chronic bone loss from periodontal disease. *There are not indications that the teeth sustained significant trauma,* and their loss is not [to] be related to it. (Ex. A). (emphasis added).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado is to assure quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1).* Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as the fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182,

1183 (Colo. App. 1990) Moreover, the ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion). The ALJ in this case finds Claimant to be sincere and credible in his belief that he lost his teeth due to a work injury. Claimant has been reasonably consistent (if belated) in describing this work incident, and the chronology of symptoms he experienced. The ALJ finds that the incident at work (being struck in the lower mouth by the 2 by 4) indeed occurred, and sometime in August of 2016, within the statute of limitations.

C. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability

D. A compensable injury is one that arises out of and occurs within the course and scope of employment. § 8-41-301(1)(b), C.R.S. An injury occurs in the course of employment when it was sustained within the appropriate time, place, and circumstances of an employee's job function. *Wild West Radio v. Indus. Claim Apps. Office*, 905 P.2d 6 (Colo. App. 1995). An injury arises out of employment when there is a sufficient causal connection between the employment and the injury. *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014). Where the Claimant's entitlement to benefits is disputed, the claimant has the burden to prove, by a preponderance of the evidence, a causal relationship between the work injury and the condition for which benefits are sought. *Snyder v. Indus. Claim Apps. Office*, 942 P.2d 1337 (Colo. App. 1997).

E. Claimant has a history of periodontitis and tooth loss relating to the disease. His periodontal disease was the reason for his initial visit to Dr. Lovato in 2012. At that time, Claimant's records show "severe bone loss," which led to looseness of the tooth adjacent to the bone loss. Two of Claimants' teeth have already had to be extracted due to the bone loss. Claimant had bone loss in additional areas, including surrounding the anterior bottom teeth, which are currently at issue.

F. Dr. Lovato opined that in order to stabilize periodontal disease, like Claimant had in 2012 through 2014 on the teeth in question, hygiene, including regular cleanings, would be necessary to prevent furtherance of the disease. Claimant apparently did not visit a dentist for regular cleanings from 2014 until after the loss of his teeth in 2018. While the precise timelines are unclear from the record, at some point Claimant had dropped his dental coverage when he went part-time. This occurred at a very inopportune time, given his preexisting periodontal woes.

G. The most Dr. Lavato would state on Claimant's behalf was that the loss of the front two teeth *could* have resulted from trauma. However, when asked if he could determine within a reasonable degree of medical certainty that Claimant's tooth loss had come from trauma, Dr. Lovato stated that he could not make that determination. He eventually opined that the most common reason for teeth simply "falling out" was periodontal disease – not from trauma. In the event of trauma sufficient to cause this type of result (pulp death of the tooth), one would most likely experience an abscess, and accompanying pain. Claimant has described neither at any point. Nor did Claimant supply #24 and #25 for any sort of forensic examination by his dentist, in order to shed some light on what just occurred. While no bad faith is implied herein, it remains Claimant's burden to show what happened to his teeth.

H. Dr. Berwick examined Claimant for an IME and noted issues of gum recession at various locations throughout Claimant's mouth. He concluded, based on his examination and Claimant's history and complaints, that the loss of the teeth in question was the result of periodontitis or chronic bone loss from periodontal disease, and not from trauma. The ALJ finds Dr. Berwick's analysis persuasive. In the end, even Dr. Lovato is not opining that the work accident was the cause of Claimant's loss; it was merely *possible.*

I. Claimant has not shown by a preponderance of evidence that this work accident was the cause of his tooth loss. However sincere, he is merely speculating that his dental problems, which did not start until five months after the injury, were the result of this work accident. The ALJ finds and concludes that it is more likely than not that Claimant's loss of teeth #24 and #25 (and the prospective loss of #23 and #26) are due to the degenerative nature of periodontal disease, and not from this work accident. Nor did this work accident cause his underlying degenerative condition to become symptomatic.

Medical Benefits/Authorized Treating Provider

J. Because this claim is not compensable, no medical or dental benefits are to be awarded.

ORDER

It is therefore Ordered that:

1. Claimant's claim for Workers Compensation benefits is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 26, 2019

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that work injuries sustained on February 24, 2015 (W.C. No. 4-989-017), January 11, 2016 (W.C. No. 5-004-904), and June 23, 2016 (W.C. No. 5-026-332), caused a pre-existing, asymptomatic Chiari Malformation Type 1 (CMF1) to become symptomatic, necessitating ongoing medical treatment.

PROCEDURAL MATTERS

I. At hearing, Respondents' counsel indicated that the issue before the ALJ solely involved W.C. Nos. 5-026-332 and 5-004-904, which had not been consolidated. Claimant's counsel indicated W.C. No. 4-989-017 was also to be considered. The ALJ noted Application for Hearing identifies W.C. Nos. 4-989-017 (February 24, 2015 date of injury), W.C. No. 5-004-904 (January 11, 2016 date of injury), and W.C. No. 5-026-332 (June 23, 2016 date of injury).Respondents' counsel subsequently agreed W.C. No. should not be excluded in consideration of this matter. Claimant argued that two additional work incidents, one in December 2016 and September 2017, should be also be considered by the ALJ. Respondents argued the December 2016 and September 2017 incidents could not be considered by the ALJ in terms of any contributory effect, as no admissions of liability had been filed for the alleged injuries, and compensability for those alleged injuries had not been endorsed as an issue for hearing. The ALJ agrees. Accordingly, with respect whether Claimant's work injuries caused an asymptomatic condition to become symptomatic, the ALJ limits her consideration to the injuries that are the subject of W.C. Nos. 4-989-017, 5-004-904 and 5-026-332.

II. During the evidentiary deposition of Dr. Lorah, counsel for Claimant posed questions to Dr. Lorah pertaining to an August 31, 2018 evaluation. At that time, undersigned counsel objected to the line of questioning, inasmuch as the August 31, 2018, office visit occurred subsequent to the August 9, 2018, hearing, and details of this evaluation should not be added into the record. Respondents' objection is sustained by the ALJ.

III. At the end of Dr. Lorah's deposition, counsel for Claimant requested that Dr. Lorah provide a complete copy of the clinical notes for the treatment that Claimant has received at the clinic. Respondents' counsel timely objected to the submission of parts of the clinical notes, given the fact that some of the clinical notes may have been generated after the August 9, 2018 hearing. Upon reviewing the records, Respondents' counsel objected to the submission of the clinical notes dated August 3, 2018, August 17, 2018, August 31, 2018, September 18, 2018, and October 24, 2018. Respondents' objection is sustained by the ALJ.

FINDINGS OF FACT

1. Claimant is a 56 year old male who works for Employer as a construction project administrator.

2. On February 24, 2015, Claimant sustained a compensable industrial injury (W.C. No. 4-989-017) after slipping and falling on ice. Claimant presented to authorized treating physician (ATP) Bruce D. Lippman, M.D. at Glenwood Medical Associates on March 2, 2015 and reported landing on his buttocks and right upper extremity. Claimant complained of neck stiffness, right wrist discomfort and a constant headache. No head injury was reported. Dr. Lippman assessed Claimant with a cervical strain and contused right upper extremity. Claimant subsequently reported occasional headaches at a March 16, 2015 evaluation, again with no mention of a head injury. Dr. Lippman opined that Claimant's headaches were the result of the cervical spine strain, which had resolved. As of Claimant's next visit on April 6, 2015, Dr. Lippman noted Claimant's only remaining symptom was soreness in the right wrist. Claimant subsequently continued to treat with Dr. Lippman at least once per month for right wrist symptoms. He ultimately underwent right wrist surgery on August 12, 2015. The medical records during that time period are devoid of any reference to a head injury or associated complaints.

3. On January 11, 2016, Claimant suffered an admitted industrial injury (W.C. No. 5-004-904) when he again slipped and fell on ice while at work. Claimant went to the emergency room and underwent a CT scan of the head, which was normal. He presented to Dr. Lippman on January 18, 2016, reporting that he fell on ice and hit the back of his head with no loss of consciousness. Claimant complained of dizziness, some nausea, headache, and neck tightness. Dr. Lippman noted, "This is the first time he has had a head injury or concussion." Dr. Lippman assessed Claimant with a concussion without loss of consciousness, cervical strain and low back strain. He removed Claimant from work due to the concussion.

4. Claimant was released to limited duty on January 25, 2016, but returned to Dr. Lippman on January 26, 2016 with complaints of increased headaches, dizziness, trouble concentrating and memory issues. Dr. Lippman restricted Claimant to sedentary work. On February 1, 2016, Dr. Lippman referred Claimant for a neurological consultation with Jeffrey Siegel, M.D.

5. Claimant presented to Dr. Siegel on March 21, 2016. Dr. Siegel diagnosed Claimant with post-concussion syndrome as a result of the January 11, 2016 incident, noting a typical expected recovery time of three to six months. He recommended Claimant undergo physical therapy and an occipital nerve block. Claimant continued to treat with Dr. Siegel, who ultimately discharged Claimant from his care on May 3, 2016. Dr. Siegel noted Claimant's symptoms were slowly and steadily improving despite continued headaches.

6. Claimant continued to see Dr. Lippman, reporting improved vertigo, occasional memory problems, headaches, photophobia, and issues with cognition and memory. Claimant continued to participate in physical therapy and work modified duty. By June

16, 2016, Dr. Lippman noted that, despite some remaining issues with short-term memory, Claimant's concussive symptoms had improved, and his headaches were

7. Claimant was rear-ended in a low-speed motor vehicle accident (MVA) while working on June 23, 2016 (W.C. No. 5-026-332). Claimant presented to Valley View Hospital with complaints of neck pain. He reported no loss of consciousness. The attending physician noted that a CT scan of the head was not indicated, as Claimant did have any seizure activity, vomiting, change in vision, gait instability or loss of consciousness. Claimant was diagnosed with a concussion and neck pain, prescribed Flexeril, and advised to follow up with his primary care physician.

8. Claimant presented to David M. Lorah, M.D. at Glenwood Medical Associates on June 28, 2016 with complaints of worsening cervical pain, low back pain and headaches after the MVA. Claimant reported he did not recall hitting his head, and there was no deployment of airbags or loss of consciousness during the incident. Dr. Lorah diagnosed Claimant with a concussion and cervical strain, referred him for physical therapy, and released Claimant with restrictions.

9. On June 30, 2016, Dr. Lippman placed Claimant at maximum medical improvement (MMI) for his January 11, 2016 work injury with no permanent impairment or need for maintenance care. He noted Claimant finished physical therapy for the January 11, 2016 injury months prior and had been working his regular job with no active problems. Dr. Lippman noted Claimant had since been involved in a MVA and appeared to have sustained another concussion and cervical strain.

10. On July 5, 2016, Dr. Lippman evaluated Claimant in connection with the June 23, 2016 MVA. Claimant complained of headaches and neck pain. Dr. Lippman diagnosed Claimant with a concussion, cervical strain, and lumbar strain, opining that the MVA aggravated Claimant's January 11, 2016 injury. He referred Claimant for physical therapy.

11. On July 26, 2016, Respondents filed a Final Admission of Liability (FAL) for Claimant's January 11, 2016 injury (W.C. No. 5-004-904) consistent with Dr. Lippman's June 30, 2016 report. Respondents admitted for reasonable, necessary and related post-MMI medical treatment. No objection to the FAL was filed.

12. Dr. Siegel reevaluated Claimant on August 16, 2016 per the referral of Dr. Lippman. Dr. Siegel noted Claimant was involved in a MVA and diagnosed Claimant with a whiplash type injury.

13. At a follow-up evaluation with Dr. Siegel on September 27, 2016, Claimant reported ongoing vertigo. Dr. Siegel noted Claimant and his wife reported that Claimant's vertigo actually "[e]xtend[ed] back to a February 2015 injury; apparently he slipped, broke his wrist, and also struck his head at that time. The vertigo was intermittent, lasting a few weeks at a time. It will then remit for a few weeks, then recur."

14. On October 4, 2016, Claimant underwent a brain MRI and saw Dr. Siegel. Dr. Siegel reviewed the MRI results and noted there was no explanatory intracranial

pathology. He assessed Claimant with dizziness after three concussive injuries over the past couple of years, two culminating from slips and falls and one whiplash type injury. Dr. Siegel noted no specific acute or subacute neuropathology was identified, other than residual concussion symptoms. He opined nothing else could be done for Claimant at that time and had no further recommendations for diagnostic workup or treatment.

15. Claimant continued to treat with Dr. Lippman and continued to report headaches, some cognitive and memory issues, and improved vertigo. At a December 16, 2016 appointment, Claimant reported to Dr. Lippman he had an episode of vertigo at work, fell down on his hands and knees, and did not feel well the rest of the day. There is no reference to Claimant hitting his head during this incident. Dr. Lippman referred Claimant back to Dr. Siegel.

16. Claimant saw Dr. Siegel on December 20, 2016, reporting that six days prior he bent down, had a spell of vertigo, and fell forward into a cabinet wall. Claimant denied having passed out. Dr. Siegel noted it was unclear whether Claimant sustained another concussion. He opined there was not much else that could be done for Claimant's vertigo at the time.

17. Dr. Lippman continued to treat Claimant, who continued to complain of headaches, photophobia, vertigo, and issues with sleep, cognition and memory. On April 14, 2017, Claimant asked Dr. Lippman for a referral to Blue Sky Neurology.

18. Upon the referral of Dr. Lippman, Claimant presented to Marc Wasserman, M.D. at Blue Sky Neurology on May 17, 2017. Claimant reported suffering a series of concussions in February 2015, January 2016, June 2016 and December 2016, alleging he hit his head during each incident. Dr. Wasserman opined Claimant suffered four most likely grade II concussions. Dr. Wasserman felt Claimant's neurological examination was somewhat embellished and opined there may be psychological overlay, but noted he could not entirely rule out a central injury. Dr. Wasserman ordered an MRI, EEG, EMG/NCGT and neuropsychological evaluation.

19. Claimant underwent a brain MRI on June 2, 2017 that revealed a Chiari I malformation without obstructive ventriculomegaly.

20. Claimant underwent EMG testing on June 15, 2017, which was normal except for mild median neuropathy at the left wrist.

21. On June 29, 2017, Respondents filed a General Admission of Liability (GAL) in W.C. No. 5-026-332 for the June 23, 2016 injury, admitting for medical benefits and temporary total disability.

22. Claimant underwent a neuropsychological evaluation with Katherine Giles, Psy.D. on July 14, 2017. Claimant reported to Dr. Giles hitting his head on the ground during each of the February 2015, January 2016, and December 2016 incidents, and experiencing whiplash as a result of the June 2016 MVA. He alleged his cognitive problems began following the February 2015 incident, but progressively worsened over time with each subsequent concussive injury. Dr. Giles opined that most of Claimant's

scores were invalid and not interpretable, which she noted could be the result of suboptimal engagement or headache, dizziness, fatigue and/or mood disorder. She stated that Claimant's scores fell below scores obtained by patients with significant brain injury and degenerative neurological conditions. Dr. Giles went on to state that these findings were inconsistent with Claimant's observed ability to provide a coherent history. She noted that Claimant's "clinical profile further indicated that he may have a preoccupation with physical functioning and health matters in general and may tend to develop physical and cognitive symptoms in response to emotional distress (i.e., conversion, somatization)." Dr. Giles gave the following diagnostic impression: concussion without loss of consciousness, post-concussive syndrome, Chiari malformation type 1, and depression. She noted that, while cognitive dysfunction is atypical in Chiari type 1 malformations, the structural abnormality could be producing or exacerbating Claimant's symptoms. Dr. Giles recommended Claimant return to Dr. Wasserman for follow-up.

23. On July 31, 2017, Nicholas K. Olsen, D.O. performed an independent medical examination (IME) at the request of Respondents. Dr. Olsen physically examined Claimant and reviewed Claimant's medical records dating back to May 2000. Dr. Olsen noted Claimant first reported to him that he could not recall whether he struck his head or lost consciousness during the February 2015 work injury, but later claimed he sustained his first concussion during the February 2015 work injury, reported the resulting symptoms, but was denied by workers' compensation. Claimant reported a third incident occurred in December 2016 where he leaned over to work on a pedestal, the pedestal "went boom" and he fell over into the snow. No specific head injury was noted. Dr. Olsen opined Claimant inaccurately portrayed his injuries noting that, based on the medical records, Claimant did not sustain an initial head injury until January 11, 2016, with no loss of consciousness. He opined Claimant suffered a mild concussion without loss of consciousness on January 11, 2016, that significantly improved prior to the MVA. He further noted Claimant did not suffer any loss of consciousness as a result of the June 23, 2016 MVA. Dr. Olsen noted that Claimant's potential for conversion or somatization, as noted by Dr. Giles, was a much more likely explanation for his current complaints than any defined diagnosis stemming from the January 11, 2016 injury. Dr. Olsen opined that there was no objective clinical evidence Claimant required further treatment related to the January 11, 2016 injury or the June 23, 2016 MVA.

24. Claimant returned to Dr. Wasserman on August 15, 2017. Dr. Wasserman noted Claimant has a Chiari malformation, but stated he did not think the Chiari malformation explained all of Claimant's current symptoms. Neurological workup was normal. Dr. Wasserman noted severe depressive symptoms as well as possible somatization and remarked that psychological factors played "a great deal" in Claimant's current symptomatology. He noted Claimant became significantly worse after his father passed away earlier in the year. Dr. Wasserman stated that, while there may be some post-concussive symptoms, at the current juncture it would be difficult to relate all of Claimant's symptoms to the December 2016 incident.

25. Claimant saw David W. Miller, M.D. on September 7, 2017 for evaluation of the Chiari malformation. Claimant reported to Dr. Miller an alleged new incident that occurred the day prior. He reported to Dr. Miller that he squatted down while at work,

felt funny and fell backwards, awakening on the ground with no recollection of what transpired. Claimant reported to Dr. Miller he suffered five concussions over the last few years. Dr. Miller reviewed Claimant's June 2, 2017 brain MRI, which he opined revealed evidence of a Chiari I malformation. Dr. Miller's medical report does not document that he reviewed any other prior medical records from any other source as part of his evaluation. He compared Claimant's June 2017 and October 2016 brain MRIs and did not note "much difference." Dr. Miller opined some of Claimant's symptoms are related to the Chiari malformation, while others, such as Claimant's reported word-searching problems, issues with balance, and headaches, are more likely related to post-concussive syndrome. Dr. Miller concluded that the only good way to treat Claimant's symptoms would be a surgical decompression of his foramen magnum.

26. Claimant also saw Dr. Lippman on September 7, 2017. He reported to Dr. Lippman that, the day prior, he squatted down to look at an electrical box and the next thing he knew was flat on his back and awakened confused and dazed. Dr. Lippman questioned whether Claimant sustained a head injury, noting it was not clear what made Claimant fall over. He removed Claimant from work.

27. Claimant presented to John James Oro, M.D. at the Colorado Chiari Institute on October 3, 2017. Claimant reported to Dr. Oro that he damaged his right wrist during a slip and fall and noticed dizziness after undergoing right wrist surgery in 2015, in January 2016 hit the back of his head and sustained a concussion from a fall, and sustained another concussion as a result of a MVA in June 2016. Claimant complained of headaches, intermittent dizziness, occasional vertigo, difficulty expressing words, and difficulty with cognition and memory. Dr. Oro noted Claimant's October 4, 2016 MRI and June 2, 2017 revealed a Chiari I malformation. His impression was, in relevant part: history of multiple concussions and Chiari I malformation. Dr. Oro recommended Claimant undergo cervical and lumbar MRIs and cervical flexion-extension films.

28. At a follow-up evaluation with Dr. Oro on October 5, 2017, Claimant reported having suffered from five work-related concussions. Dr. Oro asked Claimant and Claimant's wife to prepare a document describing each concussion. Claimant reported that on February 20, 2015 he fell on ice and hit the back of head. He further reported that he was never treated for his concussion, despite reporting the alleged concussion to his physical therapist and workers' compensation doctor at the time. Claimant reported that he was told he had concussions resulting from the January 11, 2016 slip and fall and the June 23, 2016 MVA. Regarding the December 14, 2016 incident, Claimant reported that he was opening up a cabinet door and fell down and landed on his hand. Claimant did not include any reference to striking his head during this incident. Claimant further reported that, on September 6, 2017, he fell down after squatting and got up after approximately 10-15 minutes. He reported that he went to the emergency room and was told he had a concussion. Dr. Oro opined that it is likely Claimant's neurologic syndrome is a combination of the Chiari malformation and his five concussions. He recommended Claimant not consider any surgical intervention at the time, noting Claimant's chances of improvement after a Chiari decompression were less than usual (60-75%) due to his multiple concussions.

29. Dr. Olsen performed another IME on June 20, 2018 addressing a request for speech therapy. He noted that the symptoms Claimant continued to report were very similar to the symptoms reported to Dr. Wasserman in May 2017. Dr. Olsen opined that Claimant was appropriately worked up for all work-related injuries as of August 2017, and that his continued symptoms were consistent with a tendency towards conversion and somatization. He concluded that speech therapy was not medically reasonable, necessary or related to Claimant's January 11, 2016 or June 23, 2016 work injuries.

30. Claimant testified at hearing that he hit his head during the February 24, 2015 slip and experienced dizziness after the February 24, 2015 with no cognitive difficulties. He further testified he struck his head during the January 11, 2016 slip and fall, and was also rear-ended in June 2016. Claimant stated he also fell over in December 2016 and "must've" struck his head, but he does not recall how it happened. Claimant testified that he has experienced issues with directions and memory since the fourth incident.

31. Dr. Oro testified at hearing on behalf of Claimant as an expert in neurosurgery and Chiari malformations. Dr. Oro explained that a Chiari 1 malformation is a structural abnormality in which cerebellar tonsils hang down into the spinal canal. This can result in pressurizing in the brain and dysfunction in the nerve tissues in the brain stem and upper spinal cord. Dr. Oro testified that, by the time he examined Claimant, Claimant had sustained "up to five" concussions" and presented with headaches, ringing in the ears, dizziness, vertigo, and cognitive and balance issues, which are classic symptoms of a Chiari malformation. He stated that Claimant's brain MRI clearly demonstrates a Chiari malformation, which is congenital and pre-existing, but can be triggered or worsen over time. Dr. Oro opined that Claimant concussions seemed to have aggravated the development of Claimant's Chiari malformation symptoms. On cross-examination, Dr. Oro testified that a Chiari malformation can become symptomatic without the presence of trauma, which is the most likely situation. He referred to a study conducted by Dr. Milhorat, which concluded that 24% of individuals with symptomatic CMF1 had a history of trauma contributing to those symptoms, while 76% of those with symptomatic CMF1 had an insidious onset of symptoms with no specific trauma.

32. Dr. Lorah testified by post-hearing deposition on behalf Claimant on October 24, 2018. Dr. Lorah testified as an expert in family medicine. Dr. Lorah became Claimant's current ATP after Dr. Lippman retired in late August 2018, evaluating Claimant on August 31, 2018. Dr. Lorah testified that, based on his review of Claimant's prior medical records and what has been reported to him, his impression is Claimant is a significantly different person as far as his ability to function at work, maintain organizational skills, his resilience to deal with stressors, and issues with memory and processing speed. Dr. Lorah deferred to Dr. Oro when asked whether concussions or head trauma can trigger an asymptomatic Chiari malformation to become symptomatic. Dr. Lorah agreed with Dr. Wasserman that psychological factors play a great deal into Claimant's current symptomatology.

33. Dr. Olsen testified by post-hearing deposition on behalf of Respondents on November 12, 2018. Dr. Olsen testified as an expert in physical medicine and rehabilitation. Dr. Olsen agreed that a Chiari malformation can become symptomatic as a result of trauma. He testified he reviewed the Dr. Milhorat study referred to by Dr. Oro,

and noted that, of the 24% of participants who became symptomatic due to trauma, in many cases it was severe trauma, leading to quadriparesis, death, and central cord syndrome. Dr. Olsen testified that the need for any type of CMF1 surgery would not be causally related to any of Claimant's reports of head trauma. Dr. Olsen indicated that for two of the five incidents Claimant reported causing head traumas, the medical records simply do not support that these incidents resulted in head trauma. He testified that Claimant sustained mild head trauma on January 11, 2016 which fully resolved with no permanent impairment or permanent restrictions, and the June 23, 2016 motor vehicle accident did not show any clear indication of a head injury or concussion. Dr. Olsen further testified that, to the extent Claimant had head traumas, these are not the kind of head traumas identified in the Milhorat study that would result in an asymptomatic CMF1 becoming symptomatic). Dr. Olsen also stated that the CMF1 becoming symptomatic was not related to trauma, but more likely would be explained by the natural progression of a CMF1. Dr. Olsen testified that he believed the most likely scenario in this case is that the concussive symptoms that Claimant is reporting are simply not reliable, either because he has intentionally exaggerated symptoms, or through somatization. Dr. Olsen stated that the second most likely explanation to explain Claimant's symptoms is the natural progression of Claimant's CMF1, without the presence of any kind of trauma. Finally, he opined that the least likely explanation ("very low on the list, if even on the list") would be that the current symptoms is the result of a symptomatic CMF1 occurred from the incidents at work, which boils down to the mild head trauma that he experienced on June 23, 2016.

34. The ALJ finds the opinions of Drs. Olsen and Wasserman, as supported by the medical records, more credible and persuasive than the opinions of Drs. Oro and Miller and the testimony of Claimant.

35. The ALJ finds Claimant did not sustain any head trauma as a result of the February 24, 2015 injury. Claimant sustained mild head trauma as a result of the January 11, 2016 injury and significantly improved after undergoing conservative treatment, being placed at MMI by Dr. Lippman in late June 2016 with no permanent impairment or restrictions. Claimant sustained a mild concussion as a result of the June 23, 2016 MVA. None of these aforementioned incidents, alone or combined, likely caused Claimant's asymptomatic Chiari malformation to become symptomatic.

36. Claimant failed to prove by a preponderance of the evidence that the February 24, 2015, January 11, 2016 or June 23, 2016 work injuries caused, aggravated, accelerated or combined with his pre-existing Chiari 1 malformation to produce the need for medical treatment.

37. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Medical Treatment

A claimant is required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of the employment, and that the alleged injury was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The question of whether the claimant met the burden of proof to establish a compensable injury is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d

786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

A respondent is liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. *See generally Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company*, W. C. No. 4-445-060 (February 22, 2002).

As found, Claimant failed to meet his burden to prove the February 24, 2015, January 11, 2016 or June 23, 2016 work injuries resulted in his pre-existing asymptomatic Chiari malformation becoming symptomatic. Of importance is Claimant's noted tendency towards conversion and somatization, as noted by Drs. Giles and Wasserman. Dr. Giles specifically noted Claimant's scores on his neuropsychological testing were invalid, fell below scores obtained by patients with significant brain injuries and neurological conditions, and were inconsistent with his observed ability to provide a coherent history. Dr. Wasserman opined that psychological factors played "a great deal" in Claimant's symptomatology, noting Claimant's reported condition significantly worsened after the death of his father. The accuracy of Claimant's reporting of events and symptoms is called into question considering such factors, and is significant in light of other evidence that does not support Claimant's contentions.

At his initial evaluation with Dr. Lippman, Claimant did not report hitting his head. The medical record documents complaints of headaches, which Dr. Lippman subsequently attributed to a cervical strain that had resolved. By April 6, 2015, the only symptoms noted were right wrist symptoms. Despite continuing to see Dr. Lippman on a regular basis for the February 24, 2015 injury for several months thereafter, the records contain no reference to a reported head injury or associated symptoms. To the contrary, Dr. Lippman referred to Claimant's January 11, 2016 incident as Claimant's first head injury or concussion. There is no mention in the record of Claimant allegedly hitting his head during the February 24, 2015 incident until Claimant's September 2016 evaluation with Dr. Siegel, at which time he reported experiencing intermittent vertigo dating back to February 2015. The record is devoid of sufficient credible and persuasive evidence establishing Claimant sustained any head trauma as a result of the February 24, 2015 work injury.

While Claimant did sustain a concussion as a result of the January 11, 2016 slip and fall, the credible and persuasive evidence establishes that the concussion was mild with no loss of consciousness. Claimant underwent a conservative course of care, significantly improved, and was placed at MMI on June 30, 2016 with no permanent impairment or restrictions or recommendations for maintenance treatment. Shortly before being placed at MMI for the January 11, 2016 injury, Claimant sustained a mild whiplash-type injury as a result of a low speed MVA. Claimant did not lose consciousness nor require a CT scan of the head. Dr. Olsen credibly and persuasively opined that, Claimant received an appropriate workup for the aforementioned injuries

and, to the extent Claimant sustained head trauma due to such injuries, the head trauma did not cause Claimant's Chiari malformation to become symptomatic.

Dr. Olsen conducted a thorough review of Claimant's medical records and was privy to the inconsistencies regarding Claimant's reports of the incidents and symptoms. While Dr. Miller and Dr. Oro opined that Claimant suffers from both a combination of Chiari symptoms and post-concussive symptoms, and Claimant's work injuries caused the Chiari malformation to become symptomatic, both physicians based their opinions on Claimant's subjective reports of sustaining five work-related concussions. While it is undisputed a Chiari malformation may become symptomatic due to trauma, both Dr. Oro and Dr. Olsen testified that this is the least likely scenario. Moreover, Dr. Olsen credibly testified that those situations generally involve severe trauma. Drs. Oro and Olsen both acknowledged that it is more likely that an asymptomatic Chiari malformation becomes symptomatic without undergoing any kind of trauma. Dr. Olsen credibly opined it is more likely Claimant's symptoms are attributable to the natural progression of the Chiari malformation. Based on the totality of the credible and persuasive evidence, Claimant failed to prove that the February 24, 2015, January 11, 2016 and June 23, 2016 work injuries caused his asymptomatic Chiari malformation to become symptomatic and require treatment.

ORDER

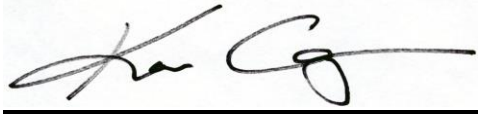
It is therefore ordered that:

1. Claimant's request for ongoing treatment related to the Chiari I malformation is not related to the February 24, 2015, January 11, 2016 or June 23, 2016 work injuries and is thus denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 28, 2019



Kara R. Cayce

ISSUES

1. Whether Claimant has established by a preponderance of the evidence an entitlement to mileage reimbursement.

2. If so, determination of the total amount of mileage reimbursement due to Claimant and whether Respondents have overpaid mileage due.

FINDINGS OF FACT

1. Claimant is a 47-year-old male who worked for Employer as a carpenter.

2. On January 7, 2014, Claimant sustained an admitted work related injury after slipping and falling on ice while pulling a tarp at Employer's work site.

3. Claimant underwent treatment with providers in the Denver metropolitan area following his injury. At the time of his injury, Claimant was living in Aurora.

4. Claimant testified that for a while, he was living on the streets and at a truck stop after he lost his home. Claimant testified that he began picking up his work related prescribed medications at a UPS facility in Commerce City. He testified that he would get prescriptions from his doctors, order the medications from a company, and that UPS would call him when they arrived and he would pick up the medications.

5. Claimant testified that he has undergone five surgeries since his injury but that he is still in pain and requires daily pain medications. Claimant also testified that he has depression and requires medications for that as well.

6. On June 7, 2016, Walter Torres, Ph.D. evaluated Claimant. Dr. Torres noted that Claimant was homeless and living in his truck after being ejected from the home he shared with his then-wife and that Claimant was in a situation involving psychosocial duress. *See* Exhibit 13.

7. On July 25, 2016, Claimant was evaluated at the University of Colorado Hospital. Claimant reported that his pain was unbearable, that he wanted to cut his legs off, that he had pain in his left shoulder and knee, headaches, anxiety, and suicidal ideation. Claimant reported that he ran out of hydrocodone and morphine five days prior. The records indicate Claimant was struggling with homelessness. *See* Exhibit 14.

8. In August and September of 2016, it was noted that Claimant continued to have difficulties with pain management. Claimant was noted to have gone 5 days without pain medications and with significant withdrawal symptoms, but was better after getting

back on his regimen. Claimant was noted to look considerably more comfortable with Embeda, which included morphine, and was noted to look functionally much better while on medications. Claimant was noted to continue to have an unstable housing situation, continuing to be homeless as of September 22, 2016 and it was also noted that Claimant's depression was complicating his chronic pain. *See* Exhibit 15.

9. At some point near the end of 2016 or in 2017, Claimant moved to Pueblo, Colorado to live at his girlfriend's brother's home. Claimant testified that he wanted to see how things would work out in Pueblo before formally changing his address or notifying Respondents of an address change. Claimant submitted a request for mileage reimbursement indicating that as of December 20, 2016 he was still living in Aurora. He submitted a formal change of address to the Pueblo address on February 9, 2017. Claimant could not testify specifically to the date that he actually moved to Pueblo, but indicated he didn't want to change his address formally until he knew the living situation with his girlfriend in Pueblo would work out.

10. While living in Pueblo, Claimant continued to see his medical providers in Aurora and in Denver.

11. On February 9, 2017, Claimant notified Respondents of his address change and that he had moved to Pueblo. Insurer had a hard time finding medical providers in Pueblo for Claimant's ongoing treatment due to the complexity of Claimant's case. Thus, Claimant continued to treat with providers in Aurora and Denver. Claimant ultimately moved back to Aurora in August of 2017 and again notified Respondents of his address change. *See* Exhibit 12.

12. While Claimant was living in Pueblo, the owner of the home where Claimant was staying did not want prescription medications or any drugs delivered to the home address and did not want the drugs inside the home.

13. Claimant testified that he attempted to go to UPS in Pueblo to see if he could set up delivery of the medications there, as he had done in Commerce City. He testified that he went to a few different locations but that all the medications had been moved to a central office and that he had trouble getting the medications. Claimant agreed that he could have picked up his medications in Pueblo, but that after going to several locations and trying to figure it out and going 3 days without medications in severe pain, he decided just to continue picking up his medications in Commerce City because he had no problems there. Claimant did not attempt to get the medications delivered to a store in Pueblo (i.e. Walgreens, Target, King Soopers, Walmart, etc.). Claimant did not attempt to set up a PO Box for delivery in Pueblo. Claimant tried once to get medications from the Pueblo UPS, felt it was too difficult to figure out, and decided to just keep driving to Denver to pick up his medications.

14. Ultimately, Claimant decided it would be easier just to continue to pick up his medications in Commerce City, since the UPS employees knew him and Claimant had been picking up the medications there for a while without problems. Claimant also testified that it helped him to get out of the house and drive to Denver.

15. On July 18, 2017, Claimant submitted a request for mileage reimbursement to Respondents. Claimant indicated all mileage submitted was for the case and requested reimbursement as soon as possible. Claimant attached five mileage application forms to the request. *See* Exhibit 11.

16. The dates/mileage on that request included:

09/26/2016	**228 miles**	Dr. Torres	*duplicate
11/07/2016	**228 miles**	Dr. Torres	*not living in Pueblo
11/15/2016	**238 miles**	Dr. Aschberger	*not living in Pueblo
12/05/2016	**238 miles**	Dr. Aschberger	*not living in Pueblo
12/07/2016	**228 miles**	Dr. Torres	*not living in Pueblo
12/21/2016	**228 miles**	Dr. Torres	*no address change
12/28/2016	**250 miles**	pick up meds	*not reasonable
01/02/2017	**238 miles**	Dr. Aschberger	*no address change
01/03/2017	**238 miles**	Dr. Aschberger	*no address change
01/06/2017	**238 miles**	Dr. Aschberger	*no address change
01/16/2017	**238 miles**	Dr. Aschberger	*no address change
01/17/2017	**228 miles**	Dr. Torres	*no address change
01/18/2017	**250 miles**	pick up meds	*not reasonable
01/25/2017	**238 miles**	Dr. Aschberger	*no address change
02/28/2017	238 miles	Dr. Aschberger	
03/06/2017	238 miles	Dr. Aschberger	
03/07/2017	228 miles	Dr. Torres	
03/10/2017	228 miles	Dr. Torres	
03/11/2017	238 miles	Dr. Aschberger	
03/13/2017	228 miles	Dr. Torres	
04/04/2017	238 miles	massage therapy	
04/10/2017	228 miles	Dr. Torres	
04/18/2017	238 miles	Dr. Aschberger/Guy MT	
04/24/2017	**250 miles**	pick up meds	*not reasonable
04/25/2017	238 miles	massage therapy	
04/27/2017	**250 miles**	pick up meds	*not reasonable
05/11/2017	238 miles	Dr. Aschberger	
05/12/2017	**250 miles**	pick up meds	*not reasonable
05/17/2017	238 miles	toni Shaw RTM	
05/18/2017	228 miles	Dr. Torres	
05/19/2017	**250 miles**	pick up meds	*not reasonable
06/01/2017	238 miles	Dr. Aschberger	
06/05/2017	**250 miles**	pick up meds	*not reasonable
06/05/2017	**236 miles**	collect meds – Walgreens	*not reasonable
06/09/2017	**250 miles**	pick up meds	*not reasonable
06/14/2017	228 miles	Dr. Torres	
06/18/2017	228 miles	Dr. Torres	
06/19/2017	238 miles	Dr. Aschberger	
06/20/2017	**250 miles**	pick up meds	*not reasonable

06/21/2017	**250 miles**	pick up meds	*not reasonable
06/26/2017	276 miles	Dalton chiropractic and pick up meds	
07/03/2017	228 miles	Dalton chiropractic	
07/05/2017	238 miles	cervical MRI apt.	
07/10/2017	228 miles	Dalton chiropractic	
07/11/2017	238 miles	physical therapy	
07/12/2017	**250 miles**	pick up meds	*not reasonable

See Exhibits 11, B.

17. The total miles requested were 10,976. Of the 10,976 miles requested, 2,986 were requested for mileage incurred in picking up medications at either a UPS facility or a Walgreens in the Denver area. Of the 10,976 miles requested (not including medication pickups) 2,806 were for dates prior to February 9, 2017 when Claimant notified Respondents of his address change.

18. On July 27, 2017, Respondents issued a letter to Claimant's attorney. Respondents indicated that mileage that occurred before Claimant's change of address to Pueblo that they were notified of on February 9, 2017 was not reasonable. Respondents also indicated that they did not believe driving to and from Denver to pick up medications was reasonable. Respondents calculated the mileage prior to the address change at 3,782 miles and the mileage for medication pickups at 2,499 miles. From Claimant's request for 10,976 miles, Respondents subtracted 3,782 miles (prior to address change) and subtracted 2,499 miles (for medication pickups). Respondents were left with 4,695 miles. The letter indicated that they would be paying mileage for 4,695 miles and that they did not believe the other mileage requests were reasonable. They also noted that they were in the process of getting a provider and new authorized treating provider in Pueblo for Claimant. *See* Exhibits 17, C.

19. On July 27, 2017, Claimant's attorney emailed Respondents' attorney indicating that Claimant had a complicated history and needed a physiatrist or occupational medicine physician to be his primary provider. The email also indicated that the move to Pueblo was a temporary move and that Claimant planned to return to Denver although had not determined when he would move back. *See* Exhibit 17.

20. On August 7, 2017, Respondents' counsel emailed Claimant's counsel. The email indicated that with Claimant's plan to move back to the Denver area, getting a new ATP in Pueblo may be a worthless endeavor but noted it would still be a problem if Claimant continued to request mileage from Pueblo to Denver. Respondents' counsel suggested allowing the treating providers to remain the same but noted a compromise of not agreeing to continue to pay mileage. The letter also indicated that the mileage payment would not include payments for Claimant to drive all the way to Denver to pick up medications. *See* Exhibit 17.

21. On August 8, 2017, Respondent issued payment to Claimant for mileage between 11/07/16 and 07/12/17. The total amount paid was $2,488.35, for 4,695 miles at .53/mile consistent with Respondents position outlined above. *See* Exhibit 10.

22. On September 27, 2017, Claimant submitted a letter to Respondent. The letter indicated that Claimant disagreed with the mileage calculation and the payment amount of $2,488.35. Claimant requested reimbursement for an additional $3,328.93 for mileage. *See* Exhibit 11.

23. The additional $3,328.93 includes the amount of mileage for the denied miles of 3,782 (prior to address change) and for the denied miles of 2,499 (for medication pickups).

24. On an earlier mileage request from January 30, 2017 that Claimant submitted, he requested mileage to/from an Aurora address for visits through December 20, 2016. In that request, one entry is for 09/26/2016 for 26 miles to/from Dr. Torres. As seen above, in the mileage request at issue for this hearing, Claimant also later requested reimbursement for the same date, 09/26/2016, for 228 miles to/from Dr. Torres from a Pueblo address. *See* Exhibits A, B.

25. The mileage request at issue for this hearing includes not only the duplicate 9/26/16 entry, but also requests reimbursement for four additional entries in November and December of 2016 to/from a Pueblo address, when Claimant's January 30, 2017 mileage request indicated that his address through December 20, 2016 was in Aurora. *See* Exhibit A.

26. From the list above, the ALJ finds that 5,792 of the miles requested in Claimant's July 18, 2017 mileage request are not supported. This amount includes all items listed in **bold** in the above list. The 5,792 number includes the duplicate entry on 9/26/16 and includes all entries prior to December 20, 2016 as Claimant previously indicated he was still living in Aurora and failed to establish that he lived in Pueblo during that time. It also includes all entries for mileage between Pueblo and either UPS or Walgreens in the Denver area as it is not found reasonable to travel that distance for medications. Finally, it includes additional dates between December 20, 2016 and February 9, 2017 when Claimant failed to notify Respondents of his move to Pueblo and failed to provide them an opportunity to get Claimant in treatment with a provider closer in Pueblo, and because Claimant has not established that he actually moved to Pueblo prior to February 9.

27. Claimant's testimony, and the medical records, support that he needs medications. However, Claimant's testimony did not establish any true attempt or inability to get medications sent to him in Pueblo. Claimant did not live in a rural area where it would be conceivable that mail delivery of medications would be difficult. Further, as shown by the mileage requests, Claimant was traveling to Denver regularly for doctors' appointments. Claimant could have coordinated medication pickups while already in Denver for doctors' visits. His requests for 250 miles roundtrip for the sole purpose of medication pickups is unreasonable.

28. Taking Claimant's request of 10,976 miles and subtracting out 5,792 miles leaves 5,184 reimbursable miles from the July 18, 2017 request. The subtraction

includes the requests that are duplicative, the requests made from Pueblo when Claimant failed to establish he was living in Pueblo, the requests for medication pickups, and the requests for dates when he failed to provide an address change/establish he actually was living in Pueblo.

29. At the reimbursement rate of .53/mile, this amounts to a total mileage reimbursement due Claimant of $2,747.52. As found above, for this mileage reimbursement request, Respondents have already issued payment for $2,488.35. Respondent thus owes Claimant an additional $259.17 for mileage.

30. Respondents argue that there are medical records missing for certain dates Claimant requested reimbursement. The dates prior to February 9, 2017 pointed out by Respondents have been denied mileage reimbursement for other reasons. Claimant has submitted into evidence verification of visits on some of the other dates contested, specifically 3/7/2017, 6/18/17, and 6/26/27. Of the three remaining disputed dates, 3/10/17, 3/11/17, and 6/1/17, Claimant submitted reports showing he was actually evaluated (but did not request mileage) within a week of those dates. Although they are incorrect dates, Claimant traveled the mileage within a week and thus it is owed. The ALJ declines to reduce/deduct mileage based on a date error. *See* Exhibit 18.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002). The weight and credibility to be assigned expert testimony is a matter within the

discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo.App. 2000).

Mileage

Workers' Compensation Rules of Procedure at 7 CCR 1101-3, Rule 18-6 (E) provides that: The payer shall pay an injured worker for reasonable and necessary expenses for travel to and from medical appointments and reasonable mileage to obtain prescribed medications. The rate for mileage shall be 53 cents per mile. The injured worker shall submit a request to the payer showing the date(s) of travel and mileage, and explain any other reasonable and necessary travel expenses incurred or anticipated. Reasonable is defined by Merriam-Webster's dictionary as "not extreme or excessive", "fair and sensible".

Claimant made insufficient attempts to have his medications delivered to Pueblo. It is entirely unreasonable to drive 250 miles roundtrip to pick up medications when a person lives in a large, non-rural area. Claimant, with slightly more effort, could easily have picked up his medications in Pueblo despite his girlfriend's brother not wanting them delivered to the home. Claimant has failed to establish that the extreme mileage he requested for medication pickups is reasonable in order to obtain prescription medications. Claimant could have obtained prescription medications without incurring such extreme mileage. Although Claimant is credible that he cannot go without medications and that it helped him to get out of the house, Claimant had significantly reduced mileage options to obtain his medications and/or get out of the house. His request for all mileage pertaining to medication pickups is denied and is found unreasonable.

Additionally, Claimant is found to be evasive and lacking in credibility surrounding the date he actually moved to Pueblo. As found above, in an earlier mileage submission, Claimant claimed mileage for an appointment with a start/end point in Aurora on December 20, 2016. The ALJ finds and concludes that Claimant did not live in Pueblo prior to December 20, 2016. The ALJ also finds, more likely than not, that Claimant did not live in Pueblo for approximately 7 weeks between December 20, 2016 and the change of address provided on February 9, 2017. Although possible that he had actually moved to Pueblo during those 7 weeks, Claimant lacks credibility and it is not found probable that he was living there or that his necessary travel for medical appointments during that time required travel between Pueblo and Denver. Claimant has not established, by preponderant evidence, that his necessary travel expenses included travel between Pueblo and Denver until after February 9, 2017. Although Claimant may have traveled

to Pueblo to visit his girlfriend and/or to see if living in Pueblo would work out or be an option for him, he has failed to establish his move until February 9, 2017 and lacks credibility that he moved earlier than that date. Even assuming he moved prior to February 9, 2017, Claimant failed to provide Respondents with an opportunity to start looking for a qualified provider in Pueblo to take over Claimant's care at any time before February 9, 2017. The dates in the list above, in bold, are denied. Claimant has established that he is due reimbursement for the remaining dates.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence an entitlement to mileage reimbursement from his July 18, 2017 request in the amount of $2,747.52 for 5,184 total reimbursable miles.

2. Respondent previously paid Claimant $2,488.35 toward the reimbursable mileage from the July 18, 2017 request. Respondents shall pay Claimant the difference and additional mileage in the amount of $259.17.

3. Insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. Any issues not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 28, 2019

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 1525 Sherman Street, 4th Floor, Denver, CO 80203	
In the Matter of the Workers' Compensation Claim of: **A,** Claimant, vs. **12,** Employer, And **RM**, Insurer, Respondents.	▲ **COURT USE ONLY** ▲ **CASE NUMBER:** **WC 5-045-612-001**

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Hearing in the above-captioned matter was held before Administrative Law Judge Margot W. Jones on May 2, 2019, at 1:30 p.m. in Courtroom 5 in Denver, Colorado. Claimant was present in person and represented by _____, Esq. Respondents were represented by _____, Esq. Exhibits 1-6, 8 and A-T were admitted into evidence.

In this order, A shall be referred to as "Claimant," 12 shall be referred to as "Employer" and RM shall be referred to as "Insurer." Employer and Insurer, collectively, will be referred to as "Respondents."

In this order, the Judge may use the following acronyms: C.R.S. refers to Colorado Revised Statutes (2018); the Act refers to the Workers' Compensation Act of Colorado, §§8-40-101, et seq., supra; OAC refers to the Office of Administrative Courts; OACRP refers to the Office of Administrative Courts Rules of Procedure, 1 CCR 104-1; and WCRP refers to Workers' Compensation Rules of Procedure, 7 Code Colo. Reg. 1101-3.

ISSUES

1. Whether Claimant established by a preponderance of the evidence that he sustained an injury or aggravation that arose out of and in the course and scope of employment with the Employer on February 8, 2017; and

2. If Claimant establishes that he sustained an injury that arose out of the course and scope of employment on February 8, 2017, whether Claimant established by a preponderance of the evidence that he is entitled to an order awarding reasonably necessary and related medical benefits, specifically, whether Claimant is entitled to an order finding that medical treatment and corresponding mileage to attend medical appointments was reasonably necessary and related.

FINDINGS OF FACT

1. Claimant alleges that on February 8, 2017, he was employed by Employer as a bus driver. Claimant had been so employed by Employer for four or five years. Claimant alleges he reached behind his seat with his left arm to put an item in the trash when his right hip popped, jarring his left shoulder, and causing him to develop pain. Claimant testified that he had performed this identical reaching maneuver a hundred times before without any problems, but on this occasion, because his hip popped he jarred his shoulder. Claimant is 76 year old (date of birth, August 12, 1943).

2. Claimant adamantly denied at hearing that he had any prior injuries or pain complaints in his left shoulder prior to the alleged February 8, 2017, work injury. Claimant's testimony is rebutted by his pre-date of loss medical records which confirm that Claimant has a significant pre-existing medical history, including issues with his right hip, bilateral shoulders, and neck. Claimant also has received impairment awards related to prior workers' compensation claims.

3. Prior to the alleged February 8, 2017, injury, Claimant presented to William Cooney, M.D. on January 10, 2011, for a preoperative appointment for biceps surgery and documented Claimant's significant medical history, including osteoarthritis and right rotator cuff syndrome.

4. On November 27, 2013, Claimant presented to Anjmun Sharma, M.D. for a DIME and evaluation of his right shoulder. Dr. Sharma noted Claimant's MRI of his right thigh revealed chronic moderate tendinosis of the proximal hamstring tendon symmetric to the left side and mild degenerative changes to the hips. Dr. Sharma assigned Claimant an 11% whole person rating and permanent restrictions, including no lifting, pushing, pulling over 70 pounds, no carrying over 65 pounds, and no overhead lifting over 20 pounds.

5. On April 1, 2014, Claimant treated with Paul Springer, P.A., and reported neck and upper trapezius pain on the right and left after a refrigerator fell on top of him at work. During the evaluation, Claimant reported a prior neck injury. Claimant also reported that he was a golfer and enjoyed outdoor activities. Claimant was eventually referred to physical therapy.

6. While in physical therapy, Claimant complained of pain complaints with his bilateral shoulders and neck on April 22, 2014, May 8, 2014, and December 26, 2014.

7. On October 23, 2014, Claimant presented to Bryan Wernick, M.D., and was diagnosed with chronic pain syndrome. Claimant complained of pain radiating into his back, neck, and bilateral shoulders. Dr. Wernick recommended consideration for additional physical therapy.

8. On February 17, 2015, Claimant treated with Richard Shouse, P.A., and reported pain in his neck from C5-T2 going along the trapezius from the side of the neck to both shoulders. Mr. Shouse noted Claimant's primary problem seemed to be the shoulders into the subscapular region.

9. On March 12, 2015, Claimant presented to Ranee Shenoi, M.D., for a DIME, who noted Claimant had a history of a prior neck fracture in 1997. During the evaluation, Claimant reported soreness in his neck and bilateral shoulders.

10. Less than three months from the alleged February 8, 2017, event, Claimant saw Mark Levstik, D.O., on November 22, 2016, with pain in his neck, bilateral shoulders, bilateral hips, and bilateral knees. Claimant reported his joint pain was worse with sitting and activity. Dr. Levstik documented Claimant's significant medical history, including osteoarthritis. Dr. Levstik prescribed Claimant Tramadol for his arthritis.

11. Following the alleged February 8, 2017, event, Claimant delayed seeking treatment for over a month. Claimant agreed at hearing that he was able to continue his normal job duties and regular activities of daily living following the February 8, 2017, incident. On March 24, 2017, Claimant first sought treatment with Monica Schubert, P.A., who noted Claimant was a 73-year-old bus driver who was reaching to throw away trash when he felt pain in his left shoulder. Ms. Schubert referred him for an MRI.

12. The MRI of Claimant's left shoulder, completed April 4, 2017, revealed a small full thickness tear of the supraspinatus tendon, impingement resulting in moderate partial thickness tear of the subscapularis tendon and intraocular portion of the biceps tendon with moderate bursitis, 4 mm calcified body, and moderate osteoarthrosis of the acromioclavicular joint.

13. Following the MRI, Claimant returned to Ms. Schubert on April 5, 2017, who referred Claimant to Dr. Hsin, an orthopedist, per the Claimant's request because Dr. Hsin had performed a prior surgery on Claimant's right shoulder. Claimant was kept at full duty.

14. On April 18, 2017, Claimant presented to Joseph Hsin, M.D., who noted Claimant sustained an injury when he was driving a school bus when he was reaching and his hip popped or clicked, which caused him to jar his shoulder. Claimant reported pain radiating into his neck. Dr. Hsin reviewed the MRI and assessed Claimant with a small full-thickness rotator cuff tear, impingement and biceps pathology. They discussed surgery, which Claimant did not want to do.

15. On June 30, 2017, Ms. Schubert discharged Claimant for non-compliance as he failed to show up for his appointments since April 26, 2017. Claimant agreed at hearing that he stopped treating for the left shoulder because he did not want to pursue surgery and his shoulder complaints had resolved.

16. After he was discharged from care, Claimant returned to Dr. Levstik on August 1, 2017, for chronic pain in his right knee.

17. On January 2, 2018, Claimant presented to John Burris, M.D., for an independent medical examination (IME) at the request of Respondents. Dr. Burris testified at hearing, within a reasonable degree of medical probability, that Claimant's left shoulder tear and MRI findings were not caused or aggravated by the alleged February 8, 2017, event.

18. In forming his opinion, Claimant reported that on February 8, 2017, he reached behind his seat with his left arm while driving a school bus, felt a click in his right hip, which caused him to jerk forward and develop pain in his left shoulder. Dr. Burris testified that the forces and positioning of the shoulder involved in the reported mechanism of injury were not sufficient to cause or contribute to the small rotator cuff tear on the left shoulder MRI. Dr. Burris explained that Claimant's MRI findings were pre-existing and degenerative in nature and consistent with Claimant's age. Dr. Burris testified that Claimant may have experienced pain when he reached behind the seat, but that experiencing pain does not mean Claimant sustained an injury that necessitated medical treatment. Dr. Burris testified that Claimant's pre-existing osteoarthritis in his hips likely caused Claimant's hip to pop, which then caused Claimant to jar his left shoulder.

19. Dr. Burris testified that Claimant has a pre-existing impingement syndrome of the left shoulder, which is an anatomical condition that predated the alleged February 8, 2017, event. Dr. Burris testified that Claimant's current impingement syndrome was a natural aging process that would have occurred regardless of the alleged February 8, 2017, event. Dr. Burris

testified that Claimant's pre-existing impingement syndrome was the more likely cause of Claimant's left shoulder tear. Dr. Burris explained that the bilateral nature of Claimant's shoulder complaints supported the conclusion that Claimant's left shoulder complaints were pre-existing and degenerative in nature.

20. During the IME, Claimant reported "feeling good" and did not report any pain. Claimant demonstrated full range of motion in the shoulder. Claimant enjoyed skiing and was doing regular exercise, including walking, stationary biking, rowing machine and lifting weights. Claimant reported that his left shoulder was sore but that it did not interfere with his normal activities.

21. Dr. Burris testified that even if Claimant sustained a minor work-related strain on February 8, 2017, the treatment he received following the minor event was not reasonable, necessary or related to this event. Dr. Burris explained that he disagreed with the course of physical therapy and medical treatment prescribed to Claimant by Concentra as this treatment was not reasonable, necessary and/or related to the February 8, 2017, incident.

22. It is found that the alleged mechanism of reaching was not the probable cause of Claimant's left shoulder rotator cuff tear, nor the cause of an aggravation of Claimant's pre-existing degenerative condition to the shoulder. It is found that Claimant did not sustain a disabling injury on February 8, 2017. Claimant did not immediately seek medical treatment, Claimant returned to his normal duties and has made virtually no changes or accommodations to his activities of daily living. Claimant's testimony that his left shoulder was asymptomatic prior to February 8, 2017, is not credible and is rebutted by Claimant's medical records. The ALJ finds Claimant's left shoulder issues pre-date the alleged February 8, 2017, event as documented in the medical records and that Claimant's impingement syndrome is the likely cause of his rotator cuff issues.

23. The ALJ further finds that the precipitating cause of Claimant's left shoulder pain on February 8, 2017, was the popping of his right hip. If Claimant's hip had not popped, then his left shoulder would not have been jarred. Thus, Claimant's alleged injuries were caused by the pre-existing hip condition and no special hazard of employment existed to increase the risk or extent of his left shoulder injury.

CONCLUSIONS OF LAW

General Legal Principles

1. The purpose of the Act is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. A claimant shoulders the burden of proving

entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4. Claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. Claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.*, 961 P.2d 571 (Colo. App. 1998).

5. A pre-existing disease or susceptibility to an injury does not disqualify a claim if the employment aggravates, accelerates, or combines with a pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Indus. Claim Appeals Office*, 107 P.3d 999 (Colo. App. 2004). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent

the result of a natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Constr. v. Renta*, 717 P.2d 965 (Colo. App. 1995).

6. In this case, Claimant may have experienced pain while reaching behind his seat while driving a school bus on February 8, 2017. However, Claimant has failed to establish by a preponderance of the evidence that this experience of pain caused a compensable injury. The incident was not proven to have caused a disability or the need for medical treatment.

7. Dr. Burris testified, within reasonable medical probability, that Claimant's alleged left shoulder tear was not caused or aggravated by the alleged February 8, 2017, event. Dr. Burris testified credibly that the force of reaching may have caused Claimant pain, but not a disabling injury. Dr. Burris testified credibly that the more likely cause of Claimant's left shoulder issues is the pre-existing impingement syndrome that would have occurred regardless of the alleged February 8, 2017, event.

8. The medical records reflect that Claimant did not seek treatment for over month following the alleged work event and continued his normal work duties. Claimant was an admitted golfer and skier, which could have caused the small tear on the left shoulder MRI. These findings support the conclusion that the February 8, 2017, event was not the cause of Claimant's left shoulder tear.

9. Based on the foregoing, the ALJ finds that Claimant failed to establish by a preponderance of the evidence that he sustained a disabling injury that arose out of and in the course of employment and therefore Claimant is not entitled to benefits.

The special hazard rule

10. Special rules apply in the event an injury is precipitated by some pre-existing condition brought by the claimant to the workplace. *Shelton v. Eckstine Elec. Co.*, W.C. No. 4-724-391 (ICAO May 30, 2008). If the claimant's injury is precipitated by a pre-existing nonindustrial condition, the injury is not compensable unless a special hazard of the employment contributes to the accident or the extent of the injuries sustained. *Nat'l Health Labs. v. Indus. Claim Appeals Office*, 844 P.2d 1259 (Colo. App. 1992). This principle is known as the "special hazard" rule. *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989). However, a condition is not considered to be a special hazard of the employment if it is ubiquitous in the sense that it is found generally outside of the employment. *Gates Rubber Co. v. Indus. Commission*, 705 P.2d 6 (Colo. App. 1985). The rationale for this rule is that unless a special hazard of employment increases the risk or extent of injury, an injury due to the claimant's pre-existing condition does not bear sufficient causal relationship to the employment to "arise out of" the employment. *Id; Gaskins v. Golden Auto. Group, L.L.C.*, W.C. No. 4-374-591 (ICAO Aug. 6, 1999) (injury when pre-existing condition caused the claimant to stumble on concrete stairs not compensable because stairs were a ubiquitous condition).

11. Alternatively, as found above, Claimant's pre-existing nonindustrial hip condition was the precipitating cause of his left shoulder injury, and Claimant cannot establish that a special hazard of employment existed to increase the risk or extent of his left shoulder injury. As found above, Claimant was simply reaching behind his seat when his hip popped, jarring his left shoulder. Claimant agreed that he performed this same reaching maneuver a hundred times before, but on this specific occasion his hip popped, which caused a jarring mechanism to the shoulder. The medical records document Claimant had extensive osteoarthritis, which caused Claimant's hip to pop, jarring his left shoulder and causing his rotator cuff tear. Thus, Claimant's pre-existing hip condition was the precipitating event of his left shoulder injury and no special hazard of employment combined with his pre-existing hip condition to cause or increase Claimant's left shoulder injury.

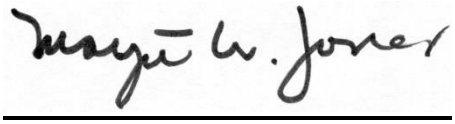
12. Based on the foregoing, the ALJ finds that Claimant failed to establish by a preponderance of the evidence that he sustained a compensable injury as Claimant's pre-existing nonindustrial hip condition was the precipitating event and there was no special hazard of employment.

ORDER

1. Claimant has failed to establish by a preponderance of the evidence that he sustained an injury that arose out of the course and scope of employment on February 8, 2017. The claim is denied and dismissed.

2. Any issues not determined in this decision are reserved for future determination.

DATED: July 1, 2019.



MARGOT W. JONES
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUE

Whether Claimant has established by a preponderance of the evidence that his excessive alcohol consumption that required ambulance transportation and treatment at the Boulder Community Hospital Emergency Room on October 5, 2018 was a direct and natural consequence of his June 22, 2016 admitted industrial injuries.

FINDINGS OF FACT

1. Claimant worked for Employer as a Flagger. On June 22, 2016 he suffered admitted industrial injuries when he was struck by a pickup truck while performing his job duties. Claimant specifically sustained a closed head injury that included almost daily migraines, short-term memory loss, anxiety and depression. He also suffered bilateral shoulder injuries, neck pain, a chest wall injury and thoracic back pain.

2. Claimant has received extensive psychological treatment for his anxiety and depression from numerous providers including Mark Babcock, MSW, LCSW, Gary S. Gutterman, M.D., David D. Robinson, Ph.D. and Paul M. Richards, Ph.D. since the outset of his claim in June 2016. Claimant testified that he has suffered depression as a result of being left alone after the June 22, 2016 accident and his inability to participate in activities at the same level he did before the accident.

3. Dr. Richards first examined Claimant on August 16, 2016. Claimant was experiencing pounding headaches behind his eyes at a pain level of 9/10 as well as depression and anxiety with some intrusive thoughts about getting hit by the vehicle. He also mentioned sleep problems from pain and emotional distress. Dr. Richards was concerned that Claimant might be self-medicating with alcohol and advised him to see Mr. Babcock for mental health treatment.

4. On September 9, 2016 Claimant visited Mr. Babcock for an evaluation. Although Claimant reported some depression as a result of an earlier Workers' Compensation injury from November 2014, he noted that his depression increased after June 22, 2016. Claimant endorsed severe anxiety and depression, social isolation and using a combination of a couple of Vicodin and ½ - ¾ of a fifth of Jack Daniels per night. Mr. Babcock was concerned about the combination and wrote "we need to help him experience significant relief from the high measure of distress he is experiencing." Through a combination of mental health treatment, pain medications and family involvement Claimant was able to avoid or limit alcohol consumption.

5. On June 19, 2017 Claimant visited Dr. Gutterman to establish psychiatric care. Claimant remarked that he had been depressed because he could not be as active as he was before the June 22, 2016 accident. Claimant also reported irritability and episodic anxiety. Dr. Gutterman commented that Claimant's affect varied particularly

when discussing how his life has changed since the accident. He started Claimant on Escitalopram, 10 mg. At his next appointments in August 2017 Claimant reported that his mood had improved on the Escitalopram and he was experiencing less anxiety. Dr. Gutterman determined that Claimant's "Adjustment Disorder with Mixed Emotional Features," due to "anxiety and mood lability resulting from chronic pain due to employment injury," was improving. He thus increased the Escitalopram to 20 mg per day.

6. In October 2017 Claimant began mental health treatment with Dr. Robinson. Dr. Robinson determined that Claimant suffered anxiety and mood disorders due to a known physiological condition that included a major depressive-like episode. He also noted that Claimant reported he had previously been tearful, but Dr. Gutterman's treatment had helped stabilize his emotional lability.

.7 On October 5, 2018 Claimant was transported to the Boulder Community Hospital Emergency Room at about 7:45 p.m. for alcohol-related symptoms. Claimant explained that he consumed the alcohol because he had undergone an independent medical examination with Taschof Bernton, M.D. that caused pain and his prescription for Lexapro had not been filled.

8. After Claimant visited Dr. Bernton for an independent medical examination on October 5, 2018 he attended his scheduled appointment with Dr. Robinson. Claimant reported that he had undergone an independent medical examination in the morning with Dr. Bernton. He remarked that Dr. Bernton had hurt his head while moving it from side-to-side. Dr. Robinson wrote that Claimant "was generally distressed during this appointment, and specifically that Dr. Bernton had caused pain during his examination. His expressions of problems and concerns is disjointed and difficult to follow, as to what has already occurred or what will take place in the future." Dr. Robinson remarked that Claimant "did not seem able to grasp the provisions of the Maintenance Management section of the chronic pain guidelines [that] provide for essential care after he reaches MMI. He catastrophizes, which is a feature of his chronic pain experience."

9. Claimant received his medications through the mail from the Injured Workers' Pharmacy (IWP) located in Methuen, Massachusetts. IWP sends Claimant his medications by overnight mail through FedEx and the medications consistently arrive on the day of or day before Claimant requires his refill. IWP sent Claimant his Lexapro every 30 days through FedEx by overnight mail from June 22, 2017 through January 10, 2019 with the exception of September 28, 2018. On September 28, 2018 IWP did not ship Claimant's Lexapro through overnight mail but instead by standard transit. Claimant thus did not receive his Lexapro until Saturday, October 6, 2018 at 2:02 p.m. rather than on September 29, 2018.

10. At some point following Claimant's appointment with Dr. Robinson on October 5, 2018 he went home and began drinking alcohol. Claimant stated that he only remembered his first drink. Claimant's 24 year-old son Jameson Clark tried to get his father to stop drinking or slow down. Mr. Jameson Clark noted that Claimant was agitated and upset. Prior to passing out, Claimant repeatedly told his son to call 9-1-1. An

ambulance arrived to transport Claimant to Boulder Community Hospital. The ambulance report specified that Claimant had consumed rum, his mood shifted to anger and he spoke of suicidal ideations. Further, the ambulance report noted Claimant had not consumed alcohol regularly for the previous two years. After reaching the Emergency Room presenting with acute alcohol intoxication, Claimant commented that he "had a very long day today." He noted that, after a psychological evaluation for depression, he went home, felt very stressed and started drinking. Claimant subsequently received treatment for alcohol intoxication in the Boulder Community Hospital Emergency Room and was released home with his children.

11. When Claimant returned to Dr. Robinson on October 12, 2018 he explained that he visited the Emergency Room on October 5, 2018 because he had fallen and struck the back of his head. Claimant did not tell Dr. Robinson that he drank alcohol because he was out of Lexapro.

12. On October 15, 2018 Claimant visited Dr. McCranie for an examination. He described an episode from the previous week where he grabbed his son forcefully and then blacked out. He told her he visited Boulder Community Hospital but did not know the results of his evaluation. Claimant did not mention increased anxiety following his independent medical examination, running out of Lexapro or passing out because of alcohol consumption.

13. On November 7, 2018 Claimant visited Dr. Gutterman for an evaluation. Claimant told Dr. Gutterman that he had discontinued all of his medications because he did not believe that any of them were helpful. He expressed that he did not want to return for follow-up visits with any of his providers. Claimant remarked that he had become "extremely frustrated" with his Workers' Compensation case because he had only received a 7% impairment rating for one of his shoulders and would have to go back to work despite persistent symptoms. He did not tell Dr. Gutterman he had difficulties filling his last Lexapro prescription, suffered increased anxiety as a result of his independent medical examination with Dr. Goldman or was taken to the hospital for excessive alcohol consumption.

14. In her report from November 12, 2018 Dr. McCranie commented that Claimant wanted to discuss the events from October. He told her he received a new antidepressant from Dr. Gutterman on October 2, 2018 and was able to have it filled. Claimant also told Dr. McCranie that he underwent an independent medical examination on October 5, 2018 and experienced increased soreness. He did not mention increased anxiety or drinking. Finally, Claimant did not relate his excessive alcohol consumption and trip to the Emergency Room on October 5, 2018 to his June 22, 2016 work injury.

15. Claimant's level of anxiety on October 5, 2018 was not unusual. Numerous providers have diagnosed Claimant with anxiety and depression as a result of his work-related injuries. His medical records are replete with examples of depression, anxiety, anger and traumatic history. Although Dr. Robinson noted that Claimant was anxious at the October 5, 2018 appointment, his symptoms were comparable to those he exhibited on February 25, 2017, March 17, 2017, June 2, 2017, August 22, 2017, November 17,

2017, December 1, 2017, April 19, 2018, April 27, 2018, May 4, 2018, June 15, 2018, July 27, 2018, August 10, 2018, October 26, 2018, November 9, 2018, December 21, 2018, March 15, 2019 and March 22, 2019. To manage Claimant's anxiety, mental health providers have furnished counseling and medications. They have also instructed him about several techniques to deal with his pain and anxiety including: biofeedback; guided imagery; problem solving; cognitive behavioral strategies; energy allocation; sleep hygiene; coping tools; relaxation skills; marksmanship breathing exercises and grief techniques.

16. Although Dr. Robinson reported that Claimant had experienced symptoms of depression and anxiety at almost every one of his weekly or bi-weekly therapy appointments from the time he started treating him on October 5, 2017, Claimant's behavior started to improve at the end of August, 2018. Claimant was weaning off his final pain medication. At Claimant's August 31, 2018 and September 24, 2018 appointments Dr. Robinson reported that Claimant's mood "was the least anxious and depressed since I began to see him." Claimant also exhibited mild optimism, expressed anticipating pleasure and suffered only mild anxiety.

17. Claimant has failed to establish that it is more probably true than not that his excessive alcohol consumption that required ambulance transportation and treatment at the Boulder Community Hospital Emergency Room on October 5, 2018 was a direct and natural consequence of his June 22, 2016 admitted industrial injuries. Claimant specifically contends that he consumed excessive alcohol on October 5, 2018 because he had undergone an independent medical examination with Dr. Bernton that caused pain and his prescription for Lexapro had not been filled. However, because Claimant's excessive drinking constituted an intentionally self-inflicted intervening cause and was not the direct and natural consequence of his June 22, 2016 industrial injuries, his request for Respondent to pay for the ambulance bill and Emergency Room services is denied and dismissed.

18. Although Claimant testified that he consumed excessive alcohol on October 5, 2018 because he suffered pain as a result of his independent medical examination with Dr. Bernton and had not received his prescription for Lexapro, his medical and treatment records subsequent to October 5, 2018 do not support his contention. When Claimant returned to Dr. Robinson on October 12, 2017 he explained that he visited the Emergency Room on October 5, 2018 because he had fallen and struck the back of his head. Claimant did not tell Dr. Robinson he drank alcohol because he was out of Lexapro. In an October 15, 2018 visit with Dr. McCranie Claimant described an episode from the previous week where he grabbed his son forcefully and then blacked out. He told her he visited Boulder Community Hospital but did not know the results of his evaluation. Claimant did not mention increased anxiety following his independent medical examination, running out of Lexapro or passing out because of alcohol consumption. On November 7, 2018 Claimant did not tell Dr. Gutterman he had difficulties filling his last Lexapro prescription, suffered increased anxiety as a result of his independent medical examination with Dr. Goldman or was taken to the hospital for excessive alcohol consumption. Finally, Claimant had received significant counseling and medications during the course of his claim to reduce his levels of anxiety and depression. His

treatment improved his condition prior to October 5, 2018. Claimant's decision to begin drinking when he returned home after his independent medical examination with Dr. Bernton and psychological treatment with Dr. Robinson was an intentionally self-inflicted intervening cause that severed the connection to his June 22, 2016 industrial injuries.

19. Attributing Claimant's excessive drinking and Emergency Room visit on October 5, 2018 to his June 22, 2016 industrial injuries is speculative. Specifically, there is an attenuated causal connection that is insufficient to establish a direct and natural relationship between Claimant's injuries and Emergency Room visit on October 5, 2018. Claimant's injuries that occurred more than two years earlier did not render him unable to resist the impulse to drink excessively. Accordingly, Claimant's request for Respondent's to pay for the October 5, 2018 ambulance bill and Emergency Room services is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107

P.3d 999, 1001 (Colo. App. 2004). The claimant bears the burden of demonstrating a causal connection between his industrial injuries and the need for additional medical treatment. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

5. In a medical emergency a claimant need not seek authorization from his employer or insurer before obtaining medical treatment from an unauthorized medical provider. *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777, 781 (Colo. App. 1990). A medical emergency affords an injured worker the right to obtain immediate treatment without the delay of notifying the employer to obtain a referral or approval. *In Re Gant*, W.C. No. 4-586-030 (ICAO, Sept. 17, 2004). Because there is no precise legal test for determining the existence of a medical emergency, the issue is dependent on the particular facts and circumstances of the claim. *In re Timko,* W.C. No. 3-969-031 (ICAO, June 29, 2005).

6. Section 8-41-301(1)(c), C.R.S., provides, as one of the conditions of recovery, that the injury must be "proximately caused by an injury or occupational disease arising out of and in the course of employment and is not intentionally self-inflicted." Generally, self-inflicted death or suicide is "an independent, nonindustrial, intervening cause which severs the chain of causation for compensability." *Dependable Cleaners v. Vasquez,* 883 P.2d 583, 584-85 (Colo. App. 1994). However, Colorado applies the "chain of causation" exception to the non-compensability of self-inflicted injuries. *Id.* at 585. The exception is applicable when the industrial injury causes a severe or deranged mental condition and the mental condition is a proximate cause of the worker's suicide or injuries. *Id.*; *Jacko Painting Contractors v. Industrial Commission,* 702 P.2d 755 (Colo. App. 1985).

7. In *In Re Nunnaly,* W.C. No. 4-168-841 (ICAO, Mar. 30, 1998), the ICAO determined that the Act "provides for the compensability of direct and natural consequences of an industrial injury, even where those consequences may involve self-destructive acts such as the misuse of drugs or alcohol." *Id.* at *4. The ICAO noted that the Act "is primarily concerned with compensating the victim." *Id.* Additionally, it reasoned that "if an industrial injury causes or aggravates a preexisting tendency to abuse alcohol, injury or death resulting from the abuse of alcohol is compensable under the 'quasi-course of employment' doctrine" as long as the use of alcohol is the "direct and natural consequence" of the original injury. *Id.* at *2. The ICAO determined that Claimant's alcohol consumption resulting in death "was a symptom of the claimant's injury-related depression, not an intervening event." *Id.* at *3.

8. The severe or deranged mental condition must be of such magnitude that it impairs the worker's "ability to resist suicidal impulses, or causes the injured worker to commit self-destructive acts without knowingly intending to end his or her life." *Dependable Cleaners*, 583 P.2d at 585; *see Gordley v. Advanced Energy Inc.* W. C. No. 4-549-974 (ICAO, Apr. 8, 2005) (noting that decedent's "severe mental condition" rendered him unable to resist the impulse to take his own life"). Otherwise, the suicide or

injuries resulting from the suicide attempt are considered to be the result of an intervening cause. *Dependable Cleaners*, 583 P.2d at 585.

9. As found, Claimant has failed to establish by a preponderance of the evidence that his excessive alcohol consumption that required ambulance transportation and treatment at the Boulder Community Hospital Emergency Room on October 5, 2018 was a direct and natural consequence of his June 22, 2016 admitted industrial injuries. Claimant specifically contends that he consumed excessive alcohol on October 5, 2018 because he had undergone an independent medical examination with Dr. Bernton that caused pain and his prescription for Lexapro had not been filled. However, because Claimant's excessive drinking constituted an intentionally self-inflicted intervening cause and was not the direct and natural consequence of his June 22, 2016 industrial injuries, his request for Respondent to pay for the ambulance bill and Emergency Room services is denied and dismissed.

10. As found, although Claimant testified that he consumed excessive alcohol on October 5, 2018 because he suffered pain as a result of his independent medical examination with Dr. Bernton and had not received his prescription for Lexapro, his medical and treatment records subsequent to October 5, 2018 do not support his contention. When Claimant returned to Dr. Robinson on October 12, 2017 he explained that he visited the Emergency Room on October 5, 2018 because he had fallen and struck the back of his head. Claimant did not tell Dr. Robinson he drank alcohol because he was out of Lexapro. In an October 15, 2018 visit with Dr. McCranie Claimant described an episode from the previous week where he grabbed his son forcefully and then blacked out. He told her he visited Boulder Community Hospital but did not know the results of his evaluation. Claimant did not mention increased anxiety following his independent medical examination, running out of Lexapro or passing out because of alcohol consumption. On November 7, 2018 Claimant did not tell Dr. Gutterman he had difficulties filling his last Lexapro prescription, suffered increased anxiety as a result of his independent medical examination with Dr. Goldman or was taken to the hospital for excessive alcohol consumption. Finally, Claimant had received significant counseling and medications during the course of his claim to reduce his levels of anxiety and depression. His treatment improved his condition prior to October 5, 2018. Claimant's decision to begin drinking when he returned home after his independent medical examination with Dr. Bernton and psychological treatment with Dr. Robinson was an intentionally self-inflicted intervening cause that severed the connection to his June 22, 2016 industrial injuries.

11. As found, attributing Claimant's excessive drinking and Emergency Room visit on October 5, 2018 to his June 22, 2016 industrial injuries is speculative. Specifically, there is an attenuated causal connection that is insufficient to establish a direct and natural relationship between Claimant's injuries and Emergency Room visit on October 5, 2018. Claimant's injuries that occurred more than two years earlier did not render him unable to resist the impulse to drink excessively. Accordingly, Claimant's request for Respondent's to pay for the October 5, 2018 ambulance bill and Emergency Room services is denied and dismissed.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request for Respondent to pay for the October 5, 2018 ambulance bill and Emergency Room services is denied and dismissed.

2. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: July 2, 2019.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Is this claim closed by a Final Admission of Liability dated October, 30, 2018?

FINDINGS OF FACT

1. Claimant suffered an admitted injury to his right foot on September 8, 2018.

2. His ATP placed him at MMI with no impairment on September 24, 2018.

3. Respondents filed a Final Admission of Liability (FAL) on October 30, 2018 based on the ATP's MMI report. The FAL admitted for $399.92 in medical benefits and five days of TTD.

4. On the date of the FAL, Claimant was represented by Lawrence D. Saunders, Esq. The FAL was sent to Mr. Saunders at "Michael Seckar, 2904 Hart Rd Ste C, Pueblo, CO 81008." That is the correct mailing address for Mr. Saunders.

5. The FAL was also addressed to Claimant at "PO Box 15052 Colorado Springs CO 80935." On the date of the FAL, that was not a valid mailing address for Claimant. He had used that address for several years, but obtained a new post office box when he moved to Pueblo before the accident. Claimant's Worker's Claim for Compensation form lists his mailing address as "2880 Siloam Rd./P.O. Box 1149, Pueblo, CO 81008."

6. The DOWC received a copy of the FAL electronically on October 30, 2018.

7. Mr. Saunders first received a copy of the FAL in the mail on December 20, 2018.

8. After receiving the FAL, Mr. Saunders contacted Claimant to see if he had received the FAL. Claimant indicated he had not received it.

9. Mr. Saunders objected to the FAL and filed a DIME Notice and Proposal on January 18, 2019.

10. The DOWC subsequently issued a DIME Panel and the parties exercised their respective strikes. Dr. Wallace Larson was selected and confirmed as the DIME physician.

11. Claimant was found indigent in an order dated March 6, 2019.

12. On March 27, 2019, PALJ Sandberg issued an order holding the DIME process in abeyance pending determination by the OAC as to whether Claimant's claim is closed.

13. Mr. Saunders' testimony regarding his office's procedures regarding incoming mail and FALs is credible and persuasive. The ALJ credits Mr. Saunders' testimony he did not receive the FAL until December 20, 2018.

14. This claim is not closed. Claimant's January 18, 2019 objection and DIME Notice and Proposal were timely because they were filed within 30 days after Mr. Saunders first received a copy the FAL.

CONCLUSIONS OF LAW

An FAL provides a statutory mechanism for the respondents to close a claim. Once an FAL is filed, the claimant must perfect an objection within thirty days or the claim will "automatically close." The purpose of an FAL is to notify the claimant of the exact basis on which benefits have been admitted or denied so the claimant "can make an informed decision whether to accept or contest the final admission." *Paint Connection Plus v. Industrial Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010). To that end, due process requires a claimant receive "actual notice" of an FAL before it can close a claim. *Bowlen v. Munford*, 921 P.2d 59 (Colo. App. 1996). The requirement of "actual notice" has repeatedly been interpreted to require receipt of the FAL itself, rather than mere knowledge of its potential existence. *E.g*., *Duran v. Russell Stover Candies*, W.C. No. 4-524-717 (April 13, 2004); *Meskimen v. Fee Transportation*, W.C. No. 3-966-629 (March 31, 2003); *Gonzales v. Pillow Kingdom*, W.C. No. 4-296-143 (July 12, 1999). If a claimant is represented, the claimant and the attorney must receive actual notice of an FAL before it can close a claim. *Hall v. Home Furniture Co*., 724 P.2d 94 (Colo. App. 1986). Lack of receipt by *either* the claimant *or* his attorney tolls the objection deadline until thirty days after it is received by each of them. *E.g*., *Gonzales v. Pillow Kingdom, supra; Henriquez v. K.R. Swerdfeger Construction*, W.C. No. 4-439-726 (May 5, 2003).

As found, Mr. Saunders first received the FAL on December 20, 2018. Thirty days from his receipt of the FAL was Saturday, January 19, 2019, so the objection deadline was extended to Monday, January 21, 2019. *See* § 2-4-108(2), C.R.S. The January 18, 2019 objection and DIME Notice and Proposal were timely and prevented the claim from closing.

ORDER

It is therefore ordered that:

1. Claimant timely objected to the FAL and initiated the DIME process. This claim is not closed.

2. PALJ Sandberg's March 27, 2019 order holding the DIME in abeyance is hereby vacated. Claimant may now proceed with the DIME. Claimant shall have ten (10)

business days from service of this order to schedule the DIME and notify Respondents and the Division of the appointment.

3. All issues not decided herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 8, 2019

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-095-145-001

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable right shoulder injury on November 13, 2018 during the course and scope of his employment with Employer.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his industrial injury.

3. A determination of Claimant's Average Weekly Wage (AWW).

4. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period November 19, 2018 until terminated by statute.

PROCEDURAL MATTERS

OAC Rule 23 addresses the procedure for entering an order against a party who did not appear for a scheduled hearing. The Rule specifies that, when a party fails to appear for a hearing and the OAC has sent notice of the hearing to the party, the judge must consider whether "the addresses to which the notice of hearing was sent are the most recent addresses provided by the non-appearing party to either the OAC or the Division of Workers' Compensation" before "entering any orders against the non-appearing party as a result of that hearing."

Initially, the Notice of Contest filed by Insurer on January 2, 2019 noted the address of Employer as 5314 S. Yale Ave., Ste 900, Tulsa, OK 74135. In a FAX dated May 15, 2019 Insurer's Senior Claims Representative Erin Corcoran denied Claimant's medical treatment. She provided the following e-mail address: erin.corcoran@thehartford.com. Ms. Corcoran acknowledged "there is a hearing in the beginning of June." The Application for Hearing in this matter was mailed to Employer at 5314 S. Yale Ave, Ste 900, Tulsa, OK 74135 and e-mailed to Ms. Corcoran at erin.corcoran@thehartford.com. The Notice of Hearing was also mailed to Employer at 5314 S. Yale Ave, Ste 900, Tulsa, OK 74135 and e-mailed to Ms. Corcoran at erin.corcoran@thehartford.com. The Notice of Hearing specified that the hearing would be conducted at 9:00 a.m. on June 7, 2019 at the 19th Judicial District-Weld County Center in Greeley, CO.

There is no evidence in the OAC file that the Notice of Hearing was returned for insufficient postage or was otherwise undeliverable. Accordingly, Respondents had adequate notice of the June 7, 2019 hearing in this matter.

FINDINGS OF FACT

1. Claimant worked for Employer as a Laborer. His job duties involved installing pipes in oil fields to capture gas in drilling locations.

2. Claimant explained that on November 13, 2018 he injured his right shoulder while performing his job duties. While installing a handrail with his supervisor who was operating a forklift, Claimant threw a rope to get it out of the way. He immediately suffered a "pop" and pain in his right shoulder.

3. Claimant visited urgent care after the accident. He was referred to Julie Parsons, M.D. at Advanced Urgent Care in Brighton, Colorado for occupational medicine treatment. On November 19, 2018 Dr. Parsons assigned Claimant work restrictions of no lifting, pushing/pulling or carrying in excess of five pounds as well as no driving with his right arm. Claimant subsequently underwent conservative care for his right shoulder condition.

4. On February 12, 2019 Claimant obtained treatment with Joshua T. Snyder, M.D. at Orthopaedic & Spine Center of the Rockies. Claimant reported that he suffered an injury at work when he threw a rope onto a platform and felt a "pop" in his right shoulder. Dr. Snyder noted that Claimant had been suffering right shoulder pain since his industrial injury on November 13, 2018. Claimant's pain had not decreased with physical therapy or limitations on activities. He also had been taking anti-inflammatory medications with minimal relief. After conducting a physical examination and reviewing diagnostic studies, Dr. Snyder diagnosed Claimant with "right shoulder pain with evidence of labral detachment." He affirmed the work restrictions assigned by Advanced Urgent Care. Dr. Snyder explained that, because Claimant had failed conservative treatment, he recommended a "right shoulder arthroscopy with labral repair and possible subacromial decompression." Orthopaedic & Spine Center of the Rockies sent a surgical authorization request for the preceding procedure. However, on May 5, 2019 Insurer denied any further medical treatment.

5. Claimant thus sought treatment on May 15, 2019 with Alicia Feldman, M.D. at the Colorado Clinic. Claimant reported that, while installing a handrail with his supervisor who was operating a forklift, he threw a rope out of the way. He felt a "pop" and pain in his right shoulder. After considering the history of Claimant's work injury and diagnostic imaging, Dr. Feldman determined that he had suffered a right shoulder labral tear. She assigned work restrictions that included limited use of the right upper extremity.

6. For the period June 23, 2018 until November 10, 2018 Claimant earned total wages of $19,575.50. The period covered 141 days or 20.14 weeks. Dividing

$19,575.50 by 20.14 weeks yields an Average Weekly Wage (AWW) of $971.97. An AWW of $971.97 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

7. Claimant explained that he has been unable to perform his job duties since November 19, 2018 because of his industrial injury. He has not reached Maximum Medical Improvement (MMI).

8. Claimant has established that it is more probably true than not that he sustained a compensable right shoulder injury on November 13, 2018 during the course and scope of his employment with Employer. He credibly testified that on November 13, 2018 he injured his right shoulder while performing his job duties. While installing a handrail with his supervisor who was operating a forklift, Claimant threw a rope to get it out of the way. He immediately suffered a "pop" and pain in his right shoulder. The medical records reflect that Claimant has consistently maintained he injured his right shoulder while throwing a rope at work on November 13, 2018. Based on Claimant's credible testimony and the medical records, Claimant suffered a disability that was proximately caused by an injury arising out of and within the course and scope of his employment with Employer.

9. Claimant has demonstrated that it is more probably true than not that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his industrial injury. Claimant initially received medical treatment for his right shoulder from Dr. Parsons at Advanced Urgent Care. On February 12, 2019 Claimant sought right shoulder care with Dr. Snyder at Orthopaedic & Spine Center of the Rockies. Dr. Snyder explained that, because Claimant had failed conservative treatment, he recommended a "right shoulder arthroscopy with labral repair and possible subacromial decompression." Orthopaedic & Spine Center of the Rockies sent a surgical authorization request for the preceding procedure to Insurer. However, on May 5, 2019 Insurer denied any further medical treatment. Claimant thus obtained care on May 15, 2019 with Dr. Feldman at the Colorado Clinic. After considering the history of Claimant's work injury and diagnostic imaging, Dr. Feldman determined that he had suffered a right shoulder labral tear. All of the preceding medical treatment was reasonable, necessary and related to Claimant's November 13, 2018 industrial injury. Moreover, the proposed right shoulder surgery is designed to cure and relieve the effects of Claimant's compensable right shoulder injury. Employer is thus financially responsible for the payment of Claimant's medical expenses including the proposed right shoulder arthroscopy with labral repair and possible subacromial decompression.

10. Claimant has proven that it is more probably true than not that he is entitled to receive Temporary Total Disability (TTD) benefits for the period November 19, 2018 until terminated by statute. On November 19, 2018 Dr. Parsons assigned work restrictions of no lifting, pushing/pulling or carrying in excess of five pounds as well as no driving with his right arm. Dr. Snyder subsequently affirmed the work restrictions assigned

by Advanced Urgent Care and Dr. Feldman assigned work restrictions that included limited use of the right upper extremity. Claimant also credibly explained that he has been unable to perform his job duties since November 19, 2018 because of his industrial injury. He has not reached MMI. Claimant is entitled to receive TTD benefits because his November 13, 2018 industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §840-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo.

App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAO, Aug. 18, 2005).

6. As found, Claimant has established by a preponderance of the evidence that he sustained a compensable right shoulder injury on November 13, 2018 during the course and scope of his employment with Employer. He credibly testified that on November 13, 2018 he injured his right shoulder while performing his job duties. While installing a handrail with his supervisor who was operating a forklift, Claimant threw a rope to get it out of the way. He immediately suffered a "pop" and pain in his right shoulder. The medical records reflect that Claimant has consistently maintained he injured his right shoulder while throwing a rope at work on November 13, 2018. Based on Claimant's credible testimony and the medical records, Claimant suffered a disability that was proximately caused by an injury arising out of and within the course and scope of his employment with Employer.

Medical Benefits

7. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

8. As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his industrial injury. Claimant initially received medical treatment for his right shoulder from Dr. Parsons at Advanced Urgent Care. On February 12, 2019 Claimant sought right shoulder care with Dr. Snyder at Orthopaedic & Spine Center of the Rockies. Dr. Snyder explained that, because Claimant had failed conservative treatment, he recommended a "right shoulder arthroscopy with labral repair

and possible subacromial decompression." Orthopaedic & Spine Center of the Rockies sent a surgical authorization request for the preceding procedure to Insurer. However, on May 5, 2019 Insurer denied any further medical treatment. Claimant thus obtained care on May 15, 2019 with Dr. Feldman at the Colorado Clinic. After considering the history of Claimant's work injury and diagnostic imaging, Dr. Feldman determined that he had suffered a right shoulder labral tear. All of the preceding medical treatment was reasonable, necessary and related to Claimant's November 13, 2018 industrial injury. Moreover, the proposed right shoulder surgery is designed to cure and relieve the effects of Claimant's compensable right shoulder injury. Employer is thus financially responsible for the payment of Claimant's medical expenses including the proposed right shoulder arthroscopy with labral repair and possible subacromial decompression.

Average Weekly Wage

9. Section 8-42-102(2), C.R.S. requires the ALJ to base the claimant's AWW on his or her earnings at the time of injury. The Judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001). However, §8-42-102(3), C.R.S. authorizes a judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed methods will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App. 1993). Specifically, §8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993); *see In re Broomfield,* W.C. No. 4-651-471 (ICAO, Mar. 5, 2007). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell,* 867 P.2d at 82. Where the claimant's earnings increase periodically after the date of injury the ALJ may elect to apply §8-42-102(3), C.R.S. and determine whether fairness requires the AWW to be calculated based upon the claimant's earnings during a given period of disability instead of the earnings on the date of the injury. *Id.*

10. As found, for the period June 23, 2018 until November 10, 2018 Claimant earned total wages of $19,575.50. The period covered 141 days or 20.14 weeks. Dividing $19,575.50 by 20.14 weeks yields an AWW of $971.97. An AWW of $971.97 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

Temporary Total Disability Benefits

11. Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability," connotes two

elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999).

12. As found, Claimant has proven by a preponderance of the evidence that he is entitled to receive TTD benefits for the period November 19, 2018 until terminated by statute. On November 19, 2018 Dr. Parsons assigned work restrictions of no lifting, pushing/pulling or carrying in excess of five pounds as well as no driving with his right arm. Dr. Snyder subsequently affirmed the work restrictions assigned by Advanced Urgent Care and Dr. Feldman assigned work restrictions that included limited use of the right upper extremity. Claimant also credibly explained that he has been unable to perform his job duties since November 19, 2018 because of his industrial injury. He has not reached MMI. Claimant is entitled to receive TTD benefits because his November 13, 2018 industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant suffered a compensable right shoulder injury on November 13, 2018 during the course and scope of his employment with Employer.

2. Employer is financially responsible for the payment of Claimant’s medical expenses for his right shoulder including the proposed right shoulder arthroscopy with labral repair and possible subacromial decompression.

3. Claimant earned an AWW of $971.97.

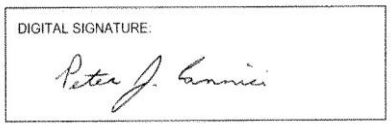
4. Claimant shall receive TTD benefits for the period November 19, 2018 until terminated by statute.

5. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge’s order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge’s order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09070). For further*

information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 8, 2019.



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Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. In addition to Claimant's stipulated Average Weekly Wage ("AWW") from Respondent, what amounts should be added to his AWW from other income sources and benefits?

II. What is Claimant's Income from other sources [Freight Agent and Uber driver] which should be deducted from his AWW to calculate his Temporary Partial Disability ("TPD") payments?

STIPULATIONS

The parties stipulated that Claimant's Average Weekly Wage from ABF Freight Systems is $1,266.53. The ALJ accepted this stipulation.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Claimant injured his right shoulder on February 16, 2018 while working as an over the road truck driver for ABF Freight Systems, Inc. ("ABF"). At the hearing on compensability, Claimant testified that while driving his normal route to Salt Lake City, he stopped in Evanston, Wyoming to get some coffee and fuel and clean his windshield of ice and snow. He was standing on the driver's side running board of the truck and holding onto the mirror with his right hand while cleaning off his windshield with his left hand. The tractor door unexpectedly popped open, knocking him off balance, and causing him lose his footing and swing by his right arm to regain his balance, then close the door.

2. This resulted in an injury to Claimant's right shoulder, for which he underwent surgery by Dr. David Weinstein. The parties now agree that the Claimant has physical restrictions, which have precluded him from returning to work as a truck driver since the date of his injury. The Claimant has not returned to work in any capacity for Respondent employer since the injury.

3. At the time of this industrial injury, the Claimant was concurrently employed as an independent freight expediter. The Claimant did business as Continuous Motion Enterprises, LLC ("Continuous Motion"). The Claimant testified that there were two distinct parts of Continuous Motion, to wit: 1) the trucking company side of the company which hauled freight from one place to another with the Claimant's own trucks, and 2) the freight expediter side of the business, which brokered payments for loads of freight, via computer, between merchandise sellers and shippers. The

Claimant testified that Landstar, Inc. was his main shipping client as a freight expediter.

4. Claimant filed Chapter 7 bankruptcy on March 30, 2018 (Ex. 13). According to the profit and loss statement, which was filed with the bankruptcy documents, the Claimant profited $2,580.00 as a freight agent in January 2018, but then showed a loss of $1,330.00 for February, 2018. No figures were listed for March. (Ex. 13, p. 383). [This equates to an AWW of $96.15, assuming the month of March is factored at $0].[Assuming the month of March is ignored-perhaps due to incomplete information-the AWW based upon January and February only comes to $144.23].

5. At hearing, Claimant testified that he does not know why the figure listed earlier in the bankruptcy document on the Attachment to SOFA, Question 4 reflects $1,800.00 'Year to Date' as a freight agent (Ex. 13, p. 348) is different. [Such a figure equates to an AWW of $141.58, as calculated by the parties]. When asked which figure was correct, he testified that he did not know. He testified that he has no reason to dispute anything reflected in the bankruptcy document, and that he told the bankruptcy court about the pending worker's compensation claim.

6. Since his Workers Compensation claim was still under a Notice of Contest at the time the bankruptcy was filed, the value of the WC claim was listed as $1.00. (Ex. 13, p. 356) (The ALJ finds this figure to be reasonable, since compensability had not yet been determined). Claimant's bankruptcy was discharged on July 26, 2018. (Ex. B). Right after the discharge, Claimant changed the name of his freight expediting agency to his own name, no longer reflecting Continuous Motion Enterprises, LLC. The freight expediting agency has continued to exist under the Claimant's name since that time.

7. Since his work injury, Claimant has continued to work as a freight expediter, still under his own name. He also worked as an UBER driver after the date of his industrial injury. The Landstar records show that the Claimant worked as a freight agent at the time of his industrial injury. (Ex. 5). Claimant's 2018 tax return (Ex. 18, pp. 490, 492) indicate that the Claimant reported a net profit of $17,885.00 from his freight brokerage business in 2018. The Claimant reported a 2018 tax loss of ($9,449.00) from his rideshare (UBER) business.

8. At the time of his industrial injury, Claimant was a member of the Western Teamsters Union ("Union"). At the time of the industrial injury, fringe benefits were available from the Teamsters, which included health insurance benefits, pension benefits and a VEBA benefit, all of which were paid for by his employer. Payment of these benefits directly to the Union were the responsibility of ABF.

9. When compensability was originally denied by the Respondents, Claimant had attempted to obtain the shoulder surgery recommended by Dr. Weinstein through his employer-provided health insurance. He was then informed by his physicians that his health insurance benefits were no longer in effect as of May 1, 2018.

10. Claimant received a COBRA letter from the Western Teamsters Welfare

Trust on May 16, 2018. This letter notified him that his health insurance had been discontinued, effective May 1, 2018. If Clamant wished to elect COBRA coverage, he would be required to pay $1,821.10 per month ($420.25 per week) (Ex.11, p. 312) but for a period of no more than 18 months.

11. Employer also contributed a total of $7,318.08 ($423.35 per week) to the Western Conference of Teamster's Pension Trust for the months of August 2017 through December 2017. (Ex.15). The Respondent Employer also paid $69.20 per month ($15.97 per week) to the union for VEBA benefits. (Ex.14, p. 397).

12. On April 25, 2019, Employer then repaid, retroactively, past due health insurance premiums totaling $13,440.21 to the Teamsters Union, to restart the Claimant's health insurance benefits. In the interim, Claimant had no access to health insurance benefits through the Union or his employer between 5/1/18 and 5/1/19. Claimant testified that he had no knowledge of any coverage waiver which he could have elected, nor did he receive any documentation regarding this waiver at the time his health insurance was discontinued. He testified that he received no documentation from either ABF or from the Teamsters Union regarding this waiver in 2018.

13. Claimant testified that the only documentation he received after May 1, 2018 regarding his health insurance was the COBRA letter dated May 16, 2018, which he received by U.S. Mail. (Ex.11, pp. 311-319). He testified that it was not until after May 1, 2019, when he received health insurance cards in the mail, that he learned his health insurance benefits had been reinstated.

14. On May 8, 2019, Claimant also received a letter from the Union informing him that his health insurance benefits had been reactivated. Claimant also received a letter dated May 13, 2019 from the Union informing him that he "may" be entitled to a waiver of premium to continue his health care coverage. Other than these three letters, Claimant testified that he received no communication, from either the Union or Employer, regarding his health insurance benefits between May 2018 and May 2019.

15. The Claimant testified that he did not have any health insurance for a period of two and a half months after his health insurance had been discontinued on May 1, 2018. Since approximately August 2018, he has been covered under an 'expensive' policy through his wife's employer. He testified that this policy was strictly for emergencies as it was cost-prohibitive to use. He estimated that the monthly premium was between $625 and $645, and was paid by his wife through her employer, but this monthly cost covered *both* of them. However, Claimant provided no cost breakdown between his wife as an employee, and Claimant as a spouse. Nor is there evidence in the record which would compare the quality of coverage between Claimant's wife's plan and that offered through Employer.

16. In April 2019, Respondent employer repaid the amount of $17,118.40 to the Union representing past due payments owed to the Union pension fund.

17. Article 53, Section 3 of the Union contract (between the Union and ABF)

specifically states that:

> If an employee is injured on-the-job, the Employer shall continue to pay the required [health insurance] contributions until such employee returns to work, however, such contribution shall not be paid for a period of more than twelve (12) months beginning with the first month after contribution for active employment ceases". (Ex.14, pp. 402-403).

18. Article 54, Section 2 of this contract states that:

> If an employee is injured on-the-job, the Employer shall continue to pay the required [pension] contributions until such employee returns to work; however, such contribution shall not be paid for a period of more than twelve (12) months beginning with the first month after contribution for active employment ceases. (Ex. 14, pp. 404-405).

19. Cindy Barr, the adjuster for the employer, acknowledged that she knew the claim was found to be compensable in late 2018, but did not pay any TPD benefits until May 9, 2019. ALJ Lamphere's order regarding compensability was signed on November 16, 2018. The General Admission of Liability filed on May 9, 2019 admitted to an average weekly wage of $1,408.11 [$1,266.53 from Employer, + $ 141.58 from Landstar]. This FAL also admitted to TPD benefits from 2/17/18 through 3/2/19.

20. Claimant's health insurance premiums and pension benefits were paid back in full to the Claimant's account, a total of $30,558.25. Ms. Barr testified Claimant could have elected the union waiver provision to obtain 6 months of coverage, that she felt Claimant was well aware of his union contract provisions, and that it was common procedure for similarly situated employees to obtain medical care that would then be reimbursed.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, *et seq*., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S*. The claimant shoulders the burden of proving by a preponderance of the evidence that he is a covered employee who suffered an "injury" arising out of and in the course of employment. *Section 8-41-301(1), C.R.S.; Faulker v. Industrial Claim Appeals Office, 12 P.3d 844 (Colo.App. 2000); City of Boulder v. Streeb, 706 P.2d 786 (Colo. 1985); Pacesetter Corp. v. Collett, 33 P.3d 1230 (Colo.App. 2001).* A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979)*. The facts in a

workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. *Section 8-43-201, C.R.S*. A workers' compensation claim is decided on its merits. *Section 8-43-201, supra.*

B. In accordance with § 8-43-215, C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, *84 P.3d 1023 (Colo. 2004).* This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5 P.3d 385 (Colo. App. 2000).*

C. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. In this case, the ALJ credits Cindy Barr with being credible in her testimony about the timing and amount of payments made by Employer. The ALJ does not find that Claimant actually knew of his union medical benefits. Had he known, he likely would have utilized them when he was injured, and not waited. The ALJ is not persuaded of the accuracy of Claimant's tax returns for 2018; however, as noted below, viable alternatives do not exist in the record.

Average Weekly Wage, Generally

D. Colorado Revised Statute §8-42-102(2) provides that a Claimant's average weekly wage should be calculated upon the monthly, weekly, daily, hourly or other remuneration which the injured employee was receiving at the time of the industrial injury. C.R.S. §8-42-102(3) gives the Administrative Law Judge wide discretion to compute the average weekly wage in whichever manner or method he or she chooses which will fairly determine an employee's average weekly wage. The overall purpose of the statutory scheme is to calculate a fair approximation of the claimant's wage loss and diminished earning capacity. Campbell v. IBM Corp., 867 P.2d 77 (Colo. App. 1993).

Average Weekly Wage from ABF

E. The parties stipulated that Claimant's AWW from ABF is **$1,266.53.**

Additional Average Weekly Wage as a Freight Expediter

F. Based upon the available figures, supplied by Claimant's own bankruptcy and tax records, the ALJ finds that Claimant's AWW – and as proposed by Respondents, and admitted to in the GAL – is **$141.58.** If one uses only the months of

January and February of 2018 (Ex. 13) [which the ALJ finds to be the more reasonable practice, since the month of March was not yet completed when the bankruptcy petition was filed], the AWW comes to $144.22; mere dollars' difference. While Claimant's figures invite some speculation, $141.58 is the most reliable figure available from the evidence. Claimant's AWW from 2/16/2018 through 4/30/2018 is therefore **$1408.11.**

Additional Average Weekly Wage for Pension Payments

G. Claimant concedes that the pension benefits- now paid retroactively in full by Employer to the Union – are not part of the AWW calculation herein.

Additional Average Weekly Wage for Medical Insurance- 5/1/2018 through 4/30/2018

H. As best can be ascertained from the record, Claimant was without medical insurance from Approximately May 1, 2018, until some date in August, 2018, when he was placed in his wife's insurance. In lieu of specific evidence, the ALJ adopts August 1, 2018 as such a date. Ergo, Claimant was without any health insurance for a period of three months. The ALJ adopts the COBRA figure for that 3-month period [**$420.25**]. While Cindy Barr sincerely believes that Claimant was familiar with the Union contract, the ALJ does not draw that inference based on her opinion alone. For a period of time, as found below, Claimant was adrift, without health insurance, and without knowledge of the alternatives which existed through the Union.

I. Since that time, Claimant has availed himself of his wife's policy, but at a cost of $645 to $665 per month. In lieu of a more specific figure, the ALJ adopts $655 per month, and imputes one-half of this figure to Claimant's portion [$655 ÷ 2 = $311 per month x 12 ÷ 52 = $71.77]. For the remainder of this time period, the ALJ finds that Claimant's medical costs are **$71.77** weekly for the 9-month period ending May 1, 2019 [when Claimant's insurance was reinstated]. The ALJ will not speculate further about what might happen moving forward with Claimant's now-reinstated medical insurance. The ALJ blends the COBRA figure and the spouse's figures thusly: [$420.25 x 13(weeks) = $5,463.25] plus [$71.77 x 39(weeks) = $2,799] = $8,262.00 ÷ 52 = **$158.88** for Claimant's additional Average Weekly Wage attributed to medical insurance. Claimant's cumulative AWW from all three sources, therefore, is found to be **$1567.00 -** for this one-year period.

Concurrent Employment during TTD

J. The final issue around which the parties disagree is how much TPD the Claimant is actually owed from the date of his injury through April 6, 2019, the date of the last Landstar commission statement. (Ex. 7). The Colorado Supreme Court in Elliott v. El Paso County and ICAO, 860 P.2d 1363 (1993) held that when determining a self-employed Claimant's post-injury AWW, reasonable depreciation should be deducted from his or her gross earnings when calculating temporary partial disability benefits. The ALJ in Elliott, *supra*, calculated the Claimant's post injury earnings by taking his

gross profit and subtracting the depreciation which was claimed on the Claimant's yearly tax return. The Court noted that decisions regarding the amount of a Claimant's average weekly wage and post injury wages fall solely within the determination of the ALJ.

Tax Year 2018 as Freight Agent and Uber Driver

K. Here, Claimant's 2018 tax return (Ex. 18) reflects gross revenue, before depreciation, of $53,234.00 from his freight expediting business (Landstar) and $21,870.00 from his Uber ridesharing business. (Ex. 18, pp. 490, 492). Claimant reports his 2018 profit (after depreciation) from his freight expediting business to be $17,885.00. He claimed a net loss of $9,449.00 from his Uber ridesharing business in 2018.

L At hearing, Claimant carefully distinguished his income (or loss) from the freight business, and that from what he made as a freight agent. "They're separate but distinct, ma'am. One [trucking] is an asset-based business, *one [freight agent] is not."* (hearing transcript, p. 40). Claimant further noted that as a freight agent, he had *one* freight client out of California that he dealt with…"and I continue that way to today." (hearing transcript, p. 25).

M. Upon examining the exhibits, the ALJ notes that Claimant began preparing his own tax return for tax year 2018. Until that time, he has used a professional tax preparer. Despite simply routing trucks from his home, presumably using a PC and a landline, Claimant depreciated 1000 square foot of his personal residence for a home office at part of his ('non-asset based') freight agent business. He also depreciated a $48,000 2015 Dodge Ram at 83.33% business usage for a business expense- again for a 'non-asset based' business, ostensibly run out of his home. The ALJ is skeptical that Claimant drove this Dodge Ram 15,000 miles per year to further a home-based business consisting of one California-based client.

N. Claimant claimed a Hyundai Sonata for his Uber business at 95% business, 5% personal. His self-prepared taxes purport to show a net loss for his Uber business – which generated $21,870 in gross revenue while he was actively driving. While Double Declining accelerated depreciation is permitted per IRS rules, the ALJ is skeptical that Claimant would persist in actually losing money week after week, were he really doing so poorly at it. According to Claimant, he even returned to Uber driving for a while, after recovering from his injury.

O. Respondents assert in their position statement [but only in their position statement] that Claimant's Uber activity during TTD payments was only discovered during surveillance. If so, even greater skepticism by the ALJ would be warranted for failing to report income while collecting TTD.

P. The issue facing the ALJ however, is what other 'reasonable' depreciation and expenses *can* the ALJ impose, other than what Claimant actually put on his tax

return? There is no competing evidence, nor guidance in the record from Respondents. In the end, despite the (not unreasonable) skepticism of Respondents, no clear, defensible alternative depreciation schedule exists in the record before this ALJ-for 2018. However reluctantly, the ALJ adopts the depreciation as outlined in Claimant's tax returns. Claimant's Uber income is effectively zero for the relevant time period.

Q. Claimant's income from his freight agent business, d/b/a Richard McArdle, is $17,885-but this is for tax year 2018 only. Those 2018 returns have been prepared, providing some sort of anchor to measure income. Further, Claimant operated his freight agent business (d/b/a Richard McArdle) for only a portion of tax year 2018, to wit: after his bankruptcy, beginning at the end of March of 2018. His 2018 income of 17,885 was thus earned over 39 weeks-not 52. Dividing $17,885 by 39 = **$458.59.** This is the weekly figure to offset from TTD payments, attributable to his (Landstar-funded) freight agent business, d/b/a Richard McArdle, for the period from 4/1/18 through 12/31/18.

Tax Year 2019 as Freight Agent

R. For tax 2019, no tax returns have been prepared. Thus, there is no anchor for 2019. There is no guidance for the ALJ to use, beyond what has been supplied. No testimony was elicited from Claimant how he intends to continue as a freight agent. It remains unknown how much additional income Claimant might derive from his freight agent business(es). It remains unknown if he will continue to depreciate his Ram truck using the same method, or how many miles he might drive servicing his client(s). It is unclear how he will claim his home office deduction. Certainly Claimant will not enjoy as generous depreciation schedule as he did in his first year of operation. What is clear (and all that is clear) from the record is that Claimant earned commissions from Landstar totaling $21,753.75 for 14 weeks in tax year 2019. In contrast to tax year 2018, the ALJ will not infer how Claimant will offset his earnings from Landstar for 2019. Therefore, Claimant's weekly income for the 14 weeks of 2019 is $21,753.75 ÷ 14 = **$1553.84**, to be offset against TTD payments made for the same period.

Tax Year 2019 as Uber Driver

S. Similarly, Claimant has received the benefit of generous depreciation and expenses from his Uber business for tax year 2018. He was allowed to claim a 'loss' for tax purposes (and for TTD purposes herein) and the ALJ has so found-for 2018. It appears Claimant not only depreciated his Hyundai on a double declining basis for 2018, but he also took 54.5 cents per mile driven – which factors in depreciation already. Thus, Claimant appears to have double-dipped his Hyundai depreciation for 2018 to magnify his losses. This, despite the fact that Claimant would not continue to operate as an Uber driver if it did not truly benefit him personally. Nonetheless, tax returns for 2018 at least exist, and the ALJ will not assume the role of tax auditor.

T. However, nothing in the record before the ALJ will allow similar speculation for tax year 2019. In this case, a prima facie case has been made - by

Respondents - that Claimant grossed $2843.28 for 9 weeks of Uber work in 2019. From the records supplied, Uber 'expenses and taxes' (presumably franchise fees and corporate taxes) are approximately 1/3 of gross income, leaving a net of $1895.43. That equals **$210.60** per week for the period ending 1/5/19 to 3/2/19. This will also offset Claimant's TTD payments made for the same period in 2019, and the ALJ so finds.

ORDER

It is therefore Ordered that:

1. Claimant's AWW from all sources is $1,567.00

2. Claimant's 2018 weekly income as a freight operator is $458.59, effective 4/1/2018 until the end of 2018.

3. Claimant's 2018 weekly income as an Uber driver is $0.

4. Claimant's 2019 weekly income as a freight agent is $1553.84, for each week he works in that capacity.

5. Claimant's 2019 weekly income as an Uber driver is $210.60 for each week he works in that capacity.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 8, 2019

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

- Who are the Deceased's eligible dependents?
- What death benefits are payable to the Deceased's dependents?
- What is the proper apportionment of death benefits between the dependents?
- Who should be the payee?

FINDINGS OF FACT

1. The Deceased was a Sheriff Road Sergeant for Employer. He died on December 12, 2018 in a motor vehicle accident while responding to a call.

2. Ms. M[Redacted] was not married to the Deceased at the time of his death. She was not dependent on the Deceased and stipulated she is not entitled to death benefits.

3. The Deceased and Ms. M[Redacted] had two children together. S.M. is the Deceased's natural daughter, born on November 29, 2006. She will reach age 18 on November 29, 2024 and age 21 on November 29, 2027. M.M. is the Deceased's natural daughter, born on May 3, 2013. She will reach age 18 on May 3, 2031 and age 21 on May 3, 2024.

4. The parties stipulated S.M. and M.M. were actually and wholly dependent on the Deceased for support at the time of his death.

5. Jared K[Redacted] is Ms. M[Redacted]'s natural son. Jared is not the natural child of the Deceased, and the Deceased did not legally adopt Jared. Jared was not dependent on the Deceased and is not entitled to death benefits.

6. The Deceased was not married at the time of his death, and has no children other than S.M. and M.M. The ALJ finds S.M. and M.M. are the only persons eligible to receive workers' compensation death benefits in connection with this claim.

7. S.M. and M.M. are each entitled to death benefits until age 18, or until age 21 if engaged in courses of study as a full-time student in an accredited school.

8. The parties have requested the death benefits be apportioned equally between S.M. and M.M., and the ALJ finds a 50-50 split is the most appropriate apportionment of benefits for the period both dependents are eligible for benefits. The ALJ further finds that, when S.M. or M.M. ceases to be eligible for benefits, their

respective share should be reallocated and paid to the remaining eligible child until terminated according to law.

9. The parties stipulated to an average weekly wage (AWW) of $1,006.36 and a corresponding compensation rate of $670.90 per week before offsets.

10. S.M. and M.M. were each awarded Social Security survivor benefits of $1,468.00 per month, effective December 2018. The parties stipulated to a weekly Social Security offset of $169.38 for each child.

11. Employer's policy XIV(C) provides "all drivers and passengers in any county-owned vehicle shall wear a seatbelt at all times while such vehicle is in motion." The Sheriff's Department advised seatbelts must be worn during regular patrol and normal duties. The Deceased knew of the policy because he acknowledged receipt of the Las Animas County policy manual.

12. The Deceased was not wearing a seatbelt at the time of the accident, contrary to Employer's established policy. The Deceased died, in part, because he was thrown from the vehicle, which could have been prevented had he worn his seatbelt.

13. The parties stipulated Respondent will reduce the death benefits by 50% based on the Deceased's willful violation of the seat belt safety rule.

14. The parties stipulated the safety rule reduction will be applied after the Social Security offset.

15. After offsets and reductions, S.M. and M.M. are each entitled to a net death benefit of $83.04 per week ($670.90 ÷ 2 = $335.45 - $169.38 = $166.07 x 50% = $83.04).

16. S.M. and M.M. live with Ms. M[Redacted] full time and she is now solely responsible for their support. Ms. M[Redacted] is willing and able to apply the benefits in S.M. and M.M.'s best interests. Ms. M[Redacted] has agreed to place S.M. and M.M.'s workers' compensation proceeds into separate accounts to be used solely for each child's respective benefit. The ALJ finds Ms. M[Redacted] is the best person to act as payee for S.M. and M.M.'s workers' compensation benefits.

CONCLUSIONS OF LAW

Death benefits are payable to the dependents of an employee who dies as a proximate result of a work-related accident. Section 8-42-115(1)(b), C.R.S. Dependents and the extent of dependency are determined "as of the date of the injury . . . and the right to death benefits shall become fixed as of said date irrespective of any subsequent change." Section 8-41-503(1), C.R.S. Children of the deceased under the age of 18 are presumed wholly dependent, and children between 18 and 21 years of age are presumed wholly dependent if they are engaged in courses of study as full-time students at any accredited school. Section 8-41-501(1)(b) and (c), C.R.S. As found, S.M. and M.M. are the Deceased's sole dependents, and were wholly dependent on the Deceased for support at the time of his injury and death.

Dependents are entitled to two-thirds of the deceased's AWW, subject to the maximum compensation rate in effect on the date of death. Section 8-42-114, C.R.S.; *Richards v. Richards & Richards*, 664 P.2d 254 (Colo. App. 1983). As found, the parties stipulated to an AWW of $1,006.36 and a weekly compensation rate of $670.90 before offsets.

Under § 8-42-114, C.R.S., workers' compensation death benefits shall be reduced by fifty percent of any Social Security survivor's benefits payable to deceased workers' dependents. As found, Respondent is entitled to a Social Security offset of $169.38 per week for each child.

Section 8-42-112(1)(b), C.R.S. provides for a fifty percent reduction of indemnity benefits "where injury results from the employee's willful failure to obey any reasonable rule adopted by the employer for the safety of the employee." The term "willful" means "with deliberate intent." The respondents need not present evidence about the claimant's state of mind or prove he had the rule "in mind" when he did the prohibited act. Rather, a "willful" violation may be inferred from evidence the claimant knew the safety rule and did the prohibited act. *Id*. The parties stipulated death benefits in this case should be reduced 50% based on a safety rule violation.

Death benefits shall be apportioned among multiple dependents in a manner the ALJ deems "just and equitable." Section 8-42-121, C.R.S. As found, the benefits should be apportioned equally between S.M. and M.M., as long as they are both eligible.

S.M. and M.M. are each entitled to a net payment of $83.04 per week. When S.M. or M.M. ceases to be eligible for death benefits, the payment shall be reallocated 100% to the remaining eligible child until terminated by law.

The surviving spouse or a friend may apply for death benefits on behalf of the deceased's minor children. Section 8-42-122, C.R.S. The ALJ has discretion to determine the manner and method of payment on behalf of minor children "in such manner as the [ALJ] sees fit." *Id*. As found, the benefits should be paid to Ms. M[Redacted] as payee for S.M. and M.M.'s benefit. Ms. M[Redacted] is the full-time custodial parent. The ALJ concludes Ms. M[Redacted] is willing and able to apply the benefits in the best interests of S.M. and M.M.

ORDER

It is therefore ordered that:

1. Respondent shall pay death benefits to S.M. and M.M. commencing December 13, 2018 and continuing until terminated according to law.

2. The benefits shall be apportioned equally. Respondent shall pay $83.04 per week for S.M. and $83.04 per week for M.M. When S.M. or M.M. ceases to be eligible, the benefits shall be reallocated 100% to the remaining eligible child.

3. The benefits shall be paid to Ms. M[Redacted] as payee, and shall be applied for the benefit of S.M. and M.M.

4. Respondent shall pay statutory interest at the rate of 8% per annum on all amounts not paid when due.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 8, 2019

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-073-549-001

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

[Redacted],

Claimant,

v.

[Redacted],

Employer,

and

[Redacted],

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on March 31, 2019 and concluded on June 24, 2019, in Denver, Colorado. The hearing was digitally recorded (reference: 3/21/19, Courtroom 1, beginning at 8:30 AM, and ending at 11:45 AM; 6/24/19, Courtroom 1, beginning at 1:30 PM, and ending at 11:00 AM).

The Claimant was present in person and represented by [Redacted], Esq. Respondents were represented by [Redacted], Esq.

Hereinafter [Redacted] shall be referred to as the "Claimant." [Redacted] shall be referred to as the "Employer." All other parties shall be referred to by name.

Claimant's Exhibits 2 through 10 were admitted into evidence, without objection. The ALJ overruled objections to parts of Claimant's Exhibits 1 and 11 and admitted these exhibits in their entirety. Respondents' Exhibits A through M were admitted into evidence, without objection.

Written transcripts of the evidentiary depositions of William Ciccone II, M.D., taken on January 16, 2019 (hereinafter "Ciccone Depo." followed by page and line references; Thomas Noonan, M.D., taken on March 12, 2019 (hereinafter "Noonan

Depo,." followed by page and line references) and, Michael [Redacted], taken on March 6, 2019 (hereinafter "[Redacted] Depo.). Also, the rebuttal evidentiary depositions of Dr. Ciccone, taken on April 17, 2019 (hereinafter referred to a "Ciccone Rebuttal Depo."); and, Dr. Noonan, taken on May 21, 2019 (hereinafter referred to as "Noonan Rebuttal Depo.") were admitted in lieu of the live testimony of these witnesses.

At the conclusion of the last session of the hearing, on June 24, 2019, the ALJ established a post-hearing briefing schedule: Claimant's opening brief was filed on June 28, 2019. Respondents' answer brief was filed on July 3, 2018. Claimant's reply brief was filed on July 8, 2019, at which time the matter was submitted for decision.

ISSUES

The issues to be determined by this decision concern compensability of a right shoulder event of March 31, 2018; if compensable, medical benefits, average weekly wage (AWW) and temporary total disability (TTD) benefits from March 31, 2018, through April 13, 2018, both dates inclusive, a total of 14 days.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. At the commencement of the hearing, the parties stipulated and the ALJ finds that the Claimant's AWW is $1,310, which yields at TTD benefit rate of $873.32 per week, or $124.76 per day.

2. On April 19, 2018, the Insurer issued a Notice of Contest stating that the Claimant's March 31, 2018, injury was not work-related.

3. The Claimant has worked as a helicopter pilot for twenty-eight years. Prior to flying helicopters for a living, he was a police officer for the Los Angeles Police Department. The Employer hired the Claimant on March 16, 2018, as a helicopter pilot. After his date of hire, the Employer required the Claimant to undergo two-weeks of training, which consisted of multiple simulated helicopter flights. On the last day of training, the Claimant would then perform a test flight in an actual helicopter known as a "check ride" (Hearing Tr., pp. 16-17: lns. 4-6; Hearing. Tr. , pp. 30-44: lns. 17-8).

4. To operate a helicopter, the Claimant explained that he had to use his right arm to control the "cyclic." He explained that the "cyclic" essentially acts as a steering wheel for the helicopter because it controls the blade. The left arm is used to operate the "collective," which will turn all the blades allowing the helicopter to either descend or rise (Hearing Tr., pp. 18-21: lns. 9-16). According to the Claimant he did not experience any pain or physical limitations in his right arm when performing the

simulator flights (Hearing Tr. p. 44: lns. 1-10). Employer records n evidence establish that the Claimant successfully completed his simulated flights on March 27, March 28, March 29, and March 30. Nowhere in these records is there any note about the Claimant appearing injured. In the record from March 30, the instructor, Ryan Daniels, recommended the Claimant for his "check ride" (Claimant's Exhibit 5, bates 10-13). The ALJ finds the Claimant's testimony in this regard credible and corroborated by extrinsic evidence in the record.

The Incident of March 31, 2018

5. On the Claimant's last day of training, March 31, 2018, he was scheduled to do the "check ride" with the training instructor, Michael [Redacted]. Prior to the "check ride," the Claimant had to do a "preflight check." This required him to review different components on the helicopter to make sure they were free from cracks, leaks, or anything that could lead to potential harm. When doing the "preflight check," the Claimant had to climb up onto the helicopter to check the rotor system. This required him to use his arms to climb up onto the helicopter and to hang onto the rotor blades. According to the Clamant, he was able to complete the "preflight The ALJ finds the Claimant' check" without any pain or physical limitations (Hearing. Tr., pp. 46-49: lns.24-21). The ALJ finds the Claimant's testimony credible and persuasive in this regard.

6. Around 10:00 PM, Supervisor Johnson asked the Claimant and another trainee, Chris [Redacted], to help move a helicopter dolly. According to the Claimant and [Redacted] helicopter dollies are usually transported with a tractor since they are very heavy.(Hearing Tr., p. 25: lns. 1-24; and p. 54: lns.4-6). Helicopter dollies weigh over 2,200 lbs. This was the first time the Claimant and [Redacted] had ever moved a helicopter dolly by hand (Hearing Tr., p. 54: lns. 4-6). Both the Claimant and [Redacted] complied with Johnson's request and attempted to move the dolly. In trying to move the dolly, the Claimant felt a tear in his right arm. He told [Redacted] and Mike [Redacted] (an instructor) that he had injured him right arm. [Redacted] then asked the Claimant if he needed an ambulance.

Medical Referrals

7. The Claimant told [Redacted] that he needed an ambulance; however, [Redacted] proceeded to call his boss and an ambulance never arrived. Eventually, the Claimant decided to drive himself to the hospital (Hearing Tr., pp. 52-57: lns.9-23). The Claimant arrived at Skyridge Medical Center just after midnight on April 1, 2018, where he was diagnosed with a ruptured bicep tendon (Claimant's Exhibit 9, bates 81). There is no persuasive evidence that the Employer made a specific medical referral on March 31, 2019, when the Claimant reported a work-related injury. Consequently, the Claimant chose Sky Ridge.

8. Sky Ridge referred the Claimant to Herbert Thomas, M.D., an orthopedist, for follow up at that time (Claimant's Exhibit 10, p.116). Instead, the Claimant went to see Thomas Noonan, M.D., an orthopedic surgeon who the Claimant had seen in the

past. The initial referral to Dr. Noonan came from Charles Henry Miranda, M.D., the Claimant's personal physician (Respondents' Exhibit C , pp. 021-022; Deposition of Dr. Noonan, March 12, 2019 p.15, ll. 1-9; Deposition of Dr. Ciccone, April 17, p. 11, ll. 5-10). Dr. Noonan was **not** within the authorized chain of referrals.

9. Six days after the Employer was aware of an alleged work-related injury, the Claimant was provided a Choice of Provider Acknowledgement on April 5, 2018 and the Claimant chose a Concentra clinic at 9330 S. University in Highlands Ranch (Respondents' Exhibit M).

10. The Claimant attended physical therapy and was released to full duty on April 9, 2018. (Ex. B , pp. 016-020; Ex. C , pp.021-022) Although he did see a provider at the chosen location, after being placed at MMI, he did not return.

11. In his reply brief, Claimant addresses Respondents' argument that the ALJ should order that they are not liable for the surgery performed by Dr. Noonan because he was not an authorized treating provider (ATP). Claimant further argues that authorization may occur if, "as part of the normal progression of authorized treatment for a compensable injury suffered by a claimant, **an authorized treating physician** (emphasis supplied) refers a claimant to one or more other physicians." *Bestway Concrete v. Indus.l Claim Appeals Office*, 984 P.2d 680, 684 (Colo. App. 1999). The question of whether a physician is an ATP is one of fact for the ALJ. *Suetrack v. Industrial Claim Appeals Office*, 902 P.2d 854 (Colo. App. 1995). As found herein abover, **no** ATP referred the Claimant to Dr. Noonan.

12. At hearing, the Claimant testified that he spoke with the Insurer about Dr. Noonan providing treatment for his injury (Hearing. Tr. , p.77: lns.1-20). There is no persuasive evidence that the insurer authorized Dr. Noonan in this conversation. In the record from April 9, 2019, Dr. McKinney and Dr. Corson, who were both ATPs, noted that the Claimant was "cleared by the orthopedist" who was Dr. Noonan. Dr. McKinney and Dr. Corson then cite to Dr. Noonan's determination that the Claimant was at MMI without restrictions to support their own determination on MMI and work restrictions (Respondents' Exhibit B). Their actions do not amount to authorization because they did not refer the Claimant to Dr. Noonan. Nonetheless, even assuming that Dr. Noonan is not an ATP, the Claimant argues that the ALJ may order that the Respondents are still liable for the surgery performed by Dr. Noonan. The ALJ does not find this argument persuasive however, it seems inequitable for the Respondents to silently accept the benefits of Dr. Noonan's surgery and not be liable for payment to him. Unfortunately, there is no specific delegation of equitable powers to construct authorization of medical providers in the Workers' Compensation Act—similar to the AWW portion of the Act. The law is clear that an ATP must make the referral to preserve the chain of authorized referrals. This did not happen here.

Medical

13. On April 2, 2018, the Claimant saw Kelly Lindauer, M.D. of Health Images at Castle Rock for an MRI (magnetic resonance imaging) of the right upper extremity (RUE). After reviewing the imaging results, Dr. Lindauer diagnosed the Claimant with a full thickness tear of the right biceps tendon and a tear of the superior labrum (Claimant's Exhibit 10, bates 119). The Claimant saw Dr. Noonan on April 5, 2018. In his report, Dr. Noonan stated that the Claimant "got complete resolution of his AC joint pain after the injection 3 weeks ago." Dr. Noonan then stated that the Claimant has a new injury after pushing a helicopter dolly. Dr. Noonan diagnosed the Claimant with a full-thickness tear of [the] long head bicep tendon at the glenohumeral joint." Despite the tear, Dr. Noonan indicated that the Clamant was able to return to work without restrictions (Claimant's Exhibit 8, bates 42-43). Casey McKinney, PA-C (Certified Physician's Assistant) saw the Claimant on April 9, 2018. She put the Claimant at maximum medical improvement (MMI). In doing so, she cited to Dr. Noonan's determination that the Claimant is able to return to work with no restrictions (Respondents' Exhibit B, bates 17-18). The ALJ takes administrative notice of the fact that "ability to return to work with no restrictions does not necessarily equate with MMI.. Consequently, the ALJ does not find PA-C Casey's opinion of MMI adequately founded or credible.

14. The Claimant was again seen by Dr. Noonan on June 6 and on August 21, 2018. Dr. Noonan noted a positive impingement exam. A repeat MRI (magnetic resonance imaging) scan showed an intact rotator cuff with capsular thickening and advanced AC arthritis. On August 29, 2018, Dr. Noonan performed a right shoulder arthroscopy with subacromial decompression, distal clavicle resection and debridement of biceps stump with a capsular release (Respondents' Exhibit H , pp.035-039).

The Claimant's Lay Witnesses, Including the Claimant

15. At hearing, the Claimant testified that his treating providers told him that it would take a few months for him to heal. Nonetheless, because he was a new hire, the he became concerned that taking too much time off from work could jeopardize his job. For this reason, he asked his treating providers to allow him to return to work. In order for this to occur, the Claimant had to complete a range of motion (ROM) test. At this time, Claimant's ROM had not become an issue and he successfully completed the test. On April 14, 2018, the Claimant successfully completed his check ride with Mike [Redacted]. Afterwards, the Claimant continued to work. He explained that, during this time, the Employer only required him to fly seven hours a month. Additionally, the Claimant was able to use autopilot when flying the helicopter. He explained that the autopilot controls the helicopter for everything other than the land and the take off. This feature allowed the Claimant to do his job despite the pain and limitations in his injured arm (Hearing Tr. pp. 59-64: 18-12).

16. Around the middle of May, the Claimant began to develop new symptoms within his shoulder. He also began to lose his ROM. Not knowing what the issue was, the Claimant went to see Dr. Noonan on June 8, 2018 (Hearing Tr. , pp. 64-67). In his report, Dr. Noonan noted that the Claimant reported continued pain in his right shoulder.

Dr. Noonan treated the Claimant with a steroid injection and recommended surgery if the symptoms persisted (Claimant's Exhibit 8, bates 47-48). The Claimant saw Dr. Noonan again on August 21, 2018. Dr. Noonan noted that the Claimant complained of worsening pain and instability in his right shoulder. After performing an MRI, Dr. Noonan noted capsular thickening in the right shoulder (Claimant's Exhibit 8, bates 50). Dr. Noonan performed surgery on the Claimant's right shoulder on August 29, 2018. In the operative report, Dr. Noonan diagnosed the Claimant with right shoulder degenerative anterior labral tearing; **adhesive capsulitis** with inferior capsular thickening; articular-sided partial-thickness **rotator cuff tear;** impingement; and acromioclavicular joint arthritis (Claimant's Exhibit 8, bates 53).

17. According to the Claimant, he dealt with shoulder problems in his AC joint prior to tearing his bicep in March of 2018. He explained that the issue with his AC joint only gave him pain, for which he would receive an injection about every six months. He further testified that he did not experience ROM issues in his right arm or shoulder until after his March 31, 2018, industrial injury (Hearing Tr., p. 66).

18. Chris [Redacted], the other individual involved in moving the dolly, testified at the June 24, 2019, hearing. Mr. [Redacted] is a long-time helicopter pilot who works for the Employer in Missouri. He also trained alongside the Claimant in March of 2018. He testified that [Redacted] asked the Claimant and himself to help move the dolly because the wind had changed direction. While moving the dolly, however, [Redacted] stated that the Claimant yelled that he hurt his arm. [Redacted] testified that he had seen Claimant throughout the two-week training and did not notice any display of pain or physical limitation. He also witnessed the Claimant perform the "preflight check" on March 31. He confirmed that the "preflight check" required the pilot to climb onto the helicopter. [Redacted] stated that the Claimant did not display any signs of pain or physical limitations when doing the pre-flight check. [Redacted] also testified that during his long career as a helicopter pilot, he has never moved a dolly by hand. On rebuttal, [Redacted] refuted [Redacted]'s testimony that he did not ask the Claimant and himself to move the dolly. He also refuted [Redacted]'s testimony that the Claimant followed [Redacted], touched the dolly, and yelled "my arm, my arm." [Redacted], although testifying by telephone, presented as straight-forward and able to answer questions without hesitation, sometimes in a quick sequence, which causes the ALJ to infer that [Redacted] did not have time to think about or contrive his answers—a sign of credibility.

Respondents' Lay Witnesses

19. Mike [Redacted] testified that on March 31, 2018, prior to the dolly incident, he allegedly went to shake the Claimant's hand and noticed the Claimant had to use his left hand to hold up his right arm to shake [Redacted]'s hand. [Redacted] admitted that, even though he was scheduled to fly with the Claimant, he made no attempt to determine if the Claimant was physically capable of operating the helicopter. [Redacted] then testified that he did not ask the Claimant to move the dolly, but instead went to move the dolly by himself. According to [Redacted], the Claimant then allegedly

followed him, touched the dolly, and yelled “my arm, my arm.” [Redacted] confirmed that the Claimant had a large knot in his arm after lifting the dolly ([Redacted] Depo. Tr., pp. 5-8: 19-11). [Redacted] admitted that, up until the dolly incident, there was no mention from anyone that the Claimant appeared injured. After the incident, [Redacted] completed an AIDMOR report, which is the protocol used by the Employer when documenting a work-related injury. Nowhere in the AIDMOR report, submitted on April 2, 2018, did [Redacted] make any indication that the Claimant was injured prior to moving the dolly. [Redacted] confirmed, that since the Claimant’s injury, the Employer put in place a new rule that all dollies be moved by a tractor and not by hand ([Redacted] Depo. Tr., pp. 26-30: 21-24). At hearing, the Claimant disputed [Redacted]’s testimony that he had to use his left hand to support his right arm when shaking his hand on March 31, 2019. The Claimant stated that this incident described by [Redacted] did not occur (Hearing Tr. pp. 67: 7-25). The ALJ finds that [Redacted]’s testimony is replete with inconsistencies and, as a whole does not make a lot of sense. On the other hand, the Claimant’s testimony was straight-forward, consistent throughout, credible and persuasive.

20. At the second session of the hearing, another training instructor, Jared [Redacted], testified that he had an identical incident in which the Claimant had to use his left hand to support his right arm to shake his hand. [Redacted] testified that it was obvious the Claimant was in pain when he went to shake his hand. Nonetheless, he admitted that he took no action in following up with the Claimant, or anyone else, even though the Claimant was scheduled to fly later with [Redacted]. [Redacted] originally testified that the incident occurred on March 31, 2018. On cross-exanimation, he was impeached with an Insurer record created shortly after the incident –created on April 4, 2018. The record stated that “Another co-worker (Jared [Redacted]) also said he [the Claimant] was off, when Jared went to shake his hand, Rob took his left hand to lift his right hand to shake Jared’s hand, and this was that day, before the reported incident on March 30, 2018” (Claimant’s Exhibit 11, admitted at the June 24, 2019 session of the hearing). After reviewing the record, [Redacted] stated that he did not remember the date of when he went to shake the Claimant’s hand, but that it was on the same day as the dolly incident. The Employer’s Safety Policy states that “Risk Management; Accident and Incident Reporting; and Safety Communications and Awareness” are core elements for all employees. [Redacted] agreed that these elements are essential to his job as a helicopter pilot instructor (Claimant’s Exhibit 4, bates 9). As with Mike [Redacted], the Claimant disputed Winter’s testimony that he had to use his left hand to hold up his right arm when shaking his hand stating that the incident did not occur (Hearing Tr. p. 67: 7-25). [Redacted]’ testimony concerning his alleged memory of the “hand-shaking” incident was impeached Indeed, the ALJ finds the Claimant’s testimony in this regard more persuasive and credible than the testimony of [Redacted] and [Redacted]. In fact, the ALJ draws a a plausible inference that moving the dolly by hand was not safe, with or without a formal safety policy against it, and it was convenient, an a plausible motive, for [Redacted] and [Redacted] to have an inaccurate memory of the timing of the Claimant’s injury in order to avoid accountability for ordering and participating in an unsafe practice, to wit, moving a 2,200 lbs.+ dolly by hand. On the other hand, a motive

for the Claimant to “fake” a work-related injury is simply not plausible in the context of the totality of the evidence.

Credibility

21. [Redacted] and [Redacted] had been training captains for several years at the airfield where the Claimant’s injury occurred. The ALJ draws a plausible inference that [Redacted] and [Redacted] were aware of and should have known that industry practice required the movement of the helicopter dolly by a tug or tractor. Regardless of whether the airfield had a specific written rule in place on March 31, 2018, [Redacted] and [Redacted] should have known that it was unsafe to do so by hand. The ALJ infers that after the dolly-moving incident, [Redacted] and [Redacted] had motives to disassociate the dolly-moving incident from the Claimant’s injuries.

22. The testimonies of both [Redacted] and [Redacted] are suspect in that neither individual took any action after allegedly witnessing the Claimant use his left arm to support his right arm to shake their hands. [Redacted] testified that it was “obvious” the Claimant was injured, yet [Redacted] failed to follow-up with the Claimant or inform anybody about the injury. Considering the fact that the Employer puts a high priority on safety, observing an injured pilot should give rise to an immediate safety concern. The failure of [Redacted] and [Redacted] to make any inquiry, after noticing the “Claimant was obviously hurt, “ creates a behavioral disconnect with their testimonies and goes against the overall credibility of their story. Furthermore, neither witness, who were in the position of supervisory employees included the “hand shaking incident” in the AIDMOR report (the AIDMOR report is the primary means by which the Employer makes a record of work-related injuries). Neither [Redacted] nor [Redacted] included any information about their respective encounters with the Claimant in the report. Additionally, both witnesses offered inconsistent testimony regarding the dates and facts surrounding the incident. The ALJ concludes as a matter of fact that the testimonies of these two gentlemen are unreliable and lacking in credibility.

23. The testimonies of [Redacted] and [Redacted] is almost identical to a fault. Indeed, other than being outweighed by the weight of credible evidence, the ALJ infers that both testimonies appeared to be synchronized and contrived in part. Nonetheless, [Redacted]’s and [Redacted]’ testimonies, purporting to support the theory that the Claimant was already injured when he dealt with the helicopter dolly, was not credible in light of the totality of the evidence.

William Ciccone II, M.D., Respondents’ Independent medical Examiner (IME)

24. Dr. Ciccone evaluated the Claimant once on December 26, 2018, at the Respondents’ request (Ciccone Depo., p. 4, lns. 4-15). Dr. Ciccone agreed with Dr. Noonan on the need for surgery (Ciccone Rebuttal Depo., p 4; lns. 9-25), however, it was Dr. Ciccone’s opinion that all of the Claimant’s conditions were pre-existing (Ciccone Rebuttal Depo., pp. 4, 5). The ALJ notes that Dr. Ciccone’s causality opinion lines up with the discredited testimony of Mike [Redacted] and Jared [Redacted],

however, the ALJ cannot draw any inferences from this coincidence. Ultimately, Dr. Ciccone's causality opinion is at odds with ATP Dr. Noonan's opinion. Although Dr. Noonan was not within the chain of authorized referrals, his opinions are nevertheless higjhly persuasive and credible. Dr. Noonan was the orthopedic surgeon who successfully operated on the Claimant's right shoulder. In the final analysis, the ALJ finds that Dr. Ciccone's "lack of causality" opinion is outweighed by the totality of the credible evidence. Therefore, the ALJ finds Dr. Ciccone's "lack of causality" opinion lacking in credibility.

Thomas Noonan, M.D., Orthopedic Surgeon

25. Dr. Noonan, who is an orthopedic surgeon, treated the Claimant for acromioclavicular arthritis prior to his industrial injury. Nevertheless, Dr. Noonan persuasively explained that the Claimant developed frozen shoulder after his bicep tear, which Dr. Noonan determined to be unrelated to the preexisting acromioclavicular arthritis. Dr. Noonan explained that frozen shoulder is an inflammatory reaction inside the shoulder joint that develops either after a traumatic injury or idiopathically. In determining whether the Claimant's frozen shoulder was post-traumatic or idiopathic, Dr. Noonan testified that with post-traumatic frozen shoulder "people have an injury, it sets off an inflammatory cascade in the shoulder. They develop subsequent stiffness and pain." With idiopathic frozen shoulder, Dr. Noonan stated that individuals have "absolutely no trauma history" only to wake up with pain in the shoulder. Dr. Noonan is of the opinion that the Claimant's frozen shoulder was the main pain generator in the Claimant's right shoulder and that had it not been for the work-related torn bicep tendon, the Claimant would not have developed the frozen shoulder nor would he have required surgery. (Noonan Depo, Tr., 10-13: 7-12); (Noonan Rebuttal Depo. Tr., pp. 5-7).

26. Regarding the delay in symptoms, Dr. Noonan stated that the inflammation from the bicep tendon tear progressed over time, creating capsular thickening and ultimately developed into frozen shoulder. Dr. Noonan recognized the Claimant's preexisting issues, but stated that it was the bicep tendon tear that "pushed the Claimant over the edge" and triggered the need for surgery. (Noonan Rebuttal Depo. Tr., pp. 7-9). Contrary to Dr. Cinccone's assertion that a bicep tendon tear never requires surgical intervention, Dr. Noonan is of the opinion that it can require surgical intervention. In the past year, Dr. Noonan has repaired three bicep tendon tears, and in the last ten years, he has repaired thirty bicep tendon tears (Noonan Depo. Tr., p. 14).

Ultimate Findings

27. For the reasons herein above specified, the lay testimony of the Claimant is credible and persuasive. The lay testimony of Mike [Redacted] and Jared [Redacted] is **not** credible.

28. For the reasons herein above specified, the expert opinions of ATP Dr. Noonan are credible and persuasive. The expert opinion of IME Dr. Ciccone on lack of causality is **not** credible.

29. Dr. Noonan was not within the chain of authorized referrals because Skyridge referred the Claimant to Dr. Thomas not to Dr. Noonan.

30. Between conflicting medical opinions, the ALJ makes a rational choice, based on substantial evidence, the accept the causality opinion of Dr. Noonan and to reject the causality opinion of Dr. Ciccone. The ALJ makes the same rational choice to accept the lay testimony of the Claimant and Chris [Redacted] and to reject the testimony of Mike [Redacted] and Jared [Redacted].

31. The Claimant has proven, by a preponderance of the evidence that he was able to work, without restrictions despite pre-existing back problems and treatment by Dr. Noonan. The incident of helping to move the helicopter dolly by hand was within the course and scope of the Claimant's employment and it caused the torn right biceps tendon to the point of the Claimant requiring medical treatment and RUE surgery plus the Claimant being temporarily and totally disabled for 14 days.

32. The Claimant has proven by preponderant evidence that all of his medical care and treatment for the torn right biceps tendon, leading up to treatment and surgery by Dr. Noonan, was authorized and within the chain of authorized referrals; and, it was reasonably necessary to cure and relieve the effects of the March 31, 2018 injury.

33. As found herein above, the parties stipulated and the ALJ found that the Claimant's AWW is $1,310, which yields at TTD benefit rate of $873.32 per week, or $124.76 per day.

34. The Claimant has proven, by a preponderance of the evidence that he was temporarily and totally disabled from March 31, 2018, through April 13, 2018, both dates inclusive, a total of 14 days.

35. The Claimant failed to designate a ripe issue concerning temporary disability from April 14, 2018, through the date of the last session of the hearing, June 24, 2019, thus, the Claimant failed to prove entitlement to temporary disability benefits during this period of time.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences

from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the lay testimony of the Claimant was credible and persuasive. The lay testimony of Mike [Redacted] and Jared [Redacted] was neither credible nor persuasive. As further found, the expert opinions of ATP Dr. Noonan were credible and persuasive. The expert opinion of IME Dr. Ciccone on "lack of causality" was **not** credible.

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Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting

medical opinions, the ALJ made a rational choice, based on substantial evidence, to accept the opinion of Dr. Noonan and to reject the opinion of Dr. Ciccone, on the issue of causality. The ALJ makes the same rational choice to accept the lay testimony of the Claimant and Chris [Redacted] and to reject the testimony of Mike [Redacted] and Jared [Redacted].

Compensability

c. An "injury" referred to in § 8-41-301, C.R.S., contemplates a **disabling** injury to a claimant's person, not merely a coincidental and non-disabling insult to the body. *See Henderson v. RSI, Inc.,* 824 P.2d 91 (Colo. App. 1991). *Also see Gaudett v. Stationers Distributing Comp*any, W.C. No. 4-135-027 [Indus. Claim Appeals Office (ICAO), April 5, 1993]. A priori, the consequences of a work-related incident must require medical treatment or be disabling in order to be sufficient to constitute a compensable event. If an incident is not a significant event resulting in an injury, claimant is not entitled to benefits. *Wherry v. City and County of Denver*, W.C. No. 4-475-818 (ICAO, March 7, 2002). The dolly-moving incident of March 31, 2018 meets the definition of "sufficient" to be compensable.

d. In order for an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Office,* 919 P.2d 207, 210, 210 (Colo. 1996). An injury "arises out of' employment if it would not have occurred **but for** the fact that the conditions and obligations of employment placed the employee in a position that he or she was injured." *See City of Brighton v. Rodriguez,* 318 P.3d 496, **2014 CO 7** presumption that an injury arises out of employment when an unexplained injury occurs during the course of employment. Thereupon, it is incumbent to show that non-work related factors caused the injury. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1) (c), C.R.S. *See Faulkner v. Indus. Claim Appeals Office,* 24 P.3d 844 (Colo. App. 2000)*; Eller v. Indus. Claim Appeals Office*, 224 P.3d 397, 399 (Colo. App. 2009); *Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277, 1279 (Colo. App. 2008). The question of causation is generally one of fact for determination by an ALJ. *Faulkner* at 846; *Eller* at 399-400. As found, the incident of helping to move the helicopter dolly by hand on March 31, 2018 was within the course and scope of the Claimant's employment and it caused the torn right biceps tendon to the point that the Claimant required medical treatment and RUE surgery, plus he was temporarily and totally disabled for 14 days.

Medical Referrals

e. The employer's initial right to select the treating physician is triggered once the employer has some knowledge of the facts concerning the injury or occupational disease with the employment and indicating "**to a reasonably conscientious manager**" that a **potential** workers' compensation claim may be involved. *Bunch v. Indus. Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006). As

found, the Employer made no medical referral on March 31, 2018, when the Claimant reported a work-related injury and the Claimant selected Skyridge.

f. All referrals must remain within the chain of authorized referrals in the normal progression of authorized treatment. *See Mason Jar Restaurant v. Indus. Claim Appeals Office,* 862 P. 2d 1026 (Colo. App. 1993); *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P. 2d 501 (Colo. App. 1995); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). As found, Skyridge referred the Claimant to Dr. Thomas. Instead, the Claimant saw Dr. Noonan, who was **not** within the chain of authorized referrals.

Medical

g. The employee must prove a causal relationship between the injury and the medical treatment for which the worker is seeking benefits. *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. Ct. App. 1997). Treatments for a condition not caused by employment are not compensable. *Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187, 1189 (Colo. Ct. App. 2002). An industrial accident is the proximate cause of a claimant's disability if it is the necessary precondition or trigger of the need for medical treatment. *Subsequent Injury Fund v. State Compensation Insurance Authority,* 768 P.2d 751 (Colo. App. 1988). In order to prove that an industrial injury was the proximate cause of the need for medical treatment, an injured worker must prove a causal nexus between the need for treatment and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). It is for the ALJ, as the fact-finder, to determine whether a need for medical treatment is caused by the industrial injury, or some other intervening injury. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). Respondents are liable for the "direct and natural consequences" of a work-related injury, including consequential injuries caused by the original compensable injury. *See Travelers Ins. Co. v. Savio*, 806 P.2d 1258 (Colo. 1985). The chain of causation, however, can be broken by the occurrence of an independent intervening injury. *See* 1 A. *Larson, Workers' Compensation Law,* section 13.00 (1997). As found, all of the Claimant's medical care and treatment for the torn right biceps tendon, leading up to treatment and surgery by Dr. Noonan, was causally related to the March 31, 2018 compensable event.

h. Medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment was and is reasonably necessary to cure and relieve the effects of the March 31, 2018 injury.

Average Weekly Wage (AWW)

i. An AWW calculation is designed to compensate for **total** temporary wage loss. *Pizza Hut v. Indus. Claim Appeals Office,* 18 P. 3d 867 (Colo. App. 2001). *See* §

8-42-102, C.R.S. As found, Claimant lost wages from the Employer and as stipulated and found, his AWW is $1,310, which is less than the State AWW for FY 17/18. The AWW yields at TTD benefit rate of $873.32 per week, or $124.76 per day.

Temporary Total Disability

j. The Claimant was temporarily and totally disabled from March 31, 2018, through April 13, 2018, both dates inclusive, a total of 14 days. Aggregate TTD benefits for this period of time equal $1,746.64.

k. The Claimant failed to prove entitlement to TTD benefits, on the ripe issue, from April 14, 2018 through June 24, 2018, the last session of the hearing.

Burden of Proof

l. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant sustained his burden on compensability, medical benefits, AWW, and TTD benefits from March 31, 2018, through April 13, 2018. The Claimant failed to sustain his burden on entitlement to temporary disability benefits from April 14, 2018, through June 24, 2018, the date of the last session of the hearing.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents shall pay the costs of all authorized medical care and treatment for the Claimant's torn right biceps tendon, with the exception of the surgical repair thereof by Thomas Noonan, M.D., who was **not** within the chain of authorized referrals, subject to the Division of Workers' Compensation Medical Fee Schedule.

B. Respondents shall pay the Claimant temporary total disability benefits at the rate of $873.32 per week, or $124.76 per day, from March 31, 2018, through April

13, 2018, in the aggregate amount of $1,746.64, which is payable retroactively and forthwith.

C. Any and all claims for temporary disability benefits from April 14, 2018, through June 24, 2019, are hereby denied and dismissed.

D. Respondents shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

E. Any and all issues not determined herein are reserved for future decision.

DATED this 9th day of July 2019..

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm.*

ISSUES

The sole issue is whether Respondent overcame the DIME's 18% whole person impairment rating by clear and convincing evidence. Respondent asserts Claimant suffered no work-related impairment, and the ATP's 0% rating is correct. Respondent withdrew the endorsed issue of apportionment, and Claimant withdrew the issue of medical benefits after MMI.

FINDINGS OF FACT

1. Claimant works for Employer as a tool rental clerk. Employer rents a variety of tools such as chainsaws, trimmers, lawnmowers, rototillers, and wood chippers. The job requires frequent heavy lifting, most commonly helping customers load and unload rented tools and equipment from their vehicles.

2. Claimant was 78 years old at the time of his industrial accident. Despite his advanced age, Claimant performed all duties of his job without difficulty or limitation.

3. Claimant suffered admitted injuries on April 12, 2018 when he tripped over a cart and fell face first onto a concrete floor. He struck the right side of his head and face on the concrete. He does not remember if he was knocked unconscious, but the next thing he remembers is sitting in the office with a coworker cleaning the cut on his left.

4. Claimant was taken by ambulance to the Penrose Hospital emergency department. He complained primarily of facial pain and neck soreness. A postinjury photograph shows Claimant lying on a gurney or hospital bed wearing a cervical collar with extensive bruising, lacerations, and dried blood around the right side of his face and right eye. A cervical CT scan showed "multiple level spondylitic changes . . . moderate to advanced multilevel intervertebral disc height narrowing and degenerative changes," but no acute findings. His facial lacerations were sutured and Claimant was discharged.

5. On April 17, 2018, Claimant saw his PCP, Dr. David Bird, to follow up for his injuries. Dr. Bird subsequently served as the primary ATP during the claim. Claimant's primary complaints were "confusion and slow thinking," facial swelling, right-sided headaches, and neck pain. Dr. Bird took Claimant off work for 2 weeks.

6. Claimant next saw Dr. Bird on April 25, 2018. He was "quite uncomfortable" because of pain in his neck and shoulders. Cervical rotation was limited due to pain, but flexion and extension were "good." He was tender about the paracervical muscle and bilateral trapezius muscles. Dr. Bird diagnosed a "cervical strain" and a neck contusion with muscle tightness and pain "secondary to fall at work." He referred Claimant to physical therapy and released him to light duty.

7. At his follow up appointment on May 14, Claimant told Dr. Bird his neck was feeling better with physical therapy, but he was still having difficulty lifting heavy objects at work. Dr. Bird noted he was "sitting with his neck a little bit crooked." Cervical range of motion was limited, and he was tender to palpation of the paracervical muscles and trapezius. Dr. Bird opined Claimant had a cervical strain with spasm.

8. On June 7, 2018, Claimant reported "intermittent neck discomfort," that worsened with "lifting heavy items repeatedly." Claimant's neck pain had improved but then worsened, so he went back to therapy. Claimant stated therapy was helpful and "he feels that he is improving each time that he goes." Claimant requested permission to lift heavier items at work, and Dr. Bird liberalized his restrictions to 50 pounds occasionally and 20 pounds repetitively.

9. At his June 25, 2018 therapy appointment, Claimant told the therapist "he is able to lift heavier objects at work, but if he has to lift by himself his right-sided neck becomes sore and painful."

10. On June 29, 2018, the therapist noted Claimant had no neck pain or headaches. But he was also noted to be tender to palpation of the right cervical muscles and upper trapezius, with painful range of motion.

11. Claimant returned to Dr. Bird on July 9, 2018. His neck was "no longer as sore as it was." He was tolerating occasional lifting of 50 pounds at work, with help. He thought therapy was still helping and had three more scheduled therapy visits. His range of motion was significantly improved from previous visits.

12. On July 10, the physical therapist noted, "his neck pain and headaches are gone." Confusingly, the therapist also noted tenderness to palpation of the right upper trapezius, right temporalis muscle, and right posterior cervical spine.

13. Claimant was discharged from physical therapy on July 19, 2018. The therapist noted "the patient reports he has no neck pain or HA and has no problems with lifting within his precautions at work." Yet again, this report contains contradictory information, because his right-sided cervical musculature was tender to palpation and he exhibited limited cervical extension.

14. Despite multiple internal inconsistencies, the physical therapy records show steady progress and significant benefit over time. What is less clear is whether Claimant's neck pain and headaches completely resolved, or simply improved substantially.

15. Dr. Bird placed Claimant at MMI on September 11, 2018, with no permanent impairment. Dr. Bird performed no physical examination and indicated all of Claimant's injury-related issues had "resolved." He noted Claimant "has been working and still having some limitations in his lifting. He feels ready to return to work without limitations." Dr. Bird released Claimant to regular duties and opined no further follow-up was necessary.

16. After being put at MMI, Claimant returned to his regular job with no restrictions. Within a few days of working full duty, he started having increased neck pain and headaches. He also felt like his neck would get "hung up" when he turned his head.

17. Claimant had a history of neck problems before the April 2018 work accident. He was involved in a motor vehicle accident on June 15, 2016 and suffered a "whiplash" type injury to his neck. Claimant saw Dr. Bird's partner the day of the accident and reported neck pain and a headache. He was prescribed a muscle relaxer and advised to take Tylenol. A CT scan showed cervical spondylosis and mild central stenosis at C6-7, but no acute structural injury. There is no further mention of headaches in Dr. Bird's records after June 15, 2016.

18. Claimant attended 11 physical therapy sessions for his neck pain from July 27 through October 3, 2016. The therapy records mention no problems with headaches. The October 3 discharge report indicated he was having "minimal soreness" with activity, and "minimal spasming and tightness" of the cervical paraspinal muscles. Cervical range of motion was described as "WNL."

19. Claimant saw Dr. Bird on October 6, 2016 for unrelated medical issues. The report contains no indication of any ongoing neck issues.

20. Consistent with the aforementioned records, Claimant credibly testified his neck pain resolved after therapy and he needed no further treatment.

21. Claimant saw Dr. Bird on June 15, 2017 for a routine primary care appointment. One issue they discussed was pain in the back of his neck. Claimant stated, "he will be looking a certain way and will be a quick onset of pain that also quickly resolves. This didn't start after his motor vehicle accident when he was rear ended." Claimant said the pain was "tolerable" and he was willing to "monitor" it. No treatment was recommended for the neck pain.

22. Claimant saw a chiropractor, Dr. Jason Gilles, on August 4, 2017 for "4 out of 10" neck pain. He stated, "the onset was gradual and began approximately 4 weeks ago. He reported no history of trauma." The pain was aggravated by moving his head. Claimant exhibited decreased ROM with flexion, right lateral flexion, right rotation, and left rotation. Dr. Gilles diagnosed a cervical "strain, segmental somatic dysfunction, myalgia, and muscle spasm. Dr. Gilles adjusted Claimant's neck and recommended Claimant return for treatment "twice per week."

23. Claimant saw Dr. Gillies again on August 9, 2017. He still had neck pain, but it had improved to 2/10. Dr. Gillies performed additional manipulations, and recommended Claimant return for treatment "once per week."

24. Claimant did not follow up with Dr. Gilles because his neck pain resolved and he did not see a need for further adjustments.

25. Claimant returned to Dr. Gillies on January 8, 2018 for recurrent "4 out of 10" neck pain that started "approximately 2 weeks ago." Dr. Gillies adjusted Claimant's neck and thoracic spine and recommended he return "twice per week."

26. Claimant sought no additional chiropractic treatment because his neck pain resolved, and he required no further adjustments.

27. There is no further mention of neck pain in the medical records until the work accident on April 12, 2018. Nor was any lay testimony presented to contradict Claimant's testimony his neck was pain-free in the three months before the accident.

28. Claimant saw Dr. Jack Rook for a Division IME on December 24, 2018. Claimant reported ongoing neck pain and headaches that he attributed to the work accident. Claimant disagreed his symptoms had completely resolved as of September 11, 2018. His primary complaint at the time of the DIME was headaches emanating from the right side of his neck. He said the headaches had been better while he was in physical therapy, and were now worse at work. Dr. Rook noted Claimant's cervical range of motion was decreased in all planes. He had increased muscle tone with severe tenderness of the right-sided paracervical and suboccipital muscles, and moderate tenderness of the left-sided paracervical muscles and bilateral upper trapezii. Dr. Rook diagnosed chronic neck pain, chronic right-sided headaches, tension headaches, and occipital neuralgia. He opined Claimant sustained permanent impairment "primarily as it relates to his cervical condition." He opined Claimant's headaches are likely triggered by his cervical condition. Dr. Rook calculated an 18% whole person impairment, comprised of 4% under Table 53 and 15% for range of motion.

29. Dr. Rook reviewed Claimant's preinjury medical records and explicitly noted the prior episodes of neck pain starting with the MVA in June 2016. Dr. Rook noted, "this patient had two episodes within the year prior to the injury in question that resulted in functional disability. However, he did not miss any work because of his condition. He had three chiropractic visits and one physician visit as a result of his condition." Dr. Rook apportioned out 2% of the range of motion impairment, resulting in a final whole person rating of 16%. Dr. Rook also opined, "An argument can be made that apportionment is not indicated in this case based on the formula provided in the Division IME paperwork. . . . [The] previous cervical condition was not work-related. The patient was working full time with no restrictions indicating that the previous condition was not independently disabling." Nevertheless, Dr. Rook ultimately decided to apportion the rating.

30. Dr. Rook issued an addendum report on February 7, 2019 in response to communication from the DIME unit. He noted,

> I recently received an incomplete notice from the Division of workers' compensation IME unit requesting that I amend the DIME report I performed . . . . Specifically, I was asked to address the following: "Apportionment: it appears that apportionment was applied to a non-work-related injury. As noted in your report, the previous cervical condition was not work-related. The patient was working full time with no restrictions indicating that previous

condition was not independently disabling. Apportionment can only be applied when there was a previous work-related injury to the same body part or if the injury was deemed independently disabling. Please review the report and clarify."

31. Dr. Rook opined apportionment was not warranted and amended the final rating to 18% whole person.

32. Claimant went back to Dr. Bird to discuss the increased neck pain and headaches because of working without restrictions. On January 31, 2019, Dr. Bird completed a request for accommodations in which he noted Claimant "still" had stiffness in his neck and decreased range of motion. He opined Claimant's cervical strain "may remain indefinitely." He requested Claimant have help lifting heavy objects and limit his lifting to no more than 50 pounds. Employer has accommodated the restriction and allowed Claimant to keep working.

33. Claimant saw Dr. Allison Fall for an IME at Respondent's request on February 28, 2018. Dr. Fall opined Dr. Rook clearly erred in assigning an impairment rating, because none of Claimant's ongoing neck pain or headaches was related to the April 2018 accident. Dr. Fall emphasized medical records showing Claimant's symptoms had "resolved" by September 11, 2018. Dr. Fall opined Claimant did not qualify for a Table 53 Specific Disorder rating because there was no objective evidence of any work-related spinal pathology. She opined any recurrent neck pain and associated range of motion deficits were due to the natural progression of Claimant's underlying degenerative disease, without contribution from the work accident. She further opined the cervical range of motion deficits measured by Dr. Rook are related to Claimant's advanced age and not the industrial injury.

34. Claimant's testimony regarding the onset, nature, progression, and duration of his neck pain and headaches was generally credible.

35. Respondent failed to overcome the DIME rating by clear and convincing evidence. Dr. Fall's opinions amount to "mere differences of medical opinion" regarding causation of Claimant's ongoing neck pain and headaches. Respondent did not prove Dr. Rook's 18% impairment rating is "highly probably incorrect."'

CONCLUSIONS OF LAW

A DIME's determination regarding whole person impairment is binding unless overcome by "clear and convincing evidence." Section 8-42-107(8)(C). The DIME's determination regarding the cause of the claimant's impairment is an "inherent" part of the diagnostic assessment that comprises the DIME process of determining MMI and rating permanent impairment. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1988). Therefore, the DIME's determination that a particular impairment is or is not related to the industrial injury is binding unless overcome by clear and convincing evidence. *Id*. Clear and convincing evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App.

2002). The party challenging a DIME's conclusions must demonstrate it is "highly probable" that the impairment rating is incorrect. *Qual-Med*, 961 P.2d 590 (Colo. App. 1998); *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A "mere difference of medical opinion" does not constitute clear and convincing evidence. *E.g., Gutierrez v. Startek USA, Inc*., W.C. No. 4-842-550-01 (March 18, 2016).

As found, Respondent failed to overcome Dr. Rook's 18% whole person rating by clear and convincing evidence. Dr. Rook's opinion that Claimant's ongoing neck pain and associated headaches are causally related to the admitted accident is a reasonable interpretation of the available evidence. While there is no question Claimant had pre-existing degenerative changes in his cervical spine, he did not need significant or regular treatment before the accident. In the sixteen months before the accident, his only treatment consisted of three visits to a chiropractor, which corroborates his testimony the neck pain was episodic and well managed. Before the accident, Claimant worked a relatively physical job without difficulty; since the accident, he has not been able to tolerate heavy lifting without exacerbating his neck pain. His pain improved with therapy and work restrictions, but when he tried to return to regular duties, it immediately flared. He now has a permanent restriction of no lifting more than 50 pounds, whereas he did not need restrictions before the accident. Fortunately for him, Employer agreed to accommodate Claimant's restrictions, or he may have been forced to stop working. There is no persuasive evidence Claimant suffered from chronic cervicogenic headaches before the accident, which now is his primary problem. The persuasive evidence supports Dr. Rook's determination Claimant has permanent impairment related to his industrial injury. He has had objective findings of soft tissue injury including muscle spasm and increased muscle tone during his treatment and at the DIME. By the time he saw Dr. Rook, Claimant had crossed the threshold requirement for "six months of medically documented pain and rigidity, with or without muscle spasm" required to qualify for Table 53 cervical rating. The mere fact that reasonable physicians can disagree regarding the evidence in this case does not rise to the level of clear and convincing evidence necessary to overcome a DIME.

ORDER

It is therefore ordered that:

1. Respondent's request to overcome the DIME regarding permanent impairment is denied and dismissed.

2. Respondent shall pay Claimant PPD benefits based on Dr. Rook's 18% whole person rating.

3. Respondent shall pay Claimant statutory interest of 8% per annum on all benefits not paid when due.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or

service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 10, 2019

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that she suffered a compensable injury to her lower back on or about November 29, 2019?

II, Has Claimant shown, by a preponderance of the evidence, that she is entitled to all reasonable and necessary medical treatment, which is related to her work injury?

STIPULATIONS

I. Claimant's Average Weekly Wage is $580.00.

II. If compensable, Claimant's Authorized Treating Physician is Dr. Marcus Button of Button Family Practice in Canon City.

III. If compensable, Claimant would be entitled to Temporary Total Disability payments until terminated by operation of law.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

The Work Incident

1. Claimant began working for the Employer on November 26, 2018, three days prior to her work incident. (Ex. 4, p. 11). She underwent a pre-employment physical earlier the same month, before being hired by the Employer. At hearing, Claimant testified that the nurse practitioner performing the physical examined her back and noted zero abnormalities. She reported no back pain or leg weakness at that time, nor was she limited by her back or legs in any way.

2. The physical was performed by Alicia Kielas, FNP-C on November 7, 2018. (Ex. 5, p. 16). The pre-employment physical indicates that Claimant was fit to perform her duties as a youth development specialist with the Employer. *Id.* Nurse Practitioner Kielas reviewed the job description and felt Claimant was able to perform the essential functions of the job. She specifically documented that Claimant had no back abnormalities. *Id.* at 19.

3. Claimant testified at hearing. The incident occurred on Thursday, November 29, 2018. On Monday and Tuesday of that week, her training consisted primarily of meeting people, slideshows, bookwork, etc. Claimant testified that they began the physical portion of their training on Wednesday, November 28, 2018. The physical training followed the Employer's "Safe Crisis Management Manual." (Ex. 13). Employees were asked to practice and demonstrate abilities to perform safe "takedown" and "restraint" maneuvers should they be required to intervene in a physical manner with one or more of their clients.

4. Claimant woke up the next morning, November 29, 2018, feeling "Fine" and experiencing no back or leg symptoms. She continued the physical training beginning the morning of the 29th. Claimant testified that they followed the training manual. She believes they completed the training up until 'floor assists'. She estimated that the training began that morning around 9:00 a.m. Claimant testified that she recalled a female trainer asking her if she was okay, as apparently Claimant had an expression of discomfort on her face.

5. Claimant and the rest of the trainees broke for lunch around noon, after the morning training session was completed. She was given an hour for lunch, off-site. She testified that she did nothing during her lunch hour which could have caused her back injury. Claimant's legs were noticeably "wobbly" to her during the lunch hour; however, the afternoon portion of the class was primarily a seated slideshow presentation that lasted approximately two hours.

6. The instructor broke the class for a break after the slideshow had been completed. It was at this time that Claimant attempted to stand up and simply could not do so. She explained that she could not bear any weight on her feet, and it took the assistance of two co-workers to get her to her feet. As Claimant attempted to walk and regain feeling in her legs, they completely gave out. She fell to the ground, and struck her head against the wall behind her. An ambulance was called.

The Medical Records

7. AMR ambulance records indicate: She [Claimant] denied any strenuous activity or any trauma to her legs or back. [We] got an initial set of vital signs. We helped patient to stand, but she couldn't bare [sic] any weight on her legs. (Ex. H, p. 101).

8. Claimant was originally transported to St. Thomas More Hospital in Canon City, Colorado. (Ex. 8). The 'History of Present Illness' upon arrival at the emergency room states as follows:

> This is a 29 y.o. female who comes in with bilateral leg weakness that occurred less than an hour prior to arrival. She was at work performing some takedown techniques and on her knees for 5-10 minutes for a few separate occasions. She was then sitting for greater than two hours at her desk. When she started to stand up she was very weak in both legs. She was able to stand but when she bent her knees she fell and fell back and struck her head." *Id.* at 55

Claimant testified that she could not recall when she first noticed the pain in her back versus the symptoms in her legs.

9. A MRI of Claimant's lumbar spine was performed at St. Thomas More Hospital on November 29, 2018. Per the radiologist report's "Findings" the MRI revealed:

> L3-4 level demonstrates a **clinically significant central disc herniation which appears acute. This is severe.** Neural foramina not significantly involved. Facet and ligamenturm flavum hypertrophy.
>
> L1-2 level demonstrates a clinically significant *right-sided* likely chronic focal disc herniation which moderately encroaches upon thecal sac and right neural foramen. Mild ligamentum flavum and facet hypertrophy. (Ex. G, p. 97, Ex. 11. P 110) (emphasis added).

10. A CT scan of Claimant's head was also obtained which revealed no acute intracranial processes. (Ex. G, p. 98).

11. Attending physicians anticipated, based on these findings - specifically the *L3-L4* - that Claimant would likely need urgent back surgery. (Ex. 8, p. 59). Claimant was then sent as a direct admit to Penrose Hospital in Colorado Springs for further evaluation and treatment.

12. Claimant was transferred to Penrose St. Francis Hospital in Colorado Springs, Colorado and evaluated by Dr. David Smoley, M.D. on the night of November 29, 2018. (Ex. E, pp. 33-38). Claimant reported to Dr. Smoley she had been at her training earlier this date "working on these maneuvers without any kind of problems." She denied any specific low back pain to Dr. Smoley, but complained primarily of leg weakness and leg heaviness in the quadriceps region bilaterally. He said that it was possible Claimant was experiencing some *meralgia paresthetica* given Claimant's obesity. Dr. Smoley began Claimant on some steroids, muscle relaxants, pain control, and some sliding scale insulin.

13. Claimant was evaluated by a neurosurgeon; however, as time progressed, the leg weakness and numbness slowly dissipated. At the time of discharge the next day, it was noted that her legs were working significantly better. (Ex. 7, p. 25). It was recommended that Claimant follow up for more non-invasive treatment before discussing possible surgery. *Id. at 48.*

14. According to neurosurgeon Dr. Christopher Tomac, Claimant presented with an episode of "lower extremity weakness yesterday [Nov. 29], status post physical activity at work." (Ex. 9, p. 94). Claimant denied any history of spinal injuries. Dr. Tomac did not recommended surgery at this time. However, Dr. Tomac recommended that Claimant undergo pain management, physical therapy, and "when necessary," a surgical follow up. *Id. at 95.*

15. Claimant established care with Button Family Medicine on Monday, December 3, 2018 as the ATP for this claim. Her first visit to Button Family Medicine after this incident was on December 3, 2018. (Ex. 10). Claimant complained of back pain at this time, but denied any history of back injuries. She was seen by Tonia Bershinsky, FNP-C. Work restrictions were imposed on Claimant, including no lifting more than 10 pounds, no pushing or pulling, no sitting for more than 30 minutes, and no twisting or bending at the waist. *Id. at 103.* Claimant was written a prescription for physical therapy based on a diagnosis of "Lumbar pain." *Id.* at 104. It was also requested by NP Bershinsky that Claimant obtain another lumbar MRI and undergo physical therapy and pain management for her 'back injury' and her 'lumbar disc herniation.' *Id.* at 108.

16. Claimant's last medical appointment to date is her December 10, 2018 appointment with Button Family Practice. She reported she was still suffering from lumbar back pain with radiculopathy. Claimant was recommended to participate in physical therapy and was referred for a follow-up neurosurgery consultation. (Ex. C, p. 21). Claimant was again released to modified duty and was provided the restrictions of no lifting, carrying, pushing, or pulling more than 10 lbs., walking and standing as tolerated, sitting only 30 minutes at a time, and no twisting or bending at the waist. *Id.* Although her ATP wanted a new MRI and for Claimant to undergo treatment, the claim was denied.

17. Claimant testified that she continues to experience symptoms to this day, which she relates to the November 29, 2018 incident. She continues to experience daily back pain, with a pins and needles sensation going down her legs to her feet. Claimant returned to her Employer the next Monday, December 3, and was informed that she would not be able to return to work until she has clearance to work full duty.

Dr. Rook's IME Report

18. Claimant underwent an IME with Dr. Jack Rook at the request of Claimant's counsel on April 1, 2019. (Ex. 12). Dr. Rook's history documents that

Claimant was at work on November 29, 2018 and was involved in very-hands-on, physical training. He based his opinion both on Claimant's history, and the Safe Crisis Management manual that Dr. Rook personally reviewed. Dr. Rook opined that there appeared to be heavy lifting requirements while bending and twisting.

19. Claimant told Dr. Rook that an instructor had asked her if she was okay because she appeared to be in discomfort. Claimant told the instructor that her legs were bothering her, but she felt she could finish out the day. Dr. Rook noted that Claimant was never able to get the repeat MRI or any physical therapy because her claim was denied, she had no treatment since December 10, 2018.

20. At the time of his exam, Claimant was still reporting constant low back and bilateral hip pain, along with the numbness, tingling, and weakness in both legs. *Id.* at *117.* Dr. Rook's physical examination documented moderate to severe tenderness at the L2, L3, and L4 spinous processes, consistent with the MRI findings. *Id. at 118*. There was a palpable spasm with severe tenderness in bilateral paraspinal musculature at these levels. The sacroiliac joints were not tender. Claimant reported an increase of low back pain with spinal flexion and extension. *Id.*

21. Dr. Rook diagnosed Claimant as suffering from low back pain, an acute disc herniation at L3-4, discogenic pain, a probable component of facet mediated pain, and muscle spasm in the low back bilaterally. (Ex. 12, p. 118). Dr. Rook ultimately concluded that the aforementioned diagnoses were more likely than not a direct result of Claimant's work activities on November 29, 2018.

22. Dr. Rook gave a list of reasons as to why he felt the Claim was compensable:

- The patient had no prior history of a low back injury[1];
- She had never treated with a medical provider for her back or her lower extremity injury;
- When she arrived at work on November 29, 2018, she was having no issues with her back or lower extremities;
- She developed weakness and pain in both legs while performing physically demanding activities as described above, while engaging in the "safe crisis management" course at her workplace;
- The activities performed included lifting a co-worker while twisting, bending, and pulling. Such an activity places significant stress on an individual's low back structures, especially bending and twisting while lifting;
- She was not involved in any other traumatic events around the time of this incident to account for the development of this condition;

[1] Although the pre-injury physical documented that Claimant had a prior "back injury," the ALJ credits the testimony of Claimant that she never had an injury per se, rather general soreness that never required medical attention as there are no medical records to suggest otherwise.

- She reported the incident immediately, and was taken by ambulance from work to the St. Thomas More emergency room for workup which demonstrated a large acute herniated disc at the L3-4 level. This condition necessitated hospital admission; and
- She filed paperwork in a timely fashion and saw a company directed work comp doctor within days of the incident. (Ex. 12, p. 119).

Dr. Burris' IME Report

23. Claimant underwent an IME with Dr. John Burris at the request of Respondents on April 16, 2019. (Ex. A, pp. 4-10). Claimant's chief complaint at the time of this evaluation was her low back pain. Claimant provided a similar history, i.e., that she did not recall a specific traumatic event, but that near the end of her morning session her legs began to "feel funny." After returning for a few more hours of watching presentations while seated, Claimant attempted to bear weight when she fell and struck her head before being transported by ambulance to the Emergency Room. As of April 16, 2018, Claimant was reporting ongoing lower back pain at a level of 5 out of 10, along with the ongoing episodic pins and needles running through her legs down to her feet. At his examination, Dr. Burris noted an essentially normal lower back examination.

24. Dr. Burris ultimately opined that Claimant did not sustain an injury to her lower back at work on November 29, 2018. (Ex. A, pp. 9-10). He reasoned that the clinical presentation was "somewhat odd," but most importantly, that she did not identify any specific event or trauma at work on the date in question. Dr. Burris opined that Claimant could have been experiencing *meralgia paresthetica. Id.* at 10.

25. Dr. Burris opined that the MRI findings from the date of the injury showing an acute disc herniation were likely independent in nature and unrelated to the work incident for 3 reasons: 1) nature of the reported workplace activities on 11/29/2018 (which would not be sufficient to cause a disc injury, 2) nature of and progression of her symptoms (nonspecific leg weakness resolving within hours, not consistent with an acute disc injury), and 3) documented non-focal examinations which do not correlate to the findings. (Ex. A, p. 10).

26. Dr. Burris issued a supplemental report dated May 23, 2019 after receiving a copy of Dr. Rook's IME report. (Ex. A, pp. 1-3). Dr. Burris reiterated his opinion that the activities Claimant was performing were not enough to cause her disc herniation, and Dr. Rook's opinions did not change his. *Id at 2.*

Dr. Burris' Deposition Testimony

27. Dr. Burris also testified via deposition on May 20, 2019 as a Level II accredited expert in occupational medicine. Early on, the following exchange took place:

> Q. ……And so on those – how were those techniques described to you by Ms. Jacobs in your examination?
> A. She didn't go into a lot of detail. She just said physical takedown and restraints, and just described it as being a physical activity."
>
> Q. Right. So based on that description, which is what you are basing your analysis on, would you say the activities or in the maneuvers that she performed during this training would be enough to establish causation under the circumstances?
> A. **Potentially.** It depends on what the ultimate outcome is, what the diagnosis is." (emphasis added).
>
> Q. So as the facts exist now, based on your examination, how she described them to you, would you say that causation is established based on her description of these takedown techniques?
> A. Well, it's **really hard to say.** As I pointed out in my report, her presentation is not straightforward; it's pretty odd…..(emphasis added)

28. Dr. Burris opined although the November 29, 2018 MRI indicated Claimant has subacute findings at the L4-5 level and severe, acute findings at the L3-4 level, the presentation of her symptoms do not align with the diagnosis of a disc herniation. Dr. Burris testified that her lack of initial pain, delayed onset of numbness, and resolution of symptoms within hours is not consistent with the typical presentation of symptoms associated with a disc herniation. Furthermore, Dr. Burris testified that even though the findings of the MRI revealed what the radiologist described as an "acute" herniation, "acute" could mean a period of days or weeks and is not always associated with an immediate event within a period of hours.

29. Dr. Burris noted that while Claimant did participate in reported rigorous physical restraint training for a number of hours before her episode of bilateral leg numbness, she did not report any specific events, traumas, or pain associated with these activities and reported no problems over her lunch break. Rather, he concluded her legs began to feel numb after she had been sitting for approximately 2-3 hours that afternoon and noted this numbness could represent *meralgia paresthetica* (a non-occupational condition), which is more consistent with the onset of symptoms after prolonged sitting (and associated with her body habitus, independent of her activities). Additionally, Dr. Burris emphasized that

Claimant demonstrated a resolution of symptoms within hours, which is not consistent with a significant injury. Dr. Burris noted that his interview with Claimant, the physical examination, and records review did not reveal any specific event or trauma on the date in question which he could point to as the cause for Claimant's disc herniation.

30. Dr. Burris agreed that there is no medical record to indicate she ever treated for any numbness, tingling, or any sort of back pain or injury prior to the November 29, 2018 work event. Moreover, Dr. Burris was completely unaware of the pre-employment physical Claimant took 22 days before the incident. Dr. Burris disagreed that lifting while bent or twisting is a common way to herniate a disc in the lumbar spine; however, he did concede that it does put more stress on the spinal elements, which does in fact include the discs.

Dr. Rook's Hearing Testimony

31. Dr. Jack Rook testified via telephone at hearing. He was qualified as a Level II accredited expert in the fields of physical medicine and rehabilitation, pain management, and electrodiagnostic medicine. Dr. Rook confirmed he was unaware of any record demonstrating that Claimant had been evaluated or treated for prior back pain. He indicated that he was not in possession of records from AMR. Dr. Rook noted that he had reviewed the Safe Crisis Management manual, and that there is evidence of twisting, grabbing, pulling, and lowering people to the floor. Therefore, he opined, there appeared to be heavy lifting requirements while bending and twisting. It was his opinion that this type of activity "places a tremendous amount of stress and force on the lower lumbar spine."

32. Dr. Rook testified that the lumbar spine MRI—taken the date of the injury—showed an acute central disc herniation at L3-4 and a moderately severe right sided likely subacute disc herniation at L1-2. Dr. Rook opined that the cause of these particular findings was due to her job. The initial emergency records do not reflect complaints of back pain at the time. Assuming Claimant was not having actual pain in her back at that moment does not mean she did not herniate a disc. As Dr. Rook expressed, if the disc was only pressing on the motor nerves at the time, there would likely be no back pain and only leg symptoms. Dr. Rook also explained that there are a lot of people who get herniated discs that have no actual back pain; simply leg symptoms.

33. Dr. Rook testified that Claimant's leg symptoms as expressed were consistent with the MRI findings. Dr. Rook's rationale is that because she had severe central canal stenosis, that would account for weakness in both legs, as opposed to foraminal stenosis where the disc herniates to one side or the other.

34. Dr. Rook also addressed Claimant's presentation of severe leg symptoms that mostly resolved while she was at the emergency room, only to return within days. It is unusual, though there is a medical explanation. Dr. Rook

explained that after Claimant arrived at the ER, she was given an infusion of intravenous steroids to reduce inflammation. The inflammation can reduce quite quickly, relieving the pressure on the nerve(s) and allowing feeling back into her legs.

35. At the time of Dr. Rook's IME, Claimant continued to report constant low back and bilateral hip pain with intermittent numbness, tingling, and weakness of her legs. Dr. Rook opined that the continuing nerve symptoms are likely due to ongoing irritation of the originally affected nerve roots. It was Dr. Rook's opinion that the disc material likely had not resorbed by the time of his examination. He further stated, "It's probably still there, and with certain movements, it – it likely impinges on the nerve roots in the central canal.

36. Dr. Rook also provided his rationale for why Claimant was not suffering from *meralgia paresthetica*. This condition only affects numbness on the outside of the thighs and does not involve the legs or the feet, nor does it cause weakness, because those are just sensory nerves, and not motor nerves.

37. Dr. Rook was asked at hearing whether he agreed with Dr. Burris' statement that the mechanism of injury in this case simply did not produce enough force to cause Claimant's herniated discs. Dr. Rook inquired if these acute MRI findings are not related to the strenuous work activity, what would they be related to? He maintained that the activities Claimant was performing were classic activities associated with development of spinal issues, whether musculoskeletal or disc related. Dr. Rook opined this stress on the spine "is frequently associated with disc herniations."

38. Dr. Rook also disagreed with Dr. Burris's second rationale for lack of causation being Claimant's progression of her symptoms, regarding the leg weakness resolving within hours. Dr. Rook reiterated that this is explained by the very fast acting IV anti-inflammatories that she received at the ER.

39. Regarding Dr. Burris's third rationale that there was no causation because of documented, non-focal examinations which do not correlate to the findings, Dr. Rook disagreed, and opined that Claimant's symptomatology is certainly consistent with the imaging and her entire clinical picture.

Ken Orth's Hearing Testimony

40. Ken Orth testified at hearing. He was the training supervisor for Employer, and was working on November 29, 2018. Mr. Orth testified that the goal of the safety training is to be able to intervene and deescalate the situation; however, if those tactics fail, the employee must be able to physically restrain a hostile youth. Mr. Orth testified that prior to doing any of the physical training, the participants are required to stretch and warm up, and that he asks if anybody is having any issues that would impact their ability to perform the safety training.

41. Mr. Orth testified that Claimant did not state that she was having any problem that morning. Mr. Orth indicated that Claimant did not mention any problems until the afternoon session when she attempted to stand up and could not because of leg weakness. Mr. Orth stated that he overheard Claimant tell EMS that she moved out of the medical field because she had a back injury from lifting patients. [The ALJ notes that there is no mention of a prior back injury by Claimant in the AMR records.] (Ex. 6).

42. Mr. Orth testified that Claimant did not appear to be in any distress during the physical training on November 28, 2019. When asked if the next morning [November 29] anybody was having any issues that may prevent them from performing the activities, nobody indicated they did, including Claimant. As far as Mr. Orth is aware, Claimant showed up to work exhibiting no outward symptoms of pain or weakness. However, she left in an ambulance due to near total loss of function of her lower extremities.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado is to assure quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1).* Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as the fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990) Moreover, the ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim*

Appeals Office, 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion).

C. In this instance, the ALJ finds Claimant to be sufficiently credible in recounting the work incident, and in describing her ongoing symptoms to her medical providers to the best of her abilities. While there are some inconsistencies in her version of events (most notably when she felt and reported back pain), the ALJ will not hold Claimant to a standard of exactitude to still be believable. This was no doubt a frightening and traumatic event, with medical histories being asked in differing contexts, in different formats, by different providers, to an unsophisticated patient. Without more, the ALJ cannot concluded she is purposefully lying.

D. Similarly, the ALJ finds Mr. Orth to be a credible and sincere individual. For reasons that will remain unclear, apparently Claimant made a statement to AMR (and overheard by Mr. Orth) to the effect of having a prior back injury. No further context is provided for such a statement, i.e., did she mean 'pain' vs a documented 'injury'? When? Was she ever treated? While Mr. Orth apparently heard a statement to this effect, it is notable that AMR personnel – assuming they heard it too - did not feel it warranted documentation in their reports. Without more, the ALJ will not conclude that Claimant actually had a preexisting back *injury* such that compensability can no longer be found.

E. There are two physicians who have offered their professional opinions, both in reports, as well as in sworn testimony. Those opinions differ, as is often the case. The ALJ finds both physicians to be equally sincere, professional, and credible in rendering their respective opinions. The ALJ's analysis, as outlined below, rests on *persuasiveness*, rather than truthfulness towards the tribunal.

F. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability, Generally

G. A claimant is required to prove that an injury arose out of and in the course of the claimant's employment by a preponderance of evidence. *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844 (Colo. Ct. App. 2000). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Indus. Comm'n v. Jones*, 688 P.2d 1116, 1119 (Colo. 1984).

H. Arising out of employment requires claimant to prove "a causal connection between the employment and injuries such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract." *Madden v. Mountain W. Fabricators*, 977 P.2d 861, 863 (Colo. 1999). Course of employment refers to the time, place and circumstances of the claimant's injury. *Wild West Radio, Inc. v. Indus. Claim Appeals Office*, 905 P.2d 6 (Colo. Ct. App. 1995).

I. Moreover, correlation is not causation. The mere fact that an employee may feel pain or symptoms while at work, or during or after a work activity, does not mean that there is a causal connection satisfying the claimant's burden. *Scully v. Hooters of Colorado*, W.C. No. 4-745-712 (October 27, 2008) (Panel finds claimant contention that because her back spasms occurred in the act of bussing tables and the spasms were immediately preceded by the claimant's twisting her back in the performance of an essential job function that the back spasm must have been caused by her twisting her back to be logical fallacy mistaking temporal proximity for a causal relationship.)

Did Claimant have Preexisting Back 'Injury'?

J. The only mention in the medical records of a prior back injury is that Claimant checked that she had a prior "Back Injury" during her pre-employment physical to inform the doctor that she had generalized soreness and aches with her back in the past. However, she checked that she was never, nor was she currently, in any degree of chronic pain at that time. Claimant had no great explanation at hearing for why she checked that particular box – to her credit, ultimately. She was likely in a hurry to just get on with it, didn't have someone sitting next to her in the waiting room to ask for clarification, and just checked a box by mistake. This does not lead the ALJ to conclude she suffered an undisclosed, serious back *injury.*

K. Claimant underwent a pre-employment physical 22 days before November 29, 2018. Claimant's back was examined during the physical with no abnormalities to her back noted whatsoever. The job description was reviewed by the provider as well, and there was no indication as of November 7, 2018 that she was experiencing any symptoms in her low back. There are no medical records suggesting otherwise.

L. According to the testimony of Mr. Orth, Claimant completed the physical testing on Wednesday, November 28 without incident and she appeared to be in no discomfort when she returned to work the morning of November 29, 2018. Mr. Orth asked if anyone had any injuries or symptoms or otherwise felt they could not perform the job. Claimant did not say that she could not perform her job duties that day. In summary, Claimant showed up to work with no signs or symptoms of leg weakness/pain or back pain and left work that day in an ambulance, totally unable to walk.

Persuasiveness of the Medical Opinions

M. The doctors differ in opinion on various aspects of the claim. By his own admission, Dr. Burris was not fully familiar with the takedown maneuvers Claimant was doing, yet still opined that her activities were not enough to cause a herniated disc. Dr. Rook reviewed the training manual, went over the maneuvers, and concluded they were sufficient to cause a herniated disc. Both doctors agreed that lifting while bent and twisting puts more stress on the discs, but disagreed on whether these maneuvers could have caused a disc injury.

N. Dr. Burris argued that nature and progression of symptoms are not consistent with an acute disc injury. Dr. Rook explained that upon arrival at the emergency room, Claimant was given a heavy dose of IV anti-inflammatories that would be likely to reduce the inflammation to the point of reducing pressure on the nerves that were initially severely compressed. Dr. Burris finally indicated that the examinations of Claimant do not correlate with the findings. Dr. Rook pointed out that the MRI clearly correlates with Claimant's condition explaining both the back pain and the bilateral lower extremity symptoms that would be caused by the severe central canal stenosis. Dr. Burris's has not indicated, however, what other possible cause there could be for Claimant's injury aside from her work activities. To his credit, Dr. Burris equivocated during his deposition on the issue of causation. He cannot be sure.

O. Further, in this case, Dr. Rook better correlates Claimant's symptoms to the L3-L4 region than does Dr. Burris. As he explained, *meralgia paresthetica* affects numbness on the outside of the thighs, but does not involve the legs or feet, nor does it cause weakness (which Claimant displayed in great abundance), since motor nerves are not affected by this condition. In the end, the ALJ finds the medical opinions of Dr. Rook to be more persuasive, and does attribute the onset of Claimant's symptoms to mere coincidence. The ALJ concludes that Claimant has established, by a preponderance of the evidence, that she sustained a compensable injury to her lower back/lumbar spine on November 29, 2018 while in the course and scope of her employment and arising out of her work activities.

Medical Benefits

P. Respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of an industrial injury. § 8-42-101 (1)(a), C.R.S. (2009); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P. 2d 362 (Colo. App. 1995). Where a claimant's entitlement to benefits is disputed, the claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997). Whether the claimant sustained his burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P .2d 496 (Colo. App. 1997).

Q. The ALJ has found that Claimant sustained a compensable injury to her lower back. All treatment Claimant has had to date is found to be reasonable, necessary, and related. Claimant is entitled to ongoing reasonable, necessary, and related treatment for her lower back, including the disc herniations noted on the lumbar spine MRI and for any surrounding soft-tissue or musculature injuries.

Temporary Total Disability Benefits

R. To receive temporary disability benefits, Claimant must prove the injury caused a disability. C.R.S. § 8-42-103(1); *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). As stated in *PDM Molding*, the term "disability" refers to the claimant's physical inability to perform regular employment. *See also McKinley v. Bronco Billy's,* 903 P.2d 1239 (Colo. App. 1995). Once the claimant has established a "disability" and a resulting wage loss, the entitlement to temporary disability benefits continues until terminated in accordance with C.R.S. § 8-42-105(3)(a)-(d). Claimant is not required to prove that the industrial injury is the "sole" cause of his wage loss to recover temporary disability benefits. *Jorge Saenz Rico v. Yellow Transportation, Inc*. W.C. No. 4-547-185 (ICAO December 1, 2003), citing *Horton v. Industrial Claim Appeals Office*, 942 P.2d 1209 (Colo. App. 1996).

S. Claimant sustained a compensable injury on November 29, 2018 and has been unable to return to work since that date. Claimant was unable to work in the days following the event, as evidenced by her symptoms, as well as the significant work restrictions put in place by Claimant's ATP. Claimant also testified that the Employer will not allow her to return to work until she has been cleared to work full duty. According to Claimant's unrebutted testimony, and the medical records, Claimant continues to remain under work restrictions. Further, the parties have stipulated that if compensability is shown, Claimant is entitled to TTD payments. She is, therefore, entitled to TTD benefits beginning November 30, 2018 and ongoing, subject to any offsets, until terminated by operation of law.

ORDER

It is therefore Ordered that:

1. Claimant's claim is compensable.

2. Respondents will pay for all reasonable, necessary, and related medical treatment for Claimant's lower back work injury.

3. Respondents will pay Temporary Total Disability payments from the date of injury until terminated by operation of law.

4. The Insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 11, 2019

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-100-039-001

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on June 27, 2019, in Denver, Colorado. The hearing was digitally recorded (reference: 6/27/19, Courtroom 1, beginning at 8:30 AM, and ending at 12:30 PM). There were two Spanish/English interpreters, who performed in relay fashion: Miguel Iraola and Jorge Espinosa.

Claimant's Exhibits 1 –7, with the exception of Exhibit 6 were admitted into evidence at the commencement of the hearing, without objection. Photographs in Exhibit 6 were authenticated and admitted into evidence during the hearing. Respondents' Exhibits A-H were admitted into evidence, without objection.

A transcript of the evidentiary deposition of Allison M. Fall, M.D., taken on June 18, 2019, was filed in lieu of her live testimony (herein after referred to a "Fall Depo., followed by a page number).

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At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, which was filed, electronically, on July 5, 2019. On July 8, 2019, counsel for the Respondents submitted suggested changes in the proposed decision. After a consideration of the proposed decision and Respondents' suggested revisions thereto, the ALJ has modified the proposal and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern: compensability; medical benefits; average weekly wage (AWW); and, whether the Claimant is entitled to temporary total disability (TTD) benefits from January 17, 2019, through March 5, 2019.

The Claimant bears the burden of proof, by a preponderance of the evidence, on all issues.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. At the commencement of the hearing, the parties stipulated and the ALJ finds that "the Claimant was sent to get a physical at Concentra Clinic by the employer on January 16, 2019 and the Claimant was compensated by the Employer for the time that he missed on his trip to the clinic." This was a routine physical examination required by the Employer.

The Incident

2. While at the Concentra Clinic, a nurse drew blood from the Claimant's dominant right arm, and another nurse ordered the nurse to do another blood draw because not enough blood had been drawn in the first instance.

3. According to David Yamamoto, M.D., the Claimant's expert witness, the fact that the blood was drawn from the Claimant's dominant right arm was unusual.

4. The Claimant went home from Concentra and within one hour began to experience swelling and numbness in his right hand, and burning in his arm.

5. Because he was unable to sleep that night, the Claimant contacted his Employer the next morning and reported his condition. He and his supervisor agreed that he should not work that day and that the Claimant should address his symptoms.

6. The Claimant went to a Walgreen's store and described his symptoms to a pharmacist who advised him to return to Concentra where the blood draw had been performed.

Medical

7. The Claimant went to Concentra and was treated for his symptoms.

8. At Concentra, the Claimant underwent medical treatment, was prescribed medication, was given work restrictions and was released to full duty work on January 21, 2019.

9. Having been released to full duty work as of January 21, 2019, the Claimant still had pain in his right arm and he immediately sought medical treatment at UC Health Sciences Center (UCHSC) (Claimant's Exhibit 1, bates 040 - 070).

10. Concentra referred the Claimant out for medical evaluation to the Vascular Institute of the Rockies for further evaluation. After receiving evaluation and treatment, he was referred to Carter Jones at Pain Medicine on January 30, 2018, for evaluation and treatment for right upper extremity (RUE) pain, swelling, and weakness and possible CRPS (complex regional pain syndrome) [Exhibit 1, bates 033, 038, and 039].

11. According to the Claimant, he could not comply with the recommendations made by the Vascular Institute of the Rockies because he could not afford the $500.00 co-pay requested by Carter Jones at Pain Medicine, who was in the authorized chain of referrals, however, the Claimant's case was fully contested.

12. On January 29, 2019, The Claimant was advised by Amanda Cava at Concentra, that if he experienced acute/severe worsening symptoms, he was advised to go to ER, and to "submit statement of injury/incident with monetary compensation requests to Concentra ops." (*Id.* at 031).

Allison M. Fall, M.D., Respondents' Independent Medical Examiner (IME)

13. Dr. Fall performed an IME of the Claimant, at Respondents' request, on April 17, 2019. In addition to examining the Claimant, Dr. Fall reviewed the questionnaire of Vascular Surgery specialist, Barbara Melendez, M.D., and the IME Report of David Yamamoto, M.D (Claimant's IME). Dr. Fall disagreed with both doctors. She diagnosed right arm thrombophlebitis as a non-work related condition.

14. Dr. Fall also reviewed the records of the blood draw and was of the opinion that there was nothing abnormal about it. In her examination of the Claimant, she found no signs of complex regional pain syndrome (CRPS). This is in direct conflict with the observations of the vascular surgeons (a more precise specialty for dealing with CRPS) and with the opinion of Dr. Yamamoto. In this case, the ALJ makes a rational choice, based on substantial evidence, to reject Dr. Fall's opinion and to accept the probable opinions of Dr. Melendez and Dr. Yamamoto.

15. Ultimately, Dr. Fall is of the opinion that the blood draw did not cause the problems with the Claimant's right arm. By necessary implication, her opinion negates work-relatedness. For the reasons articulated throughout these Findings, the ALJ rejects Dr. Fall's opinions. The probable findings of Dr. Melendez and Dr. Yamamoto are more credible.

Compensability

16. The totality of the credible evidence supports the proposition that the Claimant sustained a compensable injury, probable CRPS, by virtue of the blood draw on January 16, 2019.

17. The critical underpinning of Dr. Yamamoto's opinion on work-relatedness is the proximity in time from the blood draw to the onset of symptoms shortly thereafter. Dr. Yamamoto was credible when he stated the reasoned opinion that there can't be any other explanation for the Claimant's condition but the blood draw.

18 Dr. Yamamoto was of the opinion, within a reasonable degree of medical probability, that the Claimant sustained work-related injuries consistent with CRPS, which Dr. Yamamoto diagnosed.

19. The ALJ observed the Claimant's injured right arm as compared to his left arm. Dr. Yamamoto pointed out that the right hand was swollen, there was white hair growing on the right arm and not on the left arm and there was a difference in skin color. The ALJ confirmed all of these observations.

20. In addition, Dr. Yamamoto indicated that he had previously identified signs consistent with CRPS including striations of the nails of Claimant's right hand which were not present on his left hand for which Dr. Yamamoto used a magnifying glass.

21. Another sign that Dr. Yamamoto previously identified was that the Claimant could not make a clenched fist, had loss of range of motion on the fingers of his right hand and not on his left hand and weakness in his right hand. (RUE).

22. According to Dr. Yamamoto's testimony, the Claimant's symptoms meet the Budapest criteria for CRPS..

23. Dr. Yamamoto concluded that the Claimant **is not at maximum medical improvement (MMI).** According to Dr. Yamamoto, the Claimant is in need of further testing, like the QSART, stress thermography, x-rays, triple bone scan and may also be a candidate for a sympathetic block (Exhibit 5, bates 088). This treatment recommendation is necessary to come up with a certain diagnosis in compliance with the Division of Workers' Compensation Medical Treatment Guidelines.

24. Barbara Melendez, M.D., of the Vascular Institute (Claimant's Exhibit 2, bates 078 - 079) answered a questionnaire as follows:

a. at #3, Dr. Melendez answers in the affirmative to the question, "Absent any other impact to his arm, on January 16, 2019, can the two blood draws taken

form the Claimant have been the mechanism of injuries diagnosed by your clinic? (*Id.* at 078)

b. at #7, she answers in the affirmative to the question, "Concerning possible CRPS, should [Claimant] be evaluated and treated for CRPS and would said evaluation and treatment be reasonably related to his original injury and diagnosis? (*Id.* at 079), Dr. Melendez answered "yes."

25. According to the Claimant, he could not make a clenched fist, he has a loss of range of motion (ROM) on the fingers of his right hand and he has difficulty handling the weight of a gallon of milk with his right hand.

Medical

26. In weighing the medical evidence, Dr. Yamamoto's testimony and his report, the Claimant's testimony, and the photographs, the ALJ finds that the totality of the evidence supports the fact that the Claimant sustained a compensable injury, probable CRPS, by virtue of the blood draw on January 16, 2019.

27. Claimant's care, beginning on January 17, 2019 is causally related to the compensable injury caused by the blood draw of January 16, 2019, and was and is reasonably necessary to cure and relieve the effects thereof.

28. The ALJ finds that the Claimant's medical treatment was authorized and within the authorized chain of referrals in the natural progression of treatment for the compensable injury.

Temporary Disability

29. The ALJ finds that the Claimant has been consistently restricted from full duty by the Employer. On the date of injury, the Claimant was handling heavy equipment. He could not have returned to using heavy equipment after his compensable injury. He was off work because of the injury from January 17, 2019 through March 4, 2019. He returned to restricted employment on March 5, 2019, after being accommodated by the Employer. The Claimant was, therefore, temporarily and totally disabled from January 17, 2019 to March 4, 2019, both dates inclusive, for a total of 47 days.

Average Weekly Wage (AWW)

30. The Claimant was paid $26.76 an hour. He average more than 40-hours per week. The hourly rate at time and a half is $40.14 an hour. The Claimant's overtime pay equals $401.40. The Claimant's AWW on the date of injury was $1,471.80.

31. TTD benefits, from January 17, 2019 to March 4, 2019, both dates inclusive, a total of 47 days, equal an aggregate amount of $6,587.99.

Ultimate Findings

32. The opinions of Dr. Yamamoto and Vascular Surgeon, Dr. Melendez, were more credible and persuasive than the opinions of Dr. Fall for the reasons specified herein above.

33. Between conflicting opinions, the ALJ makes a rational choice, based on substantial evidence, to accept the opinions of Dr. Melendez and Dr. Yamamoto, and to reject the opinions of Dr. Fall.

34. The Claimant has proven, by a preponderance of the evidence that he sustained a compensable injury on January 16, 2019, resulting from the blood draw and this injury arose out of the course and scope of the Claimant's employment for the Employer herein.

35. The Claimant has proven, by preponderant evidence, that all of the Claimant's medical care and treatment for the injury resulting from the blood draw was and is causally related thereto, reasonably necessary to cure and relieve the effects thereof, and within the chain of authorized referrals in the normal progression of treatment therefore.

36. The Claimant has proven, by preponderant evidence, that further testing for CRPS, as recommended by Dr. Yamamoto and the vascular surgeons, is required.

37. The Claimant is not at MMI.

38. The Claimant has established by a preponderance of evidence that his AWW is $1,471.80, which yields a TTD benefit rate of $981.19 per week, or $140.17 per day.

39. The Claimant has proven, by a preponderance of the evidence that he was temporarily and totally disabled from January 17, 2019, through March 4, 2019, both dates inclusive, a total of 47 days. Aggregate TTD benefits for his period equal $6,587.99.

40. The Claimant has failed to prove that he was temporarily disabled from March 5, 2019, through June 27, 2019, the hearing date.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the opinions of Dr. Yamamoto and Vascular Surgeon, Dr. Melendez, were more credible and persuasive than the opinions of Dr. Fall for the reasons specified herein above in the Findings..

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions

in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting opinions, the ALJ made a rational choice, based on substantial evidence, to accept the opinions of Dr. Melendez and Dr. Yamamoto, and to reject the opinions of Dr. Fall.

Compensability

c. In order for an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Office,* 919 P.2d 207, 210, 210 (Colo. 1996). An injury "arises out of' employment if it would not have occurred **but for** the fact that the conditions and obligations of employment placed the employee in a position that he or she was injured." *See City of Brighton v. Rodriguez,* 318 P.3d 496, **2014 CO 7** [presumption that an injury arises out of employment when an unexplained injury occurs during the course of employment]. Thereupon, it is incumbent to show that non-work related factors caused the injury. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1) (c), C.R.S. *See Faulkner v. Indus. Claim Appeals Office,* 24 P.3d 844 (Colo. App. 2000)*; Eller v. Indus. Claim Appeals Office*, 224 P.3d 397, 399 (Colo. App. 2009); *Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277, 1279 (Colo. App. 2008). The question of causation is generally one of fact for determination by an ALJ. *Faulkner* at 846; *Eller* at 399-400. As found, the Claimant sustained a compensable injury on January 16, 2019, resulting from the blood draw and this injury arose out of the course and scope of the Claimant's employment for the Employer herein.

Medical Referrals

d. To be authorized, all referrals must remain within the chain of authorized referrals in the normal progression of authorized treatment. *See Mason Jar Restaurant v. Indus. Claim Appeals Office,* 862 P. 2d 1026 (Colo. App. 1993); *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P. 2d 501 (Colo. App. 1995); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). When an ATP refers an injured worker to his personal physician, under the mistaken belief that the claim was not compensable, the referral was nonetheless within the chain of authorized referrals and, thus, subsequent treatment was authorized. *See Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277 (Colo. App. 2008). As found, the Claimant's medical care was within the chain of authorized referrals in the normal progression of treatment therefore.

Medical

e. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, Claimant's medical treatment is causally related to the bolood draw of January 16, 2019. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment was and is reasonably necessary to cure and relieve the effects of his injury.

Average Weekly Wage

f.

f. Section 8-42-102(2), C.R.S., requires the ALJ to calculate a claimant's AWW based on the earnings at the time of injury as measured by the claimant's monthly, weekly, daily, hourly or other earnings. This section establishes the so-called "default" method for calculating the AWW An AWW calculation is designed to compensate for **total** temporary wage loss. *Pizza Hut v. Indus. Claim Appeals Office,* 18 P. 3d 867 (Colo. App. 2001). *See* § 8-42-102, C.R.S. As found, the Claimant lost 100% of his wages from the Employer when he was off work.

Temporary Disability

g. To establish entitlement to temporary disability benefits, a claimant must prove that the industrial injury has caused a "disability," and that he has suffered a wage loss that, "to some degree," is the result of the industrial disability. § 8-42-103(1), C.R.S; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Disability from employment is established when the injured employee is unable to perform the usual job effectively or properly. *Jefferson Co. Schools v. Headrick*, 734 P.2d 659 (Colo. App.1986). This is true because the employee's restrictions presumably impair his

opportunity to obtain employment at pre-injury wage levels. *Kiernan v. Roadway Package System*, W.C. No. 4-443-973 [Indus. Claim Appeals Office (ICAO), December 18, 2000]. There is no statutory requirement that a claimant must present medical opinion evidence from of an attending physician to establish his physical disability. See *Lymburn v. Symbois Logic*, 952 P.2d 831 (Colo. App. 1997). Rather, the Claimant's testimony alone is sufficient to establish a temporary "disability." *Id*. As found, the Claimant was temporarily and totally disabled from January 17, 2019, through March 4, 2019, both dates inclusive, a total of 47 days. Aggregate TTD benefits for this period equal $6,587.99.

h. Once the prerequisites for TTD are met (*e.g.,* no release to return to full duty, MMI has not been reached, a temporary wage loss is occurring in modified employment or modified employment is no longer made available, and there is no actual return to work), TTD benefits are designed to compensate for a 100% temporary wage loss. *See Eastman Kodak Co. v. Indus. Comm'n,* 725 P. 2d 107 (Colo. App. 1986); *City of Aurora v. Dortch,* 799 P. 2d 461 (Colo. App. 1990). As found, the Claimant sustained a 100% temporary wage loss from January 17, 2019, through March 4, 2019.

Maximum Medical Improvement (MMI)

I. MMI is defined as the point in time when any medically determinable physical or medical impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition. § 8-40-201(11.5), C.R.S. *Donald B. Murphy Contractors, Inc. V. Indus. Claim Appeals Office*, 916 P.2d 611 (Colo. App. 1995). Diagnostic procedures that constitute a compensable medical benefit must be provided prior to MMI if such procedures have a reasonable prospect of diagnosing or defining a claimant's condition so as to suggest a course of further treatment *See In the Matter of the Claim of William Soto, Claimant,* W.C. No. 4-813-582 (ICAO, October 27, 2011). As found, Dr. Yamamoto is recommending further tests, *e.g.,* a QSART Test, among other tests to positively confirm or rule out the diagnosis of CRPS. For this reason, among others, the Claimant has not yet reached MMI.

Burden of Proof

j. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 (ICAO, March 20, 2002). *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v.*

Jones, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained his burden with respect to compensability, medical benefits, AWW, and TTD benefits from January 17, 2019, through March 4, 2019. He has failed to sustain his burden with respect to temporary disability benefits from March 5, 2019, through June 27, 2019, the hearing date.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents shall pay all the medical costs related to treatment of the consequences of the work-related blood draw, including the tests recommended by David Yamamoto, M.D., to positively confirm or rule out CRPS, subject to the Division of Workers' Compensation Medical Fee Schedule.

B. Respondents shall pay the Claimant temporary total disability benefits of $981.19 per week, or $140.17 per day, from January 17, 2019, through March 4, 2019, both dates inclusive, a total of 47 days, in the aggregate amount of $6,587.99, which is payable retroactively and forthwith.

C. Any and all claims for temporary disability benefits from March 5, 2019, through June 27, 2019, are hereby denied and dismissed.

D. Respondents shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts of indemnity benefits not paid when due.

E. Any and all issues not determined herein are reserved for future decision.

DATED this 12th day of July 2019.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

ISSUE

Whether Claimant has established by a preponderance of the evidence that he should be permitted to reopen his August 11, 2014 Workers' Compensation claim based on a change in condition pursuant to §8-43-303(1), C.R.S. and Respondents should thus be financially responsible for his January 4, 2019 left shoulder surgery.

FINDINGS OF FACT

1. Claimant has worked for Employer as a Firefighter since May 2002. On August 11, 2014 Claimant suffered an admitted left shoulder injury during the course and scope of his employment. Claimant was ascending a ladder while carrying an approximately 45-pound air pack over his left shoulder. As he went to lay the air pack off to the side, he felt a sharp pain in his left shoulder. Claimant was 39 years old at the time of the incident.

2. Claimant initially underwent conservative treatment for his left shoulder through Authorized Treating Physician (ATP) Martin Boublik, M.D. at the Steadman Hawkins Denver Clinic. The treatment included ice, rest, anti-inflammatories and physical therapy.

3. On October 23, 2014 Claimant underwent an MRI of his left shoulder. The MRI revealed the following: (1) moderate supraspinatus and infraspinatus tendinosis; (2) circumferential degeneration and discrete tearing of the labrum; (3) mild chondromalacia of the posterior glenoid fossa with underlying cystic change; and (4) moderate to severe acromioclavicular joint arthrosis.

4. On October 29, 2014 Dr. Boublik administered an intraarticular corticosteroid injection into Claimant's left shoulder. The injection provided significant improvement for several months.

5. On February 2, 2015 Dr. Boublik placed Claimant at Maximum Medical Improvement (MMI) with no permanent impairment. However, by April 6, 2015 Claimant reported returning left shoulder pain with increased activities. Although Dr. Boublik administered a repeat corticosteroid injection in Claimant's left shoulder, he continued to experience discomfort.

6. On November 12, 2015 Dr. Boublik performed surgery on Claimant's left shoulder. His postoperative diagnoses included left shoulder impingement, a labral tear and degenerative joint disease.

7. On November 25, 2015 Claimant was released to return to light duty deskwork. By December 27, 2015 Claimant returned to full duty employment.

8. Claimant returned to Dr. Boublik's office for follow up on April 6, 2016. Dr. Boublik noted:

> The MRI dated October 23, 2014 revealed significant degenerative tearing of the labrum, moderate tendinopathy of the rotator cuff, only mild chondromalacia of the posterior glenoid fossa and moderate-to-severe AC joint arthropathy. Subsequently, upon his surgery on November 12, 2015 there was significant glenohumeral joint arthropathy noted with grade 4 changes in the glenoid and humeral head.

Regarding Claimant's status and prognosis, Dr. Boublik remarked:

> Overall the patient is doing well in regards to his left shoulder with known underlying DJD as well as status post above stated surgery with subacromial decompression and debridement of the labrum. Again he does get intermittent soreness which does not limit him with work.

Dr. Boublik noted that Claimant might need a total shoulder arthroplasty at some point in the future.

9. On January 30, 2017 Claimant underwent a repeat MRI of his left shoulder. The interpreting radiologist compared the results with the MRI from October 2014. The radiologist's findings were as follows: (1) severe glenohumeral arthrosis with marked interval progression since comparison study; (2) rotator cuff tendinosis, shallow articular sided fraying of infraspinatus, no measurable tear or muscle atrophy; and (3) torn superior labrum which was present previously with tendinosis of the long biceps tendon without tearing or instability.

10. By October 11, 2017 Dr. Boublik determined that Claimant had reached MMI. He noted that Claimant felt he had plateaued over the past two years and, although he was able to work, he continued to have pain with activities. Dr. Boublik assigned a 4% left upper extremity permanent impairment rating that converted to a 2% whole person rating. He also explained that Claimant was at risk for progression of his left shoulder symptoms and might require a left total shoulder replacement in the future.

11. On March 16, 2018 Claimant underwent a Division Independent Medical Evaluation (DIME) with Stephen D. Lindenbaum, M.D. After Dr. Lindenbaum considered Claimant's injury and course of treatment, he agreed that Claimant had reached MMI on October 11, 2017. However, Dr. Lindenbaum assigned a 22% permanent impairment rating of the left upper extremity. The rating consisted of 11% for loss of range of motion and 12% for crepitus. Dr. Lindenbaum did not assign work restrictions or recommend medical maintenance care.

12. On April 17, 2018 Respondents filed an Amended Final Admission of Liability (FAL). The FAL was consistent with Dr. Lindenbaum's MMI and impairment determinations.

13. On September 26, 2018 Claimant underwent another left shoulder MRI. The MRI report noted the presence of severe left glenohumeral joint osteoarthritis with large joint effusion and mild synovitis with severe stress response in the glenoid and posterior humeral head. There was also full-thickness cartilage loss with moderate thinning and decreased bone stock of the posterior half of the glenoid. The MRI revealed extensive subchondral cystic change and intraosseous ganglion cyst formation with extraosseous component of ganglion cyst extending through the posterior superior quadrant of the glenoid margin. The report further noted severe circumferential macerated degenerative tearing of the glenoid labrum of the left shoulder. The radiologist also noted severe arthritic changes of the left glenohumeral joint with severe reactive arthritis. Finally, there was a large joint effusion and mild synovitis.

14. On October 3, 2018 Claimant returned to Dr. Boublik for a follow-up examination. He reported progressively worsening left shoulder pain. Dr. Boublik reviewed the September 26, 2018 MRI results and noted the findings were consistent with the following: (1) end-stage osteoarthritic degeneration of the glenohumeral joint; (2) moderate osteoporosis of the acromial clavicular joint; and (3) no evidence of significant rotator cuff tear. Dr. Boublik diagnosed significant degenerative disease of the left shoulder located primarily in the glenohumeral articulation. He recommended a consultation with Braden Mayer, M.D. for consideration of a left shoulder joint replacement.

15. On October 22, 2018 Claimant visited Dr. Mayer for an evaluation. Claimant reported worsening left shoulder pain for several years as the result of a 2014 Workers' Compensation injury. Claimant described pain with overhead activities including significant catching and crepitus within the shoulder. Dr. Mayer reviewed the October 3, 2018 x-rays and diagnosed severe left shoulder degenerative joint disease. He noted that Claimant had exhausted all conservative treatment and had worsening pain that affected his quality of life. He commented that they discussed the need for left shoulder surgery that included humeral head resurfacing with an inlay glenoid procedure.

16. On October 26, 2018 Dr. Mayer submitted a request for prior authorization for a surgery that was tentatively scheduled for November 9, 2018. However, on November 2, 2018 Respondents denied the request because the procedure was not causally related to the claim. Respondents noted that an independent medical examination was scheduled with J. Tashof Bernton, M.D. to address the surgical request.

17. On December 11, 2018 Dr. Bernton conducted an independent medical examination of Claimant to determine the cause of his left shoulder symptoms and need for additional surgery. Dr. Bernton had also conducted a prior independent medical examination of Claimant on August 9, 2018. However, based on the posture of the claim at the time, Dr. Bernton's August 9, 2018 examination was primarily focused on permanent impairment and shoulder conversion.

18. At the December 11, 2018 examination Claimant reported that he had experienced increased pain and decreased mobility in his left shoulder since the August 2018 independent medical examination. Dr. Bernton reviewed the updated medical records from Drs. Boublik and Mayer as well as the September 26, 2018 MRI report. Following an examination, Dr. Bernton noted that Claimant demonstrated the rapid onset of severe arthritic changes in his shoulder. He determined that, while it was likely the changes were simply due to a progression of Claimant's pre-existing underlying osteoarthritis, it was also possible that they were due to the presence of a monoarticular inflammatory arthritis or an indolent infection. Dr. Bernton recommended a diagnostic evaluation on a non-work-related basis to determine whether inflammatory arthritis or an indolent infection was present.

19. Dr. Bernton explained that, whether the deterioration of Claimant's shoulder was due to the progression of his underlying osteoarthritis or the presence of inflammatory arthritis, his current condition was not work-related. However, if a Propionibacterium acne infection was present the progression of arthritis would most likely represent an infectious complication following the November 12, 2015 surgery. Otherwise, the rapid onset of degeneration and the need for additional surgery would not be causally related to his Worker's Compensation claim. Dr. Bernton determined that there was no basis to conclude that either the original mechanism of injury or the surgery would result in the type of rapid progression of degenerative osteoarthritis that Claimant suffered. Thus, unless testing revealed the presence of an indolent postoperative joint infection, Claimant remained at MMI with regard to his August 11, 2014 left shoulder injury.

20. After receiving Dr. Bernton's December 11, 2018 independent medical examination report, Respondents maintained their denial of Dr. Mayer's surgical request. On January 8, 2019 Respondents wrote letters to Dr. Boublik and Claimant's counsel offering to provide Claimant with the diagnostic workup recommended by Dr. Bernton. However, shortly thereafter, Respondents learned that Claimant had already undergone the requested surgery. In fact, medical records from Steadman Hawkins Clinic reflect that Dr. Mayer performed a left humeral head resurfacing with inlay glenoid procedure on Claimant's left shoulder on January 4, 2019. Respondents thus wrote another letter to Dr. Boublik requesting that he disregard the previous January 8, 2019 letter.

21. Claimant testified at the hearing in this matter that he was able to return to full duty work following his November 2015 arthroscopic surgery. However, he commented that his shoulder pain gradually worsened over time. Claimant described his symptoms as "the standard – arthritic pain that increased and – and continued to get worse over that three-year period."

22. Dr. Bernton testified at the hearing in this matter regarding the basis for his opinion that Claimant suffered from degenerative arthritis that existed prior to his August 11, 2014 work injury. He noted that Claimant was injured when he attempted to lift an approximately 45-pound air pack that he was carrying with his left hand over his head. He felt pain in his left shoulder as he pulled back in an external rotation and

abduction position. After reviewing Claimant's October 23, 2014 left shoulder MRI, Dr. Bernton explained some of the findings. Regarding the finding of chondromalacia in the glenoid fossa, Dr. Bernton noted that the glenoid fossa is the socket part of the ball-and-socket shoulder joint. The MRI revealed changes in the cartilage in the back of the fossa. Dr. Bernton explained that the MRI reflected cystic changes or small areas of cysts in the bone underlying the cartilage. Furthermore, the MRI showed moderate to severe arthritis of the acromioclavicular joint. Dr. Bernton explained that, while all of the changes existed a little more than two months after the work injury, the process of arthritic changes in the joint requires years to develop. In addition, Dr. Bernton noted that the changes could not have been caused by Claimant's described mechanism of injury. Consequently, the MRI demonstrated that changes representing the presence of arthritis had occurred prior to the work injury.

23. After reviewing the November 12, 2015 operative report, Dr. Bernton commented that Claimant already had severe and advanced degenerative arthritis of the shoulder. Specifically, Claimant suffered from grade IV or the most advanced form of loss, both on the humerus or the ball part of the ball-and-socket joint, and on the glenoid or the socket part of the joint. In other words, Claimant had arthritis on both sides of the joint that was grade IV out of IV in severity. Dr. Bernton explained that the process takes years to develop. Moreover, the changes would not have resulted from the mechanism of injury in the August 11, 2014 incident.

24. In contrast to the pre-existing degenerative arthritis in Claimant's left shoulder, Dr. Bernton testified that the August 11, 2014 work incident likely caused a labral tear. Dr. Bernton explained that the labrum is a small lip of cartilage that surrounds the edge of the glenoid fossa or the socket side of the joint. The labrum allows people to have more mobility in the shoulder without losing the stability or structural integrity of the joint. Dr. Bernton remarked that, because labral tears can occur on a degenerative basis, it is not possible to know whether the labrum in Claimant's left shoulder was intact or already torn and then worsened as a result of the work incident. Dr. Bernton summarized that the August 11, 2014 industrial injury consisted of either a torn labrum or the worsening of a labral tear. He described that Claimant suffered an acute injury that was superimposed on a pre-existing and underlying degenerative condition.

25. Dr. Bernton explained that the September 26, 2018 MRI revealed an effusion or excessive fluid in the joint, synovitis, or inflammation of the lining tissue of the joint, full thickness cartilage loss on both sides of the joint and advancement of the cystic changes underneath the bone. He reasoned that the MRI revealed significant advancement of the degenerative process and a rapid deterioration since the October 23, 2014 MRI and November 2015 surgery. Dr. Bernton specified that the September 26, 2018 MRI findings were reflective of end stage arthritis.

26. Dr. Bernton further testified that, if Claimant's current condition simply represents the rapid onset of his underlying degenerative arthritis, his worsened condition is also not causally related to his August 11, 2014 work injury. He explained that, while the progression of a degenerative arthritis can be changed by a structural

event, the injury would have to essentially alter the joint surface. He specifically mentioned a fracture of the humeral head that did not heal properly and caused abnormalities of the joint surface on either the humeral head or glenoid side. However, Claimant suffered a labral tear on August 11, 2014 that did not change the integrity of the joint or any of the joint surfaces. While the labral tear caused Claimant pain, it did not affect the progression of the underlying osteoarthritis.

27. Claimant has failed to establish that it is more probably true than not that he should be permitted to reopen his August 11, 2014 Workers' Compensation claim based on a change in condition pursuant to §8-43-303(1), C.R.S. and Respondents should thus be financially responsible for his January 4, 2019 left shoulder surgery. Claimant has specifically failed to sustain his burden of proving that the worsening of his left shoulder condition is causally related to the August 11, 2014 work injury. Initially, Claimant's left shoulder injury consisted of a labral tear superimposed on his underlying degenerative condition. The objective medical evidence reflects that Claimant suffered pre-existing degenerative arthritis. A recent MRI from September 26, 2018 shows significant advancement of arthritis throughout Claimant's left shoulder joint as compared to the October 23, 2014 MRI and the intraoperative findings from the November 12, 2015 arthroscopic surgery. The degree of deterioration during the period of time is unusual and, as Dr. Bernton remarked, could be due to either a progression of the underlying osteoarthritis, an inflammatory arthritis or an infectious arthritis. Dr. Bernton persuasively reasoned that, in any event, the worsened condition is not causally related to the August 11, 2014 work injury. Because the labral tear did not alter the joint surface or the integrity of the joint, it would not have caused, accelerated or otherwise changed the course of the underlying arthritis. Furthermore, if Claimant's rapid deterioration was caused by inflammatory arthritis, the arthritis also would not be causally related to a systemic or metabolic disease. Claimant's degenerative, progressive condition would thus have no causal relationship to the August 11, 2014 work injury.

28. Claimant has also not shown that the worsening of his left shoulder condition is causally related to the treatment that he received after his work injury that included the November 12, 2015 arthroscopic surgery. As Dr. Bernton persuasively explained, the procedures performed during the November 2015 surgery are frequently utilized to treat patients with osteoarthritic shoulders and do not involve any changes to the joint that would lead to the acceleration of the underlying arthritis or otherwise alter the course of the arthritis that already existed in Claimant's left shoulder. The significant changes on the September 26, 2018 MRI had occurred throughout the joint and did not reflect the localized degeneration that can be attributed to a specific traumatic injury, event or procedure. If the deterioration in Claimant's shoulder was due to inflammatory arthritis, it would still not be related to his claim because inflammatory arthritis is a systemic condition that is unrelated to and unaffected by any structural injury or specific treatment. Finally, although Dr. Bernton remarked that a Propionibacterium acne infection could be work-related as a complication from the November 12, 2015 surgery, there is no evidence that the deterioration in Claimant's left shoulder is due to an indolent infection.

29. On January 4, 2019 Dr. Mayer performed a left humeral head resurfacing with inlay glenoid procedure on Claimant's left shoulder. The surgery was designed to address Claimant's underlying severe left shoulder degenerative joint disease. Although the surgical procedure may have been reasonable, the need for surgery was independent of Claimant's work-related left shoulder injury. The bulk of the medical records, in conjunction with the persuasive opinion of Dr. Bernton, demonstrate that Claimant's worsening arthritic condition was unrelated to his August 11, 2014 work-related left labral tear. Because Claimant's worsened, degenerative condition is not causally connected to his industrial injury, he remains at MMI. Accordingly, Claimant's request to reopen his August 11, 2014 Workers' Compensation claim based on a change in condition is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Section 8-43-303(1), C.R.S. provides that a worker's compensation award may be reopened based on a change in condition. In seeking to reopen a claim the claimant shoulders the burden of proving his condition has changed and that he is entitled to benefits by a preponderance of the evidence. *Osborne v. Industrial Commission*, 725 P.2d 63, 65 (Colo. App. 1986). A change in condition refers either to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that is causally connected to the original injury. *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082, 1084 (Colo. App. 2002). A

"change in condition" pertains to changes that occur after a claim is closed. *In re Caraveo,* W.C. No. 4-358-465 (ICAO, Oct. 25, 2006). The determination of whether a claimant has sustained his burden of proof to reopen a claim is one of fact for the ALJ. *In re Nguyen,* W.C. No. 4-543-945 (ICAO, July 19, 2004).

5. As found, Claimant has failed to establish by a preponderance of the evidence that he should be permitted to reopen his August 11, 2014 Workers' Compensation claim based on a change in condition pursuant to §8-43-303(1), C.R.S. and Respondents should thus be financially responsible for his January 4, 2019 left shoulder surgery. Claimant has specifically failed to sustain his burden of proving that the worsening of his left shoulder condition is causally related to the August 11, 2014 work injury. Initially, Claimant's left shoulder injury consisted of a labral tear superimposed on his underlying degenerative condition. The objective medical evidence reflects that Claimant suffered pre-existing degenerative arthritis. A recent MRI from September 26, 2018 shows significant advancement of arthritis throughout Claimant's left shoulder joint as compared to the October 23, 2014 MRI and the intraoperative findings from the November 12, 2015 arthroscopic surgery. The degree of deterioration during the period of time is unusual and, as Dr. Bernton remarked, could be due to either a progression of the underlying osteoarthritis, an inflammatory arthritis or an infectious arthritis. Dr. Bernton persuasively reasoned that, in any event, the worsened condition is not causally related to the August 11, 2014 work injury. Because the labral tear did not alter the joint surface or the integrity of the joint, it would not have caused, accelerated or otherwise changed the course of the underlying arthritis. Furthermore, if Claimant's rapid deterioration was caused by inflammatory arthritis, the arthritis also would not be causally related to a systemic or metabolic disease. Claimant's degenerative, progressive condition would thus have no causal relationship to the August 11, 2014 work injury.

6. As found, Claimant has also not shown that the worsening of his left shoulder condition is causally related to the treatment that he received after his work injury that included the November 12, 2015 arthroscopic surgery. As Dr. Bernton persuasively explained, the procedures performed during the November 2015 surgery are frequently utilized to treat patients with osteoarthritic shoulders and do not involve any changes to the joint that would lead to the acceleration of the underlying arthritis or otherwise alter the course of the arthritis that already existed in Claimant's left shoulder. The significant changes on the September 26, 2018 MRI had occurred throughout the joint and did not reflect the localized degeneration that can be attributed to a specific traumatic injury, event or procedure. If the deterioration in Claimant's shoulder was due to inflammatory arthritis, it would still not be related to his claim because inflammatory arthritis is a systemic condition that is unrelated to and unaffected by any structural injury or specific treatment. Finally, although Dr. Bernton remarked that a Propionibacterium acne infection could be work-related as a complication from the November 12, 2015 surgery, there is no evidence that the deterioration in Claimant's left shoulder is due to an indolent infection.

7. As found, on January 4, 2019 Dr. Mayer performed a left humeral head resurfacing with inlay glenoid procedure on Claimant's left shoulder. The surgery was

designed to address Claimant's underlying severe left shoulder degenerative joint disease. Although the surgical procedure may have been reasonable, the need for surgery was independent of Claimant's work-related left shoulder injury. The bulk of the medical records, in conjunction with the persuasive opinion of Dr. Bernton, demonstrate that Claimant's worsening arthritic condition was unrelated to his August 11, 2014 work-related left labral tear. Because Claimant's worsened, degenerative condition is not causally connected to his industrial injury, he remains at MMI. Accordingly, Claimant's request to reopen his August 11, 2014 Workers' Compensation claim based on a change in condition is denied and dismissed.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's request to reopen his August 11, 2014 Workers' Compensation claim based on a change in condition and for Respondents to pay for his January 4, 2019 left shoulder surgery is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: July 12, 2019.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-036-773-001

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

[Redacted],

Claimant,

v.

[Redacted],

Employer,

and

[Redacted]
Self-Insured Respondent.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on April 2, 2019 and June 14, 2019, in Denver, Colorado. The hearing was digitally recorded (reference: 4/2/19, Courtroom 1, beginning at 8:30 AM, and ending at 12:00 PM; 6/14, 2019, Courtroom 1, beginning at 1:30 PM, and ending at 4:156 PM).

The Claimant was present in person and represented by [Redacted], Esq. The Respondents were represented by [Redacted], Esq. and [Redacted], Esq.

Hereinafter [Redacted] shall be referred to as the “Claimant." [Redacted] shall be referred to as the “Employer.” All other parties shall be referred to by name.

Respondent’s Exhibits A through R were admitted into evidence without objection. Exhibits through were admitted into evidence, without objection. Claimant’s Exhibits 3 through 10 were admitted into evidence without objection. Respondent’s objection to Claimant’s Exhibits 1 and 2 was overruled and these Exhibits were admitted into evidence.

At the conclusion of the hearing, the ALJ established a schedule for post hearing briefs. Because the case involves the Respondent’s Challenge to the Division

Independent Medical Examination (DIME) of Khoi Pham, M.D., Respondent's opening brief was filed, electronically, on June 25, 2019. Claimant's answer brief was filed, electronically, on July 2, 2019. Respondent's reply brief was filed, electronically, on July 8, 2019, at which time the matter was deemed submitted for decision. .

ISSUE

The sole issue to be determined by this decision concerns the Respondent's request to overcome the DIME of Dr. Pham on the degree of permanent medical impairment.

The Respondent bears the burden of proof by clear and convincing evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant is a 22 year-old man who was struck in the back by a heavy cart while working for the Employer on September 11, 2016. The Respondent denied the claim. At the hearing on the issue of compensability, ALJ Peter Cannici found that the Claimant had been struck with enough force to cause an injury and ALJ Cannici entered an Order on September 5, 2017 in favor of the Claimant (*Claimant"s Exhibit 1*). The ALJ's Order was affirmed by the Industrial Claim Appeals Office (ICAO) on January 8, 2018 (*Claimant's Exhibit 2*).

Authorized Treating Physician (ATP) Allison fall, M.D.

2. Allison Fall, M.D. became the Claimant's ATP. During her initial evaluation, she diagnosed the Claimant with a lumbosacral strain and lower extremity radiculitis. She referred the Claimant for injection treatment with Dr. Sacha (Respondent's Exhibit D, p. 70).

3. Dr. Fall continued to provide treatment, and a *Samms* conference was held with her on October 30, 2017. In a report generated after the conference, she indicated that she agreed that an additional ESI injection was not appropriate under the Colorado Medical Treatment Guidelines, but reversed her opinion after speaking with the Claimant, and she made more treatment recommendations, including physical therapy. (Respondent's Exhibit D, p. 64).

4. Dr. Fall continued to treat the Claimant and during a return appointment on January 5, 2018, she noted that the Claimant could forward flex with his fingertips to his lower shin, and there were no radicular signs. She referred the Claimant for massage therapy and continued his work restrictions (*Id.,* p. 59). Dr. Fall also noted that the Claimant was working new employment, had returned to school, and was no longer reporting any nerve pain in his legs (*Id.,* p. 58).

5. In Dr. Fall's evaluation of February 2, 2018, she noted that Claimant was able to forward flex with his fingertips to his lower shin, and that there were no radicular signs. She issued a six-month health membership and noted she did not anticipate impairment (*Id.,* p. 55).

6. Dr. Fall examined the Claimant again on March 19, 2018. She noted that he had nearly full flexion, with his fingertips being inches from touching his toes, but that he was stiff with extension. She noted that she had one final recommendation prior to placement at maximum medical improvement (MMI), which was a medial branch block to determine if a pain generator could be identified. She also ordered additional massage therapy (*Id*., p. 52). She recommended that the Claimant should follow up in one month, or in April 2018.

7. The Claimant did not return for treatment for almost three months, until he saw Dr. Fall on June 4, 2018, noting he had been busy and was vacationing in Florida in the interim since his last visit on March 19, 2018. Dr. Fall recorded that the Claimant reported more pain with extension than flexion and he estimated he was 25% improved. Claimant had undergone the medial branch block. Dr. Fall's physical exam recorded that the Claimant could perform a full squat, forward flexion was unrestricted with no increased pain, and there were no radicular signs, including during straight raise testing, with no neurological deficits. Dr. Fall documented that there was **no pain generator identified**, and that she could not find any structural abnormalities. As such, Dr. Fall was of the opinion there was no indication of permanent impairment. She noted there was no Table 53 diagnosis, and range of motion (ROM) was not indicated. Dr. Fall referenced a gym membership for strengthening and refills of Lyrica 75 mg. for six months (*Id.,* p. 50).

8. Dr. Fall reiterated that there were no physiologic findings to support an impairment rating in her response to the Division of Workers' Compensation" (DOWC's) inquiry of June 18, 2018 (*Id.,* p. 48).

9. Dr. Fall placed the Claimant at MMI as of June 4, 2018, with no permanent impairment. Division Independent Medical Examination (DIME), Khoi Pham, M.D., agreed with Dr. Fall's MMI date.

10. The Claimant requesting a DIME and Dr. Pham was selected to perform the examination, and his evaluation occurred on October 30, 2018 (Respondent's Exhibit A).

Division Independent Medical Examination (DIME) of Khoi Pham, M.D.

11. Dr. Pham did not identify any objective, anatomical pain generator. Instead, his only diagnosis was "Chronic low back pain" (Respondent's Exhibit A, p. 5). Further, Dr. Pham noted that the Claimant's physical evaluation was "benign" with normal strength throughout, normal muscle bulk and tone, normal sensory examination in all lumbar dermatomes. Dr. Pham also concluded the imaging study of the Claimant's low back showed only mild degenerative changes. *Id*.

12. Based solely on his diagnosis of chronic low back pain, Dr. Pham assigned the Claimant a 5% whole person impairment under Table 53 of the American Medical Association Guides to the Evaluation of Permanent Impairment, 3rd Ed., Rev. (hereinafter "AMA Guides") (Respondent's Exhibit A). Additionally, Dr. Pham added 7% whole person impairment based on range of motion (ROM) loss for a combined whole person impairment of 12%.(Respondent's Exhibit A).

13. The ALJ finds that Dr. Pham's sole diagnosis, upon which he based his permanent impairment rating, was "chronic pain." He failed to identify any anatomic or physiologic correlation based on objective findings, or pain generator to the Claimant's pain complaints. Even the additional rating for loss of ROM is premised on the diagnosis of chronic pain. Dr. Pham is a Level II accredited, Board Certified Neurologist, but there is no indication that he is well versed in the Colorado Revised Statutes. .§ 8-42-107 (8) (c) provides:

> For purposes of determining levels of medical impairment, the physician shall **not** (emphasis supplied) render a medical impairment rating based on chronic pain **without** (emphasis supplied) anatomic or physiologic correlation. Anatomic correlation must be based on objective findings…..

14. Based on the four corners of Dr. Pham's DIME Report (Claimant's Exhibit 5), the ALJ cannot even reasonably infer that Dr. Pham's diagnosis of chronic pain was based on an objective anatomical or physiological correlation. Dr. Pham's rating was based on the Claimant's complaints of pain—pure and simple. It is, indeed, unfortunate that the Claimant was deprived of a meaningful DIME because Dr. Pham either did not understand the law or did understand it and was only able to diagnose chronic pain without any correlations.

15. In light of the clear wording of § 8-42-107 (8) (c), it is unfortunate that both sides expended considerable time and effort, participating in two sessions of a lengthy hearing (approximately six hours total) and engaging the opinions and sometimes testimony of numerous non-DIME physicians and another expert to either overcome or support Dr. Pham's DIME rating (Dr. Sacha, Dr. Hughes, Dr. Primack, and Jeffrey Palmer Broker, Ph.D, an expert in biomechanics who, according to his self-declaration on the witness stand had more expertise on the human body than medical doctors). A

review of Dr. Pham's DIME Report and § 8-42-107 (8) (c) , C.R.S., is dispositive of the issue of whether the DIME's permanent medical impairment rating is clearly erroneous.

16. The ALJ has carefully perused all of the medical reports and testimony in evidence and the ALJ finds that these opinions are extrinsic and cannot, permissibly, be injected into the four corners of Dr. Pham's report (Dr. Pham did not testify) to determine whether Dr. Pham's rating is clearly erroneous—in light of the clear wording of § 8-42-107 (8) (c).

17. John Sacha, M.D., testified that even if there were no diagnosis a doctor can give an impairment rating based on pain using table 53 of the AMA Guides, provided the patient has had six months of back symptoms and provided the doctor considers the patient to be truthful (*April 2, 2019 Hearing., Tr. p.134*). Despite Dr. Sacha's strong convictions, his opinion cannot overcome, or make an exception to, the clear wording of § 8-42-107 (8) (c). It is up to the General Assembly to change the wording of the statute.

Ultimate Findings

18. The Claimant reached MMI on June 4, 2018.

18. Respondent has filed **no** admissions of liability. The DIME process was initiated based on ALJ Cannici's determination of compensability and ICAO's affirmance of his decision.

20. It is highly probable, unmistakable and free from serious and substantial doubt that Dr. Pham's DIME rating is erroneous because it was not in accord with the clear mandate of § 8-42-107 (8) (c), C.R.S., thus, Dr. Pham's permanent medical impairment rating has been overcome by clear and convincing evidence. It is, therefore, invalid and the permanent medical impairment rating must revert to the opinion of the ATP, Dr. Fall.

21. Under the circumstances, an analysis of the multitude of non-DIME opinions in evidence would be superfluous in light of the fact that there was no visible evidence within the four corners of Dr. Pham's Report that his chronic pain diagnosis was supported by the requirements of § 8-42-107 (8) (c). Extrinsic medical opinions cannot be injected into Dr. Pham's Report to add what Dr. Pham **did not** include therein.

22. Any determinations of credibility, substantial evidence, or factors other than the mandate of § 8-42-107 (8) (c) would be superfluous.

23. Under the circumstances, the only permanent medical impairment rating is that of ATP Dr. Fall, which is zero. There is an interesting question concerning what happens next, however, the ALJ abstains from addressing this question.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Overcoming the DIME of Dr. Pham

a. The party seeking to overcome a DIME physician's opinions bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office***,** 5 P.3d 385 (Colo. App. 2000). *Also see Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475 (Colo. App. 2005). The DIME physician's determination of MMI is binding unless overcome by "clear and convincing evidence." *Metro Moving & Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995); *See also Peregoy v. Indus. Claim Appeals Office,* 87 P.3d 261 (2004); and § 8-42-107(b)-(c), C.R.S. *Also see Whiteside v. Smith,* 67 P.3d 1240 (Colo. 2003). "Clear and convincing evidence" is evidence, which is stronger than preponderance, is unmistakable, makes a fact or facts highly probable or the converse, and is free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert, supra; Leming v. Indus. Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). In other words, a DIME physician's finding may not be overcome unless the evidence establishes that it is "highly probable" that the DIME physician's opinion is incorrect. *Postelwait v. Midwest Barricade,* 905 P. 2d 21 (Colo. App. 1995). To overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt". *Adams v. Sealy, Inc.,* W.C. No. 4-476-254 [Indus. Claim Appeals Office (ICAO), Oct. 4, 2001]. Suffice it to say, Dr. Pham's rating opinion was clearly erroneous and not in accord with the mandate of § 8-42-107 (80 (c), C.R.S. Therefore, it was overcome by clear and convincing evidence.

b. In light of the invalidity of the DIME rating of permanent medical impairment, a reversion to the pre-DIME status quo, the rating of ATP Dr. Fall, is warranted. It is an interesting question whether either party can commence the DIME process *de novo*, or whether the permanent medical impairment issue ends here.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant reached maximum medical improvement on June 4, 2018.

B. The permanent medical impairment rating of Division Independent Medical Examiner Khoi Pham, M.D., having been overcome, the only remaining rating is that of

authorized treating physician Allison Fall, M.D., which is zero permanent medical impairment.

C. Any and all issues not determined herein are reserved for future decision.

DATED this 16th day of July 2019.

EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

ISSUES

The issues presented for hearing were compensability; reasonable, necessary and authorized medical providers; and Respondent's contention that the accident or injury claimed was fully compensated in W.C. No. 5-009-471.

PROCEDURAL HISTORY

On August 8, 2018, the ALJ entered her order. On March 15, 2019, ICAO ordered the ALJ's order be set aside and remanded the matter for further proceedings and a new order.

This order clarifies that Claimant's November 9, 2016 injury is compensable; that Claimant's care provided by Dr. McIntyre and those in the chain of his referrals was reasonable, necessary and provided by Claimant's ATPs; and that the November 9, 2016 claim was fully compensated under W.C. No. 5-009-471.

FINDINGS OF FACT

1. On March 3, 2016, Claimant sustained a compensable injury when she struck her head on a counter in the course and scope of employment. Respondent admitted liability and Claimant's case proceeded as W.C. No. 5-009-471. Claimant treated with Dr. Brian McIntyre and several other providers in the chain of his referrals.

2. On November 9, 2016, while still treating for her March 3, 2016 injury, Claimant struck the left side of her head and neck on an x-ray machine at work. She experienced increased symptomology because of the November 9, 2016 event.

3. Claimant reported the November 9, 2016 event and her increased symptoms to Dr. McIntyre. Dr. McIntyre's note from that visit states that Claimant struck the back, left side, of her head on an x-ray machine at work. Dr. McIntyre referred to the event variably as a "re-injury" and an "injury" that caused some regression and worsening in her symptomology.

4. On November 21, 2016, claims representative Kaylee R_____(p/k/a Kaylee S_____) contemporaneously documented a conversation with Claimant. The note indicates that Ms. R_____ and Claimant discussed the November 9, 2017 event and whether Respondent would open a new claim or cover Claimant under claim W.C. No. 5-009-471. Ms. R_____'s note states: *"I advised [Claimant] since it was the same body part, and DMP [designated medical provider, Dr. McIntyre] opined that it was an aggravation, it would continue to be handled under her current claim."* Ms. R_____ testified that the note set forth the essence of the conversation and her impression that she had answered Claimant's questions and informed Claimant that Respondent was going to handle the November 9 event under the original workers' compensation claim,

W.C. No. 5-009-471. Ms. R_____ testified that she did not have any direct conversations with Dr. McIntyre but based her decision upon a review of Dr. McIntyre's reports.

5. At hearing, Claimant contested Ms. R_____'s version of the conversation and insisted that the November 9 event was a new claim. Claimant testified that she also took contemporaneous notes of the discussion. However, Claimant did not introduce into evidence any such notes, nor did she disclose such notes in her responses to discovery. On this topic, the ALJ finds the testimony and documentation provided by Ms. R_____ to be more credible and persuasive than that of Claimant.

6. Dr. McIntyre treated Claimant for both the March 3, 2016 injury and the November 9, 2016 event as part of W.C. No. 5-009-471. Dr. McIntyre's medical reports for the next several months indicate that he was treating Claimant for post-concussive syndrome and strain of the muscle, fascia and tendon at the neck level. His reports also document Claimant's progress and her gradual ability to return to work. Claimant testified at hearing that Dr. McIntyre treated her for both the March injury and November event.

7. Dr. McIntyre testified by June 6, 2018 deposition, that he treated Claimant for over a year. Claimant had a combination of head injury symptoms, including dizziness, difficulty with concentration, fatigue, headache pains, and neck pains. Dr. McIntyre indicated that he was aware of the original March 3, 2016 event, and the subsequent November 9, 2016 event. He testified that the November 9, 2016 head contusion occurred to the same general posterior aspect of Claimant's skull and that both events shared the following four elements:

- The strain of muscle, fascia and tendon at neck level,
- post concussive syndrome;
- concussion without loss of consciousness, and
- Claimant's head striking against other stationary object.

8. Dr. McIntyre testified that the diagnosis for both incidents was the same. He also testified that he did not treat the November 9, 2016 event as a completely new injury. Dr. McIntyre testified that they were **"**continuing the same vein of treatment from her previous injury," and that he hoped Claimant would not need much more treatment for the November 9, 2016 event because **"**it was just a slight increase in symptomology."

9. Claimant's treatment after November 9, 2016 included:

- Dr. McIntyre referred the Claimant to a neurological specialist, Dr. Patricia Soffer.
- Claimant underwent a CT scan to rule out any new abnormalities.
- Dr. Soffer read the scan and determined it to be normal.

- Dr. McIntyre treated the Claimant's subjective complaints until April 4, 2017.

10. Dr. Patricia Soffer's narrative report on January 27, 2017, indicated that Claimant had improved by that time. She had no further headaches, her cognitive difficulties had resolved, as had her neck pain. Dr. Soffer also found that Claimant's neck was supple with full range of motion. Dr. Soffer discharged Claimant from care on January 27, 2017.

11. Claimant returned to Dr. McIntyre's care until she eventually reached maximum medical improvement on April 4, 2017. Dr. McIntyre released Claimant to full regular activity and duty and prescribed maintenance treatment to consist of two visits with a neurologist, Dr. Patricia Soffer, within the following six (6) months and four (4) chiropractic visits within the following three (3) months of her MMI status. Dr. McIntyre testified that he felt that Claimant was at MMI from *both* the March 3, 2016 injury and November 9, 2016 event.

12. Respondents filed a Final Admission of Liability in W.C. No. 5-009-471 noting that Claimant had reached MMI and had no permanent impairment. Respondent also admitted for post-MMI maintenance care with Dr. Soffer and chiropractic care.

13. Claimant did not respond to Respondents' FAL.

14. On January 19, 2018, nine months after receiving the Final Admission of Liability, Claimant filed a new Workers' Claim for Compensation for the November 9, 2016 event. On February 20, 2018 Respondent filed a Notice of Contest, taking the position that the November 9, 2016 event was subsumed within W.C. No. 5-009-471 and that the case was closed.

15. At hearing, Claimant testified that her symptoms worsened because of the November 9, 2016 event and that she did not believe she had received adequate care and treatment.

16. Claimant testified that she did not pursue any follow-up treatment with the neurological specialist, Dr. Soffer, following Dr. McIntyre's recommendation of maintenance medical care. She offered no persuasive evidence that she followed up with any authorized chiropractic care after Dr. McIntyre made those recommendations.

17. Rather, Claimant treated with her private physicians at Kaiser Permanente. She continued to complain of neck pain and headaches in those records.

18. While Dr. McIntyre did not treat the November 9, 2016 event as a completely new injury, he did acknowledge the November 9, 2016 event caused "a slight increase in symptomology" and required medical treatment.

19. Based on the totality of the evidence, the ALJ finds that Claimant suffered a compensable injury on November 9, 2016.

20. Based on the totality of the evidence, the ALJ finds that Respondents provided Claimant all reasonable and necessary medical care for her November 9, 2016 injury as part of her March 3, 2016 claim handled as W.C. No. 5-009-471.

21. Based on the totality of the evidence, the ALJ finds that Claimant did not establish that she is entitled to any additional benefits with respect to her November 9, 2016 injury.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), §8-40-101, C.R.S. 2017, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. §8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier of fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. §8-43-201, C.R.S.

In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the ALJ. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

Compensability

For a claim to be compensable under the Act, a claimant has the burden of proving that she suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. C.R.S., §8-41-301(1) (c). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for determination by the ALJ. *Id*. at 846.

A compensable injury is an injury that "arises out of" and "in the course of" employment. *See* C.R.S. §8-41-301(1) (b). In deciding whether a Claimant has met his burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence." *See Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002).

The ALJ must examine the totality of the circumstances to determine whether there is a sufficient nexus between the employment and the injury such that the accident may be said to have occurred in the scope of the Claimant's employment. *City and County of Denver School District No. 1 v. Industrial Commission*, 581 P.2d 1162 (1978). In establishing causation, a Claimant "must show that the industrial injury bears a 'direct causal relationship between the precipitating event and the resulting disability.'" *See Garcia v. CF&I Steel*, W.C. No. 4-454-548 (ICAO May 14, 2004).

The ALJ concludes that the November 9, 2016, event constituted a compensable work injury. Claimant was in the course and scope of her work duties when she struck the left side of her head and neck on an x-ray machine at Employer's facility. Further, Claimant experienced increased symptomology from that injury which required medical care. § 8-41-301(1)(c).

Reasonable and necessary Medical Care

Respondents are liable for authorized medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury. § 8-42-101(1)(a), C.R.S; *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994).

Whether medical treatment is reasonable and necessary is for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002); *Wal-Mart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *Wal-Mart Stores, Inc. v. Industrial Claims Office, supra*.

The Judge credits Dr. McIntyre's testimony that the diagnosis for both injuries was the same, and that he treated Claimant for both injuries. Dr. Soffer also treated Claimant for both injuries and found that by January 27, 2017, Claimant had no further headaches, her cognitive difficulties had resolved, as had her neck pain and range of motion

limitations. Claimant returned to Dr. McIntyre who placed her at maximum medical improvement for both injuries on April 4, 2017. While Dr. McIntyre prescribed certain maintenance treatment, Claimant chose not to pursue such care.

Respondents filed a Final Admission of Liability in W.C. No. 5-009-471 noting that Claimant had reached MMI and had no permanent impairment. The Judge reasonably infers from context that the FAL encompassed Claimant's November 9, 2016 injury for which she had received treatment and been placed at MMI.

Claimant did not oppose the FAL, request a DIME, or file an application for hearing. Rather, Claimant waited nine months, and only then did she file a new Workers' Claim for Compensation for the November 9, 2016 event.

Based on the totality of the evidence, the Judge finds and concludes that Respondents provided Claimant with reasonable and necessary medical care sufficient for her to reach MMI without any permanent impairment or restrictions.

Thus, although Respondents should have opened a new claim for the November 9, 2016 injury, Insurer provided all reasonable and necessary medical care for that injury under the previously established claim, W.C. No. 5-009-471.

ORDER

IT IS, THEREFORE, ORDERED THAT:

1. Claimant suffered a compensable work injury on November 9, 2016.

2. while she was treating for a March 3, 2016 injury which was the subject of W.C. No. 5-009-471.

3. Claimant received all reasonable and necessary medical treatment and appropriate disability and/or impairment benefits for the November 9, 2016 event as part of W.C. No. 5-009-471. Those benefits are set forth in Respondent's Final Admission of Liability dated April 5, 2017.

4. Claimant's claims for benefits not covered in W.C. No. 5-009-471 are denied and dismissed with prejudice.

5. Any medical care provided by Kaiser Permanente is not authorized medical care for which the Respondent is responsible.

DONE this 17th day of July 2019.

OFFICE OF ADMINISTRATIVE COURTS

/s/ Kimberly Turnbow
Kimberly B. Turnbow,
Administrative Law Judge

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 1525 Sherman Street, 4th Floor, Denver, CO 80203	
In the Matter of the Workers' Compensation Claim of: **R,** Claimant, vs. **C,** Employer, And A, Insurer, Respondents.	▲ **COURT USE ONLY** ▲ **CASE NUMBER:** **WC 5-063-591-002**

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Hearing in the above-captioned matter was held before Administrative Law Judge Margot W. Jones on May 8, 2019, at 1:30 p.m. in Courtroom 3 in Denver, Colorado. Claimant was present in person and represented by_____, Esq. Respondents were represented by _____, Esq. Exhibits 1-10 and A-G were admitted into evidence. A post hearing deposition of Dr. Bryan Andrew Castro was held on June 12, 2019, and received by the Judge on July 15, 2019.

In this order, R shall be referred to as "Claimant." C shall be referred to as "Employer" and A shall be referred to as "Insurer." Employer and Insurer, collectively, will be referred to as "Respondents."

In this order, the Judge may use the following acronyms: C.R.S. refers to Colorado Revised Statutes (2018); the Act refers to the Workers' Compensation Act of Colorado, §§8-40-101, et seq., supra; OAC refers to the Office of Administrative Courts; OACRP refers to the Office of Administrative Courts Rules of Procedure, 1 CCR 104-1; and WCRP refers to Workers' Compensation Rules of Procedure, 7 Code Colo. Reg. 1101-3.

ISSUE

1. Whether Claimant has demonstrated by a preponderance of the evidence that the L5-S1 disc replacement surgery recommended by Brent Y. Kimball, M.D., is reasonable, necessary, and causally related to Claimant's industrial injury?

FINDINGS OF FACT

1. Claimant is a 34-year-old female who was employed by Employer as a Licensed Practical Nurse (LPN) for approximately 2 ½ to 3 years prior to her admitted industrial injury of September 13, 2017. As an LPN, Claimant credibly testified she assists with patient transfers, dispenses medications, and assists physicians with Employer's patients.

2. Claimant credibly testified prior to September 13, 2017, she had no limitations, pain complaints or symptoms in her lower extremity and was in good health and able to perform all aspects of her job.

3. On September 13, 2017, Claimant suffered an admitted industrial injury when in the course and scope of her employment as an LPN she was lifting a patient who had fallen toward her and who had sunk into his mattress when she felt the sudden onset of low back pain, right greater than left.

4. Following Claimant's admitted industrial injury, she commenced treating with the Employer's authorized treating provider (ATP), Robert Broghammer, M.D.

5. On January 15, 2018, after trying physical therapy which did not relieve Claimant's radiating pain into her lower extremity, Claimant underwent microdiscectomy surgery at the L5-S1 level, performed by ATP Christopher Gallus, D.O.

6. On February 28, 2018, following surgery, Claimant had increased low back pain which required an emergency room visit.

7. On May 3, 2018, ATP Gallus released Claimant from his care, however, Claimant continued to complain to ATP Broghammer of pain in the "lumbar area" and Claimant's back was still "very sore."

8. After her release by ATP Gallus, Claimant was referred out by ATP Broghammer to Samuel Y. Chan, M.D., at Mile High Sports and Rehabilitation Medicine to address Claimant's low back pain. ATP Chan performed epidural steroid injections and SI injections.

9. On July 25, 2018, because Claimant's low back was still symptomatic, even after the injections performed by ATP Chan, Claimant was referred by ATP Broghammer to Brian Andrew Castro, M.D., at Cornerstone Orthopedics and Sports Medicine. Dr. Castro opined that because the pain generator has not been fully established, Claimant was not a good surgical candidate, that a second microdiscectomy or decompression would not assist and that a fusion was not indicated in light of her young age.

10. Claimant credibly testified she did not enjoy her interaction with ATP Castro. She believed that he was not responsive to her concerns and she did not like his statement to her that she just had to "live with the pain." She raised her concerns to ATP Broghammer who made a referral out for a second surgical evaluation.

11. On September 7, 2018, Claimant was referred out by ATP Broghammer for a second opinion from Stephen F. Pehler, M.D., at Colorado Orthopedic Consultants. After evaluating Claimant, ATP Pehler wrote to Dr. Broghammer, noting a review of Claimant's medical history, and opined as follows:

> At this point in time, this patient has a complicated postop of course after a microdiscectomy. She has relatively mild neural compressive pathology with fairly debilitating low back pain. We reviewed options as well as further diagnosis. The only diagnostic modality that she has not obtained is a discogram. If the patient does have a positive response to a discogram, she could potentially be a candidate for a lumbar disc arthroplasty. I do not feel this patient would do well with a fusion or any further decompression.

See Claimant's Submission Tab 5, BS 16-17

12. After receiving ATP Pehler's surgical suggestion for a disc replacement, Respondents requested that ATP Castro conduct a records review of Claimant's case. On December 8, 2018, ATP Castro provided Respondents a written report containing his opinion regarding Claimant need for disc replacement surgery.

13. Claimant credibly testified that after meeting with ATP Pehler, her mother treated with a Brent Y. Kimball, M.D., at Carepoint Neurosurgery. Claimant requested that ATP Broghammer refer her out to Dr. Kimball, for a third surgical evaluation, in light of the fact that ATP Castro was of the opinion that no further medical care was warranted and ATP Pehler was of the opinion that if Claimant does have a positive response to a discogram, she could potentially be a candidate for a lumbar disc arthroplasty.

14. On November 19, 2018, Claimant presented to ATP Kimball, whose medical records reflect that the doctor examined and discussed with Claimant the benefits/risks/indications of fusion vs total disc replacement (TDR). Given Claimant's young age, the doctor wanted to avoid fusion. He recommended Claimant get a discogram and based on the results further discuss a L5/S1 TDR.

15. On December 8, 2018, ATP Castro completed the record review previously requested by the Respondents. In that record review, it was ATP Castro's opinion that Claimant suffered a work-related injury on September 13, 2017, that she had undergone an L5-S1 microdiscectomy on January 15, 2018, which provided short-term relief for approximately 4 to 5 weeks, but that her pain had continued. It was Dr. Castro's opinion that "I do not agree with the concept that we have tried everything else so surgery must be the next answer" (*See* Claimant's Submission Tab 10, BS 78) and his studies do not show the superiority of a disc replacement versus a fusion in treatment of low back pain, that surgical intervention would not be

likely to produce benefit or functional gains and that surgery was not causally related to the accident in question. (*See* Claimant's Submission Tab 10, BS 79).

16. On December 12, 2018 Claimant was evaluated by ATP Chan whose report reflects that Dr. Chan performed a physical exam and thoroughly reviewed the conflicting opinions of Dr. Castro and Dr. Pehler regarding disk replacement. Dr. Chan notes that Claimant continued to be seen for psychological evaluation by a Dr. Hawkins. Dr. Chan further discussed Claimant's case with Dr. Broghammer and noted that Claimant would like to have her disk replacement surgery. Dr. Chan questioned the value of electro-diagnostic testing. Dr. Chan's assessment and recommendations were that facet injections could be considered to completely rule out the possibility of a posterior element pain, prior to disk replacement surgery. Dr. Chan opined that one may certainly consider pursuing L4-5 and L5-S1 facet injections, for diagnostic reasons, to be done under fluoroscopic guidance.

17. On December 28, 2018, ATP Kimball eventually decided against the need for Claimant to undergo a discogram and submitted a request for Claimant to undergo an L5-S1 disc replacement. ATP Castro agreed with not doing a discogram at his deposition on June 12, 2019.

18. On January 9, 2019, the L5-S1 disc replacement surgery which was scheduled to occur with ATP Kimball was cancelled by Respondents who notified ATP Kimball that, attaching the IME report from Dr. Castro dated December 8, 2018, Respondents denied the December 28, 2018, surgery request.

19. On January 16, 2019, Claimant had her fifth of twelve visits with Rebecca D. Hawkins, PhD, ABPP, BCP who noted in her report Claimant has undergone an extensive Psychological Pain Evaluation in which Dr. Hawkins assessed Claimant's surgical candidacy from a psychosocial standpoint, and determined that Claimant is actually a good surgical candidate.

20. On February 19, 2019, after surgery had been denied, ATP Chan noted in his report Claimant presents for reevaluation of chronic low back pain. Dr. Chan notes second and third opinions with Dr. Castro and Dr. Pehler, then Dr. Kimball's disk replacement recommendation. A CT scan was repeated, which showed single-level diskogenic disease in L5-S1 level and a broad-based central disk protrusion in the L5-S1 level. On December 17, 2018, Claimant most recently underwent bilateral L4-5 and L5-S1 facet injections, which had no effect. Claimant was supposed to have her disk replacement on January 8, 2019, however, this was not approved by the insurance company.

21. On April 3, 2019 Claimant returned to ATP Chan who noted that she has a hearing scheduled for May 8, 2019, and that Claimant has exhausted all treatment and thus, it was recommended that the patient undergo disk replacement. Dr. Chan notes that Dr. Kimball had opined that perhaps 1-level diskogram may suffice in diagnosing discogenic complaints. Dr. Chan concluded that Claimant's clinical findings and symptoms do correlate with a discogenic-nature complaint.

22. On April 5, 2019, ATP Pehler responded to ATP Castro's December 8, 2018, record review that opined that surgery was not necessary. Dr. Pehler opined that

given the nature of Claimant's complaints and her imaging findings, the doctor recommended an isolated provocative discography at the L5-S1 level to confirm this as the source of her pain. In the event that this is a positive study, Dr. Pehler recommends a lumbar disc replacement at L5-S1.

23. On April 18, 2019 ATP Kimball responded to ATP Castro's December 8, 2018, opinion that surgery was not necessary stating that Claimant appears to be a healthy adult without gross secondary gain issues related to her clinical presentation. Dr. Kimball opined that the lack of changes in Claimant's MRI is not significant because Claimant has progressive discogenic or clinically symptomatic back pain associated with post microdiscectomy and a repeat MRI does not identify discogenic back pain. Dr. Kimball opined that the fact that Dr. Castro cannot identify a pain generator does not negate that her symptoms are primarily caused by discogenic post discectomy related low back pain.

24. Dr. Kimball further opined that Claimant's anxiety and mood changes related to her low back pain and persistent symptoms is not unusual since her symptoms are disruptive to her life. The doctor opined that Claimant's psychological overlay is not a confounding element as it is more likely a typical and common comorbid condition related to the disruption that she has experienced and her persistent pain.

25. Dr. Kimball opined that the indication for surgery is that the patient is having clinically symptomatic discogenic back pain. Dr. Kimball notes that the recommendation for surgery comes only after failed conservative treatment, including SI joint injections, epidural injections, acupuncture, trigger point injections, physical therapy, and chiropractic manipulations, as well as a prolonged amount of time after her discectomy. Dr. Kimball opined that Claimant's condition may be challenging to diagnose and it is even more difficult to treat interventionally discogenic back pain. However, the doctor believes that the fact that attempted treatments are negative is further evidence that Claimant's pain is related to her disc and because Claimant's symptoms only started after her discectomy. Dr. Kimball opined that Claimant's disc is more than likely the isolated generator of her pain.

26. ATP Kimball addressed Dr. Castro's discussion of a possible fusion surgery stating that he, Dr. Kimball, is not recommending fusion surgery at this time. Dr. Kimball further indicated that there have not been superiority trials done with lumbar disc replacement so Dr. Castro's comment regarding disc replacement is incorrect.

CONCLUSIONS OF LAW

General Legal Principles

1. The purpose of the Act is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case must be interpreted neutrally, neither in favor of either the rights of the claimant or nor in favor of the rights of the respondents, and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

2. Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of the ALJ. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

3. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Medical Treatment

4. A respondent is liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the

ALJ. *See generally Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company*, W. C. No. 4-445-060 (February 22, 2002).

5. A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004).

6. The Workers' Compensation Rules of Procedure, 7 Code Colo. Reg. 1101-3, Rule 17 establishes *Medical Treatment Guidelines*. These *Medical Treatment Guidelines* are created by the Division of Workers' Compensation using evidence-based medicine, and they address occupational injuries that occur most frequently or incur high costs of treatment. The goal is to establish guidelines for quality care at a reasonable price. The medical treatment guidelines set forth reasonable medical care for high cost or high frequency categories of occupational injury or disease. However, the Division recognizes reasonable medical care may include deviations from the guidelines in individual cases. *Medical Treatment Guidelines*, Rule 17, 19-4(A), Procedure for Questioning Care

7. When determining the issue of whether proposed medical treatment is reasonable and necessary the ALJ may consider the provisions and treatment protocols of the Guidelines because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, evidence of compliance or non-compliance with the treatment criteria of the Medical Treatment Guidelines is not dispositive of the question of whether medical treatment is reasonable and necessary. Rather the ALJ may give evidence regarding compliance with the Medical Treatment Guidelines such weight as he/she determines it is entitled to considering the totality of the evidence. *See Adame v. SSC Berthoud Operating Co., LLC,* WC 4-784-709 (ICAO January 25, 2012); *Thomas v. Four Corners Health Care*, WC 4-484-220 (ICAO April 27, 2009); *Stamey v. C2 Utility Contractors, Inc.*, WC 4-503-974 (ICAO August 21, 2008); Section 8-43-201(3), C.R.S.

8. The ALJ concludes that Claimant proved by a preponderance of the evidence the requested L5-S1 disc replacement surgery is reasonable, necessary and related to the admitted September 13, 2017, injury. While Claimant had a previous microdiscectomy at L5-S1, that surgery only provided temporary relief. Claimant was credible in her testimony that she did not have any symptoms, limitations, or restriction in her lower extremity leading up to the admitted industrial injury. Claimant has been evaluated by no less than three surgeons, two of whom have opined that disc replacement surgery is reasonable, necessary and related. Additionally, ATP Broghammer has noted that both ATPs Kimball and Pehler feel that the surgery proposed is reasonable. Claimant's psychologist has approved her for surgery. Claimant's pain specialist, ATP Chan, has indicated disc replacement surgery would be appropriate for Claimant's symptoms.

9. It is the ALJ's opinion that Claimant's admitted industrial injury of September 13, 2017, and the subsequent microdiscectomy at L5-S1 have not resolved Claimant's pain complaints and that the recommendation for L5-S1 disc replacement surgery is appropriate.

10. The ALJ has considered medical treatment guidelines as they apply to Claimant's case and, based upon the totality of the evidence, concludes it is more likely than not that Claimant's need for the L5-S1 disc replacement surgery is related to her work injury and is reasonable and necessary to cure and relieve Claimant of its effects.

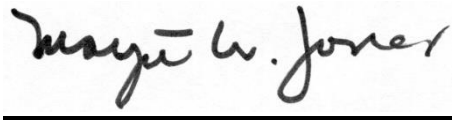
ORDER

1. ATP Kimball's request for L5-S1 disc replacement surgery is reasonable, necessary and related to Claimant's work injury.

2. Respondents shall pay for such surgery pursuant to the fee schedule.

3. Any issues not determined in this decision are reserved for future determination.

DATED: July 17, 2019.



MARGOT W. JONES
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

If you are dissatisfied with the Judge's Order, you may file a Petition to Review the Order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the Order, as indicated on the certificate of mailing or service; otherwise, the Judge's Order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the Order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see § 8-43- 301(2), C.R.S. (as amended, SB 09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a Petition to Review at ttp://www.colorado.gov/dpa/oac/forms-WC.htm.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-092-738

ISSUE

- Whether Claimant proved by a preponderance that she suffered a compensable injury on November 8, 2018.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. This matter arises out of a denied injury that occurred on November 8, 2018 while Employer employed Claimant as a waitress. Claimant suffered a non-displaced fracture of the right fifth metatarsal bone.

2. Claimant testified that she was carrying a tray of sugar caddies, walking very quickly to a meeting right before the restaurant opened, when she felt a pop and pain in her right foot, causing her to fall to the ground hitting her left knee. She was wearing non-slip, hard-soled shoes appropriate for restaurant work. Claimant testified that prior to feeling this pain/pop she did not recall slipping, tripping, or stumbling.

3. If Respondents investigated the claim, Claimant was unaware of such and Respondents asked no questions about her injury.

4. Claimant testified credibly that she had not previously experienced any symptoms in her right foot and had never received any treatment for her foot. Respondents provided no persuasive evidence to the contrary.

5. Immediately after her fall, Claimant did not want to be taken to a doctor, but after resting for 30 minutes she could not walk due to the pain. Claimant was taken to urgent care and was advised after x-rays that she had fractured her right fifth metatarsal. Claimant was placed in a walking boot, prescribed Ibuprofen, and sent home. Claimant was unable to work because of her injury from the day of her injury through November 17, 2018.

6. Claimant next treated with Dr. Ocel who casted her foot and prescribed pain medication. Dr. Ocel restricted Claimant to standing and walking to five minutes, and as a result, Claimant was unable to perform her regular job duties.

7. Claimant returned to work on November 18, 2019 as a hostess earning $13.00 per hour. Employer paid Claimant $8.18 per hour as a waitress, and Claimant credibly testified that she generally earned an average of $100 per shift in tips. However, historically her tips were higher in November and December because people were generous during the holiday season. The week immediately prior to her injury,

Claimants tips averaged $130 per shift. Claimant earned less working as a hostess than as a waitress. Claimant testified that she returned to work full duty as a waitress on December 13, 2019 and earned approximately $130 per shift in tips.

8. The ALJ finds that that Claimant's temporary partial disability benefits disability should be calculated using the following formula:

[(8.18 x hours worked) + $130] – ($13 x hours worked) = Temporary partial disability rate

9. The ALJ finds that that Claimant's temporary total disability benefits disability should be calculated using the following formula:

[(8.18 x hours worked) + $130] = Temporary total disability rate

10. On approximately November 20, 2018, Insurer notified Claimant that they had denied her claim.

11. Claimant returned to Dr. Ocel on November 30, 2018. He removed her cast and placed her back into a walking boot for thirty days. Claimant testified that she paid $75.00 to Dr. Ocel for removing her cast. She also paid $100 for two later visits to Dr. Ocel, and for additional x-rays. Claimant did not have the means to pay for recommended physical therapy.

12. At hearing, Dr. Lawrence Lesnak testified for Respondents as an expert in the fields of Rehabilitation and Occupational Medicine.

13. Dr. Lesnak performed a Respondents sponsored IME on Claimant on Marc1, 2019. He interviewed and examined Claimant and reviewed Claimant's medical records which Respondents provided. Based on Claimant's statement that she did not slip or trip, he opined that Claimant was "merely walking down a hallway" at the time of her injury, and that it was not work related. The ALJ is not persuaded. As the Doctor formed his conclusion based on Claimant's statement, she finds that the doctor's opinion was not based on any medical expertise. Rather, he appears to have construed one part of a neutral statement in a posture favorable to Respondents as they were paying for that opinion.

14. Claimant disagreed with Dr. Lesnak's description that she was merely walking. Claimant's testimony clarified that she was walking very quickly to a meeting while carrying a tray just prior to the restaurant opening for lunch. Claimant has worked as a waitress for more than eighteen years and distinguished her "work walk" from non-work walking. The ALJ finds Claimant's testimony credible and persuasive; more so than that of Dr. Lesnak.

15. The ALJ finds and concludes Claimant has met her burden of proving it more likely that she was in the course and scope of her employment at the time of the injury, and that the injury arose out of that employment.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), sections 8-40-101, C.R.S. 207, et seq., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the Claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-201 C.R.S. A preponderance of the evidence is that which leads the trier-of-fat, after considering all of the evidence to find that a fact is more probably true than not, *Page v. Clark,*197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of the Respondents. Section 8-43-201, C.R.S.

The primary issue was whether Claimant met her burden of proof with respect to the issue of compensability and showed that the injury arose out of and in the course of her employment with Employer.

An injury is compensable if it "arises out of" and "in the course of" employment. Section 8-31-301 CRS; *Price v. Industrial Claims Appeals Office*, 919 P.2d 207 (Colo. 1996). The parties do not dispute that Claimant was in the course and scope of her employment at the time of the injury. However, Respondents argue Claimant did not establish by a preponderance of the evidence the "arising out of" requirement ,which requires that the injury have its origin in an employee's work-related functions and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Gutierrez v. Walmart Stores, Inc*, W.C. No. 4-432-838 (November 30, 2000). "The mere fact that a Claimant develops an injury during the course of her employment does not relieve her of the duty to establish that the injury arose out of the employment." *Savage v. First Fleet, Inc.*, W.C No. 4-929-714-01 (August 5, 2014). "Colorado law does not create a presumption that injuries which occur in the course of employment necessarily arise out of employment." *Finn v. Industrial Commission*, 165 Colo. 106, 437 P. 2d 542 (1968).

The Supreme Court addressed this issue in *City of Brighton v. Rodriguez,* 318 P.3d 496 (Colo. 2014). In *City of Brighton*, the court identified three categories of injuries. These are (1) employment risks directly tied to the work itself, (2) personal risks, which are inherently personal, and (3) neutral risks, which are neither employment related nor personal.

While Claimant could not explain why her fifth metatarsal broke, the ALJ credits her testimony that she was not merely walking. Rather, she was walking quickly and purposefully to a pre-opening meeting minutes before the restaurant opened while carrying restaurant equipment. She credibly described this as her work walk, as opposed to merely walking along. The ALJ finds and concludes that the facts of this claim fall within the first category of risks the court identified in *City of Brighton.*

Therefore, the ALJ concludes that Claimant has met her burden of proving it more likely than not that she was in the course and scope of her employment at the time of the injury, and that the injury arose out of that employment.

ORDER

It is therefore ordered that:

1. Claimant has met her burden of proof on the issue of compensability of the claim at issue.

2. As the claim is compensable, Respondents are liable for Claimant's medical and disability benefits.

3. Claimant's medical benefits include, but are not limited to, the $175 she paid directly for medical care.

4. All matters not determined herein are reserved for future determination

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http//www.colorado.gov/dpa/oac/forms-WC.htm.

DATED July 18, 2019

/s/ Kimberly Turnbow
Kimberly Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street; 4th Floor
Denver, CO 80203

ISSUES

I. Has Claimant made a proper showing that she is entitled to a change of her Authorized Treating Physician?

II. Have Respondents shown, by a preponderance of the evidence, that they should be entitled to withdraw their admission for *Grover* medical maintenance benefits?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Claimant was injured at work on July 27, 2017, while pulling on the head of a bed. It suddenly came free and fell, while Claimant attempted to hold onto it. Claimant began to develop pain in the left shoulder. She received extensive conservative care included physical therapy, dry needling, acupuncture, and medications. At Claimant's request, a left shoulder MRI was performed on October 12, 2017, which revealed, under *Impression,* 'traces' and 'mild' abnormalities, "likely due to muscular injury or strain." (Ex. 5, p. 43).

2. A cervical MRI was performed on October 16, 2018, which showed "minimal degenerative changes of the cervical spine". Nothing in this cervical MRI suggested an injury of any sort. (Ex. 5, p. 45).

3. Claimant testified at hearing. The bases in Claimant's testimony for a change of physician were

    - Dr. Thomas Centi's lack of sincerity (in that he did not believe she sustained an injury),

    - The length of medical visits, and his placing her at maximum medical improvement without performing any injections or otherwise resolving her pain.

    Claimant indicated that she would like a physician who would provide care so that she could recover, as she still had pain and discomfort in the form of a ball in her back that would not loosen up.

Medical Treatment

4. On August 4, 2017, Claimant presented to Steven Quackenbush PA with discomfort in the left shoulder blade into neck, tingling, and numbing sensation. Her pain was self-reported at 2/10. Physical examination showed full flexion, extension, and lateral

movement of the cervical neck without focal deficits. "Reproducible pain with palpation of the left paracervical and trapezius muscles". Full range of motion of the upper and lower extremities without pain, swelling, popping, or evidence of joint trauma. (Ex. D).

5. On August 7, 2017, Claimant first presented to Thomas Centi, M.D. She reported feeling 'a little better.' Difficulty with elevation and turning neck. Located in the neck, left shoulder. Pain level was 2/10. Range of motion of the neck was normal. No pain to palpation or motion. Left sided muscle tautness and tenderness. Left shoulder range of motion was normal with no pain to palpation or motion. Dr. Centi recommended continued ice and heat, ibuprofen, and Flexeril. A physical therapy referral was made. (Ex. E).

6. From August 11, 2017 to September 13, 2017 Claimant received 10 sessions of outpatient physical therapy. (Ex. G).

7. On August 21, 2017, Claimant self-reported slight improvement, but she now rated her pain 7/10 for 20% of the time. (Ex. I, p. 62). This is the only date that Claimant marks her pain at any level above "4".

8. On September 29, 2017, Claimant returned to Dr. Centi. She felt that her condition had improved 'significantly'; pain was 2/10. She had completed therapy with great results. Nevertheless, the patient herself "now request[ed] an MRI of the shoulder to know for certain nothing [was] wrong." Dr. Centi agreed, and ordered an MRI (taken 10/12/17, as noted above) of her left shoulder, which was indicative of a muscle strain. (Ex. M, N).

9. On October 19, 2017, Claimant reported significant improvement to Dr. Centi, although her pain remained 2/10. Tolerating regular activity without problems located in the neck, left shoulder. Normal range of motion with no pain to palpation at the neck and left shoulder. Strength was normal. Reflexes were normal. Left shoulder MRI was 'essentially negative'. Dr. Centi recommended that she continue and home exercise program. He placed Claimant at MMI with no impairment or permanent work restrictions. He did diagnose a sprain of ligaments in the cervical spine, 'consistent with a work injury.' (Ex. O).

10. Claimant saw her Primary Care Physician, Steven Olson, M.D., on November 16, 2017, for a yearly physical exam- no complaints were noted. In the review of systems section under "musculoskeletal" it was stated "denies back pain, joint pain, muscle aches" and under neurological "denies numbness, weakness, headaches". On physical examination, the musculoskeletal portion stated "gait normal, no gross deformities". There was no mention of any neck or left shoulder complaints in this visit, which occurred one month after Claimant was found to be at MMI. (Ex. P).

11. Claimant timely requested a DIME. The DIME Examination took place on February 20, 2018, by Dr. John Burris, MD. Claimant reported 3/10 "discomfort" over the back of her left shoulder. Claimant described her pain as aching and tightness with intermittent shooting and burning. The pain averaged between 1 and 3/10. Claimant indicated she

was never pain-free. She denied neck pain, radiation of pain, numbness or weakness of the extremities. (Ex. A).

12. Physical examination of the cervical spine revealed normal to visual inspection – supple and non-tender. Full range of motion in all planes. Negative Spurling's sign bilaterally. Motor strength 5/5 throughout the upper extremities, DTRs symmetrical, normal sensation. (Ex. A).

13. Physical examination of the left upper extremity revealed 'neurovascularly intact throughout'. Normal color, temperature, and muscle tone. Non-tender over the clavicle and AC joint. Non-tender over the lateral edge of the acromion. Mild tenderness in the posterior shoulder girdle along the medial scapular border. Palpation in this area reproduced her pain. No muscle spasm or trigger points present. No scapular winging present. Normal scapulothoracic tracking with motion. Shoulder range of motion: 180° flexion, 55° extension, 170° abduction, 50° adduction, 90° external rotation, and 80° Internal rotation. Negative impingement sign, negative speeds test, and negative drop arm sign. Full strength with resisted abduction. Normal radial, median, and ulnar nerve function distally. (Ex. A).

14. The DIME assessed Claimant with a mild myofascial strain to the left posterior shoulder girdle at work on July 27, 2017. Diagnostic testing was negative and she has completed conservative treatment. Dr. Burris agreed with Dr. Centi's MMI date of October 19, 2017. Claimant displays full range of motion, with no objective findings, and no evidence of residual deficits. No maintenance was indicated, but he did recommend a home exercise program. (Ex. A).

15. On August 15, 2018, Dr. Centi stated that the patient reported that she continued to have the same symptoms as previously during her course of treatment including "tightness and some pain, moving better but hurts with rotating neck, no other arm or leg involvement, here for re-evaluation, still with left-sided neck and upper back pain and tightness, hurts with turning and lifting, no numbness or tingling, had been released from care but is here for more treatment located in the neck, left shoulder, she considers it to be minimal. She describes it as tender, aching". (Ex. Q).

16. A Cervical MRI of 10-16-18 showed "minimal degenerative changes of the cervical spine as described". There were minimal disc bulges at C4-5 and C5-6 [well within the normal range for an asymptomatic adult per Dr. Ridings] as the only findings. There was no spinal canal or neuroforaminal narrowing. (Ex. 5, Ex. W).

17. Between August 28, 2018 and November 15, 2018, Claimant attended over 20 physical therapy appointments. The most recent entry, from November 15, 2018, under "subjective", states that "Pt is not getting relief that lasts." (Ex. S, p. 193).

Claimant's Hearing Testimony

18. At the hearing, Claimant did not recall both Dr. Centi and Dr. Burris recommending that she continue a home exercise program following maximum medical improvement. However, the physical therapy notes indicate that Claimant had not followed this advice. A medical note from August 28, 2018 for Claimant's cervical evaluation indicates that "[t]he patient does not regularly exercise and demonstrates low tone, strength and endurance." (Ex. 4, p. 36). Further, that same note states "the diagnosis is a *relapse of a prior episode in 2016." Id at 36.* (emphasis added).

19. Claimant testified that she did not believe her condition was stable, She wanted a change of physician to improve her condition. She indicated that this request was based upon a disagreement with both Dr. Centi and Dr. Burris about whether or not her condition was stable. Claimant felt she required additional treatment to improve that condition.

20. Claimant indicated that she wanted an 'injection', believing that such a procedure may help make her condition go away forever. However, Claimant earlier admitted that she did not attempt to challenge the DIME opinion of Dr. Burris that she was at MMI.

Dr. Centi's Deposition Testimony

21. The ATP, Dr. Thomas Centi, testified via deposition on Ju7ne 26, 2018. He felt like the MRI of Claimant's shoulder was "basically normal". She had returned to regular duty at work with no complaints. He reiterated that he felt her MMI date of Oct. 19, 2017. He was unaware of any problems communicating with Claimant, and at no time did he feel he was refusing treatment that was needed. He concurred with Dr. Burris' essential findings.

22. Dr. Centi initially felt that Claimant's complaints were purely subjective in nature, but later acknowledged that she had exhibited some tautness in her shoulder, which would then qualify as objective evidence of an injury. He reiterated that range of motion was normal. He acknowledged that Claimant's self-reported pain level varied between visits, but never dropped to zero.

23. Dr. Centi was asked about entries for Claimant's neck, which appeared twice, with differing symptoms, on the same examination date. He had no explanation, save the possibility that data from one visit would be auto-carried over to the next visit. He acknowledged it was a mistake on his part.

Dr. Ridings' Report and Testimony

24. Dr. Eric Ridings, MD, was telephonically deposed on behalf from Respondents on May 13, 2019. Dr. Ridings testified that the only types of injections that could be relevant to this type of case would be either trigger point injections or cervical or thoracic injections. However, based on the Colorado Medical Treatment Guidelines, he opined that

Claimant did not meet any of the criteria for administering such injections. This is, in part, because the mechanism of injury was not consistent for facet injury.

25. Trigger point injections would only be necessary where Claimant was having difficulty participating in physical therapy. Since Claimant participated in numerous physical therapy sessions, there would be no basis for this trigger point treatment. However, Prior to MMI, Claimant also reported great results from physical therapy. *(*Ex. M, p. 86).

26. Dr. Ridings opined, that based on the PCP record and DIME record alone, there was no basis for continued care in this case. Dr. Ridings acknowledged the errors in Dr. Centi's reports and that he would not want to have Dr. Centi as his physician. However, based on the lack of any report of pain or complaints to Claimant's PCP, coupled with a normal examination with the DIME physician, there was no need for additional care. Dr. Ridings explained that rather than treating too little, Dr. Centi in fact over-indulged Claimant's requests for treatment.

27. Dr. Ridings explained that based on the medical records, it appeared that the endpoint of the treatment being prescribed by Dr. Centi was at whatever point the patient told him that she did not require any additional treatment. However, within a reasonable degree of medical probability based on the medical records (specifically the PCP report and the DIME report), none of the maintenance care prescribed Dr. Centi was reasonable and necessary. (Ex. C).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). A claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

B. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

C. In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). In this instance, while the ALJ finds Claimant to be sincere in wanting more medical treatment, her sincerely held opinions cannot overcome the weight of the medical evidence.

Change of Physician

D. A claimant may seek a change of physician upon a "proper showing." C.R.S. § 8-43-404(5)(a)(VI); *Carlson v. ICAO*, 950 P.2d 663 (Colo. App. 1997). Because the statute does not contain a specific definition of a proper showing, the ALJ has broad discretionary authority to determine whether the circumstances justify a change of physician. *Loza v. Ken's Welding*, W.C. 4-712-246 (Jan. 7, 2009). Whether a proper showing has been made is a factual determination for the ALJ. C.R.S. § 8-43-308; *see Story v. ICAO*, 910 P.2d 80 (Colo. App. 1995).

E. The claimant may procure a change of physician where she has reasonably developed a mistrust of the treating physician. *See Carson v. Wal-Mart*, W.C. No. 3-964-07 (Apr. 12, 1993). The ALJ may consider whether the employee and physician were unable to communicate such that the physician's treatment failed to prove effective in relieving the employee from the effects of his/her injury. *See Merrill v. Mulberry Inn, Inc.*, W.C. No. 3-949-781 (Nov. 1995). But an ALJ is not compelled to grant a change of physician based upon the claimant's personal dissatisfaction with that physician. *See Story v. ICAO*, 910 P.2d 80, 82 (Colo. App. 1995); *Zolman v. Horizon Home Care, LLC*, W.C. No. 4-636-044 (Nov. 3, 2010).

F. Where an employee has been receiving adequate medical treatment, courts need not allow a change in physician. *Loza v. Ken's Welding*, W.C. No. 4-712-246 (Jan. 7, 2009); *Greenwalt-Beltmain v. Dep't. of Reg. Agencies*, W.C. No. 3-896-932 (ICAO December 5, 1995). And the fact that an ATP stops providing treatment based upon the medical determination that further treatment is not needed is not a sufficient basis alone to warrant a change of physician. Rather, the claimant must seek applicable statutory remedies such as submitting a request for change of

physician or seeking a DIME. *See Bilyeu v. Babcock & Wilcox Inc.*, W.C. No. 4-349-701 (July 24, 2001), *aff'd., Bilyeu v. ICAO*, (Colo. App. No. 01CA1505, April 11, 2002) (not selected for publication).

G. Claimant in this instance has failed to make a sufficient showing. The medical evidence shows that she suffered no work injury to her neck. To the extent that she later complained of problems with her neck, after MMI, the evidence suggests any pain was due to an old injury. Nothing in the cervical MRI suggested an injury; merely mild degenerative conditions in her discs. Despite Dr. Centi's plain errors in documenting Claimant's neck symptoms, Claimant did not injure her neck at work. The ALJ finds Dr. Ridings' reasoning persuasive here; Claimant suffered a mild strain to her shoulder - nothing more - which had largely resolved by the time she reached MMI. If anything, Dr. Centi went too far in ordering diagnostics and treatment. The ALJ also finds Dr. Burris DIME to have been accurately performed, both in his diagnosis and his recommendations.

H. Here, Claimant did seek a DIME. She testified that was dissatisfied with the DIME's determination that her condition was stable. She further testified that the basis for her request for a change of physician was because of her dissatisfaction with this determination, and that she wanted another physician who would provide her with additional treatment to *improve* her condition. However, a claimant is not free simply to request a change of physician to circumvent the determination by both the ATP and the DIME that she has reached MMI with no additional treatment likely to improve her condition. By Claimant's own admission, she is not seeking additional maintenance medical benefits via a change of physician; rather, she is seeking a change of physician to obtain additional treatment to reach MMI and hopefully cure her condition. *See Chism v. Wal-Mart*, W.C. No. 4-809-103-03 (Jan 9, 2017 & July 10, 2017) (discussing the distinction between pre-MMI and post-MMI maintenance medical care).

I. Accordingly, Claimant should not be allowed to circumvent the DIME process via a change of physician where both the ATP and the DIME agree that no additional treatment is likely to improve her condition. Claimant has not made a proper showing that she should be entitled to a change of physician.

Withdrawal of Admission for Post-MMI Medical Maintenance

J. Claimants are entitled to seek maintenance medical benefits post-MMI, *Grover v. Indus. Comm'n*, 759 P.2d 705, 710 (Colo. 1988), but employers retain the right to challenge the "need for continued medical benefits," *Snyder v. ICAO*, 942 P.2d 1337, 1339 (Colo. App. 1997). Employers bear the burden of proof to modify future maintenance medical benefits. § 8-43-201(1), C.R.S. 2018.

K. In *Grover*, the supreme court recognized two different methods to challenge maintenance medical benefits. Employers have the right to "contest any future claims for medical treatment on the basis that such treatment is unrelated to the industrial injury or occupational disease." *Grover*, 759 P.2d at 712. The

respondents are only responsible for medical treatment that are reasonably necessary to cure or relieve the effects of the industrial injury. This also applies to a request for medical treatment after the date of MMI. *Grover*, 759 P.2d 705 (Colo. 1988); *Holly Nursing Care Center v. ICAO*, 992 P.2d 701 (Colo. App. 1999). The question of whether the requested treatment is reasonable and necessary is one of fact for the ALJ.

L Here, Dr. Ridings persuasively outlined several reasons why Claimant did not require continued treatment to maintain MMI:

- The treatment Claimant was seeking should not be characterized as maintenance medical care;
- The mechanism of injury did not support maintenance care; and
- The objective findings by the PCP and the DIME did not support maintenance care.

M. Additionally, the medical records showed that Claimant had not taken the basic step of continuing her home exercise program. Because of her deconditioning, any of her symptoms now were unrelated to the work injury. Dr. Ridings explained that even if Claimant were to have objective findings of some muscle tightness six months after the DIME or more recently, within a reasonable degree of medical probability these symptoms could not be attributed to her work injury. Accordingly, there is no objective basis for continued maintenance medical care related to the work injury. Respondents have met their burden here, by a preponderance of the evidence. Their request to withdraw their admission for *Grover* medical maintenance benefits is granted.

ORDER

It is therefore Ordered that:

1. Claimant's request for a change of Authorized Treating Physician is denied and dismissed.

2. Respondents' request to withdraw their admission for *Grover* medical maintenance benefits is granted.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the

certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 18, 2019

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-036-773-001

CORRECTED FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Self-Insured Respondent.

No further hearings have been held in the above-captioned matter. On July 17, 2019, Respondent's attorney indicates that Respondent was served with the Full Findings of fact, Conclusions of Law and Order. On July 19, 2019, Respondent's attorney filed a letter, electronically, commenting on clerical errors in the Full Findings. The comments of Respondent's attorney are well taken. The ALJ was away from the office on July 19, 2019, and returned on July 22, 2019, at which time he corrected the decision accordingly.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on April 2, 2019 and June 14, 2019, in Denver, Colorado. The hearing was digitally recorded (reference: 4/2/19, Courtroom 1, beginning at 8:30 AM, and ending at 12:00 PM; 6/14, 2019, Courtroom 1, beginning at 1:30 PM, and ending at 4:156 PM).

Respondent's Exhibits A through R were admitted into evidence without objection. Exhibits through were admitted into evidence, without objection. Claimant's Exhibits 3 through 10 were admitted into evidence without objection. Respondent's objection to Claimant's Exhibits 1 and 2 was overruled and these Exhibits were admitted into evidence.

At the conclusion of the hearing, the ALJ established a schedule for post hearing briefs. Because the case involves the Respondent's Challenge to the Division Independent Medical Examination (DIME) of Khoi Pham, M.D., Respondent's opening brief was filed, electronically, on June 25, 2019. Claimant's answer brief was filed,

electronically, on July 2, 2019. Respondent's reply brief was filed, electronically, on July 8, 2019, at which time the matter was deemed submitted for decision. .

ISSUE

The sole issue to be determined by this decision concerns the Respondent's request to overcome the DIME of Dr. Pham on the degree of permanent medical impairment.

The Respondent bears the burden of proof by clear and convincing evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant is a 22 year-old man who was struck in the back by a heavy cart while working for the Employer on September 11, 2016. The Respondent denied the claim. At the hearing on the issue of compensability, ALJ Peter Cannici found that the Claimant had been struck with enough force to cause an injury and ALJ Cannici entered an Order on September 5, 2017 in favor of the Claimant (*Claimant"s Exhibit 1*). The ALJ's Order was affirmed by the Industrial Claim Appeals Office (ICAO) on January 8, 2018 (*Claimant's Exhibit 2*).

2. After ICAO affirmed the decision of ALJ Cannici on January 8, 2018, Respondent filed a General Admission of Liability (GAL) on January 28, 2018. The GAL was not included in either party's proffered exhibits, either at the first session of the hearing bon April 2, 2019, or sat the last session of the hearing on June 14, 2019. Neither party brought the GAL to the ALJ's attention at either session of the hearing. Also, in Respondent's letter, Respondent admitted that it was erroneously noted that Claimant requested the Division Independent Medical Examination (DIME) when, in fact, Respondent requested it and subsequently challenged it.

Authorized Treating Physician (ATP) Allison fall, M.D.

3 Allison Fall, M.D. became the Claimant's ATP. During her initial evaluation, she diagnosed the Claimant with a lumbosacral strain and lower extremity radiculitis. She referred the Claimant for injection treatment with Dr. Sacha (Respondent's Exhibit D, p. 70).

4. Dr. Fall continued to provide treatment, and a *Samms* conference was held with her on October 30, 2017. In a report generated after the conference, she indicated that she agreed that an additional ESI injection was not appropriate under the

Colorado Medical Treatment Guidelines, but reversed her opinion after speaking with the Claimant, and she made more treatment recommendations, including physical therapy. (Respondent's Exhibit D, p. 64).

5. Dr. Fall continued to treat the Claimant and during a return appointment on January 5, 2018, she noted that the Claimant could forward flex with his fingertips to his lower shin, and there were no radicular signs. She referred the Claimant for massage therapy and continued his work restrictions (*Id.,* p. 59). Dr. Fall also noted that the Claimant was working new employment, had returned to school, and was no longer reporting any nerve pain in his legs (*Id.,* p. 58).

6. In Dr. Fall's evaluation of February 2, 2018, she noted that Claimant was able to forward flex with his fingertips to his lower shin, and that there were no radicular signs. She issued a six-month health membership and noted she did not anticipate impairment (*Id.,* p. 55).

7. Dr. Fall examined the Claimant again on March 19, 2018. She noted that he had nearly full flexion, with his fingertips being inches from touching his toes, but that he was stiff with extension. She noted that she had one final recommendation prior to placement at maximum medical improvement (MMI), which was a medial branch block to determine if a pain generator could be identified. She also ordered additional massage therapy (*Id*., p. 52). She recommended that the Claimant should follow up in one month, or in April 2018.

8. The Claimant did not return for treatment for almost three months, until he saw Dr. Fall on June 4, 2018, noting he had been busy and was vacationing in Florida in the interim since his last visit on March 19, 2018. Dr. Fall recorded that the Claimant reported more pain with extension than flexion and he estimated he was 25% improved. Claimant had undergone the medial branch block. Dr. Fall's physical exam recorded that the Claimant could perform a full squat, forward flexion was unrestricted with no increased pain, and there were no radicular signs, including during straight raise testing, with no neurological deficits. Dr. Fall documented that there was **no pain generator identified**, and that she could not find any structural abnormalities. As such, Dr. Fall was of the opinion there was no indication of permanent impairment. She noted there was no Table 53 diagnosis, and range of motion (ROM) was not indicated. Dr. Fall referenced a gym membership for strengthening and refills of Lyrica 75 mg. for six months (*Id.,* p. 50).

9. Dr. Fall reiterated that there were no physiologic findings to support an impairment rating in her response to the Division of Workers' Compensation" (DOWC's) inquiry of June 18, 2018 (*Id.,* p. 48).

10. Dr. Fall placed the Claimant at MMI as of June 4, 2018, with no permanent impairment. Division Independent Medical Examination (DIME), Khoi Pham, M.D., agreed with Dr. Fall's MMI date.

11. The **Respondent** requesting a DIME and Dr. Pham was selected to perform the examination, and his evaluation occurred on October 30, 2018 (Respondent's Exhibit A).

Division Independent Medical Examination (DIME) of Khoi Pham, M.D.

12. Dr. Pham did not identify any objective, anatomical pain generator. Instead, his only diagnosis was "Chronic low back pain" (Respondent's Exhibit A, p. 5). Further, Dr. Pham noted that the Claimant's physical evaluation was "benign" with normal strength throughout, normal muscle bulk and tone, normal sensory examination in all lumbar dermatomes. Dr. Pham also concluded the imaging study of the Claimant's low back showed only mild degenerative changes. *Id*.

13. Based solely on his diagnosis of chronic low back pain, Dr. Pham assigned the Claimant a 5% whole person impairment under Table 53 of the American Medical Association Guides to the Evaluation of Permanent Impairment, 3rd Ed., Rev. (hereinafter "AMA Guides") (Respondent's Exhibit A). Additionally, Dr. Pham added 7% whole person impairment based on range of motion (ROM) loss for a combined whole person impairment of 12%.(Respondent's Exhibit A).

14. The ALJ finds that Dr. Pham's sole diagnosis, upon which he based his permanent impairment rating, was "chronic pain." He failed to identify any anatomic or physiologic correlation based on objective findings, or pain generator to the Claimant's pain complaints. Even the additional rating for loss of ROM is premised on the diagnosis of chronic pain. Dr. Pham is a Level II accredited, Board Certified Neurologist, but there is no indication that he is well versed in the Colorado Revised Statutes. .§ 8-42-107 (8) (c) provides:

> For purposes of determining levels of medical impairment, the physician shall **not** (emphasis supplied) render a medical impairment rating based on chronic pain **without** (emphasis supplied) anatomic or physiologic correlation. Anatomic correlation must be based on objective findings…..

15. Based on the four corners of Dr. Pham's DIME Report (Claimant's Exhibit 5), the ALJ cannot even reasonably infer that Dr. Pham's diagnosis of chronic pain was based on an objective anatomical or physiological correlation. Dr. Pham's rating was based on the Claimant's complaints of pain—pure and simple. It is, indeed, unfortunate that the Claimant was deprived of a meaningful DIME because Dr. Pham either did not understand the law or did understand it and was only able to diagnose chronic pain without any correlations.

16. In light of the clear wording of § 8-42-107 (8) (c), it is unfortunate that both sides expended considerable time and effort, participating in two sessions of a lengthy hearing (approximately six hours total) and engaging the opinions and sometimes testimony of numerous non-DIME physicians and another expert to either overcome or

support Dr. Pham's DIME rating (Dr. Sacha, Dr. Hughes, Dr. Primack, and Jeffrey Palmer Broker, Ph.D, an expert in biomechanics who, according to his self-declaration on the witness stand had more expertise on the human body than medical doctors). A review of Dr. Pham's DIME Report and § 8-42-107 (8) (c) , C.R.S., is dispositive of the issue of whether the DIME's permanent medical impairment rating is clearly erroneous.

17. The ALJ has carefully perused all of the medical reports and testimony in evidence and the ALJ finds that these opinions are extrinsic and cannot, permissibly, be injected into the four corners of Dr. Pham's report (Dr. Pham did not testify) to determine whether Dr. Pham's rating is clearly erroneous—in light of the clear wording of § 8-42-107 (8) (c).

18. John Sacha, M.D., testified that even if there were no diagnosis a doctor can give an impairment rating based on pain using table 53 of the AMA Guides, provided the patient has had six months of back symptoms and provided the doctor considers the patient to be truthful (*April 2, 2019 Hearing., Tr. p.134*). Despite Dr. Sacha's strong convictions, his opinion cannot overcome, or make an exception to, the clear wording of § 8-42-107 (8) (c). It is up to the General Assembly to change the wording of the statute.

Ultimate Findings

19. The Claimant reached MMI on June 4, 2018.

20. Respondent has filed **no** admissions of liability. The DIME process was initiated based on ALJ Cannici's determination of compensability and ICAO's affirmance of his decision.

21. It is highly probable, unmistakable and free from serious and substantial doubt that Dr. Pham's DIME rating is erroneous because it was not in accord with the clear mandate of § 8-42-107 (8) (c), C.R.S., thus, Dr. Pham's permanent medical impairment rating has been overcome by clear and convincing evidence. It is, therefore, invalid and the permanent medical impairment rating must revert to the opinion of the ATP, Dr. Fall.

22. Under the circumstances, an analysis of the multitude of non-DIME opinions in evidence would be superfluous in light of the fact that there was no visible evidence within the four corners of Dr. Pham's Report that his chronic pain diagnosis was supported by the requirements of § 8-42-107 (8) (c). Extrinsic medical opinions cannot be injected into Dr. Pham's Report to add what Dr. Pham **did not** include therein.

23. Any determinations of credibility, substantial evidence, or factors other than the mandate of § 8-42-107 (8) (c) would be superfluous.

24. Under the circumstances, the only permanent medical impairment rating is that of ATP Dr. Fall, which is zero. There is an interesting question concerning what happens next, however, the ALJ abstains from addressing this question.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Overcoming the DIME of Dr. Pham

a. The party seeking to overcome a DIME physician's opinions bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office***,** 5 P.3d 385 (Colo. App. 2000). *Also see Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475 (Colo. App. 2005). The DIME physician's determination of MMI is binding unless overcome by "clear and convincing evidence." *Metro Moving & Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995); *See also Peregoy v. Indus. Claim Appeals Office,* 87 P.3d 261 (2004); and § 8-42-107(b)-(c), C.R.S. *Also see Whiteside v. Smith,* 67 P.3d 1240 (Colo. 2003). "Clear and convincing evidence" is evidence, which is stronger than preponderance, is unmistakable, makes a fact or facts highly probable or the converse, and is free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert, supra; Leming v. Indus. Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). In other words, a DIME physician's finding may not be overcome unless the evidence establishes that it is "highly probable" that the DIME physician's opinion is incorrect. *Postelwait v. Midwest Barricade,* 905 P. 2d 21 (Colo. App. 1995). To overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt". *Adams v. Sealy, Inc.,* W.C. No. 4-476-254 [Indus. Claim Appeals Office (ICAO), Oct. 4, 2001]. Suffice it to say, Dr. Pham's rating opinion was clearly erroneous and not in accord with the mandate of § 8-42-107 (80 (c), C.R.S. Therefore, it was overcome by clear and convincing evidence.

b. In light of the invalidity of the DIME rating of permanent medical impairment, a reversion to the pre-DIME status quo, the rating of ATP Dr. Fall, is warranted. It is an interesting question whether either party can commence the DIME process *de novo*, or whether the permanent medical impairment issue ends here.

ORDER

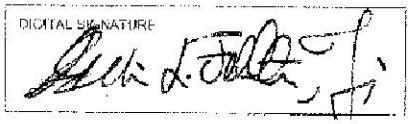
IT IS, THEREFORE, ORDERED THAT:

A. The Claimant reached maximum medical improvement on June 4, 2018.

B. The permanent medical impairment rating of Division Independent Medical Examiner Khoi Pham, M.D., having been overcome, the only remaining rating is that of authorized treating physician Allison Fall, M.D., which is zero permanent medical impairment.

C. Any and all issues not determined herein are reserved for future decision.

DATED this 22nd day of July 2019.



_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

ISSUES

- Is Claimant entitled to a general award of medical benefits after MMI?
- If so, did Claimant make a proper showing for a change of physician to Southern Colorado Clinic?
- Disfigurement.

FINDINGS OF FACT

1. Claimant worked for Employer since 2004 as a firefighter and paramedic. He suffered an admitted low back injury on August 11, 2016 while carrying a patient down a flight of stairs. He felt a painful pop in his low back and immediate burning pain in his right leg.

2. Claimant had no significant back problems before the work accident. He experienced "soreness" in his low back occasionally because of the physically demanding nature of his work, but required no treatment and had no work limitations. Claimant credibly testified his low back "felt fine" before the accident.

3. Employer referred Claimant to its occupational medicine clinic for authorized treatment, and his care has primarily been managed by PA-C Paula Homberger. He was initially diagnosed with a lumbar "sprain" and radiculopathy. He was put on work restrictions and referred to physical therapy.

4. A September 9, 2016 lumbar MRI showed multilevel disc and facet degenerative changes, most prominent at L4-5 and L5-S1.

5. Claimant started treating with Dr. Dwight Leggett on October 6, 2016. He received multiple injections from Dr. Leggett and Dr. Scheper in 2016 and 2017. Some injections provided temporary relief, but some made him worse. He underwent multilevel medial branch blocks (MBBs) in April 2017 that were not helpful.

6. On August 18, 2017, Ms. Homberger opined Claimant was "likely approaching" MMI.

7. Claimant returned to Ms. Homberger on September 15, 2017, with worsening symptoms. He stated, "there was no specific event or injury that led to the increase in pain." Ms. Homberger ordered a repeat lumbar MRI and an EMG.

8. The MRI showed foraminal L5 nerve root compression, "worse when compared to the exam dated September 9, 2016." The remaining findings were largely unchanged.

9. Dr. Michael Sparr performed an EMG on October 3, 2017, which showed "acute to subacute, mild to moderate right L5 radiculopathy."

10. Claimant had a surgical consultation with Dr. Michael Rauzzino on November 6, 2017. Dr. Rauzzino documented neurological deficits, including the right foot drop. Claimant did not want more injections and preferred "more definitive" treatment." Dr. Rauzzino recommended an L5-S1 microdiscectomy and foraminotomies.

11. Claimant underwent surgery on December 13, 2017. Dr. Rauzzino discovered a large disc herniation at L5-S1 with a large disc fragment, which necessitated a discectomy in additional to the planned foraminotomies.

12. The surgery was initially very helpful in relieving Claimant's radicular leg symptoms. It also helped his back pain to a lesser extent.

13. Claimant developed new pain down the back of his thighs approximately one month after surgery. A lumbar MRI on February 22, 2018 showed no significant new findings. The radiologist appreciated increased signal intensity in the right L5 nerve root "consistent with radiculitis."

14. On April 10, 2018, Claimant followed up with Dr. Rauzzino and his PA-C, Stephen Ladd, to review the MRI. The report from that visit states,

> Regarding the MRI, there are no new findings that warrant any additional surgery, at least any small decompression. He certainly has multilevel degenerative disk disease, which has led to some foraminal stenosis because of the disc space collapse and enlarged facet joints. At some point in his life, he may be looking at a larger operation such as a multilevel fusion. Hopefully, at this time, the leg pain is just a flare-up of some acute inflammation and swelling after the surgery [illegible] scarring and radiculitis. We hope that this will settle down in time . . . . We would like to follow up with him in a few months to see how the nerve is settling down. He also may be a good candidate for another injection at that level to see if that would help with his symptoms.

15. Claimant's last appointment with Mr. Ladd was July 3, 2018. He had some residual numbness and tingling in his leg, but minimal pain. His biggest complaint was low back pain. Mr. Ladd opined, "I do think that he is nearing MMI and likely has need for maintenance therapy." Claimant was released from a surgical standpoint, to follow up "as-needed."

16. Claimant saw Dr. Nicholas Kurz at Employer's occupational health clinic on September 4, 2018. Dr. Kurz determined Claimant was at MMI with a 19% whole person impairment. Dr. Kurz opined Claimant "does not require any medical maintenance and is not taking any ongoing medications related to this claim." He also stated, "patient agrees to follow-up with his PCP privately for his chronic, pre-existing, degenerative condition, unrelated to this DOI." This appointment appears to be the only time Claimant saw Dr. Kurz.

17. Claimant had a DIME with Dr. John Tyler on January 16, 2019. Claimant described ongoing low back pain and periodic burning pain in his right leg. Physical activity generally aggravated his symptoms. Dr. Tyler diagnosed mild residual right L5 sensory radiculopathy. He agreed Claimant was at MMI and assigned a 24% whole person impairment. Dr. Tyler recommended Claimant see a pain management specialist for mediations to control his symptoms. He also recommended intermittent massage therapy for flare-ups. He opined ongoing treatment was related to the work accident because "this patient did not have any pre-existing lumbar spinal pain until the date of injury."

18. Claimant saw Dr. Lynn Parry for an IME at his counsel's request on May 6, 2019. Dr. Parry noted Claimant had been "medically retired" from his career as a firefighter because he could not safely perform the essential functions of the job. Claimant reported ongoing back pain with pain and numbness in his right leg. He was using OTC NSAIDs for pain relief. Dr. Parry recommended post-MMI treatment including medications, intermittent physical therapy and massage therapy for flare-ups, and a gym membership.

19. Dr. Brian Reiss performed an IME at Respondent's request on May 27, 2019. Dr. Reiss opined, "The need for medical maintenance benefits is related to the underlying work injury, it is not unreasonable and should be considered necessary."

20. After receiving Dr. Reiss' report, Respondent's counsel asked Dr. Kurz to reconsider Claimant's need for post-MMI care. Dr. Kurz opined Claimant required no further care in connection with the work-related injury. Specifically, Dr. Kurz opined, "This patient has multilevel pre-existing degenerative changes that are unrelated to this claim. This should be followed by his PCP primarily, as they are chronic and pre-existing."

21. Claimant testified at hearing regarding his ongoing symptoms related to the work accident. His testimony was consistent with the reports from multiple examining physicians, including Dr. Tyler, Dr. Parry, and Dr. Reiss. Claimant has been attending massage therapy once per month at his own expense to manage his pain. He regularly uses a hot tub and performs stretching exercises, which temporarily decrease his back pain. Ms. Homberger previously prescribed valium for flares, which Claimant found helpful.

22. Claimant testified he does not want to see Dr. Kurz for further treatment. Claimant believes Dr. Kurz' reports are inaccurate and potentially dishonest. Claimant has no confidence in Dr. Kurz. Claimant wants to change to Southern Colorado Clinic in Pueblo. He has done internet research on Southern Colorado Clinic and believes it is a quality facility. It is also much closer to his home in Canon City.

23. Claimant's testimony was credible and persuasive.

24. The opinions of Dr. Tyler, Dr. Parry, Dr. Reiss, and Mr. Ladd regarding Claimant's probable need for post-MMI treatment are credible and persuasive.

25. Dr. Kurz' opinions regarding post-MMI are not credible or persuasive.

26. Claimant proved he is entitled to a general award of medical benefits after MMI.

27. Claimant made a proper showing for a change of physician to Southern Colorado Clinic.

28. Claimant has a 3-inch long by 1/8 to ¼ inch wide, indented, discolored surgical scar on the lumbar spine. The ALJ finds Claimant should be awarded $1,200 for disfigurement.

CONCLUSIONS OF LAW

A. General award of post-MMI treatment

The respondents are liable for medical treatment after MMI reasonably necessary to relieve the effects of the injury or prevent deterioration of the claimant's condition. Section 8-42-101; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). If the claimant establishes the probability of a need for future treatment, he is entitled to a general award of medical benefits after MMI, subject to the respondents' right to dispute compensability or reasonable necessity of any particular treatment. *Hanna v. Print Expediters, Inc.*, 77 P.3d 863 (Colo. App. 2003). A claimant need not be receiving treatment at the time of MMI or prove that a particular course of treatment has been prescribed to obtain a general award of *Grover* medical benefits. *Miller v. Saint Thomas Moore Hospital*, W.C. No. 4-218-075 (September 1, 2000). Proof of a current or future need for "any" form of treatment will suffice for an award of post-MMI benefits. *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). The DIME's opinion regarding medical treatment after MMI is not entitled to any special weight but is simply another medical opinion for the ALJ to consider when evaluating the preponderance of the evidence. *See Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Story v. Industrial Claim Appeals Office*, 910 P.2d 80 (Colo. App. 1995).

The existence of a pre-existing condition does not preclude a claim for medical benefits if an industrial injury aggravated, accelerated, or combined with the pre-existing condition to produce the need for medical treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). The ultimate question is whether the need for treatment was the proximate result of an industrial aggravation or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

As found, Claimant proved entitlement to a general award of medical benefits after MMI. Claimant remains symptomatic despite back surgery. The pre-existing degenerative changes in his spine were asymptomatic and non-disabling before the work accident. The persuasive evidence shows the work accident substantially aggravated Claimant's pre-existing condition and proximately caused the need for ongoing treatment. The opinions of Dr. Tyler, Dr. Parry, Mr. Ladd, and Dr. Reiss regarding the need for post-MMI care are credible and persuasive. Dr. Kurz' opinions are neither credible nor persuasive.

B. Change of physician

A claimant can request a change of physician "upon the proper showing to the division." Section 8-43-404(5)(a)(VI)(A); *Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996). Section 8-43-404(5)(a)(VI)(A) does not define a "proper showing," and the ALJ has broad discretion to decide if the circumstances justify a change of physician. *Jones v. T.T.C. Illinois, Inc*., W.C. No. 4-503-150 (May 5, 2006). The ALJ should exercise this discretion with an eye toward ensuring the claimant receives reasonably necessary treatment while protecting the respondents' legitimate interest in being apprised of treatment for which they may ultimately be held liable. *Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999); *Landeros v. CF & I Steel*, W.C. No. 4-395-315 (October 26, 2000). The ALJ may consider a variety of factors including whether the claimant has received adequate treatment, whether the claimant trusts the ATP, the level of communication between the claimant and the ATP, the ATP's expertise and skill at managing a condition, and the ATP's willingness to provide additional treatment. *E.g*., *Carson v. Wal-Mart*, W.C. No. 3-964-07 (April 12, 1993); *Merrill v. Mulberry Inn, Inc*., W.C. No. 3-949-781 (November 1995); *Greenwalt-Beltmain v. Department of Regulatory Agencies*, W.C. No. 3-896-932 (December 5, 1995); *Zimmerman v. United Parcel Service*, W.C. No. 4-018-264 (August 23, 1995). An ALJ is not obliged to approve a change of physician because of a claimant's personal reasons, including mere dissatisfaction with the ATP. *McCormick v. Exempla Healthcare*, W.C. No. 4-594-683 (November 27, 2007). On the other hand, the ALJ is not precluded from considering the claimant's subjective perception of his relationship with the physician. *Gutierrez v. Denver Public Schools*, W.C. No. 4-688-075 (December 18, 2008).

As found, Claimant made a proper showing for a change of physician to Southern Colorado Clinic. Dr. Kurz is unwilling to treat Claimant, and an award of post-MMI treatment is meaningless without an authorized provider to oversee it. Claimant justifiably lacks confidence in Dr. Kurz given multiple inaccuracies in his report. Southern Colorado Clinic is an established occupational medicine provider that serves as the designated provider for many employers in the Pueblo. Southern Colorado Clinic is closer to Claimant's home, which is more convenient and will reduce Claimant's reimbursable mileage expense.

C. Disfigurement

Section 8-42-108(1) provides that a claimant is entitled to additional compensation if he is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view." As found, Claimant has a 3-inch long by 1/8 to ¼ inch wide, indented, discolored surgical scar on the lumbar spine. The ALJ concludes that Claimant should be awarded $1,200 for this disfigurement.

[ORDER CONTINUES NEXT PAGE]

ORDER

It is therefore ordered that:

1. Respondent shall cover reasonably necessary medical treatment after MMI from authorized providers to relieve the effects of Claimant's injury or prevent deterioration of his condition.

2. Claimant's request for a change of physician to Southern Colorado Clinic is granted. Respondent shall cover reasonably necessary post-MMI treatment provided by and under the direction of Southern Colorado Clinic.

3. Respondent shall pay Claimant $1,200 for disfigurement.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 22, 2019

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUE

Whether Respondents have produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of James Regan, M.D. that Claimant has not reached Maximum Medical Improvement (MMI) as a result of her January 25, 2017 admitted right hip injury.

FINDINGS OF FACT

1. Claimant worked for Employer as a Certified Surgical Processor Technician. On January 25, 2017 she suffered an admitted right hip injury during the course and scope of her employment. Claimant specifically fell to the ground while pushing a cart of supplies.

2. As a result of the January 25, 2017 accident Claimant suffered a displaced right femoral neck fracture. On January 26, 2017 Phillip Stahel, M.D. performed a closed reduction with percutaneous pin fixation to repair Claimant's right hip.

3. By March 10, 2017 Dr. Stahel noted that Claimant had been doing very well and experiencing minimal residual pain. X-rays demonstrated no further change in alignment compared to images taken on February 9, 2017. On April 28, 2017 Dr. Stahel documented minimal pain and x-rays revealed progressive fracture healing "in excellent near anatomic position."

4. On July 7, 2017 Claimant told Dr. Stahel that she had been doing very well and resumed full weight bearing on the right leg. Dr. Stahel commented that she was still limping and had pain over the lateral IT band but no groin pain. He noted some tenderness on palpation over the screw heads in the lateral hip. He diagnosed healed right femoral neck fracture six months after screw fixation with hardware-related pain. Dr. Stahel remarked that Claimant "agreed with my recommendation to proceed with an early removal of the screws and washer to mitigate her hardware-associated symptoms related to the backed-up screws and associated IT band syndrome." He scheduled Claimant for screw removal on July 24, 2017.

5. On July 24, 2017 Claimant told Authorized Treating Physician (ATP) Alisa Koval, M.D. that she was experiencing discomfort, but not pain, in her right hip. Claimant advised Dr. Stahel that the pins would be removed on August 3, 2017.

6. The pin removal procedure did not occur on July 24, 2017 or August 3, 2017 because Claimant decided not to pursue the surgery. By August 8, 2017 Claimant noted that she had reached a plateau in her condition.

7. On September 27, 2017 Claimant returned to Dr. Koval. She remarked that Dr. Stahel had again attributed her ongoing pain to the hip joint pins rubbing against

the IT band. Dr. Stahel recommended removal of the pins. Dr. Koval noted that, because "Dr. Stahel has changed institutions to North Suburban, we will re-establish her referral to him there for continuity of care."

8. On October 3, 2017 Claimant presented to a physical therapy session with 1/10 pain and remarked that she felt her pins, "but that is normal." .Claimant underwent her final physical therapy session at SelectPT on October 26, 2017 and again reported 1/10 pain.

9. On March 18, 2018 Claimant underwent an independent medical examination with Lawrence Lesnak, D.O. After reviewing Claimant's medical records and performing a physical examination Dr. Lesnak concluded that Claimant had reached a point of functional stability by October 26, 2017 and attained Maximum Medical Improvement (MMI). Claimant required no further formal physical therapy pertaining to the initial injury and was not taking any medications. Screw removal would constitute post-MMI medical maintenance treatment and not affect Claimant's MMI status. Dr. Lesnak assigned a 5% right lower extremity impairment rating based on range of motion deficits.

10. On April 23, 2018 Claimant returned to Dr. Koval for an examination. Dr. Koval remarked that the main impediment to "the normalization of her gait is the presence of the pins in her R hip from her ORIF. The pain she describes dull & achy with occasional sharpness, in the region where the pins make contact with her IT band. Ultimately, the solution for this is to have the pins removed." Dr. Koval commented that removal of the pins was a "priority," and if Dr. Stahel was unavailable, "we need to find an alternative solution."

11. On June 6, 2018 Claimant visited Lucas Schnell, MD at the Center for Spine and Orthopedics. Dr. Schnell remarked that x-rays demonstrated complete healing of the fracture. Claimant's surgical hardware was painful, but she was taking a trip to California over the next month and would "not proceed with the surgery for a minimum of six weeks."

12. Claimant did not subsequently schedule a follow-up with Dr. Schell after she returned from California. She testified that she did not want Dr. Schnell to perform the pin removal surgery.

13. On July 31, 2018 Respondents sent Claimant a demand appointment notice for pin removal scheduled for August 20, 2018. Claimant did not attend the pin removal procedure at Dr. Schell's office. Although there was initially a dispute about the reason for the cancellation, the parties agreed that Claimant advised Dr. Schnell's office that she would not return to that facility for removal of the surgical pins because she was waiting for Dr. Stahel to receive his credentials at North Suburban Medical Center so he could perform the procedure.

14. On August 2, 2018 Dr. Koval determined that Claimant had reached MMI. Dr. Koval noted that hardware removal was scheduled to occur in August 2017 but

Claimant "had some doubts about proceeding" and the procedure did not occur. She remarked that Claimant had consulted with Dr. Schnell at North Suburban but decided to pursue the procedure at Swedish. Dr. Koval stated that, because Claimant "has chosen to pursue R hip hardware removal at a different institution than originally planned, and the timeline of that procedure is unknown at this time, I believe it is reasonable to place her at MMI and have the hardware removed under maintenance care." She noted that Claimant had plateaued in her recovery. Dr. Koval assigned Claimant a 35% scheduled rating that converted to a 14% whole person impairment. The rating consisted of 20% for a right hip replacement arthroplasty pursuant to Table 45 of the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised) (AMA Guides*) and a 19% right lower extremity rating for range of motion limitations. Dr. Koval also released Claimant to full duty employment.

15. On October 21, 2018 Claimant underwent a Division Independent Medical Examination (DIME) with James Regan, MD. Dr. Regan noted that Claimant had "considerable pain and MMI would imply that further treatment is not likely to impact her ultimate recovery. I feel that more could be offered. The consensus is that the pins should be removed. This alone should alleviate her pain greatly." Dr. Regan thus determined that Claimant would not reach MMI until she underwent the recommended pin removal. However. Dr. Regan did not mention whether he was aware that Claimant delayed undergoing the procedure that had first been recommended in June 2017 and was scheduled for July/August 2017. Based on range of motion limitations Dr. Regan assigned a 16% right lower extremity rating that converted to a 6% whole person impairment pursuant to the *AMA Guides*. He did not assign an impairment rating for a right hip replacement arthroplasty because Claimant did not undergo the procedure.

16. On February 22, 2019 Claimant underwent the recommended pin removal surgery with John Woodward, M.D. Claimant explained that Dr. Stahel referred her to Dr. Woodward for the procedure.

17. On March 29, 2019 L. Barton Goldman, M.D. performed a detailed records review of Claimant's claim. He determined that Claimant had plateaued by September 2017 and no additional improvement was likely until Claimant underwent the pin removal procedure. He explained that no documentation explained why the procedure had been postponed for several months after it had first been recommended on July 7, 2017. Dr. Goldman commented that in Level II accreditation courses physicians are taught that recommended procedures should be implemented as soon as possible or at the latest within three months of the recommendation. He also noted that:

> We further teach that if the patient fails to follow through/comply with that recommendation after 2 or 3 well-meaning attempts by the patient's provider and/or parties to this claim to facilitate such treatment, then the patient likely is approaching maximum medical improvement unless there are other interventions and treatments being contemplated and documented consistent with Rule 17 that would accelerate symptomatic and functional recovery.

18. Dr. Goldman explained that access and availability of services with respect to that "relatively minor orthopedic procedure" was not a concern. Instead, the failure to undergo pin removal was caused by Claimant's lack of compliance. Dr. Goldman reasoned that Claimant had reached MMI by October 26, 2017 after she had concluded physical therapy and decided that she was going to postpone pin removal until at least December 2018. In addressing Dr. Regan's DIME opinion, Dr. Goldman explained:

> [I would] strongly disagree with the DIME physician with respect to stating that MMI status had not yet been obtained in this case in which initial pin removal was recommended July 7, 2017 and then recommended again September 1, 2017, 13 to 16 months prior to the date of the DIME, and 17 to 20 months ago with no further treatment being provided during the interim period that would have been expected to substantially improve [Claimant's] symptomatic and functional status beyond which she was in fact exhibiting by the end of October 2017.

19. Dr. Goldman summarized that, "within greater than 99% medical probability," Dr. Regan's opinion in delaying MMI was incorrect. Based on the Level II Accreditation Course and consistent with Rule 17, the appropriate action "should have been a recommendation of MMI date most likely occurring in the fourth quarter of 2017 with potential pin removal considered most likely a post-MMI maintenance intervention."

20. Dr. Lesnak testified at the hearing in this matter. He maintained that Claimant reached MMI by October 26, 2017 and suffered a 5% right lower extremity impairment rating for range of motion deficits. Dr. Lesnak explained that MMI exists when a person has reached functional stability. He detailed that Claimant's right femoral fracture had completely healed, she had limited pain complaints, she was functioning well and her condition had stabilized by October 26, 2017. Dr. Lesnak explained that Claimant's ongoing aching was likely related to pins in her hip. The pin removal process was a minor procedure that would not affect MMI but would constitute medical maintenance treatment. He remarked that the pin removal procedure would not improve Claimant's function. Dr. Lesnak noted that the Level II curriculum provides that, if an individual declines a recommended course of treatment and no other treatment modalities are warranted, the person should be placed at MMI. He thus concluded that Dr. Regan erroneously determined that Claimant had not reached MMI.

21. Claimant testified at the hearing in this matter. She acknowledged that she cancelled the pin removal surgery in July or August 2017 because she thought her condition would improve. Claimant noted that she did not schedule another appointment with Dr. Stahel because he had moved to North Suburban. She was hesitant to see another doctor and did not know other surgeons. Claimant did not schedule an orthopedic follow-up between the time she cancelled the first surgery in summer 2017 and when she saw Dr. Schnell in June 2018. She also did not schedule a return appointment with Dr. Schnell after June 6, 2018 because she did not want him to perform the pin removal procedure. Claimant remarked that she did not receive notice

of the demand appointment for August 20, 2018 and denied that she cancelled the appointment.

22. Respondents have produced clear and convincing evidence to overcome the DIME opinion of Dr. Regan that Claimant has not reached MMI as a result of her admitted January 25, 2017 right hip injury. On January 25, 2017 Claimant suffered a displaced right femoral neck fracture. On January 26, 2017 Dr. Stahel performed a closed reduction with percutaneous pin fixation to repair Claimant's right hip. Although Claimant healed successfully, she continued to suffer hardware-related pain as a result of her surgery. Dr. Stahel thus recommended "removal of the screws and washer to mitigate her hardware-associated symptoms related to the backed-up screws and associated IT band syndrome." He scheduled Claimant for screw removal on July 24, 2017. On July 24, 2017 Claimant told ATP Dr. Koval that she was experiencing discomfort, but not pain, in her right hip. Claimant advised Dr. Stahel that the pins would be removed on August 3, 2017. However, the pin removal procedure did not occur on July 24, 2017 or August 3, 2017 because Claimant chose not to pursue the surgery. By April 23, 2018 Dr. Koval remarked that Claimant suffered pain and a gait abnormality because of the pins in her hip. She noted that removal of the pins had to be a "priority," and if Dr. Stahel was unavailable, "we need to find an alternative solution."

23. On August 2, 2018 Dr. Koval determined that Claimant had reached MMI. Dr. Koval noted that hardware removal had been scheduled for August 2017 but Claimant "had some doubts about proceeding" and the procedure did not occur. She assigned Claimant a 35% scheduled rating that converted to a 14% whole person impairment. The rating consisted of 20% for a right hip replacement arthroplasty pursuant to Table 45 of the *AMA Guides* and a 19% right lower extremity rating for range of motion limitations.

24. On October 21, 2018 Claimant underwent a DIME with Dr. Regan. Dr. Regan noted that Claimant had "considerable pain and MMI would imply that further treatment is not likely to impact her ultimate recovery. I feel that more could be offered. The consensus is that the pins should be removed. This alone should alleviate her pain greatly." Dr. Regan thus determined that Claimant would not reach MMI until she underwent the recommended pin removal. Based on range of motion limitations Dr. Regan assigned a 16% right lower extremity rating that converted to a 6% whole person impairment pursuant to the *AMA Guides*. He did not assign an impairment rating for a right hip replacement arthroplasty because Claimant did not undergo the procedure.

25. Dr. Goldman noted that pin removal was initially recommended on July 7, 2017. However, Claimant failed to undergo the procedure because she did not comply with physicians' recommendations. Dr. Goldman explained that in Level II accreditation courses physicians are taught that recommended procedures should be implemented as soon as possible or at the latest within three months of the recommendation. He reasoned that Claimant reached MMI by October 26, 2017 after she concluded physical therapy and decided that she was going to postpone pin removal until at least December 2018. Dr. Goldman strongly disagreed with Dr. Regan that Claimant has not

reached MMI and summarized that "within greater than 99% medical probability," Dr. Regan's opinion in delaying MMI was incorrect. Dr. Goldman concluded that, based on the Level II Accreditation Course, and consistent with Rule 17, Claimant should have been placed at MMI by October 26, 2017 with potential pin removal as a post-MMI maintenance intervention.

26. Similarly, Dr. Lesnak maintained that Claimant reached MMI by October 26, 2017 and suffered a 5% right lower extremity impairment rating for range of motion deficits. Dr. Lesnak explained that Claimant's right femoral fracture had completely healed, she had limited pain complaints, she was functioning well and her condition had stabilized by October 26, 2017. He commented that Claimant's ongoing aching was likely related to pins in her hip and the pin removal process was a minor procedure that would not affect MMI but would constitute medical maintenance treatment. Dr. Lesnak noted the Level II curriculum provides that, if an individual declines a recommended course of treatment and no other treatment modalities are warranted, the person should be placed at MMI. He thus concluded that Dr. Regan erroneously determined that Claimant had not reached MMI.

27. Based on the medical records and persuasive reasoning of Drs. Goldman and Lesnak, Respondents have established by clear and convincing evidence that Dr. Regan erroneously determined that Claimant had not reached MMI. Claimant failed to comply with physicians' recommendations to undergo the pin removal procedure for a lengthy period and the procedure constituted medical maintenance treatment because it would not improve her functional status. Dr. Regan did not mention whether he was aware that Claimant delayed undergoing the procedure that had first been recommended in June 2017 and was scheduled for July/August 2017. He also failed to apply the Level II curriculum or properly consider the *AMA Guides* in concluding that Claimant had not reached MMI. Claimant's refusal to undergo the pin replacement procedure for a lengthy period was unreasonable. Because Claimant's unwillingness to undergo the recommended procedure caused a significant delay in treatment, she reached MMI as a matter of law. Accordingly, Respondents have produced unmistakable evidence free from serious or substantial doubt that Dr. Regan's determination that Claimant has not reached MMI is incorrect.

28. Because Respondents have overcome Dr. Regan's determination that Claimant has not reached MMI, the correct MMI date must be determined. ATP Dr. Koval persuasively concluded that Claimant reached MMI on August 2, 2018. Dr. Koval persuasively reasoned that, because Claimant had chosen to pursue right hip hardware removal at a different institution than originally planned and the timeline of that procedure was unknown, a determination of MMI was reasonable. Moreover, she noted that the pin removal would constitute maintenance care. Dr. Koval also commented that Claimant had plateaued in her recovery. In contrast, Drs. Goldman and Lesnak reasoned that Claimant reached MMI on October 26, 2017 because her fracture had completely healed, she had limited pain complaints, she was functioning well, her condition had stabilized and she had declined pin removal for a lengthy time after physicians' initial recommendations. However, Dr. Koval had provided extensive medical treatment to Claimant, was familiar with her condition, knew all the details about

the delayed pin removal procedure and determined that she had plateaued by August 2, 2018. Accordingly, Claimant reached MMI on August 2, 2018 because she had stabilized and no additional treatment would likely improve her condition.

29. Dr. Koval assigned Claimant a 35% scheduled rating that converted to a 14% whole person impairment. The rating consisted of 20% for a right hip replacement arthroplasty and a 19% right lower extremity rating for range of motion limitations. However, Dr. Koval erroneously assigned an impairment rating for a right hip replacement arthroplasty. Notably, Dr. Regan did not assign an impairment rating for a right hip replacement arthroplasty because Claimant did not undergo the procedure. Similarly, Dr. Lesnak assigned a 5% right lower extremity impairment rating for range of motion deficits but did not mention a rating for a right hip arthroplasty. Because Claimant did not undergo a right hip replacement arthroplasty, the appropriate rating should be based on range of motion limitations. Dr. Lesnak assigned a 5% rating for right lower extremity range of motion deficits. However, Dr. Koval assigned a 19% and Dr. Regan assigned a 16% right lower extremity impairment for range of motion deficits. Based on the disparity between Dr. Lesnak's determination and the other impairment ratings, it is appropriate to adopt the 19% rating assigned by Dr. Koval at the time Claimant reached MMI. Accordingly, Claimant suffered a 19% right lower extremity impairment rating because of her January 25, 2017 industrial injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAO, June 30, 2008); *see Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

5. A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAO, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAO, Apr. 16, 2008).

6. A DIME physician's opinions concerning MMI and impairment carry presumptive weight pursuant to §8-42-107(8)(b)(III), C.R.S.; *see Yeutter v. Industrial Claim Appeals Office*, No. 18CA0498 (Apr. 11, 2019) 2019 COA 53. The statute provides that "[t]he finding regarding [MMI] and permanent medical impairment of an independent medical examiner in a dispute arising under subparagraph (II) of this paragraph (b) may be overcome only by clear and convincing evidence." *Id.* Subparagraph (II) is limited to parties' disputes over "a determination by an authorized treating physician on the question of whether the injured worker has or has not reached [MMI]." §8-42-107(8)(b)(II). "Nowhere in the statute is a DIME's opinion as to the cause of a claimant's injury similarly imbued with presumptive weight." *See Yeutter*, 2019 COA 53 ¶ 18. Accordingly, a DIME physicians opinion carries presumptive weight only with respect to MMI and impairment. *Id.* at ¶ 21.

7. "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAO, Nov. 17, 2000).

8. If a party has carried the initial burden of overcoming the DIME physician's impairment rating by clear and convincing evidence, the ALJ's determination of the correct rating is then a matter of fact based upon the lesser burden of a preponderance of the evidence. *See Deleon v. Whole Foods Market, Inc*., W.C. No. 4-600-47 (ICAO, Nov. 16, 2006). The ALJ is not required to dissect the overall impairment rating into its numerous component parts and determine whether each part has been overcome by

clear and convincing evidence. *Id.* When the ALJ determines that the DIME physician's rating has been overcome, the ALJ may independently determine the correct rating. *Lungu v. North Residence Inn*, W.C. No. 4-561-848 (ICAO, Mar. 19, 2004); *McNulty v. Eastman Kodak Co*., W.C. No. 4-432-104 (ICAO, Sept. 16, 2002).

9. MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007); *Powell v. Aurora Public Schools* W.C. No. 4-974-718-03 (ICAO, Mar. 15, 2017). Moreover, the Colorado Division of Workers' Compensation *Medical Treatment Guidelines* (*Guidelines*) specifically provide that "MMI should be declared when a patient's condition has plateaued to the point where the authorized treating physician no longer believes further medical intervention is likely to result in improved function." W.C.R.P. Rule 17, Exhibit 6, p.4.

10. The Level II Accreditation Course provides that when procedures or interventions are recommended to improve a claimant's status but the patient fails to follow-through or comply with the recommendations, then the patient is at MMI unless there are additional medical interventions available. The Level II accreditation program specifically provides that

> [a]t times patient may choose not to participate in a treatment that has been recommended by their physician … It is [ ] appropriate to declare the patient at MMI if further treatment would improve the patient's condition, but the patient chooses not to undergo any of the treatment that might be expected to improve their condition.

Page 28, Accreditation Curriculum.

11. If additional medical treatment presents a reasonable prospect for improvement, the claimant may not be at MMI only if she is willing to undergo the treatment. *See MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001, 1005 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1080 (Colo. App. 1990). A claimant who refuses the only treatment available that has a prospect for improving the injury-related condition is at MMI as a matter of law. *MGM Supply Co.* 62 P.3d at 1005; *Neidens v. Firewall Forward Aircraft Engines, Inc.,* W. C. No. 4-553-056 (ICAO, Aug. 10, 2005). The reasonableness of a claimant's refusal to submit to additional treatment is a question of fact for the ALJ. *MGM Supply Co.*, 62 P.3d at 1005-06.

12. As found, Respondents have produced clear and convincing evidence to overcome the DIME opinion of Dr. Regan that Claimant has not reached MMI as a result of her admitted January 25, 2017 right hip injury. On January 25, 2017 Claimant suffered a displaced right femoral neck fracture. On January 26, 2017 Dr. Stahel performed a closed reduction with percutaneous pin fixation to repair Claimant's right hip. Although Claimant healed successfully, she continued to suffer hardware-related pain as a result of her surgery. Dr. Stahel thus recommended "removal of the screws and washer to mitigate her hardware-associated symptoms related to the backed-up screws and associated IT band syndrome." He scheduled Claimant for screw removal on July 24, 2017. On July 24, 2017 Claimant told ATP Dr. Koval that she was experiencing discomfort, but not pain, in her right hip. Claimant advised Dr. Stahel that the pins would be removed on August 3, 2017. However, the pin removal procedure did not occur on July 24, 2017 or August 3, 2017 because Claimant chose not to pursue the surgery. By April 23, 2018 Dr. Koval remarked that Claimant suffered pain and a gait abnormality because of the pins in her hip. She noted that removal of the pins had to be a "priority," and if Dr. Stahel was unavailable, "we need to find an alternative solution."

13. As found, on August 2, 2018 Dr. Koval determined that Claimant had reached MMI. Dr. Koval noted that hardware removal had been scheduled for August 2017 but Claimant "had some doubts about proceeding" and the procedure did not occur. She assigned Claimant a 35% scheduled rating that converted to a 14% whole person impairment. The rating consisted of 20% for a right hip replacement arthroplasty pursuant to Table 45 of the *AMA Guides* and a 19% right lower extremity rating for range of motion limitations.

14. As found, on October 21, 2018 Claimant underwent a DIME with Dr. Regan. Dr. Regan noted that Claimant had "considerable pain and MMI would imply that further treatment is not likely to impact her ultimate recovery. I feel that more could be offered. The consensus is that the pins should be removed. This alone should alleviate her pain greatly." Dr. Regan thus determined that Claimant would not reach MMI until she underwent the recommended pin removal. Based on range of motion limitations Dr. Regan assigned a 16% right lower extremity rating that converted to a 6% whole person impairment pursuant to the *AMA Guides*. He did not assign an impairment rating for a right hip replacement arthroplasty because Claimant did not undergo the procedure.

15. As found, Dr. Goldman noted that pin removal was initially recommended on July 7, 2017. However, Claimant failed to undergo the procedure because she did not comply with physicians' recommendations. Dr. Goldman explained that in Level II accreditation courses physicians are taught that recommended procedures should be implemented as soon as possible or at the latest within three months of the recommendation. He reasoned that Claimant reached MMI by October 26, 2017 after she concluded physical therapy and decided that she was going to postpone pin removal until at least December 2018. Dr. Goldman strongly disagreed with Dr. Regan that Claimant has not reached MMI and summarized that "within greater than 99% medical probability," Dr. Regan's opinion in delaying MMI was incorrect. Dr. Goldman

concluded that, based on the Level II Accreditation Course, and consistent with Rule 17, Claimant should have been placed at MMI by October 26, 2017 with potential pin removal as a post-MMI maintenance intervention.

16. As found, similarly, Dr. Lesnak maintained that Claimant reached MMI by October 26, 2017 and suffered a 5% right lower extremity impairment rating for range of motion deficits. Dr. Lesnak explained that Claimant's right femoral fracture had completely healed, she had limited pain complaints, she was functioning well and her condition had stabilized by October 26, 2017. He commented that Claimant's ongoing aching was likely related to pins in her hip and the pin removal process was a minor procedure that would not affect MMI but would constitute medical maintenance treatment. Dr. Lesnak noted the Level II curriculum provides that, if an individual declines a recommended course of treatment and no other treatment modalities are warranted, the person should be placed at MMI. He thus concluded that Dr. Regan erroneously determined that Claimant had not reached MMI.

17. As found, based on the medical records and persuasive reasoning of Drs. Goldman and Lesnak, Respondents have established by clear and convincing evidence that Dr. Regan erroneously determined that Claimant had not reached MMI. Claimant failed to comply with physicians' recommendations to undergo the pin removal procedure for a lengthy period of time and the procedure constituted medical maintenance treatment because it would not improve her functional status. Dr. Regan did not mention whether he was aware that Claimant delayed undergoing the procedure that had first been recommended in June 2017 and was scheduled for July/August 2017. He also failed to apply the Level II curriculum or properly consider the *AMA Guides* in concluding that Claimant had not reached MMI. Claimant's refusal to undergo the pin replacement procedure for a lengthy period was unreasonable. Because Claimant's unwillingness to undergo the recommended procedure caused a significant delay in treatment, she reached MMI as a matter of law. Accordingly, Respondents have produced unmistakable evidence free from serious or substantial doubt that Dr. Regan's determination that Claimant has not reached MMI is incorrect.

18. As found, because Respondents have overcome Dr. Regan's determination that Claimant has not reached MMI, the correct MMI date must be determined. ATP Dr. Koval persuasively concluded that Claimant reached MMI on August 2, 2018. Dr. Koval persuasively reasoned that, because Claimant had chosen to pursue right hip hardware removal at a different institution than originally planned and the timeline of that procedure was unknown, a determination of MMI was reasonable. Moreover, she noted that the pin removal would constitute maintenance care. Dr. Koval also commented that Claimant had plateaued in her recovery. In contrast, Drs. Goldman and Lesnak reasoned that Claimant reached MMI on October 26, 2017 because her fracture had completely healed, she had limited pain complaints, she was functioning well, her condition had stabilized and she had declined pin removal for a lengthy time after physicians' initial recommendations. However, Dr. Koval had provided extensive medical treatment to Claimant, was familiar with her condition, knew all the details about the delayed pin removal procedure and determined that she had plateaued by August 2, 2018. Accordingly, Claimant reached MMI on August 2, 2018

because she had stabilized and no additional treatment would likely improve her condition.

19. As found, Dr. Koval assigned Claimant a 35% scheduled rating that converted to a 14% whole person impairment. The rating consisted of 20% for a right hip replacement arthroplasty and a 19% right lower extremity rating for range of motion limitations. However, Dr. Koval erroneously assigned an impairment rating for a right hip replacement arthroplasty. Notably, Dr. Regan did not assign an impairment rating for a right hip replacement arthroplasty because Claimant did not undergo the procedure. Similarly, Dr. Lesnak assigned a 5% right lower extremity impairment rating for range of motion deficits but did not mention a rating for a right hip arthroplasty. Because Claimant did not undergo a right hip replacement arthroplasty, the appropriate rating should be based on range of motion limitations. Dr. Lesnak assigned a 5% rating for right lower extremity range of motion deficits. However, Dr. Koval assigned a 19% and Dr. Regan assigned a 16% right lower extremity impairment for range of motion deficits. Based on the disparity between Dr. Lesnak's determination and the other impairment ratings, it is appropriate to adopt the 19% rating assigned by Dr. Koval at the time Claimant reached MMI. Accordingly, Claimant suffered a 19% right lower extremity impairment rating because of her January 25, 2017 industrial injury.

ORDER

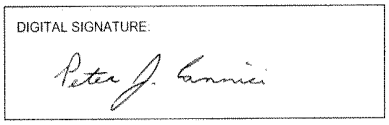
Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

.1 Respondents have overcome Dr. Regan's DIME opinion. Claimant reached MMI for her January 25, 2017 industrial injury on August 2, 2018 and suffered a 19% right lower extremity impairment rating.

2. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: July 23, 2019.



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Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she sustained a compensable work related injury on July 18, 2018.

2. Whether Claimant has established by a preponderance of the evidence an entitlement to a general award of reasonable, necessary, and causally related medical benefits and specific benefits including payment of UC Health emergency room bills for a July 23, 2018 visit.

3. Whether Claimant has established by a preponderance of the evidence an entitlement to temporary total disability (TTD) benefits.

4. Whether Claimant has established by a preponderance of the evidence that she is entitled to a change of physician based on lack of designated provider list.

FINDINGS OF FACT

1. Claimant is a 33-year-old woman who was employed by Employer as a laborer working in landscape construction.

2. Claimant's job duties included planting flowers and trees, spreading mulch, installing sprinklers, installing edging and rocks, and installing new trees.

3. Claimant was hired by Employer on June 18, 2018 and began work on June 22, 2018. Prior to this job, Claimant had worked for two years for a different landscaping company.

4. On July 18, 2018, Claimant was working with two co-workers to unload and plant three 7-foot pine trees. They each dug holes for the tree ball and roots. They then worked together to unload each tree from a trailer and put each tree into the holes that had been dug.

5. While moving the third tree, Claimant testified that her two co-workers, Ivan and Michael pushed the tree while she pulled the tree. Claimant testified that on this last tree, the root ball was loose and that they were trying to move the tree without damaging it. Claimant testified that they tipped the trailer slightly to help remove the tree. She testified that Ivan and Michael were pushing while she pulled and that she felt pain while pulling the tree. Claimant testified that the tree was tipped into her, and had she not been there, the tree would have fallen so it was on her or pushed against her while she was the only person pulling it. Claimant testified that she felt pain in her low back, left arm, and abdomen. Claimant testified that she told the guys to hold on for a minute since she

thought she had hurt herself. Claimant testified that Michael indicated they would let the supervisor know soon, but to just finish planting the tree.

6. Claimant testified that she told both her co-workers right away that she had hurt herself. Claimant testified that after they got the third tree down off the trailer and planted, they returned to Employer's office where she reported the injury to her left shoulder and left low back.

7. At Employer's office, Claimant reported the incident to Duncan H_____. One of the co-workers on Claimant's crew translated on behalf of Claimant, as Claimant only speaks Spanish. An incident report was completed and Claimant elected to complete her shift rather than go home. Claimant did not seek medical treatment that day and did lighter duty work for the rest of the afternoon.

8. On that day, July 18, 2018, Claimant filled out and signed a form titled workers' compensation offer of medical treatment. The form is in both English and Spanish. Claimant filled out the Spanish section of the form indicating she hurt her low back and signed the form. Claimant denied medical treatment that day. Respondents provided a designated providers list in their exhibit packet. The designated providers list is not signed, not dated, and Claimant testified she did not receive that form. *See* Exhibits 4, 7, F.

9. The next day, July 19, 2018, Claimant returned to Employer's office and complained of a worsening of her symptoms. Claimant was evaluated by Employer's on-call nurse, Duke Chase. The incident response report indicates Claimant reported that she was loading a truck when she felt pain in her low back and that she was complaining of lower back pain. Mr. Chase assessed lower back pain, noted that he assessed Claimant, provided ice, massage with biofreeze, and demonstrated stretches. He recommended icing the area with 20 minutes of ice followed by an hour off. He recommended applying biofreeze and taking over the counter medications as needed for pain. Claimant worked that day again doing lighter tasks. *See* Exhibit 1.

10. Claimant had July 20, 21, and 22 off work. On July 23, 2018, Claimant went to Employer and asked to be evaluated again. Claimant was taken to Concentra by a supervisor and was evaluated at Concentra by Emily Crockett, M.D. Claimant reported that she was planting a tree with coworkers on July 18 when she hurt her low back and left shoulder. Claimant reported no prior low back or shoulder injuries. Claimant reported pain in the left lateral shoulder and bilateral low back pain. On examination, Claimant had bilateral muscle spasms with palpation of the lumbosacral spine. Claimant had a negative straight leg raise test but had reported reduced range of motion. Dr. Crockett assessed strain of lumbar region and left shoulder strain and referred Claimant for physical therapy. Dr. Crockett also noted that Claimant had significant left lower quadrant pain on examination and assessed abdominal pain in female. Dr. Crockett recommended Claimant go to the emergency room to evaluate the lower quadrant abdominal pain. *See* Exhibits 12, C.

11. Claimant's supervisor then drove her to the emergency room. On July 23, 2018, Claimant was evaluated at UC Health in the emergency room. Claimant reported abdominal pain that radiated to her back and was worse with twisting after pulling a heavy tree out of the back of a truck. Claimant reported that the tree did not fall on her and that she did not fall. Claimant reported that her pain was a 9/10. Claimant's urine test was noted to be normal, having only small blood urine values and occasional bacteria urine values. Claimant's disposition was left sided abdominal pain, and acute left sided low back pain without sciatica. Claimant was discharged and was released to work with activities as tolerated. *See* Exhibits 13, B.

12. On July 24, 2018, an employee injury report was created. The report indicated that Claimant was assisting with moving a tree for installation and was helping with the trunk and not the root ball when she complained about side and back muscle pains on the left. An employer's first report of injury form was completed the same day and indicated the same mechanism of injury. *See* Exhibits 2, 5.

13. On July 25, 2018, Dr. Crockett evaluated Claimant. Dr. Crockett noted that Claimant's workup for abdominal pain was negative at the emergency room. Claimant reported she was still hurting a lot and that she needed pain medication. Claimant did not perform a musculoskeletal exam and told Dr. Crockett that it was too painful and Claimant refused to move her arm and her back. Dr. Crockett noted that Dr. McCullough at University Hospital had sent Claimant back to full duty work. Dr. Crockett assessed lumbar strain and left shoulder strain and noted that Claimant was at functional goal and ready for discharge. Claimant was released from care. *See* Exhibits 12, C.

14. On July 27, 2018, Employer noted that they were terminating Claimant for job abandonment after Claimant did not show up for work on Thursday or Friday. *See* Exhibit D.

15. On August 2, 2018, a Personnel Action Form was signed indicating that Claimant was terminated from employment with Employer based on job abandonment, "no call no show." *See* Exhibit D.

16. On August 7, 2018, Respondents filed a notice of contest indicating that the injury was not work related. *See* Exhibit 6.

17. On September 10, 2018, Claimant submitted a Request for Change of Physician form. Respondents denied the request on September 19, 2018. *See* Exhibits 8, 9.

18. On February 19, 2019, Claimant was evaluated by John Raschbacher, M.D. Claimant reported that while planting a tree at work, there was a tree that was difficult to move off the trailer and into the hole that had been dug. Claimant reported that her two male co-workers pushed the tree and that the tree fell on her and hit her at the left shoulder and the left side of the chest and abdomen and that she felt it at the left shoulder and left upper arm and also felt something in her low back. Claimant reported that she

told her foreman, that he called the manager, and that she was taken to the shop and given pain pills. Claimant reported that the completed planting that tree before going back to the shop. Claimant reported that she did not return to work and was fired. Dr. Raschbacher reviewed medical records and performed a physical examination. *See* Exhibit A.

19. Dr. Raschbacher opined that Claimant made a very poor effort at left upper extremity testing and opined that despite much tenderness to palpation reported, there were no objective findings. Dr. Raschbacher noted, remarkably, that Claimant jumped or startled when testing the upper extremity DTRs for some reason. Dr. Raschbacher found that Claimant also startled with lower extremity testing. He noted Claimant possibly had a sacral fat pad and/or increased lumbar lordosis. He again noted very poor effort with left lower extremity manual muscle testing and noted awkward transfers and deliberate /slow/awkward gait. Dr. Raschbacher found a negative seated straight leg raise and he completed several range of motion measurements. Dr. Raschbacher opined that it was remarkable that Claimant appeared to have refused to move her left arm when evaluated at Concentra and he opined that would not be anticipated medically. Physiologically, he opined that it would not make sense. He noted her very poor effort with his examination on testing and her significant pain behaviors. Dr. Raschbacher questioned Claimant's presentation and opined that it was not clear that an injury actually occurred. He recommended correlating Claimant's reports with her co-workers' observations. *See* Exhibit A.

20. At hearing, Claimant's co-worker Ivan C_____ testified. Mr. C_____ testified that he was working as a laborer alongside Claimant and that on July 18, 2018 they were assigned to install some trees and pick up sod. Mr. C_____ testified that the trees they were installing were approximately 6 feet tall. He testified that another co-worker was moving the tree at the root area and that he and Claimant were guiding the tree into the hole and directing it to be straight/steady. He testified that there was no fall but that the tree was put into the hole, then the wire was cut, then dirt was put in. He testified that Claimant had her right hand at the bottom of the tree and her left hand at the top guiding the tree on one side, while he was guiding it on the other side. He testified that when they were done and decided to go back to the shop, Claimant said that her arm hurt at the elbow/shoulder area but he testified that Claimant did not stop them or complain of an injury while they were actually moving the tree. He testified that after they were done planting the trees, Claimant reported to them that she hurt, and that they had an ice pack in the truck they gave her. He testified that they went back to the shop and that Claimant reported the injury.

21. At hearing, Claimant's supervisor Zach W_____ testified. He noted that on July 18, 2018 he was notified by phone call of Claimant having left shoulder issues when moving a tree. He testified that the next day at the office Claimant reported a back issue. He testified that he drove Claimant to Concentra twice and to the emergency room once for evaluations.

22. Dr. Raschbacher also testified at hearing. He opined that Claimant's examination was quite unusual. He testified that although something may have happened on July 18, 2018, there was no good medical examination and no good explanation for Claimant's big pain behaviors. Dr. Raschbacher testified that contusions/sprains/strains can occur but noted no documentation of outward signs of trauma at Concentra. Dr. Raschbacher opined that something happened on July 18 but that the significant pain now 10 months later has no explanation. He testified that Claimant was all over the place with her range of motion measurements, comparing his to Concentra's. He also testified that Claimant had a normal seated straight leg raise, but pain with the laying down straight leg raise, which was inconsistent. He opined that Claimant's range of motion medically did not make sense. He also testified that the mechanism of injury was not significant and that although Claimant may have had a strain/sprain, it was extremely unlikely that there was currently a medical condition to treat.

23. On June 3, 2019, Duncan H_____ testified by deposition. Mr. H_____ is an account manager and branch safety leader for Employer. Mr. H_____ noted that on July 18, 2018 Claimant and her co-workers reported to him that Claimant had tweaked her shoulder pulling a tree out of a trailer. Mr. H_____ asked Claimant that day if she wanted to go back to work and she indicated yes. Mr. H_____ testified that Claimant came back the next day and asked to have medical attention for her symptoms and that she pointed at her back the next day. Mr. H_____ testified that he called the on call nurse who assessed Claimant and testified that Claimant was released back to work and that she worked that day. Mr. H_____ noted that Claimant came into work the next Monday and asked to go to the emergency room and was taken by Mr. W_____. Mr. H_____ testified that it was probably correct that the designated medical provider list was never provided to Claimant because the document lacks her signature. Mr. H_____ also testified that if a worker was not going to report to work they are supposed to text or call their supervisor and that Claimant's normal work days were Monday through Thursday.

24. Claimant testified that after her July 23, 2018 emergency room visit, she asked her son to tell Employer she was going to rest. She testified that she had a doctor visit on July 25, 2018 and that she returned to work that day and tried to work but couldn't. Claimant testified that on July 26, 2018 she also tried to work again, but was only able to do two hours of work. Claimant testified that she contacted Mr. W_____ and left him a voice message and text message, but never heard back. Claimant testified that she cannot perform the job duties she performed previously due to her pain. Claimant testified that she has pain in her lower back and that her left leg goes numb. Claimant testified that her left shoulder does not bother her as much as her low back and leg and that it only bothers her when she scrubs the tub or mops. Claimant testified that she wants medical treatment.

25. Wage records indicate Claimant did not work or receive pay after the week ending July 22, 2018. *See* Exhibit D.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo.App. 2000).

Compensability

The claimant was required to prove by a preponderance of the evidence that at the time of the alleged injury, she was performing service arising out of and in the course of the employment, and that the alleged injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The Act creates a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" contemplates the physical or emotional trauma caused by an

"accident." An "accident" is the cause and an "injury" is the result. No benefits flow to the victim of an industrial accident unless the accident causes a compensable "injury." A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.,* W.C. No. 4-650-711 (ICAO February 15, 2007).

Claimant, overall, is not credible or persuasive. Claimant testified that both Michael and Ivan were pushing the tree when she was injured. She testified that she was pulling it and that it was tilted on/into her and if she had not been there it would have fallen. Claimant testified that she told Michael and Ivan that she was hurt while they were moving the tree. Ivan's testimony, as found above, differed greatly from Claimant's testimony. Ivan testified that Michael was the person pushing the tree. Ivan testified that he and Claimant were both guiding the tree. He also testified that Claimant did not report that she was hurt or had pain until after the tree was planted and that she did not stop them or say she was hurt mid tree planting.

Claimant also has extreme and unusual pain behaviors and presentation at medical provider visits. Claimant had very little objective evidence of an acute injury. She had reported tenderness and some muscle spasms with palpation, but negative objective tests with maneuvers performed by medical providers. Her reported pain level of 9/10 at the emergency room, her request for pain medications, and her failure to even attempt to move body parts due to her reported extreme pain are inconsistent with the overall weight of the evidence and logically do not make sense.

Finally, Claimant's reports that she had her son call in to work for her, that she called and texted a supervisor, and that she attempted to work after her release from medical care on July 25, 2018 and on July 26, 2018 are inconsistent with the weight of the overall evidence. Wage records and testimony do not support that she made these attempts or calls. Overall, Claimant's testimony fails to carry weight due to the many inconsistencies.

Dr. Raschbacher, overall, is credible and persuasive that Claimant lacks objective findings, has extremely inconsistent range of motion measurements, and has given very unexplainable poor efforts in movement of her body parts. Dr. Raschbacher is credible and persuasive that refusal to move body parts for examination due to reported pain would not be anticipated medically and physiologically would not make sense. Dr. Raschbacher pointed out that Claimant had a normal seated straight leg raise, but pain with the laying down straight leg raise, which was inconsistent. His opinion that although there may have been an incident, there was no significant mechanism of injury is persuasive. His opinion that although Claimant may have possibly had a strain/sprain on July 18, 2018, there is currently no medical condition to treat is also persuasive.

Overall, Claimant has failed to meet her burden to establish that she sustained a compensable work related injury on July 18, 2018. There are too many inconsistencies both in the reported mechanism of injury and in Claimant's medical presentation to find her credible and persuasive. Claimant has failed to establish that she sustained an acute injury causing disability and the need for medical treatment. Rather, the weight of the

evidence establishes that Claimant was guiding a tree, afterwards reported pain, but at medical appointments had reports that physiologically do not make sense. Claimant has failed to show, more likely than not, that she has any disability or need for medical treatment based on a July 18, 2018 incident.

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). Claimant requested treatment as provided by UC Health emergency room. As she has failed to establish a compensable injury, her request for medical benefits is denied and dismissed.

Temporary Total Disability

Claimant has requested temporary total disability benefits from July 24, 2018 and ongoing. Again, as she has failed to establish a compensable injury, her request for TTD is denied and dismissed.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by a preponderance of the evidence that she sustained a compensable work related injury on July 18, 2018. Her claim is denied and dismissed.

2. Claimant has failed to establish by a preponderance of the evidence an entitlement to a general award of reasonable, necessary, and causally related medical benefits and specific benefits including the medical bills from UC Health emergency room.

3. Claimant has failed to establish by a preponderance of the evidence an entitlement to temporary total disability (TTD) benefits.

4. Any issues not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty

(20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 24, 2019

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that his claim for an injured left shoulder should be reopened?

II. Has Claimant shown, by a preponderance of the evidence, that the left shoulder surgery proposed by Dr. Weinstein (superior capsular reconstruction, but then if necessary, a reverse shoulder arthroplasty) is reasonable, necessary, and related to his work injury of 3/31/16?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Claimant sustained an admitted work injury to his left shoulder while working as a forklift operator on March 31, 2016. At the time of the injury, Claimant's primary duties involved driving a forklift and receiving product into the warehouse. This job required very heavy lifting, sometimes requiring the Claimant to lift as much as one hundred pounds. Claimant lifted a wooden door from a vertical position leaning against the forks onto a horizontal stack that was about waist high when he felt and heard a pop in his left shoulder and numbness down his left arm. (Ex. C, p. 18) Claimant reported the incident to his supervisor, who then sent him to Concentra for treatment*. Id.*

2. Claimant was seen by Dr. Randall Jones at Concentra on 3/31/16 and was referred for an immediate MRI. The MRI of the left shoulder dated 4/1/16 revealed a complete full-thickness tear of the distal supraspinatus and infraspinatus tendons, with a 4.5 cm medial tendon retraction. It also showed a medial subluxation of the long head of the biceps tendon. (Ex. F, p. 135). The MRI showed minimal atrophy and minimal fatty infiltration of the supraspinatus and infraspinatus muscles.

3. Based on the results of the MRI, Dr. Jones referred Claimant to Dr. Wiley Jinkins, an orthopedic surgeon. Dr. Jinkins recommended surgical intervention to repair the rotator cuff. In his 4/5/16 medical record, Dr. Jinkins opined that, due to the severity of the Claimant's tear, he did not feel conservative management, such as physical therapy, would afford the Claimant any relief of symptoms. (Ex. 6, p. 160). On 4/21/16, Dr. Jinkins performed an open subacromial decompression and rotator cuff repair on Claimant's left shoulder. Claimant then began physical therapy. Claimant returned to work, at modified duty, approximately two weeks after surgery.

4. Approximately three months post-surgery on 7/26/16, Dr. Jinkins noted that the Claimant's pain level had decreased significantly and was at a 0 out of 10. Dr. Jinkins also noted that the Claimant's left arm was still very weak. Over time, the Claimant's

pain level remained minimal, although his left arm remained "significantly weaker than his right and his forward flexion and lateral abduction was significantly limited". (Ex. 6, p. 170). On 8/23/16, Dr. Jinkins again noted the Claimant had no pain in his left shoulder; however, it was still significantly weak, and range of motion was still limited in his forward flexion and lateral abduction.

5. Dr. Jinkins warned the Claimant that persons who have surgery to repair a severely torn rotator cuff were "definitely at risk for re-tearing if they became overzealous with lifting". He recommended that the Claimant continue physical therapy, and continue restrictions on the use of his left upper extremity. (Ex. 6, p. 168). On 9/20/16, Dr. Jinkins again saw Claimant and noted that he had no pain, yet still demonstrated significant weakness in his left shoulder. He decreased the Claimant's lifting restriction to 20 pounds, although he noted that the Claimant should not lift over waist high. He recommended another 4 weeks of physical therapy.

6. On 10/18/16, Dr. Jinkins again noted significant weakness of the left shoulder and again noted that the Claimant was "very much at risk for re-tearing" his rotator cuff. (Ex. 6, p. 175). The Claimant was placed at MMI by Dr. Jones on 11/16/16, and was given a 21% upper extremity rating. Dr. Jinkins placed the Claimant on a permanent 30-pound lifting restriction up to waist level with a 20-pound lifting restriction lifting to chest height. (Ex. C, p. 22)

7. Claimant returned to Dr. Jinkins for maintenance care on 12/13/16. Dr. Jinkins noted increased discomfort in the Claimant's left shoulder with weather changes and again reiterated that the Claimant was definitely at risk for re-tearing if he did not abide by his lifting restrictions.

8. Claimant requested a Division Independent Medical Examination (DIME) which was performed by J. Stephen Gray, M.D. on April 19, 2017. Dr. Gray reduced Claimant's impairment rating to 17 percent upper extremity. He recommended maintenance medical treatment in the form of physical therapy for documented flare ups and up to three steroid injections per year. (Ex. B)

9. Respondents filed a Final Admission of Liability dated June 5, 2017. (Ex. A) Claimant objected and the parties entered into a stipulation resolving the issues of conversion and disfigurement. The parties stipulated that the claim was closed pursuant to the June 5, 2017 Final Admission of Liability.

10. On 6/18/17, Claimant testified that as he was toweling off after a shower (not lifting anything), he felt another "pop" in his left shoulder and had immediate onset of significant shoulder pain and numbness in his left arm. Claimant returned to see Dr. Jinkins on July 11, 2017. He indicated to Dr. Jinkins that he was drying off after a shower when he experienced an acute onset of left shoulder pain. Dr. Jinkins noted a possible re-tear of the previously repaired left rotator cuff. Claimant was referred for an MRI. As claimant was working in a new position that did not require any heavy lifting, no additional work restrictions were necessary. (Ex. D, pp. 104-105)

11. Claimant underwent an MRI of the left shoulder on July 14, 2017. It revealed a re-tear of the previously repaired rotator cuff, as well as interval development of a superior labrum tear. (Ex. G, pp. 138-139)

12. Dr. Jinkins opined that attempting to repair the rotator cuff would be unreasonable given the likelihood of re-tearing. He referred Claimant for an orthopedic consultation with David Weinstein, M.D. (Ex. D, pp. 124-125)

13. On 9/18/17, Dr. Weinstein examined the Claimant and noted that the complete re-tear of the Claimant's rotator cuff was "in large due to the significant nature of his initial injury". He offered the Claimant the choice of continuing with observation and home exercises or proceeding with a superior capsular reconstruction or reverse total shoulder arthroplasty (if there were too many arthritic changes after he opened the Claimant up to observe the shoulder joint firsthand).

14. Dr. Weinstein noted that if the Claimant chose the non-surgical option, it was possible that his shoulder condition would worsen over time and require surgical intervention. Claimant chose the non-surgical route at this juncture.

15. The Claimant returned to Dr. Jinkins on 9/27/27, 10/31/17, 11/19/17, 1/9/18, 2/26/18, 4/24/18 and 7/31/18. By December of 2018, cortisone injections were failing to control the Claimant's increasing shoulder pain so he returned to Dr. Weinstein.

16. On 12/24/18, Dr. Weinstein noted that the Claimant had deep pain in his left shoulder and marked weakness. He noted that "the patient was very unhappy with his current status which is progressively worsening". Dr. Weinstein again offered the Claimant surgical treatment as outlined above.

17. This time, Claimant wished to proceed with the surgery; however, Respondents denied authorization, based upon the IME opinion of Dr. Timothy O'Brien, performed at the request of the Respondents. Dr. O'Brien also testified by deposition on June 10, 2019. His current practice consists of 20% patient care and 80% IME's, of which 98% of such IME's are at the request of the Respondents. Although Dr. O'Brien is an orthopedic surgeon, his area of specialty is the foot and ankle. He is not a shoulder and elbow specialist, nor has he surgically treated a shoulder since approximately 2003.

18. Dr. O'Brien testified that Dr. Jinkins' recommendation for surgery (rather than conservative care) so early in the case fell below the standard of orthopedic care. However, he characterized Dr. Jinkins' surgery as arthroscopic, when it was really an open procedure. Dr. O'Brien opined that the capsular reconstruction recommended by Dr. Weinstein is not reasonable, as it is an "experimental" surgery, since it is a relatively new procedure.

19. Dr. O'Brien testified that the Claimant had weakness in his left shoulder prior to the 3/31/16 industrial injury, although he could point to no medical records, which support that contention. He also admitted that there were no medical records reflecting preexisting pain or treatment of the Claimant's left shoulder. Nor were there any

records indicating the Claimant had physical restrictions to his left shoulder prior to this industrial injury.

20. Dr. O'Brien did opine that the weakness in the Claimant's left shoulder would have been more profound after the re-tear than prior to the industrial injury. He also stated that he did not know what the Claimant's job duties were prior to or at the time of his industrial injury. Dr. O'Brien agrees that if the capsular reconstruction is 'taken out of the picture', then Claimant's only viable treatment option would be a reverse total shoulder arthroplasty (consistent with both Dr. Jinkins' and Dr. Weinstein's opinions). Dr. O'Brien agreed that while Claimant is a candidate for a reverse total shoulder, it should not be considered work related.

21. Dr. Wiley Jinkins testified by deposition on June 13, 2019. Dr. Jinkins testified that after reviewing the Claimant's MRI of 4/1/16 and observing the Claimant's "pseudoparalysis" of his left arm, his decision to perform a "mini-open" rotator cuff repair was indicated, as he did not feel that conservative rehabilitation would afford the Claimant any significant relief of symptoms. He explained that the minimal atrophy and minimal fatty infiltration seen on the MRI of 4/1/16 indicated that the Claimant's shoulder was functioning at a fairly high level prior to the industrial injury.

22. Dr. Jinkins opined that if the tear itself was longstanding, and the Claimant was not functioning well, one would expect to see more atrophy and fatty infiltration than the amount seen on the 4/1/16 MRI. Regarding Dr. O'Brien's allegation in his IME that Dr. Jinkins failed to speak to the Claimant about non-invasive therapies prior to performing the rotator cuff repair surgery which falls below an orthopedic standard of care, Dr. Jinkins testified that this is incorrect. He did speak to Mr. Laabs about the possibility of conservative care, but did voice his opinion that the Claimant's rotator cuff tear and shoulder pain were not likely to improve without surgery.

23. Dr. Jinkins testified that he was concerned that if surgery were not performed relatively quickly, the additional time that would elapse would lead to deconditioning and additional atrophy of the Claimant's musculature therefore making it more difficult for the Claimant to regain function after surgery. Because the Claimant's goal was to be able to continue working at his job which required some lifting, Dr. Jinkins testified that a rotator cuff repair was the only treatment option that, if successful, would allow him to do so. Dr. Jinkins testified that once he surgically opened the Claimant's shoulder, he determined that there was enough viable tissue to repair the rotator cuff, so he proceeded with the rotator cuff repair. If there had not been enough viable tissue, he would not have continued with the surgery.

24. Dr. Jinkins disagreed with Dr. O'Brien's characterization of the injury as a "relatively minor strain/sprain that resulted in a minimal amount of inflammation" which was back to pre-injury status before 4/21/16. Dr. Jinkins testified that if the Claimant's injury were just a minor strain/sprain, it would have taken several days for the inflammation to fully develop. A strain/sprain would not necessarily cause the immediate sharp pain that Claimant described. This immediate onset of sharp pain would be more consistent with a tearing of the rotator cuff. Dr. Jinkins opined that there were very few treatment

options available for the Claimant considering the extent of the tear. He was hopeful that by repairing the rotator cuff, it would buy the Claimant time before he might need to undergo a shoulder replacement. Dr. Jinkins also testified that even if the Claimant's rotator cuff tear is found to be preexisting, his heavy lifting duties at BMC likely substantially aggravated his preexisting shoulder condition.

25. Dr. Weinstein testified by deposition on 5/10/19. Dr. Weinstein is an orthopedic specialist with 98% of his practice related to shoulder and elbow pathology. He performs approximately 300 shoulder arthroplasties per year, of which at least 50% of them are reverse total shoulder replacements.

26. Dr. Weinstein testified that some of the pathology seen on the Claimant's initial MRI scan of 4/1/16 was probably preexisting; however, Claimant was compensating extremely well, and was not having any symptoms in his left shoulder before the 3/31/16 injury. Dr. Weinstein opined that some of the rotator cuff pathology seen on the MRI of 4/1/16 was new, and that the "pop" reported by the Claimant on 3/31/16 represented further tearing of the already compromised rotator cuff. Dr. Weinstein stated that it is very possible an individual with preexisting rotator cuff pathology can present with no weakness. He testified that he frequently sees patients with preexisting pathology which neither bothers them, nor affects them. However, then an event will occur that injures the area just enough that they cannot compensate anymore.

27. Dr. Weinstein opined that, contrary to Dr. O'Brien's opinion, Dr. Jinkins appropriately treated the Claimant with rotator cuff repair surgery on 4/21/16. He explained that a severe rotator cuff tear in a 50-year-old individual does not have a lot of good treatment options besides a surgery. He agreed with Dr. Jinkins' assessment that non-invasive therapy would be contraindicated, since non-operative therapy had "no chance" of healing the tear. He further opined that the minimal atrophy and minimal fatty infiltration seen on the 4/1/16 MRI indicated that there was a possibility that the tear was repairable, or partially repairable.

28. Dr. Weinstein explained that, in an attempt to prevent the tear from becoming irreparable, Dr. Jinkin's surgery was "absolutely indicated". He opined that an individual who has preexisting, compromised rotator cuff tissue (even if surgically repaired) is more likely to suffer a re-tear of the rotator cuff at a later date. He also disagreed with Dr. O'Brien that the Claimant had returned to his preinjury level of functioning prior to the date of Dr. Jinkin's surgery. He explained that since the Claimant had no pain, and had absolutely no treatment to his left shoulder prior to this injury, there is no indication that the Claimant was "back to baseline" by April 21, 2016. He disagrees with Dr. O'Brien's opinion that Dr. Jinkin's surgery was nearly 100% certain to fail because of the Claimant's preexisting gout, prediabetes and hyperlipidemia.

29. Dr. Weinstein also disputes Dr. O'Brien's allegation that Dr. Jinkins' recommendation for surgery so early in the Claimant's care fell below the standard of care outlined by the American Academy of Orthopedic Surgeons. Dr. Weinstein knows of nowhere in the standard of orthopedic care in Colorado Springs or in the American Academy of

Orthopedic Surgeons that states **all** non-operative modalities must first be exhausted prior to proceeding with surgery. Dr. Weinstein characterized Dr. O'Brien's statements as "absolutely ridiculous" and inappropriate. Dr. Weinstein also opined that the toweling off incident on June 18, 2017 should not be characterized as a "new injury". He attributes the Claimant's need for the capsular reconstruction or reverse total shoulder arthroplasty to the work related injury of 3/31/16. He explained that once a tendon is torn, it will never be as strong as it would have been (even after repair) had it not been torn in the first place.

30. Dr. Weinstein also explained that a superior capsular reconstruction is a relatively new procedure but it should not be deemed "experimental". He has personally performed many of these procedures. He explained that prospective randomized studies have not been performed because it would be unethical to do surgery on some individuals where the procedure is actually performed and not do it on others who expect to have the procedure, but actually do not.

31. Dr. Weinstein recommends this procedure to the Claimant because of the Claimant's relatively young age, and the uncertainty as to the "longevity" of a shoulder replacement. Since shoulder replacements have only been in existence since 2004, there is no way to know what happens to the implants in fifteen or twenty years. The Claimant could need a revision surgery in the future, if the arthroplasty loosens due to age. Dr. Weinstein's goal in doing a capsular reconstruction is to extend the time before the Claimant would ultimately need a total shoulder replacement-thereby lowering the probability that an additional revision surgery might be needed. Ultimately, if there are no other options available, Dr. Weinstein opined that it is appropriate to proceed with a reverse total shoulder even in an individual as young as Claimant.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). A Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents, and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

B. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of

evidence or every inference that might lead to conflicting conclusions, and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

C. In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions, the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is to be decided on its merits. C.R.S. § 8-43-201.

Credibility Findings

D. In this instance, the ALJ finds Claimant to be credible, both as a hearing witness, and as a medical historian throughout his treatment in a sincere effort to get better. In this case, three medical experts have offered their sincerely held opinions, both on the issue of causation, as well as the reasonableness, necessity, and relatedness of the proposed surgery. The ALJ finds the opinions of Dr. Jinkins and Dr. Weinstein to be more persuasive, as outlined below, in part because of their active expertise in shoulder surgery, and in part because their reasoning is simply more sound than that of Dr. O'Brien.

Reopening, Generally

E. Pursuant to Section 8-43-303(1), C.R.S., a claim may be reopened based on a change of condition which occurs after MMI. *See El Paso County Department of Social Services v. Donn*, 865 P.2d 877 (Colo. App. 1993). The burden to prove that a claim should be reopened rests with the Claimant to demonstrate that reopening is warranted by a preponderance of evidence. Pursuant to Section 8-43-303(1), C.R.S., a "change of condition" refers to a "change in the condition of the original compensable injury or a change in claimant's physical or mental condition which can be causally connected to the original compensable injury." *Chavez v. Industrial Commission*, 714 P.2d 1328 (Colo. App. 1985). The issue of whether medical treatment is necessitated by a compensable aggravation or a worsening of the Claimant's preexisting condition is one of fact for resolution by the ALJ based upon the evidentiary record. *See Standard Metals Corp. v. Ball*, *172 Colo. 510, 474 P.2d 622 (1970); F.R. Orr Construction v. Rinta*, *717 P.2d 965 (Colo. App. 1985)*.

Medical Benefits, Generally

F. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. § 8-42-101. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990).

G. The right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000).

H. The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990). Factual determinations related to this issue must be supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. Substantial evidence is that quantum of probative evidence which a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411, 415 (Colo. App. 1995).

Intervening Events

I. If an intervening event triggers disability or need for medical treatment, then the causal connection between the original injury and the claimant's condition is severed. *See, Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970); *Vargus v. United Parcel Service*, W.C. No. 4-325-149 (ICAO August 29, 2002); *Vandenberg v. Ames Construction,* W.C. No. 4-388-883 (ICAO December 5, 2007). An independent intervening injury does not necessarily have to be so severe that it would cause injury in an individual without a pre-existing weakness. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990).

J. The Claimant has a compensable injury if the employment-related activities aggravate, accelerate or combine with the preexisting condition to cause a need for medical treatment or produce the disability for which benefits are sought.

Section 8-41-301(1)(c), C.R.S. 2015; Snyder v. Industrial Claims Appeals Office, *942 P.2d 1337 (Colo. App. 1997)*. An industrial aggravation is the "proximate cause" of a Claimant's disability if it is the "necessary precondition or trigger" of the need for medical treatment. *Subsequent Injury Fund v. State Compensation Insurance Authority, 768 P.2d 751 (Colo. App. 1988)*. The evidence in this case reveals that the trigger of the Claimant's original left shoulder pain is the 3/31/16 industrial incident. Both Dr. Weinstein and Dr. Jinkins testified that they would never recommend surgery for an individual who had no pain in his shoulder even if it was discovered that preexisting degeneration existed in the joint. Both physicians explain that they treat the individual, not necessarily results of testing. The ALJ finds this reasoning persuasive.

K. The ALJ finds that the showering incident which resulted in the re-tear of the Claimant's rotator cuff should not be deemed a "new" injury or intervening event that breaks the chain of causation. If an industrial injury has left the body in a weakened condition and that weakened condition is the natural and proximate cause of additional injury, the Claimant's additional injuries are causally related to the original industrial injury. *Standard Metals Corp. v. Ball 172 Colo. 510, 474 P.2d 622 (1970)*. Even Dr. O'Brien admitted that the Claimant's left shoulder/arm was ultimately weaker after the repair by Dr. Jinkins, therefore rendering it more likely to be injured by re-tearing it.

Relatedness of Claimant's Current Symptoms to the Work Injury

L. Here, the evidence establishes that Claimant's pain started after lifting heavy doors on 3/31/16. The Concentra record of that same date notes the Claimant's complaints about his left shoulder. The physical examination by Dr. Jones necessitated referral for an immediate MRI. Every medical record thereafter documents ongoing left shoulder pain. There are no medical records documenting preexisting pain, treatment or limitation of the Claimant's left shoulder before this date.

M. Pain is a typical symptom from the aggravation of a pre-existing condition. The Claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment related activities and not the underlying pre-existing condition. See *Merriman v. Industrial Commission, 120 Colo. 400, 210 P.2d 448 (1949)*. "But for" the lifting incident of 3/31/16, the Claimant would not have begun to experience pain in his left shoulder on 3/31/16. Even Dr. O'Brien, the Respondent's expert, agreed that there was no evidence that the Claimant ever suffered from or was treated for preexisting left shoulder pain. He even admitted that a reverse total shoulder arthroplasty was reasonable and necessary and at this point in the Claimant's treatment.

N. Dr. Jinkins and Dr. Weinstein also both explained the basis for their opinion regarding causation–namely that the Claimant was asymptomatic prior to the lifting incident on 3/31/16. This original lifting incident was the catalyst for the Claimant's need for a capsular reconstruction or reverse total shoulder arthroplasty, and the ALJ finds that Claimant's conditions has worsened as a result, but not due to any intervening cause.

O. Where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth track, 4-649-298 (ICAO May 15, 2007)*. No evidence was offered by the Respondents that would lead one to conclude that the Claimant needed surgery on his left shoulder prior to 3/31/16. It was only after the lifting incident of 3/31/16 that the Claimant's left shoulder became symptomatic and the need for a superior capsular reconstruction or reverse total shoulder arthroplasty was recommended. As Dr. Jinkins and Dr. Weinstein explained, neither would ever recommend surgery for an individual who was not having pain, whether or not they had degeneration in their joint. The ALJ finds that Claimant's current need for the reconstruction or reverse total shoulder arthroplasty surgery has been accelerated by the lifting incident of 3/31/16.

Reasonableness and Necessity of the Proposed Surgery

P. Both Dr. Jinkins and Dr. Weinstein explained that a rotator cuff tear of such magnitude was only going to be successfully treated by surgery. Both addressed the issue of any surgical risks based upon the Claimant's preexisting prediabetes, gout, and obesity. Even Dr. O'Brien agreed that there was no evidence that the Claimant ever suffered from or has been treated for preexisting left shoulder pain. He admitted that a reverse total shoulder arthroplasty was reasonable and necessary at this point in Claimant's treatment - he disagrees on causation, and the reasonableness of first attempting the superior capsular reconstruction. As a surgeon who consistently performs complex shoulder surgeries, Dr. Weinstein's opinion on the advisability of this surgery is more persuasive to this ALJ than that of Dr. O'Brien.

Conclusion

Q. Claimant has met his burden of proof. Claimant's current condition was caused by his original 3/31/16 work injury, which has worsened with time, and without any significant intervening events. Such worsening of the original condition wrought by his work injury justifies a reopening of this case, with a need for additional medical treatment. In this instance, Claimant is to be afforded the opportunity to first try the superior capsular reconstruction. In the event that procedure proves nonviable- in the sole judgment of Claimant and Dr. Weinstein-then Claimant may then undergo the reverse shoulder arthroplasty.

ORDER

It is therefore Ordered that:

1. Claimant's case is reopened, due to worsening of Claimant's condition.

2. Respondents shall pay for the superior capsular reconstruction as proposed by Dr. Weinstein.

3. In the sole discretion of Dr. Weinstein and Claimant, should a reverse shoulder arthroplasty become necessary, Respondents shall pay for that procedure as well.

4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 24, 2019

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-086-729-001

ISSUES

I. Whether Claimant established by a preponderance of the evidence that she developed a compensable occupational disease in the form of right sided carpal tunnel syndrome and right sided cubital tunnel syndrome, i.e., ulnar neuropathy, with an onset date of September 5, 2018.

II. Whether Claimant is entitled to reasonable, necessary, and related medical treatment.

III. Whether the medical treatment rendered by Concentra and Dr. McDermott, including the EMG performed on February 6, 2019, is authorized, reasonable, necessary, and related.

IV. Whether Claimant is entitled to temporary total disability benefits after she was terminated from employment.

V. Claimant's average weekly wage.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant has been a computer control machinist ("CCM") with Alfred Manufacturing for the past twelve years. She was terminated by layoff on February 6, 2019.
2. Claimant credibly testified that she felt an onset of severe right hand symptomatology on or about September 5, 2018, when she awoke in the middle of the night she had both numbness and tingling in her right hand. She also observed that her right hand was a bluish color. *Hearing Transcript ("HT") p, 18, lines 21 – 24*.
3. On September 6, 2018, she sought medical attention from Platte Valley Medical Center for wrist pain. *Exhibit 3*.
4. Thereafter, she was referred for an orthopedist evaluation by the emergency room doctors at Platte Valley Medical Center. However, after she reported her injury to her employer she was sent to Concentra and not seen by an orthopedist.
5. She began treatment at Concentra on or about September 11, 2018. The Concentra report of that date states that she was suffering right hand paresthesia and tenosynovitis in the right wrist. *Exhibit 4, BS 101*. She also complained of

severe pain in her fingers, blue coloration and extreme coldness in all of her right digits. *Id.*, *BS 102*.

6. Thereafter, Claimant underwent extensive physical therapy at Concentra which included therapeutic exercises stretching, strengthening, tendon gliding, and patient education. *Id*., *BS 99*.

7. On October 4, 2018, the Claimant was evaluated by Dr. David Bierbrauer who opined that Claimant was suffering right radial tunnel syndrome. He recommended an injection. This was provided. *Id*., BS 82. Dr. Bierbrauer noted that when the Claimant removed her brace from her right hand, she stated her fingers turned blue, even though they were symmetrical with her left upper extremity and he did not notice any discoloration at that time. *Id.*

8. On October 9, 2018, Claimant was evaluated by NP Halat. At this appointment, NP Halat provided Claimant work restrictions that limited her lifting to up to 5 pounds. *Ex. 4, BS 76*.

9. On October 30, 2018, Claimant returned to NP Halat at Concentra. At this visit, the note indicates the following:

> Ms. Forte returns to the Clinic today for recheck of her right wrist and arm pain. She has still not received anything on the ergonomic evaluation. She is feeling better and OT has been doing some paraffin on her hand and wrist which has really helped. She would like to go up on her restrictions at this time. *Ex. 4, BS 50.*

Therefore, NP Halat increased Claimant's lifting restrictions to 25 pounds. *Ex. 4, BS 50*. But, NP Halat kept Claimant on modified duty. *Ex. 4, BS 48*.

10. On November 1, 2018, Claimant attended physical therapy. The notes from that visit indicate that although her restrictions had been decreased, her wrist had become weak. The notes also indicate the restrictions continued to limit one or more of the Claimant's essential job functions. *Ex. 4, BS 45*.

11. On November 13, 2018, Claimant returned to Concentra and was seen by Dr. Strain. The note from this appointment also states that Claimant is feeling better and that she would like to go up on her restrictions. However, the note in this report, even though it was apparently written by Dr. Strain, is the exact note contained in the October 30, 2018, note which was written by NP Halat. The note from this November 13, 2018, report also provides:

> Ms. Forte returns to the Clinic today for recheck of her right wrist and arm pain. She has still not received anything on the ergonomic evaluation. She is feeling better and OT has been doing some paraffin on her hand and wrist which has really helped. She would like to go up on her restrictions at this time. *Ex. 4, BS 37.*

12. On November 26, 2018, Claimant returned to Concentra for additional physical therapy with OT Ahlenstorf. At this appointment, OT Ahlenstorf noted Claimant's "Impairment Goals," as was done in prior reports. In this report, the occupational therapist noted Claimant had made minimal progress towards her DASH goal.

She also indicated Claimant had made moderate progress towards her gripping goals. However, a review of Claimant's prior physical therapy records indicate that her initial grip strength was 7 pounds and her goal was 40 pounds. Nevertheless, as of this date, Claimant's grip strength was still 7 pounds and her grip strength goal was still 40 pounds. Moreover, the report states in another section that Claimant has only reached 12.5% of her overall goals at this time. Thus, the stated conclusion by OT Ahlenstorf that Claimant had made moderate progress towards increasing her grip strength is not supported by the records. *See Ex. 4, BS 25, and other Concentra Records*. In fact, Claimant's grip strength, which was required to perform her job duties, had not improved at all.

13. On November 27, 2018, Claimant returned to NP Halat. Despite the physical therapist noting that Claimant had only met 12.5% of her goals and documentation that her grip strength had not improved at all, NP Halat noted that Claimant's symptoms have nearly completely resolved. She also indicated she reviewed the Job Demands Analysis performed by Mr. Fallik and determined that based on Mr. Fallik's conclusions, Claimant's job did not contribute to her CTS. She further stated Claimant should be advancing her restrictions in future physical therapy visits and prescribed 3 more weeks of physical therapy. She concluded that after Claimant completes another 3 weeks of physical therapy, Claimant should be able to be returned to full duty. However, despite such statement, she returned Claimant to full duty that day. *Ex. 4, BS 19-20.* In the end, the ALJ infers and finds that NP Halat released Claimant to full duty because she did not think Claimant's job duties contributed to her carpal tunnel syndrome and elbow neuropathy based upon Mr. Falik's conclusions. Therefore, the ALJ finds that Claimant's upper extremity problems still prevented her from performing her regular job duties even though she was released to full duty by PA Halat.

14. On November 28, 2018, OT Halat discussed Mr. Fallik's report with Dr. Strain and it was determined that Claimant's case should be closed since they determined, based on Mr. Fallik's report, her right upper extremity problems were not work related. Such report also indicates Claimant should be returned to full work activity and that she would be able to work her entire shift. *Ex. 4, BS 20*. However, the ALJ finds that this full duty release was not based on Claimant's ability to work, but was instead based on the case being closed and their erroneous conclusion that Claimant's condition was not caused by her work activities and therefore there were no restrictions associated with a work related condition.

15. As previously referenced, and at Respondents request, a Job Demands Analysis was performed by Howard Fallik of Genex. He issued a report on October 21, 2018. *Exhibit 11*. In his report, Mr. Fallik opined Claimant's job duties did not involve either primary or secondary risk factors that could have contributed to her right upper extremity problems.

16. Claimant testified that she observed the Job Demands Analysis performed by Mr. Fallik. A fellow-employee named "Julian" (who had been on the job a couple of weeks) was asked to perform the various tasks. These are depicted in the

pictures attached to the Job Demands Analysis. Claimant's testimony was that Julian did not fully perform the tasks that she performed throughout her ten-hour shift. Rather, he demonstrated what tasks might be required. *HT p. 24, line 24 to p. 25, line 9*.

17. Although he did not talk to Claimant about her job, (*HT p. 30, line 23 to p. 31, line 1*), Mr. Fallik opined that the job demands of Claimant's work are in the light duty category. Claimant disagreed because her job required up to 50 lbs. lifting. She also testified that pushing on her handle or vice (or wrench) during the process was frequent, not infrequent, contradicting the statement by Mr. Fallik. *See generally HT p. 25, line 6 to p. 30, line 22*.

18. Next, despite Mr. Fallik's statement, Claimant's use of a wrench or power tool was frequent, not infrequent. She also had to lift frequently from the floor to waist and with frequent bending, squatting and twisting, with simple grasping frequently. All of these conflict with Mr. Fallik's report. *Id.*

19. The Claimant testified that the job she was called upon to do when she was injured had 15,000 parts to be completed over one week, or 3,750 parts a day) 375 parts an hour. Over this period, Claimant had constant exposure to vibration through drills and a power hose. Additionally, she was asked to write down her tasks. This she did and used this experience to enable her to detail her regular job activities that involved the repetitive and forceful use of her hands. *Id.*

20. Relying exclusively on the conclusions in Mr. Fallik's Job Demands Analysis, Concentra's Nurse Practitioner Deanna Halat opined that the Claimant did not meet the requirements of "Rule 17 for CTS or Radial Tunnel Syndrome based on the findings of Force and Repetition/Duration and Awkward Posture and Repetition/Duration." *Exhibit 4, BS 19 and 20*.

21. The record does not show that NP Halat performed an independent jobsite evaluation or visited the job site. The record also does not show that NP Halat reviewed the actual raw data of Mr. Fallik's report. Instead, NP Halat merely relied upon the stated conclusions in Mr. Fallik's report.

22. Although Claimant was given work restrictions by Concentra providers during her treatment with Concentra, she continued to work full time, i.e., 40 hours per-week, until she was laid off and terminated on February 6, 2019.

23. Shortly before her termination, Claimant Respondents denied Claimant further medical care at Concentra. On January 11, 2019, Claimant wrote a letter to Nurse Halat confirming that she had been denied medical care at Concentra. *Exhibit 5*. Thereafter, Claimant sought medical attention from her primary care physician, Dr. McDermott.

24. Dr. McDermott evaluated Claimant on January 25, 2019. His report noted the following:

> **Review of Systems and Symptoms:**
>
> Constitutional: negative

> Musculoskeletal: right forearm pain, weakness and numbness for about 7 months. This was thought to be WC related from repetitive motion. Patient and specialist consult and the specialist thought she may have radial tunnel syndrome. Patient says both the specialist and the primary treating doctor wanted EMG but WC carrier refused.

Exhibit 10, BS 139.

25. After Claimant was denied medical care by Concentra, she underwent an EMG on referral by Dr. McDermott, despite Respondents' Notice of Contest. *Exhibit 1, BS 1*.

26. Claimant's EMG, on February 6, 2019, established that the ulnar nerve conduction velocities were slow across the elbow, likely establishing an entrapment distally in the cubital tunnel. There also was a moderate entrapment of the right medial nerve of the wrist, consistent with carpal tunnel syndrome. (*See EMG*.) Dr. Kakkar recommended Claimant undergo a hand surgery consultation. *Exhibit 6, BS 113*.

27. As found above, on February 6, 2019, Claimant was laid off from work. *HT pg. 50, line 7-9*.

28. Following the EMG, Claimant continued treatment with Dr. McDermott. On March 25, 2019, Dr. McDermott issued Claimant a Spica splint to be worn at all times to help protect the carpal tunnel from further inflammation. *Exhibit 10, BS 143*. Additionally, he issued a report on May 8, 2019, in which he opined that at that time he thought Claimant's carpal tunnel syndrome was probably a result of her repetitive work. *Id*., *BS 145*.

29. The ALJ finds that Claimants' regular job duties were injurious. The ALJ also finds that Claimant was unable to perform her regular job duties as of September 5, 2018. As found above, Claimant had only met 12.5% of her goals in physical therapy and made no progress in improving her grip strength that was necessary to perform her job. Moreover, the work restrictions provided by Concentra through the majority of her claim support a finding that Claimant was unable to perform her regular job duties. Furthermore, the release to full duty was not medically based on Claimant's underlying condition, but administratively based on her claim being closed and NP Halat and Dr. Strain's erroneous conclusion that Claimant's condition was not work related. Moreover, the reduction in work restrictions, which were provided shortly before her case was closed, was done at Claimant's request in order to see if she could handle working closer to her pre-injury capacity. Such request does not negate the finding of this ALJ that Claimant has remained restricted from performing her regular job duties since September 5, 2018.

30. The ALJ further finds that wearing the Spica splint would inhibit Claimant's ability to perform her regular job duties and would restrict her from performing her regular job. Again, the ALJ finds that Claimant's was returned to full duty, based on the incorrect assumption that her work was not injurious and was not the

cause of her carpal tunnel syndrome and cubital tunnel syndrome, i.e., ulnar neuropathy. Had a proper causation assessment been made by NP Halat and Dr. Strain, the ALJ finds that the original restrictions issued by Concentra would have remained and Claimant would have been restricted from performing her regular job duties by the Concentra providers. Moreover, once laid off from work, the ALJ finds that Claimant has been unable to obtain similar employment as a machinist based on the finding that working as a machinist caused her underlying condition, she remained symptomatic, she had pain and limited grip strength, and may need surgery.

31. At the request of the Respondents, Claimant was evaluated by Dr. Marc Steinmetz on April 23, 2019. Dr. Steinmetz confirmed Claimant suffers from symptomatology consistent with carpal tunnel syndrome, including positive Tinel's and Phalen's signs. He also documented Claimant's right elbow tenderness on both the medical and lateral aspects, along with right shoulder tenderness. *Exhibit 7, BS 117*.

32. Dr. Steinmetz's opinion relied heavily on Mr. Fallik's stated conclusions as set forth in the Job Demands Analysis, while ignoring Claimant's statement concerning the nature of her job's physical demands, as well as the raw data contained in Mr. Fallik's report. Dr. Steinmetz concluded Claimant's purported history was inconsistent with the Job Demands Assessment and did not support a finding that her job caused her underlying upper extremity conditions. *Exhibit 7, BS 118*. His conclusion, however, is neither well founded nor well explained.

33. Dr. Steinmetz relied on Mr. Fallik's stated conclusions in his Job Demands Analysis to establish Claimant failed to meet the requirements of the risk factors found in Rule 17 of the *Guidelines*. *Exhibit 9, BS 138*. This Rule provides that for the disease of carpal tunnel syndrome there is good evidence that a combination of repetition and force for six hours, as well as a combination of repetition and forceful tool use with awkward posture for six hours, or a combination of 2 lb. pinch or 10 lb. hand force three times or more per minute for three hours constitute risk factors for the development of carpal tunnel syndrome. *Id.*

34. The Respondents introduced the testimony of supervisor Juan Jimenez who asserted that he had reviewed the report of Mr. Fallik and that the report was accurate.

35. The Claimant testified that although Mr. Jimenez was physically present, he did not observe the job demand evaluation performed by Mr. Fallik. Rather, he was engaged in other tasks while this was being performed. Mr. Jimenez disagreed with the statements by Claimant concerning the weights that she would be required to lift throughout the day. Claimant's rebuttal contested the accuracy of the testimony of Mr. Jimenez. *HT p. 98, line 16 to p. 99, line 3*. She also contested his claim that she was an inefficient worker. *HT p. 99, line 4 – 12*.

36. Finally, she credibly testified that Mr. Jimenez was not focused on Mr. Fallik's evaluation. *HT p, 99, lines 25 to p. 100, line 6*.

37. There appears to be no dispute that Claimant's job required the repetitive and forceful use of her upper extremities. The dispute, however, is over the extent of the repetitive and forceful use of her upper extremities that was required for her to perform her job and whether such activities caused her to develop her upper extremity conditions. To assist in this assessment, Mr. Fallik purported to measure the repetitive and forceful use of Claimant's upper extremities required to perform her job and whether they met any of the primary or secondary risk factors for the development of cumulative trauma disorders as contained in the *Guidelines*.

38. A cursory review of Mr. Fallik's conclusions indicates Claimant's job duties did not meet any of the primary or secondary risk factors for the development of a cumulative trauma disorder. Moreover, Dr. Steinmetz relied upon Mr. Fallik's conclusions without looking at and discussing the underlying raw data. For example, a review of the raw data contained in Mr. Fallik's report reveals that he only conducted two time studies. However, the results of each time study was not adequately considered and addressed by Dr. Steinmetz.

    - The first time study assessed whether Claimant's job duties met the Primary Risk Factor of 6 hours of use of 2 pounds pinch force or 10 pounds hand force 3 times or more per minute. For this risk factor, Mr. Fallik measured someone else demonstrating Claimant's job duties that required the use of 10 pounds of hand force 3 times or more per minute. Over a one-hour period, Mr. Fallik determined Claimant's job duties met that portion of the risk factor for 35 out of 60 minutes. Therefore, based on a 9 hour and 40 minute workday, Claimant used 10 pounds of hand force 3 times or more per minute for approximately 5 ½ hours per day. This is just under the 6 hours required under the *Guidelines* to be a primary risk factor. Moreover, if Claimant's testimony is credited, which it is, in that she worked faster than what Mr. Fallik observed another co-worker demonstrate, it is reasonable to conclude and find Claimant met the 6-hour primary risk factor contained in the *Guidelines*.[1] Even if Mr. Fallik's assessment were accurate, these tasks would be a secondary risk factor under the *Guidelines* since the time performing such tasks exceeded three hours.

    - The second time study assessed whether Claimant's job duties met the secondary risk factor of 3 hours of use of hand held tools weighing 2 pounds or greater. For this risk factor, Mr. Fallik determined Claimant's job required the use of hand tools weighing 2 pounds or more for greater

[1] Although there was testimony that the machine performed each task at a set time and therefore Claimant could not be faster than any other worker, Claimant credibly testified that she worked faster. Claimant's testimony is credited because even though each task the machine completed might have been performed at the same speed, a worker could still place the material into the machine and take it out of the machine faster, and perform other assembly and manual work faster, before initiating the machine to perform each additional predetermined task.

It should also be noted that Mr. Fallik did not document whether he measured how often a worker was required to use 2 pounds of pinch force, which is also a risk factor.

than 3 ½ hours per day. Therefore, based on his raw data, Claimant's job duties also met this secondary risk factor contained in the *Guidelines*.

39. Despite the raw data contained in Mr. Fallik's report, Dr. Steinmetz' report and testimony failed to describe how these findings were used to assess causation in this matter and how these findings, if true, affected his causation assessment in this case.

40. Furthermore, the *Guidelines* indicate that there is good evidence that combination of 2 pound pinch or 10 pounds of hand force 3 times or more per minute for 3 hours is a risk factor for the development of carpal tunnel syndrome. *Guidelines*, *pg. 29*. Despite this information being readily available to Dr. Steinmetz, he failed to describe and articulate how this information impacted his causation assessment.

41. In addition, the *Guidelines* provide that work activities involving wrist bending and/or full elbow flexion/extension, repetition for 4 hours, and vibration, or repetitive pronation of the forearm, or sustained pressure at the cubital tunnel are additional factors to consider in the development of cubital tunnel syndrome. However, it does not appear Mr. Fallik documented whether these risk factors were or were not present. Again, despite this gap, Dr. Steinmetz failed to elicit the lack or presence of this exposure from Claimant in order to assess causation regarding the cause of Claimant's cubital tunnel syndrome.

42. In addition, despite Dr. Steinmetz concluding Claimant's right upper extremity conditions were caused by non-occupational factors, he also failed to assess whether Claimant's job duties aggravated such conditions and necessitated the need for medical treatment. The *Guidelines* specifically state and emphasize the following:

> *Remember that preexisting conditions may be aggravated by, or contribute to, exposures lower than those listed on the table*. (Emphasis added.)

Exhibit 5, Medical Treatment Guidelines, Section D(3), pg. 18.

43. Dr. Steinmetz also failed to critically analyze and assess whether Claimant's work activities, at levels that might be lower than the various risk factors contained in the *Guidelines*, combined with her predisposing factors, such as smoking, and being female, and caused her upper extremity conditions.

44. Also absent from Dr. Steinmetz' analysis is how the force and physical demands placed on Claimant's right upper extremity each and every day while at work and performing her job could not have aggravated a preexisting neuropathy.

45. In addition, *Exhibit 5* of the *Guidelines* indicates that the epidemiological literature used to determine the primary and secondary risk factors for the development of certain cumulative trauma disorders "rely most heavily upon healthy worker populations and may not reflect the worker population with other concurrent disease or comorbidities." [*Exhibit 5, Medical Treatment Guidelines, Section D(3), pg. 18*.] Dr. Steinmetz failed to address this section of the *Guidelines* and whether it was relevant in this case.

46. Overall, the ALJ does not credit or find persuasive Dr. Steinmetz' opinions as set forth in either his report or hearing testimony regarding causation. The ALJ does, however, credit and find persuasive that portion which diagnoses Claimant with carpal tunnel syndrome and a right ulnar neuropathy, i.e., cubital tunnel syndrome. The ALJ also does not credit or find persuasive the opinions of Dr. Strain or NP Halat regarding their causation assessments and release of Claimant to full duty.

47. Overall, the ALJ finds the testimony of the Claimant concerning the nature of her job activities as a CNC machinist to be credible. The ALJ rejects the opinions of both Mr. Fallik and Mr. Jimenez to the extent such opinions and testimony supports a contention that Claimant's job duties did not meet any primary or secondary risk factors under the *Guidelines* or that Claimant's job did not require the repetitive and forceful use of her upper extremities.

48. The ALJ does credit those portions of Mr. Fallik's report that demonstrates Claimant's job duties involved the repetitive and forceful use of her upper extremities and hands and supports a finding that her job duties met some of the primary and/or secondary risk factors for the development of cumulative trauma disorders set forth in the *Guidelines*.

49. The ALJ also finds that the primary and secondary risk factors involved with Claimant's job duties are also set forth as risk factors for the development of carpal tunnel syndrome.

50. Claimant is a credible witness and her testimony is both persuasive and consistent with a significant portion of the medical records contained in record.

51. The ALJ finds and concludes that Claimant developed an occupational disease involving her right upper extremity in the form of carpal tunnel syndrome and cubital tunnel syndrome, i.e., an ulnar neuropathy.

52. Claimant has also established that she can no longer perform her regular job duties due to her occupational disease. Claimant further established that once she was laid off and terminated from her job on February 6, 2019; her wage loss became attributable to her occupational disease.

53. Claimant has also established that Respondent, and the designated and authorized providers at Concentra, refused to provide Claimant medical treatment based on the assumption that her condition was not work related. Therefore, Claimant selected, and sought treatment from, Dr. McDermott to treat her occupational disease. Therefore, Dr. McDermott, and his referrals, are authorized providers.

54. Claimant has also established that the medical treatment she has obtained up through the date of the hearing to diagnose and treat her right upper extremity problem, is reasonable, necessary, and related to her occupational disease. This includes the EMG that was performed by Dr. Kakkar at Lowry Neurological Associates, pursuant to a referral from Dr. McDermott.

55. Claimant worked 40 hours per week and was paid $18.00 per hour. Neither party disputes the hours she worked each week and the rate at which she was paid. Therefore, her average weekly wage is $720.00.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence dispositive of the issues involved. The ALJ has not addressed every piece of evidence leading to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005).

Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence

of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995).

I. Whether Claimant established by a preponderance of the evidence that she developed a compensable occupational disease in the form of right sided carpal tunnel syndrome and right sided ulnar neuropathy with an onset date of September 5, 2018.

The ALJ makes the rational choice to accept Claimant's testimony, the opinion of Dr. McDermott, portions of Dr. Steinmetz and Mr. Fallik's, and the plausible inferences drawn therefrom. The ALJ, however, rejects those portions of Dr. Steinmetz, Halat, and Strain's opinions regarding causation. The ALJ also rejects those portions of Mr. Fallik's report that understates the force, repetition, and weight that is necessary for Claimant to perform her job. Despite medical opinion to the contrary, a claim may be supported by lay testimony alone. See *Lymburn v Symbois Logic*, 952 P.2d 831 (Colo. App. 1997).

Section 8-40-201(14), C.R.S. defines "occupational disease" as follows:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

This section imposes additional proof requirements beyond that required for an accidental injury. An occupational disease is an injury that results directly from the employment or conditions under which work was performed and can be seen to have followed as a natural incident of the work, as is the case here. Section 8-40-201(14). C.R.S.; *Climax Molybdenum Co. v. Walter,* 812 P.2d 1168 (Colo. 1991); *Campbell v. IBM Corporation,* 867 P.3d 77 (Colo. App. 1993). In contrast, an accidental injury is traceable to a particular time, place, and cause. *Colorado Fuel & Iron Corp. Industrial Commission,* 154 Colo. 240,392 P.2d 174 (1964); *Delta Drywall v. Industrial Claims Appeals Office,* 868 P.2d 1155 (Colo. App. 1993).

Under the statutory definition, the hazardous conditions of employment need not be the sole cause of the occupational disease. A Claimant is entitled to recovery demonstrating that the hazards of employment cause, intensify, or aggravate, to some reasonable degree, the disability. *Anderson v. Brinkhoff,* 859 P.2d 819 (Colo. 1993). Once the Claimant makes this showing, the burden of establishing the existence of a non-industrial cause and the extent of its contribution to the occupational disease shifts to the employer. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App 1992).

Dr. McDermott opined that Claimant's occupational diseases of September 5, 2018, might have been caused by the physical demands of her job. The ALJ finds that Claimant's job activities caused her right sided carpal tunnel syndrome and cubital

tunnel syndrome, i.e., ulnar neuropathy. This culminated in a disabling occupational disease injury causing the Claimant to suffer industrial disability from September 5, 2018, ongoing.

Dr. Steinmetz also acknowledged the Claimant experienced symptoms that are consistent with carpal tunnel syndrome and an ulnar neuropathy at the elbow. However, he opined that her conditions were not caused by her work. In formulating his opinion, he used the Medical Treatment *Guidelines* ("*Guidelines*") to opine that the Claimant was exposed to none of the primary or secondary risk factors listed therein. His opinion relied solely on the conclusions stated in the Job Demands Analysis performed by Mr. Fallik and he rejected Claimant's testimony as to the demands of her job as well as the raw data contained in Mr. Fallik's report.

The *Guidelines* are contained in Rule of Procedure 17, 7 CCR 1101-3. In *Hall v. Industrial Claim Appeals Office*, 47 P.3d 459 (Colo. App. 2003), the Colorado Court of Appeals noted that the *Guidelines* are to be used by health care practitioners when furnishing medical care under the Workers' Compensation Act ("Act"). See § 8-42-101(3)(b), C.R.S. Further, the *Guidelines* are regarded as accepted professional standards for care under the Act. *Rook v. industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). At the same time, § 8-43-201(3), C.R.S. provides that ALJs are not required to utilize the *Guidelines* as the sole basis in determining whether medical treatment is reasonable, necessary, and related to an industrial injury. Additionally, the General *Guidelines* Principles provide that:

> Mechanisms of injury for the development of cumulative trauma related conditions have been controversial. However, repetitive awkward posture, force, vibration, cold exposure, and combinations thereof are generally accepted as occupational risk factors for the development of cumulative trauma related conditions.

Rule 17, Exhibit 5, p. 6.

The Courts have also recognized *Guidelines* limitations:

> We have long held that an expert's compliance with the *Guidelines* does not dictate whether the expert's opinions are admissible, or whether they may constitute substantial evidence supporting a fact finder's determinations. Rather, compliance with the *Guidelines* may affect the weight given the ALJ to any particular medical opinion. See *Cahill v. Patty Jewett Golf Course*, W.C. No. 4-729-518 (Feb. 23, 2009); see also *Thomas v. Four Corners Health Care,* W.C. No. 4-484-220 (April 27, 2009)(noting ALJ not required to award or deny medical benefits based on the *Guidelines*); *Burchard v. Preferred Machining*, W.C. No. 4-652-824 (July 23, 2008)(declining to require application of *Guidelines* for carpal tunnel syndrome in determining issue of PTD); *Siminoe v. Worldwide Flight Services, Inc.*, W.C. No. 4-535-290 (Nov. 21, 2006)(appropriate for ALJ to consider *Guidelines*; however, deviation from medical treatment guidelines does not compel fact finder to disregard the opinion of that medical expert on issue of causal connection between work-related injury and particular medical condition).

Ames v. Adams 12 Five Star Schools, WC No. 4-933-851-01 (ICAO 06/22/2018).

The risk factor definitions in the *Guidelines* indicate that the combination of force, repetition, and vibration are known risk factors for the development of carpal tunnel syndrome. *Ex. 9, BS 138*. The *Guidelines* also indicate that there is good evidence that carpal tunnel syndrome can be caused by the combination of:

> Repetition and force for 6 hours, or
>
> Repetition and forceful tool use with awkward posture for 6 hours, or
>
> Force, repetition, and awkward posture, or
>
> Two pound pinch or 10 pound hand force 3 time or more per minute for 3 hours.

See *Rule 17, Exhibits 5, BS 137-138.*

Based on Claimant's testimony and portions of Mr. Fallik's report, these risk factors were involved in Claimant's job. As found, Claimant's job duties required the use of 10 pounds of hand force 3 times or more per minute for 6 hours and represent a primary risk factor under the *Guidelines*. Claimant's job duties also required her to use hand tools weighing 2 pounds or more for over 3½ hours per day and these represented a secondary risk factor under the *Guidelines.* Therefore, pursuant to the *Guidelines*, Claimant's carpal tunnel syndrome was more likely than not caused by her job duties.

The *Guidelines* also indicate that there is some evidence that the combination of forceful tool use, repetition and probably posture for 6 hours and holding a tool in position with repetition can cause cubital tunnel syndrome. The *Guidelines* also indicate that that work activities involving wrist bending and/or full elbow flexion/extension, repetition for 4 hours, and vibration, or repetitive pronation of the forearm, or sustained pressure at the cubital tunnel are additional factors to consider in the development of cubital tunnel syndrome. See *Ex 9, BS 138*. Although it does not appear Mr. Fallik accurately documented whether these risk factors were or were not present, the ALJ finds and concludes that Claimant's job duties involved repetition, force, flexion and extension of her elbow, and that such job duties caused her to develop cubital tunnel syndrome, i.e., an ulnar neuropathy.

Claimant also has symptoms associated with carpel tunnel syndrome, which include a positive Phalen's sign and positive Tinel's sign, along with paresthesia in the thumb, index and middle finger. Next, Claimant's nerve conduction velocity study documents the presence of carpal tunnel, recognizing that symptoms fluctuate over time in both directions. *Id*., *BS 83, 84*. This positive nerve conduction study demonstrated slowing of the medial distal sensory and nerve changes in the median thenar muscles. *Id.*, *BS 86*. The *Guidelines* also provide that there is strong evidence that patients who do not have chronic carpal tunnel syndrome, will have functional improvement six months after surgery. There has been limited functional improvement.

The EMG established that Claimant was referred by Dr. McDermott for numbness, tingling and pain in the right hand, which had occurred over four months. *Exhibit 6, BS 110*. The EMG demonstrated prolonged latencies in the median ulnar

nerve, nerve entrapment at the wrist consistent with carpal tunnel syndrome, and ulnar nerve entrapment at the elbow. The EMG provider suggested hand surgery.

There is no reasonable dispute that Claimant suffers from carpal tunnel syndrome and an ulnar neuropathy. The dispute is over causation. Respondents' rely on the Job Demands Analysis performed by Fallik. The Claimant's testimony is that the Claimant's actual duration of job performance was never evaluated by him. Rather, a fellow employee demonstrated some of the jobs that she did without showing how long the Claimant performed them and what the demands were over time.

Claimant credibly testified that her physical job demands were much higher than those reported by Mr. Fallik. Further, he did not have her perform any of the tasks that she regularly performed. The Claimant's credible testimony concerning those tasks that she was required to perform was consistent with the notes she took when she was asked by the Employer to note what the activities she performed on the 15,000 piece job.

The ALJ finds Claimant's testimony more credible as to her job duties than Mr. Fallik's conclusions. Further, the ALJ finds that Dr. Steinmetz's opinion is based heavily on Mr. Fallik's Job Demands Analysis, which the ALJ finds less credible than Claimant's testimony.

Dr. McDermott concluded that Claimant's carpal tunnel syndrome was probably related to her job duties and that her neuropathy and dysfunction may be causally related to the nature of her work activities as well. The ALJ rejects Dr. Steinmetz's opinion on causation and adopts that of Dr. McDermott, to the extent it supports causation, based on substantial evidence in the record. Further, and although not required, Dr. Steinmetz does not establish a credible and persuasive alternate cause of Claimant's carpal tunnel syndrome or ulnar neuropathy.

The ALJ finds the testimony of the Claimant credible. *Lymburn v. Symies Logic*, 952 P.2d 831 (Colo. App. 1997).

Therefore, the ALJ finds and concludes Claimant has established by a preponderance of the evidence that she developed a compensable occupational disease in the form of right sided carpal tunnel syndrome and right sided cubital tunnel syndrome, i.e., ulnar neuropathy, due to the forceful and repetitive nature of her job duties.

II. Whether Claimant is entitled to reasonable, necessary, and related medical treatment.

III. Whether the medical treatment rendered by Concentra and Dr. McDermott, including her EMG performed on February 6, 2019, is authorized, reasonable, necessary, and related.

The Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury. Section 8-42-101 (1)(a), C.R.S. 2007; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997);

Country Squire Kennels v. Tarshis, 899 P.2d 362 (Colo. App. 1995). Where the Claimant's entitlement to benefits is disputed, the Claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Whether the Claimant sustained his burden of proof is generally a factual question for resolution by this ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997).

Where a treating physician refuses to render care to a Claimant the right of selection passes to the Claimant. See *Rogers v. Industrial Claims Appeals Office*, 746 P.2d 565 (Colo. App. 1987). Further, even if a treating physician refers a Claimant for treatment to the Claimant's primary care doctor based on the mistaken belief that a medical problem is not work related the primary care doctor becomes authorized despite the authorized doctor's mistake. *Cabela v. ICAO*, 198 P.3d 1277 (Colo. App. 2008).

The medical treatment provided by Concentra, Dr. Kakkar, and Dr. McDermott, was reasonable and necessary to diagnose and treat Claimant for her work related occupational disease. The evidence here also established that the Respondents denied Claimant further medical care by refusing her further treatment based on the mistaken belief that her condition was not work related. This refusal is supported by the evidence in the record. This triggered Claimant's right to select her physician, which she did, by choosing Dr. McDermott, her primary care physician to treat her. By virtue of this refusal, Dr. McDermott and his referrals are authorized. See *Roybal v. University of Colorado Health Sciences Center*, 768 P.2d 1249 (Colo. App. 1988).

Therefore, Claimant has established by a preponderance of the evidence that she is entitled to reasonable and necessary medical treatment to treat her occupational disease. Claimant also established by a preponderance of the evidence that the treatment provided by Concentra and Dr. McDermott, as well as their referrals, was reasonable, necessary, and related. This includes the EMG that was performed by Dr. Kakkar at Lowry Neurology Associates, P.C.

IV. Whether Claimant is entitled to temporary total disability benefits after she was terminated from employment.

To prove entitlement to TTD benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a

complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

The existence of disability presents a question of fact for the ALJ. There is no requirement that the claimant produce evidence of medical restrictions imposed by an ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997).

As found, Claimant's carpal tunnel syndrome and cubital tunnel syndrome has resulted in pain and decreased grip strength involving her right upper extremity. Such pain and limited grip strength precluded Claimant from performing her regular job duties as a machine operator. This was also evidenced by Claimant's testimony and the work restrictions issued by the medical providers at Concentra. Although Claimant was released to full duty by NP Halat and Dr. Strain, such release was based upon the erroneous determination that her condition was not work related and that there were therefore no restrictions based on a work related condition. Moreover, once she was laid off on February 6, 2019, her occupational disease and her symptoms such as pain and weakened grip strength hindered her ability to obtain and maintain subsequent employment as a machine operator. In addition, her regular job duties were injurious and caused her underlying condition and therefore continuing to perform her regular job duties could have worsened her condition. Moreover, in March of 2019, when she was prescribed a Spica splint, and advised to wear it at all times, except for hygiene, to protect the carpal tunnel from further inflammation, evidence of her occupational disease, the possibility of further injury, and inability to work as a machine operator was also visible to prospective employers.

Therefore, Claimant has established by a preponderance of the evidence that she is entitled to temporary total disability benefits as of the date she was laid off from work, which was February 6, 2019.

V. Claimant's average weekly wage.

Claimant worked 40 hours per week and was paid $18.00 per hour. Neither party disputes the hours she worked each week and the rate at which she was paid. Therefore, her average weekly wage is $720.00.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant established that she developed a compensable occupational disease in the form of right sided carpal tunnel syndrome and cubital tunnel syndrome, i.e., ulnar neuropathy.

2. Claimant is entitled to reasonable and necessary medical treatment to cure and relieve her from the effects of her occupational disease. This includes the treatment provided by Concentra and their referrals.

3. The right to select a treating physician passed to Claimant and Claimant selected Dr. McDermott. Therefore, Dr. McDermott is an authorized treating physician, as are his referrals, such as Dr. Kakkar.

4. Respondents shall pay for the medical treatment, which has been provided by Concentra, Dr. McDermott, and Dr. Kakkar, and their referrals, subject to the Colorado Medical Fee Schedule.

5. Claimant's average weekly wage is $720.00.

6. All issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 30, 2019

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant overcame Dr. Burris' DIME opinion on causation and impairment by clear and convincing evidence.

FINDINGS OF FACT

1. Claimant is a 53-year-old male who has worked for Employer as a milk hauler since 2006.

Prior History

2. Claimant sustained a back injury in the 1990s and underwent back surgery in approximately 1994. Subsequent to the surgery Claimant treated with physical therapy and took medications.

3. On June 29, 2010, Claimant was evaluated by Kimberly Weisser, PA at Brush Family Medicine. He presented with worsening back pain with an onset of "years ago." The location of pain was in Claimant's mid and low back radiating to both legs. He reported his pain was piercing and aggravated by daily activities and sitting. PA Weisser continued Claimant on medications and recommended physical therapy or acupuncture. Claimant declined the physical therapy and acupuncture.

4. On October 21, 2011, Claimant returned to PA Weisser with complaints of low back pain with an onset of one year. Claimant reported that the back pain occurred intermittently and rated the pain 6/10, with pain radiating down the back and into the bilateral thighs. It was noted Claimant had increased pain in the buttock when he sat for long periods of time while in his truck. Claimant continued on medication.

5. Between October 2011 and June 2012, Claimant had multiple visits with PA Weisser for unrelated issues. The medical records for those visits do not address Claimant's chronic back pain.

6. On June 18, 2012, PA Weisser again evaluated Claimant. Claimant complained of low back pain with a gradual onset and duration of three months. The pain was described as radiating down to both feet and was aggravated by sitting. PA Weisser assessed Claimant with low back pain and sciatica. She prescribed additional medication and ordered a lumbar MRI.

7. Claimant underwent x-rays and an MRI of his lumbar spine on July 5, 2012. He was noted to have degenerative disc disease at L5-S1, central disc extrusion at L4-L5

splaying the descending nerve roots, disc space height loss at L5-S1 associated with dorsal protrusion of disc material and a prior laminotomy at L5.

8. PA Weisser reevaluated Claimant on September 14, 2012. Claimant continued to complain of mild to moderate persistent and worsening back pain radiating to the lower extremities. PA Weisser referred Claimant to a neurologist and noted Claimant would follow-up with workers' compensation to see if his issues were a continuation of his previous workers' compensation claim. Claimant returned to PA Weisser on October 3, 2013 and November 5, 2013 with persistent low back pain. Claimant continued on medications.

9. On October 17, 2014, Claimant was again seen by PA Weisser, who noted Claimant was still having pain if he sat for too long and that the pain was radiating to his thighs. PA Weisser refilled Claimant's medications for a year, noting he had been using them without increase and was able to function without problems.

10. On May 14, 2015, PA Weisser reevaluated Claimant. Claimant reported persistent back pain that was aggravated by walking, climbing stairs, and driving his truck. Claimant continued on medications.

11. On June 3, 2015, Claimant took and passed a Department of Transportation driver's permit physical examination. Claimant sought treatment for unrelated issues on October 16, 2015 and December 5, 2015. The medical notes for these visits do not address Claimant's chronic back pain.

12. On May 13, 2016, Claimant returned to PA Weisser. Claimant reported that he felt good with the exception of back pain at night, which medications helped. PA Weisser refilled Claimant's medications.

Current Industrial Injury

13. On August 4, 2016, Claimant sustained an admitted industrial injury when he tripped over a door frame and landed on the left side of his body. Claimant immediately reported the incident to Employer but was able to finish his shift.

14. On August 8, 2016, Claimant presented to authorized treating physician (ATP) Anne Louise Gallion, M.D. at Banner Health. Claimant reported falling on his left side and experiencing pain in his left wrist, left shoulder, low back, and left knee, in order of severity. Dr. Gallion noted Claimant had chronic low back pain with a surgery in 1994 and had pain in his buttocks and chronic left foot numbness. Dr. Gallion diagnosed Claimant with a contusion of the left wrist, left hip, left knee, thoracic strain and acute exacerbation of chronic low back pain. His left shoulder was suspicious for a rotator cuff injury. She ordered an x-ray of Claimant's low back.

15. Claimant underwent flexion-extension x-rays of his lumbar spine on August 19, 2016 which revealed lumbar spondylosis with degenerative disc disease.

16. On August 25, 2016, Claimant saw Danielle Suzanne McDonald, M.D. at Banner Health with complaints of left shoulder, left wrist and back pain and sciatica down his left side. Claimant reported having chronic pain, but that his current symptoms were "worse and different" and felt "similar to how it felt the first time."

17. Claimant underwent a lumbar spine MRI on September 7, 2016 which showed degenerative changes superimposed on congenitally narrowed spinal canal. Spinal stenosis was greatest and increased at L4-L5 with moderate unchanged neural foraminal narrowing at L4-L5 and L5-S1.

18. On October 10, 2016, Dr. Gallion reevaluated Claimant and reviewed the September 2016 lumbar spine MRI. Dr. Gallion opined Claimant suffered an acute exacerbation of chronic low back pain from the August 4, 2016 fall and a slight exacerbation from a back strain due to an incident at work on October 9, 2016. She referred Claimant to a neurosurgeon for his back complaints.

19. On October 12, 2016, Claimant underwent left shoulder surgery, which was successful. Claimant reported that his left shoulder pain resolved, as did his left knee and left wrist pain.

20. On November 10, 2016, Dr. Gallion saw Claimant. She noted that a week before his surgery, Claimant had an incident where his legs went numb, worse on his left, and felt weak to the point where Claimant could not lift his leg to push the clutch in on his truck. Dr. Gallion put Claimant on work restrictions.

21. On December 8, 2016, Claimant was again evaluated by Dr. Gallion. She noted that at this point, Claimant's low back was more bothersome than his surgically-repaired shoulder, as he had intermittent pain going into both legs, and his legs would get heavy and weak, and go numb. Claimant reported that his back pain was 8/10 at worst, and currently 6/10.

22. On January 2, 2017, Claimant saw Regina Bower, M.D. for a neurosurgical consultation. Claimant reported pain and numbness radiating down either leg into his calves. It was noted the symptoms were not consistent and varied from day to day. Dr. Bower physically examined Claimant and reviewed Claimant's September 2016 MRI. She opined that Claimant's back pain is likely due to facet syndrome and was also myofascial in nature. She doubted Claimant's leg symptoms are due to the stenosis seen at L4-5 as Claimant's pain did not follow a clear pattern of neurogenic claudication. She ordered x-rays and referred Claimant for physical therapy.

23. Claimant saw Dr. Gallion on February 8, 2017 and March 24, 2017 and continued to complain of back pain and leg numbness.

24. On April 4, 2017, underwent bilateral L4-5 and L5-S1 transforaminal epidural steroid injections.

25. On May 18, 2017, Claimant was evaluated by Dr. Gallion. At this visit, Claimant expressed that he would like a second opinion on his back to make sure surgery was not indicated. Dr. Gallion estimated that Claimant would be at maximum medical improvement (MMI) in about a month unless surgery was indicated.

26. On June 7, 2017, Claimant presented to Robert J. Benz, M.D. for a surgical consultation. Dr. Benz reviewed Claimant's lumbar MRI and obtained x-rays. Dr. Benz diagnosed Claimant with lumbar disc degeneration with a degenerative scoliosis and severe foraminal narrowing resulting in ongoing back and left leg pain. Dr. Benz recommended Claimant undergo a L4-5 and L5-S1 fusion and requested approval for the surgery, which was denied by Respondents.

27. On August 27, 2017, Dr. D'Angelo performed an independent medical examination (IME) at the request of Respondents. Dr. D'Angelo interviewed and physically examined Claimant and conducted a thorough medical records review of records dating back to October 2000. Dr. D'Angelo noted that her review of the medical records revealed Claimant has a long history of identical complaints of lower back pain with bilateral radiculopathy for which he regularly pursued medical care, including as recently as three months prior to the work-related injury. She further noted that Claimant's September 2016 MRI showed advancement of his pre-existing osteoarthritis with no acute traumatic findings. Dr. D'Angelo opined that Claimant's current lumbar spine symptoms were not causally related to his work injury and any need for surgical intervention was not causally related to the work fall. She noted that, if Claimant did suffer an acute exacerbation of chronic low back pain, the exacerbation was temporary and of limited duration and would not be expected to persist for 10 months. She remarked that Claimant's persistent symptoms despite treatment was indicative of the failure of treating a chronic degenerative disease as if it were an acute traumatic injury. Dr. D'Angelo concluded that Claimant reached MMI for his work injury and required no further active or maintenance treatment through the workers' compensation system. She opined Claimant was not entitled to permanent impairment of the lumbar spine since his complaints were not causally related to his work injury.

28. Claimant continued to treat with Dr. Gallion. On August 29, 2017, Claimant had continued low back and left leg pain, and reported a new symptom of penile pain with erection. Dr. Gallion did not further address the reported penile pain in the medical report. Dr. Gallion noted Dr. Benz wished to proceed with a L4-5 and L5-S1 fusion, which she remarked was a good option for Claimant since he had no improvement over the last year.

29. Subsequent records do not contain mention of reported penile or groin pain, diagnosis or treatment.

30. On October 19, 2017, Dr. Gallion answered some questions posed to her by Respondents. In response to a question regarding whether Dr. Gallion agreed with Dr. D'Angelo's opinions and assessments, Dr. Gallion responded that she did not agree with Dr. D'Angelo and stated:

> Low back pain significantly worsened after fall on 8/4/16 without expected improvement with treatment (physical therapy, pain medications, epidural steroids). He had new numbness in right leg which has continued since the fall. While I agree that degenerative disc disease progresses gradually over time, I disagree that his symptoms would have progressed this suddenly, especially since the fall caused the acute change/worsening of symptoms.

Dr. Gallion noted that a significant increase in pain/numbness/weakness since his fall had affected Claimant's ability to function in the capacity in which he was able to function prior to the work injury, despite treatment. She opined Claimant required further medical treatment in the form of medication, physical therapy and a second opinion regarding the consideration of surgery.

31. On November 3, 2017, a hearing took place before ALJ Michelle Jones on the issue of authorization of Dr. Benz's request for surgery. ALJ Jones concluded Claimant failed to establish the back surgery requested by Dr. Benz was reasonable, necessary and related to the August 4, 2016 work injury.

32. Dr. Gallion placed Claimant at MMI on March 27, 2018. At the time, Claimant continued to report 5-6/10 back pain with intermittent left leg symptoms. Dr. Gallion's final assessment was acute exacerbation of chronic low back pain and low back pain with left-sided sciatica. She referred Claimant to James Rafferty, D.O. for an impairment rating.

33. Dr. Rafferty evaluated Claimant on July 19, 2018. Dr. Rafferty interviewed and physically examined and reviewed the following records: a letter from Respondents' counsel to Dr. Gallion including questionnaire and Dr. D'Angelo's IME report, a March 27, 2018 report of Dr. Gallion, and letters from Respondents' counsel to Dr. Rafferty dated May 4, 2018 and June 5, 2018. Dr. Rafferty noted Claimant admitted to a long-standing history of low back pain dating back to the late 1990s and had undergone back surgery and took medications. Claimant reported that his pre-existing symptoms were made significantly worse as a result of the August 2016 work injury. Dr. Rafferty diagnosed Claimant with, in relevant part, chronic low back pain with work-related symptomatic aggravation of pre-existing lumbar spondylosis, multi-level degenerative changes. He assigned a 12% upper extremity rating for the shoulder (whole person 7%) and 18% whole person impairment for the lumbar spine for abnormal range of motion and injury under Table 53(II)(C) of the AMA Guides. Dr. Rafferty released Claimant to full duty work with no restrictions and opined Claimant did not require maintenance care. Claimant was to remain on his current medications as managed by his primary care provider.

34. John Burris, M.D. performed a Division IME on January 8, 2019. Dr. Burris interviewed and physically examined Claimant and reviewed medical records dating back to October 2000. Dr. Burris noted Claimant underwent lumbar surgery in the 1990s and received an impairment rating but no permanent restrictions. Claimant reported having persistent low back pain since that time, mainly at night. On examination of the lumbar spine, Dr. Burris noted the following: no localized tenderness, muscle spasm, or trigger points; functional range of motion with mild loss on forward flexion; full extension and lateral bending bilaterally; and negative seated straight leg raising to 90 degrees bilaterally. Dr. Burris gave the following assessment: left shoulder rotator cuff tear. He noted that the medical records documented a "long history of chronic low back pain following lumbar surgery in 1994 and requiring regular treatment." He further stated,

> The initial examination and x-rays, and follow-up MRI on 9/7/2016, revealed no evidence of acute abnormality associated with the workplace event. Review of the records indicate no significant objective changes before or after the 8/4/2016 workplace event. Thus, there is no evidence that [Claimant] suffered a permanent aggravation of his pre-existing condition. [Claimant's] current low back complaints are, more likely than not, due to the natural progression of his pre-existing condition. Thus, there is no table 53 disorder associated with the 8/4/2016 workplace even and his subjective low back complaints are not a ratable condition.

Dr. Burris determined Claimant reached MMI on March 27, 2018 and assigned a 5% upper extremity impairment rating for Claimant's shoulder. He specifically stated no apportionment is applicable. He concluded Claimant did not require permanent work restrictions or maintenance care. Dr. Burris completed the Division IME Examiner's Summary Sheet. In Section 5 of the summary sheet regarding apportionment, he wrote "N/A."

35. Claimant testified at hearing that, in the two months preceding the work injury, he experienced low back pain at night and took medication, but did not have pain during the day or any issues performing his job duties. Claimant testified that between 2010 and 2015 he had some lower back symptoms and symptoms radiating down his leg, but remained able to function. He stated that, prior to the August 2016 work injury, he last participated in physical therapy in 1996 and never before had a back injection. When asked if he developed any new symptoms after the August 2016 work fall that he did not previously have, Claimant testified, "So I started having pain on my groin and a lot of pain in my legs and – and my back. You know, it was just the same old – numbness, heat pain, swelling, yeah." (Hrg. Tr. p.15:3-5). He stated he did not have groin issues prior to the work injury. Claimant testified that prior to the injury his pain was a 1-3/10 and at hearing his pain was a 5-6/10 while on medication. Claimant testified he believed Dr. Rafferty was more thorough in his examination, performing multiple measurements and explaining things to Claimant over the course of approximately an hour and a half. Claimant testified Dr. Burris' examination took approximately 20-30 minutes. He stated Dr. Burris took one set of quick measurements and did not explain things to him.

36. The ALJ finds the DIME opinion of Dr. Burris, as supported by Dr. D'Angelo's opinion and the medical records, more credible and persuasive than the opinions of Drs. Gallion and Rafferty and the testimony of Claimant.

37. Claimant failed to overcome Dr. Burris' DIME opinion on causation and impairment by clear and convincing evidence.

38. Evidence and inferences contrary to these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as

unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Overcoming the DIME Opinion

A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. Section 8-42-101(3.7), C.R.S.; Section 8-42-107(8)(c), C.R.S. The finding of a DIME physician concerning the claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing that it is highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

As a matter of diagnosis the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000). Section 8-42-107(8)(c), C.R.S. provides, "For purposes of determining levels of medical impairment, the physician shall not render a medical impairment rating based on chronic pain without anatomic or physiologic correlation. Anatomic correlation must be based on objective findings."

Ultimately, the questions of whether the DIME physician properly applied the AMA Guides, and whether the rating was overcome by clear and convincing evidence, present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office, supra*. Not every deviation from the rating protocols of the AMA Guides requires the ALJ to conclude that the DIME physician's rating has been overcome as a matter of law. Rather, deviation from the AMA Guides constitutes evidence that the ALJ may consider in determining whether the DIME physician's rating has been overcome. *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117 (Colo. App. 2003); *Logan v. Durango Mountain Resort,* W.C. No. 4-679-289 (ICAO April 3, 2009). Moreover, a mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

Claimant failed to produce evidence showing it is highly probable Dr. Burris' DIME opinion is incorrect. Claimant argues Dr. Burris is known respondent IME and is thus clearly biased. Claimant contends Dr. Burris' analysis is deficient and completely

ignores several facts, such as Claimant's new symptom of penile pain and worsening symptoms. Claimant also takes issue with Dr. Burris' finding that Claimant required "regular treatment" prior to the injury, arguing Claimant only took medications to "mask" the pain, but was under no treatment to improve his back condition leading up to the work injury. Claimant further argues Dr. Burris did not conduct a thorough examination, pointing to different exam findings by Dr. Rafferty. Finally, Claimant contends Dr. Burris failed to follow correct procedures because he did not answer "yes" or "no" to the apportionment flowchart included in Section 5 of the DIME Examiner's Summary Sheet.

The ALJ is not persuaded by Claimant's arguments considering the totality of the evidence. The medical records support Dr. Burris' conclusion that Claimant has a longstanding history of chronic low back pain requiring regular treatment. Medical records dating back to 2010 reflect Claimant experienced low back pain radiating to both legs for which he saw his primary care physician on at least an annual basis, if not more often, and consistently took medication for his back symptoms leading up to the work injury. Dr. Burris' opinion is corroborated by Dr. D'Angelo, who agreed Claimant's current back symptoms are not causally related to the August 4, 2016 work injury.

To the extent Claimant's pre-existing symptoms increased after the work injury, Dr. Burris and Dr. D'Angelo credibly opined that, more likely than not, Claimant's current symptoms are the natural progression of his pre-existing degenerative condition. While Claimant testified he developed a new symptom of penile/groin pain after the sustaining the work injury, there is minimal reference to such reported condition in the medical records, and no indication Claimant reported this as a primary concern to Drs. Rafferty, D'Angelo or Burris for their analysis. As determined by both Dr. Burris and Dr. D'Angelo, there is no objective evidence of acute trauma resulting from the August 4, 2016 work injury. The lumbar MRI and x-rays reveal degenerative changes, which support the opinions of Drs. Burris and D'Angelo that Claimant's current low back complaints are due to the natural progression of his pre-exiting condition.

Based on his DIME report, Dr. Burris performed a comprehensive review of Claimant's medical records and performed the necessary measurements on physical examination. Nothing in the record indicates the DOWC considered Dr. Burris' DIME report incomplete. With respect to Claimant's contention that Dr. Burris erred because he did not answer the apportionment questions in Section 5 of the DIME summary sheet, the ALJ disagrees. Dr. Burris specifically stated in his report that apportionment was not applicable. Moreover, Dr. Burris clearly wrote "N/A" on the summary sheet. The ALJ is not aware of, nor does Claimant cite, any particular provision further requiring Dr. Burris to fill out the apportionment flowchart in a situation where he has already stated and clearly indicated apportionment is not applicable.

There is insufficient credible and persuasive evidence Dr. Burris failed to follow the AMA Guides or otherwise erred in his opinions regarding causation and impairment. While Drs. Gallion and Rafferty reached different conclusions regarding the relatedness of Claimant's low back condition and permanent impairment, the ALJ concludes those opinions amount to mere differences of medical opinion, and do not rise to the level of clear and convincing evidence.

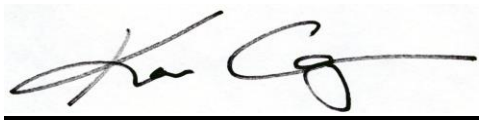
ORDER

1. Claimant failed to overcome Dr. Burris' DIME opinion on causation and permanent impairment by clear and convincing evidence.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 31, 2019



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 1525 Sherman Street, 4th Floor, Denver, CO 80203	
In the Matter of the Workers' Compensation Claim of: **P,** Claimant, vs. **D,** Employer, And , Insurer, Respondents.	▲ **COURT USE ONLY** ▲ **CASE NUMBER:** **WC 4-956-021-002**

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Hearing in the above-captioned matter was held before Administrative Law Judge Margot W. Jones on May 24, 2019, at 8:30 a.m. in Courtroom 4 in Denver, Colorado. Claimant was present and represented himself. Respondents were represented by Jeff Staudenmayer, Esq. Exhibits 1, 2 and A-M were admitted into evidence.

In this order, P shall be referred to as "Claimant," D shall be referred to as "Employer" and Pinnacol Assurance shall be referred to as "Insurer." Employer and Insurer, collectively, shall be referred to as "Respondents."

In this order, the Judge may use the following acronyms: C.R.S. refers to Colorado Revised Statutes (2018); the Act refers to the Workers' Compensation Act of Colorado, §§8-40-101, et seq., supra; OAC refers to the Office of Administrative Courts; OACRP refers to the Office of Administrative Courts Rules of Procedure, 1 CCR 104-1; and WCRP refers to Workers' Compensation Rules of Procedure, 7 Code Colo. Reg. 1101-3.

ISSUES

- Whether Claimant established by a preponderance of the evidence that he suffered a worsening of condition of his July 7, 2014, work injury to allow a reopening of WC No. 4-956-021.

- Whether Claimant established by a preponderance of the evidence that he is entitled to an award of medical benefits.

FINDINGS OF FACT

1. Claimant is a 59 year old man who worked for Employer in July 2014. On July 7, 2014, Claimant sustained a low back injury from pushing a 100-200 lb. pallet up a ramp.

2. Claimant treated at Concentra. As of July 28, 2014, Claimant was complaining of 9/10 pain in his low back radiating to his buttocks, thighs, and bilateral calves. He was attending physical therapy without benefit.

3. Dr. Allison Fall first examined Claimant on August 22, 2014, when Claimant complained of 8/10 pain from his back to the back of his knees. Dr. Fall reviewed a lumbar MRI, which showed significant central stenosis with congenital stenosis and degenerative changes as well as disc bulges bilaterally at L4-5 and L5-S1.

4. Claimant began chiropractic and acupuncture care with Don Aspegren, D.C. on August 27, 2014.

5. On September 17, 2014, Claimant was evaluated by Bryan Andrew Castro, M.D., orthopedic surgeon. Dr. Castro noted physical therapy had been terminated as not helpful. Claimant's pain was 9/10 with symptoms into his buttock and posterior thighs. Dr. Castro recommended a lumbar epidural injection.

6. Claimant was evaluated by John Sacha, M.D. on October 10, 2014, and October 15, 2014, but on each occasion he was not a candidate for injections due to high blood pressure. Dr. Sacha administered a L5-S1 interlaminar epidural injection on November 7, 2014. On November 21, 2014, Claimant reported to Dr. Sacha receiving no relief from the injection.

7. On December 5, 2014, Dr. Fall prescribed additional physical therapy.

8. Dr. Castro recommended Claimant attempt additional injections in the form of bilateral L4-5 and L5-S1 transforaminal epidural steroid injections.

9. Dr. Sacha cancelled Claimant's planned injection due to high blood pressure. Dr. Sacha administered the bilateral L5 and S1 injections on March 6, 2015.

On March 20, 2015, Claimant reported to Dr. Fall his pain was 10/10, and he received no response from the injections. Dr. Fall prescribed Hydrocodone.

10. Dr. Castro recommended surgical lumbar decompression at L3-4, L4-5, and L5-S1 on April 15, 2015.

11. An April 21, 2015, lumbar MRI showed central and bilateral foraminal stenosis at L3-S1, with broad based disc protrusions at L4-5 and L5-S1.

12. Dr. Fall noted on May 4, 2015, that Claimant was complaining of 10/10 pain, he was in no apparent distress, and he did not appear to be in 10/10 pain.

13. Claimant informed Dr. Fall on June 5, 2015, that he did not want to pursue surgery. Dr. Fall placed Claimant at maximum medical improvement (MMI) and assigned a 19% whole person impairment rating for his lumbar spine.

14. Dr. Joseph Morreale performed the Division independent medical examination (DIME) on March 11, 2016. Dr. Morreale noted that he believed Claimant was a good surgical candidate. He stated Claimant would be at MMI if he refused surgery. He assigned a provisional 22% whole person impairment rating for Claimant's lumbar spine.

15. Dr. Fall evaluated Claimant on July 1, 2016. Claimant was ready to consider surgery, and she referred him back to Dr. Castro.

16. The initial surgical scheduling was delayed due to Claimant's high blood pressure. Dr. Castro performed the surgery on December 22, 2016.

17. On February 6, 2017, Claimant reported to Dr. Fall his back pain was better, his leg pain was diminished, but he noted having left-sided hip pain. Dr. Fall prescribed a muscle relaxer, Cyclobenzaprine, and referred Claimant for physical therapy. On April 3, 2017, Dr. Fall noted Claimant continued to complain of left hip pain and his physical therapist talked to him about piriformis syndrome. Dr. Fall further noted that Claimant stated he did not need additional therapy.

18. Records of Claimant's physical therapy sessions at Concentra document under Therapeutic Exercises administered, that attention was provide to "hip flexion, abduction, extension in standing 1x10 each bilat . . ."

19. Dr. Fall placed Claimant at MMI on April 25, 2017. She noted Claimant was still complaining of low back and left thigh pain. He was taking a muscle relaxant, Cyclobenzaprine, and rare Norco. Dr. Fall assigned a 22% whole person impairment rating for Claimant's lumbar spine. She recommended maintenance care of Cyclobenzaprine for one year and annual follow-ups with Dr. Castro.

20. Claimant was evaluated by Dr. Amanda Cava at Concentra on April 28, 2017. Claimant reported "severe pain present with distal radiation down the left leg." He was using a cane for ambulation and his pain level was 7/10. Dr. Cava reiterated the maintenance medical treatment recommendations of Dr. Fall.

21. Claimant began physical therapy at Rose Medical Center outside of the workers' compensation system, the first record of which is June 26, 2017. Claimant reported 8/10 pain in his left low back and left hip. He complained of 8-9/10 pain on June 28, 2017. On July 7, 2017, Claimant reported 5-7/10 pain, and he had been bed ridden due to his pain after walking 40 minutes

22. Dr. Morreale performed a follow-up DIME July 10, 2017. Claimant reported only having "mild complaints" post-surgery. He had full range of motion in his hips. Dr. Morreale confirmed Claimant was at MMI and assigned a 29% impairment rating. He assigned a MMI date of June 22, 2016.

23. Respondents filed a Final Admission of Liability (FAL) on September 5, 2017, admitting for a 29% impairment rating and maintenance medical benefits.

24. Albert Hattem, M.D. performed an Independent Medical Examination (IME) on behalf of Respondents on February 20, 2018. Dr. Hattem noted Claimant frequently smiled, and he was comfortable and relaxed. He reported low back, left hip, and bilateral thigh pain at 8-9/10. Dr. Hattem noted Claimant had non-physiologic signs on physical exam. He also documented reviewing surveillance video from January 11 & 18, 2018, as well as February 20, 2018. He noted the surveillance showed him walking rapidly without assistance or use of a cane. Dr. Hattem separately noted Claimant presented at the IME with a slow and stiff gait and used a cane to ambulate, contrary to the surveillance. Dr. Hattem noted Claimant's non-physiologic signs and subjective pain ratings were wholly inconsistent with his demeanor.

25. Claimant was admitted to the Medical Center of Aurora on August 1, 2018. He complained of right lower quadrant abdominal pain and right rib pain. He was diagnosed with an "extremely large occlusive pulmonary embolism" in the right main pulmonary artery, along with smaller segmental pulmonary emboli, diffuse severe COPD, and cardiomegaly. Dr. Clare Prohaska was one of the attending physicians. She noted at various points in the treatment records that Claimant had "recent spinal surgery." She later documented that Claimant "did have spinal surgery – 2 months ago and reports increased driving, which was likely provoking incident." The ALJ notes Dr. Prohaska's understanding of the timing of Claimant's surgery was incorrect, as the surgery occurred in December 2016, or approximately 20 months prior to his pulmonary embolisms. A separate note in the same treatment records authored by Christian Dinescu, M.D. more accurately noted that Claimant "has had no recent surgeries . . ." Claimant was discharged on August 4, 2018.

26. On August 23, 2018, the parties entered into a stipulation noting the correct date of MMI was April 25, 2017, not June 22, 2016, as that date preceded the

date of Claimant's surgery. As a result of the stipulation, Respondents paid Claimant $7,489.59. Claimant, in part, waived with prejudice his right to attempt to overcome the opinions of Dr. Morreale in any other manner. Claimant was represented by counsel at the time, and Claimant indicated his agreement to the stipulation by notarized signature.

27. Claimant filed the Application for Hearing which is the subject of this hearing on November 14, 2018. He endorsed the issues of medical benefits, "impairment rate," petition to reopen claim, and permanent total disability. By Order dated November 4, 2018, PALJ DeMarino held the issues of permanent total disability and impairment rate in abeyance.

28. Dr. Hattem performed a follow-up IME of Claimant on February 14, 2019. He again noted Claimant's effect was pleasant and he frequently smiled. Claimant admitted he received no treatment under the workers' compensation claim in the prior year, but he was receiving medication management through his primary care provider and he had attended one month of physical therapy, which actually increased his pain complaints. Claimant reported his condition remained unchanged since Dr. Hattem last evaluated him, and he provided a pain level of 7-10/10 for his low back and left hip. Claimant again had non-physiologic signs on exam. Dr. Hattem noted that Claimant's overall condition remained the same by evaluation of Claimant's medical history and physical examination. Dr. Hattem even noted that Claimant's pain rating at that appointment was less than the appointment the prior year. Claimant also described exactly the same functional capacities between both appointments with respect to his walking tolerances. Dr. Hattem did not believe Claimant sustained a left hip injury which required treatment in the workers' compensation claim, noting that only his lumbar spine was injured in the work accident. With regard to Claimant's August 2018 pulmonary embolisms, Dr. Hattem opined that they would not be causally related to the work-injury or resultant surgery due to the interval of time from the surgery to when the embolisms manifested. He cited medical literature supporting that a provoked pulmonary embolism would have occurred within days or weeks of spinal surgery. Dr. Hattem stated that Claimant was still at MMI as of April 25, 2017, for his work-injury. He stated Claimant did not require further maintenance medical treatment for his work-injury.

29. Claimant testified at hearing. He testified he wants to reopen his claim and obtain medical treatment in the form of pain medications for his left hip and treatment for his blood clots. He testified he was unsure what medications he would need, but he wanted to see a pain specialist because his hip pain was chronic.

30. Claimant testified Dr. Fall told him his hip pain was not responding to treatment, so treatment should be stopped. He also testified that Dr. Castro's assistant informed him that his hip pain would go away, but it had not. He testified he did not receive physical therapy for his hip. Claimant testified he spoke with his prior counsel about overcoming the DIME, but his attorney told him it was too hard.

31. Regarding his blood clots, Claimant testified he sought treatment for his blood clots at the same hospital he had surgery. He presumed the physicians treating him for his blood clots would therefore have known when his surgery occurred due to the procedure occurring at the same facility, and they would not have made a mistake in determining when his spine surgery occurred.

32. Claimant testified he was in 9/10 pain at the time of the hearing. Mr. Anderson testified his pain has been the same without change since the injury, at 9/10, including from the date of injury, through surgery, at the time of MMI, and currently. He testified he had severe left hip pain at the time he was placed at MMI, and he was taking pain killers and using a cane at that time. He confirmed that around that time his pain was so severe he would be bedridden at times, and the physical therapy records from Rose Medical Center in mid-2017 correctly documented his pain complaints.

33. Claimant could not identify any medical records which he believed documented physician recommendations for additional pain management.

34. Claimant testified that none of the medications or other treatment he had received at any time in his claim, including physical therapy, surgery, muscle relaxers, pain medicine, and the nerve pain medicine Gabapentin, had provided him any benefit.

35. Dr. Hattem testified at hearing as an expert in the field of occupational medicine. He testified Claimant had documented hip complaints pre-MMI, which were similar to complaints Claimant made to him at the two IMEs he performed. Dr. Hattem testified Claimant's hip pain was likely radiating pain from his low back, confirmed by various references to sciatica pain or piriformis syndrome related to his low back condition. However, Dr. Hattem did not believe Claimant had a separate injury in his hip.

36. Dr. Hattem testified that Claimant did not report a worsening of condition. Claimant had specifically told him on multiple occasions at the February 2019 IME that his condition had remained the same. Dr. Hattem further testified that there were no objective signs of a worsened condition. Claimant's physical exam and presentation over the two IMEs he performed was substantially similar, it was similar to how Claimant presented at hearing, and in all circumstances his pain complaints did not match objective evidence and were not in line with his general presentation. Dr. Hattem further noted Claimant actually reported an improved pain score and had slightly improved lumbar range of motion in February 2019, as compared to February 2018.

37. Regarding Claimant's August 2018 pulmonary embolism/blood clots, Dr. Hattem testified that blood clots do not form 20 months after surgery, as was the timeframe from Claimant's surgery to the formation of his blood clots. Rather they will form within days, weeks, or maybe up to a month after surgery. He testified the note from Dr. Prohaska in the Medical Center of Aurora that Claimant had recent spine surgery two months prior was not accurate. He testified that Claimant's blood clots are not medically likely related to the work-injury or treatment from the work-injury.

38. The ALJ finds and concludes that Claimant failed to meet his burden of proof to establish by a preponderance of the evidence he sustained a worsening of condition related to his July 7, 2014, admitted work-injury. Therefore, Claimant is not entitled to a reopening of this workers' compensation claim.

39. The ALJ finds the collective testimony of Dr. Hattem and Claimant himself establish Claimant has not sustained a worsened condition. Although Claimant initially testified he believed his condition had worsened, he later admitted that he felt his pain had been the same from the date of injury through the present, including at the time of MMI. Dr. Hattem credibly testified there was no objective evidence that Claimant had sustained a worsened condition, and Claimant's own reports in the records and at hearing confirm as much. Conversely, Claimant has not presented any medical opinion in his favor that his condition has worsened since the date of MMI.

40. The ALJ further finds and concludes that Claimant has not established by a preponderance of the evidence that he is entitled to an award of medical benefits. Respondents admitted to maintenance medical benefits in the September 5, 2017, FAL, and therefore, a general award for maintenance medical benefits is not required and would be duplicative of that for which Respondents have already admitted liability. Moreover, Claimant failed to present sufficient evidence to establish by a preponderance of the evidence that he is entitled to an award of specific medical benefits. Claimant requested two forms of medical treatment, pain medicine for his left hip and unspecified treatment for his blood clots. As found, Claimant's blood clots are not causally related to his workers' compensation claim. Also, Claimant presented no evidence that any medical provider is continuing to recommend he be prescribed pain medicines related to his work-injury. To the contrary, Claimant testified every medication he has taken or is currently taking provided him no relief from pain he alleged to be related to the workers' compensation claim.

CONCLUSIONS OF LAW

General Legal Principles

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936; CJI, Civil 3:16 (2007).

3. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

Petition to Reopen

4. Section 8-43-303(1), C.R.S., provides that an award may be reopened on the ground of change in condition. The claimant shoulders the burden of proving his condition has changed and his entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S.; *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005). A change in condition refers either to change in the condition of the original compensable injury or to a change in the claimant's physical or mental condition that can be causally related to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). A change in condition, for purposes of the reopening statute, refers to a worsening of the claimant's work-related condition after MMI. *El Paso County Dept. of Social Services v. Donn*, 865 P.2d 877 (Colo. App. 1993).

5. As found, Claimant has failed to establish by a preponderance of the evidence that he sustained a worsened condition related to the work-injury. Although Claimant initially testified he believed his condition had worsened, he contradicted that testimony in subsequent testimony. Thereafter, he testified that he has been in constant and consistent pain throughout his claim, without improvement or worsening. With respect to his left hip, he testified he had the severity of the left hip pain of which he currently complains at the time he was placed at MMI. Moreover, Claimant failed to present any other evidence that his condition has worsened. The documents he submitted as his evidence do not reflect any worsening of a left-hip condition or opinion from a medical provider in that regard. WCRP 7-2(A) states that a party requesting reopening of a claim must have supporting documentation accompanying the request. Claimant has not provided any such supporting documentation.

6. The ALJ notes that Claimant's contention that he did not receive therapy directed to his hip appears incorrect on the face of the Concentra physical therapy records. Dr. Fall also noted on April 3, 2017, that Claimant himself was reporting he did not need additional physical therapy. He then began physical therapy outside the workers' compensation system on his own a couple months later.

7. The ALJ notes Dr. Morreale placed Claimant at MMI while documenting Claimant had full hip range of motion and had only ongoing "mild" complaints from surgery, without reference to any hip pain. This is contrary to Claimant's pain complaints with his treating providers and the Rose Medical Center physical therapists, in general and pertaining to his alleged hip pain, leading up to the DIME. To the extent Claimant is arguing his left hip pain was not adequately addressed at the time of his follow-up DIME, this is not an issue which would justify reopening of his claim. Rather, Claimant had the opportunity to overcome the opinion of Dr. Morreale that he was at MMI. And, Claimant agreed by notarized signature to waive his challenge to the DIME in exchange for the payment of additional money not included in the FAL.

8. Claimant testified his left hip pain was present at the time he was placed at MMI, and his pain levels have been consistent since that time. His medical records verify that he was complaining of left hip pain up to the time he was placed at MMI. Dr. Hattem credibly testified that the hip complaints documented in the pre-MMI medical records are similar to the complaints Claimant made to him at the IMEs. Dr. Hattem also credibly testified that Claimant exhibited no sign of a worsened condition over the two IMEs he conducted in February 2018 and February 2019. The ALJ notes Dr. Hattem's testimony that Claimant's subjective complaints do not match his objective findings, and therefore, Claimant's initial statement alone that he believed he was worsening is insufficient to constitute a preponderance of the evidence in favor of reopening his claim.

9. The ALJ credits the testimony of Dr. Hattem and finds that Claimant did not meet his burden to prove entitlement to a reopening of his claim due to change of condition by a preponderance of the evidence.

Medical Benefits

10. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. The question of whether the need for treatment is causally-related to an industrial injury is one of fact. *Wal-Mart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo. App. 1999).

11. Where the respondents file an FAL admitting for maintenance medical treatment pursuant to *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988), this does not preclude them from later contesting their liability for a particular treatment. Rather, when the respondents contest liability for a particular medical benefit, the claimant must prove that such contested treatment is reasonably necessary to treat the industrial injury. *See Grover v. Industrial Commission*, 759 P.2d at 712; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). In determining whether the claimant has proven entitlement to a specific medical benefit, the ALJ is charged with making pertinent factual determinations under a preponderance of the evidence standard. *See* § 8-43-201, C.R.S.

12. Claimant endorsed the issue of medical benefits for hearing without specification as to whether he was only requesting pre-MMI medical benefits, or if his petition to reopen were denied, maintenance medical benefits in the alternative as well. Nevertheless, Claimant failed to meet his burden in either regard.

13. As noted, Claimant failed to prove by a preponderance of the evidence that his condition has worsened and his claim should be reopened. Therefore, Claimant remains at MMI and he is not entitled to any pre-MMI medical benefits.

14. Moreover, Claimant has failed to prove by a preponderance of the evidence entitlement to an award of maintenance medical benefits. Respondents admitted for maintenance, or *Grover*, medical benefits when they filed the September 5, 2017 FAL. Therefore, the ALJ will not address whether Claimant is entitled to a general award of maintenance medical benefits, which would be duplicative to that already required of Respondents by the FAL. The sole remaining issue is whether Claimant has proven entitlement to a specific maintenance medical benefit, which he has not.

15. Claimant made specific requests to the ALJ for the authorization of pain management medications and for general authorization of treatment for his blood clots. He failed to prove entitlement to an award of either as forms of maintenance medical treatment. As to the latter, Claimant has not proven his blood clots are causally related to his work-injury. The ALJ credits Dr. Hattem's testimony that blood clots forming as a result of surgery would manifest within a matter of days, weeks, or approximately a month from surgery, but not 20 months after a surgery. And, Dr. Prohaska at the Medical Center of Aurora regarding the timing of the surgery relative to his pulmonary embolisms was not correct. Dr. Prohaska was on the face of her record under a false impression as to when Claimant's surgery occurred when she was attempting to identify a provoking incident for the embolisms. Claimant has failed to prove entitlement to an award of medical benefits related to his August 2018 pulmonary embolisms.

16. Finally, Claimant failed to prove entitlement to pain medications as maintenance treatment. Claimant's authorized treating providers have not had the opportunity to evaluate Claimant for as much. Respondents have also not had the opportunity to review and deny any such request. Claimant presented no evidence that any medical provider is of the opinion he requires ongoing pain medicines related to the work-injury. Claimant testified that the pain medicines he is taking provide him absolutely no relief. He also testified he has received no relief from any treatment provided to date. It is therefore not clear why an award for pain medications would be reasonable and necessary, even if Claimant were to have presented a medical opinion in his favor.

17. Respondents have admitted for maintenance medical benefits in general. Claimant is entitled to seek authorization for specific medical treatment. However, there is no record of any outstanding requests for medical treatment which Respondents have denied. Claimant's vague requests for pain medicines and generalized treatment for his blood clots are insufficient on their face to prove the requests reasonable, necessary,

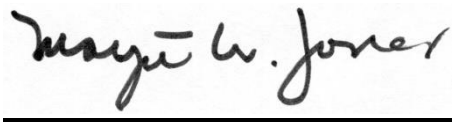
and causally related, compared to the remainder of the evidence. Moreover, the ALJ credits the opinion of Dr. Hattem stated in his February 14, 2019 IME report that Claimant requires no treatment at this time for his admitted work-injury, as it relates to the treatment Claimant specifically requested at hearing.

ORDER

1. Claimant's request to reopen his claim is denied and dismissed.

2. Claimant's claim for medical benefits is denied and dismissed.

DATED: July 31, 2019.



MARGOT W. JONES
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

If you are dissatisfied with the Judge's Order, you may file a Petition to Review the Order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the Order, as indicated on the certificate of mailing or service; otherwise, the Judge's Order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the Order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see § 8-43- 301(2), C.R.S. (as amended, SB 09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a Petition to Review at ttp://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that he suffered a compensable work injury on September 13, 2018?

II. Has Claimant shown, by a preponderance of the evidence, that he suffered a compensable work injury on September 27, 2018?

III. Has Claimant shown, by a preponderance of the evidence, that he is entitled to reasonable, necessary, and related medical treatment for a compensable work injury occurring on September 13, 2018, September 27, 2018, or both?

IV. Has Claimant shown, by a preponderance of the evidence, that he is entitled of Temporary Total Disability ("TTD") benefits as a result of a compensable work injury?

STIPULATIONS

I. Claimant's Average Weekly Wage is $544.30.

II. If the ALJ finds that Claimant suffered a wage loss, TTD benefits would total $592.17 from September 13, 2019, until terminated by operation of law.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Claimant began working for Employer in December of 2017 as a laborer. Claimant's job duties included shoveling sawdust, stacking wood, and operating a forklift.

September 13, 2018 Incident

2. Claimant testified at hearing that on September 13, 2018, he was standing on top of a four-bladed band saw, using a blower to remove sawdust, which had accumulated on top of the saw. Claimant explained that this machinery with the bandsaws is probably about 10 to 12 feet long and includes four separate saws on the same table.

3. Claimant testified that he stepped on a piece of angle iron, causing him to slip and fall, striking his left hip and shoulder. Claimant testified that he landed on a piece of angle iron between the blade and conveyor belt, and he experienced the onset of a small amount of neck pain, hip pain, and some pain in his left shoulder. Claimant testified he had an onset of back pain later in the day. Claimant testified that he immediately reported this injury to his supervisor, 'Richard', who in turn told him to "stop

being a dumbass."

4. Eagle William Spohn testified at hearing by telephone. Mr. Spohn testified that he believed he began working for the Employer in August of 2018, the month prior to Claimant's first work injury. He worked with Claimant every day prior to the work injury. Mr. Spohn observed Claimant fall on the bandsaw, although he could not recall the date of the incident. Mr. Spohn testified that he observed Claimant trip on the bandsaw, and he later observed Claimant limping and complaining about back and shoulder pain. Per Mr. Spohn, Claimant intended to try to just "walk it off."

5. Mr. Spohn had never witnessed Claimant exhibit any sort of symptoms that led him to believe Claimant was working through pain. Mr. Spohn did not witness Claimant have any issues performing the full duties of his job prior to the work injury. He indicated it was essentially standard practice to clean the bandsaws the way Claimant did, stating "you got to get up there…" in order to clean it, further stating "we had to get up on the machine." Mr. Spohn did not have any knowledge regarding the second incident [from September 27, 2018].

September 27, 2018 Incident

6. On September 27, 2018, Claimant testified he was at work cutting wood on the same table of bandsaws, but was using a different one of the four saws that day. Claimant had just cut down "six-inch 43s" into two halves. Claimant testified he was lifting and turning 90 degrees with the two 6"x43" halves of a piece of wood off the single-bladed bandsaw when he felt a 'pop' in his back. Along with the pop, Claimant testified that he had an immediate onset of pain in his back. Claimant testified that that he lifted from waist height and that the two 6x43s weighed approximately 175 pounds when lifted together.

7. Claimant testified that his injury occurred on Thursday and he reported the injury on the following Monday, October 1, 2018. [Administrative notice was taken that September 27, 2018 is a Thursday and October 1, 2018 is a Monday}. In his written report of injury, Claimant stated that he felt a pop in his *back and shoulder* while stacking the wood; however, he did not report a pop in his left shoulder to his doctors. (Ex. J; Ex F) Claimant testified that he did not have a pop in his *shoulder* on September 27, 2018.

8. Micah Langston testified at hearing. She is the corporate manager for Employer, which is owned by her parents. She handles taxes, payroll, bill payment, staff, customers, and vendors. Ms. Langston performed the Employer investigation, and completed the reporting documents on October 2, 2018. Ms. Langston testified that she attempted to view surveillance footage from the September 13, 2018 injury location, but the system had already overwritten the video footage. Ms. Langston testified that she reviewed the surveillance footage on the one-bladed bandsaw [of which there is only one], and determined that the one-bladed bandsaw was not in operation on September 27, 2018. She could not fully recall if Claimant might have appeared anywhere in the surveillance video at all, as there were people passing in the background. However, Claimant did not appear at any point to be working where one would expect this

bandsaw operator to be positioned.

9. Ms. Langston testified that she was only able to question one of the two listed witnesses, namely, Mr. Spohn. Per Ms. Langston, Mr. Spohn told her that Claimant had climbed up on the bandsaw and fallen on it, landing on the table - not the floor. Ms. Langston did not ask any detailed questions of Mr. Spohn, such as whether Claimant fell onto his hip or shoulder.

10. Bradley Dunmire is a mechanical engineer who owns several businesses in the wood industry, one of which is the Employer. He has worked in the lumber industry for 30 years. Mr. Dunmire is familiar with all of Employer's machinery and he has operated all such equipment. When he found out at a safety meeting that Claimant had been hurt two weeks prior, he insisted that Claimant go get an X-ray that same day – and not even wait until the following day. This step was implemented on October 2, 2018.

11. Mr. Dunmire also testified that the single bladed saw that Claimant says he was operating produces wood pieces that would weigh, at most, approximately 60 pounds per piece, and that one normally would handle one piece at a time by stacking it up to waist level.

Claimant Initially Seeks Treatment through his PCP

12. After his alleged injury on September 27, 2019 Claimant sought treatment outside the Workers Compensation system from Dr. Norman McLeod at Valley-Wide Health Systems. (Ex. F, p. 149) Dr. McLeod recorded that Claimant had an onset of pain in upper back, lower back, gluteal area and neck 19 years ago with radiation to the left lower extremity. (Id at 150). The history was reported as bending over and lifting a heavy object; no mention of a fall is noted within the report. On examination, Dr. McLeod does not list that any bruising was observed on Claimant's left hip. (Id).

13. Despite Claimant entering the Workers Compensation system a few days later, Claimant kept a follow-up appointment with Dr. McLeod for back and neck pain on November 13, 2018. At that appointment, Dr. McLeod noted in the physical exam, under *Musculoskeletal*, that Claimant had 'Normal Inspection and Normal Range of Motion' for each shoulder and each hip, and a 'Normal' exam for his neck. Claimant was positive for 'back pain'. (Ex. F, pp. 158-159).

14. At hearing, Claimant testified that he disagreed with Dr. McLeod's record of 19 years of back pain. Claimant further testified that he did not ever have back pain prior to September 13, 2018. Claimant testified that his answers to interrogatories specify that he has never had any prior back injuries.

Claimant's Prior Back Issues

15. Claimant has a documented history of an injury that was first reported on 8/8/2009, but which had occurred about two months prior. (Ex. G, p. 165) Claimant's initial report of injury indicated that he had popping in his left shoulder. (Id at 166). By August 29, 2009, Claimant reported 8/10 pain in his neck related to this incident. (Id at 169) Claimant submitted several handwritten requests for sick call in 2009, stating he needed treatment for his neck and back. (Ex. D). On November 28, 2009, Claimant reported pain in his neck and back, and began requesting an MRI. (Ex. G at 177) Claimant was prescribed pain medications for his back. (Id at 182)

16. On June 6, 2011, Claimant's back pain complaints extended into his thoracic spine. *Id at 196.* On July 28, 2011, Claimant complained that his medication, was not working for his shoulder and lower back pain. *Id at 198.* Claimant received trigger point injections for back pain on September 23, 2011. *Id at 200* Claimant continued to complain about his back pain through November 30, 2011, just before he ceased taking his back pain medication due to the side effects. *Id at 205-207.*

17. Claimant testified that he could not recall being injured while working out in June of 2009. Claimant then testified that he did not recall being injured but in 2007, he began having back pain. Claimant testified that he did not report his history of back pain to his treating physicians, or to either IME physician involved in this claim.

Claimant Seeks Treatment through an ATP

18. After being instructed to do so by Mr. Dunmire, Claimant began treating with Dr. Bradley at Emergicare on October 2, 2018. (Ex. B, pp. 22-29). Claimant testified that he did not have shoulder pain on October 2, 2018; however, his pain diagram from October 2, 2018 indicates left shoulder pain. (Ex. B, p. 28) Claimant also indicated on the pain diagram that he was having neck pain on October 2, 2018; however, Claimant testified at hearing that he was not experiencing neck pain at that time. *Id.*

19. Claimant did eventually report both injuries to Dr. Bradley. Dr. Bradley noted normal range of motion in the lumbosacral spine, though spasm and tenderness of the lumbar musculature was noted, as well as tenderness to the left shoulder and left trapezius. *Id at 24.* In Claimant's written history, he indicated that he felt a pop in his *back and shoulder* from stacking wood. *Id at 027.* Dr. Bradley diagnosed Claimant with generic "low back pain," an ischiocapsular ligament sprain of the left hip, and a migraine without aura. *Id at 41.* Dr. Bradley provided an injection into Claimant's dorsogluteal muscle. Claimant was put on restrictions of no lifting, carrying, pushing, or pulling more than 20 pounds.

20. Claimant continued treating with Dr. Bradley, and reported that he was still experiencing left shoulder pain on October 16, 2018. He also indicated back pain, radiating down his left arm. *Id at 35.* On that date, an x-ray of his left shoulder showed degenerative changes, but no acute injuries were noted. (Ex. E p. 144). Dr. Bradley performed an injection to Claimant's left deltoid on this date and ordered him a TENS unit. *Id.* at 52, 53. Dr. Bradley's report reflects that he had diagnosed a strain of muscles or tendons in the left shoulder. *Id.* at 54.

21. On October 23, 2018, Dr. Bradley recorded that Claimant was reporting injury and pain in his arm, shoulder, and back. Claimant's musculoskeletal exam of the lumbar and thoracic spine was normal, though Claimant did exhibit some tenderness and spasm in his spine. He also referred Claimant for chiropractic care with Dr. Wiedner.

22. On November 1, 2019, an MRI of Claimant's lumbar and thoracic spine showed minimal issues of the thoracic spine and minimal disc bulging from T12-S1. (Ex. E pp. 144-145) No acute abnormalities were identified, and no spinal stenosis or nerve impingement was noted. An x-ray of the lumbar spine on October 2, 2018 showed that the facet joints of the lumbar spine appeared normal. *Id at 141*.

23. Claimant's first appointment with Dr. Weidner took place on November 16, 2018. (Ex. 12, pp. 115-17). The intake note reflects that Claimant was referred for work injuries to his lower back, mid-back, left hip, and buttocks from the September 13 and September 27, 2018 incidents. *Id. at 115*. Claimant reported ongoing severe mid to lower back pain extending into the SI joint/buttock region. Dr. Weidner suggested a trial of 6 to 8 visits to see if the chiropractic care would help. *Id.* at 116. Dr. Weidner indicated that Claimant would need further "medical/ortho-neuro eval" if Claimant's condition did not improve with chiropractic care. *Id.*

24. On December 17, 2018, Dr. Bradley began noting that Claimant's 'subjective pain was greater than observed pain'. (Ex. B at 84) On December 31, 2019, Dr. Bradley placed Claimant at MMI. *Id at 092.* Dr. Bradley observed that Claimant's subjective pain was greater than observed pain, but Claimant had continued tenderness in the thoracolumbar region. Dr. Bradley noted that mild degenerative changes were noted at T11-L1 as well as minimal disc bulges at T12-S1 with no acute changes.

25. Claimant had completed eight chiropractic treatments without reporting relief, and Dr. Bradley determined that no further treatment would be beneficial. Claimant continued to complain of 8/10 pain in his back, but showed minimal signs of pain. Dr. Bradley records that Claimant denied previous injuries to his neck, shoulder and back. On January 13, 2019, Dr. Bradley released Claimant from care with permanent restrictions of 20 pounds push/pull/lift/carry, and a whole person impairment rating of 18%, which Dr. Bradley attributed to Claimant's "*fall injury* on {October 2}, 2018 (sic). (Ex. B, p. 107). For reasons unclear, the WC164 form dated 12/31/18 by Dr. Bradley stated that Claimant had *no permanent impairment* (Ex. 8, p. 88), but listed the lifting limit at 15 pounds.

IME with Dr. Castrejon

26. Dr. Miguel Castrejon performed an IME on 3/19/19 at Claimant's request. He testified at hearing by telephone. Claimant reported to Dr. Castrejon that on September 13, 2018, he was on top of the table of the bandsaws cleaning, and as he was going to the next section, he slipped and fell, landing on his left hip and left shoulder. (Ex. 15, p. 147). Claimant reported that he was no longer having left shoulder or left hip pain at this time, that he did not recall neck pain after the first incident, and that he did continue to experience lower back pain. *Id.* Claimant reported that on

September 27, 2018, he had lifted a bundle of wood weighing approximately 175 to 180 pounds, rotated, and experienced a sharp pain in his lower back that extended to his midback and lower neck.

27. Dr. Castrejon opined that Claimant sustained strained lumbar musculature, with some SI joint involvement from the September 13, 2018 incident. His opinion was based on the early physical therapy records that document the lumbar injury as well as some involvement of the left SI joint, and that Claimant was walking with a left-sided limp, that he had a decrease in hip motion, and that there was tenderness of the left piriformis.

28. Dr. Castrejon testified that the second incident "definitely" caused a worsening Claimant's lumbar condition, with facet mediated pain and mid-back involvement. Dr. Castrejon opined that Claimant requires additional treatment, primarily for the September 27, 2018, injury. He also testified that his medical opinion is based on the information he received, and the quality of such opinions is determined by the quality of such underlying information. Dr. Castrejon believed that Claimant was a reliable historian. Claimant did not, however, report prior back injuries during his IME.

29. Dr. Castrejon dismissed the recorded 19-year history of back pain as untrue. However, Dr. Castrejon testified that he did not have access to any of Claimant's medical records regarding his prior back injury and treatment. He testified that if he learned that Claimant was lifting between one-eighth to one-third the [175-180 lb] weight that Claimant reported to him, it would not change his opinion. Dr. Castrejon testified that if he learned that the equipment Claimant alleged he was using on the date of injury was actually not functioning, he would not change his opinion. Dr. Castrejon testified that if he learned Claimant was untruthful regarding his medical history, it would affect his reliance on Claimant's reporting.

30. Dr. Castrejon went on to testify that he understood Claimant was bending and lifting the wood from ground level. He identified the facet hypertrophy at L4-5 as the only relevant finding with regard to his opinion. However, he agreed that the facet hypertrophy is a chronic, not acute objective finding.

IME with Dr. Raschbacher

31. Dr. John Raschbacher performed an IME at Respondents' request. He testified at hearing in his capacity as a level II accredited expert in the field of occupational medicine; however, Dr. Raschbacher admitted he is no longer board certified in any field, including occupational medicine. He testified that Claimant reported to him that his low back pain began the day following his fall, and that he had a bruise on his left hip from the fall. Dr. Raschbacher stated that no medical records he reviewed recorded any sign of bruising to Claimant's left hip. He testified that a 19-year history of back pain would be significant in evaluating this claim because Claimant's pain history is an integral part of evaluating the nature of the injury.

32. Dr. Raschbacher testified that Claimant's MRI was unremarkable, showing no acute findings, and Claimant's medical history was inaccurate and incomplete.

Specifically regarding the September 27, 2018 injury, Dr. Raschbacher testified that if the single-bladed bandsaw was not operating, then Claimant's description of the work he was performing would leave an evaluator without a reliable mechanism of injury.

33. Dr. Raschbacher testified that most rotation occurs within the thoracic rather than the lumbar spine, so an injury due to rotation is expected to occur more frequently in the thoracic than the lumbar spine. He did concede that Claimant's reported mechanism of injury from September 27, 2018 - rotation of the spine while lifting and holding a very heavy item - can cause injury to the facets. He also testified that according to the impairment rating tips from the Division, one must have correlation between subjective complaints and objective findings; however, Claimant's subjective statements and symptoms are out of proportion with the objective findings.

34. Dr. Raschbacher further conceded that there are no medical records documenting any prior back injury or pain for at least seven years prior to the work related incident. He did testify that Claimant's treatment history from 2009 – 2011 was relevant for two reasons: Claimant had a significant history of back pain for which he gave a mechanism of injury that is inconsistent with correlating medical records, and Claimant has denied any prior history of back pain. Dr. Raschbacher concluded that there is no clear evidence that any injury occurred either on September 13 or 27, 2018.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Assessing weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the ALJ. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to

resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002).

Compensability, Generally

D. Claimant must prove by a preponderance of the evidence that she is a covered employee who suffered an injury arising out of and in the course of employment. C.R.S. § 8-41-301(1); S*ee*, *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett, 33 P.3d 1230* (Colo. App. 2001). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 592 P.2d 792 (Colo. 1979).

E. An injury occurs "in the course of" employment where Claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" requirement is narrower and requires claimant to show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *Id.*

A Work Injury occurred on September 13, 2018

F. The evidence presented suggests that it is more likely than not that Claimant sustained a work injury on September 13, 2018. There is reliable eyewitness to the incident, Mr. Spohn, who saw Claimant fall on the bandsaw table on September 13, 2018, walk with a limp afterwards, and complaining of back and shoulder pain. The ALJ credits the testimony of Claimant and Mr. Spohn regarding this work injury, as there has been insufficient evidence to refute that this incident occurred, aside from the fact that it was not reported until after the second injury. It is noted that Dr. Bradley attributed Claimant's permanent impairment to his mid and lower back to the *fall injury*, and not the alleged lifting incident.

A Work Injury did not occur on September 27, 2018

G. However, the evidence does not similarly support a finding that that Claimant sustained a permanent aggravation of his lumbar and thoracic spine as a result of the September 27, 2018 incident. The ALJ finds insufficient evidence to conclude this event even occurred as described by Claimant. Since it had allegedly

occurred the very same day as Claimant reported to his PCP, one would expect Claimant to describe his alleged mechanism of injury [a dramatic pop while lifting 175 lb of wood] with greater specificity to his PCP. Further, since Claimant reported this alleged injury to his PCP the same day (September 27, 2018), there can be little confusion about dates – which might otherwise explain how this might still have occurred, despite this one-bladed bandsaw not being in use on the date in question.

H. The ALJ also credits the testimony of Mr. Dunmire, who is intimately familiar with the equipment in use, the weight of the processed wood products, and the physical maneuvers required to remove the product from the one-bladed bandsaw and stack it. The ALJ is also unpersuaded by Dr. Castrejon's insistence that his medical opinion would not change, even if he found out the wood pieces Claimant allegedly moved weighed only a fraction of the 175 lb. alleged by Claimant. Additionally, while Claimant has not treated recently for his back, his failure to mention his prior back issues [at one point requesting a MRI while in the custody of DOC] to the IMEs and providers is concerning, to say the least. Claimant has not shown, by a preponderance of the evidence, that he sustained a work injury on 9/27/18.

Medical Benefits

I. Respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of an industrial injury. § 8-42-101 (1)(a), C.R.S. (2009); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P. 2d 362 (Colo. App. 1995). Where a claimant's entitlement to benefits is disputed, the claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo.App. 1997). Whether the claimant sustained his burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P .2d 496 (Colo.App. 1997).

J. The ALJ has found that Claimant sustained compensable injuries for his fall occurring on September 13, 2018 [only]. All treatment Claimant has received to date through an authorized treating provider is found to be reasonable, necessary, and related to this incident, as treated by Dr. Bradley. Regarding ongoing medical benefits, the ALJ recognizes that Claimant has been placed at MMI already, and will not order specific ongoing treatment. Therefore, Respondents should file a Final Admission of Liability consistent with the report of Dr. Bradley or file a request for a Division Independent Medical Examination.

Temporary Partial Disability Benefits

K. To receive temporary disability benefits, the claimant must prove the injury caused a disability. C.R.S. § 8-42-103(1); *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). As stated in *PDM Molding*, the term "disability" refers to the claimant's physical inability to perform regular employment. *See also McKinley v. Bronco Billy's,* 903 P.2d 1239 (Colo. App. 1995). Once the claimant has established a "disability" and a resulting wage loss, the entitlement to temporary disability benefits continues until terminated in accordance with C.R.S. § 8-42-105(3)(a)-(d). Claimant is not required to prove that the industrial injury is the "sole" cause of his wage loss to recover temporary

disability benefits. *Jorge Saenz Rico v. Yellow Transportation, Inc*. W.C. No. 4-547-185 (ICAO December 1, 2003), citing *Horton v. Industrial Claim Appeals Office*, 942 P.2d 1209 (Colo. App. 1996). As found, Claimant has suffered a work injury occurring on September 13, 2018. The parties agreed that Claimant's wage loss up through his date of MMI is a total of $592.17.

ORDER

It is therefore Ordered that:

1. Claimant suffered a compensable work injury on September 13, 2018. All reasonable, necessary and related medical treatment rendered to date (through his ATP) in connection with that injury will be paid by Respondents.

2. Claimant did not suffer a compensable work injury on September 27, 2018. Claimant's claim for workers compensation benefits in connection with that alleged injury is denied and dismissed.

3. Respondents will pay TTD benefits to Claimant of $592.17.

4. The insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 31, 2019

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

I. Determination of the amount of temporary partial disability (TPD) benefits to which Claimant is entitled for the period May 5, 2017 through April 10, 2018, as awarded by ALJ Cannici in his November 2, 2018 Order.

II. Whether Claimant proved by a preponderance of the evidence penalties should be imposed against Respondents pursuant to Section 8-43-304, C.R.S. for failing to pay the full amount of TPD benefits to which Claimant was entitled per ALJ Cannici's Order.

FINDINGS OF FACT

1. Claimant sustained an admitted industrial injury to his left hip on May 1, 2017 and underwent medical treatment. He continued to work for Employer on modified duty with temporary restrictions until April 20, 2018.

2. Respondents filed a General Admission of Liability (GAL) on May 31, 2018 admitting to an average weekly wage (AWW) of $895.00 and temporary total disability (TTD) benefits from April 20, 2018 ongoing.

3. On September 11, 2018 ALJ Peter J. Cannici held a hearing on the issues of AWW, TPD benefits from May 5, 2017 through April 10, 2018, and penalties for Respondents' failure to accurately calculate AWW or the amount of disability benefits and for unreasonable delay or denial of prior authorization of surgery.

4. ALJ Cannici entered Findings of Fact, Conclusions of Law, and Order (Order) on November 2, 2018 denying and dismissing Claimant's claims for penalties. ALJ Cannici determined Claimant's AWW was $1,314.12 and awarded Claimant TPD for the period of May 5, 2017 through April 10, 2018. Finding of Fact 22 in ALJ Cannici's Order states, in part:

> The record reveals that Claimant was limited to working 40 hours per work (*sic*) while on modified duty employment. In contrast, Claimant testified that he consistently worked in excess of 40 hours each week for Employer prior to his injury. The wage records also reveal that Claimant regularly worked in excess of 40 hours per week prior to his industrial injury but was generally limited to working 40 hours per week after May 1, 2017…Accordingly, Claimant is entitled to receive TPD benefits to the extent that his AWW of $1,314.12 exceeded his weekly earnings during the period May 5, 2017 through April 10, 2018.

5. ALJ Cannici ordered "Claimant shall receive TPD benefits to the extent that his AWW of $1,314.12 exceeded his weekly earnings during the period May 5, 2017 through April 10, 2018." The Order did not include the specific dollar amount of TPD benefits to be paid.

6. On November 19, 2018, Respondents issued a check to Claimant in the amount of $8,252.38 for partial temporary income benefits for the benefit period May 5, 2017 to April 10, 2018.

7. On December 5, 2018, Claimant's counsel emailed Respondents' counsel alleging Claimant was owed additional TTD benefits. The email indicated Claimant was owed "full value" from May 1, 2017 through November 16, 2018 and alleged an unpaid balance of $5,980.70 in TTD benefits.

8. Respondents' counsel responded via email on December 17, 2018, maintaining Claimant had been paid per ALJ Cannici's Order and requesting an explanation of Claimant's belief Respondents were required to pay "full value." Claimant's counsel responded via email the same day, stating Respondents were required to pay TTD benefits according to the newly determined AWW per ALJ Cannici's Order.

9. On December 18, 2018, Claimant's counsel sent an email to Respondents' counsel conceding that the TTD payments Claimant received were, in fact, accurate. Claimant's counsel alleged, however, that there was a slight variation in TPD benefits calculations, and requested Respondents provide the basis for their TPD calculations.

10. On January 10, 2019, Respondents' counsel replied via email stating he had followed up with the adjuster regarding the TPD issue.

11. On January 17, 2019, Respondents' counsel sent an email to Claimant's counsel attaching an indemnity log. The email attachment was not offered as evidence. Respondents' counsel did not provide an explanation regarding Respondents' TPD calculations. Respondents' counsel sent another email later in the day asking if Claimant was interested in settlement. No further evidence was entered into the record regarding additional discussions of settlement or Respondents' rationale for their calculations.

12. On January 31, 2019, Claimant's counsel emailed Respondents' counsel again alleging Claimant was entitled to additional TPD benefits for the period from May 5, 2017 to April 10, 2018. Claimant's counsel contended a literal reading of ALJ Cannici's Order would mean Claimant was entitled to the difference between his gross AWW and gross wages, which Claimant calculated to be $16,027.75. Claimant's counsel noted that, if the $16,027.75 was paid at the 2/3 TPD rate, Claimant was still owed $2,432.79 ($10,685.17 minus $8,252.38, the TPD already paid). Claimant's counsel again requested that Respondents provide their rationale for their TPD calculations or the issue would need to be resolved at a hearing or a settlement conference.

13. Claimant filed an Application for Hearing on February 20, 2019[1] endorsing "Temporary Partial Benefits from 5/05/2017 to 4/10/2018" as well as a penalty for knowingly refusing to obey a lawful Order in violation of C.R.S. 8-43-304(1).

14. Claimant testified at hearing that, based on ALJ Cannici's Order, he believes he is owed the full value of the difference between his gross AWW and his actual earnings during the period from May 5, 2017 through April 10, 2018. He testified that, upon receiving his TPD check, he immediately notified his attorney of a discrepancy. Claimant further testified the underpayment of TPD caused him and his family financial hardship, as his daughter dropped out of college because he was no longer able to provide her with financial assistance and he was no longer able to go on family vacations.

15. Jennifer Escobar Tiemann testified at hearing on behalf of Respondents. Ms. Tiemann oversaw Claimant's claim at the time of the benefits calculation; however, she was not the adjuster on the claim at the time of the TPD payment. Rick Davis, who no longer works for Insurer, was the adjuster on Claimant's claim and made the TPD calculations. Ms. Tiemann testified she was unable to determine the basis for the calculation made and did not attempt to perform her own calculations in preparation for the hearing. Ms. Tiemann testified she could not recall when she was first alerted to the TPD payment issue, nor could she recall if she was alerted prior to her notation on April 16, 2019, which is the first mention of the TPD shortage within the Respondents' claims notes. Ms. Tiemann testified the amount of $48,936.53 was a fairly accurate reflection of the Claimant's wages actually earned May 5, 2017 through April 10, 2018.

16. Per Claimant's calculations, his AWW from May 5, 2017 through April 10, 2018 was $64,016.41 and his gross earnings were $48,936.53. Claimant contends he is owed $6,827.50 in TPD benefits, after subtracting the amount of TPD that has been paid from the difference between his AWW and gross earnings ($15,079.88 minus $8,252.38). In the alternative, Claimant argues he is owed $1,800.87, which represents the total after subtracting the TPD payment already received from 2/3 of the difference of the AWW and earnings ($10,053.25 minus $8,252.38).

17. Respondents concede Claimant is owed TPD benefits for the time period awarded by ALJ Cannici. Per Respondents' calculations, the difference between Claimant's AWW and gross wages from May 5, 2017 through April 10, 2018 is $15,406.76 ($64,917.53 minus $49,881.30). Respondents contend Claimant is owed $2,018.79 in additional TPD benefits after subtracting 2/3 of the difference ($10,271.17) from what Claimant has already been paid, $8,252.38.

Ultimate Findings

18. The ALJ takes administrative notice of the calendar for the years 2017 and 2018. Claimant's pay records reflect Claimant worked Monday through Friday. May 5,

[1] The ALJ takes administrative notice of the OAC file, which includes the February 20, 2019 Application for Hearing.

2017 was a Friday and April 10, 2018 was a Tuesday. For the period May 5, 2017 through April 10, 2018, Claimant's total gross wages were $48,936.53.[2] Claimant's total AWW during this same time period was $64,016.42. Claimant's total wage loss during this time period was $15,079.89 ($64,016.42 minus $48,936.53).

19. ALJ Cannici's Order does not award Claimant the full value of the difference between Claimant's AWW and weekly earnings during the time period at issue. ALJ Cannici determined that, to the extent Claimant suffered lost wages during the period May 5, 2017 through April 10, 2018, he is entitled to TPD benefits. ALJ Cannici did not order the TPD benefits to be calculated via a method not specified in Section 8-42-106(1), C.R.S.

20. Accordingly, pursuant to ALJ Cannici's Order, Claimant was entitled to be paid TPD at a rate of 66 2/3^{rds} of the difference between Claimant's AWW and weekly earnings, $10,053.26 ($15,079.89 x 2/3). As Claimant has already been paid $8,252.38, Claimant is owed an additional $1,800.88 in TPD benefits ($10,053.26 – $8,252.38).

21. Respondents failed to comply with ALJ Cannici's Order by failing to pay the full amount of TPD benefits owed to Claimant for the time period awarded by ALJ Cannici. Respondents' actions were objectively unreasonable, as Claimant repeatedly attempted to rectify the discrepancy, Respondents acknowledge Claimant has been underpaid, and Claimant continues to be owed benefits to which he is entitled.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and

[2] Claimant earned $293.26 on May 5, 2017, which was included in the May 12, 2017 check. Claimant earned a total of $413.23 for April 9, 2018 and April 10, 2018. The remaining earnings for the other weeks during the time period at issue total $48,230.04.

draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Temporary Partial Disability

Section 8-42-106(1), C.R.S. provides,

> In the case of temporary partial disability, the employee shall receive sixty-six and two-thirds percent of the difference between the employee's average weekly wage at the time of the injury and the employee's average weekly wage during the continuance of the temporary partial disability, not to exceed a maximum of ninety-one percent of the state average weekly wage per week. Temporary partial disability shall be paid at least once every two weeks.

Claimant contends the method of TPD calculation set forth in Section 8-42-106(1), C.R.S. is a default calculation and the ALJ may substitute the calculation when making an order, citing to Section 8-40-201(15), C.R.S. Claimant argues the phrasing of ALJ Cannici's Order provides an alternative method for calculating Claimant's TPD benefits. He reasons that, per ALJ Cannici's Order, he is entitled to the full value of the difference between his AWW and his actual earnings for the period of May 5, 2017 through April 10, 2018 ($15,079.89), as opposed to 2/3 of the difference ($10,053.26). Thus, Claimant maintains he has been underpaid $6,827.50 in TPD benefits ($15,079.89 - $8,252.38).

The ALJ disagrees with Claimant's argument that ALJ Cannici's wording requires an alternative TPD calculation. Section 8-42-102(3), C.R.S. allows an ALJ discretion in calculating a claimant's AWW. However, the ALJ is unaware of, nor does Claimant cite, any authority allowing an ALJ discretion in calculating TPD benefits in a method other than that specifically outlined in Section 8-42-106(1), C.R.S. The statutory provision cited by Claimant in his position statement, Section 8-40-201(15), C.R.S., does not

support his contention that an ALJ may order TPD benefits to be calculated at a different rate, as the section merely defines "Order" as "any decision, finding and award, direction, rule, regulation, or other determination arrived at by the director or an administrative law judge."

Moreover, the wording of ALJ Cannici's Order can be reasonably interpreted as a statement of Claimant's entitlement to benefits, not an alternative method of calculating the amount of TPD benefits to be paid. The purpose of temporary disability benefits is to compensate the claimant for wage loss, including lost earning capacity, during the healing period. *Colorado AFL-CIO v. Donlon*, 914 P.2d 396, 403-404 (Colo. App. 1995); *Yates v. LaFarge Corporation*, W.C. No. 4-527-450 (July 3, 2003). When ALJ Cannici ordered that Claimant shall receive TPD benefits to the extent his AWW exceeded his weekly earnings during the time period at issue, he was merely stating that, to the extent Claimant suffered lost wages during such time period, Claimant is entitled to TPD benefits. This interpretation is supported by Finding of Fact 22 of ALJ Cannici's Order, in which ALJ Cannici specifically found Claimant worked fewer hours post-injury as compared to pre-injury.

As found, the difference between Claimant's total AWW and Claimant's actual gross earnings from May 5, 2017 through April 10, 2018 is $15,079.89. Using the method of calculation set forth in Section 8-42-106(1), C.R.S. and pursuant to ALJ Cannici's Order, Claimant is entitled to TPD at a rate of 2/3 of the difference, $10,053.26. As Claimant has already been pain $8,252.38 in TPD, he is owed a balance of $1,800.88.

Penalties

Section 8-43-304(1), C.R.S. provides for the imposition of penalties of up to $1,000 per day where the insurer "violates any provision of article 40 to 47 of [title 8], or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or the panel, for which no penalty has been specifically provided, or fails, neglects or refuses to obey any lawful order made by the director or panel…" An ALJ must first determine whether the insurer's conduct constitutes a violation of the Act, a rule, or an order. The ALJ must then determine whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of the insurer's action depends on whether it was based on a rational argument based in law or fact. *Jiminez v. Industrial Claim Appeals Office,* 107 P.3d 965 (Colo. App. 2003); *Gustafson v. Ampex Corp.,* W.C. No. 4-187-261 (I.C.A.O. August 2, 2006), *but see, Pioneers Hospital v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005) (standard is less rigorous standard of "unreasonableness"). However, there is no requirement that the insurer know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo. App. 1996).

Respondents argue there was no violation of the Act and no failure to obey ALJ's Cannici's Order. Respondents note ALJ Cannici's Order did not detail a specific dollar amount of TPD benefits to be paid, thus necessitating a calculation by Respondents.

Respondents contend a simple difference of calculations does not amount to a violation of the Act or any failure or refusal to obey an order.

Respondents concede the TPD payment issued to Claimant was incorrect and Claimant is owed additional TPD benefits. At the time of hearing and issuance of this order, there is no indication Claimant has been paid additional TPD benefits to which he is owed. Accordingly, although Respondents issued a timely TPD payment, they have failed to comply with ALJ Cannici's Order by failing to pay the full amount of benefits owed to Claimant for the time period awarded by ALJ Cannici.

Claimant concedes, and the ALJ agrees, that a mere miscalculation in these specific circumstances does not, by itself, warrant imposition of penalties. However, Insurer's inaction and failure to remedy the admitted discrepancy is objectively unreasonable. Claimant's counsel first notified Respondents' counsel of a potential discrepancy in the TPD payment on December 18, 2018, in an email requesting the rationale for Respondents' TPD calculations. Respondents' counsel replied on January 10, 2019, indicating he had followed up with the adjuster regarding the TPD issue. Respondents subsequently provided Claimant an indemnity payout log and, on January 17, 2019, inquired as to Claimant's desire to discuss settlement. The record is devoid of Respondents making any attempts to provide the basis for their initial TPD calculations, despite a January 17, 2019 email from Claimant's counsel specifically outlining Claimant's calculations, a January 31, 2019 email again requesting Respondents' rationale, and a February 20, 2019 Application for Hearing specifically detailing the calculations and endorsing penalties. While Respondents were by no means required to summarily accept Claimant's calculations, a reasonable insurer under the circumstances would make prompt efforts to ensure there were no miscalculations on their behalf. There is no evidence establishing Respondents did so.

Here, the Court deems a potential error in calculation less problematic than Respondents' failure to subsequently check their calculations when repeatedly apprised of a potential discrepancy and then promptly remedy what they readily acknowledge is an underpayment. As argued by Respondents, no particular dollar amount of TPD benefits was specified in ALJ Cannici's Order, requiring Respondents to perform their own calculations based on wage and other relevant information in their possession. Miscalculations and disputes regarding calculations can be expected to occur in workers' compensation matters and can be addressed at hearing if needed. However, this is not a situation where each party maintains their respective calculations were correct, or the sole dispute was whether Claimant is actually entitled to "full value" per his interpretation of ALJ Cannici's Order.

Respondents were notified of a potential discrepancy in TPD payments and were repeatedly asked to address the discrepancy. As of the date Claimant filed the Application for Hearing, Respondents had been given multiple opportunities over the course of several months to remedy the underpayment. The record is devoid of a reasonable explanation, or any explanation at all, for Respondents' failure to do so. Further, no explanation was provided as to the basis for Respondents' initial calculations, why there is now a difference in those calculations, and why there has

been a delay in rectifying the underpayment when it was ultimately acknowledged by Respondents.

Accordingly, the ALJ concludes Respondents are subject to a penalty for the time period of February 1, 2019through the date of hearing, June 4, 2019. By February 1, 2019, Claimant's counsel had repeatedly contacted Respondents regarding the discrepancy, requested rationale for Respondents' TPD payment, and notified Respondents Claimant would be filing an Application for Hearing if the matter was not resolved. Respondents had sufficient time by February 1, 2019 to check their calculations, confirm that there was an underpayment, and attempt to remedy the situation. February 1, 2019 through June 4, 2019 is a period of 124 days. As each day is a separate offense under the statute, Respondents shall pay a penalty of $5.00 per day, totaling $620.00 in penalties.

ORDER

1. Respondents shall pay Claimant $1,800.88 in TPD benefits owed for the time period May 5, 2017 through April 10, 2018.

2. Respondent shall pay Claimant $620.00 in penalties.

3. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 2, 2019

Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-068-409-002

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

[Redacted],

Claimant,

v.

[Redacted],

Employer,

And

[Redacted],

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on July 9, 2019 in Denver, Colorado. The hearing was digitally recorded (reference: 07/09/2019, Courtroom 3, beginning at 8:30 AM and ending at 12:30 PM). The official Spanish/English interpreter was Rigoberto Mendez.

The Claimant was present in person and represented by [Redacted], Esq. Respondents were represented by [Redacted], Esq.

Hereinafter [Redacted] shall be referred to as the "Claimant." [Redacted] shall be referred to as the "Employer." Pinnacol Assurance shall be referred to as the "Insurer". Employer and Insurer will collectively be called "Respondents". All other parties shall be referred to by name.

Claimant's Exhibits 1 through 8 were admitted into evidence, without objection, with exception of Claimant's Exhibit 8 which was withdrawn. Respondents' Exhibits A through O were admitted into evidence, with exception of Respondents' Exhibits M and O which were withdrawn.

At the conclusion of the hearing, the ALJ established a post-hearing briefing schedule: the Claimant's opening brief was timely filed, electronically, on July 16, 2019. The Respondents' answer brief was timely filed, electronically, on July 23, 2019. The Claimant's reply brief was timely filed, electronically, on July 26, 2019, at which time the matter was deemed submitted for decision.

ISSUES

The paramount issue to be determined by this decision concerns whether the Claimant sustained a compensable injury on October 5, 2017. The decision in this matter, to a great extent turns on credibility. If the case is not compensable, the other designated issues are moot.

The Claimant bears the burden of proof on all issues by a preponderance of the evidence.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ makes to following Findings of Fact:

1. The Claimant is 44 years old and has worked as a laborer his whole life. He was hired by the Employer in January of 2017. He worked full time. The Claimant's work with the Employer required frequent lifting and carrying of heavy materials.

2. The Claimant lacks any sort of ascertainable medical history because he did not frequent a doctor's office nor did he seek care for any prior injuries.

3. On October 5, 2017, the Claimant was working on a job site for the Employer. He lifted some scaffolding when he allegedly felt a pain in his back. He reported his back pain to his supervisor, Mel [Redacted] (hereinafter "Sauce") shortly after the alleged incident. The Claimant finished the work day.

4. The Claimant took the next two weeks off from work. During his time off, he received an address for "Building H" at Denver Health from Respondents. The Claimant tried to obtain care at "Building H" but it was allegedly closed. The Claimant then tried to get help with the address from personnel at Denver Health. He was told to receive care at the emergency room (ER), but admittedly never tried to obtain care from Denver Health until February 2018, almost four months later.

5. The Claimant returned to work sometime around October 17, 2017. He continued his regular job duties allegedly with the help of the Employer's brother until December 31, 2017. [Redacted] testified that his brother was incarcerated in Colorado Springs, Colorado, or in Mexico during the period that the Claimant alleged that the Employer's brother helped him with the work. The ALJ finds [Redacted]'s testimony in

this regard credible. The Claimant did not persuasively contradict [Redacted]'s testimony.

6. During December, the Employer allegedly received complaints about the Claimant's work quality and the Claimant was allegedly seen with a pipe and drugs at a work site. The Claimant denied having ever used drugs. The Employer told the Claimant he no longer had work for the Claimant after December 31, 2017.

7. On January 13, 2018, the Claimant went to the Division of Worker's Compensation and filled out a Worker's Claim for Compensation. The Claimant required assistance because he only speaks and reads Spanish.

8. On February 23, 2018, the Claimant spoke with Chanyn [Redacted] from Pinnacol. The Claimant admitted to [Redacted] that he had received a list of medical providers from the Employer but failed to obtain medical care because "Building H" was closed. [Redacted] informed the Claimant that she would be denying his claim because there was no evidence of injury, the Claimant failed to obtain medical care, the Claimant failed to contact Insurer, and the Claimant continued his regular job duties after the injury.

Medical

9. On February 24, 2018, the Claimant sought care at Denver Health for back pain. Amarprett Kaur, M.D., diagnosed the Claimant with lumbar back pain and prescribed pain medication.

10. On March 22, 2018, the Claimant sought care at Swedish Medical Center. There, he was diagnosed with radiculopathy in the L4-L5 region.

11. On April 18, 2018, the Claimant underwent an X-ray. The sX-ray showed a superior anterior corner of the L4 vertebral body with anterior displacement of the fragment. This fracture was described as chronic with no known date.

12. On May 1, 2018, the Claimant went to Alejandrina Viadales, M.D., at Jeffco Family Health Services Clinic. The Claimant reported his back pain and that he believed he hurt his back lifting scaffolding at work. Dr. Viadales diagnosed the (PT).

John Raschbacher, M.D. Respondents' Independent Medical Examiner (IME)

13. On June 15, 2018, the Claimant was evaluated by Dr. Racshbacher for an IME requested by the Respondents. Dr. Racshbacher was of the opinion in his report that the mechanism of injury (lifting the corner of scaffolding) was not medically likely to cause a vertebral body fracture at L4 or otherwise. He also was of the opinion that even in the unlikely event a fracture did occur, the Claimant would not have been able to tolerate any degree of physical work thereafter..

14. On August 4, 2018, the Claimant underwent an MRI (magnetic resonance imaging) of his back. Joseph Morgan, M.D., found mild spondylosis and facet arthrosis in the L3-L4, L4-L5 and L5-S1 region. The MRI failed to pick up a fracture.

15. Robert Messenbaugh, M.D., issued an IME records review on June 9, 2019. Dr. Messenbaugh reiterated the opinions of Dr. Racshbacher.

Testimony of the Claimant

16. The Claimant testified at hearing through an interpreter. He stated that on October 5, 2017 he was lifting scaffolding at a job site for the Employer when he felt a puncture in his back. He also stated he told [Redacted] right away, but was sent away to work at another site.

17. The Claimant also testified that he did not return to work for two weeks because of the back pain he (Building H at Denver Health) was closed. He did not attempt to receive medical attention for his condition until February 2018, almost four months after the alleged injury.

18. The Claimant also testified that he returned to work in mid-October. He stated that he would work with [Redacted]'s brother Bernardo who did all the heavy lifting for the two of them. The Claimant continued to work for Respondents until he was let go in December for lack of work.

19. When asked on cross examination if the real reason the Claimant was terminated from his job was due to the use of drugs and poor work performance, the Claimant denied both accusations.

20. In rebuttal to the Employer's assertion that Bernardo [Redacted]'s brother had been arrested and deported to Mexico during the time that Bernardo was allegedly helping the Claimant, the Claimant testified that he thought Bernardo had been arrested and deported some time but did not know the exact date. He could not recall if Bernardo worked with him in November and December. This contradicted Claimant's earlier version of being helped by Bernardo. The ALJ infers and finds that the Claimant's waffling on this matter when confronted with Bernardo's jailing and/or depoprtation, significantly undermines the Claimant's credibility.

21. The Claimant testified that he was unsure of how to proceed with medical treatment because he was hurt at work and that on February 23, 2018 when [Redacted] contacted the Claimant to deny his claim, it was the first time he had spoken with someone from Insurer.

22. Lastly, the Claimant testified that he still experiences significant back pain, but the level of pain varies. The Claimant wishes to seek treatment at Jeffco Family Services Clinic and he wants to continue PT.

Testimony of Mel [Redacted]

23. [Redacted] testified that the Claimant reported his back pain to him on October 5, 2017, but that Claimant continued to work even after [Redacted] told him to go home for the day.

24. [Redacted] also testified that he went to the Claimant's house to bring him the worker's compensation paperwork including the list of providers. The Claimant rejected [Redacted]'s advice to seek medical attention. The Claimant was then absent for one to one and one-half weeks from work, but he told [Redacted] that he was absent because he was ill not because he allegedly injured his back at work.. The ALJ finds [Redacted]'s testimony credible and persuasive.

25. When the Claimant returned to work in mid-October, he said nothing about his back to [Redacted]. He also continued to work his regular 40-hour week, during some of which [Redacted] saw the Claimant lift up to 100 lbs. on his own. [Redacted] also stated that Bernardo was absent during the time in which the Claimant alleged Bernardo assisted him. [Redacted] stated that Bernardo was arrested in Colorado Spring, Colorado, on October 17, 2017 and remained incarcerated until sometime in January 2018 when he was deported to Mexico. The ALJ finds [Redacted]'s testimony in this regard highly persuasive, credible and unrebutted by the Claimant.

26. [Redacted] stated that he had received complaints from a customer stating that the Claimant was showing up late to the job. [Redacted] also testified about witnessing the Claimant place a clear substance into a pipe and smoking it. [Redacted] stated that these were the reasons the Claimant's employment was terminated on December 31, 2017, but admitted that he only told the Claimant that there was not any more work for him.

Testimony of Chanyn [Redacted]

27. [Redacted] testified at hearing that she spoke on the phone with the Claimant on February 23, 2018. She stated that the Claimant told her that he had received the authorized provider list, but never sought medical care because it was too late in the day. The ALJ finds [Redacted]'s testimony credible. The Claimant did not contradict [Redacted] in this regard.

28. [Redacted] also stated that she told the Claimant that she would be denying his claim because there was a lack of evidence to support the existence of an injury, the Claimant had failed to seek medical treatment, that the Claimant failed to contact the Insurer before February 2018..

29. Lastly, [Redacted] stated that another claims representative was handling the claim prior to February 2018. [Redacted] stated that based on a review of the file, the prior representative had documented a conversation with the Employer. The

conversation stated that the Employer had filed a First Report of Injury and had given the list of providers to the Claimant.

Testimony of Drs. Racshbacher and Messenbaugh

30. Dr. Racshbacher and Dr. Messenbaugh testified at hearing that they believed the Claimant did not suffer an injury to his low back on October 5, 2017. Both also were of the opinion that it was medically probable that even if an injury did occur on October 5, 2017, the Claimant's injury did not require medical treatment, work restrictions, time from work. The ALJ finds their opinions credible and persuasive.

31. Additionally, Dr. Messenbaugh stated that the Claimant had not aggravated or accelerated a pre-existing condition. Dr. Messenbaugh stated that if any injury had even occurred, it was likely a strain and the Claimant would not still be feeling pain.

Ultimate Findings

32. The ALJ finds the Claimant's testimony lacks credibility and is not supported by the weight of the persuasive medical evidence, as found herein above.

33. The ALJ finds the opinions of Mel [Redacted], Chanyn [Redacted] and Drs. Racshbacher and Messenbaugh credible and persuasive and supported by the totality of the medical evidence in the record.

34. Based on the totality of the evidence, the ALJ finds that the Claimant did not sustained an injury to his low back on October 5, 2017, sufficient to be compensable.

35. The Claimant failed to sustain her burden of proof by a preponderance of the evidence on the issue of compensability.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines

the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.**

The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). Moreover, the ALJ, as the fact finder, is allowed to use reason and common sense in drawing inferences from other facts that have been proved. *Venetucci v. City of Colorado Springs,* 99 Colo. 389, 63 P.2d 462 (1936); *Independence Coffee & Spice Co. v. Kalkman* 61 Colo. 98, 156 P. 135 (1916).*Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). As found, the Claimant's testimony was not credible nor supported by the weight of the medical evidence. The testimony of Drs. Racshbacher and Messenbaugh as well as Respondents' lay witnesses, Mel [Redacted] and Chanyn [Redacted] was credible and supported by the weight of the medical evidence in the record.

Compensability

b. An "injury" referred to in § 8-41-301, C.R.S., contemplates a **disabling** injury to a claimant's person, not merely a coincidental and non-disabling insult to the body. *See Henderson v. RSI, Inc.,* 824 P.2d 91 (Colo. App. 1991). *Also see Gaudett v. Stationers Distributing Comp*any, W.C. No. 4-135-027 [Indus. Claim Appeals Office (ICAO), April 5, 1993]. A priori, the consequences of a work-related incident must require medical treatment or be disabling in order to be sufficient to constitute a compensable event. If an incident is not a significant event resulting in an injury, claimant is not entitled to benefits. *Wherry v. City and County of Denver*, W.C. No. 4-475-818 (ICAO, March 7, 2002). As found, based of the opinions of Drs. Raschbacher and Messenbaugh, the Claimant's injuries, if any, were not sufficient for the Claimant to seek medical attention, which would have been necessary almost immediately after the incident of October 5, 2017, inferentially, according to the opinions of Drs. Raschbacher and Messenbaugh.

c. In order for an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Office,* 919 P.2d 207, 210, 210 (Colo. 1996). An injury "arises out of' employment if it would not have occurred **but for** the fact that the conditions and obligations of employment placed the employee in a position that he or she was injured." *See City of Brighton v. Rodriguez,* 318 P.3d 496, **2014 CO 7** presumption that an injury arises out of employment when an unexplained injury occurs during the course of employment. Thereupon, it is incumbent to show that non-work related factors caused the injury. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1) (c), C.R.S. *See Faulkner v. Indus. Claim Appeals Office,* 24 P.3d 844 (Colo. App. 2000)*; Eller v. Indus. Claim Appeals Office*, 224 P.3d 397, 399 (Colo. App. 2009); *Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277, 1279 (Colo. App. 2008). The question of causation is generally one of fact for determination by an ALJ. *Faulkner* at 846; *Eller* at 399-400. As found, the Claimant failed to prove by a preponderance of the evidence that a compensable injury was in the course and scope of and arose out of his employment with Respondent on October 5, 2017.

d. An injured worker has a compensable new injury **if the employment-related activities aggravate, accelerate, or combine with the pre-existing condition to cause a need for medical treatment or produce the disability for which benefits are sought.** § 8-41-301(1) (c), C.R.S. *See Merriman v. Indus. Comm'n,* 120 Colo. 400, 210 P.2d 448 (1949); *Anderson v. Brinkoff,* 859 P.2d 819 (Colo. 1993); *National Health Laboratories v. Indus. Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992); *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997)*.* An injury resulting from the concurrence of a preexisting condition and a hazard of employment is compensable. *H & H Warehouse v. Vicory*, *supra*. *Duncan v. Indus. Claims App. Office*, 107 P.3d 999 (Colo. App. 2004). Even where the direct cause of an accident is the employee's preexisting disease or condition, the resulting disability is compensable where the conditions or circumstances of employment have contributed to the injuries sustained by the employee. *Ramsdell v. Horn*, 781 P.2d 150 (Colo.App. 1989). *Also see* § 8-41-301(1) (c), C.R.S; *Parra v. Ideal Concrete,* W.C. No. 4-179-455 [Indus. Claim Appeals Office (ICAO), April 8, 1998]; *Witt v. James J. Keil Jr.,* W.C. No. 4-225-334 (ICAO, April 7, 1998). As found, the incident of October 5, 2017, did not aggravate or accelerate any of the Claimant's preexisting back conditions.

Burden of Proof

e. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to

benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant failed to sustain his burden that a compensable injury occurred on October 5, 2017.

ORDER

IT IS, THEREFORE, ORDERED THAT:

Any and all claims for Workers' Compensation benefits are hereby denied and dismissed.

DATED this 5th day of August 2019.

EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm.*

ISSUES

- Did Respondent prove a basis to withdraw its admission of liability?
- Did Claimant prove his claim should be reopened for additional medical benefits for treatment of cervical myelopathy?[1]

FINDINGS OF FACT

1. Claimant works for Employer as an IT specialist. On October 17, 2018, he suffered admitted injuries while moving a printer. The printer was very large so Claimant enlisted a coworker, Michael P[Redacted], to help him. Claimant and Mr. P[Redacted] were surprised by the weight of the printer, which they estimated weighed at least 100 pounds. The printer was inside a metal rack on a shelf approximately 24 inches off the ground. They planned to put the printer on a wheeled cart Claimant had pulled up next to the shelf. As they were "manhandling" the printer out of the rack, the cart was bumped and rolled away. They tried to move toward the cart, but Mr. P[Redacted] stumbled over on some equipment on the floor and ultimately lost his grip. The printer crashed to the floor, striking Mr. P[Redacted] on the leg while it was falling. In the process, Claimant bumped into a storage cabinet and his head moved backward and forward.

2. Claimant reported the incident to his supervisor and completed an accident report. He listed the injured body parts as "shoulder – left and neck." Immediately after the accident, Claimant did not feel he had suffered any injuries but wanted to see how he felt in the morning. The next day he felt "pretty stiff and sore" around his neck and left shoulder, so Employer referred him to CCOM for evaluation.

3. Claimant saw Dr. Thomas Centi at his first CCOM appointment on October 19, 2018. Claimant completed a pain diagram showing pain about his posterior left shoulder and the left side of his neck. He had no numbness or tingling in his extremities. Dr. Centi's report indicates Claimant "fell to the floor" and the printer fell "onto his left shoulder and neck." At hearing, Claimant agreed that history is not accurate—he did not fall and the printer did not fall on him. Claimant's left arm strength was normal on examination. He was tender to palpation of the superior shoulder region, upper trapezius and left side of his neck. Shoulder and cervical range of motion were mildly reduced. An x-ray of the left shoulder showed degenerative changes and mild osteoarthritis but

[1] At hearing, Claimant argued the claim was not closed by a November 27, 2018 Final Admission of Liability (FAL). In the alternative, Claimant requested the case be reopened for additional medical benefits. In his brief, Claimant conceded he did not timely object to the FAL and his claim "automatically closed," and now simply requests the claim be reopened. Claimant's concession that the claim is closed accurately reflects the controlling law on this issue. *See Martinez v. Energy Saving Crew LLC*, W.C. No. 5-055-251-002 (May 31, 2019); *Suomie v. Spectrum Retirement Communities*, W.C. No. 5-050-347-01 (June 14, 2019).

nothing acute. Dr. Centi diagnosed a left shoulder contusion and a cervical "sprain." He prescribed NSAIDs and muscle relaxers and put Claimant on work restrictions.

4. Claimant followed up with Dr. Centi on October 22, 2018. He reported ongoing pain in his left shoulder and left neck, but his pain levels were lower than the previous visit. He had no numbness or tingling in his extremities. The physical examination findings were unchanged, with no suggestion of neurological abnormalities. Dr. Centi referred Claimant to Action Potential for physical therapy.

5. Claimant had his initial physical therapy visit the next day, on October 23. He reported neck and left shoulder pain, but "no neurological sx." On the intake forms, Claimant stated he had no tingling in his arm, shoulder, or hand. On examination, he was tender to palpation of the left shoulder, biceps, and neck. Shoulder range of motion and left cervical rotation were reduced 50%. Manual muscle testing was graded 3/5 but there was no myotomal weakness.

6. Claimant ultimately had nine PT sessions at Action Potential. His reported symptoms were generally confined to his left shoulder and neck, with no mention of any neurologic symptoms suggestive of myelopathy. The only reference to anything other than left shoulder or left neck symptoms is a non-specific statement on November 5, 2018 that "[he] did something over the weekend and is really sore today pain radiated to the right side." The "objective" section of each PT report was cloned from the initial visit, so it is unclear whether the therapist performed a new physical examination at any subsequent visits. But the ALJ infers the therapist appreciated no worrisome neurologic signs or symptoms at any time or he would have documented same in his records.

7. Claimant followed up with Dr. Centi a few more times in October and November 2016. On November 12, 2018, Dr. Centi noted Claimant was making "good progress with therapy." He was still having left shoulder and neck pain, but "no numbness or tingling." On the accompanying pain diagram from the November 12 appointment, Claimant made marks near his left upper arm, but the report is not legible enough for the ALJ to discern whether he indicated "aching" or "pins & needles." Regardless, there was no indication of any right-sided symptoms that date, and nothing on the pain diagram to suggest he was experiencing symptoms consistent with cervical myelopathy.

8. Claimant was 71 years old at the time of the work accident. He had received treatment for age-related neck pain before the October 2018 accident.

9. On May 14, 2018 (approximately five months before the accident), Claimant received chiropractic treatment for neck and upper back pain. Claimant had been doing "a lot of yard work recently, but did not have any one specific event that caused a problem." Physical examination showed "moderate" muscle spasm in the left side of the neck, left trapezius and in the thoracic area. Cervical extension and left rotation were mildly reduced due to pain.

10. Claimant was still having left trapezius pain when he saw his PCP, Dr. James Kinsman, on June 27, 2018. He said the pain had been "present for a few months"

and persisted despite four chiropractic visits "with only very transient benefit." Dr. Kinsman opined, "Muscle spasm is just as likely as radiculopathy if not more so without any arm symptoms." He recommended PT, which Claimant declined.

11. Claimant saw his chiropractor again on November 19, 2018. He complained of pain in the left neck and left posterior shoulder "over the last 2 weeks." Claimant denied any injury, accident, or fall. He received chiropractic adjustments to his neck, thoracic spine and left shoulder. There was no indication of any neurological symptoms such as numbness, tingling, weakness, or coordination difficulties.

12. Dr. Kinsman's records suggest Claimant had symptoms consistent with cervical stenosis, radiculopathy, or myelopathy before the work accident. A March 27, 2018 record lists unresolved diagnoses of "cervical myelopathy," "cervical radiculopathy," and "cervical spinal stenosis." Those diagnoses were carried forward to subsequent notes dated April 6, April 12, April 26, May 14, and June 27, 2018. In his deposition, Dr. Kinsman seemed puzzled by those notations but offered no persuasive explanation for how they came to be found in records predating the accident.

13. Claimant's final appointment with Dr. Centi was on November 26, 2018. He presented in a notably different condition than previous visits. Dr. Centi noted, "[he] has now developed an unsteady gait, coordination issues." For the first time, Claimant's pain diagram included symptoms in the low back, right leg, and bilateral hands and fingers. Claimant had "completed all therapy" for his shoulder and neck strains. He still had aching and stiffness in his neck, but "considers it to be minimal." Dr. Centi opined Claimant was at MMI without impairment for his soft tissue strains, and advised him to follow-up with his personal physicians for the new "unrelated medical condition."

14. Claimant went to the Penrose Hospital emergency department the afternoon of November 26 because he thought might be having a stroke. He reported symptoms including weakness in his right arm and leg, balance problems, dragging his right foot, and difficulty writing. Multiple examining and treating providers at the hospital documented that the neurological symptoms started approximately one week before Claimant arrived at the ER and became progressively worse, which the ALJ finds as fact. At least two providers noted Claimant fell at home within a week before presenting to the ER. Multiple providers also erroneously stated the work accident occurred approximately 2 weeks before the ER visit.

15. Physical examination at the ER showed "significant weakness" of the right arm and right leg, and some right-sided drift. Claimant was admitted to the hospital for further workup.

16. A neurological nurse practitioner evaluated Claimant on November 27 and confirmed weakness in the right arm and leg. She diagnosed "possible incomplete cervical myelopathy" and recommended brain and neck MRIs.

17. An MRI of Claimant's brain on November 27, 2018 showed mild chronic small vessel disease but no evidence of acute cerebral infarct. A cervical MRI on

November 28, 2018 showed severe C4-5 and moderate-to-severe C5-6 canal stenosis with subtle cord edema, and moderate foraminal stenosis at C3-4.

18. Claimant had a surgical consult with Dr. Christopher Tomac on November 29, 2018. Dr. Tomac documented, "States attempted to lift 100-pound printer with colleague, his colleague slipped and printer fell onto his LEFT shoulder. He states initially increased spasm pain LEFT shoulder/trapezius area. This was followed by right-sided numbness and pain with some mild weakness (both the RIGHT upper extremity and RIGHT lower extremity)." Dr. Tomac was under the mistaken impression it had only been "2-3 weeks since accident." Dr. Tomac opined, "within reasonable medical certainty, [the] patient's cervical spondylosis, as well as any required treatment up to and including surgery, is resultant from the accident." Claimant told Dr. Tomac his symptoms were improving, which was borne out by the physical examination findings. Dr. Tomac opined, "Based on my interpretation of the imaging and [the] patient's significantly improving exam, I cannot, with a clear conscience recommend a surgical intervention at the present time."

19. Claimant was transferred to the rehab unit and remained there from November 30 to December 11, 2018. The principal diagnosis was cervical myelopathy. His rehab was managed by Dr. House, a PM&R specialist. At intake, Claimant told Dr. House,

> He was helping move a printer to a table. His partner carrying the other side tripped and fell with the printer coming toward him, knocking him into the file cabinet. This led to rapid flexion of the head and immediate symptoms described below. He has weakness of the right arm and leg and left hand if it is less than his baseline. He also has tingling in her bilateral upper extremities that appears to be worse on the left. His foot is dragging when he walks.

20. On December 19, 2018, Dr. Kinsman observed Claimant was using a walker and "obviously has weakness and poor coordination of his upper extremities." Dr. Kinsman summarized his understanding of the HPI as: "[H]e was hospitalized . . . after a fall that occurred at work when he was trying to lift something heavy with a coworker and he injured his neck. Obviously, he had pre-existing changes that had never been symptomatic and now he effectively has a cervical myelopathy." Dr. Kinsman diagnosed "cervical myelopathy due to a combination of pre-existing but as yet previously asymptomatic cervical stenosis and foraminal stenosis but with trauma superimposed. Little improvement since early November injury."

21. Claimant had a surgical consultation with Dr. Sergiu Botolin on December 26, 2018. Claimant told Dr. Botolin "he was fine until [a] work-related accident that happened at the beginning of November. He reports that he and another coworker were lifting a laser printer and the other person [ ] tripped and fell which made [Claimant] fall too. He reports that after the fall he has noticed severe deterioration of his balance. He has to walk with a walker or otherwise he falls down." Dr. Botolin diagnosed cervical spondylosis with myelopathy and an incomplete spinal cord injury at C5-7 without bone

injury." Dr. Botolin opined, "I explained to the patient that he does present with a clinical picture of cervical myelopathy. Based on the patient's story, his changes developed suddenly after his fall at work, which implies that he had an incomplete spinal cord injury at that time. He does appear to have spinal cord edema on the MRI from November 28." Dr. Botolin recommended a C3-6 anterior cervical discectomy and fusion. Claimant wanted to think about his options before deciding whether to have surgery.

22. Claimant has had type 2 diabetes for many years. On January 25, 2019, Dr. Botolin postponed surgery after receiving blood work showing elevated hemoglobin A1c and a prolonged prothrombin time ratio. Dr. Botolin's PA-C advised Claimant to follow up his PCP "for optimization of his co-morbidities" so he could proceed with surgery.

23. Claimant saw Dr. Kinsman on January 28, 2019, who opined his A1c level "should not preclude surgery . . . [and] we would be hard-pressed to get this down much further." After discussing the matter with an endocrinologist and with Dr. Botolin's medical assistant, he determined Dr. Botolin is "more strict" about this than are other surgeons. Claimant requested a second opinion and Dr. Kinsman referred him to Dr. Ronald Hammers, a neurosurgeon.

24. Dr. Hammers evaluated Claimant on February 4, 2019. Dr. Hammers noted, "[Claimant] reports a fall in October of 2018 while moving a piece of equipment at work. Prior to this injury he denies any symptoms resembling radiculopathy or myelopathy. Subsequent to this injury, he developed a variety of symptoms," including pain and numbness in his arms and hands, worse on the right, dragging his right leg, and decreased coordination. On examination, he demonstrated a spastic gait, bilateral upper extremity weakness, and decreased sensation in the right hand. Dr. Hammers diagnosed cervical spondylosis with myelopathy and central cord syndrome. He recommended Claimant undergo a C4-6 anterior decompression and fusion "soon" because of the severity of his symptoms and lack of improvement. Dr. Hammers did not consider Claimant's A1c level or PT ratio to outweigh the relatively urgent need for surgery.

25. Dr. Hammers performed the surgery on February 14, 2019. The surgery was successful, with Claimant reporting "night and day" improvement in his gait and significant improvement in using his arms.

26. Claimant saw Dr. Eric Ridings for an IME at Respondent's request on March 25, 2019. Dr. Ridings spent considerable time reviewing the incident and injury mechanism with Claimant. The history Claimant provided Dr. Ridings differed significantly from that documented in other records. Notably, Claimant denied falling and denied that the printer fell on him. Based on the incident as Claimant described to him, Dr. Ridings opined Claimant suffered a left shoulder strain, with referred soft tissue pain into the neck. He saw no mechanism that would cause any specific injury to the cervical spine. Dr. Ridings believed Claimant's soft tissue strain improved with therapy and he was appropriately put at MMI without impairment on November 26, 2018. After reviewing all the records, Dr. Ridings opined, "while the patient may have had some mild and perhaps transient symptoms beginning the weekend of November 3 or 4, he likely did not begin having symptoms that he considered significant and worrisome until approximately

November 26." He opined the neurological symptoms that necessitated surgery were related to "cervical stenosis with cervical myelopathy, which was not, well within a reasonable degree of medical probability, caused, aggravated, or accelerated by his work injury or its treatment." Dr. Ridings explained,

> The typical pattern of the onset of cervical myelopathy from cervical stenosis is that at some point there is enough pressure on the spinal cord that inflammation is caused. The inflammation causes swelling which, of course, then dramatically increases the pressure at that level, leading to the onset of nerve injury. There does not have to be any identifiable incident or "cause"; the stenosis can simply become tighter with the deposition of calcium molecule-by-molecule over a period of years due to osteoarthritis, until at some point a critical stenosis is reached leading to the cascade of events described above.

27. Dr. Kinsman provided an opinion regarding causation in a report dated April 24, 2019, stating,

> Unbelievably, the situation was denied as a Workmen's Compensation claim. I reviewed my chart and the patient has 9 visits with me from August 2014 through June 2018 with no mention of any symptoms that could have been at all related to C-spine problems until the June note when he mention some trapezius area pain and I thought that might have been muscular more likely than cervical radiculopathy. Then after his accident he had latent and progressive cervical myelopathy with the threat of paralysis. It is clear to me that he had minimal or no symptoms related to degenerative cervical changes and suddenly had critical symptoms as a result of being injured on the job.

28. Dr. Hammers testified via deposition on May 24, 2019. He had not spent much time investigating causation because he was primarily focused on providing treatment. Dr. Hammers opined,

> The spondylosis . . . [is] an arthritic condition, [and] would not have been caused by one acute traumatic event. This is years and years of buildup of arthritic or degenerative change that causes tightness of stenosis around the spinal cord. Now it is certainly conceivable that a one-time acute injury can take that underlying spondylosis and cause it to become acutely symptomatic and acute myelopathy, which is a form of trauma we generally referred to as central cord syndrome.

29. When asked whether he would relate the onset of symptoms to the work accident at the level of reasonable probability, Dr. Hammers replied,

> In the history of feeling normal and there being an absence of cervical spine related symptoms prior to the injury and then having the onset of the symptoms that I saw, if those symptoms indeed onset subsequent or just

after the injury, then I think it is plausible to relate that event as a causative mechanism.

30. Dr. Hammers opined central cord syndrome or exacerbation of myelopathy does not require direct trauma to the spine, and "many times it is an indirect trauma like whiplash and acceleration-deceleration injuries that can directly contribute." Dr. Hammers further opined that the subtle cord edema shown on the MRI, in combination with Claimant's symptoms, "can strongly suggest that that has been a more acute or subacute rather than chronic finding."

31. Dr. Kinsman testified in a deposition on June 13, 2019. He emphasized the dramatic change in Claimant's condition between his appointments in June 2018 and December 2018 as a significant factor in his causation assessment. He also relied on the temporal coincidence of the symptoms developing after the work accident. Dr. Kinsman explained, "I had a patient I saw who had minimal symptoms that might have been related to cervical spinal stenosis in June of 2018, but then saw me again in December . . . who had cervical myelopathy, and reported an injury and accident on the job in October. And I have to go on my patients, you know, veracity, his honesty that he suffered one injury and that the symptoms, if he had one injury, his symptoms followed that." When asked about the cause of the drastic change in Claimant's condition between June 2018 and December 2018, he stated, "I think the accident at work was the most likely cause." Dr. Kinsman admitted he had not previously seen records from Dr. Centi or Action Potential.

32. Dr. Centi testified via deposition on June 17, 2019. Dr. Centi confirmed he neither observed nor knew of any neurologic symptoms suggestive of myelopathy before Claimant's November 26, 2018 appointment. Dr. Centi opined the new symptoms Claimant exhibited on November 26 were new and unrelated to the October 2018 the work injury. He opined Claimant's cervical and left shoulder strains improved and resolved with therapy. He maintained his opinion Claimant suffered no impairment and required no further treatment for any work-related medical condition.

33. Dr. Ridings testified at hearing consistent with his IME report. He acknowledged that "sudden extension of the neck is the most common sort of trauma that causes cervical stenosis to get worse or symptomatic," but opined "the expectation from a sudden traumatic exacerbation . . . would be rapid onset of swelling in the cervical cord and a rapid progression of symptoms, really for the first 24 hours, and certainly not . . . beginning more than 48 hours later." Dr. Ridings opined that the mechanism of injury Claimant relayed to him could not cause a worsening of his pre-existing stenosis or cause new onset of cervical myelopathic symptoms."

34. Respondent filed a Final Admission of Liability on November 27, 2018 based on Dr. Centi's November 26 MMI report. On December 26, 2018, Claimant emailed the adjuster and indicated "Dr. Centi should never have turned me loose . . . [e]veryone knows that this was mishandled and should still be a Comp situation as this definityly [sic] is a work-related accident and should be treated as such." Claimant filed a formal Objection to Final Admission of Liability on January 8, 2019, but did not apply for a hearing or request a DIME in conjunction with the objection.

35. Claimant's claim automatically closed on December 27, 2018.

36. Respondent failed to prove a basis to withdraw its admission of liability. The persuasive evidence shows Claimant suffered soft tissue shoulder and cervical strains that reasonably required evaluation and conservative care.

37. Dr. Ridings' opinions regarding the cause of Claimant's progressive cervical myelopathy leading to surgery are credible and more persuasive than medical opinions in the record to the contrary.

38. Claimant failed to prove his work accident caused, aggravated, accelerated or combined with his pre-existing severe cervical stenosis to cause the need for treatment of cervical myelopathy. The treatment Claimant received after being released by Dr. Centi was not related to the industrial injury. Claimant failed to prove a basis to reopen his claim.

CONCLUSIONS OF LAW

A. Withdrawal of admission of liability

When an employer files an admission of liability, the employer has "admitted that the claimant has sustained the burden of proving entitlement to benefits." *City of Brighton v. Rodriguez*, 318 P.3d 496, 507 (Colo. 2014). If the employer subsequently seeks to withdraw its admission of liability, it must prove by a preponderance of the evidence that the claimant's injuries were not compensable in the first instance. *See* § 8-43-201(1) ("a party seeking to modify an issue determined by a general or final admission … shall bear the burden of proof for any such modification.").

Even a "minor strain" can be a sufficient basis for a compensable claim if it was caused by a claimant's work activities and caused him to seek medical treatment. *Garcia v. Express Personnel*, W.C. No. 4-587-458 (August 24, 2004); *Conry v. City of Aurora*, W.C. No. 4-195-130 (April 17, 1996).

As found, Respondent has failed to prove by a preponderance of the evidence that Claimant suffered no compensable injury. The persuasive evidence shows Claimant suffered shoulder and cervical strains that reasonably required conservative care. Dr. Centi's initial physical exam found tenderness of the left shoulder and "left-sided muscle taughtness and tenderness" of the neck, consistent with soft tissue strains. The medications and therapy prescribed by Dr. Centi were reasonably necessary to cure and relieve the effects of Claimant's compensable strains.

B. Reopening

Section 8-43-303 authorizes an ALJ to reopen any award on the grounds of error, mistake, or a change in condition. The allowance for reopening reflects a "strong legislative policy" that the goal of achieving a fair and just result overrides the interests of litigants in obtaining final resolution of their dispute. *Padilla v. Industrial Commission*, 696 P.2d 273, 278 (Colo. 1985). Thus, a "final" award means only that the matter has been concluded subject to reopening if warranted under the applicable statutory criteria. *Renz*

v. Larimer County School District Poudre R-1, 924 P.2d 1177 (Colo. App. 1996). The authority to reopen a claim is permissive, and whether to reopen a claim if the statutory criteria have been met is left to the ALJ's discretion. *Id*. The party requesting reopening bears the burden of proof. Section 8-43-304(4).

A "change in condition" refers to a change in the condition of the original compensable injury or a change in the claimant's physical or mental condition that can be causally related to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo. App. 1985). If a claimant's condition is shown to have changed, the ALJ should consider whether the change represents the natural progression of the industrial injury, or results from some other cause. *Goble v. Sam's Wholesale Club*, W.C. No. 4-297-675 (May 3, 2001).

As found, Claimant failed to prove his worsened condition after MMI was causally related to the work accident. The change of Claimant's condition reflects the natural progression of his severe pre-existing spinal stenosis, without contribution from the accident at work. Dr. Hammers' and Dr. Kinsman's causation opinions are predicated largely on the assumption Claimant suffered significant trauma to his neck and/or the myelopathy manifested shortly after the accident. Neither assumption is correct. Similarly, Dr. Tomac mistakenly believed the printer fell "onto" Claimant's shoulder and that the accident happened only 2-3 weeks before his hospitalization. The ALJ accepts Dr. Hammers' opinion that trauma such as whiplash *can* cause or aggravate cervical myelopathy, but also credits Dr. Ridings' opinion that, had that been the case here, the symptoms would have manifested sooner. Claimant testified he developed symptoms suggestive of myelopathy – unsteady gait, coordination issue, and tingling in his hands – while still in therapy. But the contemporaneous medical records do not corroborate his testimony in this regard. The therapy notes document no neurological symptoms or findings, and Claimant noted no such issues on the pain diagrams he completed at CCOM (until November 28). Although Claimant's head may have moved backward and forward during the accident, the ALJ is not persuaded he experienced a significant "whiplash" sufficient to proximately cause, aggravate or accelerate cervical myelopathy. As Dr. Ridings persuasively explained, the onset of significant symptoms in late November 2018 is most consistent with the natural and expected progression of myelopathy in the context cervical stenosis, with a slow and steady accretion of pressure on the spinal cord eventually leading to acute inflammation and myelopathy. The fact that the cord pressure reached a tipping point within six weeks after Claimant's accident is more likely coincidental than indicative of a cause and effect relationship.

ORDER

It is therefore ordered that:

1. Respondent's request to withdraw its admission of liability is denied and dismissed.

2. Claimant’s request to reopen his claim for medical benefits related to cervical myelopathy is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 5, 2019

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable work related injury on November 18, 2017.

2. Whether Claimant has established by a preponderance of the evidence that the right shoulder surgery recommended by Dr. Parker and denied by Respondents is reasonable, necessary, and causally related to a November 18, 2017 work injury.

3. Whether Respondent has established by a preponderance of the evidence that Claimant suffered an intervening injury on or about July 2, 2018 that severed the causal connection between Claimant's neck symptoms and a November 18, 2017 injury.

FINDINGS OF FACT

1. Claimant is a 51-year-old male who is employed by Employer as a firefighter/engineer. Claimant has been so employed since approximately October of 1997.

2. On November 18, 2017 while so employed, Claimant and other firefighters were dispatched to a residential house fire during the evening hours. At the scene, Claimant was wearing his full bunker gear that weighed approximately 75 pounds. Claimant was using a tool, weighing approximately 35 pounds, which was essentially a combination sledgehammer and ax.

3. With the tool, Claimant had to reach overhead to break through drywall to see the attic space and contain hot spots. Claimant also assisted in carrying two victims from the home. Claimant held one arm and one leg of the victims, while a fellow firefighter held the other arm and leg of the victims.

4. Claimant felt pain and fatigue in both shoulders, his neck, and his back while tearing down the drywall. Claimant testified that he thought his symptoms would get better but that they got worse the next morning.

5. After working a shift with continued pain, Claimant reported the alleged injury and was referred for treatment.

6. On November 21, 2017, Joan Mankowski, M.D. evaluated Claimant. Claimant reported right shoulder pain and weakness, left shoulder pain, tightness in both shoulders, and tightness in his upper and lower back. Claimant reported that his right shoulder did not feel right. Claimant reported he first noted symptoms on November 18 after pulling down a ceiling in search of an active fire. Claimant reported that he worked

a full shift on November 19, but then the pain worsened, prompting him to seek medical evaluation. Claimant reported his right shoulder pain was aggravated with lifting, reaching forward, abduction, and adduction and was rated 9/10 at its worst. Claimant reported his left shoulder pain was aggravated with lifting and rated 6/10 at its worst. Claimant reported his neck pain was achy and tight aggravated with neck extension, rated 6/10 at its worst. Claimant reported ongoing and pre-existing neck problems for which he was treating with his personal physician and had an injection early November. Claimant reported his low back pain was constant, crampy, and dull in character. Dr. Mankowski assessed strain of muscle, fascia, and tendon at neck level, low back pain, and strain of muscle, fascia, and tendon at the bilateral shoulders/upper arms. She ordered an MRI of the right shoulder. *See* Exhibits 3, D.

7. On November 29, 2017, Claimant underwent an MRI of his right shoulder interpreted by Patrick O'Malley, M.D. Dr. O'Malley provided the impression of moderately severe supraspinatus and infraspinatus tendinosis, moderate subscapularis tendinosis, and no deep partial thickness or full thickness rotator cuff tear. He also opined that Claimant had subacromial impingement/rotator cuff impingement syndrome with severe degenerative change in the acromioclavicular joint with inferior osteophyte formation. Dr. O'Malley found exuberant edema associated with the acromioclavicular joint and opined that it may be degenerative in nature or could be related to mild grade 1-2 acromioclavicular joint separation in the appropriate clinical setting. Dr. O'Malley found no evidence of a labral teat. *See* Exhibits 3, D.

8. On November 20, 2017, Dr. Mankowski evaluated Claimant. Claimant reported a generalized worsening of pain in both shoulder, neck and back. Claimant reported his back pain was at a 7-8/10 at its worst with occasional seizing up. Claimant reported new intermittent pain from the midline of the low back to the left foot. Dr. Mankowski assessed worsening low back pain, no evidence of right shoulder tear on MRI that was positive for rotator cuff tendinosis. Dr. Mankowski noted that if there was no clinical improvement she would consider referral to a pain medicine and rehabilitation specialist and noted Claimant may be a candidate for shoulder injections. *See* Exhibit 3.

9. On December 19, 2017, Dr. Mankowski evaluated Claimant. Claimant reported his right shoulder pain was unchanged, his left shoulder pain was worse, his back pain was slightly improved, and his neck pain was stable. Claimant reported his right shoulder pain was 6/10 at rest and 9/10 with abduction and flexion. Claimant reported his left shoulder pain was 4-5/10 at rest and 8-9/10 with flexion and adduction. Claimant reported his low back pain was 6/10. Dr. Mankowski assessed strain muscle/fascia/tendon at shoulder/upper arm and opined that it was a complex case involving multiple body parts in the setting of pre-existing cervical spine pathology. Given no improvement in persistent symptoms, she referred Claimant to Dr. Chan, a pain medicine and rehabilitation specialist for further evaluation and treatment. *See* Exhibit 3.

10. On January 15, 2018, Samuel Chan, M.D. evaluated Claimant. Claimant reported that he was pulling ceiling tile during a fire rescue and did not have any type of pain but after the adrenaline rush had gone down that night, he had significant pain over

the cervical spine area that radiated to the bilateral shoulders. Claimant reported the areas were very tight and he had constant spasms. Claimant reported continued diffuse pain with the majority of the pain achiness from the mid lumbar spine to the low back area. Claimant reported his pain was between 7-8/10. Claimant reported no prior past medical history other than relating to the knees and wrists. On exam, Dr. Chan found limited range of motion in the cervical spine with tenderness to palpation and active trigger points. In the lumbar spine, Dr. Chan found tenderness to palpation over the lumbosacral paraspinal muscles and tenderness with extension and rotation bilaterally at about L4-5 and L5-S1. The bilateral shoulder exams were unremarkable. Dr. Chan diagnosed cervical spine discogenic disease, facetogenic pain, and myofascial complaints. He also diagnosed bilateral acromioclavicular joint degenerative changes in the shoulders. Dr. Chan diagnosed bilateral L4-5 and L5-S1 facetogenic lumbosacral pain and recommended ruling out lumbar discogenic disease. Dr. Chan opined that the findings were most consistent with musculoskeletal pain, but given the length of symptoms, he recommended an MRI of the cervical and lumbar spines. *See* Exhibit 2.

11. On January 16, 2018, Alisa Koval, M.D. evaluated Claimant. Claimant reported that his symptoms were largely unchanged. Dr. Koval noted that Claimant had consulted with Dr. Chan a few days prior and was planning to undergo MRIs of the cervical spine and lumbar spine. Claimant reported that his shoulders and low back were pain free before this incident at work. Claimant reported he had pre-existing neck pathology that was aggravated by this injury event. Claimant reported extensive heavy use of the back and shoulders on November 18, 2017 when he used a tool to break down a ceiling and assisted evacuating two people from a building. Dr. Koval assessed strain of muscle, fascia, and tendon at neck level, low back pain, and strain of muscle/fascia/tendon at bilateral shoulders/upper arms. Dr. Koval noted the pending MRIs per Dr. Chan. *See* Exhibit 3.

12. On January 25, 2018, Claimant underwent an MRI of his cervical spine interpreted by Eduardo Seda, M.D. Dr. Seda provided the impression of degenerative disc changes with mild dural sac indentation and mild bilateral foraminal narrowing at C5-6. Dr. Seda found small central disc bulges with mild dural sac indentation at C5-6 and C6-7. *See* Exhibits 3, D.

13. On January 25, 2018, Claimant also underwent an MRI of his lumbar spine interpreted by Dr. Seda. Dr. Seda provided the impression of degenerative disc and joint changes with slight dural sac indentation, no root sleeve deformity. He found small central disc bulges at L4-5 and L5-S1. *See* Exhibits 3, D.

14. On February 5, 2018, Dr. Chan evaluated Claimant. Dr. Chan noted that the MRIs of the cervical and lumbar spine showed some mild facetogenic issues with diffuse degenerative changes including disc desiccation. Claimant reported his pain at a 7/10 with more pain on the right bicipital tendon region. Dr. Chan diagnosed cervical spine facetogenic pain and myofascial complaints with an essentially normal MRI. He diagnosed some AC joint arthritis in the bilateral shoulders. Dr. Chan also diagnosed bilateral L4-5 and L5-S1 facetogenic pain with a normal MRI and essentially normal

neurologic examination of the lumbar spine. Dr. Chan opined that the MRIs showed some age appropriate degenerative changes and is essentially within normal limits. Dr. Chan opined that the examinations demonstrated findings consistent with facetogenic pain over the cervical and lumbar spine areas and noted that facet injections could be considered. *See* Exhibit 2.

15. On February 6, 2018, Dr. Koval evaluated Claimant. Dr. Koval noted that Claimant was pending injections for his cervical spine. Dr. Koval recommended evaluation by an orthopedist regarding his right shoulder as Claimant continued to report burning pain in the acromioclavicular region. She recommended continued physical therapy, chiropractor, and massage therapy. *See* Exhibit 3.

16. On February 13, 2018, Claimant was evaluated by Andrew Parker, M.D. for his bilateral shoulders. Claimant reported pain at a 7/10 with sharp, dull, throbbing symptoms. Claimant reported that his symptoms were made worse with moving, athletics, gripping, lifting, and reaching overhead. Claimant reported that the problem started after an injury at work when he was pulling ceiling and carrying victims out. Claimant reported the symptoms had been present since November 17, 2018. On examination, Dr. Parker found bilateral tenderness over the acromioclavicular joints. Dr. Parker noted that the MRI demonstrated significant increased signal on the acromioclavicular joint. Dr. Parker diagnosed primary osteoarthritis of the right and left shoulders and bilateral osteoarthritis of the acromioclavicular joint. Dr. Parker performed injections bilaterally of the acromioclavicular joints. Dr. Parker noted that Claimant's pain was immediately improved bilaterally following injection and noted he wanted to see how Claimant did with a follow up one month out. *See* Exhibit 1.

17. On March 1, 2018, Dr. Koval evaluated Claimant. Claimant reported he had recent shoulder injections and that he was scheduled for injections of his neck and lower back. Claimant reported chiropractic care had significantly improved his neck range of motion and pain. Claimant reported his neck pain at a 5, back pain at a 5, and shoulder pain at a 7. The assessment included improving bilateral shoulder, neck, and lumbar strains. *See* Exhibit 3.

18. On March 11, 2018, Haley Burke, M.D. performed bilateral C6-7 and C7-T1 cervical intra articular facet injections. Claimant reported a pre-procedure pain score of 7/10 and a post procedure pain score of 3/10. *See* Exhibit D.

19. On March 15, 2018, Dr. Mankowski evaluated Claimant. Claimant reported his shoulders and lower back were improving. Claimant reported that he had undergone a neck injection with minimal appreciable response. *See* Exhibit 3.

20. On March 15, 2018, Dr. Chan evaluated Claimant. Dr. Chan noted that the MRIs of the cervical and lumbar spine showed degenerative type findings without any acute findings. Claimant reported that his March 8 facet injections gave him about 3-4 hours of pain relief. Dr. Chan wished to observe the response longer. *See* Exhibit 2.

21. On March 19, 2018, Dr. Parker evaluated Claimant. Claimant reported that the injections in the bilateral acromioclavicular joints had helped tremendously but that he still had pain laterally on the right shoulder. Dr. Parker continued to assess bilateral osteoarthritis of the shoulders and provided a new impression of rotator cuff tendinitis/impingement on the right shoulder. Dr. Parker performed a subacromial space injection on the right. *See* Exhibit 1.

22. On April 10, 2018, Dr. Koval evaluated Claimant. Dr. Koval noted that Claimant had been making good progress with the combination of cervical and shoulder injections, physical therapy, chiropractic care, and massage therapy. She opined that he was likely a patient who would continue improving with conservative measures. She found Claimant to be functioning with less pain, improved range of motion, and significant reduction in muscle spasms in neck/trapezius. *See* Exhibit 3.

23. On April 11, 2018, Dr. Chan evaluated Claimant. Claimant reported improvement from the March 8 injections and the March 15 injection. Claimant reported his pain at a 4/10. Claimant reported definite overall pain improvement and increased function. Dr. Chan noted that if Claimant continued to be symptomatic, they could consider medial branch blocks, but if Claimant continued to do well, he may be approaching maximum medical improvement. *See* Exhibit 2.

24. On April 16, 2018, Dr. Parker evaluated Claimant. Claimant reported that with most daily activities and at rest, his shoulders were doing well. He noted that with strenuous activity such as overhead he shoulder pain on the right side. Dr. Parker discussed the option of surgical intervention and reviewed that surgery would involve right shoulder arthroscopy, subacromial decompression, distal clavicle excision, and rotator cuff debridement with possible repair. Claimant reported that he would observe his right shoulder for the next 4 weeks to see how he was doing. Dr. Parker noted that if the shoulder continued to be symptomatic with strenuous activity, they would likely proceed with right shoulder arthroscopy. *See* Exhibit 1.

25. On May 24, 2018, Samuel Chan, M.D. evaluated Claimant. Claimant reported that the bilateral facet injections were very beneficial. Claimant also reported his h-wave and Celebrex had provided significant benefits. Claimant reported that he had two injections in his shoulders that offered benefit as well and that he has continued to work full time and full duty but that he was now working in the fire prevention department and did not have to respond to calls. Dr. Chan performed a physical examination. Dr. Chan opined that Claimant's cervical spine MRI was essentially normal, that his lumbosacral MRI was normal, and that his right shoulder MRI showed AC joint arthrosis. Dr. Chan noted that Claimant had done rather well and had rather minimum pain complaints. Dr. Chan noted that even though Claimant had some sort of pain, it was no longer functionally limiting. Dr. Chan noted the MRI findings were essentially within normal limits and opined that Claimant would most likely be at maximum medical improvement. Dr. Chan noted that with no significant pathology identified on imaging studies, he did not anticipate any permanent impairment. Dr. Chan noted that for

maintenance, Claimant may have chiropractic care, repeat facet injections in the cervical spine, and repeat shoulder injections. *See* Exhibits 2, D.

26. On June 15, 2018, Dr. Koval evaluated Claimant. She noted that overall Claimant's neck and back pain were fairly well controlled and flared up occasionally, but did not last. Dr. Koval noted that Claimant's shoulders had waxed and waned for quite some time and had never returned to 100%. Dr. Koval noted that Dr. Parker was recommending arthroscopy on the right shoulder and an MRI on the left shoulder and that the right shoulder surgery was tentatively scheduled for July 25, 2018 pending insurance approval. *See* Exhibit 3.

27. On June 22, 2018, Claimant underwent an MRI of his left shoulder interpreted by Trystain Johnson, M.D. Dr. Johnson provided the impression of diffuse rotator cuff tendinosis and articular surface fraying with low grade partial articular side tear of the distal 10 mm of the upper subscapularis with no full thickness rotator cuff tear or muscle belly atrophy. She also provided the impression of severe acromioclavicular joint arthrosis with capsular thickening and edema as well as subchondral bony remodeling and probably erosive change and opined it most likely was chronic repetitive trauma with developing arthrosis. She found mild long head biceps tendinosis without tear or subluxation and diffuse labral fraying without tear. *See* Exhibits 3, D.

28. On June 26, 2018, Respondent filed a notice of contest contesting/denying Claimant's workers' compensation claim. See Exhibit A.

29. On July 2, 2018, Dr. Parker evaluated Claimant. Dr. Parker noted that Claimant tentatively had surgery for the right shoulder scheduled for later in the month but that the claim had not been accepted. On examination, Dr. Parker found tenderness over the acromioclavicular joint in the right shoulder and left shoulder. Dr. Parker opined that the left shoulder MRI demonstrated acromioclavicular osteoarthritis and rotator cuff tendinosis versus small partial tear. Dr. Parker diagnosed primary osteoarthritis, right shoulder and secondary osteoarthritis, left shoulder. Dr. Parker opined that Claimant would ultimately probably need surgical intervention bilaterally in the shoulders. Dr. Parker opined that Claimant's history certainly supported a significant work aggravation to the bilateral acromioclavicular arthritis with some rotator cuff findings bilaterally. See Exhibit 1.

30. On July 16, 2018, Dr. Koval evaluated Claimant. Claimant reported persistent pain in both shoulders, right greater than left. Dr. Koval noted that surgery was not approved for the right shoulder and that they would continue with conservative care. Claimant reported his low back pain at a 4/10, his neck pain at a 6-7/10 and his right shoulder pain at a 6-7/10. *See* Exhibit 3.

31. On August 23, 2018, Dr. Koval evaluated Claimant. She noted that his symptoms were unchanged. She noted that the case had been under a notice of contest since June 26, with no updates. Claimant denied having ever been treated in the past for

his shoulder issues. Dr. Koval continued to recommend conservative treatment. *See* Exhibit 3.

32. On November 29, 2018, Claimant underwent an independent medical evaluation performed by Lawrence Lesnak, D.O. Claimant reported that on November 18, 2017 he was removing ceiling drywall in a building that had caught fire and that he did not recall any specific inciting event. Claimant reported that sometime afterward had increased fatigue and pain in his bilateral anterior shoulder regions and that when the fire call was complete, he went back to the firehouse and went to sleep. Claimant reported that several days later, he notified his supervisor because he had increased symptoms and went for evaluation. Claimant reported no long-term improvement of his symptoms. Claimant reported constant bilateral anterior shoulder aching sensations, constant posterior neck aching and diffuse low back pain. Claimant reported a history of chronic neck pain for which he had been undergoing treatment for at least the past 10-15 years. Claimant reported a cervical MRI six months prior to November 2017 and a cervical facet joint trial in approximately 2016. Claimant also reported that he had bilateral shoulder pain prior to November 2017 but that he had undergone no specific treatment for the shoulder symptoms before November 2017. Claimant also reported that he had no specific low back issues before November 2017. *See* Exhibit B.

33. Claimant reported that his symptoms were essentially unchanged from what they were before November 2017 but that his function was somewhat different. Claimant reported he could still do everything but it just caused more pain. Claimant reported his worst pain at a 7/10 and his best at a 3/10. Dr. Lesnak reviewed medical records. Dr. Lesnak noted that Claimant had undergone a C5-6 bilateral facet joint injection on November 1, 2017 just 17 days prior to the reported injury. Dr. Lesnak also noted that Claimant's November 29, 2017 right shoulder MRI is completely unchanged from Claimant's October 18, 2017 right shoulder MRI done just one month prior to the reported injury. Dr. Lesnak also noted that the findings on Claimant's January 25, 2018 cervical spine MRI appeared to be identical to the findings on Claimant's cervical spine MRI on October 18, 2017 just one month prior to the reported injury. *See* Exhibit B.

34. Dr. Lesnak opined that Claimant had no work related diagnoses relating to the reported injury on November 18, 2017. Dr. Lesnak opined that it was quite clear that Claimant had chronic and progressive neck, upper back, shoulder, and upper extremity symptoms for many years prior to November 18, 2017. Dr. Lesnak noted a cervical spine MRI and right shoulder MRI were performed just one month before the reported injury due to Claimant's chronic progressive symptomatology. Dr. Lesnak also noted that Claimant was referred for an orthopedic surgery evaluation for the right shoulder symptoms and was referred for cervical facet joint injections for his neck pains just prior to the reported injury. Dr. Lesnak pointed out that Claimant's pain levels just prior to November 18, 2017 were noted as being between 6-9/10 and essentially the same as what were reported after the November 18, 2017 reported injury. Dr. Lesnak also opined that the MRIs were identical before and after November 18, 2017. Dr. Lesnak opined that there was no evidence of any structural injury and that although Claimant reported subjectively that his symptoms were worse, the records show the symptoms were

essentially the same before and after November 18, 2017, other than some complaints of low back pain. Dr. Lesnak also opined that the exam findings were essentially identical before and after November 18, 2017. Dr. Lesnak opined there was no acute exacerbation of a pre-existing condition. Dr. Lesnak opined that Claimant should continue seeking medical care outside the workers' compensation claim since there appeared to be no occupational injuries. Dr. Lesnak opined that Claimant merely had ongoing chronic symptoms that have been chronically progressive but essentially unchanged just prior to and after November 18, 2017. *See* Exhibit B.

35. Prior to November 18, 2017, Claimant had undergone several cervical spine MRIs including ones on November 30, 2006, April 8, 2015, and October 18, 2017. In 2006, the MRI order comments noted that Claimant had bilateral radicular pain/numbness and to rule out herniated disk. The 2006 findings included multilevel discogenic degenerative change most pronounced at C5-6. In 2015, the MRI order comments noted tingling in hands and chronic neck pain with request to rule out disk herniation or nerve root compression. The 2015 findings included multilevel disk and/or bony bulging with resultant borderline to mild central spinal canal stenosis at C5-6 and narrowing of the left C5-6 neural foramen as well as minor foraminal narrowing bilaterally at C6-7. *See* Exhibit C.

36. On October 4, 2017, Ranee Shenoi, M.D. evaluated Claimant. Claimant reported pain and discomfort in his neck and shoulders and that the pain began 20+ years ago with no trauma other than a motor vehicle accident or football from years ago. Claimant reported tightness in his shoulders for the past three months and that it hurt to lift them. Claimant reported concern with his quality of life due to constant irritation with his pain/function at a 6-7/10 usually but spiking to an 8-9/10. Overall, Claimant reported his pain was worsening. Claimant reported that he had undergone chiropractic care, acupuncture, physical therapy, and massage that were not helpful and that he was taking oxycodone and flexeril medications. Claimant reported bilateral hand numbness/tingling in his median 2 digits that correlated with muscle tightness in his shoulders. On examination, Claimant had mildly decreased bilateral flexion in cervical range of motion and tenderness along the shoulder girdle, biceps tendons, acromioclavicular joints and subacromial spaces bilaterally. Dr. Shenoi assessed bilateral shoulder pain, right greater than left and cervical disc disease with possible radiculopathy or facet mediated pain. Dr. Shenoi recommended a right shoulder MRI and a cervical MRI. Dr. Shenoi referred Claimant to physical therapy and opined that a surgical opinion was not indicated at the time but would be considered if Claimant's symptoms were not responsive to non-surgical care. *See* Exhibits C, E.

37. The October 18, 2017 cervical MRI, which was performed approximately one month before this reported work injury, shows in the history that it was for Claimant's complaints of bilateral shoulder pain and tingling in his median 2 digits, cervical radiculopathy. The findings included mild progression in degenerative changes with moderate bilateral foraminal narrowing and mild canal stenosis at C3-4, grossly similar moderate to severe bilateral foraminal narrowing at C5-6, moderate to severe right and

moderate left foraminal narrowing at C6-7, and straightening and mild reversal of the normal lumbar lordosis. *See* Exhibit C.

38. One month prior to November 18, 2017, Claimant also underwent an MRI of his right shoulder. On October 18, 2017, the findings from the MRI included very low-grade partial articular surface tear involving the posterior fibers of the supraspinatus at the footprint. They also included supraspinatus, infraspinatus, subscapularis, and intra-articular biceps tendinosis, subacromial/subdeltoid bursal fluid consistent with mild bursitis. Acromioclavicular degenerative arthrosis was found and mild fraying of the superior labrum without discrete labral tear was also found. *See* Exhibit C.

39. Dr. Lesnak testified at hearing consistent with his independent medical examination report.

40. Claimant testified at hearing inconsistent with the medical records in evidence.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove, by a preponderance of the evidence, a causal relationship between a work injury and the condition for which benefits are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The existence of a preexisting condition will not prevent an injury from "arising out of" the employment. *Peter Kiewit Sons' Co. v. Indus. Comm'n of Colo.*, 124 Colo. 217, 220, 236 P.2d 296, 298 (1951); *Subsequent Injury Fund v. Thompson*, 793 P.2d 576, 579 (Colo. 1990). Generally, an injury will be found compensable if the employment aggravated, activated, caused, or accelerated a medical disability or need for medical treatment. *Id*.

An incident, which merely elicits pain symptoms caused by a pre-existing condition, does not compel a finding that the claimant sustained a compensable aggravation. *F. R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Barba v. RE 1J School District*, W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company*, W.C. No. 3-850-024 (December 14, 1989). Rather, a claimant must establish to a reasonable degree of probability that the need for additional medical treatment is proximately caused by the aggravation, and is not simply a direct and natural consequence of the pre-existing condition. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo.1949); *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990) *cf. Valdez v. United Parcel Service*, 728 P.2d 340 (Colo. App. 1986). A respondent is liable only for the disability flowing proximately and naturally from an industrial injury. *Travelers Insurance Co. v. Savio*, 706 P.2d 1258 (Colo. 1985); *Standard Metals Corp. v. Ball*, 474 P.2d 622 (Colo. 1970).

Claimant, overall, is not found credible or persuasive. During the course of his treatment for this alleged work injury, Claimant falsely reported to Dr. Koval that he had never been treated in the past for shoulder issues. However, records show that he had been referred to physical therapy and prescribed muscle relaxers for his bilateral shoulder pain prior to the alleged work injury and had undergone a right shoulder MRI just one month prior to the alleged work injury. Claimant also testified on direct examination that prior to the injury, his pain in the bilateral shoulders, neck, and low back was at a 3-4/10 and increased to an 8/10 after the alleged injury. However, medical records show a pre-injury pain level of 6-7/10 spiking to 8-9/10.

Claimant also testified that he was more or less asymptomatic prior to this alleged injury and had low pain and was able to perform his activities of daily living without pain. Again, medical records show just six weeks prior to the alleged work injury Claimant reported pain and discomfort in his neck and shoulders that had worsened in the past

three months such that it hurt to lift his shoulders and to a degree that he was concerned about his quality of life due to the constant irritation. Additionally, medical records contradict Claimant's report that he had no left shoulder symptoms prior to the alleged injury and the medical records show that he had bilateral shoulder pain, right worse than left.

Dr. Lesnak is found credible and persuasive. As found above the objective medical testing and imaging found no indication of an acute injury on November 18, 2017. The imaging of the right shoulder and cervical spine were nearly identical to the imaging performed just prior to the alleged work related injury. Although there is no pre-existing imaging for the left shoulder or lumbar spine, the objective evidence is consistent with Dr. Lesnak's opinion that there was no acute injury to any areas. Dr. Parker's opinion on aggravation and acceleration is not, overall, persuasive. Dr. Parker bases his opinion on Claimant's subjective reports and the first visit with Dr. Parker shows that Claimant reported his problems and symptoms began in his bilateral shoulders after the November 18, 2017 work incident. We know this to be inaccurate. It is unclear whether Dr. Parker had access to Claimant's significant and severe pre-existing shoulder issues, but Claimant did not subjectively report his history accurately to Dr. Parker. Dr. Lesnak had full access to prior records and his opinion is more persuasive and consistent with the overall weight of the evidence.

Claimant had severe and ongoing pre-existing problems that were causing him problems and pain prior to this alleged work injury and continue to cause him problems and pain. It is not surprising that he had pain with activity during work hours as he was having pain with activity at all times prior to November 18, 2017. Claimant has failed to establish, by a preponderance of the evidence, that he either sustained a new injury or aggravated/accelerated his pre-existing and significant ongoing conditions. Therefore, his claim is denied and dismissed.

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Claimant has failed to establish that any medical treatment is reasonable and necessary to cure and relieve the effects of a work related injury. Rather, Claimant remains in need of medical treatment as he was in need prior to November 18, 2017. His request for right shoulder surgery is denied and dismissed.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable work related injury on November 18, 2017. His claim is denied and dismissed.

2. As Claimant has failed to establish a compensable work related injury, his request for right shoulder surgery as recommended by Dr. Parker is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, *see* section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 6, 2019

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 1525 Sherman Street, 4th Floor, Denver, CO 80203	
In the Matter of the Workers' Compensation Claim of: , Claimant, vs. Employer, , Insurer Respondents.	▲ COURT USE ONLY ▲ **CASE NUMBER:** **WC 4-952-617-001**

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Hearing in this matter was held on December 12, 2018, and March 29, 2019, before Administrative Law Judge (ALJ) Margot W. Jones in Denver, Colorado. The hearing was held in Courtroom 3 on December 12, 2018, and in Courtroom 4 on March 29, 2019. Claimant was present at the hearing and represented by Jess Perez, Esq. Respondents appeared through Bradley J. Hansen, Esq. The parties' exhibits 1-19 and A-Y were admitted into evidence.

In this order, EB shall be referred to as "Claimant," X shall be referred to as "Employer" and N shall be referred to as "Insurer." Employer and Insurer, collectively, will be referred to as "Respondents."

In this order, the Judge may use the following acronyms: C.R.S. refers to Colorado Revised Statutes (2018); the Act refers to the Workers' Compensation Act of Colorado, §§8-40-101, et seq., supra; OAC refers to the Office of Administrative Courts; OACRP refers to the Office of Administrative Courts Rules of Procedure, 1 CCR 104-1; and WCRP refers to Workers' Compensation Rules of Procedure, 7 Code Colo. Reg. 1101-3.

ISSUES

1. Whether Claimant proved by clear and convincing evidence that the opinion of the Division independent medical examiner (DIME), Dr. Scott Hompland, D.O. with regard to maximum medical improvement (MMI) is most probably incorrect;

2. Whether Claimant established by a preponderance of the evidence that he is entitled to an award of indemnity benefits; and

3. Who is Claimant's authorized treating physician (ATP).

FINDINGS OF FACT

1. Claimant is a 40-year-old male who worked for Employer on an oil rig. Claimant sustained a work-related back injury on April 9, 2014. Claimant states he was pushing back pipe and he felt his back "pop." Claimant treated at Banner Health Occupational with Dr. Laura Caton.

2. Prior to working for Employer, Claimant worked on another oil rig for another company as a yard hand. Claimant had a back injury while working for this employer that included two "shattered" discs.

3. Claimant has had chronic back pain that dates back to 2001. Claimant was seen at University of Colorado Hospital on March 24, 2011, complaining of low back pain for 10 years that was debilitating. On April 14, 2011, Claimant had a fusion surgery at University of Colorado Hospital from L4-SI.

4. Claimant had SI joint injections in 2012 after the fusion surgery due to complaints of continued back pain. An x-ray was performed on November 14, 2013, for back pain. Claimant was taking morphine and other narcotics at the time. An MRI of the lumbar spine was ordered due to six months of low back pain above the incision line from his fusion surgery.

5. On January 17, 2012, Claimant reported to his primary care physician at Monfort Family Clinic that he was tired and needed pain meds for back pain.

6. On October 25, 2012, Claimant reported he was taking Percocet 1 every 3-4 hours for back pain, starting SI joint therapy and considering surgery again, however it would be a 2-year process as only 1 SI joint can be operated on at one-time.

7. On August 14, 2014, Claimant was seen by Dr. Laura Caton at Banner Health for his work injury with Employer. Dr. Caton noted it was "challenging" to identify a pain generator.

8. Claimant had hardware injections but reported his pain was 10/10. An MRI completed on July 2, 2014, revealed postoperative changes from the fusion surgery and mild progression at L3-L4.

9. Dr. Brian Beatty performed an independent medical examination (IME) on October 9, 2014, and opined all appropriate interventions had been performed on Clamant and there is no further medical care that would bring him to MMI. All of Claimant's current symptoms and complaints are related to the lumbar spinal fusion surgery from 2011.

10. Claimant continued treatment with Dr. Caton to include injections, medications, and physical therapy. Claimant was placed at MMI on June 24, 2015, and assigned a 31% impairment rating. Respondents challenged the opinion of the ATP and requested a DIME.

11. The DIME was done by Dr. Scott Hompland on December 7, 2015. The DIME agreed with the authorized treating physician (ATP) that Claimant was at MMI on June 24, 2015, and assigned a 22% whole person impairment rating. A final admission of liability was filed on December 22, 2015, admitting for the findings of the DIME.

12. Claimant objected to the FAL and filed an application for hearing to overcome the DIME findings of MMI and permanent partial disability benefits (PPD). The issue of temporary total disability benefits was not endorsed by Claimant on the application for hearing (APH) filed on January 20, 2016, and subsequent AFH filed on October 20, 2016.

13. Claimant's medical care was transferred to Dr. Alicia Feldman due to Dr. Caton transferring to another clinic.

14. Claimant continued to treat with Dr. Alicia Feldman for maintenance care after the filing of the FAL. On July 25, 2016, Dr. Feldman agreed that SI joint fusion was not reasonable or related to the April 9, 2014, work injury. SI joint injections were also considered not reasonably necessary or work related.

15. On March 6, 2017, Dr. Feldman responded to Respondents' counsel's interrogatories and opined Claimant's symptoms were due to his previous work injury and SI joint pathology was present prior to 2014. Dr. Feldman also stated Claimant was discharged from the clinic for violation of his pain contract.

16. Claimant began treating outside the workers' compensation system since he had been discharged from care from Dr. Feldman.

17. Claimant began treating with Dr. Kathy McCranie for pain management upon agreement of the parties. Claimant testified at hearing that Dr. McCranie was an

ATP. Claimant was seen by Dr. McCranie on three separate occasions but discontinued going due to her recommendation to wean Claimant off pain medications. Claimant indicated at the July 25, 2018, office visit that he did not feel he needed to see Dr. McCranie any further. The ALJ finds Dr. McCranie is Claimant's ATP.

18. On May 2, 2017, Claimant had a right SI joint injection at Denver Health Medical Center.

19. On August 23, 2017, Claimant underwent an IME with Dr. Stephen Gray who opined Claimant was not at MMI and required additional medical treatment. Dr. Gray testified Claimant had extreme pain behaviors disproportionate to objective findings. Dr. Gray recommended SI joint injections, fusion, and hardware removal.

20. On February 1, 2018, Claimant underwent a left SI joint fusion with Dr. Fernando Techy. On March 23, 2018, Claimant underwent a right SI joint fusion. Claimant reported no benefit from the surgery. Claimant had a SI joint injection which Claimant states only increased his pain.

21. On August 10, 2018, Claimant had hardware removal at L4-L5 and L5-SI.

22. Dr. Jeffrey Raschbacher performed an IME at the request of Respondents on October 30, 2018. Dr. Raschbacher opined in his report that further application of medical resources would not produce significant improvement in subjective complaints for Claimant's reported functional status. Dr. Raschbacher did not recommend any further treatment or intervention under the claim. Dr. Raschbacher also testified at the hearing held in this matter. His opinion remained the same and noted that all the treatment recommendations that were suggested for Claimant's SI joints have been done and yet, he still has no improvement in his symptoms.

23. Claimant testified at the hearings held in this matter. Claimant testified he was still in pain and that the procedures were not helpful.

24. The ALJ credits the medical records and the opinions of Drs. Hompland, Caton, Feldman, Raschbacher, McCranie, and Beatty over the conflicting opinion of Dr. Gray that Claimant is not at MMI for his 2014 work injury.

25. Claimant has failed to overcome the DIME physician's opinion of MMI by clear and convincing evidence.

26. Claimant's expert, Dr. Gray, does not provide any treatment he is recommending that has not been provided to Claimant without any beneficial effect. The ALJ does not find Dr. Gray's testimony and opinion persuasive or credible.

27. Claimant was properly placed at MMI by the DIME on June 15, 2015, and is not entitled to additional indemnity benefits of TTD.

28. The ALJ finds the medical treatment and medications Claimant received after being placed at MMI to include left and right SI joint injections, left and right SI joint fusion, pain medications, rhizotomy, spinal cord stimulator and surgical hardware removal were not necessary nor reasonable treatment for Claimant under the claim as they provided no beneficial effect to Claimant.

29. Evidence and inferences contrary to these findings were not credible and persuasive.

CONCLUSIONS OF LAW

General Legal Principles

1. The purpose of the Act is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1), C.R.S. Generally, the claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979).

2. A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive*. Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. Industrial Commission of Colorado v. Jones, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

4. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

DIME procedure

5. In this case, Claimant contends that the DIME's opinion on MMI is most probably incorrect. MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. A DIME physician's finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

6. Under the statute, MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007). A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Construction Management,* W.C. No. 4-356-512 (ICAO May 20, 2004); *Hatch v. John H. Garland Co.,* W.C. No. 4-638-712 (ICAO August 11, 2000). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. Therefore, the DIME physician's opinions on these issues are binding unless overcome by clear and convincing evidence. *See Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

7. The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the

DIME physician's finding concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

8. As found, Claimant failed to prove by clear and convincing evidence that the opinion of Dr. Scott Hompland is most probably incorrect with regard to the issue whether Claimant is at MMI. No credible or persuasive evidence was presented that Dr. Hompland's opinion on MMI was incorrect. Claimant relies on Dr. Gray's opinion rendered after conducting an IME that Claimant requires additional curative treatment. However, Dr. Gray does not point to any treatment he is recommending that has not already been provided to Claimant without any beneficial effect.

9. Dr. Hughes' opinion does not establish by clear and convincing evidence that Dr. Hompland's DIME opinion was most probably incorrect.

10. Dr. Raschbacher testified that in workers' compensation claims, while unfortunate, a claimant may have chronic pain from a work injury and nothing further will cure the symptoms. As the definition of MMI states, the point when nothing further will improve the effects of the industrial injury. All of the procedures Claimant had done after being placed at MMI were ineffective and so he was properly placed at MMI on June 24, 2015. Also, the ATP and DIME opined that a lot of Claimant's pain stemmed from his prior back injury to this claim and that the treatment for his SI joints predated the 2014 work injury. Chronic back issues are to be expected given the original 2011 back fusion and numerous other treatment but this does not mean Claimant is not at MMI.

11. The ALJ also finds the opinion and testimony of Claimant's expert, Dr. Gray, to not be persuasive or credible. Dr. Gray testified at the hearing that he examined Claimant for purposes of an IME at the request of Claimant's counsel. At hearing, Dr. Gray testified that Claimant had "extreme" pain behaviors out of proportion to objective findings. Dr. Gray admitted every procedure he had recommended in his IME report had been completed and did not appear to relieve Claimant of his symptoms. Claimant has failed to meet his burden of clear and convincing evidence to overcome the DIME opinion.

Temporary Total Disability Benefits

12. Temporary total disability benefits (TTD) benefits continue until the occurrence of one of the four terminating events specified in section 8-42-105(3), C.R.S. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Under section 8-42-105(3)(a), C.R.S., temporary disability benefits terminate when the employee reaches MMI. Since it is found and concluded that the DIME's opinion on MMI was not overcome by clear and convincing evidence, it is also found that Claimant is not entitled to an order awarding indemnity benefits.

Authorized provider of medical treatment

13. Section 8-43-404(5)(a), C.R.S. gives the respondents the right in the first instance to select the authorized treating physician (ATP). Authorization refers to a physician's legal status to treat the industrial injury at the respondents' expense. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *Popke v. Industrial Claim Appeals Office,* 944 P2d. 677 (Colo. App. 1997). Once an ATP has been designated the claimant may not ordinarily change physicians or employ additional physicians without obtaining permission from the insurer or an ALJ. If the claimant does so, the respondents are not liable for the unauthorized treatment. *Yeck v. Industrial Claim Appeals Office,* 996 P.2d 228 (Colo. App. 1999). If upon notice of the injury the employer fails forthwith to designate an ATP, the right of selection passes to the claimant. *Rogers v. Industrial Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987). The employer's obligation to appoint an ATP arises when it has some knowledge of the accompanying facts connecting an injury to the employment such that a reasonably conscientious manager would recognize the case might result in a claim for compensation. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006).

14. As found, Claimant treated with Dr. Kathy McCranie and conceded she is his ATP. Therefore, the ALJ finds Dr. Kathy McCranie is claimant's ATP. Claimant was discharged from care with the original ATP, Dr. Feldman, for violation of his pain contract. Dr. Feldman was providing pain management maintenance care to the Claimant. After Claimant was discharged from care, he began seeking treatment outside of workers' compensation. At no time during the course of this claim did respondents give up their right to select an ATP. Claimant presented no evidence to dispute the right of selection had passed to him.

15. Upon agreement of the parties, claimant began treating with Dr. McCranie for pain management on May 8, 2018. Claimant was seen by Dr. McCranie on three separate occasions. If there was a dispute as to the ATP, Claimant in effect "chose" Dr. McCranie by continuing to treat with her, and, claimant testified at the March 29, 2019 hearing that she was the ATP. For these reasons, it is found Dr. McCranie is Claimant's ATP.

16. Dr. Raschbacher testified that in workers' compensation claims, while unfortunate, a claimant may have chronic pain from a work injury and nothing further will cure the symptoms. As the definition of MMI states, the point when nothing further will improve the effects of the industrial injury. All of the procedures Claimant had done after being placed at MMI were ineffective and so he was properly placed at MMI on June 24, 2015. Also, the ATP and DIME opined that a lot of Claimant's pain stemmed from his prior back injury to this claim and that the treatment for his SI joints predated the 2014 work injury. Chronic back issues are to be expected given the original 2011 back fusion and numerous other treatment but this does not mean Claimant is not at MMI.

17. The ALJ also finds the opinion and testimony of Claimant's expert, Dr. Gray, to not be persuasive or credible. Dr. Gray testified at the hearing that he examined Claimant for purposes of an IME at the request of Claimant's counsel. At hearing, Dr. Gray testified that Claimant had "extreme" pain behaviors out of proportion to objective findings. Dr. Gray admitted every procedure he had recommended in his IME report had been completed and did not appear to relieve Claimant of his symptoms. Claimant has failed to meet his burden of clear and convincing evidence to overcome the DIME opinion.

ORDER

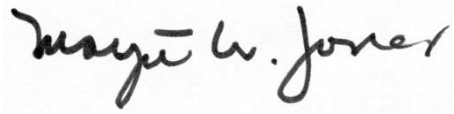
1. Claimant has failed to overcome the DIME opinion of Dr. Scott Hompland by clear and convincing evidence.

2. Dr. Kathy McCranie is claimant's ATP.

3. Claimant is not entitled to an order awarding indemnity benefits since he is at MMI.

4. All matters not determined herein are reserved for future determination.

DATED: August 2, 2019



MARGOT W. JONES
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, Denver, Colorado, 80202. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. (as amended, SB 09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that he suffered a functional impairment contained off the schedule of injuries set forth at Section 8-42-107(2), C.R.S. and is entitled to permanent partial disability benefits based upon a whole person conversion of the upper extremity rating.

2. Whether the Claimant is entitled to compensation for disfigurement pursuant to C.R.S. § 8-42-108 and, if so, the amount of compensation.

3. Whether Claimant has established by a preponderance of the evidence an entitlement to medical maintenance benefits as recommended by the DIME physician Dr. Hall.

FINDINGS OF FACT

1. Claimant is a male who was employed by Employer as a mechanical assembler at the time of a November 28, 2016 work injury. Claimant remains employed by Employer but now is a test stand operator. Claimant has been employed by Employer for approximately 12 years.

2. On November 28, 2016, Claimant sustained an admitted work related injury to his left forearm. On that date, when it was cold outside, Claimant went to close an overhead door. By some means, his left arm was caught in a chain and the chain cut through his left forearm as the chain was moving. Claimant pulled with his other arm trying to avoid the cable/chain cutting completely through his left forearm. While his forearm was caught in the chain, the chain was pulling Claimant off the ground. Claimant yelled for a coworker to help, a coworker arrived with cutters and cut the chain, and Claimant fell to the ground. Claimant was bleeding significantly and initially attempted to run to his car in an attempt to drive to the hospital, but he was stopped by Employer's response team who assisted him and called an ambulance.

3. Records from Thompson Valley EMS on November 28, 2016 show that Claimant was picked up at work and transported by ambulance to Mckee Medical Center Emergency Department. *See* Exhibit 5.

4. Claimant arrived at the Emergency Department of McKee Medical Center and was evaluated. Claimant reported that a cable from the garage at work cut into his arm. A left forearm laceration at the volar aspect of the left forearm was noted. Claimant reported numbness in his left hand involving the thumb and index finger. Claimant reported no pain or injury to his neck, upper back, or chest. The examination found a deep and extensive laceration across the volar aspect of the left forearm and the proximal

third transected muscle tissue. It was noted that Claimant was unable to flex his wrist and that he had sensory deficit in his left thumb and index finger. *See* Exhibit 6.

5. Steven Sides, M.D. was brought in to evaluate and perform surgery on Claimant's left forearm. Dr. Sides noted at the Emergency Department evaluation on November 28, 2016 that Claimant's laceration was quite deep, that there was some sensation loss, but that the motor function seemed intact. On examination, Dr. Sides found full range of motion of the left shoulder and non-tenderness about the shoulder and elbow. He found a 12 cm laceration on the middle third of the forearm that was transverse in nature, perpendicular to the long axis of the forearm that was complex. Dr. Sides noted there was exposed muscle and blood clot in the wound. Dr. Sides assessed left forearm laceration with penetrating trauma, likely intramuscular injury only although he opined there may be some mild neurological injury as well. Dr. Sides planned surgery including debridement and irrigation of the left forearm would with repair of structures as needed and Claimant was taken into surgery that afternoon. *See* Exhibits 6, A.

6. In surgery, Dr. Sides debrided some skin, some underlying subcutaneous fat, a small amount of muscle, some fascia, and some deeper tissue. Dr. Sides noted that the radial artery was lacerated and completely clotted in the wound and he tied off the ends with silk ties. Dr. Sides opined that there was no tendinous tissue that could be repaired. He felt the median nerve as intact and could not visual well the superficial radial nerve. He again noted that the radial artery was completely lacerated. He closed the wound and noted capillary refill in all digits of the hand after the procedure. *See* Exhibit 6.

7. As a result of his surgery and injury, Claimant has a scar measuring approximately 6 inches on his left forearm. The scar is deep, wide, and discolored from Claimant's skin tone despite adequate time for healing. At hearing, although pictures of the injury were offered, the ALJ viewed the actual scar in its current condition. In addition to the deep, wide, 6-inch scar, Claimant has an indentation of musculature on his left forearm that is visibly different in appearance from his non-injured right forearm.

8. On November 30, 2016, Employer completed a member incident report after getting a statement from Claimant over the phone. The report indicates that Claimant was working near the receiving door and that it was cold outside so he went to close the door. Claimant reported that when he pushed the button to close the dock door, the cable for the door was hanging loose, the motor started winding the cable up, and his left forearm was caught between the cable and the door. Claimant reported that the cable started cutting into his arm and he started to be lifted off the ground because his arm was wedged between the cable and door. Claimant reported that he yelled for someone to bring wire/cable cutters and that a co-worker cut the cable and he fell to the ground. Claimant reported he was fearful his left arm would have been amputated. *See* Exhibit 3.

9. On December 6, 2016, Steven Mull, M.D. evaluated Claimant. Claimant reported that his left forearm was stuck in cables at work. Claimant reported that he went to McKee Medical Center by ambulance and had surgery that day. Claimant reported his

pain was at a 7/10. Claimant reported his left middle, index, and thumb were numb and tingling. Claimant reported difficulty sleeping due to his pain. Dr. Mull opined that neurologic damage was still uncertain. Dr. Mull assessed laceration with deep tissue vascular and neurologic injury, post-surgical repair and he recommended follow up reevaluation in one month. *See* Exhibit 7.

10. On July 27, 2017, Gregory Reichhardt, M.D. evaluated Claimant. Claimant reported that he had some pain over the radial forearm and numbness in the palmar and dorsal aspects of digits one through three on the left hand. Claimant denied any symptoms proximal to the mid-forearm. Claimant reported his pain was at a 5-6/10 and that using his hand to do physical work aggravated his pain. Claimant reported that his pain interfered with playing sports, working on cars, playing drums, doing handyman work, and grabbing things. On examination, Claimant had decreased sensation to light touch over the palmar and dorsal aspect of the left hand, digits one through three. Claimant had no tenderness to palpation about the cervical spine, no tenderness about the shoulder, and had good shoulder range of motion. Claimant had no cervical paraspinal muscle spasm, no tenderness to palpation about the elbow, and normal elbow range of motion. On an assessment, Claimant reported not at all to a question of whether the muscles in his neck ached. Claimant also had negative test signs over the median and ulnar nerves at the elbow. Electrodiagnostic testing showed left median neuropathy at the wrist with old/chronic axonal involvement but without acute axonal involvement, left radial sensory neuropathy at the wrist. *See* Exhibits 8, B.

11. On January 8, 2018, Dr. Sides evaluated Claimant. Claimant reported that he did not think his arm was getting stronger and that he continued to have numbness in his fingers. Dr. Sides recommended compounding cream to help with the nerve pain. *See* Exhibit 9.

12. On February 8, 2018, Kevin O'Toole, D.O. evaluated Claimant. Dr. O'Toole noted that Claimant had recently completed a functional capacity evaluation where he reported occasional shooting pains from his incision distally into the palm, constant numbness of the radial forearm, entire dorsal hand, and medial one half of the volar aspect of the hand. Dr. O'Toole noted that Claimant had been functioning satisfactorily at work but had not resumed playing bongo drums. Claimant reported that he had been using a xenia compound cream for neuropathic pain and that it reduced his daily pain. Claimant reported that his current symptoms included pain in the left arm and that his condition had stayed the same since his last visit. Dr. O'Toole assessed laceration of radial artery at left forearm level, forearm laceration, and radial neuropathy. Dr. O'Toole recommended independent exercises, continued use of Xenia compound cream, and maintenance medication as needed with occupational medicine evaluation every 6-12 months. Dr. O'Toole opined that Claimant was at maximum medical improvement with a rating of 21% upper extremity impairment. *See* Exhibits 10, C.

13. On March 12, 2018, Respondents filed a final admission of liability. Respondents admitted to permanent partial disability benefits as a scheduled impairment rating of 21% of the arm at shoulder. Respondent also admitted to post maximum medical

improvement medical benefits that were related, reasonable, and necessary as recommended by an authorized treating physician. Respondents reserved the right to challenge the reasonably necessity and causal relatedness of any treatment recommended by a provider or sought by Claimant. *See* Exhibit 1.

14. On November 7, 2018, Claimant underwent a Division Independent Medical Examination (DIME) performed by Timothy Hall, M.D. Dr. Hall noted that he reviewed the mechanism of injury with Claimant and that it was consistent with the records. Dr. Hall also noted that he reviewed the medical records and that there were no discrepancies. Dr. Hall performed a physical examination. Dr. Hall opined that Claimant was at maximum medical improvement (MMI). Dr. Hall recommended as maintenance care a trial of neuroleptic medication such as gabapentin or Lyrica and recommended the medications over a two-year period with physician visits every three months. Dr. Hall opined that Claimant had a 27% upper extremity impairment rating which converted to a 16% whole person impairment for the radial nerve injury below the triceps, the range of motion loss involving the wrist, and the claudication due to injury to the radial artery. Dr. Hall recommended permanent restrictions of no repetitive gripping or pinching with the left hand and no lifting greater than 10 pounds with the left arm, waist to shoulder. *See* Exhibits 4, D.

15. On February 8, 2019, Respondents filed a new final admission of liability, following the DIME. Respondents admitted to permanent partial disability benefits as a scheduled impairment rating of 27% of the arm at shoulder. Respondents also admitted to maintenance care after maximum medical improvement pursuant to Dr. O'Toole's February 8, 2018 report. *See* Exhibit 2.

16. Throughout the course of his treatment, Claimant regularly filled out pain diagrams. Claimant did not circle any areas above his left elbow in pain diagrams dated January 10, 2017, January 31, 2017, February 23, 2017, March 9, 2017, May 16, 2017, July 6, 2017, September 7, 2017, December 19, 2017, January 8, 2018, and February 8, 2018. *See* Exhibits F, G, H, I, J, K, L, M, N, O.

17. Claimant testified at hearing that he has constant pain at all times, with his lowest pain level being a 5/10. Claimant testified that he has intermittent daily shooting pain from his incision site down into his hand. Claimant testified that he lost an artery in his forearm and has nerve damages to his fingers. Claimant also testified that his pain from the injury will sometimes shoot up his arm and down his chest and that he has muscle tightness in his neck and left side. Claimant reported that he cannot perform sports, wear a baseball glove, or drum. Claimant was an avid drummer and performed with bands throughout the last 30 years. Claimant testified that he has trouble sleeping due to the pain and that his pain wakes him up 2-3x per night. Claimant testified that in the winter, he has to wear a sleeve on his arm because of his nerve issues.

18. Claimant testified that he has not been on opioids since his surgery, but that he would like to try Lyrica/gabapentin for his pain. Claimant testified that he never had shooting pain in his shoulder or neck prior to this injury. Claimant testified that the pains

in his shoulder he gets with heavy work and with sleeping and that his overall pain limits his activity.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Disability Compensation Based on Scheduled Injury vs. Whole Person Impairment

The claimant bears the burden of establishing functional impairment beyond the arm at the shoulder and the consequent right to permanent partial disability benefits under§ 8-42-107(8)(c), C.R.S., by a preponderance of the evidence. *Maestas v. American Furniture Warehouse,* W.C. No. 4- 662-3 69 (June 5, 2007); *Johnson-Wood v. City of Colorado Springs,* W. C. No. 4-536-198 (ICAO June 20, 2005).

The question of whether a claimant sustained a "loss of an arm at the shoulder" within the meaning of § 8-42-107(2)(a), C.R.S. or a whole person medical impairment compensable under § 8-42-107(8)(c), C.R.S. is one of fact for determination by the ALJ. In resolving this question, the ALJ must determine the situs of the claimant's "functional impairment," and the site of the functional impairment is not necessarily the site of the injury itself. *Langton v. Rocky Mountain Health Care Corp.,* 937 P.2d 883 (Colo. App. 1996); *Strauch v. PSL Swedish Healthcare System,* 917 P.2d 366 (Colo. App. 1996); *Warthen v. Industrial Claim Appeals Office,* 100 P.3d 581 (Colo. App. 2004).

There is no requirement that functional impairment take any particular form in order to be compensable under § 8-42-107(8)(c), C.R.S. Evidence of pain and discomfort which interferes with the claimant's ability to use a portion of the body may be considered impairment for this purpose. Aligaze *v. Colorado Cab Co. / Veolio Transportation*; W.C. No. 4-705-940 (ICAO April 29, 2009); *Chacon v. Nichols Aluminum Golden, Inc.,* W.C. No. 4-521-005 (ICAO November 29, 2004); *Guillotte v. Pinnacle Glass Company*, W.C. No. 4-443-878 (ICAO November 20, 2001), aff'd., *Pinnacle Glass Co. v. Industrial Claim Appeals Office*, (Colo. App. No. 01CA2386, August 22, 2002) (not selected for publication). The courts have held that damage to structures of the "shoulders" may or may not reflect a "functional impairment" enumerated on the schedule of disabilities. *See Walker v. Jim Fouco Motor Company,* supra*; Strauch v. PSL Swedish Healthcare System,* supra, *Langton v. Rocky Mountain Health Care Corp.,* supra*; Price v. United Airlines,* W.C. No. 4-441-206 (ICAO January 28, 2002); *Johnson-Wood v. City of Colorado Springs,* supra.

In this case, Claimant has failed to establish by a preponderance of the evidence that his functional impairment extends beyond the arm at the shoulder. Rather, all the credible evidence and testimony limits the functional impairment to areas below Claimant's elbow. As found above, on examinations Claimant has had no spasms, tenderness, or problems noted by physicians above the left elbow. Claimant filled out multiple pain diagrams reporting no problems above the left elbow. On the date of injury, at the emergency department, Claimant reported no pain or injury to his neck, upper back, or chest. Claimant had full range of motion in his left shoulder and non-tenderness about his left shoulder and elbow on examination by Dr. Sides at the emergency department. In July of 2017, when evaluated by Dr. Reichhardt, Claimant reported no symptoms proximal to the mid-forearm and he had no tenderness to palpation about the cervical spine, no tenderness about the shoulder, and had good shoulder range of motion. At the July 2017 evaluation, Claimant had no cervical paraspinal muscle spasm, no tenderness to palpation about the elbow, and normal elbow range of motion and Claimant reported not at all to a question of whether the muscles in his neck ached.

The weight of the credible evidence establishes that Claimant does not have permanent partial disability or functional impairment beyond the arm at the shoulder. Although Claimant testified to sleep issues and argues that his impaired sleep impairs his whole body function and is beyond the arm at the shoulder, the ALJ finds this not persuasive. Claimant's functional limitations are below his left elbow and do not qualify for a whole person impairment rating.

Medical Maintenance Benefits

The need for medical treatment may extend beyond the point of MMI where claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expediters Inc.*, 77 P.3d 863, 865 (Colo. App. 2003); *Hobirk v. Colorado Springs School District #11,* W.C. No. 4-835-556-01 (ICAO, Nov. 15, 2012). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that the claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999); *Hastings v. Excel Electric*, W. C. No. 4-471-818 (ICAO, May 16, 2002). The claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915 (Colo. App. 1993); *Mitchem v. Donut Haus*, W.C. No. 4-785-078-03 (ICAO, Dec. 28, 2015). An award of *Grover* medical benefits should be general in nature. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003); *Anderson v. SOS Staffing Services,* W. C. No. 4-543-730, (ICAO, July 14, 2006).

In cases where the respondents file a final admission of liability admitting for ongoing medical benefits after MMI they retain the right to challenge the compensability, reasonableness, and necessity of specific treatments. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003); *Oldani v. Hartford Financial Services,* W.C. No. 4-614-319-07, (ICAO, Mar. 9, 2015). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School District No.11*, W.C. No. 3-979-487, (ICAO, Jan. 11, 2012); *Ford v. Regional Transportation District,* W.C. No. 4-309-217 (ICAO, Feb. 12, 2009. The question of whether the claimant has proven that specific treatment is reasonable and necessary to maintain her condition after MMI or relieve ongoing symptoms is one of fact for the ALJ. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Claimant has consistently reported significant pain as a result of his injury and medical records establish neuropathic pain exists in this case. Claimant testified that he would like to try the additional medications of Lyrica/Gabapentin that have been recommended by DIME physician Dr. Hall. As found above, Dr. Hall recommended as maintenance care a trial of neuroleptic medication such as gabapentin or Lyrica over a two-year period with physician visits every three months. Claimant has established that this specific medical maintenance benefit is reasonable and necessary to relieve the effects of his work related injury or to prevent further deterioration of his condition. As found above, Dr. O'Toole also recommended maintenance medication as needed. Although Dr. O'Toole did not specify or recommended gabapentin or Lyrica, the recommendation for maintenance medication as needed is consistent with Dr. Hall's recommendations. Claimant has met his burden and Respondents shall authorize maintenance benefits for two years trial of neuroleptic medication. Claimant also indicated that he wears a sleeve due to his nerve issues and that at some point in the future, he will need another sleeve. This specific benefit is denied at this time. Claimant

has failed to establish that a new sleeve is reasonable and necessary to relieve the effects of his injury or prevent further deterioration of his condition. This order does not preclude Claimant from seeking a sleeve in the future.

Disfigurement Award

Pursuant to C.R.S. § 8-42-108, if the Claimant is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view, in addition to all other compensation benefits…the director may allow compensation not to exceed four thousand dollars to the employee who suffers such disfigurement." The area normally exposed to public view has been interpreted to include all areas of the body that would be apparent in swimming attire. *Twilight Jones Lounge v. Showers,* 732 P.2d 1230 (Colo. App. 1986). The ability to conceal a disfigurement, by means of clothing or a prosthetic or artificial device does not defeat an entitlement to benefits for the disfigurement. *Arkin v. Industrial Commission,* (145 Colo. 463, 358 P.2d 879 (1961).

As a result of his work related injury and surgery, Claimant has a significant scar on his left forearm, measuring approximately 6 inches in length. The scar is deep, wide, and significantly discolored from Claimant's normal skin tone despite adequate time for healing. In addition to the scar, Claimant has an area on his forearm where there is a raised bump type appearance of his muscle, near where muscle was removed in surgery. Claimant, therefore has sustained permanent disfigurement to an area of his body normally exposed to public view and is entitled to additional compensation. Although Claimant requested a disfigurement award under the higher cap and argues that he has extensive body scars, the ALJ finds this not persuasive and finds that compensation under § 8-42-108(1), C.R.S. adequately compensates Claimant for the degree of his disfigurement. The ALJ finds that Insurer shall pay Claimant $2,900 for the disfigurement described above.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by a preponderance of the evidence that he suffered a functional impairment contained off the schedule of injuries set forth at Section 8-42-107(2), C.R.S. Claimant is not entitled to permanent partial disability benefits based upon a whole person conversion of the upper extremity rating.

2. Claimant is entitled to compensation for disfigurement pursuant to C.R.S. § 8-42-108(1) in the amount of $2,900.

3. Claimant has established by a preponderance of the evidence an entitlement to neuroleptic medications as medical maintenance benefits. Claimant retains the right to request and Respondents retain the right to deny any future specific maintenance medical benefits.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, *see* section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 8, 2019

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 1525 Sherman Street, 4th Floor, Denver, CO 80203	
In the Matter of the Workers' Compensation Claim of: **M,** Claimant, vs. **R,** Employer, And **N**, Insurer, Respondents.	▲ **COURT USE ONLY** ▲ **CASE NUMBER:** **WC 5-044-197-002**

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Hearing in the above-captioned matter was held before Administrative Law Judge Margot W. Jones on April 25, 2019, at 3:22 p.m. in Courtroom 4 in Denver, Colorado. Claimant was present in person and represented by _____, Esq. Respondents were represented by _____, Esq. Claimant's exhibits A-B and Respondents' exhibits A-E were admitted into evidence.

In this order, M shall be referred to as "Claimant," R shall be referred to as "Employer" and N Insurance Company shall be referred to as "Insurer." Employer and Insurer, collectively, will be referred to as "Respondents."

In this order, the Judge may use the following acronyms: C.R.S. refers to Colorado Revised Statutes (2018); the Act refers to the Workers' Compensation Act of Colorado, §§8-40-101, et seq., supra; OAC refers to the Office of Administrative Courts; OACRP refers to the Office of Administrative Courts Rules of Procedure, 1 CCR 104-1; and WCRP refers to Workers' Compensation Rules of Procedure, 7 Code Colo. Reg. 1101-3.

ISSUE

Whether Claimant has proven by a preponderance of the evidence that the Synvisc injection recommended by William Sterett, M.D., is causally related to the industrial injury of March 29, 2017.

STIPULATION

Claimant's Average Weekly Wage is $1,636.45.

FINDINGS OF FACT

1. On March 29, 2017, Claimant sustained an admitted industrial injury to his right knee, right shoulder and left hand when he slipped while walking down a hallway while working for Employer. Respondents admitted liability for the injuries and provided Claimant with medical treatment.

2. Claimant first sought treatment from Aspen Medical Clinic on April 3, 2017, where he was seen by Kim Scheuer, M.D. Dr. Scheuer documented that Claimant's right knee pain was in the area located "behind" [posterior] and "outside" [lateral] his right knee, with "no instability." Dr. Scheuer assessed Claimant with acute pain of the right shoulder, right knee and left wrist, ordered x-rays of the left wrist and recommended physical therapy.

3. Claimant returned to Aspen Medical Clinic on April 12, 2017, where he was seen by Dewayne Niebur, M.D. Consistent with Dr. Scheuer's office note, Dr. Niebur documented that Claimant's right knee pain was "[p]osterior and medial/lateral" with "[n]o instability." Exhibit 1, p. 130. William I. Sterett, M.D. has performed multiple surgeries to Claimant's left knee, culminating in a total knee arthroplasty in March 2013. Therefore, Claimant requested a referral to Dr. Sterett and Dr. Niebur complied.

4. Claimant underwent right knee x-rays on April 19, 2017, which showed postoperative[1] and degenerative changes without acute fracture or effusion.

5. Dr. Sterett examined Claimant's right knee on April 24, 2017, documenting Claimant's complaints of right knee medial and lateral joint pain. Dr. Sterett recommended a right knee MRI.

6. Claimant underwent the right knee MRI on May 5, 2017, which Dr. Sterett reviewed on the same date and opined that the exam showed lateral meniscus posterior root tear, 2 loose bodies and patellofemoral and lateral compartment chondromalacia. His diagnosis was meniscus tear and loose bodies. Dr. Sterett specifically did *not* diagnose Claimant with osteoarthritis.

[1] Claimant underwent a right knee anterior cruciate ligament bone-patellar-bone reconstruction in August 1999. [Exhibit A2, pp. 51-52].

7. On May 30, 2017, Dr. Sterett performed right knee arthroscopic partial medial and lateral meniscectomies, bicompartmental chondroplasty, lysis of adhesions and removal of scar tissue and removed two loose bodies.

8. On July 12, 2017, Dr. Sterett documented that Claimant complained of medial sided catching, causing pain along the joint line of the right knee. Therefore, Dr. Sterett performed a steroid injection into the area of the catching.

9. The Aspen Valley Hospital Rehabilitation Services discharge summary indicates that as of July 17, 2017, Claimant denied pain in his right knee. On August 23, 2017, Dr. Sterett released Claimant from care with no restrictions, indicating that Claimant is making excellent progress and future treatment is not anticipated. Claimant was to seek treatment, as needed.

10. Claimant returned to Aspen Medical on August 24, 2017, where Dr. Niebur documented that Claimant stated his right knee symptoms were usually without pain, but he may ache if active. Claimant reported an injection resolved the medial knee pain. On the Pain Diagram for this visit, Claimant did not mark any pain in his right knee. On all of the Pain Diagrams prior to August 24, 2017, Claimant marked pain in his right knee.

11. On September 21, 2017, Dr. Niebur documented that Claimant reported his right knee was doing well with no pain or swelling. On the Pain Diagram for this visit, Claimant again did not mark any pain with his right knee. Dr. Niebur removed the right knee from the problem list in his medical records, providing assessments for only Claimant's right shoulder and left wrist.

12. Claimant testified that he essentially noticed no improvement from his right knee surgery. Claimant's testimony is not credible, as the physical therapy discharge note, Dr. Niebur's records and Dr. Sterett's records all document that Claimant's right knee was pain free and he was very active in August and September 2017. Claimant's reports to Dr. Sterett regarding his knee are deemed credible. The evidence established that Claimant made excellent progress postoperatively and was reporting no pain in his right knee. Thus, Claimant's testimony regarding his pain complaints and his response to surgery is not credible.

13. Claimant returned to Dr. Niebur on October 24, 2017, complaining of burning pain to the anterior and medial right knee and a sense of instability with swelling which occurred on transition from biking to hiking. Claimant's complaints in October 2017 are different from his complaints after his fall at work. After the fall at work, Drs. Scheuer, Niebur and Sterett all document that Claimant's pain complaints were in the posterior knee with no instability. In October 2017, after experiencing almost three and one-half months of no right knee pain, Claimant began to complain of pain in his anterior knee with instability.

14. On November 15, 2017, Dr. Sterett performed another steroid injection, and stated that if Claimant was not better, the doctor would order a repeat MRI of the right knee without contrast to evaluate for a possible medial meniscal tear.

15. The repeat MRI of the right knee was taken on January 4, 2018. On January 19, 2018, Dr. Sterett opined that the MRI revealed a progression of Claimant's lateral and patellofemoral osteoarthritis. Dr. Sterett opined that the cause of Claimant's right knee pain was secondary to chondromalacia and inflammation of the knee. Dr. Sterett recommended an injection of Synvisc One.

16. On March 16, 2018, Dr. Sterett opined that Claimant's meniscus tear resolved, but the chondral delamination was continuing to delaminate. Dr. Sterett's assessment was chondral delamination with multiple loose bodies patellofemoral joint of the right knee. Dr. Sterett recommended the Synvisc injection and related it to the original injury. However, Dr. Sterett recommended the Synvisc injection to treat Claimant's chondral delamination of the patella.

17. Based on Dr. Sterett's March 16, 2018, note, he reached the conclusion that the chondral delamination of the patella is related to the work related injury because he observed chondral delamination during the arthroscopic surgery on May 30, 2017. Claimant has the burden to prove that the chondral delamination of the patella observed and debrided by Sterett during surgery was caused, aggravated or accelerated by the incident on March 29, 2017. Claimant did not sustain his burden of proof on this issue.

18. Dr. Sterett's assessment on May 5, 2017, and May 25, 2017, was tear of the lateral meniscus and loose body of the right knee. In his letter dated February 7, 2019, when commenting specifically on causation, Dr. Sterett made no mention of Claimant sustaining an injury to his patella or chondral delamination. Dr. Sterett opined that Claimant sustained meniscal tears in the event on March 29, 2017. Yet, during surgery, Dr. Sterett chose to debride the patella. Dr. Sterett debrided Claimant's pre-existing, non-industrial chondral delamination of the patella since the doctor already was inside Claimant's knee on March 29, 2017. However, Claimant still has the burden of proving that the chondral delamination Dr. Sterett addressed during surgery on May 30, 2017, was caused or aggravated by the industrial injury. Claimant has provided no credible evidence to that effect.

19. Douglas Scott, M.D., credibly testified that the chondral delamination present in Claimant's knee before the surgery was pre-existing, caused by Claimant's long-standing osteoarthritis. This opinion is supported by Dr. Sterett's operative report, which found grade III changes of the patella that were debrided and Dr. Sterett's postoperative plan indicating that Claimant's knee was at significant risk for continued degenerative changes. Therefore, Claimant has failed to prove that the portion of the surgery in which Dr. Sterett debrided Claimant's patella to address the pre-existing non-industrial chondral delamination was necessitated by the incident on March 29, 2017.

20. Dr. Scott testified that if Claimant had no history of an injury on March 29, 2017, and no surgery on May 30, 2017, Claimant's pre-existing osteoarthritis would have become symptomatic at some point in the future because an injury or surgery is not a prerequisite to Claimant's pre-existing non-industrial osteoarthritis and chondral delamination of the patella becoming symptomatic. Claimant's medical records show that he was pain free and released from care for his meniscal tears, and more than three months later began to complain of a different pain to his anterior knee with instability, rather than the prior posterior knee pain without instability prior to his surgery. This different area of pain supports Dr. Scott's testimony that Claimant's pain is not coming from the meniscal tears or any area that was symptomatic prior to surgery.

21. Dr. Sterett issued a letter dated February 7, 2019, again addressing causation. Dr. Sterett stated that Claimant had continued deterioration of the knee. However, Dr. Sterett did not identify where that continued degeneration of the knee is occurring, or why that area of the knee is continuing to deteriorate. Since Respondents are not liable for the continued degeneration of the knee if that continued degeneration was not caused, aggravated or accelerated by the injury.

CONCLUSIONS OF LAW

General Legal Principles

1. The purpose of the Act is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. A claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See Bodensleck v. ICAO, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. Arenas v. ICAO, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. Cordova v. ICAO, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to

expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Medical Benefits

4. The claimant bears the burden of establishing entitlement to medical treatment. *See Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Proof of causation is a threshold requirement which an injured employee must establish by a preponderance of the evidence before any workers' compensation is awarded. Section 8-41-301(1)(c), C.R.S.; *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000). Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo.App.1997).

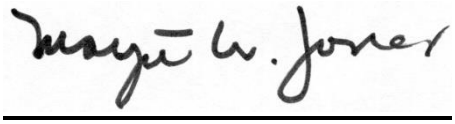
5. The Administrative Law Judge finds and concludes, considering the totality of the evidence that Claimant has failed to prove by a preponderance of the evidence that the Synvisc injection recommended by Dr. Sterett is causally related to Claimant's fall on March 29, 2017. Dr. Sterett opined that the portions of Claimant's knee surgery causally related to the fall were the meniscal tears and the loose bodies. Dr. Sterett also performed surgery on Claimant's degenerative chondral delamination of the patella, but Claimant has failed to prove that this portion of the surgery was causally related to the injury. Dr. Sterett now has recommended a Synvisc injection to address a continued degeneration of the chondral delamination of the patella, but has not addressed whether the issue of whether the non-industrial portion of the surgery on May 30, 2017, caused the continued chondral delamination.

ORDER

1. Claimant's request for the Synvisc injection recommended by Dr. Sterett is denied and dismissed.

2. Any issues not determined in this decision are reserved for future determination.

DATED: August 8, 2019.



MARGOT W. JONES
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

If you are dissatisfied with the Judge's Order, you may file a Petition to Review the Order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the Order, as indicated on the certificate of mailing or service; otherwise, the Judge's Order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the Order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see § 8-43- 301(2), C.R.S. (as amended, SB 09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a Petition to Review at ttp://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

- Is Claimant entitled to a change of physician to Elizabeth Yurth, M.D.?
- Did Claimant meet her burden of proof to show she was entitled to TTD or TPD benefits after February 5, 2019?

FINDINGS OF FACT

1. Claimant was employed as a merchandise execution supervisor for Employer.

2. On April 26, 2018, Claimant suffered an admitted industrial injury while working for Employer.[1] In particular, Claimant injured her low back while moving a table in a loading area.

3. Claimant was evaluated at an urgent care facility on April 26, 2018 and then by her primary care physician, Mira Lee, M.D. the next day. Dr. Lee documented moderate-to-severe tenderness in the right lower lumbar spine, with moderate to severely decreased range of motion ("ROM") of the back, as well as a very slow gait. Dr. Lee's assessment was: back pain and muscle spasm. She prescribed oxycodone-acetaminophen and a Medrol dose pack.

4. Claimant was referred to Darla Draper, M.D. at Concentra, the ATP for Employer, who evaluated her on April 30, 2018. Dr. Draper diagnosed strain of muscle, fascia and tendons in lower back. She ordered occupational therapy and physical therapy ("PT") and Claimant had a restriction of no activity. Dr. Draper continued this restriction in the follow-up-appointment on May 7, 2018.

5. Dr. Draper modified Claimant's work restrictions on May 14, 2018. Claimant was allowed to return to work on May 14, 2018 with the following restrictions: may lift up to 5 lbs. frequently-up to six hours/day; may push/pull up to 5 lbs. frequently-up to six hours/day; change positions periodically to relieve discomfort. Dr. Draper kept the same work restrictions in place after the May 16, 2018 office visit.

6. On May 31, 2018, Claimant was evaluated by Eric Shoemaker, D.O. and was complaining of radicular symptoms in the low back. Dr. Shoemaker reviewed the May 8, 2018 MRI films, which showed a moderate sized disc herniation with extrusion at L4-5, which appeared to abut and displace the traversing L5 nerve roots bilaterally without compression. There was a shallow broad-based protrusion at L5-S1, traversing

[1] A Notice of Contest was filed on May 17, 2018 in which Respondents disputed liability, however, a GAL was filed on June 18, 2018.

right S1 nerve root without compression. There was a prominent high-intensity zone at L3-4, consistent with annular tearing, but no protrusion and no nerve impingement. The remaining levels were unremarkable.

7. Dr. Shoemaker's diagnoses included: dorsalgia, unspecified; unspecified thoracic, thoracolumbar and lumbosacral intervertebral disorder; low back pain. Dr. Shoemaker opined that Claimant did not have a significant spondylosis or degenerative disc changes and felt this represented a discrete and probably acute to subacute injury, which was consistent with her mechanism of injury. He felt it was probable that this represented a work-related injury. Dr. Shoemaker prescribed metalaxone, tramadol, atenolol and continued Claimant's work restrictions.

8. Claimant was evaluated by Debra Smith, M.D. on June 5, 2018, at which time the following work restrictions were given: may lift up to 5 lbs. constantly-up to 8 hours/day; may push/pull up to 5 lbs. constantly-up to 8 hours/day; change positions periodically to relieve discomfort. Claimant returned to Dr. Smith on June 14, 2018 and these work restrictions were continued.

9. On June 18, 2018, a General Admission of Liability ("GAL") was filed on behalf of Respondents. Respondents admitted for medical benefits and TTD, beginning on April 27, 2018. TTD benefits were paid at the rate of $401.48 per week, based upon an AWW of $602.22.

10. On June 28, 2018, Claimant returned to Dr. Smith who reduced her work restrictions. The work restrictions included: may lift up to 30 lbs. constantly-up to 8 hours or greater/day; may push/pull up to 200 lbs. constantly-up to 8 hours or greater/day; may bend occasionally-up to 3 hours; may stand and walk constantly up to 8 hours or greater/day; change positions periodically to relieve discomfort; no climbing ladders.[2]

11. Claimant received conservative treatment, including PT, during this period of time and Dr. Smith oversaw her treatment. Claimant underwent a bilateral L5 transforaminal epidural steroid injection on July 6, 2018. In her follow-up evaluation with Dr. Smith on July 12, 2018, Claimant reported increased pain since the injection. The diagnoses included: bulging of lumbar intervertebral disc, lumbar strain; multilevel degenerative disc disease. Dr. Smith maintained the same work restrictions.

12. Claimant returned to Dr. Shoemaker on July 19, 2018 and reported she felt worse compared to before the injection. In light of that, Dr. Shoemaker did not recommend a repeat epidural steroid injection to which Claimant agreed. Claimant was to remain active with PT and begin transitioning to an independent strengthening home exercise program.

[2] Exhibit 4, p. 46.

13. In the evaluations which occurred on August 9 and 16, 2018, Dr. Smith maintained Claimant's work restrictions, as well as adding that Claimant could occasionally bend and constantly stand. Dr. Smith approved a light duty work offer for Claimant on August 15, 2018. She noted Claimant required regular 10 minute breaks every two hours.[3] Claimant received PT, which included therapeutic exercise through September 11, 2018. When Claimant returned to Dr. Draper on September 25, 2018, she was referred to massage therapist, as well as to a physiatrist.

14. An amended GAL was filed on September 13, 2018. TTD benefits were paid from April 27, 2018 through September 8, 2018, with TPD benefits paid on September 9 and 10, 2018. TTD then resumed on September 11, 2018.

15. Claimant was evaluated by Kathy McCranie, M.D. on October 1, 2018, to whom she was referred by Dr. Smith. Claimant was complaining of low back pain described as a constant ache, with occasional spasms and sharp pain. The pain radiated down the back of her left leg and heel. Dr. McCranie's examination of Claimant was positive for joint pain, muscle cramps and joint stiffness. Dr. McCranie's diagnoses were: status post lumbar strain, with mild facial involvement; lumbar degenerative disc disease; probable left sacroiliac strain. Dr. McCranie recommended transitioning from the current physical therapy to a work conditioning program, in order to increase lifting. She prescribed Cymbalta for Claimant, as well as massage therapy. She also discussed chiropractic care with Claimant to address sacroiliac involvement.

16. On November 15, 2018, Claimant was evaluated by Linda Thomas, M.D. She complained of midline mid back pain and noted the symptoms occurred intermittently. Dr. Thomas noted left sciatic notch tenderness. The assessment was: lumbar strain and multilevel degenerative disc disease. Claimant's restrictions were lifting up to 30 lbs.-occasionally; push/pull up to 50 lbs.-occasionally; must be able to change positions from sit to stand as needed. Dr. Draper evaluated Claimant on November 28, 2018 and continued Claimant's work restrictions. Claimant had missed a few weeks of work conditioning and was to return to that treatment. Claimant returned to Dr. Draper on January 2, 2019, at which time tenderness was present in the left paraspinal and mild decreased ROM was noted. Claimant was to start trigger point injections with Dr. McCranie to be followed by massage therapy, PT-work conditioning.

17. A letter, dated January 9, 2019, was sent to Scott Richardson, M.D. with a job description prepared by Employer. This letter outlined modified duty that was available to the Claimant and was signed by Kelly Redoutey for Insurer. The physical requirements included standing up to 8 hours/day, not including 30-minute lunch and two 15 minute breaks; walking around the store for up to 8 hours/day; lifting returned items from customers up to 30 lbs.; push/pull fixtures and/or carts/vehicles with merchandise. On January 17, 2019, Dr. Richardson approved the modified job duty. The ALJ determined that by formalizing the modified job offer and securing ATP approval, Respondents intended that Claimant comply with the terms of the offer.

[3] Exhibit P.

18. Claimant returned to Dr. McCranie on January 14, 2019. She reported improvement with the injection and was taking ibuprofen and gabapentin. Tenderness on palpation was noted in the bilateral quadratus lumbar ROM and bilateral SI paraspinals. Dr. McCranie's impression was: low back pain, status post strain, with mild facial involvement; lumbar degenerative disc disease. Dr. McCranie administered trigger point injections, which was the second in a series. Claimant was to receive massage therapy and Dr. McCranie opined a third set of injections would benefit her.

19. On January 22, 2019, a certified letter was sent to Claimant, which offered a modified duty position to Claimant within her restrictions for 40 hours per week, with a starting date of February 5, 2019, at 9:00 a.m. Claimant's schedule was subject to change based upon business needs. The letter listed Shana R_____ as the person to whom Claimant was to report and set her rate of pay at $18.90 per hour. The letter was signed by Ms. Y_____ , HR Business Partner for Employer. The ALJ concluded Respondents had all relevant information concerning the offer of modified duty made to Claimant, as well as her restrictions.

20. Claimant testified she was scheduled for the last sessions of work conditioning the week of February 5, 2019. She attended the work conditioning sessions two times per week. Claimant spoke to someone at Employer (possibly Shana) and asked to put off the return to work, so she could finish the work conditioning.

21. Shana R_____ testified as a representative of Employer. Her position was general manager and she has worked at the Westminster store location since January 2019. When Claimant was first scheduled to return for modified duty, Ms. R_____ had not met her.

22. Ms. R_____ testified the first conversation she had with Claimant was on January 27, 2019. Claimant called to introduce herself and discuss her return to work. Ms. R_____ testified that they discussed what hours Claimant was available. Ms. R_____ agreed Claimant did not initiate the discussion about what hours she was available. Ms. R_____ said she asked if Claimant had flexibility in her schedule and Claimant responded she needed to pick up her grandson. Ms. R_____ testified supervisors were required to have open availability. The supervisor role remained open from February 5 through March 7, 2019. Ms. R_____ said she did not communicate that this position was open.

23. During her conversation with Claimant, there was no discussion about a change of benefits. She was not involved in the administration of workers' compensation benefits. Ms. R_____ testified she was going to find out the next steps from her HR partner, Beth Y_____ . The ALJ found Employer had the information required to make the modified duty job offer available, including the open available positions, as well as Claimant's restrictions.

24. Ms. R_____ testified she was aware of the job offer letter sent by Ms. Y_____ . She stated a supervisor was required to be available 40 hours per week. Employer has been able to accommodate the job restrictions since March 8, 2019.

25. Claimant testified that during her telephone conference with Ms. R_____ , a change to her workers' compensation benefits was not discussed. Claimant confirmed she discussed picking up her grandson with Ms. R_____ , but said if she had she known her benefits were impacted, she would have had another family member pick up her grandson. Claimant was not aware that the supervisor position remained available to her.

26. Claimant did not return to work on February 5, 2019. This terminated Claimant's right to receive TTD benefits, at least until the starting date of the second modified duty offer.

27. A second modified duty offer, dated February 7, 2019, was sent to Claimant. The modified duty position was identified as merchandise execution associate with a new starting date of February 12, 2019. This second offer identified varying hours over seven days per week. This letter listed a starting day of February 19, 2019 at 9:00 a.m. Once again, Claimant was to report to Ms. R_____ . Claimant's pay rate was listed as $11.25 per hour. The letter was signed by Ms. Y_____ , HR Business Partner for Employer. The ALJ found this offer of modified duty superseded its predecessor.

28. A third modified duty offer, dated February 7, 2019 was sent to Claimant. This letter was identical in all respects to the second modified duty offer, with the exception that the start date was listed February 19, 2019. The ALJ found this offer of modified duty superseded its predecessor. Claimant signed the acceptance portion of the temporary modified-duty assignment on or about February 11, 2019. Communications between counsel for the parties were admitted as part of Claimant's Exhibit 1. These confirmed an agreement that Claimant's start date for the modified duty position was February 19, 2019. The ALJ concluded Claimant relied upon the modified terms of the modified her.

29. Respondents changed the terms of the modified job duty offer by virtue of the letter sent on February 7, 2019. Accordingly, Claimant was entitled to receive TTD benefits from February 12-19, 2019.

30. A revised GAL was filed on February 8, 2019. This reflected payment of TTD benefits from September 11, 2018 through February 4, 2019. TTD was terminated based upon the job offer made to Claimant within her restrictions "earning her normal wage".

31. Claimant returned to work on or about February 19, 2019 and has been working the modified duty job.

32. Claimant was evaluated by Dr. Yurth on February 21, 2019. She reported pain in her low back, more severe on the left, which occasionally radiated down into the left knee. The steroid injection aggravated her back pain. On examination, tenderness was noted and Claimant lacked 20° of flexion. The straight leg raise test at 90° caused left-sided low back pain and flexion caused left gluteal pain. Dr. Yurth's assessment was: severe bilateral facet joint synovitis at L4-5 and L5-S1.

33. Dr. Yurth reviewed the May 18 lumbar spine MRI and noted a very large facet joint effusion was present at L4-5 and less so at L5-S1.[4] Dr. Yurth recommended Claimant obtain an updated lumbar spine MRI to evaluate for the persistence of the effusion, as well as L4-5 and L5-S1 facet joint aspiration and steroid injections. Dr. Yurth was not an ATP, as Claimant went to her on her own. Claimant testified she was not confident that Dr. McCranie would be able to resolve her issues and wanted to treat with Dr. Yurth.

34. On February 26, 2019, Claimant underwent an MRI of the lumbar spine. The films were read by Christopher Nasser, M.D. At L4-L5, a slight broad-based annular bulge was present, along with a small central protrusion and posterior annular tear, which was smaller from the comparison examination. Mild to moderate facet arthropathy was seen, with mild fluid distention of the facet joints bilaterally. No significant neural foraminal encroachment was present. At L5-S1, a broad based annular bulge was present, but no significant facet arthropathy was noted. No significant neural foraminal encroachment was present. Dr. Nasser's impression was multilevel degenerative disc and degenerative joint disease present at those levels. There was slight improvement of the central spinal canal narrowing at L4-L5, with a diminished size of the central protrusion was observed. Mild to moderate facet arthropathy was present at L4-L5, with mild fluid distention of facet joints.

35. The ALJ found this MRI was reasonable and necessary, as well as related to Claimant's industrial injury. Dr. McCranie confirmed this in her hearing testimony, noting it was valuable in determining her treatment plan.[5]

36. Claimant was next evaluated by Dr. McCranie on March 8, 2019 and reported the trigger point injections were not helpful for her. Claimant advised Dr. McCranie she went to see Dr. Yurth, outside of workers' compensation system and Dr. Yurth said effusions were present at L4-5 and L5-S1. Claimant said a repeat MRI was recommended, as well as consideration of aspiration at the facets and injections at the facet joints. Claimant subsequently underwent the MRI, but the MRI report was not available.

37. Dr. McCranie reviewed the previous MRI and there was no mention of joint effusion on the MRI report. On examination, Claimant's deep tendon reflexes were +2 and the straight leg raise, Patrick's maneuver, and piriformis tests were negative,

[4] It was not clear from this report whether Dr. Yurth reviewed the actual films or the MRI report.

[5] Hearing Transcript ("Hrg. Tr."), p.74: 15-18.

though Claimant reported pain on external rotation at the L4 paraspinals, left more than right. Dr. McCranie stated that based upon the examination that there did not a significant facetogenic component to Claimant's pain, but that could be evaluated after viewing the second MRI. An epidural steroid was to be evaluated after that review. The ALJ inferred that Dr. McCranie was open to additional treatment options upon review of the MRI films. Dr. McCranie also noted Claimant could treat with Dr. Yurth outside the workers' compensation system.

38. Dr. McCranie testified as an expert in Physical Medicine and Rehabilitation and Pain Medicine. She is Level II accredited pursuant to the WCRP. Dr. McCranie began treating Claimant on October 1, 2018 and Claimant's diagnoses included: a lumbar strain, myofascial involvement, lumbar degenerative disc disease, as well as a sacroiliac strain.

39. Dr. McCranie noted when she first evaluated Claimant one of the main concerns was her inability to return to work and consequently, the focus of her treatment was improving her strength and conditioning. This is the reason for the referral for a work conditioning program. Dr. McCranie testified she tried medications, referred Claimant to massage therapy, discussed chiropractic care, but Claimant decided to hold off on the latter. Claimant followed through with a work conditioning program, but had a bad reaction to an epidural steroid injection, which was why Dr. McCranie recommended a course of trigger point injections that were administered in January 2019. Claimant did not return to Dr. McCranie until March 2019.

40. Dr. McCranie reviewed the MRI report, which had been ordered by Dr. Yurth and stated there was a small amount of fluid in the L4-5 facets. Dr. McCranie testified she contacted the radiologist to clarify discrepancy between what Dr. Yurth related to Claimant and what was in the MRI report. Dr. McCranie ordered a facet injection and aspiration at L4-5, which was the same as recommended by Dr. Yurth. Dr. McCranie made this recommendation on May 17, 2019, which was three business days before the hearing. She did not order treatment at the L5-S1 level because there was no facet involvement and no fluid at that level. Dr. McCranie wanted to see whether the injections worked for Claimant and wanted to rule out whether or not there was a facetogenic component to her pain. Dr. McCranie testified she wanted to examine Claimant again to consider the etiology of her back pain, as well as treatment options such as facet rhizotomy and potentially a referral for a surgical consult. The ALJ concluded Dr. McCranie was fully considering available treatment options at this time.

41. Claimant failed to prove she was entitled to a change of physician.

42. Claimant's restrictions were modified on March 8, 2019, limiting her work to four hours per day. Respondents agreed Claimant sustained a wage loss, based upon 20 hours per week.

43. Claimant testified she has worked between 8 and 12 hours per week since March 8, 2019. Claimant's supervisor determines her work hours and Ms. R_____ testified this depends on workload.

44. No ATP has placed Claimant at MMI, nor has an ATP released her to return to full duty.

45. Claimant's pay records were introduced into evidence.[6] These showed Claimant earned the following amounts from February-May 2019:

February 17, 2019 through March 2, 2019: $385.38 (gross pay).
March 3, 2019 through March 16, 2019: $407.20 (gross pay).
March 17, 2019 through March 30, 2019: $325.81 (gross pay).
March 31, 2019 through April 13, 2019: $260.56 (gross pay).
April 14, 2019 through April 27, 2019: $443.94 (gross pay).
April 28, 2019 through May 11, 2019: $666.67 (gross pay).

46. Claimant sustained a wage loss attributable to her industrial injury.

47. From February 20, 2019 through March 7, 2019, Claimant gross wages were $385.38. Claimant is entitled to TPD in the amount of $709.73. [$724.99 (AWW) x 2 = $1,449.98 less $385.38 gross = $1,064.60 x 2/3 = $709.73]. Claimant noted that the pay periods did not directly correspond and the ALJ was persuaded by the calculation put forward by Claimant.

48. From March 8, 2019 through May 11, 2019, Claimant gross wages totaled $2,104.18 over that 10 week period. Claimant is entitled to TPD in the amount of $3,430.65. [$724.99 x 10 weeks = $7,249.90 less $2,104.18 gross = $5,145.72 x 2/3 = $3,430.65. Subsequent to the hearing, Respondents paid Claimant TPD benefits in the amount of $149.48 per week.[7] [$3,430.65 less $1,494.80 = $1,935.85 TPD owed from March 8, 2019 through May 11, 2019]. Respondents are entitled to a credit for TPD benefits paid from March 8, 2019 and continuing.

49. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be

[6] Exhibits 8 & L.

[7] Claimant's Position Statement, p. 6.

interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. (2016). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). In the case at bench, the credibility of Claimant, as well as the opinions of the medical experts was dispositive.

Change of Physician

Claimant made a request for change of physician pursuant to § 8-43-404(5)(VI)(A), C.R.S. (2018), which Respondents denied in a timely fashion. Both parties agreed that compliance with this section was not an issue. The question presented at hearing was whether Claimant made the requisite showing to prove she was entitled to a change of physician.

Claimant may seek a change of physician upon a "proper showing". Section 8-43-404(5), C.R.S. (2018); *Carlson v. Industrial Claim Appeals Office* 950 P.2d 663 (Colo. App. 1997). § 8-43-404(5) does not contain a specific definition of what constitutes a "proper showing" for change of physician. Consequently, it has been previously held the ALJ possesses broad discretionary authority to grant a change of physician depending on the particular circumstances of the claim. *Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999); *Szocinski v. Powderhorn Coal Co.*, W.C. No. 3-109-400 (December 14, 1998); *Merrill v. Mulberry Inn, Inc.*, W.C. No. 3-949-781 (November 16, 1995). An abuse of discretion does not exist unless the ALJ's Order is beyond the bounds of reason, as where it is unsupported by the evidence or is contrary to law. *Rosenberg v. Board of Education of School District No. 1*, 710 P.2d 1095 (Colo. 1995).

When making this determination, the ALJ considered the scope and type of treatment Claimant received and concluded no change of physician was warranted. The ALJ's reasoning was twofold; first, the ALJ was persuaded Claimant received a comprehensive course of treatment, which was punctuated by regular office visits with ATPs, as well as diagnostic testing. As determined in Findings of Fact 4-13, Claimant's treatment was overseen by Dr. Draper, then Dr. Shoemaker and Dr. Smith. These physicians evaluated Claimant at regular intervals and modified her treatment (including medications) depending on her response. The record reflected referrals by these ATPs

for PT, injections and the like. As found, Claimant underwent an MRI on or about May 8, 2018 in the acute phase of her injury. (Finding of Fact 6).

Claimant was referred to Dr. McCranie, a physiatrist, who focused on Claimant's return to work. (Finding of Fact 6). The ALJ was also persuaded that Dr. McCranie's evaluations and treatment of Claimant were thorough and considered the full range of therapeutic options. (Findings of Fact 37, 40).

Second, the ALJ determined Claimant's course of treatment comported with the DOWC MTG for treatment of lumbar spine injuries. The DOWC MTG treatment recommendations focus included physical therapy and exercise program, as well as regular physician evaluations every 3 to 4 weeks. (WCRP Rule 17, Exhibit 1, pp. 2-7). Diagnostic testing, specifically an MRI was ordered based upon Claimant's symptoms. (WCRP Rule 17, Exhibit 1, p. 17). Claimant underwent injections as part of her treatment course. (WCRP Rule 17, Exhibit 1, pp. 44-47, 51). Based upon these findings, the ALJ concluded Claimant's treating physicians provided her the full range of treatment options.

The ALJ considered Claimant's argument (which was based on her testimony) that she lost confidence in Dr. McCranie and determined this was not sufficient to require a change of physician at this time. This contention was raised in several cases. *Loza v. Ken's Welding*, W.C. 4-712-246 (January 7, 2009); *Zolman v. Horizon Home Care, LLC, Inc.*, W.C. 4-636-044 (November 3, 2010). In *Loza*, the Panel affirmed the denial of a change of physician where the ALJ found Claimant had not introduced persuasive evidence that he developed mistrust of the ATP or had been unable to communicate with the physician.

In *Zolman*, the ICAO considered a similar argument where Claimant asserted there was a breakdown in the physician-patient relationship with his treating physicians, Dr. Danahey and Dr. Primack. Claimant also argued that he had developed a relationship with Dr. Yamamoto, but the ALJ concluded no such relationship was present. The Panel concluded that Claimant's testimony standing alone was not sufficient to allow the change of physician. The Panel also found there was no basis to disturb the ruling denying the change of physician to Dr. Yamamoto. Explaining its rationale, the Panel considered the application of *Merrill v. Mulberry Inn, Inc., supra,* stating at page 6 of the opinion:

"In *Merrill*, the Panel interpreted § 8-43-404 (5)(a)(VI), C.R.S. as affording the ALJ discretionary authority to grant the Claimant's request for a change of physician. *Vigil v. City Cab Co.* W.C. No. 3-985-493 (May 23, 1995); Carson v. Wal Mart, W.C. No. 3-964-079 (April 12, 1993). However, the Panel also noted that an ALJ is not compelled to grant a change of physician based upon the Claimant's personal dissatisfaction with a physician, citing *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985).

Based upon the totality of the evidence, the ALJ determined Claimant's dissatisfaction with Dr. McCranie was not a sufficient basis to order a change of physician and thus, Claimant failed to meet her burden of proof. (Finding of Fact 41).

The ALJ based this decision regarding a change in physician considering the need to ensure Claimant is provided reasonable and necessary medical treatment as required by §8-42-101(1), C.R.S. while at the same time protecting Respondents' interests in being apprised of the course of treatment for which they may ultimately be held liable. *Yeck v. Industrial Claim Appeals Office*, *supra*, 996 P.2d at 229. Accordingly, Claimant's request for change of physician is denied.

Temporary Disability Benefits

Respondents asserted Claimant's failure to appear for work on the date and at the time specified by the modified duty job offer bars the claim for temporary total and temporary partial disability benefits. Respondents argued they should not be penalized for making an accommodation, which was requested by Claimant. Respondents asserted this defense applied both to the claim for TTD and the claim for TPD benefits.

Claimant argued there was a disconnect in the communications between Employer's representative and her regarding the return to work. Claimant testified that part of the reason she requested a later start date was in order to complete her work conditioning program. Claimant asserted that her conversation with Ms. R_____ was simply about her availability for the work schedule and she was not aware of the impact on her workers' compensation benefits. Claimant contended that Respondents agreed to change her scheduled date for the return to work, which should not bar her claim for temporary disability benefits.

The ALJ evaluated the claim for TTD benefits first. Respondents relied upon the statutory basis for terminating said benefits, specifically § 8-42-105(3), C.R.S. (2018) which provides:

> "(3) Temporary total disability benefits shall continue until the first occurrence of any one of the following:
> …
>
> (d) (I) The attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment."

Under the facts of this case, the offer to return to modified duty tendered by Respondents specified a start date of February 5, 2019. Claimant did not appear for work at that time and this bars the initial period of TTD benefits. (Finding of Fact 25).

However, the ALJ found that Respondents agreed to alter the terms of the modified job duty return and was persuaded by Claimant's argument that Respondents acquiesced in the request for a later start date for the modified duty. In effect, Claimant has argued Respondents should be estopped from asserting that Claimant's failure to return to work on February 5, 2019 precludes her claim for temporary disability benefits. As found, Employer agreed to modify Claimant's start date under the modified duty offer on two occasions. Each successive modified duty job offer superseded the preceding

one, which created new terms of employment under which Claimant was to return to work. (Findings of Fact 27-28).

In *Johnson v. Industrial Commission of the State of Colorado,* 761 P.2d 1140, 1146 (Colo. 1988), the Colorado Supreme Court considered the application of the doctrines of waiver and estoppel in a workers' compensation context [where Respondents sought to take an offset for Social Security disability benefits after a permanency award and after the time for reopening expired]. Colorado decisional law has long recognized the principle that "[a] statute cannot stand in the way of waiver or equitable estoppel when the facts demand their application in the interest of justice and right." [citation omitted]; *see also Greeley Gas & Fuel Co. v. Thomas,* 288 P. 1051 (Colo. 1930) [employer and workers' compensation insurer estopped from invoking statute of limitations as a bar to late-filed workers' compensation claim].

Estoppel is an equitable doctrine premised upon the principle of fair dealing and is designed to aid in the administration of justice when a rigid and inflexible application of the law would otherwise result in an injustice. *Mabray v. Williams,* 291 P.2d 677, 679 (Colo. 1955); *Sanger v. Larson Construction Co.,* 251 P.2d 930, 933 (Colo.1952). There are four basic elements to a claim of estoppel, all of which must be established by the party claiming the estoppel: the party to be estopped must know the relevant facts; the party to be estopped must also intend that its conduct be acted on or must so act that the party asserting the estoppel has a right to believe the other party's conduct is so intended; the party asserting the estoppel must be ignorant of the true facts; and the party asserting the estoppel must detrimentally rely on the other party's conduct. *Department of Health v. Donahue,* 690 P.2d 243, 247 (Colo.1984).

The ALJ concluded all four elements of estoppel were met in the case at bar. Respondent knew all of the relevant facts, as these related to the modified job offer. (Finding of Fact 19). By virtue of formally tendering an offer of modified duty, Respondents intended Claimant to act upon and comply with the terms set forth in the letter. (Findings of Fact 17, 23). Respondents then altered the terms of the modified duty offer, by changing the position Claimant was to fill, the wages and the start date. (Findings of Fact 27-28). Claimant did not know her request for an alternate schedule would have an impact on her workers' compensation benefits and was unaware that the manager position remained open for a period of time. (Finding of Fact 25). Claimant detrimentally relied on the offers tendered by Respondents. (Finding of Fact 28).

Accordingly, the ALJ concluded the doctrine of estoppel applies in this instance and given the circumstances of the case, Respondents were estopped from arguing that Claimant's failure to return to work on February 5, 2019 bars the claim for TTD and TPD benefits. Claimant proved she was entitled to temporary total disability benefits from February 12, 2019 through February 18, 2019. (Finding of Fact 29). Under the terms of the modified duty position, Claimant was entitled to TPD benefits, as she sustained a wage loss, which was attributable to the work injury. *Montoya v. Industrial Claim Appeals Office,* –P.3d -, 2018 COA 19 (Colo. App. 2018)

Wage records through May 11, 2019 were admitted into evidence. Based upon the wage records admitted at hearing, the ALJ determined Claimant was entitled to receive TPD benefits from February 19, 2019 through March 7, 2019 in the amount of $2,645.58. Claimant was also entitled to receive TPD benefits from March 8, 2019 and continuing. Since no doctor has placed Claimant at MMI or returned her to full duty, Claimant continues to be entitled to temporary partial disability benefits. No payroll records after May 11, 2019 were introduced into evidence. The ALJ makes no findings as to the amount of those benefits to which Claimant is entitled after May 11, 2019.

ORDER

It is therefore ordered:

1. Respondents shall pay for the cost of the February 26, 2019 MRI, pursuant to the Colorado Workers' Compensation Fee schedule.

2. Claimant's request for reimbursement for two office visits with Dr. Yurth is denied and dismissed.

3. Claimant's request for a change of physician to Dr. Yurth is denied and dismissed.

4. Claimant's request for TTD benefits from February 5, 2019 to February 12, 2019 is denied and dismissed.

5. Respondents shall pay TTD benefits from February 12, 2019 to February 18, 2019.

6. Respondents shall pay TPD benefits from February 19, 2019 through March 7, 2019 in the amount of $2,645.58. Respondents shall pay TPD benefits from March 8, 2019 and continuing.

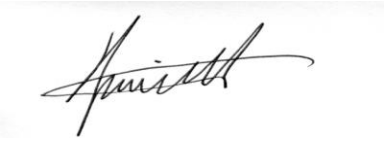
7. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a

petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 12, 2019

STATE OF COLORADO



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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Whether Claimant established by a preponderance of the evidence that he is unable to earn any wages in the same or other employment as a direct and proximate result of his industrial injury and entitled to permanent total disability benefits.[1]

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. At the time of the hearing, Claimant was 38 years old.
2. Claimant was injured in the course and scope of his employment as a maintenance and construction supervisor for eBuilding Services LLC on October 26, 2016. Claimant was injured while cutting zip ties from on top of a work van when the pocketknife he was using slipped, "continued to travel, and penetrated his left hand." He was initially treated at the University of Colorado, Colorado Springs Emergency Department later that day. *(Respondents Exhibit C)*
3. Claimant was initially diagnosed with distal radial nerve damage involving his left hand and underwent surgery. Unfortunately, Claimant's pain complaints worsened and he began to develop signs and symptoms consistent with Complex Regional Pain Syndrome (CRPS). After undergoing significant treatment and extensive diagnostic testing, Claimant was ultimately diagnosed with Complex Regional Pain Syndrome in the left upper extremity. *(Respondents Exhibit B)*
4. Claimant's diagnosis of CRPS is agreed upon by the majority, if not all of, the medical providers who have either evaluated or treated Claimant. The dispute, however, is the extent of the restrictions and symptoms that flow from such condition and the impact on his ability to obtain and maintain employment.
5. Claimant was placed at maximum medical improvement on January 2, 2019. His primary treating physician, Dr. Roberta Anderson-Oeser, provided Claimant a 15% whole person impairment rating for the CRPS. Dr. Gary Gutterman,

[1] The issue of "offsets and overpayments" was endorsed to be heard at the hearing. Moreover, the issue of social security offsets was discussed briefly at the beginning of the hearing. The parties agreed to attempt to resolve such issue after resolution of the PTD matter and the court agreed. Therefore, whether Claimant received social security disability benefits, whether Respondents can take an offset against any TTD benefits, and the amount of such offset, was not addressed at the hearing. Moreover, whether any offset against permanent total disability benefits can be taken, since Claimant was under 45 on the date of injury, was also not discussed and addressed at the hearing. Therefore, the issues involving SSDI offsets and overpayments are reserved.

Claimant's primary treating psychiatrist, provided Claimant a 5% mental impairment. The two ratings combined to a 19% whole person.

6. An amended Final Admission of Liability was filed on March 1, 2019. As set forth in the FAL, Respondents' asserted Claimant had reached the cap for indemnity benefits, and had been overpaid TTD in the amount of $4,731.69, based on TTD payments made from January 2, 2019 through February 11, 2019. Moreover, based on the indemnity cap being met, no permanent partial disability benefits were admitted and paid for any portion of the physical or mental impairment rating. *(Respondents Exhibit G)*

7. At the hearing, Dr. Anderson-Oeser was called by Claimant as a witness. Dr. Anderson-Oeser is a physician specializing in physical medicine and rehabilitation. She has been board certified in physical medicine and rehabilitation for almost 20 years. Her practice extends to treating persons with chronic pain, musculoskeletal injuries, nerve injuries, and brain injuries. She treats people with Complex Regional Pain Syndrome, and has done so for over 24 years. At the time of hearing, she estimated that she currently had approximately 30 patients suffering from Complex Regional Pain Syndrome and for whom she was providing treatment. The parties stipulated, and the Administrative Law Judge agreed, that Dr. Anderson-Oeser qualified as an expert in the field of physical medicine and rehabilitation.

8. Dr. Anderson-Oeser began treating Claimant on January 25, 2017, and has been seeing him approximately every one to two months since that time.

9. Dr. Anderson-Oeser diagnosed Claimant as suffering from Complex Regional Pain Syndrome, adjustment disorder with anxiety and depression, and chronic pain with significant psychological dysfunction. She noted that Claimant had previously suffered a radial digital artery and nerve laceration to the left hand, requiring surgical repair.

10. Dr. Anderson-Oeser has prescribed multiple modalities in an attempt to mitigate Claimant's pain symptomology associated with his Complex Regional Pain Syndrome. Such attempts have included prescriptions of Gabapentin, opioids, Tizanidine, and Lyrica in an attempt to manage his pain and muscle spasms and occupational therapy for desensitization techniques.

11. Dr. Anderson-Oeser described Claimant's symptomology associated with his Complex Regional Pain Syndrome. She noted that at times his left hand would turn red and purple. He has spasms and terrible tremors to the point that some days he is unable to even pick up a pen because his hand trembles so much. She described Claimant as guarding his hand by keeping it in a shirt or sweatshirt, because it is so painful.

12. Dr. Anderson-Oeser referred Claimant to Dr. Boyd, a neuropsychologist who provides cognitive behavioral therapies to assist Claimant in dealing with the psychological consequences arising from his chronic pain. Similarly, Dr. Anderson-Oeser referred Claimant to Dr. Gutterman, a psychiatrist, to provide medications to help manage Claimant's depression and anxiety, which flow from his CRPS.

13. Dr. Anderson-Oeser testified that Claimant's report of pain on the pain scale consistently runs between a seven and nine. She noted that he has days where his pain is so bad that he is unable to get out of bed or do anything.

14. Dr. Anderson-Oeser testified that Claimant's pain symptomology is increased by changes in temperature, blowing air (such as one might experience from indoor air conditioning), light touching of the left hand, (which she described as being as simple as rubbing a gauze bandage over the hand), stress, or vibration (which she described it as being something as simple as tapping on the hand or holding the steering wheel of his car).

15. Dr. Anderson-Oeser also noted that Claimant has difficulty sitting for prolonged periods. She opined that she believed remaining in a seated position allowed the Claimant to mentally focus on his pain, but being able to change positions frequently served as a distraction from the mental focus on his pain. She did note, however, that simply walking could aggravate his pain because of the airflow caused by walking.

16. Dr. Anderson-Oeser also noted that merely coughing can aggravate Claimant's pain levels.

17. Dr. Anderson-Oeser noted that Claimant's pain level is sometimes so severe as to cause him to vomit. His pain levels also interfere with his ability to sleep. As noted throughout the medical records, Claimant's sleep is oftentimes limited to approximately 4 hours per night.

18. Dr. Anderson-Oeser testified that Claimant's medications, cognitive behavioral strategies, and desensitization techniques sometimes helped take the "edge off" Claimant's pain levels so that he can perform some of his activities of daily living, but that nothing is very effective in controlling Claimant's pain.

19. Dr. Anderson-Oeser relayed that Claimant's pain is located in his left hand and fingers, and noted that Claimant's Complex Regional Pain Syndrome has spread up the left extremity, from the elbow distally, as well as into his left shoulder.

20. Dr. Anderson-Oeser opined that Claimant is restricted from lifting more than one to two pounds maximum with his left upper extremity, and that such lifting should be limited to 6% or less of the day. She considered this restriction to be very lenient, as opposed to restricting him from no use of the extremity, so as not to discourage Claimant from attempting to use his hand.

21. Respondents' IME physician, Dr. Schakaraschwili, opined in his deposition that Claimant might be able to use his left hand as a prop to assist with use of his right hand. Dr. Roberta Anderson-Oeser found this suggestion to be highly unlikely given that Claimant is unable to touch his hand without experiencing significant and an incapacitating increase in his pain.

22. Claimant is unable to perform grip strength tests because of pain. He does not have the ability in his left hand to close his thumb and index finger together. Claimant sometimes is unable to even pick up and hold a pen.

23. Dr. Anderson-Oeser testified the Claimant has cognitive limitations. His cognitive limitations, in part, arise from the pain itself, which is great enough that Claimant has a hard time reading and comprehending. Additionally, his medications have the side effect of drowsiness that further affect his ability to concentrate. Throughout her medical records, she noted Claimant is not to drive while taking his Oxycodone or Tizanidine, which she has consistently prescribed. She also noted that such medication side effects are consistent with the drug manufacturers' respective advisements. Overall, Claimant has difficulty focusing on tasks due to his pain and the adverse effects of his medications.

24. As of the last medical appointment documented in Claimant's hearing exhibits from Dr. Anderson-Oeser, which is dated April 11, 2019, she was still prescribing Claimant oxycodone for his severe pain and Tizanidine for his muscle spasms. She again advised Claimant that he was not to drive while taking either of those two medications.

25. Dr. Anderson-Oeser has diagnosed Claimant as suffering from depression, and anxiety with severe panic attacks. With treatment and medication, there has been some minimization of his depression and anxiety-related symptoms, including a decrease in frequency of panic attacks, but Claimant continues to experience such.

26. Dr. Anderson-Oeser explained that Claimant engages in "guarding" behavior. Essentially, he keeps his left arm next to his body so as to avoid any inadvertent contact with his left upper extremity. Claimant engages in this guarding behavior almost constantly.

27. Dr. Anderson-Oeser completed a Residual Functional Capacity Questionnaire, setting forth her opinions as to the functional limitations being experienced by Claimant. *See Exhibit 1.*

28. Dr. Anderson-Oeser further opined that Claimant's Complex Regional Pain Syndrome requires him to change positions to help distract his mind from the pain. As such, he is limited to sitting no more than 30 minutes at a time and standing no more than 20 minutes at a time. She believed that Claimant would need to get up and walk around every 30 minutes, for up to 7 minutes at a time, in order to distract himself from his pain. If there was any job that Claimant was able to do, it would need to accommodate Claimant's need to shift positions from sitting to standing or walking.

29. Dr. Anderson-Oeser opined that Claimant is unable to walk even a city block without severe pain. She explained that this is not based on a physical inability to walk, but that the movement substantially increases the symptomology and that Claimant always has severe pain.

30. Dr. Anderson-Oeser opined that in a work setting, Claimant would require unscheduled breaks that could last from 10 to 20 minutes, or as long as several hours.

31. Dr. Anderson-Oeser also limited Claimant's use of his right hand to 80% of the time, so as to avoid developing overuse syndrome of his functioning right upper extremity.

32. Dr. Anderson-Oeser testified the Claimant has days when his pain symptomology is so severe that he is unable to do anything. She opined that he would experience these "bad days" more than four times per month.

33. In *Exhibit 1*, Dr. Anderson-Oeser also noted that Claimant may only use his left hand to grasp, turn, and twist objects less than 5% of the day, to use his left fingers for fine manipulation less than 5% of the day, that he can only reach in front of his body with his left extremity less than 5% of the day, and he can only reach overhead with his left extremity less than 5% of the day.

34. In *Exhibit 1*, Dr. Anderson-Oeser also noted that his pain symptomology is constantly severe enough to interfere with his attention and concentration, so as to render him unable to even perform simple work tasks.

35. In *Exhibit 1*, Dr. Anderson-Oeser also noted he is unable to be in hot or cold work environments.

36. Overall, this ALJ found Dr. Anderson-Oeser's testimony to be credible and persuasive.

37. As noted above, Claimant was referred to Dr. Gutterman, a psychiatrist, for treatment of his depression and anxiety. Dr. Gutterman's records indicate he evaluated and treated Claimant on five occasions: December 12, 2017, March 5, 2018, June 11, 2018, October 9, 2018, and January 2, 2019.

38. Dr. Gutterman's records note that Claimant complained that it was hard to focus on occasion, that his mood fluctuated, and that he was only sleeping three to four hours per night. Claimant further noted that his energy was reduced and that his sexual libido had diminished. Dr. Gutterman initially diagnosed Claimant as suffering from an adjustment disorder, with mixed emotional features, as a result of his employment injury and chronic pain.

39. In his June 11, 2018 report, Dr. Gutterman noted that Claimant was still experiencing panic attacks three times per week.

40. On January 2, 2019, Dr. Gutterman concluded Claimant had reached MMI, psychiatrically, and completed a mental health impairment worksheet, contained within *Exhibit 7*. A 5% psychiatric impairment rating was assigned to Claimant. As noted on the worksheet, "… Impairment ratings based on chronic pain are not applicable within the mental/behavioral domain, but are restricted to physical examination with evidence of anatomical or physiological correlation and included within a physical impairment rating."

41. Dr. Gutterman opined that because of Claimant's depression and anxiety, his social functioning was minimally impaired, but that his thinking, concentration, and judgment were not impaired.

42. There is no credible and persuasive evidence that Dr. Gutterman assessed the effects of Claimant's chronic pain or medication on Claimant's cognitive abilities.

There is no credible and persuasive evidence that he tested or evaluated Claimant's ability to think, concentrate, and use good judgment while experiencing significant pain.

43. Dr. Gutterman's January 2, 2019 report, however, does note that Claimant continues to experience intermittent anxiety, despite medication to control such. It also notes Claimant is more irritable due to persistent pain, that he has trouble dealing with stress because of his pain, and that he is experiencing short-term memory issues associated with his medications.

44. On April 19, 2019, Claimant returned to Dr. Gutterman for a follow up psychiatric examination, i.e., maintenance evaluation for management of his medication. On his report from this date, Dr. Gutterman indicated, by placing an "x" in front of "Improving," that Claimant was improving. However, such notation must have been in error, because at this appointment, Claimant did not describe improvement and he was not improving. At this appointment, Dr. Gutterman noted the following:

> [Claimant] reports that his mood has been reasonably stable but he has been experiencing more anxiety and panic attacks over the past two months. This seems to have occurred since he started taking Clonazepam PRN as opposed to on tab BID. I had recommended that he decrease the frequency because he was experiencing forgetfulness. He reports that the forgetfulness is due to the Lyrica. As a result, I suggested that he resume Clonazepam 0.5 mg BID in order to treat the panic attacks and anxiety. It also appears the Buspirone, 7.5 mg QID is not benefiting him significantly, As a result, I recommend that he decrease the dose to TTD and perhaps we will titrate this down further in the future. He also reports that his sleep has not been particularly good getting only four hours of sleep per night and two hours during the day. As a result, I suggested that he discontinue Trazodone and start Mirtazapine, 30 mg, one tab HS.

45. Therefore, on April 19, 2019, Claimant's psychiatric problems due to his CRPS were getting worse and Dr. Gutterman was trying to manage such problems pharmacologically. Thus, instead of improving, Claimant was experiencing an increase in anxiety attacks, panic attacks, and forgetfulness. In addition, Claimant was continuing to have ongoing problems with sleep and was only sleeping about 4 hours a night.

46. Moreover, Dr. Gutterman's statement or conclusion that Claimant's thinking, concentration, and judgment were not impaired, even though Claimant was only sleeping 4 hours per night, is at odds with other information contained in the medical record. Therefore, Dr. Gutterman's statement regarding a lack of impairment in these areas does not seem well founded.

47. Claimant testified that his left index finger is permanently bent over and is unable to straighten it. Claimant is also unable to make a tightly-closed fist with his left hand.

48. Claimant testified that he has pain constantly from his left shoulder down to his left hand, with most of the pain being concentrated from the left elbow down to the hand.

49. Claimant testified that his hand is discolored at times and that he experiences swelling. The discoloration and swelling are associated with periods when he is experiencing severe pain.

50. Claimant testified that he is taking multiple medications, including Tizanidine, Lyrica, Buspar and Oxycodone. Even when he is taking his medications, he rates his average daily pain level between a 7 and 8 on the pain scale of 1 to 10.

51. Claimant testified that he experiences pain as high as a nine on the pain scale. He is not always able to ascertain what causes such a pain flare-up, but does know that bumping or brushing his arm up against anything results in such an increase, as does stress, and hot or cold weather.

52. Claimant testified that his pain is spread over time and during periods of flare-ups he will experience pain in his arm and into his hand, to the degree that he has used scissors to trim his armpit hair because it creates a “pulling sensation.”

53. Claimant testified that he engages in his desensitization exercises, which involve running a silk cloth over the affected areas, but that such desensitization exercises in and of themselves, have, at times, caused periods of exacerbation. He noted that coughing can exacerbate his pain, as does driving because of the bumpy roads and the difficulty reaching out with his left arm. Claimant described that even the back-and-forth motion of vacuuming, despite utilizing just the right extremity to move the vacuum, can result in flares.

54. Claimant testified that presently he experiences flare-ups that last entire days, two to three times a month. In the month of May, he described two extended flare-up periods, one lasting 3 days and another lasting 2 days. Additionally, Claimant also described flare-ups that did not last days, but could last several hours. Flare-ups always consist of a pain level that he associates with a nine.

55. Claimant described that the pain level is so severe during flare-ups that he lays in bed and that he considers bed to be his “safe space”. He also testified that during flare-ups, he does not eat much because he tends to vomit.

56. During a “normal day” when Claimant’s pain is a 7 to 8/10 pain level, Claimant testified that he is still very limited in his activities of daily living.

57. Claimant acknowledged that when he leaves his home he guards his left extremity by keeping it near his body, so as to avoid people or things inadvertently brushing up or hitting it.

58. Claimant testified that he has difficulty concentrating and paying attention. He described problems with following instructions as well.

59. Claimant indicated that he still attempts to use his left hand and will try to pick up light objects, such as keys or clothes. However, he drops things when he picks them up with his left hand because of weakness. He is also unable to hold a fork without dropping it.

60. Claimant testified that he is unable to tie his shoes and, as a result, wears shoes that are pre-tied or that have slipknots.

61. Claimant indicated that he is afraid to use his left hand for fear of experiencing flare-up episodes. He indicated that he has vomited from pain. Claimant indicated that he still experiences panic attacks, but acknowledges that they are less now that he is on medication. Despite that, he describes panic attacks occurring two to three times per week. When having a panic attack, Claimant indicated that it is like a heavy weight has been placed on his chest and he needs to go outside to breathe. His heart rate increases and he becomes sweaty. While he has learned biofeedback techniques to assist with these moments a panic attacks, the techniques do not always help. He testified that panic attacks last between half-an-hour and two hours.

62. During the hearing, the ALJ had the opportunity to observe Claimant during the hearing and during his testimony. During that time, Claimant was observed guarding his left hand. When Claimant was sitting next to his attorney during the hearing, he also appeared to have a flat affect and appeared depressed. Claimant's flat affect and depressed appearance continued through his testimony, and the remainder of the hearing. Claimant's overall appearance and body language exhibited a sense of despair, hopelessness, and lethargy.

63. This ALJ found Claimant's testimony and presentation to be credible and consistent with the majority of the medical record and the restrictions outlined by his primary treating physician Dr. Anderson-Oeser.

64. Claimant called Jammie Massey as a witness. Ms. Massey is a vocational rehabilitationist, and holds an undergraduate degree in psychology and a Master's degree in rehabilitation counseling. She has been certified in rehabilitation counseling by the commission of rehabilitation counselors, and has been so certified since 2006. Although not previously qualified as a vocational expert by the Colorado Division of Workers' Compensation, Ms. Massey was recognized by this ALJ as being an expert in the field of vocational rehabilitation.

65. Ms. Massey testified that a person with unskilled to low-end semi-skilled work will not be able to maintain employment if they experience more than two absences per month. If a person has skilled experience, a person might be able to miss as much is three days' work per month and maintain employment. Ms. Massey testified that Claimant's previous work experience placed him in the semi-skilled category.

66. Ms. Massey further explained that leaving work early for sickness would constitute an absence from work. Ms. Massey testified that if a person was required to miss four or more days from work per month, whether partial days or whole days, that such person would be unable to maintain competitive employment.

67. Ms. Massey testified that persons with unskilled and semi-skilled work assignments may only be off task 10% of the day, or less, in order to maintain competitive employment. If a person is working at a skilled level, a person may be off task approximately 15% of the day, and be able to maintain competitive employment. If a person exceeds such standards, they are considered unable to maintain employment.

68. Ms. Massey testified that the physical restrictions of limited use of the upper extremity one to two pounds of lifting less than 6% of the day, no reaching, no dexterity, and no fingering, that no competitive work is available on a part-time or full-time basis. She explained that the one to two pound lifting restriction would relegate somebody to sedentary seating capacity work, which typically requires bilateral use of the hands on a frequent, constant basis. Work that would accommodate such physical restrictions, by themselves, would constitute a sheltered work setting.

69. In her report, Ms. Massey also listed some of the problems Claimant described regarding his emotional response to his CRPS. Ms. Massey noted that Claimant experiences depression, anxiety, panic attacks, irritability, frustration, impatience, loss of self-worth and self-esteem, social isolation and withdrawal, embarrassment, and changes in his personality. She also noted that Claimant indicated that since his injury, he and his wife have struggled emotionally with coping and communication and have discussed attending marriage counseling. She also noted Claimant has a child with special needs and has an Individualized Education Plan (IEP) at his school. Claimant advised Ms. Massey that the school administration and teachers have requested that Claimant no longer attend meetings regarding his son's education due to his irritability and inability to communicate. She also noted that Claimant is no longer able to shower since his left upper extremity is unable to tolerate the water hitting it and that he now has to take a bath. She also noted Claimant had to install grab bars in his bathroom to assist with entering and exiting the bathtub and using the toilette. She further noted Claimant stated that prior to the injury, he enjoyed numerous recreational activities including spending time with family and friends, fishing, camping, snowmobiling, skiing, riding all-terrain vehicles, practicing judo, playing football, and shooting guns competitively. However, since the injury, she noted that Claimant said he has sold most of his recreational equipment since he is no longer able to use it and that he is also no longer able to shoot competitively.

70. The ALJ finds that the impact the injury has had on Claimant's marriage, raising his children, as well as his recreational activities is consistent with the physical restrictions issued by Dr. Anderson-Oeser and problems identified by Dr. Boyd, his psychologist. The ALJ also finds that the impact the injury has had on Claimant's marriage, raising his children, as well as his recreational activities is consistent with the limitations and symptoms described and exhibited by Claimant to his medical providers and at hearing.

71. During her testimony and in her report, Ms. Massey did not state the proper legal standard for determining whether Claimant is permanently and totally disabled under the Colorado Workers' Compensation Act. Moreover, based upon the

testimony of Ms. Montoya, Ms. Massey used some outdated data in assessing Claimant's ability to work. Despite these shortcomings, the ALJ still finds her testimony to be credible and persuasive in determining whether Claimant can earn "any wages in the same or other employment."

72. On February 17, 2017, Dr. Schakaraschwili saw Claimant at the request of Dr. Anderson-Oeser for diagnostic testing to assist in determining whether Claimant had Complex Regional Pain Syndrome. Based on the diagnostic testing performed by Dr. Schakaraschwili, Claimant had an abnormal thermogram, which objectively noted temperature asymmetries between the left and right hands, and an abnormal warming of the left hand. Claimant also had abnormal skin temperature and stimulated sweat output on the autonomic testing battery. According to Dr. Schakaraschwili, the test results indicated a high probability that Claimant was suffering from Complex Regional Pain Syndrome. At the time of the evaluation, Claimant had not undergone any sympathetic blocks.

73. On September 14, 2018, Dr. Schakaraschwili performed an independent medical exam at the request of Respondents' counsel, and upon agreement of the parties, since he was an authorized treating physician. This consisted of reviewing Claimant's medical records, obtaining a history from Claimant, and examining his affected left hand. Based on his physical examination of Claimant, he noted the following:

    a. There were no abnormal pain behaviors observed during the examination.

    b. Claimant had a flattened, depressed affect.

    c. Claimant's left hand was reddish and slightly swollen and held in a flexed position, especially the left index finger.

    d. There were healed surgical scars on both the dorsal surface of the hand over the first dorsal interosseous and in the palm "just ulnar to the midline."

    e. There was hyperhidrosis involving Claimant's palm.

    f. Claimant was sensitive to touch diffusely in the hand and in the arm.

    g. There appears to be slightly increased hair growth on the fingers and dorsum of the hand.

    h. Allodynia is most pronounced in the palm and index finger.

    i. The fingers feel cold to the touch.

74. Upon a thorough examination of Claimant and review of his medical records, which included Claimant's response to the sympathetic blocks, Dr. Schakaraschwili concluded Claimant has the following work related diagnoses which were caused by the October 25, 2016, industrial injury:

    a. Laceration of the left hand, left index finger radial digital artery, and left digital nerve laceration.

b. Complex regional pain syndrome of the left upper extremity, and

c. Depression, which is related to his injury and chronic pain.

75. The ALJ finds that Dr. Schakaraschwili concluded that there was no indication of symptom magnification during his examinations. In other words, there was no indication that Claimant's pain complaints and symptoms were out of proportion to Dr. Schakaraschwili's objective findings, physical examination, test results, and the underlying diagnoses.

76. Dr. Schakaraschwili testified by deposition. *(Claimant's Exhibit 9)*. Dr. Schakaraschwili is a physician specializing in physical medicine and rehabilitation, as well as electrodiagnostic medicine. He is board certified in each. It was stipulated that he is an expert in physical medicine and rehabilitation and electrodiagnostic testing.

77. Dr. Schakaraschwili testified that persons experiencing Complex Regional Pain Syndrome will develop a constellation of symptoms, including swelling, decreased range of motion, color changes, temperature changes, sweating, and changes in skin, hair, or nails. In particular, patients with Complex Regional Pain Syndrome experience allodynia, which is pain from stimuli that are not normally painful, such as a breeze against one's skin, water from a shower, or light touch.

78. As found above, Dr. Schakaraschwili described in his report his objective findings on physical examination that were consistent with, and the hallmark of, Complex Regional Pain Syndrome.

79. According to Dr. Schakaraschwili, the actual physiology of CRPS is not clearly understood. He testified that:

> There are speculations that it's an abnormal reaction of the body to pain and that the pain signals are causing something in the central nervous system or maybe more peripherally in the sympathetic nervous system to get disregulated, and it creates kind of a positive feedback, it gives you more pain, which irritates whatever is getting irritated even more, and you get this cycle of pain. Nobody really knows what's actually going on. *Schakaraschwili deposition, pg. 7*.

80. Dr. Schakaraschwili also noted that Claimant became tearful during examination of his left index finger and hand, which is an example of allodynia. Dr. Schakaraschwili also noted that Claimant had limited motor strength in his left-hand due to pain.

81. Dr. Schakaraschwili opined that Claimant's use of the left hand was restricted to very occasional activity. He indicated that the left hand did not have enough finger dexterity to make the left hand useful, but might be able to be used to steady objects being manipulated by the right hand.

82. Dr. Schakaraschwili considered the medical report of a Dr. Nnunukwe, dated November 14, 2017. It was noted that Dr. Nnunukwe had opined that Claimant was able to lift 50 pounds occasionally and 25 pounds frequently. Dr.

Schakaraschwili indicated that Claimant was clearly unable to do such with his left extremity and assumed that these were restrictions for the right extremity. However, Dr. Schakaraschwili did not clearly indicate how such strenuous use, such as lifting 25 pounds frequently, might impact Claimant's left upper extremity and pain levels.

83. Dr. Schakaraschwili opined that Claimant should be restricted to lifting no more than four pounds, very occasionally, with his left hand. He described "very occasionally" as 10 to 15% of the day. He indicated that if lifting four pounds with the left hand resulted in exacerbation or swelling that he would want to revise the restriction downwards.

84. Dr. Schakaraschwili acknowledged that Oxycodone, Lyrica, Tiznidine can have side effects of drowsiness.

85. Dr. Schakaraschwili admitted that Claimant might experience exacerbation of his pain, if he attempts to work within the four-pound lifting restriction.

86. Dr. Schakaraschwili acknowledged the Claimant might require unscheduled breaks because of his Complex Regional Pain Syndrome.

87. Dr. Schakaraschwili acknowledged that it is possible that Claimant would be absent from work more than four days per month, and that such absenteeism was not unreasonable, given Claimant's condition of Complex Regional Pain Syndrome. Dr. Schakaraschwili also acknowledged that Claimant might be forced to leave work early due to his symptomology as much as four times per month.

88. Dr. Schakaraschwili acknowledged that cold and hot environments could exacerbate Claimant's pain.

89. Dr. Schakaraschwili admitted that a physician who sees a patient on a regular basis, over the course of several years, has a better ability to assess a claimant's limitations that a physician who sees a person on a one-time basis.

90. Dr. Schakaraschwili did not obtain any history from Claimant about how often he experiences extended periods of heightened pain. Dr. Schakaraschwili did not recall asking Claimant whether his pain interfered with his ability to concentrate.

91. Dr. Schakaraschwili did, however, provide some testimony regarding how pain can interfere with someone's ability to concentrate. Although his examples were extreme, they were still illustrative. He was asked: Does severe pain that's sufficient to interfere with your concentration fall within that 9 to 10 pain level category? He responded by saying:

> Yes. And again, 9 to 10 -- the scale is not an objective measure of pain. It's a perception of pain. And true 10 out of 10 pain would be, okay, the equivalent -- okay, appendicitis, some types of childbirth. You don't expect a woman in labor to be able to, you know, type out a manuscript, say, at the same time, although there may be some tough ones that could do that.

> If I soaked your arm in gasoline and lit it, I wouldn't expect you to be able to concentrate enough to read a book. But 10 out of 10, nobody can really tolerate 10 out of 10 pain for any length of time, that's what it is. The ability to concentrate, there's no pain level that you could come up with and say, okay, pain level of 4 you can't concentrate. It really depends on the person, how stoic they are, how motivated they are to concentrate on whatever they're trying to concentrate. *Schakaraschwili Deposition pg. 37-38.*

92. Although Claimant's pain levels are subjective and cannot be measured, it is clear that pain can interfere with a person's ability concentrate, follow instructions, stay on task, complete a task, and interact appropriately with co-workers, customers, and the general public. Therefore, chronic pain can interfere and hinder a person's ability to perform their job and maintain their job.

93. While this ALJ found Dr. Schakaraschwili to be credible, greater weight was given to the testimony of Dr. Anderson-Oeser and the restrictions she assigned. Great weight was given to Dr. Anderson-Oeser's opinions regarding the work restrictions she placed on Claimant because she had the opportunity to treat and evaluate Claimant approximately once a month over the course of more than two years. This has provided her a greater opportunity to observe and examine Claimant and determine the extent of his restrictions and limitations that flow from his Complex Regional Pain Syndrome.

94. Respondents called Katie Montoya as a vocational expert. When presented with just the physical restrictions outlined by Dr. Schakaraschwili, (which consisted of no work requiring finger dexterity in both hands and lifting restricted to the left hand of no more than four pounds occasionally), Ms. Montoya opined that work was available for Claimant within such restrictions.

95. When presented with just physical restrictions outlined by Dr. Anderson-Oeser, (which consisted of no lifting or carrying with the left extremity greater than one to two pounds and no repetitive lifting with the left hand carrying, as well as no repetitive or frequent use of the left hand), Ms. Montoya opined that jobs were available for the Claimant within just these restrictions.

96. Based on just the physical restrictions assigned by Dr. Schakaraschwili or Dr. Anderson-Oeser, Ms. Montoya opined that Claimant should be able to work jobs as a hostess, a cashier, or an unarmed security guard.

97. Ms. Montoya, however, acknowledged that the "rule of thumb" is that only two days of unanticipated absences are generally accepted within the vocational community and that more absences would eliminate a person from competitive employment.

98. Ms. Montoya acknowledged that missing four days of work per month would generally render a person unemployable.

99. Ms. Montoya acknowledged that having unscheduled breaks during the workday, to the degree indicated by Dr. Anderson-Oeser, would render a person unemployable.

100. Similarly, Ms. Montoya acknowledged that vocational rehabilitation generally considers a person that will be off task 10 to 15% of the day to be unable to maintain competitive employment.

101. Ms. Montoya acknowledged that an unarmed security person/surveillance monitor is often required to use bilateral extremities. She was unable to state how many such positions were available, and how much erosion of job availability there would be to such positions, if a person is limited to one arm use. Ms. Montoya was also unable to state how much erosion there would be to security jobs if one was limited to indoor activity. Ms. Montoya was also unable to state how many host jobs were currently available, or how much erosion there would be to host jobs if someone is limited to one-arm work. Ms. Montoya was unable to state how many cashier jobs were available, or how much erosion there would be to cashier jobs if a person was limited to one-armed work.

102. While Ms. Montoya maintained that one-arm jobs were available, she did not identify an actual opening for any such job. Moreover, she did not indicate how successful Claimant would be in obtaining and maintaining such jobs. More specifically, she did not indicate how Claimant's flattened and depressed affect combined with his constant guarding of his left hand, all of which were visibly noticeable and apparent during the hearing, would impact his ability to get hired, especially when competing against available workers who were not constantly guarding their left hand and presenting with a flattened and depressed affect.

103. Dr. Anderson–Oeser referred Claimant to psychologist, Dr. William Boyd. Dr. Boyd first saw Claimant on April 13, 2017, and performed a psychological interview. Dr. Boyd's medical records are set forth in Exhibit 6. During this initial interview, Claimant endorsed feeling depressed and anxious. Claimant noted that he had panic attacks, problems sleeping, and loss of energy. Claimant reported difficulties with activities of daily living, including his hobbies, relaxing, dressing, and sex. Dr. Boyd noted that Claimant had a depressed affect.

104. Dr. Boyd administered psychological testing. Such testing included a Validity Index, which suggested that Claimant approached the test in an open and honest manner. Claimant's score on the Depression Scale supported a diagnosis of depression. Similarly, Dr. Boyd's interpretation of Claimant's score on the Anxiety Score suggested that Claimant may have trouble controlling his anger, may become irritated by situations and events that formally went relatively unnoticed, would be uncomfortable in social situations, and the Claimant would find it difficult to relax and make decisions. Dr. Boyd also suggested that clear logical thinking may be difficult for the Claimant and his coping skills may be strained.

105. Following psychological testing, Dr. Boyd prescribed cognitive behavioral sessions.

106. Following a completion of cognitive behavioral therapy, Dr. Boyd completed *Exhibit 2*, entitled "Mental Residual Functional Capacity Statement", which is dated October 2, 2017.

107. As noted in *Exhibit 2*, Dr. Boyd opined that Claimant's restrictions, associated solely with his mental problems of depression and anxiety, have little, if any, impact on Claimant's ability to function independently, appropriately, and effectively on a

sustained, consistent, useful, and routine basis, in a regular competitive work setting.

108. However, Dr. Boyd noted that the combination of Claimant's physical problems, along with any mental limitations, were such that Claimant would be precluded from completing work more than 30% of any given work day, that he would be absent from work five days or more per month, and that that he will leave work early because of an inability to complete his work day five days or more per month. When compared to an average worker, Dr. Boyd further opined that Claimant could only efficiently perform work duties eight hours per day, five days per week, on a sustained basis less than 50% of the time. The ALJ finds Dr. Boyd's opinions regarding Claimant's limitations regarding his ability to complete work, how often he might be absent, how often he might have to leave work early, and how often he could efficiently perform work duties to be credible and consistent with the testimony of Dr. Anderson-Oeser.

109. Claimant has established that it is more probably true than not that his medical condition will result in him being totally absent from being able and available to work on average four days per month or more. Similarly, Claimant has established that his medical condition will render him unable to complete a workday, if he were working that day, four times or more per month. Such findings are consistent with the medical reports and testimony of authorized treating physician, Dr. Anderson-Oeser, the medical reports and testimony of Respondents' independent medical examiner, Dr. Schakaraschwili, and the medical reports of authorized treating psychologist, Dr. Boyd. Although it cannot be predicted which days, in a 30 day period, Claimant will be unable to work or will have to leave work early – it is found that if Claimant were able to obtain some type of employment, Claimant's condition would ultimately cause him to miss time from work and leave early to such an extent that it would preclude him from being able to maintain that employment.

110. Based on the testimony of both vocational rehabilitationists Ms. Massey and Ms. Montoya, Claimant has established that it is more probably true than not that this degree of possible absenteeism, in any given month, renders him unable to obtain and maintain the same or other employment.

111. Claimant has established that this more probably true than not that his medical condition will require him to be off task more than 15% of a normal workday. Being off task is found to include inability to concentrate because of pain or side effects of medication, and/or the need to take unscheduled work breaks because of pain. Such findings are consistent with the medical reports and testimony of authorized treating physician, Dr. Roberta Anderson-Oeser, and the medical reports of authorized treating psychiatrist, Dr. William Boyd.

112. Based on both the testimony of vocational rehabilitationist Ms. Massey and Ms. Montoya, Claimant has established that it is more probably true than not that being off task to the degree of 15% of the day or more would render him unable to obtain or maintain the same or other employment.

113. On October 31, 2017, Claimant was interviewed evaluated by a psychologist, Dr. William Morton, Psy.D. Respondents contend Dr. Morton determined Claimant had

no memory impairment, no difficulty sitting for extended times, and no difficulty with mood or verbal expression. *(Respondents Exhibit A)*. However, the ALJ does not find Dr. Morton's report to be persuasive, reliable, or helpful in determining the extent of Claimant's psychological restrictions and impairments that will impact his ability to earn any wages. For example, Dr. Morton concluded Claimant has only mild mental limitations concerning interacting appropriately with supervisors, co-workers, and the public. However, Dr. Morton does not explain which portion of his examination and Claimant's medical record supports such conclusion. Moreover, this conclusion is inconsistent with Claimant's statements contained in Ms. Massey's report regarding his inability to interact appropriately with his son's teachers when discussing his son's IEP plan. In fact, Claimant's inability to regulate his behavior at the IEP meetings with his son's teachers resulted in Claimant being advised that he was no longer welcome to attend the IEP meetings.

114. Dr. Morton also concluded in his assessment that "There were no indications of memory impairment." However, his testing revealed that while Claimant was able to recall four unrelated words immediately, he was only able to recall three words after a ten-minute delay, and that he was unable to remember any of the words when given just the category, and ultimately only 1 word when given a multiple choice.

115. Moreover, in another section of his report, Dr. Morton indicated that when Claimant was asked why many foods need to be cooked, Claimant stated, "Disease." He also notes that when Claimant was asked why it is important to study history, he stated, "It repeats itself." From these two questions and Claimant's answers, Dr. Morton concluded Claimant's "judgement and reasoning appear to be fair." This ALJ is unable to determine how those two questions – and Claimant's answers – allowed Dr. Morton to conclude Claimant's judgment and reasoning were fair.

116. Lastly, Dr. Morton concluded Claimant's prognosis is fair and that his limitations will persist until adequately treated. This statement tends to show greater disability than Dr. Morton's other statements which tend to minimize Claimant's limitations. Consequently, the ALJ is unable to find the information contained in Dr. Morton's report to be persuasive in disputing Claimant's contention about the extent of his disability due to his CRPS and the psychological sequelae from such condition.

117. On November 14, 2017, Claimant presented to Dr. Nnunukwe. While noticing sensitivity in the left index finger, the doctor stated Claimant's strength was 5/5 in both the right and left upper extremity, as well as remaining fingers on both hands. The doctor gave Claimant no limitations for standing, sitting, reaching, travelling, or climbing. He also assigned lifting restrictions of 50 pounds occasionally and 25 pounds frequently. *(Respondents Exhibit B)* However, absent from Dr. Nnunukwe's report is any indication how Claimant's medications might impair his cognition and what impact Claimant's lack of restful sleep every night, which is limited to about 4 hours per night, will have on Claimant's ability to concentrate and stay on task in order to obtain and maintain employment. Moreover, there is no indication how Claimant's chronic pain will impact his ability to engage in the physical activities Dr. Nnuwuke contends claimant can perform without causing Claimant's pain to flare up. The ALJ does not find it credible that Claimant would be able to perform a job that would require him to lift with his right hand 50 pounds occasionally and 25 pounds

frequently without causing his CRPS to flare-up. In essence, Dr. Nnunukwe contends Claimant would be able to frequently lift with his right hand approximately 3 gallons of milk at one time and engage in this activity frequently during his workday while guarding his left hand and not have any flare-ups of his CRPS in his left hand. Moreover, Dr. Nnunukwe does not discuss how many flare-ups Claimant might have each month. He also fails to address how many days Claimant might be unable to work each month and how many days Claimant might not be able to complete a shift each month due to a flare-up. In the end, the ALJ does not find Dr. Nnunukwe's opinions to be persuasive.

118. Due to his work related injury, Claimant is unable to earn any wages in the same or similar employment.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, Section 8-40-101, *et seq.*, C.R.S. (the "Act"), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1), C.R.S. Generally, the claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

The ALJ's resolution of issues will be affirmed if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *City and County of Denver School District 1 v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). Substantial evidence is that quantum of probative evidence, which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

I. Whether Claimant established by a preponderance of the evidence that he is unable to earn any wages in the same or other employment as a direct and proximate result of the industrial injury and entitled to permanent total disability benefits.

To establish a claim for PTD, Claimant shoulders the burden of proving by a preponderance of the evidence that he is unable to earn any wages in the same or other employment. Sections 8-40-201(16.5)(a) and 8-43-201, C.R.S. (2003); *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). Claimant must also prove the industrial injury was a significant causative factor in the PTD by demonstrating a direct causal relationship between the injury and the PTD. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001). The term "any wages" means more than zero wages. *See Lobb v. Industrial Claim Appeals Office,* 948 P.2d 115 (Colo. App. 1997); *McKinney v. Industrial Claim Appeals Office,* 894 P.2d 42 (Colo. App. 1995).

In weighing whether Claimant is able to earn any wages, the ALJ may consider various human factors, including the claimant's physical condition, mental ability, age, employment history, education, and availability of work that Claimant could perform. *Weld County School Dist. Re-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). The ALJ may also consider Claimant's ability to handle pain and the perception of pain. *Darnall v. Weld County,* W.C. No. 4-164-380 (I.C.A.O. April 10, 1998). The critical test is whether employment exists that is reasonably available to Claimant under his or her particular circumstances. *Weld County School Dist. Re-12 v. Bymer*, *supra*. The question of whether Claimant proved inability to earn wages in the same or other employment presents a question of fact for resolution by the ALJ. *Best-Way Concrete Co. v. Baumgartner,* 908 P.2d 1194 (Colo. App. 1995).

As a matter of public policy, PTD benefits may be awarded even if Claimant has held, or currently holds, some type of post-injury employment where the evidence shows that Claimant is not physically able to sustain the post-injury employment, or that such employment is unlikely to become available to Claimant in the future in view of the particular circumstances. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001).

Claimant has been diagnosed with, *inter alia*, Complex Regional Pain Syndrome, depression, anxiety, and significant psychosocial dysfunction resulting from the industrial injury. Claimant credibly testified that he continues to experience various symptoms, which includes chronic pain, as a result of his work-related conditions, which have decreased his functionality and ability to work. Objective findings combined with

consistent reports of ongoing symptoms and difficulties performing various activities of daily living throughout the medical and vocational record corroborate Claimant's reports and testimony of ongoing symptomatology and disability.

There are some alleged inconsistencies in the record. For example, Dr. Anderson-Oeser has advised Claimant that he should not drive while taking Oxycodone or Tizanidine. The records indicate that Claimant drives to his medical appointments when he does not have alternative transportation available. However, the fact that Claimant is driving, when he should not, does not negate the fact that his medications are mentally impairing. Therefore, despite some inconsistencies contained in the record, the record as a whole supports Claimant's claimed disabilities.

Dr. Anderson-Oeser credibly opined Claimant is severely restricted in his ability to perform various physical activities which would be required for Claimant to work. She also credibly opined that Claimant will require, on average, 4 days off per month due to flare-ups and that Claimant will also have to leave work early and unpredictably due to flare-ups. Both Ms. Massey and Ms. Montoya agreed that such absenteeism would hinder Claimant's ability to maintain employment. The ALJ is mindful that if Claimant were able to obtain some type of employment, his anticipated flare-ups might not coincide with an actual work shift at least 4 times per month or cause him to leave early at least 4 times per month. Regardless, the unpredictable nature of his flare-ups will negatively affect his ability to obtain and maintain any employment. Furthermore, Claimant also suffers from mental limitations with respect to concentration, memory focus and comprehension as a result of his pain and medications.

Dr. Schakaraschwili gave some examples of events than would cause enough pain to prevent a person from concentrating and staying on task. Although the examples were extreme, such as childbirth and having an arm soaked in gasoline and lit on fire, they conveyed the point that pain can negatively impact a person's ability to concentrate and stay on task.

Claimant's continued symptoms, restrictions, and limitations were caused by his industrial injury. Based on the totality of the evidence, Claimant has established by a preponderance of the evidence that it is more likely than not that he is unable to earn any wages in the same or other employment and that he is entitled to permanent total disability benefits.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant is permanently and totally disabled.

2. Respondents shall pay Claimant permanent total disability benefits as of January 2, 2019, pursuant to the average weekly wage of $1,211.78 per week, as reflected in the Amended Final Admission of Liability dated March 1, 2019.

3. As noted in footnote 1, the issue of "offsets and overpayments" was endorsed to be heard at the hearing. The issue of social security offsets was discussed briefly at the beginning of the hearing and it was ultimately agreed that the parties would attempt to resolve such issue after resolution of the PTD matter and the ALJ agreed. Therefore, whether Claimant received social security disability benefits and whether Respondents can take an offset against certain TTD benefits that have been paid, and the amount of such offset, was not addressed at the hearing. Moreover, whether any offset against permanent total disability benefits is allowed pursuant to Section 8-42-103(1)(c)(IV), C.R.S., since the injury on which the award for PTD is based occurred before Claimant reached 45 years of age, was also not discussed and addressed at the hearing. Therefore, the issues involving social security offsets and overpayments are reserved for future determination.

4. Respondent shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. Any issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 13, 2019

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-094-478-001

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on May 16, 2019, in Denver, Colorado. The hearing was digitally recorded (reference: 5/16/19, Courtroom 1, beginning at 8:30 AM, and ending at 11:00 AM). The official Spanish/English Interpreter was Jose Meza. shall be referred to as the "Employer." All other parties shall be referred to by name.

Claimant's Exhibits 1 and 2 were admitted into evidence, without objection. Respondents' Exhibits A through I were admitted into evidence, without objection, with the exception of Exhibit B, pp. 11-14, which was originally objected to as to the translation, however, the official interpreter made notations amending the translation, and as amended, Exhibit B, pp. 11-14, was admitted without objection.

At the conclusion of the hearing, the ALJ permitted the filing of the post-hearing evidentiary depositions of Kay B[Redacted] and the Claimant, which were taken on May 17, 2019, and written transcripts thereof were filed on June 10, 2019. Thereafter, the ALJ ordered telephonic closing arguments, which occurred on July 22, 2019. At the conclusion of the arguments, the matter was deemed submitted for decision and the ALJ ruled from the bench, referring preparation of a proposed decision to counsel for the Claimant. The proposed decision was submitted on July 29, 2019, and Respondents filed technical objections on July 31, 2019, at which time the matter was submitted for decision. After considering the proposed decisions and the objections thereto, the ALJ has modified the proposal and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern average weekly wage (AWW); temporary partial disability (TPD) benefits from September 23, 2018 through October 20, 2018; temporary total disability (TTD) benefits from October 21, 2018 through March 20, 2019; and, Respondents' affirmative defense of Responsibility for termination/voluntary resignation.

The Claimant bears the burden of proof on all issues, with the exception of "responsibility for termination/voluntary resignation, in which case Respondents bear the burden of proof. The burden is "preponderance of the evidence."

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant's theory of AWW was $376.43. Respondents' theory of AWW was $362.33. Based on independent calculations,the ALJ finds that the Claimant's AWW is $366.71.

2. The parties stipulated and the ALJ finds that the Claimant continued to work at reduced wages and is, therefore, entitled to TPD is entitled to TPD benefits. It undisputed that the Claimant had restrictions which precluded her from performing her regular pre-injury duties.

3. The Claimant sustained an admitted industrial injury to her left knee on September 19, 2018 (Respondents' Exhibit A).

4. On September 20, 2018, Martin Kalevik, D.O., the Claimant's authorized treating physician (ATP) assigned restrictions of limited lifting, pushing and pulling to 10 to 15 pounds and to avoid crawling, kneeling, squatting and climbing (Claimant's Exhibit 1,,p..6).

5. Claimant's regular employment as a hotel housekeeper requires lifting over 15 pounds and kneeling in order to properly clean the bathrooms, empty trash, and change linens.

Temporary Total Disability/Voluntary Resignation

6. The Claimant stopped working on October 21, 2019. Respondents deny TTD benefits based on a claim that Claimant voluntarily stopped presenting for work. The Claimant claims that she stopped working because she could no longer perform work outside her restrictions. As found herein below, no persuasive evidence was presented that Claimant was warned, fired, or violated a company policy by her stopping work because she was performing work outside her restrictions.

7. On October 1 and 5, 2018, ATP Dr. Kalevik documented that the Claimant acknowledged she was working, however, "that she has been forced to exceed her recommended restrictions" (Claimant's Exhibit 1, pp. 8-11).

8. On October 15, 2018, the Claimant complained tto ATP Dr. Zachary Jipp, D.C., Ciropractor, that she was in a lot of pain and she thought work was making it worse. "She admit her co-workers are older people and she feels bad making them do all the work so she admits she is doing activities above her restrictions which aggravate her." In the assessment ATP Jipp notes, "work continues to aggravate her as she is performing duties above her restrictions. She is going to try to see a provider today to discuss this" (Claimant's Exhibit 1, p. 22).

9. Claimant reported feeling better two days later on October 17, 2019 "She saw the provider a couple of days ago and now is following her restrictions at work which is helping prevent flare ups for her" (Claimant's Exhibit 1, p.23).

10. On October 22, 2018, the Claimant reported to ATP Chiropractor Jipp that "her boss is giving her a hard time for missing work for these appointments and that he isn't accommodating her restrictions very well" (Claimant's Exhibit 1, p. 23).

11. On October 24, 2018, the Claimant reported, "She says she has been under tremendous amount of stress and she thinks the stress is what is preventing her from improving. She tells me her boss does not accommodate her restrictions and gets mad at her for missing work for her doctor appointments. She says that he is requesting more paper work from her but she has given him every piece of paperwork that she get and that she has" (Claimant's Exhibit 1, p. 25). The ALJ finds the Claimant credible in this regard. The peripheral details in her testimony reveal that she could not have had an opportunity to fabricate the details concerning how she was pressured to exceed her restrictions and, thus, constructively forced to stop coming to work. She consistently recounted the same pressure to exceed her restrictions.

12. Dr. Jipp noted, "She fails to progress as rapidly because she is under a lot of stress at work with her boss and is also being forced to work above and beyond her restrictions" (Claimant's Exhibit 1, p. 25).

13. After a two-week gap, the Claimant returned to Dr. Jipp. She reported, "she hasn't been coming because her boss has been intimidating her and making her

work beyond her restrictions and telling her she will have to pay for these treatments" (Exhibit 1, p. 26).

Evidentiary Deposition of Kay B[Redacted]

14. Respondents' representative Kay B[Redacted] testified by evidentiary deposition.. B[Redacted] testified that he always accommodated her restrictions and that Claimant simply stopped coming to work. B[Redacted]'s testimony amounted to a generalized denial of any pressure on his part in forcing the Claimant to exceed her restrictions. B[Redacted]'s testimony does **not** support a firing or violation of company policy,*e.g.* "no-call, no-show." In fact, no persuasive evidence regarding this proposition was presented.

15. Respondents failed to demonstrate that it is more probably true than not that Claimant was responsible for her termination. In considering the testimony at hearing and the evidentiary depositions, along with the exhibits, the ALJ is not persuaded that Claimant voluntarily stopped coming to work for the following reasons:

a. Claimant's medical records, created prior to litigation and contemporaneously with the events as they occurred demonstrate Claimant's state of mind – specifically that she felt that the work exceeded her restrictions, that her Employer questioned her missing work for medical treatment, and that she was not getting the assistance she needed.

b. The text messages and the testimony reflect that Claimant and Kay B[Redacted] had difficulty communicating. Claimant believed B[Redacted] could speak Spanish. B[Redacted] testified that he did not speak Spanish. The translated text messages reveal various translation errors, some of which could dramatically affect the message. For example in one, Claimant asked, "Are you firing me?" but it was translated, "I'm running."

16. The Claimant was placed at maximum medical improvement (MMI). by her ATP on March 21, 2019.

Ultimate Findings

17. For the reasons herein above specified, the ALJ finds the Claimant's testimony credible and persuasive. The ALJ further finds the testimony of Kay B[Redacted] lacking in credibility. The opinions of Dr. Kalevik and Dr. Jipp, D.C. are undisputed and credible.

18. Between conflicting lay testimony, the ALJ makes a rational decision, based on substantial evidence, to accept the Claimant's version of being forced to

exceed her restrictions and, thus, constructively forced to leave work on October 21, 2018.

19. The ALJ reviewed almost a full year of employer wage records and determined that this duration of time would be the fairest to determine temporary wage loss. The Claimant's AWW is $366.71, which is the baseline for temporary wage loss.

20. The Claimant was temporarily and partially disabled from September 23, 2018 through October 20, 2018 and, thus, entitled to $578.74 in TPD benefits for this period.

21. The Claimant was temporarily and totally disabled from October 21, 2018 through March 20, 2019, both dates inclusive, 151 days.

22. Respondents failed to prove their affirmative defense of voluntary separation from employment by preponderant evidence.

23. Based on her AWW of $366.71, a weekly TTD rate of $244.47 (or $34.9244) is yielded. For the period from October 21, 2018 through March 20, 2019, both dates inclusive, the Claimant has proven by preponderant evidence that she is entitled to aggregate TTD benefits of $5,273.59.

24. The Claimant failed to prove TTD from March 21, 2019 through the hearing date of May 16, 2019.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913);

also see Heinicke v. Indus. Claim Appeals Office, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As found, the Claimant's testimony was credible and persuasive. The testimony of Kay B[Redacted] was lacking in credibility. The opinions of Dr. Kalevik and Dr. Jipp, D.C. were undisputed and credible.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting lay testimony, the ALJ made a rational decision, based on substantial evidence, to accept the Claimant's version of being forced to exceed her restrictions and, thus, constructively forced to leave work on October 21, 2018, and to reject Kay B[Redacted]'s testimony.

Average Weekly Wage

c. Section 8-42-102, C.R.S. is designed to compensate for **total** temporary wage loss. *See Pizza Hut v. Indus. Claim Appeals Office,* 18 P. 3d 867 (Colo. App. 2001). *See* § 8-42-102, C.R.S. As found, Claimant lost wages from the Employer and

Further, an ALJ has the discretion to determine a claimant's average weekly wage, including the claimant's cost for COBRA insurance, based not only on the claimant's wage at the time of injury, but also on other relevant factors when the case's unique circumstances require, including a determination based on increased earnings and insurance costs at a subsequent employer. *Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008). By implication an ALJ has discretion in reviewing employer wage records, to use a period of time that most fairly illustrates wage loss/loss of earning capacity. As found, the ALJ determined that the Claimant's AWW is $366.71.

Temporary Partial Disability

d. As stipulated and found, the Claimant was TPD from September 23, 2018 through October 20, 2018, and entitled to aggregate TPD benefits of $578.74.

Temporary Total Disability

e. To establish entitlement to temporary disability benefits, the Claimant must prove that the industrial injury has caused a "disability," and that she has suffered a wage loss that, "to some degree," is the result of the industrial disability. § 8-42-103(1), C.R.S; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). When a temporarily disabled employee loses his employment for other reasons which are not her responsibility, the causal relationship between the industrial injury and the wage loss necessarily continues. Disability from employment is established when the injured employee is unable to perform the usual job effectively or properly. *Jefferson Co. Schools v. Headrick*, 734 P.2d 659 (Colo. App.1986). This is true because the employee's restrictions presumably impair her opportunity to obtain employment at pre-injury wage levels. *Kiernan v. Roadway Package System*, W.C. No. 4-443-973 [Indus. Claim Appeals Office (ICAO), December 18, 2000]. There is no statutory requirement that a claimant must present medical opinion evidence from of an attending physician to establish her physical disability. See *Lymburn v. Symbois Logic*, 952 P.2d 831 (Colo. App. 1997). Rather, the Claimant's testimony alone is sufficient to establish a temporary "disability." *Id*. As found, the Claimant was temporarily and totally disabled from October 21, 2018 through March 20, 2019, both dates inclusive, a total of 151 days.

f. Once the prerequisites for TTD are met (*e.g.,* no release to return to full duty, MMI has not been reached, a temporary wage loss is occurring and there is no actual return to work), TTD benefits are designed to compensate for a 100% temporary wage loss. *See Eastman Kodak Co. v. Industrial Commission,* 725 P. 2d 107 (Colo. App. 1986); *City of Aurora v. Dortch,* 799 P. 2d 461 (Colo. App. 1990). As found, based on her AWW of $366.71, a weekly TTD rate of $244.47 (or $34.9244) is yielded. For the period from October 21, 2018 through March 20, 2019, both dates inclusive, the Claimant has proven by preponderant evidence that she is entitled to aggregate TTD benefits of $5,273.59.

g. The Claimant has failed to prove entitlement to TTD benefits from March 21, 2019 through the hearing date, May 16, 2019.

Burden of Proof

h. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits beyond those admitted. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained her burden on all issues with the exception of entitlement to TTD benefits from March 21, 2019 through the hearing date of May 16, 2019.

i. Respondents have failed to sustain their burden with respect to their affirmative defense of responsibility for termination/voluntary resignation.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents' affirmative defense of "responsibility for termination/voluntary resignation is hereby denied and dismissed.

B. Respondents shall pay the Claimant temporary partial disability benefits from September 23, 2018 through October 20, 2018. in the aggregate amount of $578.74, which is payable retroactively and forthwith.

C. Respondents shall pay the Claimant temporary total disability benefits from October 21, 2018 through March 20, 2019, both dates inclusive, a total of 151 days, at the rate of $244.476 per week, or $34.92 per day, in the aggregate amount of $5,273.59, which is payable retroactively and forthwith.

D. Any and all claims for temporary disability benefits from March 21, 2019 through May 16, 2019 are hereby denied and dismissed.

E. Respondent on all amounts of indemnity benefits due and not paid when due.

F. Any and all issues not determined herein are reserved for future decision.

DATED this 14th day of August 2019.

EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-070-233-003

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she sustained a compensable right upper extremity injury on January 30, 2018 during the course and scope of her employment with Employer.

2. A determination of Claimant's Average Weekly Wage (AWW).

3. Whether Claimant has proven by a preponderance of the evidence that she is entitled to receive Temporary Total Disability (TTD) benefits for the period January 31, 2018 until terminated by statute.

FINDINGS OF FACT

1. Employer is a temporary staffing company that provides janitorial services to the Colorado Convention Center. Claimant worked part-time for Employer performing janitorial duties. She specifically picked up trash and cleaned bathrooms during and after events.

2. Claimant worked for Employer from July 7, 2017 through January 30, 2018 or a period of 30 weeks and five days. Throughout Claimant's employment, she earned $14.53 per hour for "Regular," $5.27 per hour for "Fringe," $0.50 per hour for "Shift Differential" and $0.23 per hour for "Travel." Claimant testified that she received $23.50 per hour. She earned a total of $3,743.12 during her employment.

3. On January 30, 2018 Claimant was pushing a tilt cart on a concrete floor to remove trash, boxes, plastic and papers after an event at the Colorado Convention Center. The cart was made of plastic with rubber wheels and a metal handle. Claimant rolled the cart over a screw then hit a live wire that flashed and sparked. She experienced a jolt or shock in her right upper extremity. Claimant noted she specifically felt tingling, pain and numbness from her right shoulder down to her torso. She reported her injury to Employer and then went home and rested.

4. Frank Davis worked with Claimant on January 30, 2018 and was pushing a trash cart next to her at the time of the electrical incident. He completed an injury report form and testified at the hearing in this matter. In the report Mr. Davis stated that Claimant ran over a live wire and a screw with her trash cart. They saw a flash, were startled and contacted a supervisor. Mr. Davis noted "no injury occurred, [Claimant] was only stunned by the flash, but she was okay."

5. A supervisor's Accident Investigation Form, Incident Investigation Report, and a handwritten statement were submitted into evidence. The Investigation Form stated that there was a spark under the cart. The Incident Investigation Report noted the incident as a "near miss" and there was no burn or other injury. The Report further reflects that Claimant reported the incident over the radio and when she was asked whether she was okay she responded "she was in shock." The written statement attached to the incident report stated that Claimant called "over the radio saying that the cord sparked and that she was fine." The statement further recorded that "she was wearing rubber gloves and was pushing a plastic cart with rubber wheels." Finally, the statement specified that Claimant was cleared by medical and sent home to relax

6. Laurie Sarmiento is the owner of Employer. Ms. Sarmiento learned about the spark incident from a third person and first spoke with Claimant about the matter on January 30, 2018. Claimant remarked that she was fine but startled, and had been advised to go home and rest. On January 31, 2018 Ms. Sarmiento instructed Claimant to visit a doctor because she was still experiencing pain.

7. On January 31, 2018 Claimant visited Concentra Medical Centers for treatment. Claimant reported pain, achiness and numbness in her right upper extremity. A physical examination of Claimant's right arm was normal and did not reveal any bruises or burn marks. Medical providers diagnosed an electrical burn, upper extremity weakness and right upper extremity numbness. Physicians prescribed medications and assigned light duty work restrictions.

8. Claimant subsequently underwent conservative treatment including physical therapy. She continued to report aching, numbness and weakness in her right upper extremity. Physicians noted that Claimant did not exhibit any visible wounds or burns on her right arm.

9. On March 21, 2018 Gary Zuehlsdorff. D.O. performed a physician advisor review of Claimant's claim. He noted that Claimant had been pushing a tow cart at the Colorado Convention Center, struck a screw and then hit a wire that sparked. Dr. Zuelhsdorff commented that Claimant was wearing rubber gloves and the cart was plastic with rubber and plastic wheels. Concentra records revealed that Claimant did not suffer any dermatological changes or entrance and exit wounds. Dr. Zuehlsdorff concluded that it was "extremely unlikely that [Claimant] would have suffered any type of electrical injury given the above review of the physical setting." He emphasized that the cart was plastic, had rubber and plastic wheels and Claimant was wearing rubber gloves. Furthermore, there were no entrance of exit wounds but merely diffuse complaints of musculosketal pain. Dr. Zuehlsdorff determined that there was only minimal evidence to suggest that Claimant suffered any injury and the case should be closed for lack of causation.

10. On April 24, 2018 Claimant underwent a right shoulder MRI. The MRI revealed a "moderate grade partial-thickness superior rotator cuff tear with mild overlying

bursal inflammation." The imaging also reflected a possible superior labral tear and a low-grade partial thickness tear of the subscapular tendon.

11. On May 31, 2018 Claimant visited Armando F. Vidal, M.D. at UCHealth for an examination. Claimant reported that she suffered "an acute right shoulder electrocution-type injury to her right shoulder." She specifically remarked that on January 30, 2018 she was pushing a cart at work, suffered a shock from a live wire and experienced immediate pain in her right shoulder. She underwent physical therapy and a right shoulder MRI. An examination revealed acute inflammation in Claimant's right shoulder. The MRI reflected fluid in the subacromial and subdeltoid bursas. Dr. Vidal diagnosed Claimant with a moderate grade partial-thickness rotator cuff tear with mild overlaying bursal inflammation, a possible superior labral tear and a low-grade partial thickness tear of the subscapular tendon.

12. On June 28, 2018 Claimant underwent right shoulder surgery at UCHealth Surgical Care. The surgery consisted of a right shoulder arthroscopy, rotator cuff repair, biceps tenodesis and subacromial decompression.

13. On December 21, 2018 Claimant underwent an independent medical examination with John Raschbacher, M.D. Dr. Raschbacher explained that on January 30, 2018 Claimant was pushing a tilt trash cart in the Colorado Convention Center. The cart was made of plastic with four plastic wheels and had a metal handle. Claimant had her right hand on the metal handle of the cart while she was holding a piece of trash in her left hand. She reported that she felt a tingle and heard a pop while rolling her cart behind a coworker. Claimant specifically reported a shock and tingling in the right side of her neck down into her right hip. She remarked that surgery improved her symptoms and completely removed the burning sensation and electrical feeling from her right shoulder.

14. After reviewing Claimant's medical records and performing a physical examination, Dr. Raschbacher determined that it was not medically probable that Claimant suffered a right upper extremity injury while at work on January 30, 2018. He specifically noted that it was unlikely an electrical current was transmitted from a wire by a screw, across plastic or rubber wheels, through a plastic cart and into Claimant's right arm. Moreover, because Claimant may have been wearing rubber gloves, an electrical shock was even less likely. Dr. Raschbacher noted that the electrical incident involved a household current that would not have produced the symptoms described by Claimant or "an anatomical disruption in a shoulder joint requiring surgery." Moreover, there was no evidence of an electrical shock in the form of entry or exit wounds on Claimant's right arm. Dr. Raschbacher thus recommended denying liability for Claimant's January 30, 2018 claim.

15. Claimant testified at the hearing in this matter regarding the January 30, 2018 electrical incident. She explained that the tilt cart was made of plastic but rested on a metal frame. The wheels were attached to the metal frame. The cart also had a metal

handle and she was not wearing rubber gloves. When Claimant ran over the electrical cord with the trash cart she immediately felt a shock, pain, tingling and numbness on her right side from her shoulder down to her torso.

16. Dr. Raschbacher also testified at the hearing in this matter. He maintained that it was not medically probable that Claimant suffered an electrical injury to her right upper extremity while working for Employer on January 30, 2018. He reiterated that Claimant ran over a screw and wire with a plastic tilt cart that had plastic wheels and a metal handle. Dr. Raschbacher explained that Claimant did not exhibit any entry or exit wounds after the accident. Claimant also had a normal EMG of her right upper extremity and thus did not suffer any neurological damage. Finally, Dr. Raschbacher commented that, if Claimant had suffered an injury on January 30, 2018, her symptoms would have resolved and not increased over time.

17. Claimant has failed to establish that it is more probably true than not that she sustained a compensable right upper extremity injury on January 30, 2018 during the course and scope of her employment with Employer. Initially, on January 30, 2018 Claimant was pushing a tilt cart on a concrete floor to remove trash after an event at the Colorado Convention Center. The cart was made of plastic with rubber wheels and a metal handle. Claimant rolled the cart over a screw then hit a live wire that flashed and sparked. Despite Claimant's contention that she suffered an electrical injury to her right upper extremity because of the incident, the written reports, medical records and persuasive opinions reflect that she likely did not suffer an injury as a result of the January 30, 2018 incident.

18. Claimant and Mr. Davis testified consistently regarding the events leading up to and including the observation of a spark as Claimant pushed her tilt cart over a wire on the ground. However, there is significant divergence between Claimant's assertions at hearing and the written and testimonial record. Claimant testified and stated to her numerous treatment providers that she felt an immediate onset of symptoms including pain, numbness, tingling and aching in her right arm and shoulder. However, in Claimant's written statement immediately following the January 30, 2018 incident, there was no mention of an electrical injury or symptoms immediately following the event. Furthermore, Mr. Davis testified that Claimant did not exhibit any signs of injury or make any remarks about an injury after pushing the trash cart over the electrical cord. The written investigation reports included similar statements from Claimant suggesting that she was fine and was sent home to calm down instead of for any physical injury. Ms. Sarmiento also testified that during a telephone conversation with Claimant on the evening of January 30, 2018 Claimant stated she was fine. The accounts of Mr. Davis, Ms. Sarmiento, Claimant's own written report and the investigation report all suggest that Claimant was likely not injured during the spark incident on January 30, 2018.

19. The medical records also reflect that Claimant unlikely suffered an electrocution-type injury at the Colorado Convention Center on January 30, 2018. On

January 31, 2018 Claimant visited Concentra for treatment. A physical examination of her right arm was normal and did not reveal any bruises or burn marks. Claimant subsequently underwent conservative treatment including physical therapy. She continued to report aching, numbness and weakness in her right upper extremity. However, physicians noted that Claimant did not exhibit any visible wounds or burns on her right arm. Physician Advisor Dr. Zuehlsdorff concluded that it was "extremely unlikely that [Claimant] would have suffered any type of electrical injury given the above review of the physical setting." He reasoned that the cart was plastic, had rubber and plastic wheels and Claimant was wearing rubber gloves. Furthermore, there were no entrance of exit wounds but merely diffuse complaints of musculosketal pain. Dr. Zuehlsdorff determined that there was only minimal evidence to suggest that Claimant suffered any injury and the case should be closed for lack of causation. Furthermore, Dr. Raschbacher determined that it was not medically probable that Claimant suffered a right upper extremity injury while at work on January 30, 2018. He specifically noted that it was unlikely an electrical current was transmitted from a wire by a screw, across plastic or rubber wheels, through a plastic cart and into Claimant's right arm. Dr. Raschbacher noted that the electrical incident involved a household current that would not have produced the symptoms described by Claimant or "an anatomical disruption in a shoulder joint requiring surgery." Moreover, there was no evidence of an electrical shock in the form of entry or exit wounds on Claimant's right arm. The bulk of the persuasive evidence thus reveals that Claimant did not suffer an electrical injury while pushing a trash cart on January 30, 2018. There is a lack of a causal connection between pushing the trash cart over the electrical cord and Claimant's right upper extremity symptoms. More concisely, there was an insufficient mechanism of injury to produce Claimant's reported symptoms. Accordingly, Claimant's claim for Workers' Compensation benefits is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §840-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as

unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that she suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAO, Aug. 18, 2005).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAO, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAO, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. As found, Claimant has failed to establish by a preponderance of the evidence that she sustained a compensable right upper extremity injury on January 30, 2018 during the course and scope of her employment with Employer. Initially, on January

30, 2018 Claimant was pushing a tilt cart on a concrete floor to remove trash after an event at the Colorado Convention Center. The cart was made of plastic with rubber wheels and a metal handle. Claimant rolled the cart over a screw then hit a live wire that flashed and sparked. Despite Claimant's contention that she suffered an electrical injury to her right upper extremity because of the incident, the written reports, medical records and persuasive opinions reflect that she likely did not suffer an injury because of the January 30, 2018 incident.

8. As found, Claimant and Mr. Davis testified consistently regarding the events leading up to and including the observation of a spark as Claimant pushed her tilt cart over a wire on the ground. However, there is significant divergence between Claimant's assertions at hearing and the written and testimonial record. Claimant testified and stated to her numerous treatment providers that she felt an immediate onset of symptoms including pain, numbness, tingling and aching in her right arm and shoulder. However, in Claimant's written statement immediately following the January 30, 2018 incident, there was no mention of an electrical injury or symptoms immediately following the event. Furthermore, Mr. Davis testified that Claimant did not exhibit any signs of injury or make any remarks about an injury after pushing the trash cart over the electrical cord. The written investigation reports included similar statements from Claimant suggesting that she was fine and was sent home to calm down instead of for any physical injury. Ms. Sarmiento also testified that during a telephone conversation with Claimant on the evening of January 30, 2018 Claimant stated she was fine. The accounts of Mr. Davis, Ms. Sarmiento, Claimant's own written report and the investigation report all suggest that Claimant was likely not injured during the spark incident on January 30, 2018.

9. As found, the medical records also reflect that Claimant unlikely suffered an electrocution-type injury at the Colorado Convention Center on January 30, 2018. On January 31, 2018 Claimant visited Concentra for treatment. A physical examination of her right arm was normal and did not reveal any bruises or burn marks. Claimant subsequently underwent conservative treatment including physical therapy. She continued to report aching, numbness and weakness in her right upper extremity. However, physicians noted that Claimant did not exhibit any visible wounds or burns on her right arm. Physician Advisor Dr. Zuehlsdorff concluded that it was "extremely unlikely that [Claimant] would have suffered any type of electrical injury given the above review of the physical setting." He reasoned that the cart was plastic, had rubber and plastic wheels and Claimant was wearing rubber gloves. Furthermore, there were no entrance of exit wounds but merely diffuse complaints of musculosketal pain. Dr. Zuehlsdorff determined that there was only minimal evidence to suggest that Claimant suffered any injury and the case should be closed for lack of causation. Furthermore, Dr. Raschbacher determined that it was not medically probable that Claimant suffered a right upper extremity injury while at work on January 30, 2018. He specifically noted that it was unlikely an electrical current was transmitted from a wire by a screw, across plastic or rubber wheels, through a plastic cart and into Claimant's right arm. Dr. Raschbacher noted that the electrical incident involved a household current that would not have produced the symptoms

described by Claimant or "an anatomical disruption in a shoulder joint requiring surgery." Moreover, there was no evidence of an electrical shock in the form of entry or exit wounds on Claimant's right arm. The bulk of the persuasive evidence thus reveals that Claimant did not suffer an electrical injury while pushing a trash cart on January 30, 2018. There is a lack of a causal connection between pushing the trash cart over the electrical cord and Claimant's right upper extremity symptoms. More concisely, there was an insufficient mechanism of injury to produce Claimant's reported symptoms. Accordingly, Claimant's claim for Workers' Compensation benefits is denied and dismissed.

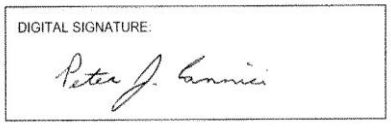
ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's claim for Workers' Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: August 15, 2019.



_____

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 1525 Sherman Street, 4th Floor, Denver, CO 80203	
In the Matter of the Workers' Compensation Claim of: **M,** Claimant, vs. **R,** Employer, And **N**, Insurer, Respondents.	▲ **COURT USE ONLY** ▲ **CASE NUMBER:** **WC 5-044-197-002**

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Hearing in the above-captioned matter was held before Administrative Law Judge Margot W. Jones on April 25, 2019, at 3:22 p.m. in Courtroom 4 in Denver, Colorado. Claimant was present in person and represented by _____, Esq. Respondents were represented by _____, Esq. Claimant's exhibits A-B and Respondents' exhibits A-E were admitted into evidence.

In this order, M shall be referred to as "Claimant," R shall be referred to as "Employer" and N Insurance Company shall be referred to as "Insurer." Employer and Insurer, collectively, will be referred to as "Respondents."

In this order, the Judge may use the following acronyms: C.R.S. refers to Colorado Revised Statutes (2018); the Act refers to the Workers' Compensation Act of Colorado, §§8-40-101, et seq., supra; OAC refers to the Office of Administrative Courts; OACRP refers to the Office of Administrative Courts Rules of Procedure, 1 CCR 104-1; and WCRP refers to Workers' Compensation Rules of Procedure, 7 Code Colo. Reg. 1101-3.

ISSUE

Whether Claimant has proven by a preponderance of the evidence that the Synvisc injection recommended by William Sterett, M.D., is causally related to the industrial injury of March 29, 2017.

STIPULATION

Claimant's Average Weekly Wage is $1,636.45.

FINDINGS OF FACT

1. On March 29, 2017, Claimant sustained an admitted industrial injury to his right knee, right shoulder and left hand when he slipped while walking down a hallway while working for Employer. Respondents admitted liability for the injuries and provided Claimant with medical treatment.

2. Claimant first sought treatment from Aspen Medical Clinic on April 3, 2017, where he was seen by Kim Scheuer, M.D. Dr. Scheuer documented that Claimant's right knee pain was in the area located "behind" [posterior] and "outside" [lateral] his right knee, with "no instability." Dr. Scheuer assessed Claimant with acute pain of the right shoulder, right knee and left wrist, ordered x-rays of the left wrist and recommended physical therapy.

3. Claimant returned to Aspen Medical Clinic on April 12, 2017, where he was seen by Dewayne Niebur, M.D. Consistent with Dr. Scheuer's office note, Dr. Niebur documented that Claimant's right knee pain was "[p]osterior and medial/lateral" with "[n]o instability." Exhibit 1, p. 130. William I. Sterett, M.D. has performed multiple surgeries to Claimant's left knee, culminating in a total knee arthroplasty in March 2013. Therefore, Claimant requested a referral to Dr. Sterett and Dr. Niebur complied.

4. Claimant underwent right knee x-rays on April 19, 2017, which showed postoperative[1] and degenerative changes without acute fracture or effusion.

5. Dr. Sterett examined Claimant's right knee on April 24, 2017, documenting Claimant's complaints of right knee medial and lateral joint pain. Dr. Sterett recommended a right knee MRI.

6. Claimant underwent the right knee MRI on May 5, 2017, which Dr. Sterett reviewed on the same date and opined that the exam showed lateral meniscus posterior root tear, 2 loose bodies and patellofemoral and lateral compartment chondromalacia. His diagnosis was meniscus tear and loose bodies. Dr. Sterett specifically did *not* diagnose Claimant with osteoarthritis.

[1] Claimant underwent a right knee anterior cruciate ligament bone-patellar-bone reconstruction in August 1999. [Exhibit A2, pp. 51-52].

7. On May 30, 2017, Dr. Sterett performed right knee arthroscopic partial medial and lateral meniscectomies, bicompartmental chondroplasty, lysis of adhesions and removal of scar tissue and removed two loose bodies.

8. On July 12, 2017, Dr. Sterett documented that Claimant complained of medial sided catching, causing pain along the joint line of the right knee. Therefore, Dr. Sterett performed a steroid injection into the area of the catching.

9. The Aspen Valley Hospital Rehabilitation Services discharge summary indicates that as of July 17, 2017, Claimant denied pain in his right knee. On August 23, 2017, Dr. Sterett released Claimant from care with no restrictions, indicating that Claimant is making excellent progress and future treatment is not anticipated. Claimant was to seek treatment, as needed.

10. Claimant returned to Aspen Medical on August 24, 2017, where Dr. Niebur documented that Claimant stated his right knee symptoms were usually without pain, but he may ache if active. Claimant reported an injection resolved the medial knee pain. On the Pain Diagram for this visit, Claimant did not mark any pain in his right knee. On all of the Pain Diagrams prior to August 24, 2017, Claimant marked pain in his right knee.

11. On September 21, 2017, Dr. Niebur documented that Claimant reported his right knee was doing well with no pain or swelling. On the Pain Diagram for this visit, Claimant again did not mark any pain with his right knee. Dr. Niebur removed the right knee from the problem list in his medical records, providing assessments for only Claimant's right shoulder and left wrist.

12. Claimant testified that he essentially noticed no improvement from his right knee surgery. Claimant's testimony is not credible, as the physical therapy discharge note, Dr. Niebur's records and Dr. Sterett's records all document that Claimant's right knee was pain free and he was very active in August and September 2017. Claimant's reports to Dr. Sterett regarding his knee are deemed credible. The evidence established that Claimant made excellent progress postoperatively and was reporting no pain in his right knee. Thus, Claimant's testimony regarding his pain complaints and his response to surgery is not credible.

13. Claimant returned to Dr. Niebur on October 24, 2017, complaining of burning pain to the anterior and medial right knee and a sense of instability with swelling which occurred on transition from biking to hiking. Claimant's complaints in October 2017 are different from his complaints after his fall at work. After the fall at work, Drs. Scheuer, Niebur and Sterett all document that Claimant's pain complaints were in the posterior knee with no instability. In October 2017, after experiencing almost three and one-half months of no right knee pain, Claimant began to complain of pain in his anterior knee with instability.

14. On November 15, 2017, Dr. Sterett performed another steroid injection, and stated that if Claimant was not better, the doctor would order a repeat MRI of the right knee without contrast to evaluate for a possible medial meniscal tear.

15. The repeat MRI of the right knee was taken on January 4, 2018. On January 19, 2018, Dr. Sterett opined that the MRI revealed a progression of Claimant's lateral and patellofemoral osteoarthritis. Dr. Sterett opined that the cause of Claimant's right knee pain was secondary to chondromalacia and inflammation of the knee. Dr. Sterett recommended an injection of Synvisc One.

16. On March 16, 2018, Dr. Sterett opined that Claimant's meniscus tear resolved, but the chondral delamination was continuing to delaminate. Dr. Sterett's assessment was chondral delamination with multiple loose bodies patellofemoral joint of the right knee. Dr. Sterett recommended the Synvisc injection and related it to the original injury. However, Dr. Sterett recommended the Synvisc injection to treat Claimant's chondral delamination of the patella.

17. Based on Dr. Sterett's March 16, 2018, note, he reached the conclusion that the chondral delamination of the patella is related to the work related injury because he observed chondral delamination during the arthroscopic surgery on May 30, 2017. Claimant has the burden to prove that the chondral delamination of the patella observed and debrided by Sterett during surgery was caused, aggravated or accelerated by the incident on March 29, 2017. Claimant did not sustain his burden of proof on this issue.

18. Dr. Sterett's assessment on May 5, 2017, and May 25, 2017, was tear of the lateral meniscus and loose body of the right knee. In his letter dated February 7, 2019, when commenting specifically on causation, Dr. Sterett made no mention of Claimant sustaining an injury to his patella or chondral delamination. Dr. Sterett opined that Claimant sustained meniscal tears in the event on March 29, 2017. Yet, during surgery, Dr. Sterett chose to debride the patella. Dr. Sterett debrided Claimant's pre-existing, non-industrial chondral delamination of the patella since the doctor already was inside Claimant's knee on March 29, 2017. However, Claimant still has the burden of proving that the chondral delamination Dr. Sterett addressed during surgery on May 30, 2017, was caused or aggravated by the industrial injury. Claimant has provided no credible evidence to that effect.

19. Douglas Scott, M.D., credibly testified that the chondral delamination present in Claimant's knee before the surgery was pre-existing, caused by Claimant's long-standing osteoarthritis. This opinion is supported by Dr. Sterett's operative report, which found grade III changes of the patella that were debrided and Dr. Sterett's postoperative plan indicating that Claimant's knee was at significant risk for continued degenerative changes. Therefore, Claimant has failed to prove that the portion of the surgery in which Dr. Sterett debrided Claimant's patella to address the pre-existing non-industrial chondral delamination was necessitated by the incident on March 29, 2017.

20. Dr. Scott testified that if Claimant had no history of an injury on March 29, 2017, and no surgery on May 30, 2017, Claimant's pre-existing osteoarthritis would have become symptomatic at some point in the future because an injury or surgery is not a prerequisite to Claimant's pre-existing non-industrial osteoarthritis and chondral delamination of the patella becoming symptomatic. Claimant's medical records show that he was pain free and released from care for his meniscal tears, and more than three months later began to complain of a different pain to his anterior knee with instability, rather than the prior posterior knee pain without instability prior to his surgery. This different area of pain supports Dr. Scott's testimony that Claimant's pain is not coming from the meniscal tears or any area that was symptomatic prior to surgery.

21. Dr. Sterett issued a letter dated February 7, 2019, again addressing causation. Dr. Sterett stated that Claimant had continued deterioration of the knee. However, Dr. Sterett did not identify where that continued degeneration of the knee is occurring, or why that area of the knee is continuing to deteriorate. Since Respondents are not liable for the continued degeneration of the knee if that continued degeneration was not caused, aggravated or accelerated by the injury.

CONCLUSIONS OF LAW

General Legal Principles

1. The purpose of the Act is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. A claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See Bodensleck v. ICAO, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. Arenas v. ICAO, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. Cordova v. ICAO, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to

expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Medical Benefits

4. The claimant bears the burden of establishing entitlement to medical treatment. *See Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Proof of causation is a threshold requirement which an injured employee must establish by a preponderance of the evidence before any workers' compensation is awarded. Section 8-41-301(1)(c), C.R.S.; *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000). Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo.App.1997).

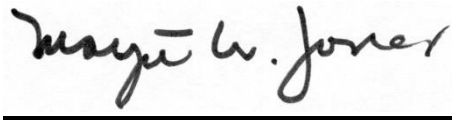
5. The Administrative Law Judge finds and concludes, considering the totality of the evidence that Claimant has failed to prove by a preponderance of the evidence that the Synvisc injection recommended by Dr. Sterett is causally related to Claimant's fall on March 29, 2017. Dr. Sterett opined that the portions of Claimant's knee surgery causally related to the fall were the meniscal tears and the loose bodies. Dr. Sterett also performed surgery on Claimant's degenerative chondral delamination of the patella, but Claimant has failed to prove that this portion of the surgery was causally related to the injury. Dr. Sterett now has recommended a Synvisc injection to address a continued degeneration of the chondral delamination of the patella, but has not addressed whether the issue of whether the non-industrial portion of the surgery on May 30, 2017, caused the continued chondral delamination.

ORDER

1. Claimant's request for the Synvisc injection recommended by Dr. Sterett is denied and dismissed.

2. Any issues not determined in this decision are reserved for future determination.

DATED: August 8, 2019.



MARGOT W. JONES
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

If you are dissatisfied with the Judge's Order, you may file a Petition to Review the Order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the Order, as indicated on the certificate of mailing or service; otherwise, the Judge's Order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the Order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see § 8-43- 301(2), C.R.S. (as amended, SB 09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a Petition to Review at ttp://www.colorado.gov/dpa/oac/forms-WC.htm.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-611-293-002

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on June 20, 2019, in Denver, Colorado. The hearing was digitally recorded (reference: 6/20/19, Courtroom 1, beginning at 1:30 PM, and ending at 3:30 PM).

Claimant's Exhibits 1, 2 and 4 were admitted into evidence, without objection. Claimant's Exhibit 3 was rejected. Respondents' Exhibits A through I were admitted into evidence, without objection.

Transcripts of the evidentiary depositions of Jeffrey J. Sabin, M.D., and Jonathan Clapp, M.D., were lodged at the commencement of the hearing in lieu of their live testimony. Transcripts of the post-hearing evidentiary depositions of Kathy McCranie, M.D, lodged on July 10, 2019, and George Frey, M.D., lodged on July 22, 2019, were in lieu of their live testimony.

At the conclusion of the hearing, the ALJ established deadlines (after the lodging of all evidentiary depositions) for the filing of post-hearing briefs. The Claimant's opening brief was filed on July 23, 2019. Respondents' answer brief was filed on August 2, 2019. Claimant's reply brief was filed on August 5, 2019, at which time the matter was deemed submitted for decision.

ISSUES

The issues to be determined by this decision concern: (1) whether the spinal cord fusion surgery proposed surgery recommended by George Frey, M.D., the Claimants authorized treating orthopedic spine surgeon since 2004 is reasonably necessary and causally related to the Claimant's compensable injury of March 1, 2004; and, whether the ablation recommended by Joseph Fillmore, M.D. ir reasonably necessary and causally related to the compensable injury of March 1, 2004.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant sustained an admitted compensable on the job injury arising out of the course and scope of his employment on March 1, 2004, when he slipped and fell on ice.

2. The Claimant's date of birth is October 21, 1958 and he is presently 60 years old.

3. The Claimant initially underwent care and treatment with Dr. Frey as a result of the injuries sustained at the time in 2004 and Dr. Frey has been his treating orthopedist for his low back injuries since that time. The Claimant had a previous low back fusion performed in 1986 as a result of a motor vehicle injury and the fall that forms the basis of this compensable on the job injury resulted in a fracture of the L5 vertebrae and fused the L4-S1 levels of his back. (Tr. p. 16, ll.9-23).

4. Thereafter, the Claimant returned to work, with the Employer, the hardware was removed in 2009, and the Claimant continued to work for the Employer until January 2011, at which time he could no longer perform the work due to the fact that the pain was too distracting, it was too difficult to move around and that Claimant was suffering from fatigue due to the high level of pain (Tr. p. 17, ll. 3-9).

5. In January 2011, the Claimant was working part time as a systems engineer. At the time of the compensable injury in March of 2004 he was a program manager for the Employer.

6. According to the Claimant, Dr. Frey in approximately 2007 referred him to Joseph Fillmore, M.D., for pain management and thereafter was referred by Dr. Fillmore to Jonathan Clapp, M.D. for pain management as well.

7. Dr. Fillmore and Dr. Clapp have tried different medications to try to help alleviate the pain. Presently the Claimant is on MS Contin and Dilaudid for the pain. In conjunction with the pain management regime, Dr. Fillmore and Dr. Clapp have instituted a program of performing radiofrequency ablations or radiofrequency neurotomies to help alleviate the pain.

8. According to the Claimant, the ablations usually last between five and six months and after he has an ablation he is able to stop using the MS Contin for a period of time until the ablation wears off (Tr. p. 20, ll.23-25).

9. The Claimant had been getting the ablations every six months or so but recently in 2017 and 2018, Respondents would not authorize him to have them as frequently due to the medical opinions of Dr. McCranie that he should have them only once per year. As a result of the reduction in ablations the Claimant has had to increase his medication intake.

10. With his increase in leg pain over the last eighteen months or any surgical treatment modalities that would reduce his pain and alleviate some or all of his dependence on the medications.(Tr. p. 22, ll 16-25; p. 23. Ll.1-19).

Dr. Frey's Recommended Spinal Cord Fusion

11. Dr. Frey wants to perform a decompression of the facets and extend the lumbar fusion to the L3-4 level. Dr. Frey submitted a request for pre-authorization for such surgery in February of this year. The request was denied.

12. The Claimant understands the risks of the surgery that Dr. Frey wants to perform and further understands that the surgery will not alleviate all of his pain but given the fact that the ablations work for a period of time and he is more functional and is able to get off the MS Contin until the ablation wears off, the Claimant believes that having the surgery will alleviate the need for the ablations, get rid of some of his leg pain that is progressively getting worse and will help with reducing his medication intake (Tr. p. 24, ll. 10-24).

13. The Claimant presented as an highly intelligent, straight-forward, reasonable individual, who had a firm grasp on his medical condition and on managing it.

14. The Claimant understands that Dr. McCranie in her deposition and her reports states the opinion that the reasonable and necessary solution to the Claimant's condition is to become engaged in an extended multidisciplinary approach consisting of an inpatient pain program which, it is Dr. McCranie's belief, will help the Claimant learn how to deal with his pain. Considering the fact that Dr. Frey is a board certified orthopedic surgeon, who specializes in spinal surgery, and Dr. McCranie's is an occupational physician whose opinion is contrary to the opinion of Dr. Frey, the ALJ finds McCranie's opinion amounts to a mechanical application of the Division of

Workers' Compensation Medical Treatment **Guidelines** (hereinafter "MTG"), without regard to the clinical specifics of the Claimant's medical case. Further, her opinion is contrary to the weight of the medical opinions of physicians with more specific expertise than her, as illustrated by the evidence in the record. Therefore, the ALJ finds Dr. McCranie's opinion in this regard lacking in credibility.

15. The Claimant believes he has demonstrated that he knows how to deal with his pain as is shown by his being able to curtail the use of the MS Contin after the ablations and that he wants to undergo medical treatment that has a reasonable opportunity to alleviate some of his pain and radicular symptoms in his legs. for a longer term (Tr. p.27, ll. 5-15).

Jonathan Clapp, M.D.

16. The evidentiary deposition of Dr. Clapp served in lieu of his live testimony (Claimant's Exhibit 5). Dr. Clapp was accepted as an expert in pain and physical medicine and rehabilitation. He is a board member of the Colorado Pain Society and serves on the Colorado Medical Society's Prescription Drug Abuse Committee.

17. Dr. Clapp has been a treating physician for the Claimant since 2009 or 2010. He is of the opinion that if the Claimant cannot get the ablations as needed then the Claimant has a dramatic increase in his need for opioid medications. When the Claimant obtains the ablations as needed, there is a marked decrease in the need for medications and significant improvement in functioning.

18. Dr. Clapp indicated that he is familiar with the Colorado Division of Workers Compensation Medical Treatment Guidelines (hereinafter "MTG") and the opinions of Dr. McCranie concerning the frequency with which an individual Claimant should be entitled to ablations. Given his evaluation of the Claimant both before and after the ablations, the decrease in pain medications, and the demonstrated improved functioning, Dr. Clapp is of the opinion that this Claimant is one of those individuals who as long as the condition exists, needs ablations more frequently than the MTG would suggest. Dr. Clapp stated that it is probably due to genetic differences but it is difficult to tell as the doctor cannot have an exact visualization of the nerve during the cautery

19. Dr. Clapp further testified, when questioned about the MTG indication that with an ablation a claimant should be able to obtain six to eighteen months of relief, that: "I am aware of that but that is, in my opinion, contrary to the evidence in the literature" (Clapp Depo., p. 27, ll14-15).

20. Dr. Clapp when asked to weigh the increase in medication that would be needed to control the Claimant's pain versus the increase in the frequency of the radiofrequency neurotomies, which was more reasonable and prudent medical care for the Claimant, Dr. Clapp responded: 'by far the rhizotomies are the more reasonable, safer route to maximizing his function, decreasing the pain" (Clapp Depo., p.29, ll. 10-12). When asked why, Dr. Clapp stated: "Because opioids are dangerous, and he—to

do a procedure that is relatively safe and be able to decrease opioids with side effects like constipation, risks of overdose, risk to friends and family having lots of these medications around in the house, for 60 to 80 percent of the medications that are diverted in this country come from friends and family with or without their knowledge. This is by far the safest and most ethical way to proceed to take care of him." (Clapp Depo. p.29, ll.14-22).

George Frey, M.D./Surgical Recommendation

21. The evidentiary deposition of Dr. Frey served in lieu of his live testimony. Dr. Frey was accepted as an expert in the field of orthopedic surgery. He has specialized in complex spinal surgery since 1993, exclusively, and has performed approximately 300 fusions per year over the past 8-9 years (Frey evidentiary depo, p. 6 ll. 6-8).

22. Dr. Frey stated that the Claimant has been a patient of his since 2004 when he originally performed surgery on the Claimant. That surgery was a repair of a nonunion from a prior fusion done many years previously that had gone to nonunion as a result of the admittedly compensable on the job injury of March 1, 2004 (Frey evidentiary depo, p. 8, ll5-13).

23. Dr. Frey is of the opinion that the Claimant's condition has progressively gotten worse over the last couple of years. Dr. Frey has reviewed two MRIs, one from July of 2018 and one from June of 2019, an EMG from November of 2018, met with and physically examined the Claimant, noted the ongoing and progressive scoliosis and radicular symptoms that the Claimant is experiencing and has concluded that the best course of treatment for the Claimant is to perform a decompression of the facets and to extend the previous fusion performed in 2004 up to the L2- L3-4 level. Dr. Frey testified:as follows

> Well, we need to address his stenosis, his foraminal stenosis that has been identified by the radiologist subjectively and by myself as well at both the L2-3 and L3-4. We have to make room for those nerves"
>
> We also would be well advised to address the mechanical pain that he is having from those damaged facets that have been addressed up to now with these rhizotomies which we have recognized are temporary for him. And that would be done by extending his fusion, in other words, bridging those facet joints with bone and immobilizing those so they are no longer a pain generator. So it's a decompression and fusion extending that fusion to L2-L3-L4.

(Frey evidentiary depo, p. 12, l.25; p. 13, ll1-12).

24. When asked whether that type of surgery would limit the progression of the facet stenosis, Dr. Frey stated: "It would eliminate it altogether, because there is no further movement once the fusion is solid, there is no movement across those joints and, therefore, the facets are no longer mechanically under load, and they, therefore, won't continue to deteriorate. That becomes a permanent solution" (Frey evidentiary depo, p. 13, ll.15-21). The ALJ finds this opinion more credible than any opinions to the contrary.

25. Dr. Frey noted that the Claimant has two pain generators, the compression of the nerve roots and also the injured facet joints and in his opinion, based upon reasonable medical probability and his substantial experience performing these type of surgeries, the Claimant's best option is to have the surgery that he has requested be authorized.

26. Dr. Frey, when asked about Dr. Sabin's offered testimony that the surgery would not reduce the intake of MS Contin, would not reduce the pain and would not improve the Claimant's function, Dr. Frey emphatically disagreed. Dr. Frey believes that the surgery will help decrease the need for the medications, will reduce the pain levels that the Claimant is experiencing and thereby improve his functioning. Dr. Frey further testified that the Claimant in his opinion does have adjacent level disease which according to Dr. Frey is a condition that occurs by placing more stress in the transition between a fused area of the spine and the adjacent unfused area (Frey ervidentiary depo, p.17, ll21-25; p. 18, ll.1-9).

27. Dr. Frey further stated that he does not believe that at this point a multi-disciplinary pain program as suggested by Dr. McCranie would be of any benefit because would not alleviate the pain generators nor would it decrease the progression of the disease. "It is my opinion that a structural solution that actually addresses his pain generators, because they are addressable, would be the better option and the better solution for Mr. Auten at this time" (Frey evidentiary depo, p.19, ll8-11).

28. Dr. Frey indicated that he had explained the risks of the surgery to the Claimant and that while he could expect perhaps a 50 to 70% reduction in his symptoms but that if he would not have surgical intervention presently he will have increased mechanical back pain, an increase in radicular symptoms, deconditioning, psychological impact and increasing dependence on opioid medications along with increasing stenosis, and eventual motor loss with weakness in his extremities. (Frey evidentiary depo, pp. 23-24).

Respondents' Arguments Concerning Dr. Frey's Recommended Surgery

29. Respondents place substantial weight on the EMG result that was performed by Dr. Treihaft on November 7, 2018. Those results indicate that the Claimant has both lumbar radicular involvement (job related) and peripheral involvement. (non-job related). Dr. Frey in his deposition, in detail, explained that the lumbar radicular component is related to the spinal stenosis which would be eliminated by the decompression of the

facets and extension of the fusion. It would not, however, eliminate the numbness in the Claimant's feet which he considered to be peripheral in nature. Dr. Frey stated that this worsening leg pain was related to the spinal stenosis. Dr. Frey further had reviewed the most recent MRI performed on June 29, 2019, in conjunction with the MRI from July of 2018 and the EMG from November of 2018, along with examining the Claimant and advising him of the risks and concluded that a decompression and extension of the fusion was the best course of action. Respondents do not mention the fact that the Claimant has been Dr. Frey's patient for approximately 15 years and that Dr. Frey has specialized in complex surgery of the spine for the last 26 years exclusively and performs approximately 300 fusion surgeries annually (Frey evidentiary depo., p .6, ll. 6-8).

30. Dr. Frey's office originally requested pre-authorization for the surgery and Respondents denied it. Thereafter, on February 26, 2019, Dr. Frey's office sent in a much more detailed request for the surgery that was still denied.

31. Respondents place considerable weight upon the fact that Sanders (Dr. Frey's physician assistant) ordered an ESI injection which Dr. Frey indicated can be both diagnostic and therapeutic. Since Dr. Sabin testified that steroid injections are part of what should be considered before proceeding with surgery based on leg complaints, Respondents argue, by implication, that Dr. Frey does not have an adequate background upon which to perform surgery. Such an implied argument is ludicrous under the circumstances.

32. The records in evidence show that over the years, the Claimant has had a number of ESI injections, without apparent relief and that Dr. Frey testified that based upon his review of the matter including his personal knowledge of the Claimant, the diagnostic testing performed and the response to the ablations that the pain generator was clearly coming from the L3-4 level and that in his opinion an additional ESI would not serve a useful purpose in determining the appropriate course of treatment.

33.. While Dr. Frey could not detail the last time that he had seen the Claimant prior to the February request for pre-authorization, he was able to testify that he had seen the Claimant on the very day of his deposition (July 3, 2019) had examined the Clauimant, had gone over the additional MRI performed on June 29, 2019 along with the other diagnostic tests performed, was familiar with the Claimant's care and treatment since 2004 and was familiar with the Claimant's worsening lumbar related radicular complaints. Dr. Frey was also aware of the fact that after the ablations the Claimant was able to wean himself from the MS Contin until such time as the ablation wore off. As of the date of his deposition, July 3, 2019, Dr. Frey was succinct and credible in his belief that the most reasonable treatment for the Claimant was proceeding with the decompression and extension of the fusion.

34. Dr. Sabin and Dr. Frey have a difference of opinion as to whether the Claimant will have a significant amount of pain relief or that the surgery will result in functional gain. Dr. Frey is of the opinion that the surgery will reduce the Claimant's

reliance on pain medications but does not believe it will alleviate it all together. Dr. Sabin was asked whether it would alleviate the need altogether and Dr. Sabin indicated it would not. As far as functional gain is concerned, Dr. Sabin indicated that the surgery would not get the Claimant back to work which is not an issue in the case. Such a statement reveals that Dr. Sabin was out of touch with the totality of facts concerning the Claimant's case. The Claimant testified that after the ablations he was more functional, was able to get off the pain meds and had significant pain relief. Dr. Frey is of the opinion that the surgery would rid the Claimant of the radicular leg pain resulting in functional gain and alleviate some of the back pain. Dr. Sabin testified that if the Claimant was his patient, he would offer him the proposed surgery.

Jeffrey Sabin, M.D. Respondents' Independent Medical Examiner (IME)

35. Dr. Sabin testified by evidentiary deposition as an expert in orthopedic surgery. His two reports of April 1, 2019 and April 24, 2019 are also considered.

36. Dr. Sabin performed an IME evaluation of the Claimant at Respondents' request. He reviewed the MRI (magnetic resonance imaging) from July of 2018, examined the Claimant, reviewed the medical records submitted to him and stated that the "surgery could be done as long as the patient and the surgeon both had an understanding of what they were-what their expectations were, I wouldn't have terrific expectations that it would get him off the pain medicine, the heavy duty narcotics. And I don't think it would increase his functionality. It's hard to predict how much pain relief he would get. He may notice some pain relief, but it's likely not to be stellar" (Sabin evidentiary depo, p.11. ll8-17). The ALJ finds the opinions of Dr. Frey and Dr. Clapp substantially more credible and persuasive than the opinions of Dr. Sabin.

37. Dr. Sabin was asked to assume a hypothetical patient such as the Claimant coming to him as a patient and given the history, the findings, and the diagnostic tests and knowing the history, would he be willing to perform the surgery as suggested by Dr. Frey to which Dr. Sabin indicated: "I would call his pain management doctor… and I would say, here's the story, [Claimant] wants to have surgery, there is nothing further we can do but do surgery, it is my opinion that it could relieve his pain a little bit, but I don't have high hopes to get him off of pain medicine, in fact, it could increase it." (Sabin evidentiary depo, pp.33-34). The ALJ finds that the opinions of Dr. Frey and Dr. Clapp substantially outweigh the opinion of IME Dr. Sabin.

Kathy McCranie, M.D., Respondents' IME

38. The evidentiary deposition of Dr. McCranie serves in lieu of her live testimony. Also, the ALJ has considered her many reports commencing March 21, 2013 Dr. McCranie was accepted as an expert in physical medicine and pain and rehabilitation. Her reports are primarily concerned with the ablation procedures and whether the Colorado MTG permit the frequency of ablations that Dr. Fillmore and Dr.

Clapp were requesting. As to the last ablation that Dr. Fillmore requested, Dr. McCranie was of the opinion that another ablation procedure could be performed in July of 2019 as long as the Claimant continued to receive at least 80% relief for six months and improved function. To have them performed more often according to Dr. McCranie results in decreased musculature and increased degeneration. Based upon Dr. Sabin's report that Dr. McCranie interpreted as indicating that surgery was not an option, she believed that an inpatient 5-8 week multidisciplinary pain program was an appropriate method of treating the Claimant's ongoing complaints. While not testifying as to whether surgery was an appropriate option, Dr. McCranie was of the opinion that based upon Dr. Sabin's report, a pain program was a better option. Dr. McCranie had not examined the Claimant since 2013, 6 years ago. Dr. McCranie's opinions neither refute nor compromise Dr. Frey's opinions in any manner. Dr. McCranie acknowledged that the Claimant indicated and the records reflected that he had a reduction of his consumption of MS Contin immediately after the ablations. Dr. McCranie was of the opinion that she thought the MTG should be followed when possible but conceded that the Treatment Guidelines permitted deviations from them. The ALJ finds that Dr. Frey's opinion decisively supports a deviation from the MTG in the Claimant's specific case. Overall, the ALJ finds the opinions of Dr. Frey and Dr. Clapp considerably more credible and persuasive than the opinions of Dr. McCranie and Dr. Sabin.

39. The efficacy of a multi-disciplinary pain program, suggested by Dr. McCranie, and supported by Dr. Sabin, is not supported by the Claimant, Dr. Frey or by the totality of the evidence The Claimant testified, credibly, that after the ablations, he has been able to get off the MS Contin until such time as the ablation wears off. ((Tr. p. 27, ll, 5-15). Dr. Frey testified that with the decompression and the fusion extension, the ablations would no longer be necessary and "it would eliminate it altogether…the facets are no longer mechanically under load, and they, evidentiary depo, p. 12, ll. 15-21). Dr. Frey noted that the surgery would reduce the pain levels and improve function, and that "it is my opinion that a structural solution that actually addresses the pain generators, because they are addressable, would be the better option and the better solution for [Claimant] at this time" (Frey evidentiary depo, p. 19, ll. 8-11).

40. Respondents rely upon Dr. McCranie's report of May 14, 2019 and her deposition testimony regarding the multi-disciplinary pain program option for the Claimant. Dr. McCranie, solely relied upon Dr. Sabin's reports indicating that surgery was not an option and based upon that she was of the opinion that the pain program was the most viable alternative. She did not review Dr. Sabin's deposition testimony, review Dr. Frey's opinions regarding the pain generators and in fact, had not examined the Claimant since 2013. Dr. McCranie acknowledged that the Claimant throughout the period of time that he had been receiving the ablations consistently reported that he had

41. The ALJ infers and finds that Dr. McCranie's primary function in her evaluation of the Claimant, based upon the multitude of reports from her since 2013, appears to be to indicate whether the Claimant is entitled to an additional ablation procedure when a request has been made to perform one prior to the expiration of the

time period as set forth in the MTG. Dr. McCranie acknowledged that those Guidelines can be deviated from but she believes that they should be followed when possible.

Ultimate Findings

42. The medical reports, diagnostic tests and notes of treatment have been submitted and reviewed. Those records essentially support the above findings and the ALJ has reviewed all the evidence presented.

43. Dr. Frey, Dr. Fillmore and Dr. Clapp have been authorized treating doctors (ATPs) for the Claimant between the date of injury and the present time. The issue before the ALJ is whether the surgery proposed by Dr. Frey and/or the additional ablation requested by Dr. Fillmore are now reasonably necessary. Based on the totality of the evidence, the ALJ finds that the surgery proposed by Dr. Frey and the more frequent ablations requested by Dr. Fillmore are causally related to the industrial injury and reasonably necessary to maintain the Claimant at maximum medical improvement (MMI) and to prevent a deterioration of his work-related condition.

44. The medical opinions of Dr. Clapp and Dr. Frey are credible and persuasive. Dr. Clapp stated the basis upon which he believed that in the Claimant's case the Medical Treatment Guidelines should be deviated from and Dr. Frey, who has been the Claimant's orthopedic doctor for fifteen (15) years and has done thousands of the type of surgery that is being considered, is of the opinion that surgical intervention is the best option for the Claimant. This coupled with the Claimant understanding the risks and desiring to go forward with the surgery, given all of the conservative treatment modalities that have been tried, show that the overwhelming and substantially credible evidence dictates a finding that the surgery requested by Dr. Frey is reasonably necessary. Based upon the finding that the surgery by Dr. Frey is reasonably necessary and the agreement by the Respondents' expert, Dr. McCranie, that the Claimant is eligible for another ablation presently, the issue of the ablation is presently moot. It should be left to the determination of the treating physicians, Dr. Fillmore and Dr. Frey as to whether this Claimant should have another ablation before the surgery.

45. Based on the conflicting sets of medical opinions, *i.e.* Dr. Frey/Dr. Clapp /Dr.Fillmore vs. Dr. McCranie and Dr. Sabin, the ALJ makes a rational choice, based on substantial evidence, to accept the opinions of Dr. Frey and Dr,. Clapp and to reject all opinions to the contrary.

46. As found herein above, substantial evidence supports Dr. Frey's request. for surgery.

47. Claimant has sustained his burden of proof by a preponderance of the evidence.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the medical opinions of Dr. Clapp and Dr. Frey were credible and persuasive. Dr. Clapp stated the basis upon which he believed that in the Claimant's case the Medical Treatment Guidelines should be deviated from and Dr. Frey, who has been the Claimant's orthopedic doctor for fifteen (15) years and has done thousands of the type of surgery that is being considered, is of the opinion that surgical intervention is the best option for the Claimant. This coupled with the Claimant understanding the risks and desiring to go forward with the surgery, given all of the conservative treatment modalities that have been tried, show that the overwhelming and substantially credible evidence dictates a finding that the surgery requested by Dr. Frey is reasonably necessary and a deviation from the MTG is warranted.. Based upon the finding that the surgery by Dr. Frey is reasonably necessary and the agreement by the Respondents' expert, Dr. McCranie, that the Claimant is eligible for another ablation presently, the issue of the ablation is presently moot. It should be left to the determination of the

treating physicians, Dr. Fillmore and Dr. Frey as to whether this Claimant should have another ablation before the surgery.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, based on conflicting sets of medical opinions, *i.e.* Dr. Frey/Dr. Clapp and Dr. Fillmore, the ALJ made a rational choice, based on substantial evidence, to accept the opinions of Dr. Frey, Dr,. Clapp and Dr. Fillmore and to reject all opinions to the contrary.

Deviation From the Medical Treatment Guidelines

c. The Division of Workers' Compensation Medical Treatment Guidelines (MTG), Workers' Compensation Rules of Procedure (CRP), Rule 17, although fitted under a Rule are not rules but **Guidelines.** The MTG are limited to workers' compensation cases and therein may be considered as evidence of accepted standards of practice in workers' compensation cases.. *See Hall v. Indus. Claim Appeals Office,* 74 P.3d 459 (Colo. App. 2003). The MTG may be considered as evidence of accepted standards in the evaluation of causation. *See Cahill v. Patty Jewett Golf Course,* W.C. No. 4-729-518 [Industrial Claim Appeals Office (ICAO), February 23, 2009); *Simone v. Worldwide Flight Services,* W.C. No. 4-535-290 (ICAO, November 21, 2006). Also, when determining whether proposed treatment is reasonably necessary, an ALJ may consider the MTG because they represent accepted standards of practice in workers' compensation cases. Evidence of compliance, or non-compliance, with the MTG, however, is not **dispositive** of the question of whether medical treatment is reasonably necessary. Rather, an ALJ may give evidence regarding compliance with the MTG such weight as the ALJ determines it is entitled to considering the totality of the evidence. *See Adame v. SSC Berthoud Operating Co.,* W.C. No. 4-784-709 (ICAO, January 25, 2012); *Stamey v. C2 Utility Corners Health Care,* W.C. No. 4-484-220 (ICAO, April 27, 2009); *Stamey v. C2 Utility Contractors, Inc.,* W.C. No. 4-503-974 (ICAO, August 21, 2008). The provisions of the Medical Treatment Guidelines are not

legally binding in any way. *Eldi v. Montgomery Ward,* W.C. No. 3-757-021 (ICAO, October 30, 1998). As found, the compelling opinions of Dr. Frey and Dr. Clapp, plus Dr. McCranie's concession, firmly establish that a **deviation** from the MTG to implement ATP Dr. Frey's recommended surgery and more frequent ablations is warranted.

Causal Relatedness and Reasonable Necessity of Recommended Surgery

d. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, Claimant's medical treatment is causally related to the compensable back injury of March 1, 2004. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). The same tests for post-MMI medical treatment, *i.e.,* causal relatedness and reasonable necessity apply. As found, the surgery recommended by Dr. Frey is reasonably necessary to maintain the Claimant at MMI and to prevent a deterioration of his work-related condition. § 8-42-101(1) , C.R.S. requires payment of medical benefits at the time of the injury " and thereafter during the period of disability to cure and relieve from the effects of the injury," *Grover v. Indus. Comm'n of Colorado,* 759 P.2d 705 (Colo. 1988) is the seminal case that defined the test for the provision of medical benefits to injured workers after the date of MMI: "(T)here must be substantial evidence in the record to support a determination that future medical treatment will be reasonably necessary to relieve the injured worker from the effects of the work-related injury or occupational disease." As found, there is substantial evidence in the record that the surgery recommended by Dr. Frey and the more frequent ablations recommended by Dr. Fillmore are reasonably necessary to maintain the Claimant at MMI and to prevent a deterioration of his condition.

Burden of Proof

e. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Clauinant has sustained his burden with respect to the surgery recommended by his ATP, Dr. Frey.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. In addition to other post maximum medical improvement benefits, Respondents shall pay the costs of the spinal cord fusion surgery recommended by George Frey, M.D., orthopedic surgeon specializing in spinal cord surgeries and the costs of more frequent ablations recommended by Joseph Fillmore, M.D., the frequency of which shall be in the clinical judgment of Dr. Fillmore, subject to the Division of Workers' Compensation Medical Fee Schedule.

B. Any and all issues not determined herein are reserved for future decision.

DATED this 21st day of August 2019.

EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

ISSUES

I. Have Claimant's shown, by a preponderance of the evidence, that Decedent suffered a compensable injury while working for Employer? In his instance, was Decedent last injuriously exposed to asbestos while working for Employer, resulting in fatal mesothelioma?

STIPULATIONS

I. Decedent's Average Weekly Wage ("AWW") is $245.65.

II. If this claim is deemed compensable, Respondents are entitled to a dollar-for-dollar offset against settlement proceeds paid from third-party defendants to Claimants.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

Decedent's Exposure to Brake Components

1. Kathryn Lavender ("Decedent") was born on May 23, 1974. She began assisting her stepfather in performing brake jobs and other mechanic duties between age eight and seventeen. (Ex. D, p. 157). The Decedent took an auto shop class during her senior year of high school. Prior to working for Employer, she worked for Danny's Car Wash as an oil and lube technician. During this time, she did around twenty-five brake jobs. She also worked for Montgomery Ward, where she performed around five brake jobs by herself and around ten brakes jobs assisting other employees. After high school, the she attended Universal Technical Institute and graduated with an Associate's degree in automotive and diesel in February 1994. *Id at 158.* While in school, the decedent worked at several local companies performing brake and mechanic work. *Id at 154.*

2. Decedent worked for the Employer from 1994 through 1997, first as a mechanic and then as an administrative assistant. The Decedent recalled performing approximately 25 brake jobs and assisted on another 45 brake jobs in approximately eight months. (Ex. D, p. 155). Decedent later injured her knee, and she was placed on modified duty and moved to administrative work for the remainder of her time with the Employer. The Decedent alleged that she was exposed to mechanical work while in these administrative positions with Employer. (Ex. D, pp. 157-158).

3. At hearing, Claimant Alex Lavender described the process of working on brakes. He stated that brake dust was located inside of the adjustor, the springs, and on top of the wheel cylinder. He would then hit the drum with a hammer to pull the drum off,

which would release the brake dust. Additionally, Mr. Lavender stated that they would have to do a safety inspection with every car. This required the removal of the tires and the drums in order to inspect the front and rear brakes. In dealing with the dust, Mr. Lavender stated that they would use an air hose to spray the dust. For protection, Mr. Lavender stated that he and the Decedent only used safety glasses. They did not use a ventilator nor did they have anything to cover their mouths. Mr. Lavender stated that the majority of brakes during his time with the Employer were drum brakes; however, when he worked on disc brakes, he also had to deal with brake dust. Mr. Lavender also stated that he changed clutches while with the Employer. When changing clutches, Mr. Lavender stated that "stony black" dust would also be released in the air.

4. Claimant worked as a mechanic for Employer for about six months. The Decedent continued to work for the Employer from 1994 to 1998. During this time, Claimant would often visit the Decedent while at work. He explained that she spent the first year working as a mechanic. She then spent the next two years working in the dispatch area. Mr. Lavender explained that the dispatch area was located on the south part of the shop and allowed her to look over the entire shop. He stated that the dispatch desk was elevated and in the same area as the bays. There was no glass separating the dispatch desk from the rest of the shop. Mr. Lavender explained that the area was "all open" and that there was dust everywhere. He also explained that the Decedent would have to walk around the shop as well to do coding, go to the parts room, or to talk with the mechanics.

5. In the deposition of her civil suit, Decedent provided additional information about her time at dispatch stating that "[t]he dispatch center was right in the middle of the – to describe it, customers would bring in their vehicles in to either get oil changes or major service work[…] and every technician had four bays of their own. There's probably 30 bays in that area. And the dispatch desk sat right there. And so we had no protection from what those guys were doing, coming at us." (Ex. 3, p.8).

6. After her time at the dispatch desk, Decedent was transferred to the heavy truck center. Although there was a door from the shop to the desk, Mr. Lavender explained that it was always open because she, and the other mechanics, had to go back and forth between the desk and the shop. When he would visit the Decedent at work, Mr. Lavender stated that the Decedent would always have a tissue over her water glass in order to prevent dust from getting into her water. Mr. Lavender stated that there were no fans or ventilation in the truck area. Mr. Lavender has experience working with heavy trucks. He stated that because a brake drum is 15 to 16 inches around on a heavy truck, it would generate more dust.

7. Claimant and Decedent were married on May 13, 1995. The couple had two children, Rhett Lavender born October 23, 1998 and Jessica Lavender born February 6, 2000. In 1988, the Decedent left her job with the Employer. This was her last job working in the automotive industry.

8. During his marriage to Decedent, Claimant performed "shade tree work", and performed brake and clutch work on friends' and families' vehicles, as well as for

paying customers. The Decedent assisted when the Claimant performed this work. Claimant stopped performing this type of work in 2008. (Ex. D, p. 171).

9. The Decedent was diagnosed with mesothelioma in April, 2016. She died on December 20, 2017. Prior to her death, the Decedent also filed a civil claim in the 22nd Judicial Circuit Court in the state of Missouri against a number of defendants including the Ford Motor Company, Wester Auto Supply Company, and Advance Auto Parts, Inc.

Respondents' Expert Reports: Exposure to Chrysotile Asbestos

10. Mary Beth Beasley, M.D. reviewed the Decedent's medical records and answers to interrogatories completed by the Decedent prior to her death. Dr. Beasley noted that Decedent was diagnosed with malignant mesothelioma. Dr. Beasley opined that not all types of asbestos are equally potent. Specifically, chrysotile asbestos does not have the same association with mesothelioma as other forms of asbestos. (Ex. C, p. 149). Dr. Beasley opined that there is doubt that chrysotile asbestos causes mesothelioma. Dr. Beasley concluded that the Decedent's reported lifelong exposure to automobile brake and friction products did not cause her mesothelioma. (Ex. C, p. 149).

11. Similarly, Brian A. Taylor, M.D. reviewed the Decedent's responses to interrogatories, as well as the depositions taken of the Decedent, Claimant and the Decedent's stepfather regarding the Decedent's alleged lifelong exposure to asbestos. Dr. Taylor documented the decedent's alleged direct and secondary exposure to asbestos. (Ex. D, pp. 151-172).

12. Dr. Taylor opined that chrysotile and amphibole asbestos are quite different in their potential to cause disease. Specifically, chrysotile asbestos is estimated to have a potency between 0 and 1/200th compared with amphibole asbestos in causing disease. Dr. Taylor concluded that "no compelling evidence exists to implicate chrysotile as a cause of malignant mesothelioma." (Ex. D, p. 151). Dr. Taylor opined that the Decedent likely had some direct exposure to asbestos from occupational and non-occupational sources, but the medical and scientific literature has consistently failed to demonstrate an increased risk for malignant mesothelioma among automotive mechanics. Dr. Taylor concluded that it was reasonably certain that the Decedent's cumulative lifetime exposure to asbestos (all sources and pathways) was *de minimus,* and did not cause or contribute to her development of mesothelioma. (Ex. D, p. 175).

13. Dominik Alexander is a Principal Epidemiologist, with extensive experience in health research and disease causation, including exposure to asbestos and asbestos-related disease. (Ex. H, p. 261). After reviewing the Decedent's interrogatory responses and deposition testimony regarding her claimed lifelong exposure to chrysotile asbestos, Dr. Alexander opined that the epidemiology studies of work in occupations in which brake repairs and motor vehicle repairs were performed, the evidence did not support an increased risk of mesothelioma. (Ex. H, p. 275). Dr. Alexander concluded that since the epidemiological evidence did not support a causal

link to occupational exposure, the Decedent's work did not place her at risk for developing mesothelioma. (Ex. H, p. 276).

Respondents' Expert Fiona Mowat

14. Fiona Mowat, Ph.D., d/b/a Exponent, Inc., performed a risk assessment on this matter. Dr. Mowat testified at hearing that risk assessment as a process is well accepted, and that the federal government has set forth the four steps: hazard identification, dose response, exposure assessment, and risk characterization.

15. Dr. Mowat examined the Decedent's claimed lifelong exposure to asbestos. Dr. Mowat explained that asbestos is a generic term and refers to mineral silicates that occur in nature. The basic forms of asbestos are chrysotile and amphibole. Chrysotile makes up the most commonly used asbestos in the United States. (Ex. A, p. 20). Dr. Mowat testified that the scientific studies, including a study by the National Institute for Occupational Safety and Health ("NIOSH") show that chrysotile was the form of asbestos used in brakes, when asbestos was used for this purpose. Additionally, Dr. Mowat reported that beginning in the 1980s and into the early 1990s Ford phased out asbestos-in its brake products. (Ex. A, pp. 46-47).

16. Dr. Mowat documented the history of asbestos in automotive materials, specifically brakes and clutches. (Ex, A, p. 25). Chrysotile asbestos was selected for use due to its high heat resistance, thermal stability, strength, and reasonable cost. (Ex. A, pp. 25-26). Chrysotile asbestos was the sole type of asbestos used in brakes and clutches, because other forms of asbestos were too harsh. (Ex. A, p. 26). Dr. Mowat testified that during the braking process, heat and friction are both applied to the brakes which causes the chrysotile to degrade. The chrysotile then breaks down into "a blobby substance" that is called forsterite, which is not known to be harmful.

17. Dr. Mowat testified that the different forms of asbestos have different health effects. She testified that from a toxicology perspective, it is important to differentiate between the different types of asbestos, because different types of asbestos have different compositions, different durability and biopersistence (how long particles remain in the lung after inhaled). These characteristics impact the effect on human health. Dr. Mowat testified that chrysotile is a curly, flexible fiber, whereas amphiboles are more like a hard form of spaghetti. As such, the body can more easily clear chrysotile from the lungs, while amphiboles linger in the body for a much longer time, and the body cannot easily handle these fibers.

18. Dr. Mowat reported that these differences between the amphibole and chrysotile asbestos, result in amphibole being far more potent in causing mesothelioma. Chrysotile has shorter fiber lengths and a different chemical composition that affects its biopersistence. (Ex. A, p. 29). Dr. Mowat reported that short fibers have little to no disease-producing potential.

19. Dr. Mowat, citing several more recent studies, reported that "there is strong evidence that asbestos and short vitreous fibers shorter than 5 microns are

unlikely to cause cancer in humans". (Ex. A, p. 31). In addition to fiber size, the structure of chrysotile allows the body's natural defenses to remove it. The biological half-life of inhaled chrysotile fibers is only days or weeks, rather than years or decades, as is the case with amphibole fibers. (Ex. A, p. 32).

20. Dr. Mowat reviewed the Decedent's deposition transcript and responses to interrogatories in order to quantify the Decedent's claimed exposure to asbestos. Dr. Mowat testified that auto mechanics are exposure to decomposition products of brakes, so the dust in the wheel after braking contains less than 1% short-fiber chrysotile. Dr. Mowat opined that the extensive body of published epidemiologic literature shows there is no increased risk of mesothelioma associated with occupational exposures incurred during vehicle repair work. This includes long-term mechanics and those that work with brakes. (Ex. A, p. 46).

21. Dr. Mowat testified that the concentration and frequency are important when determining exposure risk. Dr. Mowat testified that in reviewing the literature, cumulative exposure (lifetime exposure), about 95% of mechanics are exposed to levels of asbestos less than the currently allowable limits permissible by Occupational Safety and Health Administration ("OSHA"). Dr. Mowat also testified that the epidemiologic studies have consistently demonstrated no increased risk of mesothelioma in automobile mechanics -including brake mechanics - compared with the general population.

22. Dr. Mowat testified that even if the decedent had continued her work as a mechanic, she would not have had the requisite exposure to cause mesothelioma because her exposure level was very low. Such exposure was also to short-fiber chrysotile that the body can handle. Dr. Mowat further testified that the robust body of epidemiological literature has demonstrated that long-term, career mechanics do not develop mesothelioma.

23. Dr. Mowat also noted that the decedent was born in 1974, and was 41 years old when she was diagnosed with mesothelioma. Mesothelioma has a long latency period and given the reduction to the potential exposure to asbestos since the 1970s, it is unlikely that the cause of the decedent's mesothelioma was asbestos related. (Ex. A, p. 47). Dr. Mowat concluded that after review of all of the Decedent's claimed exposure to asbestos, the claimed exposure to asbestos was inconsequential with regard to her development of mesothelioma.

Spontaneous and/or Unknown Causes of Mesothelioma

24. Dr. Taylor opined that spontaneous cell mutations arise and cancers can result. In other words, environmental agents are just one factor. Spontaneous cases of all types of cancer, including mesothelioma, do arise. (Ex. D, p. 175).

25. Dr. Mowat reported that while mesothelioma has been strongly associated with asbestos exposure, such exposure cannot explain all cases of mesothelioma. Dr. Mowat reported that additional studies have found other causal links for mesothelioma.

Several epidemiologic studies have found mesothelioma cases with no history of asbestos exposure at all, particularly in women. (Ex. A, p. 33). Indeed, Dr. Mowat noted there are cases of mesothelioma in children, so it is well accepted that there are cases of mesothelioma unrelated to asbestos. (Ex. A, p. 33).

26. James McCluskey, M.D., cautioned that use of the scientific methodology should be used in opining on causal links. A failure to do so results in arbitrary and incorrect causal associations. Dr. McCluskey opined that the scientific literature "clearly indicates" that auto maintenance and repair work does not result in a "biologically" significant exposure to asbestos. As such, Dr. McCluskey concluded that it is a possibility that the Decedent's disease was spontaneous, or that the Decedent had an unknown biologically significant exposure to amphibole at a level which was known to cause mesothelioma. (Ex. F, p. 199).

27. Dr. Alexander opined that studies have shown that a large proportion of mesothelioma in women have not been attributed to occupational or non-occupational exposure to asbestos. (. Ex. H, p. 276).

Decedent's Exposure to Chrysotile Asbestos

28. Dennis O'Brien, Ph.D., a retired representative of NIOSH and certified industrial hygienist, also reviewed the materials in the case and documented the history of asbestos hazards (Ex. B, p. 85). Dr. O'Brien noted that in 1972, OSHA published a comprehensive standard for asbestos, which indicated there were limits for which asbestos could be safely handled. (Ex. B, pg. 87). Dr. O'Brien noted the permissible exposure limits by OSHA for 1976, 1984 and 1994. (Ex. B, p. 88).

29. Dr. O'Brien opined that all of the Decedent's claimed exposure to asbestos during her lifetime did not put her at risk of mesothelioma. (Ex. B, p. 118). Dr. O'Brien, relying on numerous studies, opined that the exposures for mechanics were consistently below the applicable occupational standards in the 1970s, 1980s, and 1990s. (Ex. B, p. 118). Dr. O'Brien opined that the Decedent's exposure to asbestos would have been less than that documented in the studies, because typical U.S. mechanics perform three to four brake jobs per week. Based on the studies, the time weighted average ("TWA") exposure was far less than the requirements. (. Ex. B, p. 118). Additionally, Dr. O'Brien opined that most likely the brakes the Decedent encountered had non-asbestos brakes:

> Specific to Ford replacement brakes remanufactured by AER, her potential exposure would have been limited to only Ford used cars that would have had their brakes previously replaced with these products. Regarding her work with used cars, Genesove (1993) noted that about 60 percent of new car dealer (NCD) used cases are no more than 4 years old (1976-79). He further noted that only 10 percent of NCD cars sold are more than 7 years old. Thus, *most of the used vehicles she encountered likely had non-asbestos brakes.* (Ex. B, p. 120). (emphasis added).

30. Dr. Mowat also opined that mechanics' exposures to asbestos were well below the current regulatory permissible exposure limit for asbestos, including cumulative exposure. (Ex. A, p. 46).

31. Mary Finn, a certified hygienist, examined the decedent's exposure to asbestos in automobile clutches. (Ex. G, p. 217). Dr. Finn concluded that the Decedent's claimed lifelong exposure to chrysotile asbestos related to clutch work was below the dose allowed under the current permissible exposure limit set by OSHA in 1994. It was also less than the dose necessary for an increased risk to develop mesothelioma above the general public. (Ex. G, p. 254). Dr. Finn also opined that the decedent's dose would have been in the range of ambient levels. *Id at 255.*

32. William Ringo, certified hygienist, has a background in asbestos studies and has taught the Environmental Protection Agency courses in asbestos work. (Ex. I, p. 280). Dr. Ringo opined that it was unlikely many of the brakes used by the decedent from 1994 to 2015 contained any asbestos. (Ex. I, p. 283). Furthermore, Dr. Ringo concluded that fiber release associated with the use, handling, and removal of chrysotile-containing brakes (which was the only type of asbestos used in brake materials) did not present a hazard to users in the workplace. Specifically, the *de minimus* exposure of the products was significantly below the current OSHA regulatory exposure levels as a time weighted average. (Ex. I, p. 284).

Possible Environmental Exposure to Amphibole Asbestos

33. In addition, Dr. O'Brien opined that the decedent had exposure to amphibole asbestos based on the general environment. Dr. O'Brien opined that the decedent's Colorado residences were within 50 miles of several sources of naturally occurring asbestos, including amphibole forms, and this area of the country has shown higher instances of mesothelioma. (Ex. B, p 124).

Dr. Murray Finkelstein

34. Dr. Murray Finkelstein in an expert in epidemiology as well as occupational and environmental medicine. The majority of his career was spent as an occupational physician and epidemiologist with the Ontario Department of Labor where he would propose regulations on occupational exposure limits for asbestos.

35. Dr. Finkelstein determined that the Decedent was exposed to sufficient levels of asbestos during her time with the Employer to cause mesothelioma. In support of his opinion, he stated that asbestos is the only relevant known cause of mesothelioma and subsequently the only relevant cause of the Decedent's mesothelioma. In determining the cause of the Decedent's mesothelioma, Dr. Finkelstein first stated that, for most of the 20th century, friction components used in brakes contained approximately 25-60% asbestos. (Ex. 3, p. 14). Dr. Finkelstein then referred to number of brake jobs that Decedent performed with the Employer, the use of compressed air, and the bystander exposure at the dispatch desk and heavy truck

shop. Dr. Finkelstein relied upon the Decedent's own testimony in the deposition of her civil suit in which she stated that she performed about 65 brake jobs for the Employer.

36. During his deposition, Dr. Finkelstein stated that the friction products, including the brakes and clutches, encountered by the Decedent during her time with the Employer certainly would have contained asbestos with both chrysotile and tremolite asbestos fibers. Contrasting with reports submitted by the Respondents, Dr. Finkelstein testified that it is incorrect to say that the Decedent was exposed only to chrysotile asbestos, because the asbestos used at the time the Decedent worked for the Employer was actually Canadian-mined asbestos, which was a combination of chrysotile and tremolite asbestos fibers, and that this combination can cause mesothelioma.

37. Dr. Finkelstein stated that the Decedent "absolutely" would have been exposed to tremolite asbestos while working for the Employer and that the lung burden measurements on brake mechanics found more tremolite than chrysotile fibers. He further stated that, while the asbestos mills filtered the asbestos so that it could contain mostly short fibers, it would be impossible to reduce the asbestos to only short fibers. This resulted in a combination of short and long hair fibers in brakes and other friction products. Even with the short fibers, Dr. Finkelstein opined that there is "very little difference in toxicity between the shorter and longer fibers."

38. However, when asked about the possible causes of mesothelioma, Dr. Finkelstein opined:

> A. Well, we know a number of causes, asbestos being the most important. There are several other mineral fibers which are known to cause mesothelioma…so we know causation by mineral fibers, of which that [asbestos] is most important, and we also know that therapeutic radiation causes mesothelioma.
>
> Q. Is it possible for it to occur, as Dr. Mowat states, spontaneously or as a result of accumulations of mutations over one's lifetime?
>
> A. There – you know, *it is impossible to know* because everybody in the United States has inhaled asbestos fibers and has some asbestos in their lungs. Asbestos is a known cause of mesothelioma.
>
> *It is certainly possible* that aging processes lead to some of these mutations. It requires five or six mutations to occur in a cell before mesothelioma develops. So it is *certainly possible* that some are caused by asbestos fibers. Some are caused by other causes.
>
> But *we can't say that in any case,* particularly when there was occupational exposure, that his occurred spontaneously and is not caused by the known carcinogen, asbestos. (Deposition transcript, pp. 21-22) (emphasis added)

39. Dr. Finkelstein disagreed with the methods and epidemiology used by Dr. Mowat to formulate her opinion on the cause of the Decedent's mesothelioma. He stated that Dr. Mowat failed to consider any of the studies that were positive in finding a causal correction between brake mechanics and mesothelioma. Additionally, Dr. Finkelstein stated that, of the studies relied upon by Dr. Mowat, she failed to consider the work environment of the mechanics including the use of compressed air, whether the work was done indoors or outdoors, and whether sanding was used on the friction products.

40. Dr. Finkelstein disagreed with the notion that the braking process shortens the fiber length, explaining that the brake dust debris will often contain fibers that are 5 microns in length. Dr. Finkelstein further stated that he disagreed with the opinion that the measurements of brake mechanics indicate low exposure levels stating that "the exposure levels over a one-hour period of doing a brake job are about a hundred thousand asbestos fibers per cubic yard of air," which he stated is capable of causing disease.

41. Dr. Finkelstein has testified in an excess of 200 depositions and between thirty to forty trials on behalf of plaintiffs in asbestos related civil suits. Regarding Exponent Consulting, Dr. Finkelstein stated that Exponent has a "business model of doing work for defendants in toxic tort litigation." He explained that the big three automakers, including Ford Motor Company, spent in the range of $330 million to Exponent Consulting to sponsor research for the purpose of defense litigation in civil trials further stating that "the analysis of epidemiologic studies indicated that there was no increased risk of mesothelioma among brake mechanics, and that opinion is always expressed using that Exponent research."

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

2. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or

unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. Assessing the weight, credibility and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Moreover, the weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part or none of the testimony of an expert witness. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968). In this instance, expert testimony (and reports) has been elicited on both sides of this issue. The ALJ finds that such experts are all knowledgeable and sincere in rendering their respective opinions, thus all are, in a sense, "credible." In this case, the ALJ must decide who is simply more *persuasive* in light of what evidence is known.

Dependency Determination

4. Pursuant to §8-42-114, C.R.S. death benefits are payable to dependents of a decedent in the amount of two-thirds of the AWW subject to the applicable minimum. If there are wholly dependent persons at the time of the employee's death, they are entitled to weekly compensation equal to two-thirds of the decedent's AWW. §8-42-115(1)(b), C.R.S. 20. Section 8-41-501(1), C.R.S. designates classes of persons who are presumed to be wholly dependent on a decedent. Section 8-41-501(1)(a) provides that a widow or widower is wholly dependent "unless it is shown that she or he was voluntarily separated and living apart from the spouse at the time of the injury or death or was not dependent in whole or in part on the deceased for support." The statutory presumption of spousal dependency can thus only be rebutted by demonstrating that the surviving spouse was voluntarily separated and living apart from the decedent or was not dependent upon the decedent for any support. See Exeter Drilling v. Industrial Claim Appeals Office, 801 P.2d 20, 21 (Colo. App. 1990); Michalski v. Industrial Claim Appeals Office, 781 P.2d 183, 184-85 (Colo. App. 1989). 21.

5. Section 8-41-501, C.R.S. presumes that a decedent's minor children under the age of 18 years are wholly dependent on the decedent. Pursuant to §8-41-501(1)(c), C.R.S. minor children of a decedent who are over 18 years of age and under 21 years of age who are engaged in courses of study as full-time students at accredited

schools are also wholly dependent on the decedent. Section 8-42-121, C.R.S. grants discretion to the Director to apportion death benefits among the beneficiaries in the manner the Director deems just and equitable. Because the undersigned ALJ acts on 12 behalf of the Director in determining appropriate apportionment after a hearing, the ALJ is afforded the same power to apportion benefits.

6. It is undisputed that Alex Lavender in the Decedent's surviving spouse. They were legally married on May 13, 1995 and have lived together since 1992. It is also undisputed that Rhett and Jessica are the children of the Decedent and Mr. Lavender and that both are under the age of 18. The ALJ finds that Mr. Alex Lavender, Rhett Lavender, and Jessica Lavender are the wholly dependents of the Decedent.

Compensability, Generally

7. Compensable injuries involve an "injury" which requires medical treatment or causes disability. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970). Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. Div. 5 2009).

Causation

8. Chrysotile asbestos was used in brakes for a period of time. However, chrysotile asbestos is far less potent than amphibole asbestos, which is a known cause of mesothelioma. This is because chrysotile asbestos is short-fiber asbestos. It is also shaped differently, which allows the human body to handle and clear the asbestos. As such, chrysotile does not remain in the body for a very long time. Additionally, heat and friction cause chrysotile asbestos to lose its water content and change into forsterite, which is not known to be harmful.

9. Dr. Mowat concluded that in the Decedent's case, the Decedent would not have been exposed to asbestos at a harmful level while employed with the Employer. Dr. Mowat persuasively testified that extrapolating the asbestos exposure over her lifetime, still would not have put Decedent at an increased risk for mesothelioma.

10. Based on the opinions of Dr. Mowat regarding chrysotile asbestos, and the epidemiological studies refuting that exposure to chrysotile asbestos causes mesothelioma, the ALJ concludes that the opinions of Dr. Mowat, Dr. Taylor, Dr. Alexander and Dr. Beasley are persuasive that the Decedent's mesothelioma was not caused by her exposure to chrysotile asbestos. As found, chrysotile is a short fiber asbestos and due to its composition, its biopersistence is reduced. The ALJ concludes that the Decedent's asbestos exposure during her lifetime was *de minimus*. This extends to any residual tremolite, if any, that Decedent would have been exposed to.

11. Further, as evidenced by Dr. Finkelstein's candid admissions during his deposition, it is simply not possible to know in a given case what may have caused a person's mesothelioma. It can occur spontaneously, or as a result of the latent

asbestos that can be found in certain quantities in all of us – not merely those persons exposed in the workplace.

12. The ALJ therefore concludes that because the Decedent's exposure to chrysotile asbestos was *de minimus*, the decedent's development of mesothelioma was not caused by her work-related duties.

Compensability – Last Injurious Exposure

13. The employer in whose employment the employee was last injuriously exposed to the hazards of such disease and suffered a substantial permanent aggravation thereof and the insurance carrier if any on the risk when such employee was last so exposed under such employer shall alone be liable therefor, without right to contribution from any prior employer or insurance carrier. C.R.S. 8-41-304(1). Moreover, C.R.S. 8-41-304(2) provides that in the event of death, if such employee has been injuriously exposed to such disease while in the employ, the last employer will be liable.

14. An injurious exposure is a concentration of toxic material which would be sufficient to cause the disease in the event of prolonged exposure to such concentration. *Climax Uranium Co. v. Smith's Claimants*, 522 P.2d 134, 136 (Colo. App. 1974). Thus, the last injurious exposure need not be the cause in fact of the disease. *Id.*

15. The Supreme Court adopted this standard in *Union Carbide Corp. v. Industrial Commission*, 581 P.2d 734, 736 (Colo. 1978). The Court concluded that length of employment was immaterial to finding liability with a particular employer. *Id.* The Court reasoned that an employee must prove that he contracted an occupational disease and it was caused by his employment activities, but when an employee may have worked for several different employers, it may be that no single exposure was sufficient to cause the disease, but all the exposures contributed to the final result. Id. at 737. Nonetheless, an employee still must show "injurious exposure" which is an exposure to the chemical in a concentration that could cause the disease. *Id.*

16. Decedent worked for the Employer as a mechanic and administrative assistant in the mid-1990s. As found, OSHA set forth limits for which asbestos could be safely handled. The ALJ concludes that asbestos exposures for mechanics were well below the current regulatory permissible limits for asbestos as documented in numerous epidemiological studies. Finding the opinions of Dr. O'Brien, Dr. Finn and Dr. Ringo persuasive, the ALJ concludes the Decedent's exposure as a mechanic and bystander while working for the Employer was *de minimus* exposure and well below the OSHA regulatory exposure levels.

17. The ALJ is not persuaded by Dr. Finkelstein's hypothesis that if a given individual experiences occupational exposure to asbestos, then develops mesothelioma, that a causal link has been established, ipso facto. Taken ad absurdum,

such a causal link would be established if a brake mechanic performed one brake job, then quit that same afternoon – so long as that was his last job as a mechanic.

18. Further, by the time Decedent went to work for this Employer, asbestos, in any form, was being phased out - if not entirely removed - from Ford brake products and its associated after-market. It cannot be concluded that there was exposure to asbestos, *even in non-injurious levels,* during Decedent's tenure with this Employer. Assuming, arguendo, that the chrysotile asbestos mined in Canada contained harmful tremolite (as urged by Dr. Finkelstein), such exposure would still not have extended to Decedent's time at Phil Long. Decedent was working on newer cars by then, largely (perhaps entirely) free of asbestos in any form.

19. Therefore, the ALJ concludes that the Decedent was not last injuriously exposed to asbestos while working for the Employer because: 1) any claimed exposure was below OSHA regulatory exposure levels, and 2) it has not been shown that Decedent has been exposed to injurious levels of asbestos at all, since asbestos was largely phased out of the brake products Decedent would have been working with during her tenure with this Employer.

ORDER

It is therefore Ordered that:

1. Claimants' claim for Workers Compensation benefits is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 21, 2019

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

I. Whether Claimant overcame Dr. Mason's DIME opinion on permanent impairment by clear and convincing evidence.

II. Whether Claimant proved by a preponderance of the evidence additional medical maintenance treatment is reasonable, necessary and related to his December 7, 2017 work injury.

FINDINGS OF FACT

1. Claimant is a 73-year-old male who worked for Employer as a gate keeper. On December 7, 2017, Claimant sustained an admitted industrial injury when he was struck by a vehicle while attending the front gate entrance. Claimant flagged down a commercial truck attempting to enter the complex through the resident gate and advised the driver he needed to go through the commercial truck entrance. The driver became irritated and pulled away quickly, striking Claimant in the shoulder, back, and arm. Claimant immediately reported the incident to Employer and was sent to Concentra for treatment.

2. Glenn Peterson, PA-C evaluated Claimant at Concentra on December 7, 2017. Claimant presented with no neurological complaints or findings. PA-C Peterson assessed Claimant with a right shoulder contusion, acute cervical strain, thoracic sprain and lumbar strain. He referred Claimant for physical therapy, noting Claimant was already taking Meloxicam for pain and inflammation.

3. On December 12, 2017, Claimant presented to Thomas Corson, D.O. at Concentra with complaints of pain and aching in the right upper trapezius and shoulder blade and weakness in the right upper extremity with no tingling or numbness. Physical examination revealed tenderness in the right supraspinatus and distal tendon and painful right shoulder abduction. Dr. Corson prescribed Cyclobenzaprine and Lidocaine external patches.

4. Claimant saw Dr. Corson on December 20, 2017, January 3, 2018, January 4, 2018, February 7, 2018, March 7, 2018, March 21, 2018, April 4 2018 and April 25, 2018 with continued right shoulder complaints, at times radiating into the posterior neck and upper back. The records of these visits contain no mention of numbness or tingling. Lumbar exam findings were either normal or not noted. Neurological and psychiatric findings on examination, as well as cervical and thoracic spine findings were normal, with the exception of tenderness in the cervical and thoracic spine noted on April 4, 2018. Lumbar strain was sporadically noted as a diagnosis. Claimant continued on medication, physical therapy and dry needling.

5. Claimant underwent a right shoulder MRI on May 8, 2018. The impression was: (1) rotator cuff tendinopathy with non-displaced 5 mm full-thickness tear distally; (2) biceps tear with mild retraction and moderate cyst formation adjacent to the anchor without impingement on structures in the supra-scapular notch; (3) degeneration of the posterior labrum without a displaced tear; and (4) acromioclavicular arthropathy.

6. Dr. Corson reevaluated Claimant on May 9, 2018, noting the MRI revealed a right rotator cuff tear. Claimant complained of shoulder pain radiating to the right neck and right scapula. Tingling and numbness were noted under review of systems. Right shoulder range of motion was full with pain and tenderness. Neurologic and psychiatric exams were normal. Dr. Corson referred Claimant to an orthopedic specialist.

7. Claimant presented to Cary Motz, M.D. for an orthopedic evaluation on May 15, 2018. Dr. Motz diagnosed Claimant with a right shoulder small rotator cuff tear and chronic biceps tendon tear and performed a steroid injection into the subacromial space.

8. Claimant returned to Dr. Corson on May 30, 2018 and reported that the steroid injection only helped for 48-72 hours. Claimant continued to report right shoulder symptoms. Numbness was noted under the review of symptoms. Right shoulder active range of motion was 90 degrees flexion 45 degree extension and 90 degrees abduction. Cervical spine had full range of motion with tenderness. No lumbosacral findings were included. Neurologic and psychiatric findings were normal.

9. Dr. Motz reevaluated Claimant on July 17, 2018. Dr. Motz noted Claimant's shoulder had good function and minimal discomfort. Dr. Motz noted that if Claimant's symptoms worsened, he could consider a steroid injection under maintenance treatment.

10. Dr. Corson reexamined Claimant on August 1, 2018. Claimant complained of pain in the right posterior shoulder that did not radiate. On physical examination, Dr. Corson noted tenderness in the right shoulder and the following active range of motion measurements of the right shoulder: forward flexion 100 degrees, extension 45 degrees, and abduction 100 degrees. Dr. Corson noted cervical spine tenderness with full range of motion. Neurologic and psychiatric findings were normal. No lumbosacral findings were noted. Dr. Corson placed Claimant at maximum medical improvement (MMI) with no permanent impairment. His final assessment was acute cervical strain, right shoulder contusion, right shoulder strain, tear of right rotator cuff, and thoracic sprain. Dr. Corson released Claimant to full duty work with no restrictions and opined Claimant could follow up with Dr. Motz for another steroid injection within the next 12 months if needed.

11. Respondents filed a Final Admission of Liability (FAL) on August 14, 2018 consistent with Dr. Corson's August 1, 2018 report. Respondents admitted for reasonable and necessary and related medical maintenance care. Claimant objected to the FAL and filed an Application for a DIME. On the DIME Application, Claimant listed

"neck, back, right shoulder, and psychological" under the body parts/conditions to be evaluated.

12. At the request of Claimant, John Hughes, M.D. performed an independent medical examination (IME) on November 12, 2018. Claimant complained of right shoulder and neck pain. Physical examination revealed cervical spine and right shoulder tenderness. Cervical active range of motion measurements were as follows: left lateral flexion 9 degrees, left lateral rotation 31 degrees, right lateral flexion 17 degrees, right lateral rotation 45 degrees, flexion 51 degrees and extension 36 degrees. Right shoulder active range of motion measurements were 110 degrees flexion, 36 degrees extension, 97 degrees abduction, 23 degrees adduction, 70 degrees external rotation and 61 degrees internal rotation. Neurologic exam findings were normal. No lumbosacral findings were noted.

13. Dr. Hughes assessed Claimant with (1) cervical spine sprain/strain with residual cervical facet joint arthropathy, (2) right shoulder sprain/strain with a partial rotator cuff tear and labral tear, and (3) resolved lumbar spine sprain/strain. He agreed Claimant reached MMI, but assigned a total permanent impairment rating of 17% for the cervical spine and 10% for the right upper extremity, which combined for a whole person impairment rating of 22%. He opined Claimant should be permanently restricted from reaching or lifting and using the right arm above shoulder level. With regard to medical maintenance, Dr. Hughes' stated:

> At the present time, I do not have any recommendations for additional medical evaluation or treatment of [Claimant]. He does have cervical spine facet joint signs and symptoms and all these might be amenable to cervical spine injections. There really is no firm basis to proceed with this type of treatment. Instead, I would recommend a continuing course of home exercise with the use of heat. If cervical spine symptoms persist, it may be beneficial to revisit the idea of cervical spine interventional treatment.

14. On February 4, 2019, Claimant underwent a DIME with Kristin D. Mason, M.D. Claimant complained of right shoulder pain and grinding, occasional numbness and tingling and neck pain. Dr. Mason reviewed Claimant's medical records from the date of injury through Dr. Hughes' November 12, 2018 IME report. On physical examination, Dr. Mason noted "questionable decreased sensation in the right C5 and C6 distributions" and tightness in the right cervical paraspinal muscles. Cervical active range of motion was 43 degrees flexion, 50 degrees extension, 20 degrees right side bending, 35 degrees left side bending, 50 degrees right rotation and 70 degrees left rotation. Right shoulder active range of motion measurements were 130 degrees flexion, 30 degrees extension, 30 degrees adduction, 105 degrees abduction, 60 degrees internal rotation and 55 degrees external rotation. No lumbosacral findings were noted.

15. Dr. Mason assessed Claimant with a cervical sprain/strain with probable myofascial and facet-based components and chronic right shoulder partial rotator cuff

tear in the setting of mild degenerative arthritis. She specifically noted, "I was also asked to evaluate for back impairment and psychologic impairment. I do not see any evidence of significant complaints in either of those areas. In fact, the patient made no marks over his thoracolumbar spine on his pain diagram and denied any significant psychologic distress." Dr. Mason opined Claimant reached MMI on August 13, 2018 and assigned a 13% impairment rating for the cervical spine and 7% for the right upper extremity, which combined for a whole person impairment rating of 19%. She recommended permanent restrictions of lifting no more than 10-15 pounds with the right upper extremity and avoiding overhead lifting entirely and limiting overhead reaching. As maintenance care, Dr. Mason recommended follow up with Dr. Motz and steroid injections on an as-needed basis. She stated,

> Injections are somewhat risky because the patient is on anticoagulation. It appears that physical therapy had an equivocal benefit for him and he cannot take anti-inflammatories. If his neck complaints should worsen, I agree with Dr. Hughes that facet procedures might be an option but, again, the anticoagulation makes that somewhat risky. If he worsens with respect to his shoulder, a second opinion with another orthopedic surgeon would also be reasonable.

16. On March 8, 2019, Respondents filed a FAL admitting for a 12% upper extremity rating and 13% whole person rating and maintenance care.

17. Claimant testified at hearing he has current symptoms of right shoulder pain and headaches 5-7 days per week along with limited range of motion in his cervical spine. Claimant testified he continues to see his primary care physician due to neck pain and headaches and saw Dr. Motz on July 9, 2019 for further evaluation and workup due to ongoing issues with his right upper extremity and neck pain. Claimant testified he is able to perform his job with his current work restrictions.

18. Dr. Hughes testified by post-hearing deposition on July 11, 2019. He testified electrodiagnostic testing would have been a "reasonable thing to do" given Dr. Mason's finding of decreased sensation in the right C5 and C6 distributions. He acknowledged, however, that his examination did not indicate the presence of any neurological pathology, nor did he recall if the medical records tracked any neurological signs or symptoms. Dr. Hughes also took issue that Dr. Mason did not indicate she examined the lumbar and thoracic spine and only made a cursory reference to the back in her report. He, however, acknowledged that he examined Claimant's back and did not find that an impairment rating was warranted. Dr. Hughes testified that the difference in his and Dr. Mason's range of motion measurements was likely due to the variability of spinal stiffness to be expected in individuals of Claimant's age. He stated individuals with facet joint arthritis have waxing and waning in the clinical course, with good days and bad days. Dr. Hughes testified he had no criticism of Dr. Mason's measurements and had no reason to question the impairment ratings assigned by Dr. Mason.

19. Dr. Hughes testified he has not examined Claimant since his IME and was unaware Claimant has continued to treat for neck and shoulder pain. When asked what interventional treatment would he recommend for the cervical spine if Claimant is still treating, Dr. Hughes testified,

> Given the incomplete information currently available to me, I believe that he would be a candidate for a trial of facet joint injections for diagnostic purposes primarily, and potentially medial branch blocks leading up to a radiofrequency neurotomy procedure if he had a positive response to the medial branch blocks.

Dr. Hughes continued to opine Claimant remains at MMI, but agrees with Dr. Hughes that should Claimant's neck complaints worsen, facet procedures or medial branch blocks might be an option.

20. The ALJ finds Claimant's testimony credible and persuasive.

21. The ALJ finds Dr. Mason's opinion on permanent impairment, as supported by Dr. Corson's opinion and the medical records, more credible and persuasive than Dr. Hughes' opinion and testimony.

22. Claimant failed to overcome Dr. Mason's DIME opinion on permanent impairment by clear and convincing evidence.

23. Claimant proved by a preponderance of the evidence he is entitled to reasonably necessary and related maintenance treatment.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and

draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Overcoming the DIME on Permanent Impairment

The finding of a DIME physician concerning the claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995); *Lafont v. WellBridge D/B/A Colorado Athletic Club* W.C. No. 4-914-378-02 (ICAO, June 25, 2015).

As a matter of diagnosis the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003); *Sharpton v. Prospect Airport Services* W.C. No. 4-941-721-03 (ICAO, Nov. 29, 2016). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998); *Watier-Yerkman v. Da Vita, Inc.* W.C. No. 4-882-517-02 (ICAO Jan. 12, 2015); Compare *In re Yeutter*, 2019 COA 53 ¶ 21 (determining that a DIME physicians opinion carries presumptive weight only with respect to MMI and impairment). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000).

The questions of whether the DIME physician properly applied the *AMA Guides*, and ultimately whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000); *Paredes v. ABM Industries* W.C. No. 4-862-312-02 (ICAO, Apr. 14, 2014). A mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO, Mar. 22, 2000); *Licata v. Wholly Cannoli Café* W.C. No. 4-863-323-04 (ICAO, July 26, 2016).

As found, Claimant failed to overcome Dr. Mason's DIME opinion on permanent impairment. Claimant argues Dr. Mason erred by not considering Claimant's potential neurologic impairment. Claimant points to his reported symptoms of numbness and tingling and Dr. Mason's exam finding of decreased sensation in the right C5 and C6 distribution. Importantly, Dr. Mason described the exam finding of decreased sensation as "questionable," indicating doubt as to the accuracy of the finding. Other than few sporadic reports of numbness in the records, the medical records do not reflect consistent neurological complaints, nor any abnormal neurologic findings, including at the time of MMI and at Dr. Hughes' evaluation. While Dr. Hughes testified decreased sensation in the right C5 and C6 distributions can be related to a neurologic condition, and it might have been reasonable to perform electrodiagnostic testing, in light of Dr. Mason qualifying the finding as "questionable" and the lack of complaints and findings throughout the records, there is insufficient evidence Dr. Mason erred by not further addressing Claimant's reported subjective neurological symptoms.

Claimant also argues Dr. Mason erred by failing to consider variability in spinal stiffness when measuring cervical range of motion and overall impairment. Claimant contends Dr. Mason's measurements likely to do not reflect the true extent of Claimant's limitations, pointing to differences in the measurements between Dr. Mason and Dr. Hughes. The ALJ is not persuaded by Claimant's contention. Dr. Hughes explained that variability in spinal stiffness is to be expected in an individual of Claimant's age. This variability in spinal stiffness likely accounts for the difference in measurements and supports a conclusion that Dr. Mason did not err in performing the range of motion measurements. Dr. Hughes specifically testified he had no criticism of Dr. Mason's measurements. There is no indication Dr. Mason felt the measurements were significantly non-physiologic requiring repeat measurements or use of measurements obtained by other providers. Accordingly, the ALJ is not persuaded that an alleged failure to consider variability in spinal stiffness resulted in an incorrect opinion on permanent impairment.

Lastly, Claimant contends Dr. Mason erred by failing to examine Claimant's lumbar spine. The ALJ is not persuaded Dr. Mason's exclusion of lumbar exam findings rises to the level of clear error in this circumstance. In the DIME report, Dr. Mason acknowledges she was asked to evaluate for back and psychologic impairment and clearly explains she did not see any evidence of significant complaints in either area. Although Claimant was initially diagnosed with a lumbar strain and this diagnosis continued to appear inconsistently throughout the medical records, the records reflect no further lumbar complaints or findings throughout the course of treatment, including at

the time Claimant was placed MMI and at the time of Dr. Hughes' IME. To the extent Dr. Hughes diagnosed Claimant with a lumbar sprain/strain, he noted that the injury had resolved over time; furthermore, Dr. Hughes testified he did not find any back impairment on his examination. As the medical records do not contain evidence of significant lumbar findings or complaints, no lumbar impairment was found by either Dr. Corson or Dr. Hughes, and Dr. Mason explained her basis for not further addressing the back in her report, any failure to include lumbar exam findings or to further expound on the lumbar spine does not render Dr. Mason's opinion highly probably incorrect.

Dr. Hughes testified he did not have any reason to question Dr. Mason's impairment ratings. To the extent Dr. Hughes' opinions vary from those of Dr. Mason, the ALJ considers this a mere difference of opinion that is insufficient to overcome Dr. Mason's DIME opinion.

Medical Benefits

The need for medical treatment may extend beyond the point of MMI where claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expediters Inc.*, 77 P.3d 863, 865 (Colo. App. 2003); *Hobirk v. Colorado Springs School District #11,* W.C. No. 4-835-556-01 (ICAO, Nov. 15, 2012). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that the claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999); *Hastings v. Excel Electric*, W. C. No. 4-471-818 (ICAO, May 16, 2002). The claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915 (Colo. App. 1993); *Mitchem v. Donut Haus*, W.C. No. 4-785-078-03 (ICAO, Dec. 28, 2015). An award of *Grover* medical benefits should be general in nature. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003); *Anderson v. SOS Staffing Services,* W. C. No. 4-543-730, (ICAO, July 14, 2006).

In cases where the respondents file a final admission of liability admitting for ongoing medical benefits after MMI they retain the right to challenge the compensability, reasonableness, and necessity of specific treatments. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003); *Oldani v. Hartford Financial Services,* W.C. No. 4-614-319-07, (ICAO, Mar. 9, 2015). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School District No.11*, W.C. No. 3-979-487, (ICAO, Jan. 11, 2012); *Ford v. Regional Transportation District,* W.C. No. 4-309-217 (ICAO, Feb. 12, 2009. The question of whether the claimant has proven that specific treatment is reasonable and necessary to maintain her condition after MMI or relieve ongoing symptoms is one of fact for the ALJ. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

As found, Claimant has met his burden to prove entitlement to reasonable, necessary and related maintenance treatment. Claimant's authorized treating providers, Drs. Corson and Motz, opined Claimant could undergo follow up and steroid injections as maintenance treatment. Dr. Mason also recommended follow up and steroid injections as needed. Dr. Hughes opined additional cervical intervention was reasonable in the event Claimant's cervical spine symptoms persisted. Claimant credibly testified he continues to experience symptoms. Based on the totality of the credible and persuasive evidence, Claimant has proven entitlement to maintenance treatment. Respondents retain the right to challenge the compensability, reasonableness and necessity of any specific treatments.

ORDER

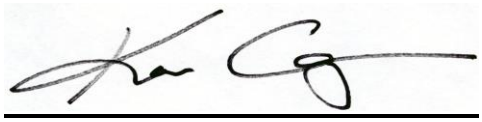
1. Claimant failed to overcome Dr. Mason's DIME opinion on permanent impairment by clear and convincing evidence.

2. Claimant is entitled to reasonably necessary and related medical maintenance treatment.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 23, 2019



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS

STATE OF COLORADO

W.C. No. 5-078-723-001

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS.

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

A hearing on the merits in the above-referenced matter is scheduled for September 11, 2019, in Denver, Colorado. The hearing is hereby vacated.

The matter is before Edwin L. Felter, Jr., Administrative Law Judge (ALJ) on a Motion for Summary Judgment. Respondents filed the Motion for Summary Judgment on July 8, 2019, seeking to dismiss Claimant's "Petition to Reopen" and "Application for Hearing." Attached to the Respondents' Motion were Exhibits 1 through 15. Claimant filed no response. This Motion for Summary Judgment was deemed submitted for a decision on July 31, 2019.

ISSUE FOR SUMMARY JUDGMENT

The issue before the Court is whether there is a genuine issue of disputed material fact concerning whether Claimant's Application for Hearing did in fact challenge Respondents' Final Admission of Liability (FAL) as required by § 8-43-203(2)(b)(II), C.R.S., and whether Claimant's Petition to Reopen was filed before the case had closed, in which case that Petition to Reopen would be premature.

FINDINGS OF FACT

Based on Respondents' Motion for Summary Judgment and the attachments to that Motion, the ALJ makes the following Findings of Fact:

Undisputed Facts

1. Claimant sustained an admitted injury on February 6, 2018.

2. Under History of Present Illness, Amanda P. Cava, M.D., noted Claimant's complaints of left post hip/SI pain, pain in left buttock, lateral hip and anterior upper thigh, and right hip/buttock pain, as well as knee pain. Despite these complaints, Dr. Cava's assessment was tear of medial meniscus of right knee, status post right knee surgery. She limited her impairment rating to the right knee.

3. On September 21, 2018, the adjuster filed a Final Admission of Liability, (FAL), based on Dr. Cava's August 30, 2018 maximum medical improvement (MMI) date and 18% scheduled rating. Post-MMI medical benefits were also admitted pursuant to Dr. Cava's report.

4. Claimant objected to the FAL and requested a Division Independent Medical Examination (DIME) on October 15, 2018.

5. On October 30, 2018, Claimant returned to Dr. Cava for a maintenance appointment. He complained that his left post hip/SI pain was worsening over the past few months, even causing his leg to give out on multiple occasions. He also complained of numbness/tingling in his right buttocks and a pulling sensation down the left leg to the left foot, and right hip pain and heel pain. Dr. Cava referred the Claimant to John Aschberger, M.D., for further evaluation. She did not rescind her MMI determination.

6. On November 13, 2018, the Claimant was seen by Dr. Aschberger for a physical medicine consultation. Dr. Aschberger noted that the Claimant had persistent complaints of pain at the hips, right lumbosacral area pain, left groin pain and issues of the left leg buckling, and tingling at the lateral foot. Dr. Aschberger noted that there did not appear to be any predominant presentation of back complaints on review of the records. He ordered a lumbar MRI (magnetic resonance imaging).

7. The Claimant returned to Dr. Aschberger on December 4, 2018. Dr. Aschberger noted that the Claimant continued with issues of pain predominantly in the buttocks. He specifically noted that the Claimant had no radicular radiation of symptomatology. His assessment was lumbosacral strain and status post bilateral knee surgery for meniscal tear. He noted that the MRI scan was not significant for neural compromise or radiculitis.

8. On January 23, 2019, Dr. Aschberger stated he expected MMI was coming up and he was of the opinion that Claimant would warrant impairment for the knees and likely for the lumbar area.

9. On February 1, 2019, Dr. Cava noted that an impairment rating was performed previously for both knees and the Claimant may need an impairment rating assessment for lumbar spine. Although she had never rescinded her previous MMI date or given an opinion that the Claimant's condition had worsened, Dr. Cava noted Claimant was approaching MMI.

Division Independent Medical Examination of Kathy McCranie, M.D.

10. The DIME was performed by Kathy McCranie, M.D., on February 8, 2019. Her report is dated February 28, 2019. Dr. McCranie noted that the Claimant's primary complaints were of right buttock, heel, and left hip pain. In her records review, Dr. Cava had noted that Claimant's first mention of right hip pain in the available medical records was July 10, 2018, and his first complaint of low back pain was July 24, 2018. Dr. McCranie also noted that the Claimant had brought in pain diagrams ranging from November 30, 2017 through January 4, 2019. She noted the first indications of more diffuse lower extremity pain was on April 30, 2018, two months and three weeks after his work injury. She noted that, one month later, on May 30, 2018, the Claimant mentioned that he had low back pain and right foot numbness and tingling.

11. Dr. McCranie's impression regarding the work-related injury of February 6, 2018, was right knee pain: a. Right knee lateral horn medial meniscal tear with debridement of 15% of the meniscus and b. Status post debridement of medial plica and chondroplasty of the medial femoral condyle June 4, 2018. Dr. McCranie indicated the right buttocks/low back pain, complaints of left hip pain, and complaints of right heel pain were subsequent conditions. Dr. McCranie rated Claimant's knee injury but not the left hip or the lumbar spine. She noted there was no specific injury to the left hip and she did not find any indication of permanent injury on physical examination. Regarding Claimant's lumbar spine, she stated there was no indication that the later onset of lumbar pain was related to the work injury of February 6, 2018. She stated the same was true for his complaints of right heel pain. Based on the records received, she did not find a causal relationship between his complaints and that of his work injury. She also noted his reported mechanism of injury of tripping but not falling is not a mechanism that would cause a permanent lumbar injury, and his diagnosis of lumbar with sacral strain was not a diagnosis that would be permanent in nature.

12. On February 14, 2019, Dr. Aschberger noted Claimant reported persistent pain in the back and some radiation of symptomatology, and his pain level was unchanged. Dr. Aschberger scheduled him for an impairment rating.

13. On February 22, 2019, Dr. Cava released Claimant from care at maximum medical improvement. Her assessment on that date was strain of left hip, lumbar strain, tear of medial meniscus of right knee, status post right knee surgery.

14. On March 7, 2019, Dr. Aschberger performed an impairment assessment. He noted that the Claimant had had persistent complaints of pain at the "hips," at the groin, and at the back. Dr. Aschberger assigned a 14% lower-extremity rating (RLE) for Claimant's right knee and a 5% whole person impairment rating for "lumbosacral strain with component of SI irritation and restriction." Dr. Aschberger did not render an opinion that the Claimant's condition had worsened. In fact, Dr. Aschberger had the same information and impressions available to him, at the same time if not before, that DIME Dr. McCranie had available at the time of her examination.

15. On March 18, 2019, the Division of Workers' Compensation (DOWC) issued its notice that the DIME process was concluded.

16. On March 28, 2019, the adjuster filed a FAL, based on DIME Dr. McCranie's August 30, 2018 MMI date and 19% RLE scheduled rating. Maintenance care after MMI was also admitted pursuant to Dr. McCranie's report.

17. On April 22, 2019, the Claimant filed a Petition to Reopen on the ground of change in medical condition based on the March 7, 2019 report of John Aschberger, M.D. In fact, Dr. Aschberger's report was based on information and impressions contemporary with DIME Dr. McCranie's information and impressions.

18. On April 22, 2019, the Claimant filed an Application for Hearing endorsing the issues of Petition to Reopen Claim, Permanent Partial Disability Benefits, and "Claimant seeks to reopen his claim based on the March 7, 2019 report of John Aschberger, MD; Claimant seeks a determination of the date of MMI; Claimant seeks a determination of the amount of PPD benefits owed." Claimant did not check the box to indicate the hearing was requested in response to an FAL

Ultimate Findings

19. In his Application for Hearing, Claimant did not indicate that the hearing was requested in response to the FAL.

20. Claimant filed the Petition to Reopen twenty-six days after Respondents had filed their FAL during which time Claimant's case was still open.

21. Claimant's case automatically closed thirty days after the date the FAL was filed. That means Claimant's case is now closed. Yet, while Claimant's case is now closed, that does not mean that Claimant's premature Petition to Reopen has become ripe for review. This is because Claimant's grounds for reopening, which consisted of a March 7, 2019 report from John Aschberger, M.D, could have been used to timely challenge the FAL and the DIME, which it was not

22. The ALJ infers and finds that the Petition to Reopen amounts to an attempted "end-run" around the statutory provisions specifying how DIMEs are challenged, with the potential net effect of lessening the Claimant's burden of proof to "a preponderance," as opposed to "clear and convincing evidence."

23. There is no disputed issue of genuine material fact herein.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Summary Judgment

a. Summary judgment may be sought in a workers' compensation proceeding. *See Fera v. Indus. Claim Appeals Office,* 169 P.3d 231, 232 (Colo. App. 2007). Pursuant to Office of Administrative Courts Rules of Procedure (OACP) Rule 17, 1 CCR 1101-3, "any party may file a motion for summary judgment seeking resolution of any endorsed issue for hearing." The OAC Rule allows a party to support its Motion with affidavits, transcripts of testimony, medical reports, or employer records. A motion for summary judgment may be supported by pleadings, depositions, answers to interrogatories, and admissions on file. C.R.C.P. 56; *See also Nova v. Indus. Claim Appeals Office*, 754 P.2d 800 (Colo. App. 1988) (C.R.C.P. and C.R.E. apply insofar as they are not inconsistent with the procedural or statutory provisions of the Act). As found, the Respondents' Motion for Summary Judgment is supported by Exhibits 1 through 15. As further found, there were no timely responses to Respondents' Motion for Summary Judgment.

b. Summary judgment is appropriate when the pleadings show there is no genuine disputed issue of material fact and the movant is entitled to judgment as a matter of law. C.R.C.P. 56(c); *Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (Colo. 1988). This rule allows the parties to pierce the formal allegations of the pleadings and save the time and expense connected with trial when, as a matter of law, based on undisputed facts, one party could not prevail. See *Drake v. Tyner*, 914 P.2d 519 (Colo. Ct. App. 1996). As found, the Motion for Summary judgment and the attached Exhibits establish that the facts in the present case are undisputed in showing that Claimant's Petition for Reopening was filed before the case had closed, and Claimant's Application for Hearing failed to challenge Respondents' Final Admission of Liability (FAL) as required by § 8-43-203(2)(b)(II), C.R.S.

c. Once the moving party shows specific facts probative of a right to judgment, it becomes necessary for the non-moving party to set forth facts showing that there is a genuine issue of material fact that would require a hearing. *See Miller v. Van Newkirk*, 628 P.2d 143 (Colo. App. 1980). The failure of the opposing party to satisfy its burden entitles the moving party to summary judgment. *Gifford v. City of Colorado*

Springs, 815 P.2d 1008 (Colo. App. 1991). As found, Claimant did not respond in a timely manner to contend that there are genuine disputed issues of material fact. As found, there are no genuine issues of disputed, material fact.

Application for Hearing

d. Section 8-43-203(2)(b)(II), C.R.S. states, in pertinent part, that a case will be "automatically closed as to the issues admitted in the final admission if the claimant does not, within thirty days after the date of the final admission, contest the final admission in writing and request a hearing on any disputed issues that are ripe for hearing."

e. Because Respondents filed the FAL on March 28, 2019, and because Claimant filed his Application for Hearing on April 22, 2019, it is undisputed that Claimant filed its Application for Hearing within thirty days after the date of the Final Admission of Liability (FAL), however, the Application failed to designate "overcoming the DIME" as an issue.

f. It is also undisputed that in his Application for Hearing Claimant contested neither the FAL nor the division-sponsored independent medical examination (DIME) on which the FAL was based. Rather, on his Application for Hearing, Claimant cited "Petition to Reopen Claim" as an issue to be considered, along with "a determination of the MMI" and "a determination of the amount of PPD benefits owed. Claimant failed to check the box or otherwise indicate that the Application for Hearing was in response to the FAL.

g. Claimant cannot circumvent the process for challenging a DIME, specified in § 8-42-107 (8) (b) (III), C.R.S., which provides an elevated standard of proof, *i.e.,* "clear and convincing evidence," by filing a petition to reopen before the deadline to challenge the DIME, the net effect being a lowering of thec standard of proof to a "preponderance of the evidence." For an analogous holding concerning circumvention of statutory processes in the Workers' Compensation Act, *see Story v. Indus. Claim Appeals Office,* 910 P.2d 80 (Colo. App. 1995).

h. Accordingly, because it is undisputed that Claimant failed to contest the FAL in writing within the requisite thirty days, Claimant's case, by operation of law, automatically closed as to the issues admitted in the FAL. *See* § 8-43-203(2)(b)(II), C.R.S..

Petition for Reopening

i. Also on April 22, 2019, Claimant filed a Petition for Reopening. An ALJ may reopen any award on the grounds of error, mistake, or change in condition. § 8-43-303(1), C.R.S. 2018. But, a petition to reopen is premature if the claim has not yet closed. *See Justiniano v. Indus. Claim Appeals Office*, 2016 COA 83, ¶ 13. A claim

closes thirty days after the Final Admission of Liability is filed. Section 8-43-203(2)(b)(II), C.R.S..

j Like the Application for Hearing, it is undisputed that Claimant's Petition for Reopening was filed twenty-six days after the FAL was filed. Because thirty days had not yet passed when Claimant filed his Petition for Reopening, Claimant's case had not yet closed. As found, because Claimant's case had not yet closed, the Petition to Reopening was premature.

k. As found, Claimant's case automatically closed thirty days after the date the FAL was filed. That means Claimant's case is now closed. Yet, while Claimant's case is now closed, that does not mean that Claimant's premature Petition for Reopening has become ripe for review. This is because Claimant's grounds for reopening, which consisted of a March 7, 2019 report from John Aschberger, M.D, could have been used to timely challenge the FAL and the DIME, which it was not. *See, e.g., Justiniano,* ¶¶ 12-15 (holding that a petition to reopen, filed prematurely, should not be addressed if it is based on information that a claimant could have used to timely challenge the FAL; this rule prevents claimants from avoiding the "clear and convincing evidence" standard that is required to overturn a DIME's findings).

l. Moreover, it is undisputed that Dr. Aschberger's medical report could have been used to timely challenge the FAL, as the Petition to Reopen, which cited that very report, was filed twenty-six days after the FAL was filed. And, as stated, a claimant has thirty days to timely contest the FAL. *See* § 8-43-203(2)(b)(II), C.R.S.

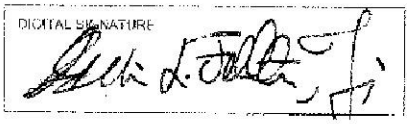
ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondents' Motion for Summary Judgment is hereby granted.

B. The hearing of September 11, 2019 is hereby vacated.

DATED this 27th day of August 2019.



EDWIN L. FELTER, JR.
Administrative Law Judge

ISSUES

1. Whether Claimant has overcome the Division Independent Medical Examination (DIME) physician's opinion of the date of maximum medical improvement (MMI) and/or the permanent impairment rating by clear and convincing evidence.

2. If Claimant overcomes the DIME physician's opinion on MMI, whether Claimant is entitled to temporary total disability benefits from April 27, 2018 to January 11, 2019.

3. Whether an overpayment exists.

FINDINGS OF FACT

1. Claimant is a 33-year-old male who was employed by Employer as an automotive technician.

2. On August 22, 2015, Claimant sustained an admitted work related injury to his lower back when he was changing an oversized tire. Claimant reported at subsequent medical evaluations that he went to pick up the tire and felt a pop/tweak in his back and had immediate pain.

3. Claimant underwent medical treatment for the admitted work related injury.

4. On January 6, 2016, John Sacha, M.D. evaluated Claimant. Dr. Sacha noted that Claimant had a lumbar epidural that provided no short-term relief indicating a non-diagnostic response. Dr. Sacha opined it was unlikely Claimant had discogenic pain and that it was unclear what the pain generator was. Dr. Sacha opined that Claimant had an MRI with minimal findings of a disc bulge. Dr. Sacha opined that Claimant was at maximum medical improvement (MMI). On examination, Claimant reported pain with forward flexion. Dr. Sacha provided the impression of lumbosacral radiculopathy and noted that nothing further was appropriate for care other than a one time rheumatologic panel to ensure there were no work related entities causing ongoing symptoms. Dr. Sacha cleared Claimant for full duty work and opined that Claimant had a 7% whole person permanent impairment related to the injury. *See* Exhibit C.

5. Approximately one year later, Claimant underwent a Division Independent Medical Examination (DIME).

6. On January 18, 2017, Douglas Scott, M.D. performed the DIME. Claimant reported constant low back pain with pain into the anterior legs. Claimant reported back spasms in his low back, difficulty sleeping, pain with bending forward, and trouble working

without use of pain pills. Dr. Scott noted that the mechanism of injury was a lift greater than 50 pounds in a bent forward flexed position. Claimant reported no prior back injuries, low back pain, or low back treatment. Dr. Scott reviewed medical records and performed a physical examination. On examination, Dr. Scott opined that Claimant's pain and tenderness was with palpation at the belt line bilateral lumbosacral paraspinal region. Dr. Scott found muscle tone in the lower back and buttocks to be increased with very tight muscles in those areas. Dr. Scott opined that based on the mechanism of injury and symptoms, Claimant's injury was suggestive of a disc injury at L5-S1. Dr. Scott opined that Claimant still had symptoms related to the disc injury, was not stable, and that further treatment might reasonably be expected to improve Claimant's condition. Dr. Scott opined that Claimant was not at MMI, and recommended further evaluation and second opinion consultation to clarify diagnosis, design rehabilitation and treatment plan, and consider whether or not the pain was possibly due to facet joint disorder and whether facet joint injections would be beneficial. Dr. Scott also recommended massage therapy for the tight paraspinal and buttock muscles. *See* Exhibits 4, D.

7. Based on DIME physician Dr. Scott's opinion, Claimant received additional treatment.

8. On October 2, 2017, Dr. Ogin evaluated Claimant. Claimant reported chronic low back pain with no problems prior to an episode at work two years ago. Claimant reported aching and stabbing pain across his back with numbness and tingling into his buttocks. Claimant reported that his pain ranged from a 4-10/10 and that his pain was currently a 7/10. Dr. Ogin performed a physical examination and reviewed Claimant's MRI of the lumbar spine. Dr. Ogin noted a mild disc bulge at L5-S1 and mild facet arthropathy. Dr. Ogin provided the impression of possible discogenic pain, central L5-S1 disc protrusion, and negative reported response to facet blocks. Dr. Ogin noted that Claimant had been treated comprehensively without any lasting results. Dr. Ogin opined that the MRI findings were pretty minimal. Dr. Ogin noted it was possible that Claimant may have a component of discogenic pain and that it was reasonable to trial a one time epidural steroid injection. *See* Exhibit 6.

9. On October 17, 2017, Dr. Ogin performed bilateral L4-5 and L5-S1 intra-articular facet joint injections. Claimant reported pre-injection pain at a 4/10 at rest and at a 6/10 with walking and standing. Claimant reported his post-injection pain at a 2/10 with walking and standing. *See* Exhibit 5.

10. On November 21, 2017, Dr. Ogin performed left L3, L4, L5 medial branch blocks. Claimant reported his pre-injection pain at a 6/10 increasing up to an 8/10 with flexion and extension. Claimant reported his post injection pain at a 0/10 with provocative maneuvers. *See* Exhibits 5, 6.

11. On November 27, 2017, Dr. Ogin evaluated Claimant. Claimant reported an excellent response to the medial branch blocks. Dr. Ogin opined that Claimant had an excellent diagnostic response to facet blocks and to confirmatory medial branch blocks

and was a good candidate to move forward with radiofrequency neurotomy. *See* Exhibit 6.

12. On December 19, 2017, Dr. Ogin performed a radiofrequency neurotomy. Claimant reported on January 8, 2018 that he was doing quite well with his back pain down to a 2/10. Dr. Ogin had a long conversation with Claimant about MMI and maintenance care and recommended Claimant continue physical therapy to review core strengthening and stabilization and to do work simulation tasks. *See* Exhibit 6.

13. On January 9, 2018, Dr. Miller evaluated Claimant. Claimant reported that he had been doing well since his radiofrequency ablation. Claimant reported aching in the central lumbar spine but no longer had the continuous sharp pain. *See* Exhibit 7.

14. On January 29, 2018, Dr. Ogin evaluated Claimant. Claimant reported that he continued to do well and that his pain had stabilized at a 2/10. Claimant reported that he was continuing physical therapy. Dr. Ogin opined that Claimant was approaching MMI. Dr. Ogin assessed low back pain with positive results from lumbar left L3, L4, and L5 medial branch rhizotomies. *See* Exhibit 6.

15. On March 26, 2018, Dr. Ogin evaluated Claimant. Claimant reported that he was 70-80% better overall following his December 2017 neurotomy. Claimant reported that most of the time his pain was at a 2/10. Claimant reported that he took oxycodone rarely. Dr. Ogin provided the impression of facet syndrome, status post radiofrequency neurotomy, doing significantly better. He opined that Claimant was doing fairly well. *See* Exhibits 6, F.

16. On April 27, 2018, Dr. Ogin evaluated Claimant. Claimant reported that he had been attending work conditioning, had gotten quite a bit stronger, and had been going almost daily. Claimant reported that as a result of going daily to work conditioning, he had quite a bit of achy axial back pain that felt muscular and was at about a 7/10 on the pain scale. Claimant reported that he had gotten to 75 pounds lifting and believed that would get him back to full duty work. Claimant reported that he had ran out of all medications and had last taken occasional Percocet mid-February. On examination, Claimant ambulated without difficulty and had adequate lumbar flexion and extension. Dr. Ogin opined that Claimant was doing fairly well with some achy pain that was muscular related due to work conditioning. Dr. Ogin opined that the muscular pain should abate with time. Claimant reported he had made significant progress and that the radiofrequency neurotomy was quite helpful. Dr. Ogin noted that Claimant would continue with his independent exercise regimen and that if Claimant's facet pain recurred, they could consider repeating rhizotomy in the future, presuming that Claimant had a minimum of six to nine months of relief. Dr. Ogin gave Claimant Percocet for pain flare-ups as he was exercising. Dr. Ogin noted he would see Claimant back again in six weeks for maintenance care. *See* Exhibits 6, F.

17. On April 27, 2018, Dr. Miller also evaluated Claimant. Claimant reported that he had started work hardening and felt sore. Claimant reported progressive return

of the central lumbar spine aching pain shooting into the posterior and anterior left thigh. Claimant had pain with lumbar motion. Dr. Miller again opined that the gym pass was important and needed due to Claimant's deconditioning, lack of work, and chronic pain. Dr. Miller hoped to regain strength and function with work conditioning and the gym pass. *See* Exhibit 7.

18. On May 7, 2018, Claimant underwent physical therapy. The therapist noted that a December 2017 rhizotomy led to a big improvement in Claimant's symptoms. It was noted that Claimant could lift floor to waist bilaterally at 115 pounds and waist to shoulder bilaterally at 75 pounds which were increases over the weights one month prior. The therapist noted Claimant demonstrated good strength improvements with material handling testing and good improvements in non-material handling tasks. The therapist noted that Claimant could return to full time unrestricted duty and had met goals in the maximum lift/material handling of 75 pounds lifting. *See* Exhibit G.

19. On May 25, 2018, Dr. Miller evaluated Claimant. Claimant reported that he had completed work hardening and didn't feel much more fit but looked forward to using a gym pass to maximize his physical fitness. Claimant reported progressive return of his central lumbar spine pain and felt overall improved, but was worried about the progressive return of lumbar discomfort. *See* Exhibit 7.

20. On June 4, 2018, Dr. Ogin evaluated Claimant. Claimant reported some continued axial back pain. Claimant reported that as he had been doing more core conditioning and general work, he was developing more flexion-based central axial pain. Dr. Ogin opined that Claimant had some annular tearing along the lower discs. Claimant reported his pain level was at a 5/10 aggravated with bending and twisting. Dr. Ogin found mild tenderness to deep palpation. Dr. Ogin provided the impression of lumbar facet syndrome, significantly improved following radiofrequency neurotomy, probable discogenic low back pain with intermittent left leg radicular pain complaints, myofascial pain, and muscle deconditioning. Dr. Ogin opined that it was too soon to consider repeat radiofrequency neurotomy as Claimant was only six months out. Dr. Ogin opined that Claimant would really benefit from getting into a gym. Dr. Ogin noted he had discussed with Dr. Miller that Claimant would be at MMI after the epidural steroid injection, but opined that Claimant may require some additional rhizotomies as part of a maintenance program down the road. *See* Exhibit 6.

21. On June 22, 2018, Dr. Miller evaluated Claimant. Claimant again noted ongoing central lumbar spine pain that was slowly getting worse. Dr. Miller noted they were waiting final disposition on planned injections by Dr. Ogin and that MMI was pending progress with a gym pass and final disposition on the planned injections. *See* Exhibit 7.

22. On August 17, 2018, Dr. Miller evaluated Claimant. He noted that Claimant had been approved for lumbar epidural steroid injections and had finally been approved for a gym pass. *See* Exhibit 7.

23. On August 28, 2018, Dr. Ogin performed left L5 and S1 transforaminal epidural steroid injections. Claimant reported that his baseline pain level of 6/10 with provocative maneuvers was reduced with the injections to 0/10 in regards to his leg. Claimant continued to report mild aching in his back. *See* Exhibit 5.

24. On September 17, 2018, Dr. Ogin evaluated Claimant. Claimant reported that nearly all of his leg pain resolved following the epidural steroid injection. Claimant reported the injection did not help his back pain and that his back pain was getting worse and was now back to the point where it was prior to his rhizotomy nine months prior. Claimant reported that he had been trying to go to the gym but that his exercise tolerance was decreased. Dr. Ogin suspected that Claimant was reinervated and that Claimant's facetogenic pain had returned. Dr. Ogin set Claimant up for a repeat radiofrequency neurotomy and noted that Claimant had more than six months of good functional relief with the prior radiofrequency neurotomy. *See* Exhibit 6.

25. On October 2, 2018, Dr. Miller evaluated Claimant. Dr. Miller noted that Claimant had undergone epidural steroid injections with an excellent response in regard to his left leg symptoms. Dr. Ogin noted that Claimant was reported progressive return of his central mechanical low back pain and that a repeat radiofrequency ablation was scheduled based on a prior good response to rhizotomy. Dr. Miller addressed the possibility of MMI and Dr. Miller advised Claimant that pending the response to the planned radiofrequency ablation and a period of gym based workouts they might remove all work restrictions and proceed with evaluation for impairment with maintenance care. *See* Exhibit 7.

26. On November 13, 2018, Eric Ridings, M.D. was scheduled to perform an independent medical examination. Claimant did not appear for the evaluation. Dr. Ridings performed a medical record review and issued a report. Dr. Ridings indicated it was his strong opinion that Dr. Sacha appropriately placed Claimant at MMI and appropriately rated Claimant for a lumbar strain. Dr. Ridings opined that after Dr. Sacha, Dr. Miller repeated many treatments without effect. Dr. Ridings pointed out that Dr. Sacha had assessed Claimant for facet dysfunction, but found Claimant asymptomatic. Dr. Ridings also pointed out that the mechanism of injury description changed in subsequent treatment where Claimant began reporting a specific onset of pain while forward flexed and lifting a specific tire. Dr. Ridings opined that the new mechanism of injury was not a medically reasonable mechanism to injure the facet joints. Dr. Ridings opined that after being placed at MMI by Dr. Sacha on January 6, 2016, Claimant underwent treatment with Dr. Miller and Dr. Ogin that was not based on objective findings and was based on patient complaints with procedures done contrary to the medical treatment guidelines. Dr. Ridings opined that Claimant did not require any additional treatment or evaluation under the claim and did not require any activity restrictions. *See* Exhibit H.

27. On January 4, 2019, Dr. Scott performed a follow up DIME. He issued a report dated January 12, 2019. Dr. Scott reviewed medical records and performed a physical examination. Dr. Scott found no tenderness to palpation and no muscle spasms. Dr. Scott found active range of motion of the lumbar spine to be reduced. Dr. Scott found

Claimant's examination and lumbar range of motion to be about the same as it was on January 18, 2017 and opined that Claimant had returned to baseline prior to the radiofrequency neurotomy performed in December of 2017. Dr. Scott diagnosed facetogenic low back pain, recurrent. Dr. Scott opined that Claimant probably reached MMI for his August 22, 2015 low back injury around April 27, 2018 when Dr. Ogin noted significant improvement in low back pain and function following the radiofrequency neurotomy. Dr. Scott noted that Claimant's' lumbar range of motion improved after the first radiofrequency neurotomy and now had again worsened one year after the neurotomy with a repeat neurotomy recommended to restore range of motion function and improve pain levels. Dr. Scott opined that Claimant's current decreased range of motion values for the lumbar spine were not permanent and should not be given a permanent rating. Dr. Scott opined that Claimant's permanent impairment was 8% whole person. *See* Exhibits 3, I.

28. On January 8, 2019, Dr. Ogin performed left L3, L4, L5 medial branch radiofrequency ablation. No complications were noted. *See* Exhibit 5.

29. On January 21, 2019, Dr. Ogin evaluated Claimant. Claimant reported that his back pain was a lot better. Claimant continued to report that his leg symptoms were fairly well following the August epidural steroid injection. Dr. Ogin opined that Claimant was doing fairly well and discussed MMI with Claimant. Dr. Ogin noted he would see Claimant on an as needed basis and went over an independent gym program with Claimant. Dr. Ogin noted that if Claimant had recurrent back pain, he would consider repeat radiofrequency ablation if medically indicated and that if Claimant's leg pain got severe, he would consider repeating an epidural steroid injection one or two times per year. *See* Exhibit 6.

30. On April 12, 2019, Dr. Miller evaluated Claimant. Claimant reported that his second lumbar rhizotomy was performed on January 8, 2019 and that he had continued with his gym based workouts. Claimant reported that he felt stronger and was tolerating heavier lifting in the gym. Claimant reported that he continued to experience rather severe flares in symptoms including radiation of pain into his whole left leg. *See* Exhibit 7.

31. On May 28, 2019, Dr. Miller evaluated Claimant. Dr. Miller noted that Claimant saw Dr. Scott four days prior to a planned radiofrequency ablation and that Dr. Scott inexplicably backdated MMI to April 27, 2018 and did not include lumbar range of motion in the impairment calculation. Dr. Miller noted that Dr. Scott admitted that Claimant's lumbar motion was reduced from normal on examination but anticipated it to become normal after January 8, 2019 and the planned ablation. Dr. Miller opined that the logic of believing Claimant was maximally improved but would later achieve ongoing improvements in motion and function was failed circular logic. Dr. Miller noted that Claimant continued to be symptomatic although he felt stronger. *See* Exhibit 7.

32. Dr. Scott, the DIME physician, testified at hearing. Dr. Miller, Claimant's treating physician, also testified at hearing.

33. Dr. Miller testified that Claimant was not at MMI on April 27, 2018 and that Claimant reached MMI on June 21, 2019. In between April of 2018 and June of 2019 Dr. Miller testified that Claimant was improving, then stopped improving, then got worse. Dr. Miller testified that DIME physician Dr. Scott erred. Dr. Miller noted that Claimant was scheduled for a radiofrequency ablation four days after the January 4, 2019 DIME with Dr. Scott and testified that the procedure was meant to cure and relieve Claimant's symptoms. Dr. Miller opined that Dr. Scott's opinions about the planned procedure helping are indicative that Claimant was not at MMI yet.

34. Dr. Scott testified that the repeat radiofrequency ablation was recommended by Dr. Ogin as maintenance care and that it can be done as maintenance. Dr. Scott testified that after this type of procedure, a patient will be stable and issues will resolve, but that often nerves can grow back so the procedure is repeated under maintenance. Dr. Scott testified that reports around the time of April, 2018 supported that Claimant had met therapy goals, had improved function, and could do full time work and supported his opinion on an April, 2018 MMI date. Dr. Scott testified that his 8% whole person rating did not include range of motion and was rated 7% whole person under Table 53(II)(c) and 1% whole person under Table 53(II)(f) for the radiofrequency ablation and the documented pain and rigidity. Dr. Scott testified that he did not provide an additional rating for range of motion because Claimant did not have a permanent range of motion deficit. Dr. Scott testified that Claimant's range of motion was good after the first radiofreqency ablation and was expected to return to good again, so he did not include range of motion deficits in his 8% whole person rating as he did not believe Claimant had permanent range of motion deficits related to his 2015 injury.

35. On cross-examination, Dr. Scott testified that he thought the radiofrequency ablation set for January 8, 2019 would improve Claimant's condition and admitted it might have been a mistake to place Claimant at MMI and might have been better to bring Claimant back after the radiofrequency ablation had been performed. After this testimony, Dr. Scott also testified that Claimant was at MMI in April of 2018 but opined that it could be that Claimant was at MMI in April of 2018, then worsened, and after worsening needed a new radiofrequency ablation. He also testified that range of motion measurements are not required and that Claimant had no range of motion deficits due to the 2015 injury.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Burden to overcome DIME on MMI

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. A DIME physician's finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000); *Kamakele v. Boulder Toyota-Scion,* W.C. No. 4-732-992 (ICAO, Apr. 26, 2010).

MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007); *Powell v. Aurora Public Schools* W.C. No. 4-974-718-03 (ICAO, Mar. 15, 2017). A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No.

4-320-606 (ICAO, Mar. 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Construction Management,* W.C. No. 4-356-512 (ICAO, May 20, 2004);

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*. "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Lafont v. WellBridge D/B/A Colorado Athletic Club* W.C. No. 4-914-378-02 (ICAO, June 25, 2015). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAO, Nov. 17, 2000). Rather it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Industries,* WC 4-712-812 (ICAO, Nov. 21, 2008); *Licata v. Wholly Cannoli Café* W.C. No. 4-863-323-04 (ICAP, July 26, 2016).

Claimant has failed to establish, by clear and convincing evidence, that DIME physician Dr. Scott erred. Dr. Scott, as noted above, changed his opinion and testimony at hearing. He initially confirmed what was in his report, then admitted he may have erred, then again went back to his report opinion. Although he went back and forth on his opinion, the ALJ finds his true opinion remains that Claimant reached MMI in April of 2018 with an 8% whole person impairment. This opinion has not been shown to be incorrect and has not been overcome by clear and convincing evidence.

As found above, Claimant initially underwent a DIME in January of 2017. At that time, DIME physician Dr. Scott believed Claimant still had symptoms related to the work injury, was not stable, and that further treatment might reasonably be expected to diagnose and improve Claimant's condition. At that time, Dr. Scott believed Claimant needed further evaluations and he specifically noted that there should be consideration as to whether or not Claimant's pain was possibly due to facet joint disorder and whether facet joint injections would be beneficial.

Claimant underwent additional treatment, which ended up including facet treatment. The additional treatment greatly relieved Claimant's pain and symptoms. In October of 2017, Claimant had facet injections. In November of 2017, Claimant had medial branch blocks. In December of 2017, Claimant underwent radiofrequency neurotomy. By January of 2018, after his facet pain had been identified and treated, Claimant reported he was doing well and that his sharp pain was gone. Dr. Ogin opined in January of 2018 that Claimant was approaching MMI. In March of 2018, Claimant

continued to report he was doing well. In April of 2018, Claimant was found to be significantly better. In May of 2018, physical therapy found Claimant to be able to lift 115 pounds bilaterally and Claimant was noted to have met his goals for lifting/material handling. The medical records support that by April of 2018, Claimant's work related condition had been diagnosed, treated, and Claimant was not only stable but very much functionally improved.

As expected, the results from a radiofrequency neurotomy can include the nerves growing back together. Here, it was not unexpected that Claimant's sharp low back pain might gradually return and that he might need another neurotomy in the future if that happened. However, Claimant was stable in April of 2018. There was no further treatment needed or reasonably expected to diagnose or improve his condition. His condition was well identified and was not likely to improve beyond the relief that the neurotomy provided. Although Claimant ended up needing an additional neurotomy as his nerves grew back, the additional neurotomy simply maintained the improvement that was gained in early 2018 when the doctors diagnosed and treated the pain generator. Claimant has failed to show that there was any reasonable likelihood that he would be improved by any further treatment past April of 2018. Claimant was at MMI in April of 2018 and although treatment was likely going to be needed down the road to maintain his status, there was no future treatment likely to diagnose or improve his work related condition.

There are significant differences of opinion between Dr. Miller and Dr. Scott. However, the differences do not rise to the level of clear and convincing evidence to show that Dr. Scott erred. The weight of the medical records as a whole support Dr. Scott's opinion that Claimant reached MMI in April of 2018 despite later needing an additional procedure to maintain his MMI status. Claimant was maximally improved in April of 2018. No further diagnostics or treatment were going to reduce his pain or improve his function. The ALJ finds persuasive that a second neurotomy is maintenance and is not intended to diagnose or improve Claimant's condition. Claimant's condition had been well diagnosed and was improved with the first procedure. Rather, this second neurotomy was meant to maintain the improvements that were reached when the pain generator was initially diagnosed/identified/treated.

Burden to overcome DIME on impairment

The finding of a DIME physician concerning the claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995); *Lafont v. WellBridge D/B/A Colorado Athletic Club* W.C. No. 4-914-378-02 (ICAO, June 25, 2015).

As a matter of diagnosis the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003); *Sharpton v. Prospect Airport Services* W.C. No. 4-941-721-03 (ICAO, Nov. 29, 2016). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998); *Watier-Yerkman v. Da Vita, Inc.* W.C. No. 4-882-517-02 (ICAO Jan. 12, 2015); Compare *In re Yeutter*, 2019 COA 53 ¶ 21 (determining that a DIME physicians opinion carries presumptive weight only with respect to MMI and impairment). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000).

The questions of whether the DIME physician properly applied the *AMA Guides*, and ultimately whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000); *Paredes v. ABM Industries* W.C. No. 4-862-312-02 (ICAO, Apr. 14, 2014). A mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO, Mar. 22, 2000); *Licata v. Wholly Cannoli Café* W.C. No. 4-863-323-04 (ICAO, July 26, 2016).

Claimant has failed to overcome the opinion of DIME physician Dr. Scott as to his permanent impairment rating. It is found credible, persuasive, and consistent with the medical records that Dr. Scott did not believe Claimant had permanent range of motion deficit related to his work injury. Claimant's range of motion was good after his first radiofrequency ablation and Dr. Scott did not err when he decided not to rate range of motion as a permanent impairment as range of motion was anticipated to be good again once a maintenance radiofrequency ablation was performed. Claimant has not shown that he had a permanent loss in his range of motion due to his injury or that his impairment rating should be increased from the 8% whole person provided by DIME physician Dr. Scott.

Overpayment

Temporary total disability benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S. As found above, Claimant reached MMI on April 27, 2018. As such, Claimant was only entitled to

TTD benefits until April 27, 2018. Any payment of TTD subsequent to that date would be payment of benefits to which Claimant was not entitled and constitutes an overpayment.

ORDER

It is therefore ordered that:

1. Claimant has failed to overcome DIME physician Dr. Scott's opinion on MMI. Claimant reached MMI on April 28, 2018.

2. Claimant has failed to overcome DIME physician Dr. Scott's permanent impairment rating. Clamant has a whole person impairment of 8% as a result of his work injury.

3. As Claimant reached MMI on April 27, 2018, Claimant was not entitled to temporary total disability benefits subsequent to that date. Temporary total disability paid between April 28, 2018 and January 10, 2019 is an overpayment.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, *see* section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 27, 2019

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that his request for prior authorization for a trial [high frequency] spinal cord stimulator is reasonable, necessary, and related to his work injury?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Claimant was originally a heavy equipment operator. The Claimant sustained an admitted work-related injury on November 26, 2012 when a boulder was dropped into the back of the truck he was operating. Claimant severely injured his lumbar spine. (Ex. 3, p. 25) (Ex. 2, p. 6).

2. As a result of his work injury, the Claimant has undergone a series of five lumbar spine surgeries, four of which involved a spinal fusion. (Ex. 7, pp. 83-99).

3. The Claimant was placed at maximum medical improvement ("MMI") on October 5, 2018 by his ATP, Dr. Matthew Young. The Claimant has received ongoing maintenance care including medications and injections. (Ex. 5, pp. 62-65; Ex. 3, pp. 8-44).

4. Claimant relocated to the State of Kentucky around May of 2018. Claimant relocated from Colorado to Kentucky primarily for health reasons related to his work-related lumbar injury. (Ex. 3, pp. 11). The Claimant's medical provider recommended relocating to a lower altitude with less temperature extremes.

5. Claimant testified at hearing. He continues experiencing chronic, constant low back pain. Claimant stated that he is never without back pain, and his lumbar pain fluctuates in severity. On some days, the Claimant's pain is severe enough that he is unable to engage in any activities; instead, he spends most of the day lying down. When the pain is really bad, he can remain bedridden for 4 or 5 days. On other days, the Claimant will try to do light activity as tolerated.

6. The Claimant testified that he also experiences intermittent pain in both legs, but primarily on the left. Although the Claimant advised that radicular pain is generally intermittent, the radicular symptoms are worsening. He cannot stand for long periods of time, and cannot travel for more than two hours.

7. Since relocating to Kentucky, the Claimant has received primary care for his work-related injuries under the direction of Brandon Gish, M.D., Commonwealth

Occupational Medicine. (See generally Cl. Ex. 3). He has received other forms of treatment, to include injections and a "block". Claimant also described a number of prescription medications he has tried.

8. Dr. Gish noted that the Claimant has failed conservative therapies and therefore prescribed Opioid medications, such as Percocet. Additional medications prescribed by Dr. Gish included Methocarbamol, Cymbalta, and Celebrex. (Ex. 3, pp. 11). Additional treatment provided by Dr. Gish included bilateral lumbar trigger point injections. (Ex. 3, pp. 21, 25).

9. On February 28, 2019, Dr. Gish noted that the Claimant's pain was worsening. The bilateral lumbar trigger point injections provided temporary relief as confirmed by Dr. Gish's medical records and the testimony of the Claimant. (Ex. 3, p. 25). The Claimant requested further trigger point injections in an effort to obtain further pain relief. (Ex. 3, pp. 26). The repeat trigger point injections were provided by Dr. Gish on March 11, 2019. (Ex. 3, pp. 30-31). Dr. Gish's medical report of April 28, 2019 notes that the Claimant's pain was worsening with an average pain scale of 8 / 10. Dr. Gish's medical report of that date noted pain radiating down the left lower extremity to the knee (thigh) which Claimant described as 'throbbing'. (Ex. 3, pp. 42-44).

10. As a result of the Claimant's worsening pain symptoms, including chronic low back pain and worsening intermittent radicular pain, Dr. Gish has now recommended a *high frequency* spinal cord stimulator trial. (Ex. 3, pp. 39, 45-46).

11. At hearing, Claimant testified that the type of spinal cord stimulator being proposed is a new, *high frequency* type to help his back. He is willing to take any psychological evaluation as a condition precedent. He testified that he understands such a stimulator will not cure his pain problem but is intended to mask his pain symptoms. He understands that a foreign body will be implanted, but wants to try the stimulator if it might benefit him.

12. In 2014, the Claimant underwent an EMG study to diagnose the source of his ongoing back pain. At that time, Michael Janssen, DO indicated the EMG was 'noncontributory' (Ex. A. p. 1). The CT of the Lumbar Spine without contrast that was ordered by Dr. Gish was completed on January 16, 2019 and did not demonstrate any nerve impingement. (Ex. 4). The radiologist's report notes, however, that disc herniations could be obscured by the streak from the metallic hardware. (Ex. 4, p. 48).

13. Dr. Kathy McCranie, MD provided a medical records review at the request of Respondents. Dr. McCranie did not evaluate or examine the Claimant. Her initial report was dated May 1, 2019. (Ex. A, pp. 1-7).

14 Dr. McCranie, citing the Medical Treatment Guidelines, concluded that the spinal cord stimulator trial was not reasonable and necessary. Dr. McCranie noted that the Claimant's symptoms are "predominately axial." In her report, Dr. McCranie states, "There was *one* notation of lumbar radicular symptoms an April of 2019. Otherwise,

however, *over the four years of medical records reviewed, Mr. Lay's symptoms were predominately, if not uniquely, axial in nature."* (Ex. A, p. 5) (emphasis added).

15. Dr. McCranie further stated that "operative procedures are geared to improve functional benefit, i.e., returning to work, deceasing restrictions or medications, or increasing range of motion and strength. *No such functional goals have been outlined or anticipated with this treatment. Id at p. 5* (emphasis added).

16. In a supplemental report dated August 1, 2019, Dr. McCranie indicates her opinion remains unchanged after reviewing Dr. Gish's medical records:

> Mr. Lay still does not fit the Medical Treatment Guidelines. These Guidelines indicate that to be an appropriate candidate for spinal cord stimulation, it is *necessary to have clear radicular pain*…..Records indicated a predominance of axial pain. There is *no evidence* of clear neuropathic radicular pain in Mr. Lay's case…..[said stimulator] *is not an option for individuals without clear radicular pain* such as Mr. Lay (Ex. A, p. 7) (emphasis added).

17. Dr. Young and Dr. Gish's medical records support the Claimant's hearing testimony that he experiences intermittent radicular symptoms, which are worsening. (Ex. 5, p. 50 (9/27/17), p. 53 – (11/21/17), p. 58 – (4/26/18), (Ex. 6, p. 68). Claimants' Functional Capacity Exam, dated 10/5/2018, reports that Claimant "reports continued low back pain which will *radiate into his right LE* with increased activity, decreased ROM in his lower back. (Ex. 6, p. 68) (emphasis added).

18. Dr. Gish reviewed the Medical Treatment Guidelines and advised that Mr. Lay would be referred for a psychological evaluation in accordance with the Medical Treatment Guidelines. (Ex. 3, pp. 39, 45). In support of the proposed spinal cord stimulator trial, Dr. Gish confirms that "high frequency stimulators may be used for patients with predominantly axial back pain." (Ex. 3, p. 45). In this regard, Dr. Gish diagnoses the Claimant with failed back syndrome due to his work-related injury, noting that he has undergone multiple lumbar fusion surgeries, yet had failed all other conservative options.

19. In conclusion, Dr. Gish notes:

> I feel that the denial that was issued did not examine the full scope of Mr. Lay's injury. The guidelines read that spinal cord stimulation is appropriate for patients with failed spinal surgery diagnosis…..If the guidelines were read in their entirely the reviewer would see that Mr. lay would in fact fit as a candidate. Mr. Lay's quality of life has severely been impacted by his multiple surgeries due to his injuries and he should at least be allowed to trial this therapy to see if it is successful at improving his quality of life and allowing him to reduce his medication intake. Should has pain complaints not be reduced by at least 50% during the course of

the trial then we would not proceed with the request to implant the device permanently. (Ex. 3, p. 46).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado is to assure quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1).* Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as the fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990) Moreover, the ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion). In this instance, the ALJ finds Claimant to be entirely forthright and credible, both to his medical providers, and in his testimony, in a sincere effort to get well. There are no identifiable indicators of secondary gain, and reducing his dependence upon opioids is a laudable goal, in and of itself.

C. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or

unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Medical Treatment, Generally

D. The Respondents are liable for medical treatment reasonably necessary to cure or relieve the effects of an industrial injury. Section 8-42-101. Even if the Respondents admit liability, they retain the right to dispute the reasonable necessity or relatedness of any particular treatment, and the mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Snyder v. City of Aurora, 942 P.2d 1337 (Colo. App. 1997); McIntyre v. Kl, LLC, W.C. No. 4-805-040 (July 2, 2010).The Claimant must prove that an injury directly and proximately caused the condition for which he seeks treatment, and that the treatment is reasonably necessary. Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office, 989 P.2d 251 (Colo. App. 1999); Snyder v. Industrial Claim Appeals Office, 942 P.2d 1337 (Colo. App. 1997).

Medical Treatment Guidelines

E. Under § 8-42-101(3)(b) and WCRP 17-2(A), medical providers must use the Medical Treatment Guidelines when furnishing medical treatment. As the arbiter of disputes about treatment, the ALJ may consider the Medical Treatment Guidelines as an evidentiary tool but is not bound by the Medical Treatment Guidelines when determining if requested medical treatment is reasonably necessary or injury- related. Section 8-43-201(3); Logiudice v. Siemans Westinghouse, W.C. No. 4-665-873 (January 25, 2011).

F. The Division of Workers Compensation most recently revised Rule 17, Exhibit 9 of the Medical Treatment Guidelines [Chronic Pain Disorder] on 10/6/2017, and they became effective on 11/30/2017. § H, Therapeutic Procedures-Operative reads, in pertinent part:

> 1. NEUROSTIMULATION
>
> a. Description: Spinal cord stimulation (SCS) is the delivery of low-voltage electrical stimulation to the spinal cord or peripheral nerves to inhibit or block the sensation of pain. The system uses implanted electrical leads and a battery powered implanted pulse generator (IPG). *There is some evidence that SCS is superior to reoperation in the setting of persistent radicular pain after lumbosacral spine surgery, and there is some evidence that SCS is superior to conventional medical management in the same Chronic Pain Disorder Page 158 setting. Success was defined as achieving 50% or more pain relief.* However, the study could not demonstrate increased return to work. *Some functional gains have been demonstrated.* These findings may persist at 3 years of follow-up in patients who had an excellent initial response and who are highly motivated. (emphasis added).
>
> There is some evidence that a **high-frequency,** 10 KHz spinal cord stimulator is **more effective than a traditional low frequency** 50 Hz stimulator **in reducing both back pain and leg pain** in patients who have had a successful trial of an external stimulator. Two-thirds of the patients had

radiculopathy and one-half had predominant back pain. **The high frequency device appears to lead to greater patient satisfaction than the low frequency device,** which is likely to be related to the fact that the high frequency device does not produce paresthesias in order to produce a pain response. In contrast to the low frequency stimulator, which requires recharging about twice per month, the high frequency stimulator is recommended for daily recharging for 30 to 45 minutes. A United Kingdom study of cost effectiveness for high frequency spinal cord stimulators found high cost effectiveness compared to traditional non-rechargeable or rechargeable stimulators, re-operation, or medical management. (emphasis added).

SCS can be used for patients who have CRPS II. Spinal cord stimulation for spinal axial pain has traditionally not been very successful. It is possible that future technological advances such as high frequency and burst stimulation may demonstrate better results for axial spine pain. Currently, **traditional spinal cord stimulators are not recommended for axial spine pain**. (emphasis added).

c. Surgical Indications: Patients with established CRPS I or II or a failed spinal surgery with persistent functionally limiting radicular pain greater than axial pain who have failed conservative therapy including active and/or passive therapy, pre-stimulator trial psychiatric evaluation and treatment, medication management, and therapeutic injections. Traditional SCS is not recommended for patients with the major limiting factor of persistent axial spine pain. **High frequency stimulators may be used for patients with *predominantly* axial back pain**. Traditional or other SCS may be indicated in a subset of patients who have a clear neuropathic radicular pain (radiculitis) with or without previous surgery. The extremity pain should account for at least 50% or greater of the overall back and leg pain experienced by the patient. Prior authorization is required. Habituation to opioid analgesics in the absence of a history of addictive behavior does not preclude the use of SCS. Patients with severe psychiatric disorders, issues of secondary gain, and one or more primary risk factors are not candidates for the procedure. The prognosis worsens as the number of secondary risk factors increases. *Approximately, one third to one half of patients who qualify for SCS can expect a substantial long-lasting pain relief;* however, it may not influence allodynia and hypesthesia. **Patients' expectations need to be realistic, and therefore, patients should understand that the SCS intervention is not a cure for their pain but rather a masking of their symptomatology which might regress over time.** There appears to be a likely benefit of up to 3 years, although some practitioners have seen benefits persist for longer periods. Prior to surgical intervention, the patient and treating physician should identify functional operative goals and the likelihood of achieving improved ability to perform activities of daily living or work, as well as possible complications. The patient should agree to comply with the pre- and post-operative treatment plan including home exercise. The provider should be especially careful to make sure the patient understands the amount of post-operative therapy required and the length of partial- and full-disability expected post-operatively. Informed decision making should be documented for all invasive procedures. This must include a thorough discussion of the pros and cons of the procedure and the possible complications as well as the natural history of the identified diagnosis. **Since many patients with the most common conditions will improve significantly over time, without invasive interventions, patients must be able to make well-informed decisions regarding their treatment.** (emphasis added).

In Conclusion

G. Claimant has consistently demonstrated chronic lumbar pain with intermittent radicular symptoms that are worsening. Dr. Gish recommends a high frequency trial stimulator, which according to the Medical Treatment Guidelines, has shown effectiveness even in injured workers with significant *axial* back pain. Although based in Kentucky, Dr. Gish has demonstrated greater knowledge of the Colorado Medical Treatment Guidelines in regards to the appropriateness of the trial stimulator for the Claimant than does Dr. McCranie.

H. In none of her reports does Dr. McCranie even reference the difference between high frequency stimulators and the traditional low frequency stimulators. Further, while Dr. McCranie notes exactly one reference to radicular pain in Claimant's medical records, in fact, they exist in several places, over a course of months. While it might not be cost-effective to arrange an IME exam across state lines, a simple phone call to Claimant would have yielded pertinent information, to wit: his ongoing description of increasing radicular pain. Dr. McCranie further notes that "no functional goals have been outlined or anticipated with this treatment." The ALJ does not concur with this assessment. Clamant would like his overall quality of life to improve, with all that entails. In summary, if Claimant did indeed suffer from near exclusive *axial* back pain (which he ALJ finds is not the case), and no functional goals were anticipated, and if Claimant were requesting a *low frequency* spinal cord stimulator (which he is not), the ALJ might well concur with Dr. McCranie. But those are not the facts here.

I. Under these facts, while the ALJ is free to deviate from the Medical Treatment Guidelines, it is not even necessary to do so here. The ALJ finds that the proposed (trial) high frequency spinal cord stimulator is within the Guidelines, and Claimant is an appropriate candidate. While time will tell if the trial phase will indicate permanent implantation, Claimant has suffered enough, and should not be denied the opportunity to find out for himself, in consultation with his ATP. The ALJ finds that this trial stimulator, as proposed by Dr. Gish, is reasonable and necessary [and related] to cure Claimant of the effects of his work injury.

ORDER

It is therefore Ordered that:

1. Respondents shall pay for the proposed [high frequency] trial spinal cord stimulator as recommended by Dr. Gish.

2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 27, 2019

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

- Whether the claimant has demonstrated, by a preponderance of the evidence, that the eyeglasses recommended by Dr. Randall Rottman constitute reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted April 22, 2018 work injury.

- Whether the claimant has demonstrated, by a preponderance of the evidence, that penalties should be assessed against the respondents pursuant to Sections 8-43-304 and 8-43-305, C.R.S. In the claimant's Amended Application for Hearing the claimant lists a number of alleged behaviors for which the claimant believes penalties should be assessed. At hearing the parties agreed to number these allegations as follows:

1. Penalties for the dates of October 21, 2018 and ongoing, for the alleged late denial of the eyeglasses recommended by Dr. Randall Rottman.

2. Penalties for the dates of November 23, 2018 through December 10, 2018, for the alleged late approval of the referral to Dr. Matthew Provencher.

3. Penalties for the dates of November 23, 2018 through January 8, 2019, for the alleged late approval of the referral to Dr. David Good.

4. Penalties for the dates of December 31, 2018 and continuing, for the alleged late approval of a nurse case manager.

5. Penalties for the dates of March 5, 2019 and continuing, for the alleged late approval of surgery recommended by Dr. Matthew Provencher.

6. B.[1] Penalties for the dates of December 21, 2018 and ongoing, for the alleged failure to exchange medical records utilized by a peer reviewer.

6. C. Penalties for the dates of September 28, 2018 through October 19, 2018, for the alleged failure to comply with PALJ Martinez Tenreiro's September 14, 2018 prehearing order for failure to mail the claimant's indemnity checks to his counsel's office and for alleged failure to exchange medical records within fifteen days.

[1] The request for penalties identified as "6.A." was withdrawn by the claimant.

- If the respondents are successful in demonstrating that any alleged violation listed above has been cured as allowed pursuant to Section 8-43-304(4), C.R.S., then the claimant's burden of proof will be to prove whether, by clear and convincing evidence, the respondent knew or reasonably should have known they were in violation for each alleged violation.

FINDINGS OF FACT

1. The claimant worked for the employer building, installing, and maintaining zip lines. On April 22, 2018, the claimant suffered an admitted injury when he was unable to stop while on a zip line he was maintaining for the employer. The claimant's injury occurred as he slammed feet first into a tree while moving at approximately 30 miles per hour on the zip line. The claimant's initial medical records indicate that the claimant did not hit his head at the time of the injury.

2. The respondents have admitted for the injury and the specific body parts of the claimant's head, neck, mid-back, and upper extremities.

3. The claimant has undergone a number of treatment modalities during this claim. His authorized treating provider (ATP) is St. Mary's Occupational Health. At that practice the claimant has been seen by James Harkreader, PA, and Dr. James McLaughlin. Mr. Harkreader and Dr. McLaughlin have made a variety of referrals for the claimant's medical treatment.

Referral to Dr. Randall Rottman and recommended eyeglasses

4. On October 4, 2018, Mr. Harkreader referred the claimant to ophthalmologist Dr. Randall Rottman. The claimant was first seen by Dr. Rottman on October 5, 2018. At that time, the claimant reported his vision symptoms as difficulty reading in which "the letters looked [three]-dimensional" and a feeling that his "eyes were not working/focusing together". Dr. Rottman opined that the claimant suffered a concussion "with no ocular manifestations". In addition, he diagnosed myopia, astigmatism, and presbyopia. On that date, Dr. Rottman prescribed corrective lenses for the claimant.

5. The claimant's counsel exchanged the October 5, 2018 eyeglass prescription with the respondents on October 10, 2018. On October 12, 2019, the claimant's counsel sent the October 5, 2018 medical record to the respondents. The claimant's counsel sent additional documents to the respondents on October 19, 2018 that supported Dr. Rottman's recommendation for eyeglasses. There is no indication in the evidence entered into evidence that Dr. Rottman sent any request directly to the insurer.

6. On October 30, 2018, the respondent's counsel notified Dr. Rottman in writing that the eyeglasses were denied pending a Rule 16 records review by Dr. Chester Roe.

7. The ALJ takes Administrative notice that October 19, 2018 was a Friday. Seven business days from October 19, 2018 was Tuesday, October 30, 2018. The respondents notified Dr. Rottman of the denial of the eyeglasses (pending a records review) on the seventh business day.

8. On November 19, 2018, Dr. Roe completed his medical records review and issued a report. Dr. Roe noted that the claimant had a normal eye examination with mild astigmatism, myopia and age appropriate presbyopia. Dr. Roe also noted that the records do not contain documentation of any injury to the claimant's eyes following the work injury. Dr. Roe opined that the claimant's need for glasses is age related and therefore unrelated to the April 22, 2018 work injury.

9. Based upon the opinion of Dr. Roe, the respondents denied authorization for the recommended eyeglasses. Dr. Rottman was sent a notice of this denial on December 6, 2019. On February 28, 2019, the claimant returned to Mr. Harkreader. At that time, Mr. Harkreader opined that the recommended corrective lenses could help the claimant's spatial issues.

Referral to Dr. Matthew Provencher

10. During this claim this claimant was referred to Dr. Keenan Vance for a surgical consultation. After examining the claimant, Dr. Vance ordered a left shoulder magnetic reasoned image (MRI). On November 6, 2018 the MRI of the claimant's left shoulder showed that although there was no tear to the claimant's left rotator cuff, there was a superior through posterior superior labral tear.[2]

11. Based upon the results of the MRI, Dr. Vance recommended that the claimant undergo a left shoulder arthroscopy with open biceps tenodesis. Subsequently, the surgery recommended by Dr. Vance was authorized by the respondents. However, rather than proceed with Dr. Vance as his surgeon, the claimant requested a referral to another provider.

12. On November 1, 2018, the claimant was seen by Mr. Harkreader. At that time, the claimant indicated that he wanted a second opinion from surgeons at Steadman Hawkins. Mr. Harkreader's note on that date includes the language "[the claimant] is referred to Steadman." The WC 164 of that same date provides that Mr. Harkreader's office "will fax referral to Dr. Provencher [*sic*] office to schedule". The November 1, 2018 medical record and related WC 164 were provided to the respondents on November 5, 2018. On November 29, 2018, the claimant was seen by Dr. McLaughlin who noted his opinion that "it would be reasonable for [the claimant] to have surgery at Steadman Hawkins". The ALJ notes that this appears to be the first medical record in which a provider opined regarding a referral to Steadman Hawkins.

[2] Also referred to as a "SLAP" tear.

The prior records state that it is the claimant that is requesting the second opinion. The ALJ finds as true that the first supported recommendation for a referral to Steadman Hawkins/Dr. Provencher was the November 29, 2018 medical record.

13. The referral to Dr. Provencher was authorized by the respondents no later than December 10, 2018. The respondents explained to the claimant that the delay occurred because the respondents were waiting for a referral from St. Mary's Occupational Health. The ALJ calculates that a total of five business days elapsed between the November 29, 2018 medical records and the notification to claimant of the approval on December 6, 2018. The provider was notified of the approval on the seventh business day, December 10, 2018.

Dr. Provencher's surgical recommendation

14. The claimant was seen by Dr. Provencher on January 3, 2019. This appointment was scheduled based upon the availability of the doctor. On February 19, 2019, Dr. Provencher mentioned that treatment options for the claimant would include an arthroscopic left shoulder debridement and open tenodesis. However, Dr. Provencher also noted that prior to undergoing the shoulder surgery, the claimant would need to follow up with Dr. Kirk Clifford , the surgeon who performed the claimant's prior neck surgery[3]. Despite the recommendation that the claimant first seek additional follow up with Dr. Clifford, on February 22, 2019, Dr. Provencher submitted a request for authorization to the respondents that was titled "ATTN: Prior Authorization".

15. At the request of the respondents, on March 5, 2019, Dr. Andrew Farber performed a peer review of the medical necessity of the shoulder surgery recommended by Dr. Provencher.[4] Based upon his review of the claimant's medical records Dr. Farber recommended that the respondents not authorize the left shoulder surgery. In support of his opinion, Dr. Farber noted that the claimant had no range of motion issues in his left shoulder and no documentation of instability. In addition, Dr. Farber noted no documentation of conservative treatment beyond physical therapy and the use of NSAIDs[5]. Dr. Farber opined that without additional conservative treatment modalities the recommended surgery did not meet the Colorado Medical Treatment Guidelines (MTG). However, Dr. Farber did not make any specific recommendations regarding appropriate conservative treatment for the claimant.

[3] On September 20, 2018, Dr. Clifford performed a C6-7 artificial disc replacement. Dr. Provencher seemed to suggest that it would be necessary to ascertain the condition of the claimant's neck prior to proceeding with shoulder surgery.

[4] The ALJ addresses the claimant's concerns specifically surrounding Dr. Farber's peer review below.

[5] Nonsteroidal anti-inflammatory drugs.

16. Based upon the opinion of Dr. Farber, the respondents denied authorization of the left shoulder surgery. This denial was communicated to the claimant and Dr. Provencher on March 5, 2019. The ALJ notes that February 22, 2019 was a Tuesday and Tuesday, March 5, 2019 was 7 business days later.

17. On March 25, 2019, the claimant did see Dr. Clifford for follow up, as recommended by Dr. Provencher. At that time, Dr. Clifford noted that the cervical disc replacement was healing "without evidence for concern." The respondents authorized the recommended left shoulder surgery on April 8, 2019. The claimant underwent left shoulder surgery on June 28, 2019.

Dr. David Good

18. On November 14, 2018, Mr. Harkreader completed a Notification by an Authorized Treating Provider (form WC 195). In that notice, Mr. Harkreader stated that a referral to psychiatrist, Dr. Daniel Good was prescribed treatment within the MTG. The claimant's counsel received this notice on November 15, 2018 and exchanged it with the respondents on that same date. In an email from the respondents' counsel dated December 4, 2018, the claimant was notified that treatment with Dr. Good had been authorized. The claimant first treated with Dr. Good on January 8, 2018. Ms. Miller, an employee of Dr. Good, testified that this date was selected based upon the doctor's availability.

19. November 15, 2018 was a Thursday. In addition, Thursday, 22, 2018 was Thanksgiving Day, which is a state and Federal holiday, and is therefore not a "business day". The ALJ finds that 12 business days elapsed between the date the notification regarding Dr. Good was provided to the respondents and the date the respondents' counsel communicated that the referral was authorized.

Nurse Case Manager

20. On November 29, 2018, the claimant was seen by Mr. Harkreader. In the form WC 164 of that date, Mr. Harkreader listed "nurse case manager" under the section titled Treatment Plan. However, the dictated medical note of that date does not mention this as a recommendation. That November 29, 2018 WC 164 form was submitted to the respondents on December 3, 2018. In a medical record dated December 14, 2018, Dr. McLaughlin opined that a nurse case manager could be helpful to the claimant.

21. Thereafter, on January 3, 2019, the respondents asked whether the claimant would agree to a nurse case manager. On January 7, 2019 the claimant's counsel stated to the respondents, via email, that the claimant agreed to a nurse case manager. On February 25, 2019, the respondents notified the claimant that assignment of a nurse case manager was authorized. On March 29, 2019, the respondents confirmed with a specific nurse case manager, Nacole Williams, had accepted the assignment to the claimant's case. It is undisputed that between the claimant's agreement to the use of a nurse case manager on January 7, 2019, and the

respondents' authorization on February 25, 2019, a new adjustor was assigned to the claimant's claim.

Records used in peer review

22. The claimant asserts that of the medical records reviewed by Dr. Farber in the completion of his March 5, 2019 peer review, there were ten records that were not properly exchanged with the claimant. However, since the issuance of the March 5, 2019 report, eight of the ten records have been exchanged. Ms. Riehl testified that as of the date of the hearing two medical records had still not been exchanged. These are records from the claimant's acupuncturist, Anita Alexander, L.Ac, dated January 16, 2019 and January 23, 2019. In her testimony, Ms. Riehl acquiesced that these two "missing" medical records from the claimant's acupuncturist had no bearing on the treatment of the claimant's left shoulder. Upon review of the exhibits entered into evidence it does not appear that the respondents had these Alexander records.

September 14, 2018 PALJ Order

23. On September 14, 2018, PALJ Elsa Martinez Tenreiro issued an order granting the claimant's motion to compel. In her order, PALJ Martinez Tenreiro ordered, *inter alia*, that the respondents send the claimant's indemnity checks to the office of the claimant's counsel. In addition, the respondents were directed to exchange all medical records within 15 days. PALJ Martinez Tenreiro ordered compliance with the order by September 28, 2018.

24. On October 4, 2018, the parties conferred regarding the status of the address used for the claimant's indemnity checks. On October 5, 2018, the respondents' counsel confirmed that the address had been changed to counsel's address. However, a check had been initiated October 5, 2018 prior to the address correction and could not be amended. Beginning October 19, 2018, the claimant's indemnity payments were received at the claimant's counsel's address. It is undisputed that the respondents have paid all indemnity payment owed to the claimant.

25. The claimant also asserts that the respondents are in violation of the September 14, 2018 order as medical records have not been exchanged within 15 days. Other than the records addressed above as related to Dr. Farber's peer review, the claimant has not indicated what medical records, if any, were exchanged beyond 15 days. Despite this, the claimant has requested additional penalties for this alleged violation.

26. On April 4, 2019, the claimant filed an Amended Application for Hearing endorsing the various penalty allegations in this case.

27. With regard to the request for eyeglasses/corrective lenses, the ALJ credits the medical records and the opinion of Dr. Roe and finds that the claimant's vision symptoms are not related to the work injury. On the contrary, the claimant has age appropriate vision diagnoses. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that the recommended eyeglasses/corrective lenses constitute reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury.

28. With regard to the claimant's request for penalties for the dates of October 21, 2018 and ongoing, for the alleged late denial of the eyeglasses recommended by Dr. Randall Rottman, the ALJ finds that monetary penalties are not appropriate. The ALJ credits the evidence entered into evidence and finds that the respondents responded to the request for eyeglasses on the seventh business day after receiving all supporting documentation. The ALJ finds that the behavior of the respondents was objectively reasonable.

29. With regard to the claimant's request for penalties for the dates of November 23, 2018 through December 10, 2018, for the alleged late approval of the referral to Dr. Matthew Provencher, the ALJ finds that monetary penalties are not appropriate. The ALJ credits the evidence entered into evidence and finds that five business days elapsed between the November 29, 2018 medical records and the notification to claimant of the approval on December 6, 2018. The provider was notified of the approval on the seventh business day, December 10, 2018. The ALJ finds that the behavior of the respondents was objectively reasonable.

30. With regard to the claimant's request for penalties for the dates of November 23, 2018 through January 8, 2019, for the alleged late approval of the referral to Dr. David Good, the ALJ finds that monetary penalties are not appropriate. The ALJ declines to use the dates proposed by the claimant for penalties as the end date of January 8, 2019 indicates the date the claimant first saw Dr. Good, despite authorization on December 4, 2018. The respondents' are not responsible for delays in treatment due to a providers' unavailability. The referral was authorized December 4, 2018, twelve business days after the request. The ALJ finds that the behavior of the respondents was objectively reasonable.

31. With regard to the claimant's request for penalties for the dates of December 31, 2018 and continuing, for the alleged late approval of a nurse case manager, the ALJ finds that monetary penalties are not appropriate. The ALJ credits the evidence entered into evidence and finds that a nurse case manager was not recommended, with supporting information, until Dr. McLaughlin's note of December 14, 2018. The ALJ finds that the prior mention of a nurse case manager on the WC 164 forms was not sufficient to notify the respondents that there was a request for authorization. Following the exchange of the December 14, 2018 medical record, authorization for a nurse case manager occurred on February 25, 2019. Although Ms. Williams was not appointed until March 29, 2019, the ALJ finds that any argument for penalties would be from the dates of December 14, 2018 to February 25, 2019. During that time the respondents asked for confirmation that the claimant wanted a nurse case

manager. The ALJ finds this to be objectively reasonable. Additionally, there was a change to the adjustor on the claimant's case. The ALJ finds that the behavior of the respondents was objectively reasonable.

32. With regard to the claimant's request for penalties for the dates of March 5, 2019 and continuing, for the alleged late approval of surgery recommended by Dr. Matthew Provencher, the ALJ finds that monetary penalties are not appropriate. The ALJ credits the evidence entered into evidence and finds that a notification for authorization request was submitted on February 22, 2019. The respondents asked Dr. Farber to perform a peer review which he did on March 5, 2019; seven business days following the request. The respondents denied the request on that same date. The ALJ finds that the behavior of the respondents was objectively reasonable.

33. With regard to the claimant's request for penalties for the dates of December 21, 2018 and ongoing, for the alleged failure to exchange medical records utilized by a peer reviewer, the ALJ finds that monetary penalties are not appropriate. The ALJ credits the evidence entered into evidence and finds that although there appear to have been ten medical records reviewed by Dr. Farber that were not exchanged with the claimant; eight of the ten were eventually exchanged. With regard to the remaining two acupuncture records, the ALJ is not persuaded that the respondents withheld those records as there is no persuasive evidence on the record that the respondents ever had those specific records. The ALJ finds that the respondents actions were objectively reasonable.

34. With regard to the claimant's request for penalties for the dates of September 28, 2018 through October 19, 2018, for the alleged failure to comply with PALJ Martinez Tenreiro's September 14, 2018 prehearing order for failure to mail the claimant's indemnity checks to his counsel's office, the ALJ finds that monetary penalties are not appropriate. The ALJ credits the evidence entered into evidence and finds that although the address was not corrected by September 28, 2018, as ordered, the respondents acted reasonably in confirming on October 5, 2018 the correct mailing address would be used. The process for payment that resulted in an October 5, 2018 payment being mailed to the claimant's personal address was objectively reasonable under the circumstances.

35. With regard to the claimant's request for penalties for the dates of September 28, 2018 through October 19, 2018, for the alleged failure to comply with PALJ Martinez Tenreiro's September 14, 2018 prehearing order for alleged failure to exchange medical records within fifteen days, the ALJ finds that monetary penalties are not appropriate. As noted above, other than the records related to Dr. Farber's peer review, the claimant has not indicated what medical records, if any, were exchanged beyond 15 days. The ALJ finds that the claimant has failed to demonstrate that the respondents did not comply with the PALJ's order in this regard.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2017).

Medical Benefits

4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

5. As found, the claimant has failed to demonstrate by a preponderance of the evidence that the eyeglasses/corrective lenses recommended by Dr. Rottman are reasonable and necessary to cure and relieve the claimant from the effects the work injury. As found, the ALJ is persuaded by the opinion of Dr. Roe that the claimant's vision symptoms are age appropriate and not related to the work injury.

Penalties

6. Pursuant to Section 8-43-304(1), C.R.S. a claimant must first prove by a preponderance of the evidence that the disputed conduct constituted a violation of statute, rule, or order before a court can assess penalties against a respondent. *Allison v. Industrial Claim Appeals Office*, 916 P.2d 623 (Colo. App. 1995). If respondent committed a violation of the statute, rule or order, penalties can be imposed only if respondents' actions were not reasonable under an objective standard. *Pioneers*

Hospital of Rio Blanco County v. Industrial Claim Appeals Office, 114 P.3d 97 (Colo. App. 2005); *Jiminez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo. App. 2003). The standard is "an objective standard measured by reasonableness of the insurer's action and does not require knowledge that the conduct was unreasonable." *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 907 P.2d 676 (Colo. App. 1995).

7. As an initial matter, the respondents have argued that the claimant has cited incorrect citations in endorsing and arguing the various requests for penalties. The ALJ agrees. However, the ALJ finds the error to be harmless. It is undisputed that there was a change to WCRP Rule 16 effective January 1, 2019. Therefore, requests for authorization made prior to January 1, 2019 are to be evaluated pursuant to the prior version of the rule, while those requests made on or after January 1, 2019 are analyzed using the new iteration of the rule. The ALJ is cognizant of this distinction and applies the appropriate versions of WCRP 16 below.

8. Prior to January 1, 2019, WCRP Rule 16-11 allowed respondents seven days to contest a recommended medical treatment. If respondents failed to comply with the requirements of WCRP 16-11, the requested treatment is deemed authorized. That prior version of WCRP 16-11(B) provides, in part:

> [i]f the payer is contesting a request for prior authorization for medical reasons, the payer shall, within seven (7) business days of the completed request: (1) Have all submitted documentation . . . reviewed by a physician or other health care professional, as defined in section 16-5(A)(1)(a), . . .
>
> (3) Furnish the provider and the parties with a written contest that sets forth the following information: (a) An explanation of the specific medical reasons for the contest, including the name and professional credentials of the person performing the medical review and a copy of the medical reviewer's opinion; (b) The specific cite from the Medical Treatment Guidelines exhibits to Rule 17, when applicable; (c) Identification of the information deemed most likely to influence the reconsideration of the contest when applicable; and (d) A certificate of mailing to the provider and parties.

9. Prior to January 1, 2019, WCRP 16-10(E) provided that for an authorization request to be "complete" the medical provider "shall concurrently explain the reasonableness and the medical necessity of the services requested, and shall provide relevant supporting medical documentation." That version of WCRP 16-10(E) further identified supporting medical documentation as "documents used in the provider's decision-making process to substantiate the need for the requested service or procedure."

10. WCRP 16 was revised effective January 1, 2019. The 2019 version of WCCP 16-6(C) provides:

> Prior authorization for a prescribed service or procedure may be granted immediately and without medical review. However, the payer shall respond to all prior authorization requests in writing within seven (7) business days of the provider's completed request, as defined in section 16-6(E). The duty to respond to a provider's request applies regardless of who transmitted the request.

11. Previously the panel has addressed the requirement that Rule 16 request for preauthorization include documents included in the provider's decision making process. *Lichtenberg v. J.C. Penney Corp.*, W.C. No. 4-814-897 (July 19, 2012); *See Aguirre v. Nortrak*, W.C. No. 4-742-953 (March 19, 2012); *McDaniel v. Vail Associates. Inc. supra; Skelly v. Wal-Mart*, W.C. No. 4- 632-887 July 31, 2008); *Cross v. Microglide*, W.C. No. 4-355-764 (September 2, 2003) aff'd, *Cross v. ICAO*, 03CA1807 (Colo. App. 2004) (not selected for publication); *Wilkens v. First Lutheran Church*, W.C. No. 4-369-843 May 17, 001).

12. With the amendments to WCRP 16 effective January 1, 2019, what constitutes a "complete" request was further clarified at WCRP 16-6(E), which specifically states:

> To complete a prior authorization request, the provider shall concurrently explain the reasonableness and the medical necessity of the services requested, and shall provide relevant supporting medical documentation. Supporting medical documentation is defined as documents used in the providers' decision-making process to substantiate the need for the requested service or procedure. The following documentation is required:
>
> (1) An adequate definition or description of the nature, extent, and necessity for the procedure;
>
> (2) Identification of the appropriate Medical Treatment Guideline, if applicable; and
>
> (3) Final diagnosis.

13. It is the claimant's burden to demonstrate that there was a "completed request" for purposes of assessing a penalty for violation of Rule 16. *See McDaniel v. Vail Associates. Inc.*, W.C. No. 3-111-363 (July 18, 2011). A respondent is not required to plead insufficiency of a request for authorization as an affirmative defense. *Id.*

14. While Section 8-43-304, C.R.S., generally provides for the opportunity for penalties, Section 8-43-304(4), C.R.S. provides for a cure period of twenty days. This cure period begins from the date an Application for Hearing (AFH) is filed. That same section also provides that "[i]f the violator cures the violation within such twenty-day period, and the party seeking such penalty fails to prove by clear and convincing evidence that the alleged violator knew or reasonably should have known such person in is violation, no penalty shall be assessed."

15. A fact or proposition has been proved by clear and convincing evidence if, considering all of the evidence, the trier-of-fact finds it to be highly probable and free from substantial doubt. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

16. With regard to the penalties requested by the claimant, the ALJ concludes that the appropriate remedy for a late response to a request for authorization is that the request will be deemed authorized. Therefore, the monetary penalties addressed in Section 8-43-304, C.R.S. are generally not applicable to the alleged behavior in the current case. The claimant has alleged five instances in which he believes that the respondent did not comply with the seven-day requirement of WCRP 16-10(E), for requests made prior to January 1, 2019, and the seven-day requirement of WCRP 16-6 (C) for requests made January 1, 2019 and thereafter.

17. The ALJ concludes that for each alleged violation of WCRP 16-10(E) or WCRP 16-6(C), the respondents cured the alleged violation within 20 days of the claimant's Amended AFH as allowed by Section 8-43-304(4), C.R.S. In some instances, the alleged violations were cured prior to the claimant's Amended AFH. Therefore, the claimant has the burden to demonstrate by clear and convincing evidence that the respondents knew, or reasonably should have known they were in violation of a rule. However, even if this burden is met, the ALJ has concluded that the proper remedy is automatic authorization of the requested treatment and not a monetary penalty.

18. As found, the claimant has failed to demonstrate that penalties are appropriate for the alleged late denial of the eyeglasses recommended by Dr. Rottman. A request with supporting documentation was submitted to the respondents on October 19, 2018. The respondents notified Dr. Rottman that the eyeglasses were denied, pending a records review, on the seventh business day, October 20, 2018. The respondents did not violate the 2018 version of WCRP 16. In addition, the ALJ is not persuaded that the respondents' actions were unreasonable.

19. As found, the claimant has failed to demonstrate that penalties are appropriate for the alleged late approval of the referral to Dr. Provencher. Although Mr. Harkreader documented the claimant's ongoing request to seek a second opinion from Steadman Hawkins, it was not until Dr. McLaughlin noted an opinion regarding the appropriateness of such a referral that a referral with supporting documentation was provided to the respondents. Therefore, the seven-day time period began to run on

November 29, 2018. Five business days elapsed between the November 29, 2018 paperwork and the notification to claimant of the approval on December 6, 2018. The provider was notified of the approval on the seventh business day, December 10, 2018. Therefore, the respondents did not violate the 2018 version of WCRP 16. Furthermore, the ALJ finds that the respondents' actions were objectively reasonable.

20. As found, the claimant has failed to demonstrate that penalties are appropriate for the alleged late approval of the referral to Dr. Good. The referral was authorized December 4, 2018, twelve business days after the request. Therefore, the authorization occurred five days after the seven-day deadline provided for in WCRP 16. As found, the ALJ concludes that the appropriate remedy is for the authorization to be automatic. The claimant does not also receive a second remedy of monetary penalties. The ALJ finds no persuasive evidence on the record that the respondents acted unreasonably. Additionally, this alleged violation was cured long before the claimant's Amended AFH was filed. The ALJ concludes that the claimant has failed to demonstrate by clear and convincing evidence that the respondents knew or reasonably should have known they were in violation.

21. As found, the claimant has failed to demonstrate that penalties are appropriate for the alleged late approval of a nurse case manager. As found, the failure to authorize or deny a requested medical benefit within seven days simply results in automatic authorization. The claimant does not also receive a second remedy of monetary penalties. In addition, this alleged violation was cured long before the claimant's Amended AFH was filed. The ALJ finds no persuasive evidence on the record that the respondents acted unreasonably. The ALJ concludes that the claimant has failed to demonstrate by clear and convincing evidence that the respondents knew or reasonably should have known they were in violation.

22. As found, the claimant has failed to demonstrate that penalties are appropriate for the alleged late approval of surgery recommended by Dr. Provencher. A request with supporting documentation was submitted to the respondents on February 22, 2019. Following Dr. Farber's peer review, the respondents denied the surgery on the seventh business day, May 5, 2019. The respondents did not violate the 2019 version of WCRP 16. The ALJ finds that the respondents' actions were objectively reasonable.

23. As found, the claimant has failed to demonstrate that penalties are appropriate for the alleged failure to exchange medical records utilized by a peer reviewer. As found, eight of the ten documents were exchanged prior to the Amended AFH, and thereby cured. With regard to the remaining two acupuncture records, the ALJ is not persuaded that the respondents withheld those records as there is no persuasive evidence on the record that the respondents ever had those specific records. The ALJ finds that the respondents actions were objectively reasonable. The ALJ concludes that the claimant has failed to demonstrate by clear and convincing evidence that the respondents knew or reasonably should have known they were in violation.

24. As found, the claimant has failed to demonstrate that penalties are appropriate for the alleged failure to comply with PALJ Martinez Tenreiro's September 14, 2018 prehearing order for failure to mail the claimant's indemnity checks to his counsel's office. As found, the respondents' correction of the mailing address on October 5, 2018, was objectively reasonable. Furthermore, the penalty of late compliance with the PALJ's order was cured prior to the filing of the claimant's Amended AFH. The claimant has failed to demonstrate by clear and convincing evidence that the respondents knew or reasonably should have known they were in violation.

25. As found, the claimant has failed to demonstrate that penalties are appropriate for the alleged failure to comply with PALJ Martinez Tenreiro's September 14, 2018 prehearing order due to failure to exchange medical records within fifteen days. Other than the records addressed above (as related to Dr. Farber's peer review), the claimant has not indicated what medical records, if any, were exchanged beyond 15 days. The ALJ finds that the respondents did not fail to comply with the PALJ's order in this regard. Therefore, there is no violation upon which to assess penalties.

ORDER

It is therefore ordered:

1. The claimant's claim for corrective lenses is denied and dismissed.

2. The claimant's claim for penalties for the dates of October 21, 2018 and ongoing, for the alleged late denial of the eyeglasses recommended by Dr. Randall Rottman are denied and dismissed.

3. The claimant's claim for penalties for the dates of November 23, 2018 through December 10, 2018, for the alleged late approval of the referral to Dr. Matthew Provencher are denied and dismissed.

4. The claimant's claim for penalties for the dates of November 23, 2018 through January 8, 2019, for the alleged late approval of the referral to Dr. David Good are denied and dismissed.

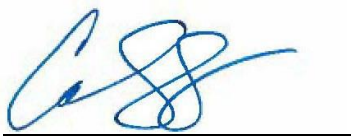
5. The claimant's claim for penalties for the dates of December 31, 2018 and continuing, for the alleged late approval of a nurse case manager are denied and dismissed.

6. The claimant's claim for penalties for the dates of March 5, 2019 and continuing, for the alleged late approval of surgery recommended by Dr. Matthew Provencher are denied and dismissed.

7. The claimant's claim for penalties for the dates of December 21, 2018 and ongoing, for the alleged failure to exchange medical records utilized by a peer reviewer are denied and dismissed.

8. The claimant's claim for penalties for the dates of September 28, 2018 through October 19, 2018, for the alleged failure to comply with PALJ Martinez Tenreiro's September 14, 2018 prehearing order for failure to mail the claimant's indemnity checks to his counsel's office and for alleged failure to exchange medical records within fifteen days are denied and dismissed.

Dated this 29th day of August, 2019.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. **In addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 3-746-413-001

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on July 25, 2019, in Denver, Colorado. The hearing was digitally recorded (reference: 7/25/19, Courtroom 1, beginning at 8:30 AM, and ending at 11:15 AM).

Claimant's Exhibits 1 through 9 were admitted into evidence, without objection. Respondents' Exhibits A, B, C, L, M and N were admitted into evidence, without objection. Claimant's objections to D, E and F were sustained and these proposed exhibits were rejected. Ruling was reserved on proposed Exhibits G and H and because an inadequate foundation was laid through the telephone witnesses, these proposed exhibits were rejected.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, which was filed, electronically, on or about August 6, 2019. Counsel for Respondents filed a lengthy Objection to the proposed decision, which resembles the launch of an appeal because it contains Respondents' arguments, many of which were not contemporaneously raised at hearing and insofar as raised were rejected by the ALJ. On or about August 9, 2019, counsel for Claimant filed a Response to Respondents' Objections.

RESPONDENTS' OBJECTIONS TO PROPOSED DECISION AND ALJ's DETERMINATIONS RELATIVE THERETO

1. Respondents object to the issues listed for determination in the Issues section of Claimant's Proposed Full Findings of Fact, Conclusions of Law, and Order, starting at page 2. At hearing Claimant argued that waiver and laches were not issues for hearing secondary to PALJ Broniak's prehearing conference order. Respondents argue that they were prevented from introducing evidence of waiver and laches, including Pinnacol's Claim File Notepad (Respondents' Exhibit H, which was rejected). Pinnacol's notepad allegedly supports the affirmative defenses of laches and waiver. There was an inadequate foundation for this rejected exhibit. In response to the ALJ's concern that there must be actual, hard evidence of prejudice to sustain the affirmative defenses of waiver and laches, Respondents' response was that the passage of time alone made hard evidence unavailable because evidence was desroyed for unknown reasons.. Ann R_____, who retired from Pinnacol in May 2009 (over ten years ago) testified on behalf of Respondents, without specifically identifying Exhibit H, testified that she remembered similar screen shots. Objection No. 1 is not factually correct and is not supported by the record.

2. Respondents object generally to the Proposed Findings of Fact to the extent it allegedly includes facts that were not entered into evidence at hearing or misrepresents the accepted evidence. Respondents' objection No. 2 is not only argument but it requests the opportunity to re-organize the ALJ's decision, presumably to give it a more favorable spin for the Respondents.

a. Respondents requested that **Proposed Findings of Fact Number 10** be moved to **Proposed Findings of Fact Number 3** (before the sentence starting "At some point"), and that the Court provide the following language to Proposed Findings of Fact Number 3 with respect to Claimant being represented by counsel: "Claimant was represented by John Breit, Esq. following his work injury, and before his last indemnity benefits were paid in September 1988 (Resp. Ex. B, bns 013, 017, 019, 026, 036, 040). The Division's chronological history does not indicate that Breit withdrew as counsel (Resp. Ex. A, bn 001). The Court took judicial notice that Breit perished in a plane crash in 1995. The ALJ rejects Respondents' suggestion that Claimant was still being represented by Breit on September 29, 1988, the date Pinnacol claims a full and final settlement check was issued on this claim." The ALJ finds Respondents' suggested language and re-ordering of the decision inappropriately designed to give the decision a more favorable spin when Respondents failed to sustain their burden on case closure by preponderant evidence.

b. Respondents object to **Proposed Findings of Fact Number 4** as

incomplete. Proposed Findings of Fact Number 4 includes Claimant's interpretation of the Division Chronological History entry "Conversion-[to] prevent Closur[e]". Proposed Finding of Fact Number 4 should also include a reference to the Division's Chronological History entry dated December 1, 1992 "File Destroyed" (Resp. Ex. A, bn 001), and the Division Claim Status History on the claim information screen: "Status: C - Close[d] Date Dec 1, 1992" (Id. at bn 002). Respondents argue, without adequate support, that Claimant Status History is unrefuted evidence that this claim was closed as of December 1, 1992. This is the opinion of R_____ and Claimant's counsel, based on their interpretation of a screen shot from 30 years ago. The ALJ rejects this argument because there is not an adequate foundation underlying it. Again, Respondents seek to augment the findings with shaky evidence some of which was rejected in order to place a more favorable spin on the decision.

c. Respondents argue that **Proposed Findings of Fact Number 5** should be modified to include the fact that R_____ testified that, in her opinion, Pinnacol had a settlement committee in September 1988 and that the settlement committee only settled claims on a full and final basis. This statement is without adequate foundation concerning all of the ramifications of resolving issues by Pinnacol,. As of today, the ALJ can just as easily infer and find partial settlement as opposed to a full and final settlement. There is no adequate foundation concernhing how R_____ would absolutely know that Pinnacol only did "full and final" settlements in 1988. The opinion of R_____ concerning what occurred 40 years ago is without foundation or support. Indeed, Respondents again desire the ALJ to add in fact findings, based on evidence rejected by the ALJ.. Although she was not there, Respondents argue that R_____'s testimony was not speculative, as R_____ testified to her alleged firsthand knowledge of these facts of 30 years ago—without notes or contemporaneous documentation. The The ALJ finds much of R_____'s testimony to be speculative. She testified by telephone and there is no indication that she had the same documents referenced in Respondents' exhibits before her when she rendered her opinions. The ALJ infers and finds that Respondents pushed the evidentiary envelope beyond the bounds of reason,

d. Respondents' request that **Proposed Findings of Fact Number 6.c.** be modified to read as follows: "Based upon Pinnacol's Indemnity Payment History (Ex. C, bn 056) and Pinnacol Comp Check screenshots from WCIS (Resp. Ex. D, which was rejected), Claimant was advanced $7,192 in PPD while collecting TTD

benefits. Claimant then received a $24,900 check on September 29, 1988. R_____ testified that the September 29, 1988 check was a full and final settlement check," in her opinion. She did not distinguish between full and final settlements and partial settlements. Again the ALJ finds R_____'s testimony inadequately supported and speculative.

e. Respondents request that **Proposed Findings of Fact Number 6.d** be modified to completely remove "Although there is no explicit reference to a "settlement" in any of Respondents' exhibits", and the word "interpreted" is used twice in this section. R_____ stated that based upon her knowledge (the ALJ finds this to be her opinion) of Pinnacol's practice and procedures during the period in question (September 1988) the notation on Respondents' Exhibit E "PERM PARTIAL1STIP-COMMITTE TO@ 0.00; Line Total: $24,900" indicates that a full and final settlement was reached in this claim, and the $24,900 check was a settlement check ordered by Pinnacol's Settlement Committee. Again, R_____'s opinion is speculative because she did not explain or distinguish "partial" settlements from "full and final" settlements.The ALJ sustained Claimant's objection to Exhibit E and Exhibit E was rejected,.

f. Respondents request that **Proposed Findings of Fact Number 6.e** be modified to remove the word "interpreted" as used in this proposed finding of fact. The ALJ finds that it would be more appropriate to substitute "speculatively opined" for "interpreted," however, R_____ did "interpret" what the legal coding contained in Respondents' Exhibit G means. R_____ stated based upon her opinion of Pinnacol's practice and procedures related to Pinnacol's alleged longtime use of legal codes that the legal status codes "81" and "17" when used together by Pinnacol indicate a full and final settlement was reached on this claim. The ALJ finds this assertion to be inadequately supported and speculative.

g. Respondents request that **Proposed Findings of Fact Number 6.g** be modified to remove the word "asserted" as used in that section. R_____ stated that based upon her personal knowledge of Pinnacol's practice and procedures during the time frame in question Pinnacol never paid any claimant PPD benefits beyond the PPD benefit cap. The ALJ finds this opinion testimony to be speculative along the lines of "never say never,."

h. Respondents request that **Proposed Findings of Fact 6.j.** be modified to remove the statement that " R_____'s 'opinion' that various codes and comments in Respondents' Exhibits C, D, E, and G (all of which were rejected in evidence because of inadequate

and speculative foundational considerations) establish a full and final settlement or case closure is highly speculative, lacks credibility, and is unpersuasive."

3. Respondents object to the proposed conclusions of law in so far as they include conclusions not held by the ALJ and misapply or misstate the pertinent and applicable laws. Rather than Respondents reading the ALJ's mind, underlying how he arrived at an application of the law to the facts, Respondents would be better served by strict legal argument. The ALJ has applied and stated the law applicable, according to his best lights

a. Respondents object to claimant's Proposed Conclusions of Law section entitled "**Settlement Requirements Under the Act**" in that Claimant incorrectly states the law. Colorado Rule of Evidence 1004 (1) provides that secondary evidence is admissible to establish the contents if the original(s) is lost or destroyed, unless the proponent destroyed it in bad faith. Thus, in a case with an alleged lost or destroyed document, such as the settlement documents in this case, Respondents are permitted to prove a settlement occurred with "secondary" evidence, however, the "secondary evidence" in the present case is without an adequate foundation because it's relevancy as "secondary evidence" is insufficient and based on the speculation of Ann R_____ and Candy Whitmer, who testified based on their memories of 30 years ago, which the ALJ simply does not find credible. To prove that a "full and final" settlement occurred, Respondents do not need to produce the actual settlement agreement, signed by the parties, approved in writing by a hearing officer or Director, and filed permanently with the Division, however, the 'secondary evidence" must be credible, which it is not. Also, the unavailability of the settlement documents, although suspicious in light of the fact that old "screen shots" were available, does not rise to the level of "bad faith" from an evidentiary standpoint. Secondary evidence can be used to prove a settlement occurred, even if it cannot be used to prove the terms of the settlement. See *In re Dalton*, W.C. No. 4-977-664-01 (September 22, 2016) (ALJ did not err in admitting and considering extrinsic evidence to determine whether a party failed to prove a full and final settlement by a preponderance of reliable evidence). As found herein below, Respondents failed to prove a **full and final settlement** by a preponderance of reliable secondary evidence.

b. Respondents object to **Proposed Conclusions of Law section 3.e.,** in that it claims Respondents failed to meet the statutory requirements through custom and usage. Again, Respondents need not prove the statutory requirements cited to prove a claim settled in a case where the settlement documents were lost or destroyed. Respondents only

> need to prove that the claim settled, which Respondents have failed to do. Respondents' evidence, including the indemnity ledger, the check history screenshots, and legal status codes, do not establish that the claim settled on or around September 29, 1988, **on a full and final** basis. R_____'s un-supported opinion as to what those documents mean do not show the claim settled. Mere suspicion that a full and final settlement may have occurred does not equate to preponderant evidence.

Ultimately, the ALJ considers Respondents' lengthy launch of an appeal as a Motion for Reconsideration, with a prayer for relief that the ALJ flip the outcome, reverse himself, and provide that the Respondents prevail. This "Motion," as herein below provided is effectively denied and dismissed.

CLAIMANT'S RESPONSE TO RESPONDENTS' OBJECTIONS

:

Claimant avers that for the most part, Respondents' Objections are argument. Objection No. 1, however – "Respondents were prevented from introducing evidence of waiver and laches, including Pinnacol's Claim File Notepad (Resp. Ex. H)" – is not factually correct and is not supported by the record.

While it is correct that Claimant *argued* that PALJ Broniak's order had reserved Respondents' equitable defenses for a later time, this ALJ specifically stated, "I'm not bound by prehearing judges' orders." Audio Recording of 7/25/19 Hearing, Courtroom 1 20190725 ("Audio) at 9:54am. In fact, the ALJ overruled Claimant's numerous relevance objections expressly because "I have to be mindful of one of Respondents' arguments and that is their position that there we'll see what comes out of the hopper." Audio at 9:53:40am. *See also, e.g., id.* at 9:29am ("They've raised the defenses of laches, waiver, estoppel . . . "); 9:55 ("I can envision that there can be a case closure by the operation of time by imposition of the laches doctrine on the grounds of prejudice") (overruling relevance objection at 9:56:51am).

Specifically regarding the Pinnacol Claim File Notepad (Resp. Ex. H), the record is clear that the ALJ excluded the document for lack of foundation – not because Respondents' equitable defenses were not the subject of the hearing. *Id.* at 10:22:38 – 10:24:00am.

Further, in closing, Respondents' counsel specifically argued that its equitable defenses were part of the hearing:

> [Claimant's] Counsel represents that Judge Broniak's order limits this to closure, but laches and waiver are issues. They've always been issues. They're on the case information sheet.[1]

[1] Claimant's Ex. 9 (Issues remaining for determination – ". . . waiver, estoppel, laches . . .").

Id. at 10:51:36am; *see also id.* at 10:54-55am (evidence of passage of time constitutes evidence of unconscionable delay and such delay prejudiced Respondents) (Respondents' closing argument).

Finally, the ALJ allowed Respondents to make their case but specifically found that Respondents failed to meet their burden of proof. on case closure. "The only evidence, if you will, that Pinnacol was prejudiced was their own fault. Their destruction of records. Laches and estoppel are issues for another day. Issues where there must be a showing of prejudice to the Respondents after they destroyed some of their own records for unknown reasons.

FINDINGS OF FACTS

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact;

1. The Claimant is 57 years old, and was born on November 26, 1961.

2. The Claimant was injured on July 19, 1984, at the age of 22, due to a fall of approximately 16 feet off of a roof while working (Respondent's Exhibit B at p.10). He sustained a closed head injury, as well as other physical injuries. *Id.* He had no memory of the incident or the days before the incident. In the months following, he had difficulty concentrating on one task at a time, appeared preoccupied with his inability to remember what he had done day-to-day, and had poor moment-to-moment recall. He also had poor attention span and an inability to follow instructions without repetition, and appeared bewildered. He had problems expressing himself, and his thinking was tangential and disorganized (Respondents' Exhibit B at p. 13). On January 30, 1985, the Claimant reported that he could not remember the two months following the accident. *Id.* at 15. He was diagnosed with "encephalopathy with cognitive and (RUE), either cervical root or local in the right shoulder." *Id.* at 14.

3. The Claimant's doctors continued to report difficulty with memory, confusion, and agitation from his "organic brain injury" *Id.* at 13, 17, 19, 21, 24, 26, 28, 30, 34, 36-37, 43, 46, 48, 52-54. Even after moving back home to California sometime in 1986, these same reports of memory, confusion, and agitation continued. *Id* at 40, 43, 46, 48, 52-54. At some point, for unknown reasons, Claimant stopped receiving medical care, however in 2013, there is a report of a Weschsler Adult Intelligence Exam performed by Marlene Frankel, Ph.D. back in Colorado. Dr. Frankel reported that "He previously received Workmen's Compensation and Social Security Disability benefits. He was confused and vague about why those benefits ended." After the testing, Dr. Frankel determined that that his "pattern of uneven scores and impaired processing speed is consistent with a traumatic brain injury." (Rs' Ex. I at 81). In 2017 and 2018, Lesley Moak, NP, reported that Claimant had no memory of his life prior to the early 2000's; he continued to experience memory loss; and that he was inattentive, disorganized, and needed frequent redirection during the medical appointments. (Respondents' Exhibit J at pp. 83-86, 88).

4. The Division (DOWC) received the First Report of Injury on July 27, 1984, and assigned the Workers' Compensation claim number 3-746-413 (*See* Respondents' Exhibit A--certified copy of DOWC file for claim number 3746413, Claimant [redacted] (June 20, 2018) and Claimant's Exhibit 1 (certified copy of DOWC file (June 6, 2018)). The DOWC's file documents that a hearing was held on Claimant's claim on May 3,1985 and that an ALJ Order was issued on June 17,1985. The file further documents that on July 13, 1991 there was a "Conversion- [to] prevent closur[e]" of

Claimant's claim. *Id.* Insure and/or its predecessors made regular indemnity payments to Claimant in conjunction with a compensable workers' compensation claim from August 1984 through at least September 1988. (Respondents' Exhibits C-E). The ALJ finds the documents of the parties admitted into evidence credible and persuasive to establish that Claimant made a prima facie showing that he had an open and compensable claim as a result of the July 27, 1984, incident.

5. Ann R_____ testified at hearing for Respondents. R_____ previously worked for Insurer, from February 24, 1986, through May of 2009, when she retired. Over her 25 years with the Insurer, she worked as an adjuster, a supervisor, and eventually the business director. She also served on the business requirements team and the design and implementation team, which determined what information would be transferred from the Insurer's claims' handling software prior to 1997 (known as MAGEC) to their new computer system (known as Workers Compensation Information System or "WCIS"). She stated that when the Insurer converted MAGEC to WCIS, the following information was transferred: payment information, including the check history of when the check was paid, the check number, and the type of check that was issued; the legal status codes; and basic information for the claim. Finally, she discussed that in the 1980s, the Insurer had a settlement committee that settled all claims with the claimants. R_____ admitted that she did not serve on that committee.

6. R_____ was not the adjuster for the Claimant's claim and had no personal knowledge of the facts of his case, but discussed the overall policies and her understandings of claims' adjusting for Insurer, as it related to the Claimant's claim:

a. would have been converted from MAGEC to WCIS.

b. R_____ identified Claimant's case file and stated that, based on the date of injury, the Claimant's case file (Respondents' Exhibit C) as Pinnacol's indemnity payment history for the Claimant's claim. She stated that this document was from the WCIS system and that it demonstrated Pinnacol or its predecessors had paid Claimant both temporary total (TTD) and permanent partial disability (PPD) benefits.

b. Based on the screenshots from WCIS in the Claimant's file (Respondents' Exhibit D), she expressed the opinion that the Claimant received an advance of PPD benefits of $3,000 on February 5, 1986, and $24,900 in permanent partial disability (PPD) on September 29, 1988. This fails to establish a full and final settlement.

c. Although there is no explicit reference to a "settlement" in any of Respondents' exhibits, R_____ interpreted

the notations on Respondents' Exhibit E "PERM PARTIAL1STIP – COMMITTE TO@ 0.00; Line Total: $24,900" to mean that a settlement occurred for $24,900 between the Insurer and thee Claimant. She interpreted the word fragment "COMMITTE" in Respondents' Exhibit E as a reference to the Insurer's settlement committee.

d. R_____ interpreted the legal codes "81" and "17" and the word "stipulation" on the screenshot of Respondents' Ex.hibit G to refer to a "stipulated settlement" negotiated by the settlement committee.

e. Rather than making explicit reference to a "settlement,". R_____ asserted that Insurer instead would report a settlement payment as a PPD payment on an indemnity payment summary when the computer systems were changed over from MAGEC to WCIS.

f. R_____ discussed that the PPD maximum at the time of the injury was $26,292, and the Claimant received a total of $32,092, which was more than the maximum benefit. She asserted that the Insurer did not pay PPD beyond the cap unless the claim was settled.

g. Reading Respondents' Exhibits C at 56, D at 64, E at 68, and G at 71 together, R_____ opined that on September 29, 1988, a settlement check was issued in the Claimant's case. She further stated the opinion that the Insurer would not issue settlement checks without signed settlement documents and a signed order from a judge. She had no personal knowledge that this was so in the Claimant's case nor did she have personal knowledge that the Insurer would never issue settlement checks without signed settlement documents nor did you distinguish checks issued in partial settlement. She could not say whether this approach was always followed.

h. R_____ noted that Insurer destroyed most of the records in the Claimant's case and there were no pleadings in his current file between 1984 and 1988. She stated that it was the Insurer's policy not to destroy open claim files. She admitted that she did not know whether that policy was always followed.

i. Finally, R_____ testified that the Insurer's records did not contain a written settlement agreement signed by both parties in the case, nor did she have knowledge otherwise.

> Additionally, upon reviewing the Insurer's documents relating to the Claimant's claim, she had not seen an order approving the settlement. The ALJ finds that R_____'s opinion that the various codes and comments in Respondents' Exhibits C, D, E, and G establish a full and final settlement or case closure is highly speculative, lacks credibility and is not persuasive. **Indeed, there is no persuasive evidence whatsoever the a judge approved a full and final settlement**

7. Respondents also called Candy Whitmer, a former claims' adjuster for Insurer. Before testifying to any matter of substance, the ALJ encouraged, and Respondents chose, to move to R_____'s testimony so she could testify live concerning the proposed exhibits. When the ALJ provided Respondents a second opportunity to call Whitmer back to testify after R_____'s live testimony, Respondents declined to do so.

8. The DOWC file for Claimant's claim notes that Claimant contacted the DOWC and/or attorneys in 2007, 2008, and 2010 about his benefits (Claimant's Exhibit 1 at p. 3; Respondents' Exhibit A at p. 3). Additionally, the DOWC file reports that, at a minimum, Claimant's file did not close in 1988, as it was still open in 1991. *Id.* ("CONVERSION-PREVENT CLOSUR").

9. In the DOWC file, there is no FAL (nor any other pleadings), no copy of an order dismissing or closing the claim, no copy of a settlement agreement, no order of the ALJ confirming an agreement, nor even records noting that any of the previous documents existed in Claimant's permanent record with the DOWC (Respondents' Exhibit A; Claimant's Ex.hibit 1). Further, Respondents did not produce a FAL, a settlement agreement signed by the parties, or an order of a judge confirming a settlement of Claimant's workers' compensation case.

10.. The ALJ takes administrative notice that Claimant was represented at some point in the 1980's by counsel, but that attorney has since passed away.

Ultimate Findings

11. The ALJ finds R_____'s ultimate opinion, piecing together screen shots and testifying from more than a ten-year old "memory" about Pinnacol procedures concerning full and final settlements in which she was not directly involved, lacking in credibility not because of prevarication but because there was no persuasive, foundational evidence that she possessed an eidetic memory that captured minor details of over ten years ago. Without R_____'s speculative opinions the secondary evidence, consisting of screen shots and isolated codes and fragmented documentary evidence is meaningless.

12. Although secondary evidence may establish the existence of a "full and final" settlement over 30 years ago, the secondary evidence herein is neither sufficiently credible or adequate to establish a full and final settlement.

13. Without a "full and final settlement, closing this case," the aggregate evidence establishes that the case remains open, *i.e.,* the claim was timely filed, there was never a final admission closing the case, nor was there any other credible indication that the case was closed.

14. Respondents have failed to prove, by a preponderance of the evidence, that there was a case closure, however, the issues of laches and estoppel remain viable factual issues

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad

discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, R_____'s ultimate opinion, piecing together screen shots and testifying from more than a ten-year old "memory" about Pinnacol procedures concerning full and final settlements in which she was not directly involved, lacking in credibility not because of prevarication but because there was no persuasive, foundational evidence that she possessed an eidetic memory that captured minor details of over ten years ago. Without R_____'s speculative opinions the secondary evidence, consisting of screen shots and isolated codes and fragmented documentary evidence is meaningless.

Full and Final Settlements

b. A workers' compensation claim "shall not be assigned, ***released***, or commuted except as provided in [the Act]." § 8-52-107(1), C.R.S. *See also City Market v. Indus. Claim Appeals Office,* 800 P.2d 1335, 1337-38 (Colo. App. 1990) (workers' compensation settlement agreement is not final unless it strictly adheres to the requirements of the Act). The 1984 Act, in effect at the time of Claimant's injury, established three ***mandatory*** requirements for the settlement of a workers' compensation claim:

1. The settlement agreement "***shall be in writing***" signed by a representative of the employer/insurer and signed and sworn by the injured employee.

2. The written agreement "shall be reviewed in person with the injured employee and ***approved in writing by a hearing officer or the director*** of the division ***prior to the finalization*** of such settlement."

3. The settlement agreement shall be ***filed with the division as part of the injured employee's permanent record***."

Section 8-53-105 (1984) (emphasis added) (Claimant's Exhibit 6, p.31); *see also (*Claimant's Exhibit 7 (excerpts of 1988 Workers' Compensation Rules), Section XI.G (Settlement), p. 44

c. The Colorado Court of Appeals and the Industrial Claim Appeals Office have long held that a workers' compensation settlement is not final and is thus unenforceable unless each statutory requirement has been satisfied. *See, e.g., Cook v. McLister,* 820 P. 2d 1167 (Colo. App. 1991) (release not approved by an ALJ or Director); *Oxford Chems. v. Richardson,* 782 P.2d 843, 845 (Colo. App. 1989) (settlement ineffective without approval of ALJ or the director); *Garrison v. Direct Tire Sales,* W.C. No. 3-892-130 (Dec. 28, 2007) (no written agreement signed by both parties; no Division approval); *Choate v. Corn Constr. Co.,* W.C. 3-057-954 (Feb. 16, 1993) (settlement agreement introduced at hearing lacked respondent's signature); *and*

see Jerla v. Henkels & McCoy, pp. *1-2, W.C. No. 4-263-427 (Jan. 10, 2005) ("Our courts have consistently held that failure to adhere to these statutory requirements prevents the enforcement of an alleged settlement)." For example, in *Cook*, the claimant entered into a written pre-claim settlement agreement that released employer for "any and all actions, claims and demands" and included compensation for lost wages. The court of appeals found that the settlement was ineffective to bar claimant's later workers' compensation claim because the settlement was not approved by an ALJ or the Director. 820 P. 2d at 1169-70.

d. In the present case, there is no credible or persuasive evidence that *any* of the Act's requirements for a final settlement were met: there is no written agreement signed by both parties; there is no record of an order from an ALJ or the Director approving a final settlement, and; there is no copy of the agreement or record of the agreement being filed in Claimant's permanent record with the Division. Indeed, the DOWC's docket list for Claimant's file contains no record of any of the required documents, not even a secondary reference. The absence of a record required kept and preserved in the ordinary course of a regularly conducted business activity is admissible "to prove the nonoccurrence or nonexistence of the matter." C.R.E. 803(7). Thus, Pinnacol failed to produce the documents the Act requires to finalize and enforce a full and final settlement. The ALJ concludes, that more likely than not, there was not a full and final settlement or a stipulation on future medical benefits, and Respondents' failed to meet their burden of the affirmative defense of "case closure."

e. Further, Pinnacol's attempt to meet its statutory requirements with the custom and usage testimony of retired employees purporting to interpret computer codes is not persuasive or credible. None of the records they attempted to interpret specifically used the term "settlement" and Ann R_____ lacked personal knowledge of the relevant facts of the case or the specific terms of any purported settlement. Even in non-workers' compensation cases, custom and usage evidence is admissible *only to interpret* the terms of an existing, written contract that the parties agree exists. Such evidence "***is not admissible where no contract has been first shown to exist***." *OC Kinney, Inc. v. Paul Hardeman, Inc.,* 379 P.2d 628, 631 (Colo. 1963) (emphasis added). Even so, the ALJ has considered all of the evidence, including the custom and usage evidence presented at hearing, and finds it unpersuasive and lacking in credibility Because the secondary evidence as specified herein above was lacing in credibility,. Respondents failed to meet their burden to prove that it is more likely than not that the case was closed by settlement, thus, they have failed to meet their burden by preponderant evidence.

Burden of Proof

f. The burden of proof is generally placed on the party asserting the affirmative of a proposition. In the present case, it is upon the Respondents to prove vtheir affirmative defense of case closure by a preponderance of the evidence. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, Respondents have failed to meet their burden on the affirmative defense of case closure. Claimant's case remains open.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondents' affirmative defense of "case closure" is hereby denied and dismissed, without prejudice to the potential affirmative defenses of laches and estoppel.

B. All issues not determined herein are reserved for future decision.

DATED this 29th day of August 2019.

EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm.*

ISSUES

I. Whether Claimant proved by a preponderance of the evidence he suffered a change in condition warranting reopening of his claim.

II. Whether Claimant proved by a preponderance of the evidence entitlement to medical benefits.

III. Whether Claimant proved by a preponderance of the evidence he is entitled to temporary total disability (TTD) benefits from October 13, 2018 through October 29, 2018.

FINDINGS OF FACT

1. Claimant is a 32-year-old male who works for Employer as a facility trainer. Claimant previously worked for Employer as an associate warehouse worker.

2. On A May 16, 2013, Claimant presented to his primary care physician at Kaiser Permanente with complaints of low back pain for three weeks and pain and numbness into his left leg. Claimant reported previously having back pain off and on. Claimant was diagnosed with lumbar radiculopathy and prescribed hydrocodone and etodolac.

3. On July 1, 2013, Claimant suffered an admitted industrial injury to his low back when his body was jarred while unloading a trailer. Claimant underwent treatment with his primary authorized treating physician (ATP) Linda A. Mitchell, M.D. at High Country Occupational and Travel Medicine. At his initial evaluation on July 3, 2013, Claimant reported low back pain and numbness and tingling in the lateral aspects of his calves and feet. Dr. Mitchell initially diagnosed Claimant with a lumbar strain.

4. A July 26, 2013 lumbar MRI revealed a disc bulge at L5-S1 causing slight displacement of the left S1 nerve root. Claimant was subsequently diagnosed with a herniated nucleus pulposus (HNP) at L5-S1 and residual left S1 radiculopathy. He underwent conservative treatment and was initially placed at maximum medical improvement (MMI) by Dr. Mitchell on November 1, 2013. At that time, Claimant reported total relief of radicular symptoms and occasional 1/10 left low back with certain motions.

5. Claimant's back pain and radicular symptoms returned in June 2014. Claimant subsequently underwent an L5-S1 laminectomy and discectomy on January 21, 2015. Claimant underwent postoperative therapy, including physical therapy and a left L5 transformational ESI on November 19, 2015.

6. Due to Claimant's worsening condition, Respondents filed a General Admission of Liability (GAL) on February 4, 2015 which admitted to medical benefits and ongoing temporary total disability (TTD) benefits from January 21, 2015 at a rate of $498.21 per week.

7. On July 17, 2015 Respondents terminated TTD benefits by filing an amended GAL with a Supplemental Report for Return to Work, which reflected Claimant's return to work on June 29, 2015.

8. Dr. Mitchell placed Claimant back at MMI on December 1, 2015. At this time, Claimant continued to report low back pain with pain and numbness radiating through the left buttock. Straight leg raise testing was positive on the left. Dr. Mitchell assigned 25% whole person impairment and permanent restrictions of no lifting/pushing/pulling/carrying over 50 pounds and no repetitive lifting of 25 pounds. As maintenance treatment, Dr. Mitchell recommended the use of Tramadol, three epidural steroid injections a year over the next five years, and six-month follow ups over the next year.

9. On January 12, 2016, Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Mitchell's December 1, 2015 report, admitting for a 25% whole person impairment rate and $81,706.44 in permanent partial disability (PPD) benefits. Claimant reached the statutory cap for indemnity benefits, resulting in only $69,338.10 in PPD benefits being owed. Claimant objected to the FAL and requested a Division Independent Medical Exam (DIME). A corrected FAL was filed on February 11, 2016. Claimant objected to the February 11, 2016 FAL. Respondents filed an amended FAL on April 28, 2016 and Claimant again objected and requested a DIME.

10. Franklin Shih, M.D. conducted the DIME on June 14, 2016. Claimant reported 4/10 ongoing back and proximal left lower extremity pain. Straight leg raise testing was moderately positive on the left. Dr. Shih assessed Claimant with chronic low back pain and radicular pain syndrome. He agreed Claimant reached MMI as of December 1, 2015 and assigned a 24% whole person impairment.

11. Respondents filed an amended FAL on June 17, 2016 consistent with Dr. Shih's DIME report, admitting for a 24% whole person impairment and post-MMI maintenance care. Claimant objected to the FAL and filed an Application for Hearing. Prior to a hearing taking place, Respondents filed a FAL on January 31, 2017 admitting to an MMI date of December 1, 2015, 24% whole person impairment, an average weekly wage ("AWW") of $840, disfigurement benefits and reasonably necessary maintenance care. The claim closed on the January 31, 2017 FAL.

12. Claimant continued to see Dr. Mitchell and attend physical therapy, chiropractic treatment and massage treatment as maintenance care. Records from Dr. Mitchell's evaluations and the chiropractic sessions note Claimant consistently reported 3-5/10 low back pain radiating to the buttock and down to the knee with numbness and tingling. At Claimant's last chiropractic session on July 31, 2017, Claimant reported 3/10 pain

that was present 30% of the time, with continuous sharp, tightness, numbness and tingling in low back.

13. Claimant testified that while at home on Saturday, October 13, 2018, he bent over to pick up a piece of paper that dropped on the ground and when he stood up he immediately felt pain in his lower back radiating into his bilateral legs down to his feet. Claimant testified he sat on the couch for the remainder of the day and reported his symptoms to Employer the following day, who advised Claimant to seek medical attention at Sky Ridge Medical Center.

14. On October 15, 2018, Claimant sought treatment at the emergency department at Sky Ridge Medical Center. He presented with back pain shooting down his bilateral legs, worse on the posterior left leg. It was noted the pain began after Claimant bent down to pick up a piece of paper and stood back up. Claimant reported having pain and left leg weakness prior to a previous back surgery. Physical exam revealed lumbar and paraspinal tenderness and positive straight leg raise bilaterally. Claimant underwent a lumbar spine MRI that demonstrated postsurgical changes present from the L5 left hemilaminectomy and a tiny left paracentral disc protrusion present at L5-S1 without resulting in canal stenosis or nerve root impingement. It was noted there was no abnormality identified on the MRI to explain Claimant's symptoms. Claimant was prescribed medication and discharged with instructions to follow-up with his spinal doctor.

15. While on complete restrictions from Dr. Mitchell, Claimant initially missed 10 days of work.

16. On October 16, 2018, Claimant returned to Dr. Mitchell with complaints of increased low back pain and radicular symptoms in both legs after bending over to pick up a piece of paper at home. Claimant was ambulatory with a walker. In his pain diagram from that appointment, Claimant noted 8/10 pain in his lower back, and radiating numbness through his left leg down to his ankle, and through his right buttock to his right upper thigh. On examination, Dr. Mitchell noted positive straight leg raise bilaterally and increased paraspinous lumbar tone. She diagnosed Claimant with lumbar disc with radiculopathy and removed Claimant from work. Dr. Mitchell recommended physical therapy for exacerbation and a surgical consultation with Dr. Rauzzino for worsening low back pain.

17. On October 25, 2018, Claimant saw Dr. Rauzzino, who requested authorization of a pelvic MRI, lumbar spine and pelvic x-rays, and an EMG/NCS. The requests were denied by Respondents.

18. Dr. Mitchell reexamined Claimant on October 29, 2018. Claimant reported resolution of his right lower extremity pain. Dr. Mitchell returned Claimant to modified duty working 4-hour workdays with no sitting or standing for more than one hour at a time.

19. Claimant presented to Dr. Mitchell on November 5, 2018 for a recheck of chronic low back pain with recent exacerbation. He reported feeling somewhat better and tolerating work at four hours a day. Dr. Mitchell noted no further evaluation was authorized pending an Independent Medical Examination (IME). She returned Claimant to his previous permanent work restrictions.

20. On December 21, 2018, Nicholas Kurz, D.O. performed an IME at the request of Respondents. Dr. Kurz performed a records review and physical examination of Claimant. On physical examination, Dr. Kurz noted a nontender lumbar spine with normal range of motion and negative straight leg raise testing bilaterally. Dr. Kurz focused on the July 1, 2013 and opined Claimant did not sustain a new injury or any acceleration or aggravation on July 1, 2013. He opined Claimant's back condition was pre-existing, and Claimant should not have received treatment under the workers' compensation system. Dr. Kurz further concluded that the "inappropriate medical maintenance" should be discontinued, as there was a non-work-related home mechanism of injury resulting from bending on October 13, 2018. He opined that the resultant emergency room visit, MRI and any additional workup should be covered through Claimant's private insurance as Claimant's condition it is degenerative in nature and unrelated to the claim.

21. In a note dated February 20, 2019 regarding a teleconference with Claimant's counsel, Dr. Mitchell wrote, "Discussed that [Claimant's] recent aggravation was due to a trivial activity and would not have occurred if he did not have the prior work injury and surgery. Issue of causality of initial work injury is not in question."

22. At Claimant's next appointment on March 28, 2019, Dr. Rauzzino prescribed lidocaine patches. Dr. Rauzzino noted that patient's condition was related to "Employment" and that the date of current injury was July 1, 2013, the date of Claimant's initial injury.

23. Claimant testified at hearing he has worked in several capacities for Employer as a result of his July 1, 2013 injury to accommodate his physical abilities and work restrictions. At the time Claimant reached MMI, he had already changed positions at his company to avoid heavy lifting. Claimant was able to perform all the requirements of his new jobs even with the restrictions provided by Dr. Mitchell until he had an aggravation/exacerbation of his injury on October 13, 2018.

24. Claimant further testified that the pain from the July 1, 2013 work injury never fully resolved and, between He testified that between July 2016 and October 2018 he experienced consistent 3-4/10 low back pain and pain radiating into his left buttock. However, after the October 13, 2018 incident, he experienced 9/10 back pain, 8-9/10 left leg pain, and 7-8/10 right leg pain and required the use of a cane.

25. Claimant testified that he requested Dr. Mitchell release him back to work on October 29, 2018 because he ran out of paid time off and his symptoms improved. When asked if he had returned to the baseline he had before October 13, 2018, Claimant testified, “The right leg is good. I still have some of the symptoms in my lower -- in my left leg that comes down to my buttocks and then my lower back. You know, I would say baseline, but I have worsening at the same time.” (Hrg. Tr. 39:15-19).

26. Dr. Kurz testified at hearing on behalf of Respondents as a Level II accredited expert in family medicine. Dr. Kurz testified that the October 13, 2018 was not a work-related incident because the incident did not occur on work grounds. He opined that there is no objective evidence of a worsening of a new injury, aggravation, or worsening of Claimant’s condition. On cross-examination, Dr. Kurz testified that the October 13, 2018 incident did not suffer an aggravation as a result of the October 13, 2018 incident, but, rather, an exacerbation.

27. Claimant’s testimony is found credible and persuasive.

28. The ALJ credits the opinions of Drs. Mitchell and Rauzzino over the opinion and testimony of Dr. Kurz and finds Claimant proved it is more probable than not he sustained a change in condition causally related to Claimant’s July 1, 2013 work injury and subsequent surgery.

29. Claimant proved it is more likely than not he is entitled to reasonable and necessary medical benefits related to the change in condition.

30. Claimant proved it is more likely than not he is entitled to TTD benefits from October 13, 2018 through October 29, 2018, as Claimant was removed from work due to his worsening back condition.

31. Evidence and inferences contrary to these findings were not found credible or persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers’ Compensation Act of Colorado (the “Act”), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Reopening

Section 8-43-303(1), C.R.S. provides that a worker's compensation award may be reopened based on a change in condition. In seeking to reopen a claim the claimant shoulders the burden of proving his condition has changed and that he is entitled to benefits by a preponderance of the evidence. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Osborne v. Industrial Commission*, 725 P.2d 63, 65 (Colo. App. 1986). A change in condition refers either to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that is causally connected to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082, 1084 (Colo. App. 2002). A "change in condition" pertains to changes that occur after a claim is closed. *In re Caraveo,* W.C. No. 4-358-465 (ICAO, Oct. 25, 2006). Reopening is warranted if the claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Industrial Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000); *Dorman v. B & W Construction Co.,* 765 P.2d 1033 (Colo. App. 1988). The determination of whether a claimant has sustained her burden of proof to reopen a claim is one of fact for the ALJ. *In re Nguyen,* W.C. No. 4-543-945 (ICAO, July 19, 2004).

Respondents assert that while a worsening may have occurred, the worsening and the October 13, 2018 is due to the natural degeneration of Claimant pre-existing back condition evidenced in the May 16, 2013 Kaiser Permanente records. The ALJ is

not persuaded. While the May 2013 Kaiser medical record reflects Claimant had prior low back pain and left leg symptoms, Claimant suffered a significant admitted industrial injury on July 1, 2013, for which he underwent multiple years of pre-MMI and post-MMI treatment, including surgery, and ultimately received a 24% whole person impairment rating and permanent restrictions. When Claimant was placed at MMI by ATP Mitchell in December 2015, Claimant reported low back pain and numbness radiating to the left buttock. At the June 2016 DIME evaluation, Claimant reported 4/10 low back pain and left lower extremity pain. Straight leg raise testing was positive on the left and negative on the right at both the MMI evaluation and DIME evaluation. Claimant remained able to perform his job duties with restrictions. Although Claimant continued to experience symptoms, he credibly testified that between July 2016 and October 2018, his symptoms were limited to 3-4/10 low back pain radiating into the left buttock. This testimony is corroborated by the medical records.

On October 13, 2018, Claimant suffered an aggravation of his work injury and change in condition. Claimant's pain increased from 3-5/10 to 8/10 and expanded to include his right lower extremity along with left lower extremity. Physical examination at the October 13, 2018 emergency room visit and the October 16, 2018 visit with Dr. Mitchell revealed positive straight leg raise testing bilaterally. Claimant sought medical treatment as a result of the worsening of his condition. Additional medical treatment has been prescribed by Drs. Mitchell and Rauzzino. Additionally, the change in condition resulted in Dr. Mitchell temporarily removing Claimant from work. Dr. Mitchell noted Claimant suffered a recent aggravation of his condition that would not have occurred but for the prior work injury and surgery. The ALJ is more persuaded by Dr. Mitchell's opinion in this matter, as she has been treating Claimant since 2013 and is familiar with his injury, condition, and course of treatment.

Based on the totality of the credible and persuasive evidence, Claimant has proven it is more likely than not he suffered a change in condition that is causally connected to the July 1, 2013 work injury and subsequent surgery, warranting reopening of his claim.

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). Our courts have held that in order for a service to be considered a "medical benefit" it must be provided as medical or nursing treatment, or incidental to obtaining such treatment. *Country Squires Kennels v. Tarshis,* 899 P.2d 362 (Colo. App. 1995). A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Industrial Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO, May 31, 2006). A service is incidental to the provision of treatment if it enables the claimant to obtain treatment, or if

it is a minor concomitant of necessary medical treatment. *Country Squires Kennels v. Tarshis,* 899 P.2d 362 (Colo. App. 1995)*; Karim al Subhi v. King Soopers, Inc.,* W.C. No. 4-597-590, (ICAO. July 11, 2012). The determination of whether services are medically necessary, or incidental to obtaining such service, is a question of fact for the ALJ. *Bellone v. Industrial Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO, May 31, 2006).

As found, Claimant met his burden to prove entitlement to medical treatment as related to his worsening condition. Accordingly, the treatment received at Sky Ridge Medical Center, and subsequent evaluations and treatment with Dr. Mitchell and Rauzzino are reasonably necessary and related.

TTD Benefits

To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* Sections 8-42-(1)(g), 8-42-105(4); *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

As found, Claimant met his burden to prove entitlement to TTD benefits from October 13, 2018 through October 29, 2018. Dr. Mitchell removed Claimant from work during this time period due to Claimant's worsened condition. Claimant suffered wage loss during this time period as a result.

ORDER

1. Claimant's claim for workers' compensation benefits shall be reopened pursuant to Section 8-43-303, C.R.S.

2. The medical treatment from the October 13, 2018 exacerbation/aggravation is reasonable, related, and authorized, including, but not limited to, the ER visit, and Dr. Mitchell and Dr. Rauzzino's visits, prescriptions, and referrals. Respondents

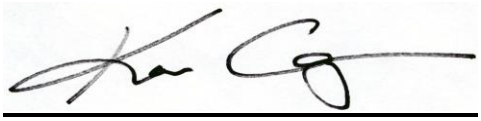
shall pay for that medical treatment according to the Colorado Medical Fee Schedule.

3. Claimant is entitled to TTD from October 13, 2018 to October 29, 2018.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 30, 2019



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Whether the claimant has demonstrated, by a preponderance of the evidence, that the bilateral pronator release surgeries recommended by Dr. Rhett Griggs constitute reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted November 8, 2017 work injury.

- Whether the claimant has demonstrated, by a preponderance of the evidence, that the right trigger finger release is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted November 8, 2017 work injury.

- Whether the claimant has demonstrated, by a preponderance of the evidence, that treatment of the left upper extremity is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted November 8, 2017 work injury.

FINDINGS OF FACT

1. The claimant is employed as a sergeant at the employer's detention center. The claimant's job duties include processing and interacting with inmates. In addition, the claimant performs a number of administrative duties in her role as a sergeant.

2. On November 8, 2017, the claimant was involved in training new employees. During the training, the claimant was playing the part of an inmate while another employee immobilized and handcuffed her. During this maneuver the claimant's right arm was pulled back while her right wrist was pushed down. The claimant felt a pop in her right elbow and pain in her right wrist. The claimant testified that the following day she had symptoms in her right hand and fingers that included numbness. In addition, she had pain in her right elbow.

3. The respondents have admitted for the November 8, 2017 injury as it pertains to the claimant's right upper extremity. However, the respondents have denied treatment of the claimant's left upper extremity.

4. The claimant's authorized treating provider (ATP) for this claim is Gunnison Valley Health Family Medicine Center. The claimant first treated with that practice on November 14, 2017 and was seen by Jodi Bauer, FNP. At that time, the claimant reported numbness in her right hand and fingers, with numbness in her right elbow. Ms. Bauer referred the claimant to physiatrist Dr. William Timothy for evaluation of a possible nerve injury.

5. Subsequently, the claimant began treating with Dr. Rhett Griggs on November 20, 2017. At that time the claimant reported that she had right elbow pain

with radiating numbness and pain into her right thumb, index, and long fingers. Dr. Griggs diagnosed a right elbow LCL sprain with traumatic right epicondylitis and medial nerve traction injury. He ordered a magnetic resonance image (MRI) of the claimant's right elbow and referred her to occupational therapy.

6. On December 5, 2017, an MRI of the claimant's right elbow showed low grade tendinopathy in the distal biceps and distal triceps without significant disruption of either. It also showed a small partial tear of the common extensor tendon at the lateral humeral epicondyle involving about twenty percent of the insertional footprint. The MRI also showed the collateral ligaments were normal.

7. On December 11, 2017, the claimant was seen by Dr. Timothy who performed electromyography and nerve conduction studies (EMG/NCS). Dr. Timothy diagnosed the claimant with severe carpal tunnel syndrome, on the right. In addition, Dr. Timothy noted that although the EMG/NCS testing was negative for radial tunnel syndrome, the physical examination was positive. Dr. Timothy suspected mild radial tunnel syndrome and referred the claimant to an orthopedic surgeon for consultation.

8. The claimant was seen by Dr. Griggs on December 14, 2017. In the medical record of that date, Dr. Griggs noted that the EMG/NCS testing showed moderate carpal tunnel syndrome. On that same date, Dr. Griggs reviewed the imaging from the MRI and diagnosed lateral epicondylitis of the right elbow.

9. On January 10, 2018, Dr. Griggs performed a surgery on the claimant's right elbow. That surgery included open lateral partial epicondylectomy, distal humerus ostectomy of a bone spur, ECRB degenerative tendon excision, ECRL and ECRB with EDC tendon repair at the lateral epicondyle, radial tunnel decompression, ECRB fasciectomy, and carpal tunnel release. In the surgical record of that date, the post-operative diagnoses are listed as: right lateral epicondylitis with lateral mobile wad tearing and degeneration, right radial tunnel syndrome, and right carpal tunnel syndrome.

10. On April 5, 2018, an MRI of the claimant's right wrist showed a horizontal peripheral triangular fibrocartilage complex (TFCC) tear, extensor carpi ulnaris (ECU) subluxation from the groove, and ECU tendinosis with thin intermediate signal.

11. On May 2, 2018, Dr. Griggs performed surgery on the claimant's right wrist that included arthroscopic TFC debridement, ECU subsheath repair with six dorsal compartment reconstruction, and de Quervain's first dorsal compartment release.

12. During this claim, the claimant has treated with, Jodi Lindner, Occupational Therapist. On July 16, 2018, Ms. Lindner noted that the claimant had pain in her bilateral forearms. Based upon the medical records entered into evidence, this is the first report of left sided symptoms.

13. On August 7, 2018, the claimant was seen by Dr. Griggs. On exam, Dr. Griggs noted that the claimant was tender over her right pronator and had pain over her left pronator. Dr. Griggs diagnosed the claimant with pronator syndrome and

recommended pronator decompression. On that same date, Dr. Griggs requested authorization for bilateral pronator release.

14. On August 20, 2018, the respondents asked Dr. Jonathan Sollender to review the claimant's medical records and opine regarding whether the recommended bilateral pronator release surgeries were reasonable, necessary, and related to the claimant's work injury. In his report, Dr. Sollender opined that bilateral pronator releases were not reasonable, necessary, or related to the claimant's work injury. With regard to a left sided pronator release, Dr. Sollender noted that the claimant's injury was to her right arm, and therefore treatment of the claimant's left upper extremity would not be related to the work injury. With regard to the right pronator release, Dr. Sollender noted that the claimant did not complain of any right forearm symptoms. In addition, the EMG and MRI failed to identify proximal forearm pathology of the median nerve. Therefore, it is Dr. Sollender's conclusion that the claimant's pronator region of the medial nerve was not injured at the time of the work injury. Based upon the opinions of Dr. Sollender, the respondents denied authorization of the requested pronator release surgeries.

15. Thereafter on September 28, 2018, Dr. Griggs authored a letter in which he recommended the claimant undergo bilateral pronator release. In support of his recommendation, Dr. Griggs noted that the claimant had pain in her bilateral forearms over her pronator teres and median nerve. Dr. Griggs also opined that the need for these procedures was due to the claimant's "compensating" with her left arm following procedures on her right arm.

16. On January 18, 2019, Dr. Griggs submitted a second request for bilateral pronator release surgery as well as authorization for a right thumb trigger release.

17. On January 26, 2019, Dr. Sollender was asked to review the claimant's medical records a second time. As with his prior report, Dr. Sollender was asked to opine regarding whether the recommended bilateral pronator release surgeries were reasonable, necessary, and related to the claimant's work injury. Dr. Sollender's opinion was unchanged from his August 20, 2018 report. In addition to his reasoning from that prior report, Dr. Sollender also noted that the Colorado Medical Treatment Guidelines (MTG) provide that "[w]hen no objective evidence is present and the patient continues to have signs and symptoms consistent with the diagnosis [of pronator syndrome] after 6 months of conservative treatment including a psychological evaluation, a second opinion should be obtained before operative treatment is considered." Dr. Sollender stated that in his opinion there was no objective evidence of pathology. Therefore, Dr. Sollender noted that, pursuant to the MTG, both a psychological evaluation and a second opinion would need to occur prior to pursuit of surgery. Dr. Sollender also recommended that the claimant undergo an independent medical examination (IME).

18. On April 22, 2019, the claimant attended an IME with Dr. Sollender. In connection with the IME, Dr. Sollender again reviewed the claimant's medical records, obtained a history from the claimant, and conducted a physical examination. In his IME report, Dr. Sollender opined that the claimant's bilateral trigger thumbs are not work

related. He also noted that, based upon his exam, the claimant does not have pronator syndrome.

19. On May 17, 2019, Dr. Sollender authored a letter in which he opined that splints for the claimant's bilateral trigger thumbs should not be authorized because the claimant's trigger thumbs are not causally related to the work injury.

20. The claimant's occupational therapist, Ms. Lindner, testified at hearing. Ms. Lindner testified that in her opinion the claimant's left upper extremity symptoms are causally related to the injury to the claimant's right upper extremity. More specifically, Ms. Lindner opined that the claimant has over used her left upper extremity to compensate for her injured right hand and wrist. This had resulted in repetitive stress to the claimant's left upper extremity.

21. Dr. Sollender's testimony at hearing was consistent with his reports. Dr. Sollender testified that the claimant does not have pronator syndrome. He also testified that the claimant underwent a carpal tunnel release (on the right) and her symptoms improved. Dr. Sollender opined that if the claimant had pronator syndrome, she would not have improved following her carpal tunnel release. Dr. Sollender also testified that he diagnosed carpal tunnel syndrome on the left. However, in his opinion the carpal tunnel in the claimant's bilateral wrists is unrelated to the claimant's work injury. Dr. Sollender also noted his disagreement with the opinions of Dr. Griggs and Ms. Lindner that the claimant has developed left sided symptoms because of overuse of her left hand and arm. In support of his opinion, Dr. Sollender noted that the MTG do not recommend "over use" as a diagnosis of a contralateral body part. With regard to the claimant's complaints of trigger finger, Dr. Sollender also opined that those symptoms are not related to the claimant's work injury. Dr. Sollender noted in his testimony that the trigger finger symptoms did not appear until a year after the claimant's injury.

22. The claimant testified that her current symptoms include pain in her fingers, with the most pain in her middle fingers. She also has pain in her left forearm that radiates into her left biceps. The claimant further testified that she wants the recommended surgeries so that she can return to work.

23. The ALJ credits the medical records and the opinions Dr. Sollender over the contrary opinions of Dr. Griggs and Ms. Lindner. The ALJ finds that the claimant does not have pronator syndrome and that the diagnosis of carpal tunnel in the claimant's left wrist is unrelated to the claimant's work injury. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that the bilateral pronator release surgeries recommended by Dr. Griggs constitute reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted November 8, 2017 work injury.

24. The ALJ credits the medical records and the opinions Dr. Sollender over the contrary opinions of Dr. Griggs and Ms. Lindner and finds that the claimant's right trigger finger symptomology is unrelated to her work injury. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that the need for right trigger finger release is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted November 8, 2017 work injury.

25. The ALJ credits the medical records and the opinions Dr. Sollender over the contrary opinions of Dr. Griggs and Ms. Lindner. The ALJ is not persuaded that the claimant's left sided symptoms are the result of her "over use" of her left arm. The ALJ finds that the claimant's left sided symptoms are not related to the work injury. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that treatment of the claimant's left upper extremity is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted November 8, 2017 work injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2017).

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

5. As found, the claimant has failed to demonstrate by a preponderance of the evidence that the bilateral pronator release surgeries recommended by Dr. Griggs constitute reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted November 8, 2017 work injury. As found, the medical records and the opinions Dr. Sollender are credible and persuasive.

6. As found, the claimant has failed to demonstrate by a preponderance of the evidence that the right trigger finger release is reasonable medical treatment

necessary to cure and relieve the claimant from the effects of the admitted November 8, 2017 work injury. As found, the medical records and the opinions Dr. Sollender are credible and persuasive.

7. As found, the claimant has failed to demonstrate by a preponderance of the evidence that treatment of the claimant's left upper extremity is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted November 8, 2017 work injury. As found, the medical records and the opinions Dr. Sollender are credible and persuasive.

ORDER

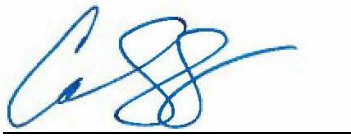
It is therefore ordered:

1. The claimant's request for bilateral pronator release surgeries is denied and dismissed.

2. The claimant's request for a right trigger finger release is denied and dismissed.

3. The claimant's request for treatment of her left upper extremity is denied and dismissed.

Dated this 3rd day of September, 2019.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. **In addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-074-353-001

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable right shoulder injury on December 11, 2017 or February 11, 2019 during the course and scope of his employment with Employer.

2. Whether Claimant has demonstrated by a preponderance of the evidence that the right shoulder surgery requested by Satoru T. Chamberlain, M.D. is reasonable, necessary and causally related to his December 11, 2017 or February 11, 2019 industrial injuries.

FINDINGS OF FACT

1. Claimant worked for Employer as a Cattle/Livestock Driver. His job duties involved loading hogs into pens in a truck. He then delivered the hogs by unloading them from the truck. Claimant testified that the hogs each weighed from 280-315 pounds.

2. Claimant explained that on December 11, 2017 he was unloading hogs by pushing them out of a chute. He remarked that one of the hogs "locked up" and would not move. Claimant thus attempted to push the hog from the chute but experienced pain and a burning sensation in his right shoulder. He immediately reported his symptoms to his supervisor.

3. On December 22, 2017 Claimant visited primary care physician Arlyn La Bair, M.D. at the Haxtun Family Medicine Center for an evaluation. Claimant reported that he injured his right shoulder at work when he was pushing an approximately 320 pound hog out of a chute. He noted constant burning pain into his forearms that became worse with lifting and pushing. Physical examination revealed right shoulder tenderness and decreased range of motion. Dr. La Bair diagnosed Claimant with right rotator cuff repair syndrome after prior rotator cuff surgery and recommended an MRI.

4. Claimant previously underwent right shoulder surgery at Orthopaedic & Spine Center of the Rockies Orthopaedic Outpatient with Satoru T. Chamberlain, M.D. on October 8, 2016. The pre-operative diagnosis was right shoulder internal derangement with rotator cuff disparity of function. The surgical procedures included "arthroscopic debridement, bicipital tenotomy and synovectomy" of the right shoulder as well as debridement of the right rotator cuff. The post-operative diagnoses were: (1) biceps avulsion, significant intra-articular synovitis; and (2) rotator cuff tear with calcific deposition and dystrophic calcification. On January 26, 2017 Dr. Chamberlain released Claimant to full duty employment.

5. On December 26, 2017 Claimant underwent a right shoulder non-contrast MRI at Haxtun Hospital. The MRI reflected post-operative changes including a suture anchor in the greater tuberosity of the humeral head in the region of the posterior supraspinatus and anterior infraspinatus from a previous rotator cuff repair surgery. There were no findings of a re-tear of the rotator cuff. The MRI revealed mild acromioclavicular degenerative changes and a Type III hooked acromion.

6. On January 25, 2018 Claimant returned to Dr. Chamberlain for an examination. He reported anterior right shoulder pain with limitations of abduction and forward flexion. Claimant exhibited "quite good" range of motion. Dr. Chamberlain diagnosed Claimant with a "rotator cuff partial sprain, no true tear" after prior rotator cuff repair surgery.

7. On March 15, 2018 Claimant again visited Dr. Chamberlain for an examination. Claimant reported continuing right shoulder symptoms. After conducting range of motion testing Dr. Chamberlain determined that Claimant's symptoms were consistent with "subacromial irritation with an intact cuff." Dr. Chamberlain administered a corticosteroid injection and recommended physical therapy. He also continued light duty work restrictions.

8. On April 6, 2018 Claimant returned to Dr. Chamberlain. Claimant reported relief after the corticosteroid injection but recurrent right shoulder symptoms. A physical examination of the right shoulder revealed limited arc of motion and "grinding." Dr. Chamberlain recommended right shoulder surgery including diagnostic arthroscopy with possible revision rotator cuff tear based on a diagnosis of "irritation of rotator cuff muscle."

9. On May 2, 2018 Adam J. Farber, M.D. conducted a Rule 16 records review of Claimant's claim. After considering Claimant's medical records, Dr. Farber determined that Claimant's right shoulder symptoms were not solely related to the December 11, 2017 industrial incident. He explained that Claimant underwent a right shoulder arthroscopic biceps tenotomy with mini rotator cuff repair on October 8, 2016. Dr. Farber remarked that, because physicians prematurely returned Claimant to work after the October 8, 2016 surgery, he was at greater risk for future rotator cuff and shoulder problems. In specifically addressing Claimant's December 11, 2017 industrial incident, Dr. Farber commented that an MRI revealed subacromial bursitis but no recurrent rotator cuff or labral tearing. He emphasized that surgery was not warranted because Claimant's right rotator cuff remained intact. Dr. Farber explained that, although Claimant had been diagnosed with "subacromial irritation" and "irritation of the rotator cuff muscle" the irritation was more likely the result of a hooked Type III acromion than the December 11, 2017 industrial incident. He commented that Type III acromial morphology is a congenital issue associated with an increased risk of rotator cuff pathology. Furthermore, Dr. Farber remarked that Claimant's biceps tendon was extremely unstable after a tenotomy procedure and any biceps tendon irritation was more likely related to Claimant's October 8, 2016 surgery than the December 11, 2017 industrial incident. He summarized that

many of Claimant's current symptoms "can be attributed to his previous surgery and congenital acromial morphology but not entirely the incident of December 11, 2017." Specifically, the December 11, 2017 event did not warrant surgical intervention because Claimant did not suffer a rotator cuff tear and his Type III acromion is congenital.

10. On May 21, 2018 Dr. Chamberlain drafted an appeal letter contesting Dr. Farber's opinion that the proposed right rotator cuff repair surgery was not related to the December 11, 2017 work incident. Dr. Chamberlain acknowledged that Claimant's right shoulder MRI did not reveal a rotator cuff tear, but noted that an arthroscopic debridement and physical examination of the cuff constituted the "gold standard." He explained that Claimant's "recurrent symptoms occurred in a temporal relation to his normal and customary work activities." Dr. Chamberlain commented that the advancement in Claimant's underlying right shoulder pathology was "directly related" to his work activities of "loading animals" on December 11, 2017. Relying on the "eggshell skull principal," Dr. Chamberlain reasoned that Claimant would benefit from physical and arthroscopic subacromial and glenohumeral examination, followed by surgical treatment in the form of a bursectomy and an acriomioplasty with possible revision rotator cuff surgery.

11. On May 24, 2018 Dr. Farber authored a response to Dr. Chamberlain's appeal letter. Dr. Farber reiterated that Claimant's right shoulder MRI revealed an intact rotator cuff. He commented that Dr. Chamberlain relied on the temporal relation between Claimant's work activities and the development of rotator cuff irritation. However, Dr. Farber maintained that the irritation was more likely caused by Claimant's congenital Type III acromial morphology than the December 11, 2017 industrial incident. Accordingly, Dr. Farber explained that right shoulder surgery "should be handled on a non-industrial basis" to address Claimant's Type III acromion.

12. Claimant testified that on February 11, 2019 he suffered a second right shoulder injury while working for Employer. He explained that he was unloading hogs from his truck but one of the hogs refused to move. Claimant remarked that he reached over to slap the hog on its back but felt a burning sensation from the front of his right shoulder down through the bicep into his right hand.

13. On March 7, 2019 Claimant visited Bonnie Hablutzel, NP in Sterling, Colorado. She recited that on February 11, 2019 Claimant reached over to slap a pig on his back and felt a pop and pain in his right shoulder that radiated down to his right hand. NP Hablutzel described swelling and burning in Claimant's hand and noted that he suffered a previous injury with surgery on the right shoulder. She diagnosed Claimant with right shoulder pain, ordered an MRI of the right shoulder and referred Claimant back to Dr. Chamberlain. NP Hablutzel also assigned a work restriction of no lifting in excess of 15 pounds.

14. On March 11, 2019 Claimant underwent a non-contrast right shoulder MRI at Banner Sterling Regional Medical Center. The MRI revealed a possible post-surgical change in the supraspinatus. The tendon was attenuated but there was no "fluid-filled

gap or retracted fibers evident to suggest [a] full-thickness tear." There was also infraspinatus tendinosis and articular side fraying without a tear. The MRI reflected an attenuated but intact long head biceps tendon. Finally, there was labral fraying and degeneration without evidence of a tear.

15. On March 27, 2019 Claimant returned to Dr. Chamberlain for an examination. After conducting a physical examination, Dr. Chamberlain reviewed the March 11, 2019 right shoulder MRI. He remarked that the MRI revealed "a combination of rotator cuff insufficiency, biceps partial avulsion and some degenerative arthritis." The MRI confirmed that the rotator cuff was intact but attenuated. Dr. Chamberlain commented that Claimant would benefit from a limitation of activities and surgical intervention. He commented that he would like to proceed with "rotator cuff repair, arthroscopic examination as a diagnostic and therapeutic procedure and very likely labral and bicipital debridement."

16. On April 24, 2019 Dr. Farber reviewed additional records and issued a second Rule 16 records review. He maintained that the recommended right shoulder arthroscopic debridement and reassessment of the rotator cuff is not reasonable, necessary or causally related to Claimant's December 11, 2017 industrial incident. Dr. Farber initially noted that Claimant's pain symptoms radiating down from his shoulder to right hand with swelling and burning of his hand were not consistent with intrinsic shoulder pathology. He also explained that the March 11, 2019 right shoulder MRI did not reveal any new objective findings that warranted surgery. Dr. Farber specifically reasoned that there was no labral, biceps or chondral pathology in the glenohumeral joint that would warrant arthroscopic debridement. Furthermore, subacromial decompression to address Claimant's congenital Type III acromion would not be related to his December 11, 2017 industrial injury. Finally, the March 11, 2019 MRI did not reflect any partial or full-thickness rotator cuff tear justifying revision rotator cuff repair surgery. Dr. Farber summarized that the proposed arthroscopic surgery for Claimant's December 11, 2017 industrial incident was not reasonable and necessary because Claimant's shoulder complaints were inconsistent with intrinsic shoulder pathology and there were no surgical indications reflected on the March 11, 2019 MRI.

17. Dr. Farber testified at the hearing in this matter. He maintained that Claimant did not suffer compensable right shoulder injuries on December 11, 2017 or February 11, 2019. Dr. Farber specifically noted that the December 11, 2017 event simply involved pushing or pulling and in the February 11, 2019 incident Claimant simply reached over. He concluded that Claimant did not injure his right shoulder through either mechanism. Dr. Farber also explained that tears in that the March 11, 2019 MRI did not reveal any new tears. He suggested that the minimal bursitis seen in the MRI was not something that would require surgery. Dr. Farber commented that there was no difference between the December 26, 2017 and March 11, 2019 right shoulder MRI's. He thus summarized that right shoulder arthroscopic debridement and reassessment of the

rotator cuff was not reasonable, necessary or causally related to Claimant's December 11, 2017 or February 11, 2019 industrial incidents.

18. Claimant has established that it is more probably true than not that he sustained a compensable right shoulder injury on December 11, 2017 or February 11, 2019 during the course and scope of his employment with Employer. Initially, on December 11, 2017 Claimant attempted to push a hog out of a chute but experienced pain and a burning sensation in his right shoulder. Similarly, on February 11, 2019 Claimant suffered a second right shoulder injury when he reached over to slap a hog that would not move and felt a burning sensation from the front of his right shoulder down into his right hand. The medical records reveal that Claimant has consistently detailed the cause of his right shoulder symptoms. Prior to both of the preceding incidents Claimant was performing his regular job duties, but after the events he was restricted to light duty work.

19. Dr. Chamberlain persuasively explained that Claimant's "recurrent symptoms occurred in a temporal relation to his normal and customary work activities." He commented that the advancement in Claimant's underlying right shoulder pathology was "directly related" to his work activities of "loading animals" on December 11, 2017. In contrast, Dr. Farber concluded that Claimant did not suffer compensable right shoulder injuries on December 11, 2017 or February 11, 2019. He emphasized that Claimant's right shoulder symptoms were not solely related to his work activities. Dr. Farber commented that Claimant's premature return to work after the October 8, 2016 right shoulder surgery and congenital Type III acromial morphology increased his risk for developing right shoulder symptoms and were thus more likely the cause of his condition than the December 11, 2017 and February 11, 2019 industrial incidents.

20. Rather than justifying the denial of compensability, Dr. Farber's analysis that Claimant's premature return to work and Type III acromion increased his risk for right shoulder injuries suggests that Claimant was more likely to suffer a compensable aggravation of his pre-existing condition. Claimant's right shoulder symptoms shortly after the December 11, 2017 and February 11, 2019 incidents, in conjunction with the consistent medical records and persuasive medical opinion of Dr. Chamberlain, demonstrate that he suffered an industrial right shoulder injury at work. Accordingly, his work activities of moving hogs on December 11, 2017 and February 11, 2019 aggravated, accelerated or combined with his pre-existing right shoulder condition to produce a need for medical treatment.

21. Claimant has failed to demonstrate that it is more probably true than not that the right shoulder surgery requested by Dr. Chamberlain is reasonable, necessary and causally related to his December 11, 2017 or February 11, 2019 industrial injuries. Dr. Chamberlain recommended right shoulder surgery, including diagnostic arthroscopy with possible revision rotator cuff tear, based on a diagnosis of "irritation of rotator cuff muscle." He acknowledged that Claimant's right shoulder MRI did not reveal a rotator cuff tear, but

noted that an arthroscopic debridement and physical examination of the cuff constituted the “gold standard.”

22. In contrast, Dr. Farber persuasively explained that the right shoulder surgery proposed by Dr. Chamberlain was not reasonable, necessary or related to the December 11, 2017 or February 11, 2019 industrial injuries. He initially noted that Claimant’s pain symptoms radiating down from his shoulder to right hand with swelling and burning of his hand were not consistent with intrinsic shoulder pathology. He also explained that the right shoulder MRI’s did not reveal any new objective findings that warranted surgery. Dr. Farber specifically reasoned that there was no labral, biceps or chondral pathology in the glenohumeral joint that would warrant arthroscopic debridement. Furthermore, subacromial decompression to address Claimant’s congenital Type III acromion would not be related to his industrial injuries. Finally, the MRI’s did not reflect any partial or full-thickness rotator cuff tear justifying revision rotator cuff repair surgery. Although Claimant suffered an irritation of his right rotator cuff on December 11, 2017 and February 11, 2019 that constituted an aggravation of his pre-existing condition, the persuasive opinion of Dr. Farber reflects that the proposed surgery would not address his work-related symptoms. Accordingly, the recommended right shoulder arthroscopic debridement and reassessment of the rotator cuff is not reasonable, necessary or causally related to Claimant’s December 11, 2017 or February 11, 2019 industrial injuries.

CONCLUSIONS OF LAW

1. The purpose of the “Workers’ Compensation Act of Colorado” (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §840-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge’s factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the

reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v.* Americold D/B/A Atlas Logistics, W.C. No. 4-960-513-01, (ICAO, Oct. 2, 2015)

6. However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Atsepoyi v. Kohl's Department Stores*, W.C. No. 5-020-962-01, (ICAO, Oct. 30, 2017). The question of whether a claimant has met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). *Fuller v. Marilyn Hickey Ministries, Inc., W.C. No. 4-588-675, (*ICAO, Sept. 1, 2006*).*

7. As found, Claimant has established by a preponderance of the evidence that he sustained a compensable right shoulder injury on December 11, 2017 or February 11, 2019 during the course and scope of his employment with Employer. Initially, on December 11, 2017 Claimant attempted to push a hog out of a chute but experienced pain and a burning sensation in his right shoulder. Similarly, on February 11, 2019 Claimant suffered a second right shoulder injury when he reached over to slap a hog that would not move and felt a burning sensation from the front of his right shoulder down into his right hand. The medical records reveal that Claimant has consistently detailed the cause of his right shoulder symptoms. Prior to both of the preceding incidents Claimant

was performing his regular job duties, but after the events he was restricted to light duty work.

8. As found, Dr. Chamberlain persuasively explained that Claimant's "recurrent symptoms occurred in a temporal relation to his normal and customary work activities." He commented that the advancement in Claimant's underlying right shoulder pathology was "directly related" to his work activities of "loading animals" on December 11, 2017. In contrast, Dr. Farber concluded that Claimant did not suffer compensable right shoulder injuries on December 11, 2017 or February 11, 2019. He emphasized that Claimant's right shoulder symptoms were not solely related to his work activities. Dr. Farber commented that Claimant's premature return to work after the October 8, 2016 right shoulder surgery and congenital Type III acromial morphology increased his risk for developing right shoulder symptoms and were thus more likely the cause of his condition than the December 11, 2017 and February 11, 2019 industrial incidents.

9. As found, rather than justifying the denial of compensability, Dr. Farber's analysis that Claimant's premature return to work and Type III acromion increased his risk for right shoulder injuries suggests that Claimant was more likely to suffer a compensable aggravation of his pre-existing condition. Claimant's right shoulder symptoms shortly after the December 11, 2017 and February 11, 2019 incidents, in conjunction with the consistent medical records and persuasive medical opinion of Dr. Chamberlain, demonstrate that he suffered an industrial right shoulder injury at work. Accordingly, his work activities of moving hogs on December 11, 2017 and February 11, 2019 aggravated, accelerated or combined with his pre-existing right shoulder condition to produce a need for medical treatment.

Medical Benefits

10. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

11. As found, Claimant has failed to demonstrate by a preponderance of the evidence that the right shoulder surgery requested by Dr. Chamberlain is reasonable, necessary and causally related to his December 11, 2017 or February 11, 2019 industrial injuries. Dr. Chamberlain recommended right shoulder surgery, including diagnostic arthroscopy with possible revision rotator cuff tear, based on a diagnosis of "irritation of

rotator cuff muscle." He acknowledged that Claimant's right shoulder MRI did not reveal a rotator cuff tear, but noted that an arthroscopic debridement and physical examination of the cuff constituted the "gold standard."

12. As found, in contrast, Dr. Farber persuasively explained that the right shoulder surgery proposed by Dr. Chamberlain was not reasonable, necessary or related to the December 11, 2017 or February 11, 2019 industrial injuries. He initially noted that Claimant's pain symptoms radiating down from his shoulder to right hand with swelling and burning of his hand were not consistent with intrinsic shoulder pathology. He also explained that the right shoulder MRI's did not reveal any new objective findings that warranted surgery. Dr. Farber specifically reasoned that there was no labral, biceps or chondral pathology in the glenohumeral joint that would warrant arthroscopic debridement. Furthermore, subacromial decompression to address Claimant's congenital Type III acromion would not be related to his industrial injuries. Finally, the MRI's did not reflect any partial or full-thickness rotator cuff tear justifying revision rotator cuff repair surgery. Although Claimant suffered an irritation of his right rotator cuff on December 11, 2017 and February 11, 2019 that constituted an aggravation of his pre-existing condition, the persuasive opinion of Dr. Farber reflects that the proposed surgery would not address his work-related symptoms. Accordingly, the recommended right shoulder arthroscopic debridement and reassessment of the rotator cuff is not reasonable, necessary or causally related to Claimant's December 11, 2017 or February 11, 2019 industrial injuries.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant suffered a compensable right shoulder injury on December 11, 2017 or February 11, 2019 during the course and scope of his employment with Employer.

2. Claimant's request for right shoulder surgery proposed by Dr. Chamberlain is denied and dismissed.

3. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory*

reference, see section 8-43-301(2), C.R.S. (as amended, SB09070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 4, 2019.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that he is entitled to post-MMI medical treatment, in the form of a permanent peripheral nerve stimulator as proposed by Dr. Barolat, to prevent the effects of his work injury and prevent deterioration of his condition?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Claimant sustained an admitted injury on December 7, 2016. (Ex. 2).

2. At the time of the injury, Claimant had been working for the Employer for 20 years. He was a heavy equipment operator, and sustained an injury to multiple body parts when a stack of risers on a cart tilted and he was caught underneath the cart and risers. (Ex. 1).

3. Claimant was initially treated at Penrose St. Francis hospital and then was treated by Dr. Michael Sparr, the Authorized Treating Physician (ATP).

4. Lumbar spine x-rays were taken of the Claimant on December 8, 2016. Dr. John Sherman noted "no definite instability" with deformity related to "dextrorotatory scoliosis and multilevel degenerative disc disease with probable facet arthropathy." (Ex. A).

5. Dr. Sparr's original medically documented injuries were: (L) hip contusion, ®hip contusion, lumbar strain/contusion. *Id at 258, 261.* Dr. Sparr referred Claimant for x-rays, prescribed medication and took Claimant off of work for 4 days.

6. Dr. Sparr followed up with Claimant on December 13, 2016, where his medically documented injuries changed to sacroilitis, hip contusion and trochanteric bursitis. *Id at 248,* as well as lumbar facet arthropathy. *Id at 250.* Dr. Sparr prescribed a left trochanteric burs and gluteal trigger point injection, referred claimant for a short course of physical therapy and continued medications. *Id.*

7. By the next visit on December 20, Dr. Sparr documented substantial decrease in pain and Claimant taking medications as needed only. *Id at 244*. Per this chart note Claimant felt he could return to eight hours of work.

8. Claimant had intermittent periods of TPD and TTD and conservative care as a result of his injuries. He was placed at MMI by Dr. Sparr on March 20, 2018 and

given a 14% whole person impairment rating. This was based on a 7% Table 53 II (c) impairment rating and a 7% loss of range of motion rating. (Ex. 4, pp. 17-18). At that time, Dr. Sparr indicated that the Claimant would need on going medical maintenance including ongoing medications, repeat medial branch block and repeat rhizotomy, for his multi-level chronic back pain. (Ex. 4, pp. 19-21).

9. Respondents admitted for the 14% impairment rating and post-MMI medical maintenance, and filed a Final Admission of Liability on April 25, 2018. (Ex. 4, p. 9). Claimant did not object to the FAL nor did he file a Notice and Proposal to Select a DIME.

10. Prior to being placed at MMI, Claimant had undergone a variety of treatments. His medical records start with the initial examination the day after the injury, with the Claimant being in 9/10 pain with central lumbar pain slightly above the belt, and left lateral hip pain. (Ex. 14, pp. 259-262). Claimant had "aggressive" manual physical therapy with Action Potential Physical Therapy. (Ex. 18), chiropractic care with Dr. Abercrombie, (Ex. 18), multiple trigger point injections with Dr. Sparr, (Ex. 14, pp. 250, 238, 230), facet injections with Dr. Scheper on March 21, 2017, (Ex. 14, pp. 224-225), left ESI injection with Dr. Scheper on May 2, 2017, (Ex. 14, pp. 210-211), repeat ESI injection performed by Dr. Scheper on June 13, 2017 (Ex. 14, pp. 202-203),

11. An EMG resulting in an abnormal study was performed by Dr. Sparr on July 28, 2017, (Ex. 14, pp. 184-193), Claimant also had X-rays, (Ex. 16, pp. 272, 280-282), An MRI was conducted on 2/23/2017, (Ex. 16, pp. 277-279), CT scans were done on April 14, 2017, (Ex. 16, pp. 275-276), and September 26, 2017 (Ex. 17, p. 283), A surgical evaluation was performed with Dr. Brian Reiss of August 16, 2017, (Ex. 20, pp. 314-315).

12. Claimant reported being in intense pain through August of 2017, which he described as "severe back pain which often makes it difficult for him to sit comfortably at night. Pain is in the central lumbar region, deep and achy." Dr. Sparr advised him to increase his medications; however, Claimant did not want to do anything that would cause him to have any cognitive dysfunction at work. Dr. Sparr noted that he had supplied all medical records for Dr. Reiss' appointment. In turn, Dr. Reiss suggested core conditioning and possible fact injections/medial branch blocks. "It is frustrating that he was not aware that we had already tried lumbar facet injections without significant diagnostic or therapeutic benefit. He [Dr. Reiss] advised that surgery would not be appropriate, as he reportedly would have to fuse five levels." (Ex. 14, pp. 179-180).

13. Thereafter, Dr. Sparr prescribed a lumbar discogram. This was performed by Dr. Scheper, and read by him as 'indeterminate'. (Ex. 14, pp. 173-174).

14. Claimant returned to Action Potential physical therapy on October 3, 2018. The physical therapist noted Claimant's rehabilitation potential was fair. Claimant had attended eight PT sessions. (Ex. C). The independent physical therapist did not assess Claimant's functional ability.

15. By October 6, 2017, Dr. Sparr placed a 10-pound lifting restriction on Claimant, but those restrictions were not being followed. (Ex. 14, pp. 167-168). Thereafter Dr. Sparr was assured that the Employer would follow the restrictions. Additional medial branch blocks were scheduled as a "last option." (Ex. 161-162).

16. The medial branch blocks were performed by Dr. Scheper on October 27, 2017. (Ex. 14, pp. 158-159). Claimant had excellent results, with pain reduction from a 7/10 pain level to a 2/10 for 60 minutes. He also had 5/10 until eight hours elapsed, at which time it increased to its previous level. Dr. Sparr thought this was an "excellent response to a medial branch block." (Ex. 14, p. 155). He thereafter recommended a bilateral lumbar radiofrequency neurotomy at L3, L4 and L5 to denervate the L4/L5 and L5/S1 facet joints. (Ex. 14, pp. 155-156).

17. The bilateral neurotomies were performed by Dr. Scheper on November 16, 2017 and November 26, 2017. (Ex. 14, pp. 152-153, 149-150).

18. Initially, it appeared that Claimant responded well to the neurotomies. Dr. Sparr thought it appropriate for the Claimant to try to increase his workload to full duties as of December 14, 2017. (Ex. 14, pp. 145-146). Dr. Sparr also wanted to maintain his medications, but to wean Claimant off narcotics initially. *Id*.

19. Upon a return to full duties, the Claimant had a flare up of his pain. He increased his pain medications, according to the evaluation of February 13, 2018. (Ex. 14, pp. 137-139). He was placed at MMI on March 20, 2018. (Ex. 4, pp. 17-18).

20. The pain diagrams of Claimant all show that he is complaining of pain at the beltline and across, and radiates more into the left than right thigh with pain greater on the left with consistent pain levels of 8/10 before MMI.

21. Claimant had another flare up, and was seen for maintenance treatment on June 1, 2018. Dr. Sparr reported that Claimant had a significant flare-up in the central lumbar pain and that the pain is at the beltline and the lumbar pain left somewhat greater than the right. Dr. Sparr recommended additional bilateral neurotomies similar to the one performed on November 16, 2017. These were performed by Dr. Sheper on June 19, 2018 and July 6, 2018.

22. Dr. Sparr permanently restricted the Claimant's lifting on June 28, 2018 to occasional shoveling and light materials of 10-15 pounds due to his lumbar facet disc pain. His lifting was limited to 50 pounds "occasionally" and "constantly" to 10 pounds. (Ex. 14, p. 122).

23. Claimant still had ongoing central lumbar pain, which Dr. Sparr continued to diagnose as lumbar discogenic pain and lumbar facet issues. Claimant had no relief from the additional neurotomies. He had no new trauma, but the he evidently was not

aware of the restrictions which had been placed on him by Dr. Sparr on June 28. (Ex. 14, p. 116).

24. Dr. Sparr suggested an additional MRI to see if there was any new disc herniation. Dr. Sparr noted that all conservative treatment modalities had been tried. Surgery was not an option, and "there is not a great deal more that can be done other than make certain that the patient follows his work restrictions and to see how he responds to the medication changes." (Ex. 14, p. 117).

25. As of August 30, 2018, Dr. Sparr had reviewed the new MRI results. He notes at the L5-S1 level that there was some progression of the right foraminal stenosis, and the facet arthropathy appeared unchanged. At L4-L5, there was chronic facet arthropathy and the same at L3-L4. There was an attempt at medication changes without success. Given the ongoing nature of Claimant's complaints, Dr. Sparr concluded that the Claimant was "an ideal candidate for a lumbar stimulator trial."

26. Dr. Sparr referred Claimant to Dr. Barolat for the trial of the stimulator as medical maintenance. This was approved by Respondents. Thereafter Dr. Sparr saw Claimant on January 31, 2019 and March 22, 2019. Dr. Sparr talked with Dr. Barolat regarding the trial, and spoke with the Clamant regarding his response to the trial. Based upon those conversations and the examinations, Dr. Sparr was of the opinion that Claimant would be an excellent candidate for the permanent stimulator implant. During the trial, the Claimant stated he had excellent relief, which was confirmed by Dr. Barolat.

27. After the stimulator was removed, Claimant had increased pain. By March 22, 2019, he was having increased central lumbar pain, right greater than left-sided with radiation down into the posterior and lateral thighs to the lateral legs bilaterally and was having extreme difficulty sleeping. Dr. Sparr's impression was worsening lumbar pain. He noted: "I'm concerned of his report of frequent shifting and popping within the lumbar spine during relatively normal activities….Certainly he had an exceptional response to the trial. He is an excellent candidate for such…." (Ex. 14, p. 102).

28. A Rule 16 record review evaluation was performed Dr. Allison Fall. She was also deposed on July 17, 2019. Dr. Fall testified as an expert in physical medicine and rehabilitation and is Level II certified by the Director of the Division of Workers' Compensation.

29. Dr. Fall testified that she is generally familiar with the technologies involved with the implant of a peripheral nerve stimulator, as they discussed in the Medical Treatment Guidelines. She testified that the difference between a spinal cord stimulator and a peripheral nerve stimulator is "where they are providing the stimulation."

30. Dr. Fall testified that a peripheral nerve stimulator implant was to only be used when there is a clear nerve injury. She felt that there was no cluneal nerve injury.

In Claimant's situation, he has chronic pain that covers a wide area. She reasoned that, since there has been no diagnosis of a peripheral nerve injury and since there has been no objective medical evidence that the majority of the Claimant's pain is in a nerve distribution, implant of a peripheral nerve stimulator is inappropriate.

31. Dr. Fall stated that the trial of the peripheral nerve stimulator was not performed in accordance with Rule 17 (9) of the Medical Treatment Guidelines since any functional gains during the trial were not substantiated by an independent physical therapist or occupational therapist along with the primary treating physician before discontinuation of the trial. Dr. Fall did not recall documentation of functional gain according to the Visual Analogue Scale. She opined that Dr. Barolat did not follow the Guidelines requiring an independent physical therapist or occupational therapist evaluate the Claimant during the trial.

32. Dr. Fall does not believe that any of the pain generators that the Claimant has would be addressed by a peripheral nerve stimulator, as the Claimant does not have radiculopathy. Claimant has a lot of diffuse pain for which a peripheral nerve stimulator would not be indicated.

33. After reviewing Dr. Goldman's report and his recommendations for ongoing treatment, Dr. Fall testified that those modalities are designed to alleviate pain symptoms without the risks inherent in a stimulator implant procedure. As far as the noted improvement during the trial as indicated by the Claimant and Dr. Barolat, Dr. Fall was of the opinion that such could have been a placebo effect.

34. Dr. Fall's conclusion was that, while she could not testify what the Claimant's pain generator was, since she did not believe that there had been any objective evidence identified as to the pain generator, she did not think that a peripheral nerve stimulator was appropriate. In fact, she concluded if there were complications, his function could decline. (Ex. D).

35. Dr. Giancarlo Barolat testified as a board certified expert in the field of neurosurgery, with a sub-specialty since 2005 of neurostimulation surgery, both with spinal cord stimulators and peripheral nerve stimulators. He testified that since he moved his practice to Colorado in 2005 that he has implanted nearly 2000 spinal cord stimulators and "hundreds" of peripheral nerve stimulators. Although not Level II certified, he has reviewed and is generally familiar with the Medical Treatment Guidelines and specifically Rule 17, Ex. 9 for the treatment of chronic pain patients. In his estimation, he has published approximately 80 articles and book chapters on spinal cord and peripheral nerve stimulation with five or six of those articles dealing with peripheral nerve stimulators.

36. Dr. Barolat testified that in the Claimant's situation there were two options when he first saw him on November 15, 2018, to wit: a spinal cord stimulator or a peripheral nerve stimulator. Dr. Barolat explained that, in Claimant's case, since he had mid and upper lumbar pain, it is easier to control the pain with a peripheral nerve

stimulator, rather than a spinal cord stimulator. Dr. Barolat testified: "my experience is that when people have pain in the mid to upper lumbar area, it's very difficult to control their pain with a spinal cord stimulator. It's -- it's much easier to control the pain with a peripheral nerve stimulator, and -- and so -- and I developed this over decades of doing these procedures with my experience." (Hearing Tr. pp. 26-27). When asked the difference between the two stimulator devices, Dr. Barolat stated that "a spinal cord stimulator, the electrode -- or electrodes are placed in the spine and the peripheral nerve stimulator, the electrodes are placed in the back under the skin on the nerves that go to the back." (Hearing Transcript. p. 26).

37. Dr. Barolat indicated that he had reviewed the report of Dr. Carbaugh, the clinical psychologist that the Claimant saw before the trial simulator. Based upon that, his review of the medical records sent to him by Dr. Sparr, and the physical examination, he thought that the Claimant was an appropriate candidate for the trial of the stimulator.

38. However, Dr. Barolat testified he never performed an epidural block or any other type of block which would have identified the source of the Claimant's pain. Dr. Barolat admitted he did not refer the Claimant to an independent occupational therapist or physical therapist to do a baseline physical examination as otherwise required by the Medical Treatment Guidelines.

39. Nonetheless, authorization was requested for the trial, which was nonetheless, in turn, approved by Respondent. The trial stimulator was placed on December 11, 2018. According to Claimant's reports from this trail, Claimant obtained excellent relief which lasted two and one half weeks, and he had an 80 to 90% improvement in his pain symptoms.

40. Dr. Barolat noted that in his opinion, there was not a placebo effect with the Claimant. He stated that usually if there is a placebo effect after 10 days it will usually go away. With Claimant's trial lasting as long as it did, Dr. Barolat opined that the improvement that the Claimant demonstrated was real. He spoke with other family members about the improvement, and felt that the Claimant was an excellent candidate for a permanent peripheral nerve stimulator.

41. Dr. Barolat disagreed with Dr. Goldman and Dr. Fall about the benefits of peripheral nerve stimulation and indicated, in his experience in the hundreds that he has performed, that patients benefit from the treatment modality for a decade and longer. As to Dr. Goldman's plan regarding physical therapy, gym membership and biofeedback, Dr. Barolat noted his disagreement as to the efficacy of that plan.

> I disagree with that. I agree that some physical therapy and a membership to a gym could be beneficial to him, but his pain is too high for -- for that to help. So once we bring his pain down with the stimulator, then I think it would be beneficial for him to stay active and -- and stay fit,

but at the present condition he can't do that. He just cannot do that because the pain is overwhelming. (Hearing transcript, p. 40).

42. Dr. Barolat testified that his opinion regarding the benefit to the Claimant of the permanent stimulator implant would not change if a physical or occupational therapist saw the Claimant before and during the trial. Dr. Barolat felt he was qualified to evaluate the patient. Further, the patient and his family members reported increased activity, improved sleep, and change in attitude during the entirety of the trial.

43. Prior to this work injury, the Claimant never had a back injury. The Claimant testified about the care and treatment he had prior to the trial. During the trial he felt great, his pain went down form an 8 to 9 all the way down to a 1 to a 2, his mood was perfect and he was able to sleep. After the trial concluded his pain levels went back up to an 8 to 9, up through the present time.

44. On May 17, 2019, the Claimant presented to Dr. Sparr reporting a fall at home he believed to be a result of his industrial injury. The Claimant alleged a back spasm, which caused his leg to go numb and give out. He was taken to Penrose Main Emergency Room, but no x-rays were obtained. He was diagnosed with myofascial strain and released. (Ex. B). Dr. Sparr concluded the fall was unrelated to the industrial injury and recommended the Claimant seek care under his regular insurance. The Claimant still complains of left sided pain as a result of the 2019 fall at home. *Id*

45. Dr. L. Barton Goldman testified as an expert in physical medicine and rehabilitation. Dr. Goldman indicated that he had reviewed the medical reports, had met with and physically examined the Claimant, and is familiar with the Medical Treatment Guidelines. He stated that peripheral nerve stimulators are rarely used for low back pain. They are typically used for more peripheral nerve injuries such as in the extremities.

46. Dr. Goldman does not think that a stimulator will help the Claimant, and is of the opinion that the Claimant probably had a placebo effect. He opined that the trial by Dr. Barolat did not conform to Ex. 9 of Rule 17 of the Guidelines. Dr. Goldman was asked whether he thought that the Claimant had an intervening event before he saw Dr. Sparr on June 1, 2018. He stated that the question was whether it was a temporary exacerbation or significant aggravation, which is something that he did not explore.

47. Dr. Goldman found nerve stimulators are generally unhelpful to workers like the Claimant who work in a medium or heavy work category. Dr. Goldman testified the heavy vibratory exposure in trucks and equipment is "almost always disruptive to how the stimulator stays in place and functions over time." Over 30 years, Dr. Goldman stated he had never seen or could imagine a peripheral nerve stimulator being successful under the Claimant's circumstances.

48. Dr. Goldman concluded a peripheral nerve stimulator is not reasonable necessary to maintain MMI as it has more risk than not "to worsen Mr. Kohne's overall functional and emotional health."

49. Dr. Goldman further testified that the type of peripheral nerve stimulation that Dr. Barolat desires to perform is not contained in the Guidelines. The stimulation that Dr. Barolat desires to do is to mask the multilevel pain that the Claimant has in his low back, and is not for neuropathic pain into Claimant's lower extremities. As such, it is not technically covered in the Guidelines in either Rule 17, Ex. 1 or Rule 17, Ex. 9.

50. In his written report, Dr. Goldman concluded that 90-95 percent of patients had a placebo effect with nerve stimulators in his experience. Furthermore, he found that permanent nerve stimulators were only meaningful for one to two years.

51. However, Dr. Goldman indicated that this was a two edged coin. For that reason, Dr. Goldman is of the opinion that the stimulator implant is "essentially investigational and experimental." Dr. Goldman noted that, in his practice if as a last resort he thinks that neurostimulation is needed for a patient, he sends the patient to Dr. Barolat, as he is "technically the best."

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

1. The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. Section 8-40-101, *et seq.*, is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. Section 8-40-102(1). A claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. Section 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. Section 8-43-201.

2. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the

evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. Section 8-43-201.

Post MMI Medical Care, Generally

4. Every employer shall provide medical care as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability and period of vocational rehabilitation, to cure and relieve from the effects of the injury. C.R.S. Section 8-49-101(1)(a). An injured worker can reach maximum medical improvement from an injury and yet require periodic medical care to prevent further deterioration in his or her physical condition. *Grover v. Indus. Com. of Colo.*, 759 P.2d 705, 710 (Colo. 1988).

5. An ALJ may "order the Employer to pay the Claimant's medical expenses for any future treatment reasonably necessary to relieve the claimant from the effects of the industrial injury." *Id*. Before an order for future medical benefits may be entered there must be substantial evidence in the record to support a determination that future medical treatment will be reasonably necessary to relieve the injured worker from the effects of the work-related injury or occupational disease. *Id* at 711. The employer may contest any future claims for medical treatment on the basis that such treatment is unrelated to the industrial injury. *Id*.

Unsuccessful Post MMI Medical Care to Date

6. Since Claimant's own ATP, Dr. Sparr, placed Claimant at MMI of March 20, 2018, the Respondent has been paying for the continuing medical maintenance care and treatment for the Claimant's ongoing low back complaints. It is of no small significance that Respondent, based upon the medical reports of Dr. Barolat and Dr. Sparr, *authorized the trial* of the peripheral nerve stimulator, which was placed in December of 2018. At the time the trial stimulator was approved, it was apparently of little concern to Respondents that Dr. Barolat was not Level II accredited. It was also presumably known that his reputation for success with these permanent devices preceded him, which begs another question: If Respondent's feel so strongly that nerve stimulators (be they spinal or peripheral) are highly prone to a placebo effect, why authorize the trial?

7. The medical records and diagnostic studies performed show that Claimant has been complaining of 8/10 lumbar back pain since the injury. None of the medical treatment-other than the trial of the stimulator-has been successful in alleviating his pain issues. The diagnostic testing confirms a pathological basis of his complaints of multi-level back pain.

Respondents' Expert Opinions

8. Dr. Fall has suggested that the peripheral nerve stimulator is not reasonable and necessary, since the results of the trial are not in conformity with Rule 17 of the Medical Treatment Guidelines. Dr. Goldman has testified that in his opinion, while not specifically within the parameters of the Guidelines, that the peripheral nerve stimulator implant proposal by Dr. Barolat is experimental and not reasonable and necessary. Dr. Goldman opines that there are other less invasive treatment modalities which may afford the Claimant relief and avoid the necessity of surgery. Dr. Goldman further testified that, when he has a patient that he believes is in need of a stimulator, he refers them to Dr. Barolat for evaluation and potential treatment, since he is "technically the best."

9. Respondent, based upon the opinions of Dr. Fall and Dr. Goldman, takes the position that the proposed medical treatment will not improve the Claimant's functioning, is invasive, and may cause, according to Dr. Goldman, the inability for the Claimant to continue in his position with the Employer. Dr. Goldman opines that other less invasive methods should be tried first. If those do not work, then peripheral nerve stimulation may indeed become an alternative. Such an opinion seems logical, sequential, and appealing on its face. The downside, however, is that Claimant is likely to endure chronic, near debilitating pain in the meantime, eventually winding up in the same position after exhausting every option conceivable. The ALJ finds that the failed conservative measures taken to date through his ATP are sufficient to conclude that the next step was warranted, i.e., the trial stimulator.

Dr. Barolat's Rationale for the Peripheral Nerve Stimulator

10. Based upon the evidence before the ALJ, substantial evidence supports a conclusion that the peripheral nerve stimulator implant surgery as requested by Dr. Barolat is reasonable and necessary medical treatment for this Claimant. The Claimant has lived with his condition relating to this injury since December of 2016. He has had a great number conservative treatment modalities for his low back complaints. Surgery to fix the problem is not being suggested by any of his doctors, including the Respondent's experts.

11. The ALJ finds the Claimant's testimony regarding the relief that he obtained from the trial of the peripheral nerve stimulator credible. Further, Dr. Barolat testified, and his concurrent notes reflect, that the Claimant reported significant improvement with the trial of the peripheral nerve stimulator. Dr. Barolat has been performing surgeries

exclusively in the fields of nerve and spinal cord stimulation over the past twenty (20) years and has performed hundreds of peripheral nerve stimulator implants with a high percentage success rate. His field of expertise is neurosurgery. Respondent's experts' fields of interest are in physical medicine and rehabilitation. As such, one might reasonably expect that their opinions would be based more closely upon the application of the Guidelines, than would those of a neurosurgeon. In this instance, despite the sincerely held professional beliefs of Drs. Fall and Goldman, the ALJ finds the rationale of Dr. Barolat to be more persuasive in determining whether to move forward with implanting this device.

12. The ALJ recognizes the Respondent's reliance on Rule 17 of the Medical Treatment Guidelines of the Division of Workers' Compensation and the fact that Dr. Barolat is not Level II certified by the Director of the Division of Workers' Compensation. The ALJ finds that there is a relative dearth of evidence-based medicine to form any specific guidelines on peripheral nerve stimulators as proposed by Dr. Barolat. While the procedure outlined in the Guidelines for review by a physical or occupational therapist before and after the trial seems reasonable, Dr. Barolat opines otherwise. Examining the Claimant during the trial, and speaking with the Claimant's family provides sufficient evidence to conclude that the permanent implant of the peripheral nerve stimulator would relieve the Claimant from the effects of his injury and prevent deterioration of his condition-perhaps for a decade or more.

13. The ALJ finds that, as to peripheral nerve stimulation in this Claimant, the Guidelines are not clearly based upon evidence-based medicine. As to spinal cord stimulation, Rule 17 cites to articles written by Dr. Barolat. That plus the testimony of Dr. Goldman, that he refers patients to Dr. Barolat for spinal cord stimulation, adds to the weight that the ALJ gives to the opinion of Dr. Barolat.

Deviation from the Medical Treatment Guidelines

14. The Guidelines themselves indicate that they are not mandates, but are to be used as a helpful aid in determining appropriate treatment when dealing with work injury. As the Guidelines are formulated on evidence-based medicine and there is relative lack of evidence supporting the portion of the Guidelines on peripheral nerve stimulation, the ALJ finds the experience of Dr. Barolat to be sufficient to conclude that the permanent implant is reasonable and necessary.

15. The Division of Workers' Compensation Medical Treatment Guidelines Workers' Compensation Rules of Procedure (CRP), Rule 17, although fitted under a Rule are not rules but *Guidelines.* The Guidelines are limited to Workers' Compensation cases and therein may be considered as evidence of accepted standards of practice in workers' compensation cases.. *See Hall v. Indus. ClaimAppealsOffice,*74 P.3d 459 (Colo. App. 2003). The Guidelines may be considered as evidence of accepted standards in the evaluation of causation. *See Cahill v. Patty Jewett Golf Course,* W.C. No. 4-729-518 (Industrial Claim Appeals Office (ICAO), February 23, 2009).

16. When determining whether proposed treatment is reasonably necessary, an ALJ may consider the Guidelines, because they represent accepted standards of practice in workers' compensation cases. Evidence of compliance, or non-compliance, with the Guidelines, however, is not dispositive of the question of whether medical treatment is reasonably necessary. Rather, an ALJ may give evidence regarding compliance with the MTG such weight as the ALJ determines it is entitled to considering the totality of the evidence. The provisions of the Medical Treatment Guidelines are not *legally binding* in any way. *Eldi v. Montgomery Ward,* W.C. No.3-757-021 (ICAO, October 30, 1998). As found, the persuasive opinions of Dr. Sparr and Dr. Barolat firmly establish that a *deviation* from the Guidelines to implement Dr. Barolat's recommended permanent peripheral nerve stimulator implant is warranted.

ORDER

It is therefore Ordered that:

1. The Post-MMI permanent peripheral nerve stimulator as proposed by Dr. Barolat is reasonable and necessary. Respondents shall authorize and pay for said surgery, and all related aftercare.

2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 4, 2019

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

- Did Claimant prove a right total knee arthroplasty ("TKA") is reasonably necessary to cure and relieve the effects of her industrial injury?

FINDINGS OF FACT

1. Claimant worked for Employer as a server. At the time of her industrial accident, she had worked nine years for Employer, and a total of 19 years as a server. Employer's restaurant is very busy, and Claimant commonly worked 50-60 hours per week.

2. Claimant suffered admitted injuries to her right knee and low back on November 24, 2017, when she slipped and fell on a wet floor. Her left foot slipped out from under her, causing her weight to shift awkwardly to her right leg before she fell. Her right knee hyperextended and twisted when she slipped.

3. Claimant reported the incident to her manager but did not request immediate treatment because she assumed she "just pulled a muscle." Claimant finished her shift that evening.

4. The next day, Claimant opened the restaurant and worked the lunch shift. Her knee felt sore but she completed the shift.

5. During her shift the following Wednesday (November 29), Claimant's manager noticed something seemed amiss and asked if Claimant was okay. Claimant reiterated she thought she had "pulled a muscle" when she fell. She indicated the knee was becoming more painful as she worked. She finished her shift that day and went home.

6. On Friday, December 1, Claimant asked to see a doctor because she realized the problem with her knee was "more than just a pulled muscle." Employer referred Claimant to its designated provider, Concentra.

7. Claimant saw PA-C Kerri McKee at her initial Concentra appointment on December 1, 2017. Claimant reported pain in her low back and right knee. The knee pain was primarily in the back of the knee and radiated down the back of the leg. Ms. McKee noted tenderness in the popliteal fossa, but none over the anterior knee for the medial tibial plateau. Medial and lateral McMurray's tests were negative. Her low back was tender with palpable muscle spasm. An x-ray of the right knee was interpreted as normal, with no apparent joint effusion or degenerative changes. Ms. McKee diagnosed a right knee sprain and a low back strain. She gave Claimant a large hinged knee brace and referred her to physical therapy. Ms. McKee opined Claimant could try to work with the knee brace and they would re-evaluate her status the following Monday (December 4).

8. Claimant attended her initial physical therapy session on December 4, 2017. She reported ongoing pain and difficulty walking. The therapist noted a mildly antalgic gait. Examination of the right knee showedreduced range of motion and slight weakness with flexion and extension. McMurray and Thessaly's tests were positive, suggesting meniscal pathology. The therapist diagnosed a "right knee sprain with possible meniscal involvement."

9. Claimant had her follow-up Concentra appointment after the physical therapy session on December 4. This time she saw Dr. Mary Nolan. In describing her fall to Dr. Nolan, Claimant stated she did not land on the knee but was "fairly certain" she twisted the knee as she fell. She denied any injurious activities or events outside of work. Claimant's pain was unchanged since the prior appointment. Examination of the knee showed tenderness in the hamstrings, the popliteal fossa, and in the back of the knee. Dr. Nolan "deferred" meniscal tests and other special tests. Dr. Nolan restricted Claimant to no lifting over 15 pounds with periodic position changes to relieve discomfort.

10. At her December 8, 2017 Concentra appointment, Claimant stated her knee pain had improved enough that she no longer needed any medications. She rated her knee pain at 2/10, but said it "could be more at the end of the day." She "still" had popping in the knee, but no instability, catching, locking. She was not wearing her knee brace and was said to be tolerating work activity well.

11. At hearing, Claimant credibly explained she stopped wearing the knee brace because it was too big for her and "it kept falling down." She also disagreed with the indication she was working without difficulty. Although she had no formal restrictions on shift frequency or length, Claimant self-limited her work by taking shorter shifts and "releasing" some shifts to coworkers. Even during the shorter shifts, she noted increasing pain with standing and walking.

12. Claimant's testimony regarding her work tolerance is corroborated by the December 11, 2017 physical therapy report, which notes, "after working a 4 hour shifts she was very sore at the following shift that lasted another 5 hours. She states the pain behind her right knee is a constant dull ache until after prolonged work it feels like a sharp pain with each step and after prolonged sitting."

13. Subsequent Concentra and PT records in December reflect gradual improvement in her knee pain and tolerance for prolonged standing, walking and sitting.

14. Claimant was evaluated by Dr. Thomas Corson at Concentra on December 29, 2017. Claimant stated she was "feeling much better" and only had "mild aching pain" in the right knee after prolonged sitting or bending down. She had stopped PT because, "she feels back to baseline and has been working full duty." She was doing home exercises and "wants to close her case today." Dr. Corson released Claimant at MMI with no restrictions.

15. Claimant worked on New Year's Eve, "one of our busiest nights." Soon after that shift, her knee pain flared significantly.

16. Claimant returned to Dr. Corson on January 23, 2018. Dr. Corson's report states,

> Her case was closed at MMI on 12/29. She returned to work and was doing well for about a week. Around January 6, she started experiencing throbbing pain throughout the right knee with swelling. Pain is worse with weightbearing and progressively worsens the more she is on her feet . . . . She reports feeling intermittent painful clicking with ROM in the knee, but no locking. She's been taking Motrin and tramadol since the pain recurred, which takes the edge off. She's had to give up several of her waitressing shifts because she can't walk for more than an hour or two without significant worsening of pain to the point that it becomes unbearable. The pain continues to progressively worsen each day.

17. Respondents authorized Claimant to resume treatment, so Dr. Corson ordered an MRI and referred her back to physical therapy.

18. The MRI was completed on January 30, 2018. It showed a posterior medial meniscus root tear with meniscal extrusion, a partially intact/partially ruptured popliteal cyst (Baker's cyst), grade 3-4 chondral degeneration on the weightbearing surface of the medial femoral condyle, bone marrow edema, and osteophytic ridging.

19. After reviewing the MRI report, Dr. Corson referred Claimant for an orthopedic evaluation.

20. Claimant saw Dr. Failinger, an orthopedic surgeon, who administered a cortisone injection. The injection was not helpful.

21. On April 13, 2018, Claimant saw another orthopedic surgeon, Dr. Michael Hewitt, for a second opinion. Dr. Hewitt explained it is difficult to treat a meniscal root tear in the context of underlying arthritis. He stated, "arthroscopy does not significantly alter the natural history of arthritis in root tear and prognosis for arthroscopy is guarded. She understands the final option is knee replacement."

22. Claimant was evaluated by Dr. Hewitt's partner, Dr. Phillip Stull, on May 29, 2018. Dr. Stull opined, "she is a reasonable candidate for both an arthroscopy of the knee or joint replacement. I explained the differences in detail to her. I explained that with arthroscopy she is likely to have some persistent symptoms. After thoughtful consideration, she has decided to proceed with arthroscopy of the knee which I do think is reasonable. We will put a request in for authorization."

23. Dr. Henry Roth performed a Rule 16 record review on June 6, 2018. He opined Claimant's ongoing right knee symptoms were not related to the November 24, 2017 work accident. He opined the pathology shown on the MRI was long-standing and degenerative, and the work accident did not cause, aggravate, or accelerate the pre-existing degenerative changes in Claimant's right knee. Based on the symptoms and clinical findings documented in the early medical records, Dr. Roth concluded, "the posterior knee pain is fully explained by a pre-existing degenerative popliteal cyst, which

more likely than not, ruptured." He further opined, "the surgical recommendation now, whether arthroscopy or arthroplasty, is not specifically directed at any anatomic change that occurred on 11/24/18 [sic] but rather now the diffuse pain [from] . . . advanced arthrosis, a pre-existing condition." Dr. Roth opined arthroscopy was not reasonable because it would not effectively treat the underlying arthritis. He recommended Claimant try NSAIDs and strengthening. If symptoms persisted, she should pursue a TKA under her personal health insurance.

24. Respondents denied the surgery based on Dr. Roth's report.

25. Claimant followed up with Dr. Corson on June 27, 2018. He noted, "surgery has been denied by the insurer. She is no better since her last visit and is still unable to return to her waitressing job due to her SXs and knee pain." Despite stating Claimant was "not at end of healing," Dr. Corson put Claimant at MMI and released her from care. The ALJ infers Dr. Corson's declaration of MMI was based on administrative issues (denial of surgery) rather than a medical determination.

26. Claimant saw Dr. Braden Mayer at the Steadman Hawkins Clinic on July 19, 2019 for another orthopedic opinion. Dr. Mayer noted Claimant "had no [knee] pain prior to her injury in November 2017 at work." He advised Claimant an arthroscopy would probably not give any long-lasting relief and may actually worsen the arthritis-related pain. He opined Claimant was a candidate for a TKA.

27. Claimant attended a DIME with Dr. William Watson on October 30, 2018. Dr. Watson noted Dr. Roth's analysis focused on degenerative arthritis and generic medical meniscal tears, whereas Claimant has a posterior medial meniscus *root* tear. He explained, "this is a different entity than a routine posterior horn tear of the meniscus which does not affect strength of the meniscus as a root tear does." He further explained a posterior root tear destroys the loadbearing ability of the meniscus and "results in a mechanical condition much like a total meniscectomy." This, in turn, leads to accelerated joint degeneration. Dr. Watson concluded,

> I believe in this case, the examinee indeed had pre-existing osteoarthritis but was well compensated because of the continuity of the medial meniscus. When she had her injury, she had immediate pain in the posterior aspect of the knee and following this, she had a clicking sensation. These are classic symptoms of the posterior root tear of the medial meniscus. She was able to function initially but as time progressed, I believe she had progressive extrusion of the medial meniscus out of the joint and therefore, had increasing difficulty. In other words, her previously compensated osteoarthritis became uncompensated because of the root tear . . . and subsequent extrusion. . . .
>
> I believe the proximate cause of her increasing symptoms from her pre-existing osteoarthritis was caused from the posterior root tear of the meniscus. Nothing else can explain why she could function for over 19 years as a waitress and then after one episode of traumatic injury to her

> knee, developed increasing symptoms of her osteoarthritis. Her MRI which showed the arthritis and extrusion of meniscus secondary to root tear was done over 2 months from the time of the injury. During this time she had progressive symptoms of medial joint arthritis secondary to loss of hoop strength from the medial meniscus root tear.
>
> I agree with the orthopedic surgeons who feel that a total joint arthroplasty is the best approach. There are mechanisms to repair the posterior root, however, I feel with the amount of extrusion she has had and the degenerative changes that the best approach would be to proceed with a total joint arthroplasty. I believe the proximate cause of her needing the total joint arthroplasty was her work-related injury. It should be noted this is a common injury to trivial trauma in a female of her age.

28. Dr. Watson opined Claimant was not at MMI pending the TKA.

29. Claimant returned to Dr. Stull on January 25, 2019. His report states, "the patient has thought more about management of her knee condition. We had discussed arthroscopy as an interim step, or joint replacement and at this time she is leaning more towards joint replacement because her knee is quite disabling to her." Dr. Stull opined, "joint replacement is certainly reasonable and most likely to provide definitive long-term symptom relief. She would like to proceed with that."

30. Respondents denied the TKA as unrelated to the work accident based on Dr. Roth's previous Rule 16 report.

31. On February 14, 2019, Respondents filed a GAL accepting Dr. Watson's MMI determination and reinstating TTD. Respondents maintained their denial of the TKA.

32. On March 1, 2019, Dr. Corson offered his opinion regarding the TKA, stating,

> [Claimant] NEEDS knee replacement surgery as a result of her work-related accident which I believe is a direct cause for her current physical injuries. I believe the surgery IS medically necessary in order for her to regain her preinjury activity status. This was also corroborated by Dr. Watson . . . . The longer she goes without the surgery, her chances of incurring more extensive damage and post-surgical disability greatly increase. (Capitals in original).

33. Claimant saw Dr. John Schwappach, an orthopedic surgeon, for an IME at Respondents' request on June 23, 2019. Dr. Schwappach provided a written report and testified via deposition for Respondents. He reached essentially the same conclusions as Dr. Roth regarding causation. He believed Dr. Hewitt's April 13, 2018 report was the first reference to twisting the knee when she fell, and "for her to now all of a sudden remember she had a twisting injury isn't very plausible." He apparently overlooked Dr. Nolan's December 4, 2017 report wherein Claimant said she was "fairly certain" she twisted her knee when she fell. Dr. Schwappach opined Claimant hyperextended her right knee when

she slipped and ruptured a pre-existing popliteal cyst in the back of her knee. He opined popliteal cysts generally develop because of meniscal tears, so the meniscal tear probably predated the accident. Dr. Schwappach opined Claimant's knee pain was explained by the partially ruptured degenerative popliteal cyst, secondary to a pre-existing meniscal injury. He saw no evidence in the early medical records that Claimant sustained a meniscal root injury when she slipped at work on November 24, 2017. It does not appear he reviewed the physical therapy records because he did not mention the therapist's exam findings suggesting meniscal pathology on December 4, 2017. Nor did he discuss the knee "clicking" Claimant experienced shortly after her accident. He opined the meniscal pathology shown on MRI was consistent with a slow, degenerative pattern, rather than an acute event. He emphasized Claimant had improved rapidly after the accident and returned to full duty, consistent with the partially ruptured popliteal cyst. Ultimately, Dr. Schwappach concluded the November 2017 accident did not cause, aggravate, or accelerate Claimant's pre-existing degenerative arthritis and cause a need for further treatment, including a TKA. Dr. Schwappach agrees a TKA is reasonable but does not believe it is related to Claimant's work injury.

34. Claimant's testimony at hearing was credible and persuasive.

35. Dr. Watson's opinions regarding causation are credible and more persuasive than contrary opinions in the record.

36. Claimant proved by a preponderance of the evidence a right TKA is reasonably necessary and causally related to her November 24, 2017 work accident.

CONCLUSIONS OF LAW

The respondents must provide medical treatment reasonably needed to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a). But the mere fact that a claimant suffers a compensable injury does not mean all requested treatment is reasonably necessary or caused by the industrial injury. A claimant is only entitled to treatment that flows proximately and naturally from the injury, and must prove the requisite causal connection by a preponderance of the evidence. *See Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The claimant must also prove the requested treatment is reasonably necessary, if disputed. *Id*.

The existence of a pre-existing condition does not preclude a claim for medical benefits if an industrial injury aggravated, accelerated, or combined with the pre-existing condition to produce the need for medical treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). The ultimate question is whether the need for treatment was the proximate result of an industrial aggravation or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

As found, Claimant proved the proposed TKA is reasonably needed and causally related to her work accident. There is really no significant dispute regarding reasonable

necessity, because Respondents' experts agree arthroscopy is unlikely to help and a TKA is reasonable after failure of conservative treatment. The more challenging question here is causation. No doubt, Claimant has significant degenerative changes in her knee that predated the accident. But her knee was asymptomatic and nondisabling despite working long hours for years in a job that required constant standing and walking. The work accident provides a plausible injury mechanism, with hyperextension and twisting of the knee. The ALJ finds Dr. Watson's analysis and conclusions persuasive on the issue of causation. As Dr. Watson explained, from a biomechanical perspective, a posterior root tear is nearly equivalent to a total meniscectomy in terms of the increased load transmitted to the knee joint surfaces. The loss of mechanical integrity and subsequent extrusion of the medial meniscus would reasonably be expected to aggravate Claimant's underlying but previously asymptomatic arthritis. The ALJ also credits Claimant's credible testimony she was not doing as well in late December 2017 as it might appear from Dr. Corson's December 29, 2017 report. Claimant credibly explained her knee felt significantly better while she was limiting her shits, but the pain quickly returned when she resumed regular duties. Her testimony is corroborated by Dr. Corson's January 23, 2018 report noting she did well for approximately a week her before significant symptoms recurred. And Dr. Corson agrees Claimant's current condition is a "directly" result of her work accident.

ORDER

It is therefore ordered that:

1. Insurer shall cover the right total knee arthroplasty surgery recommended by Dr. Stull.

2. All issues not decided herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 6, 2019

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-061-774-003

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that he suffered an injury arising out of and in the course and scope of his employment on October 27, 2017.

II. Whether Claimant established, by a preponderance of the evidence, that he is entitled to reasonable, necessary, and related medical treatment.

III. Whether the medical treatment provided Dr. Yee at Advanced Orthopedics & Sports Medicine between August 13, 2018 and September 17, 2018 was reasonable, necessary, and related to Claimant's right shoulder injury.

IV. Whether Claimant established, by a preponderance of the evidence, that the right to select the authorized treating physician passed to Claimant, and that he selected Dr. Yee.

V. Whether Claimant is entitled to temporary total disability benefits.

VI. Claimant's average weekly wage ("AWW").

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

Claimant's Pre-Existing Medical and Employment History

1. Claimant testified that he dislocated his right shoulder in middle school (*Hearing Transcript March 5, 2019, hereafter referred to as "H.T." p.42, ll.18-19*).

2. While the medical records show Claimant broke his collarbone in 2007, Claimant did not recall such incident at hearing (*H.T. p.42, ll.11-16*).

3. On December 2, 2011, Claimant treated with Dr. Yee and reported right shoulder pain due to an injury occurring during football practice (*R. Ex. p.189*). Claimant reported a prior clavicle fracture four years prior (*Id*.). After performing a physical examination, Dr. Yee diagnosed Claimant as suffering from a Type II SLAP tear and AC pain-ostolysis. Dr. Yee ordered an MRI, which Claimant underwent on December 19, 2011, revealing findings suggesting post-traumatic changes\possible separation of the AC joint with no evidence of rotator cuff tendon tear or displaced SLAP lesion (*R. Ex. p.156*).

4. On January 5, 2012, Claimant underwent an AC joint reconstruction with Dr. Yee (*R. Ex. p.151*).

5. On August 10, 2012, Claimant returned to Dr. Yee and reported right shoulder pain due to an injury occurring in football practice where he "heard a pop" (*R. Ex. p.178*). Dr. Yee ordered an MRI (*Id*.).

6. On August 15, 2012, Claimant returned to Dr. Yee to review his MRI (*R. Ex. p.176*). Dr. Yee diagnosed Claimant with a right shoulder SLAP re-tear (*Id*.).

7. On October 17, 2012, approximately two months after being diagnosed with a SLAP re-tear by Dr. Yee, Claimant returned to Dr. Yee complaining of additional right shoulder pain for the past two weeks, stating "he dislocated his shoulder two weeks ago and felt a pop" (*R. Ex. p.172*).

8. On August 27, 2013, Claimant returned to Dr. Yee with reports of right shoulder pain due to wrecking his bike and falling a couple of months prior (*R. Ex. p.171*). Based on Claimant's increasing shoulder pain, which had been present for about two months since wrecking his bike, Dr. Yee diagnosed Claimant as suffering from an additional SLAP re-tear (*Id*.).

9. Claimant testified he was involved in a motor vehicle accident on May 20, 2016, at which time his car flipped about six times (*H.T. p.48, l.14*).

10. At hearing, Claimant testified that he injured his hand, which led to the need for surgery, at his brother's graduation party (*HT p.35, ll.10-16*). Claimant also testified that even though he was involved in a motor vehicle accident in May 2016, and the car rolled about six times, that:

> [N]othing came of it because I wasn't injured or anything like that. And I never had to, like, seek treatment for it, because there was nothing wrong with me, I walked away from it. Not a scratch on me" (*H.T. p.34, ll.11-15*).

11. On the other hand, medical records from Kingman Regional Medical Center, Dr. Heyman, Dr. Milford and Dr. Hallier, as well as Claimant's statements to Mr. Bounds and Mr. Jarrett, contradict Claimant's testimony (R. Ex. D; M; N; H.T. p.100, ll.14-17; H.T. p.14, ll.1-23). According to a triage note from Kingman Regional Medical Center dated May 30, 2016, Claimant reported hand and wrist pain, "was in a motor vehicle accident one week ago where he injured it" (R. Ex. p.132).

12. In addition, on June 3, 2016, Claimant underwent surgery to his hand with Dr. Hallier at the Kingman Regional Medical Center (*R. Ex. p.129*). According to the surgeon, Claimant "was involved in a motor vehicle accident on May 20, 2016 where his right hand apparently impacted in the dashboard…the patient was complaining of persistent right hand pain…when he came in to see orthopedics after referral for this hand injury, he was noted to have complete instability of the fourth and fifth carpometacarpal joint of his right hand." Claimant underwent an open reduction and internal plate fixation of the right fourth and fifth carpometacarpal joint dislocations (*H.T. p.129*).

13. On June 7, 2016, Claimant returned to Kingman Regional Medical Center and reported that about 2 weeks prior, he was involved in a motor vehicle accident and stated that he noticed that the tendons on his fourth and fifth fingers on the right hand had popped up and out *(R. Ex. p.127*). Claimant reported that he pushed them back down and did receive medical attention (*Id*.). He reported that after such incident, about one week later, while playing with his brother, the two tendons again popped up and out (*Id*.).

14. On September 5, 2016, Claimant treated at Kingman Regional Medical Center for injuries sustained to his right upper extremity (*R. Ex. p.123*). Claimant reported that he was rock climbing and fell 10 feet and struck his right upper extremity (*Id*.).

15. Claimant had worked off and on for Employer from 2015 to 2017 (*H.T. p.117, ll.6-8*). In January 2017, Employer re-hired Claimant to start on a jobsite in Colorado (*H.T. p.12, l.2*). Claimant testified that he was still having some physical problems at that time and the Employer offered and he accepted a modified duty position. (*H.T. p.72, l.9; p.74, ll.8-14*). Claimant could not recall why he left his position in April 2017 (*H.T. p.73, l.3*).

16. Mr. Richard Bounds, superintendent for MDA Construction, testified that he had been superintendent since 2011 and that he became familiar with Claimant in about 2012, 2013 (*H.T. p.99, ll.18-24*). Before the alleged October 27, 2017 injury, Mr. Bounds testified that he was on a job site with Claimant, at which time Claimant was working light duty, and he discussed Claimant's restrictions with him (*H.T. p.100, ll.12-15*). In this context, when asked what had happened, Claimant responded to Mr. Bounds that he had injured his hand, arm and shoulder in a car accident *(H.T. p.100, ll.14-17*). Mr. Bounds explained that Employer was accommodating Claimant's restrictions then and that, "the company tries to help as best they can" (*H.T. p.101, ll.7-12*). Mr. Bounds testified that while working light duty, Claimant became unable to work due to his injuries and as such, he was asked to go recuperate *(H.T. p.101, ll.18-20*). Mr. Bounds explained that at the time, Claimant was living in an apartment owned by the employer and that due to his inability to work, he would need to provide his own housing and that, "after that…until he was healed and recovered, he could come back to work" (*H.T. p.101, ll.21-25*). Mr. Bounds explained that there was a gap where Claimant could not work because of his injuries in the motor vehicle accident from approximately April 2017 to September 2017 (*H.T. p.102, ll.2-10*).

17. On February 28, 2017, Claimant treated with Dr. Heyman and reported that he sustained an injury to his hand in May from a "car roll, then fractured it again two months later" (*R. Ex. p.111*). When questioned when the injury occurred, Claimant responded with, "a car accident and a subsequent injury while messing around hitting a concrete floor" (*Id.*). Because of painful hardware, Dr. Heyman noted that an attempt to remove the hardware may be performed but it may not be possible to get all of the hardware out (*R. Ex. p.111-115*).

18. On March 22, 2017, Claimant sought treatment at Parker Adventist Emergency Room for total body pain (*R. Ex. L, p.97*). Claimant reported being hit by a beam in the back three months prior, in December of 2016 (*Id*.).

19. On September 9, 2017, approximately 1 ½ months before his alleged work injury, Claimant sought treatment at Denver Health for various complaints and was diagnosed with ***right arm weakness*** (emphasis added) (*R. Ex. p.70*). Claimant denied any triggering event (*R. Ex. p.68.5*). However, at hearing, Claimant disagreed with this history as he attributed such complaints to a beam falling on him (*H.T. p.22-25; p.61, l.3*).

20. On October 20, 2017, Claimant underwent an MRI to his C-spine (*H.T. p.61, l.17*).

21. At hearing, Claimant testified that, "I had no prior shoulder problems before October 27, nothing at all. I was 100 percent…no problems at all." (*H.T. p.233 ll.2-5*) Specifically, Claimant disputed injuring his right shoulder again in 2012. (*H.T. 2 p.62, ll.12-13*). However, Dr. Yee documents Claimant's presentation of right shoulder pain, and a pop, which occurred during football practice. Due to this injury, Dr. Yee ordered an MRI and diagnosed Claimant as suffering from a right shoulder SLAP re-tear (*R. Ex p.176*). With regard to the August 27, 2013 injury at which time Claimant wrecked his bike, he testified he sustained "road rash, but they didn't work on anything with the SLAP tears." Yet, Dr. Yee's August 27, 2013 note specifically documents right shoulder pain for which he diagnosed another SLAP-re-tear (*R. Ex. p.171*). Claimant denied any injury at all while rock climbing (*H.T. 2 p.60, ll.10-18*). On the other hand, hospital records from Kingman Regional Medical Center document a reported 10-foot fall from a cliff "and hurt right arm" (*R. Ex. N, p.22*). After being provided with medical records documenting injuries, including dislocations and ongoing treatment to the right shoulder, Claimant conceded that he did treat for right shoulder injuries and pain after 2012 up through October 27, 2017.

Alleged October 27, 2017 Work Injury

21. Claimant asserts that he sustained a compensable work-related injury to his right shoulder on October 27, 2017. Specifically, Claimant testified that while lifting a shoring post, he felt a pop in his shoulder and his arm gave out and he fell back "on my shoulder. And at that point, that's when I felt—it knocked me down to my knees and I got out from underneath it…" (*H.T. p.19, ll.10-15*).

22. When questioned through discovery about the body parts Claimant alleged to be injured as a result of the October 2017 injury, he reported, "the right side of his head, all the way down to his right lower extremity," but at hearing limited the alleged injury to his right shoulder (*HT p.42, ll.1-8*).

23. Claimant testified at hearing that Respondents designated treatment and Claimant ultimately agreed to seek treatment at AFC Urgent Care (*HT p.20, ll.15-16*).

24. Mr. Bounds testified that on the morning of the alleged injury, Claimant came to see him and requested the day off, indicating, "my baby's momma is coming into town…can I have off, I need to get off" (*H.T. p.102, ll.20-25*). Mr. Bounds explained that he told Claimant no, due to the company being shorthanded, they needed him to work (*H.T. p.103, l.1*). Mr. Bounds testified that Claimant was very adamant about needing to get off of work to go meet his baby's momma *(H.T. p.103, ll.2-3*). Sometime thereafter, before lunch, Claimant reported to Mr. Bounds that he had

hurt his shoulder carrying a shoring post (*H.T. p.103, ll.5-9*). Claimant then said to Mr. Bounds that he just wanted to go home and rest his shoulder, to which Mr. Bounds said that if he was injured on the job, he would need to go to the clinic (*H.T. p.103, ll.11-16*). Claimant replied, "no, I don't want to go to the clinic, just—just—**just an old injury**" (emphasis added) (*H.T. p.103, ll.18-19*). Mr. Bounds explained that he asked Claimant to wait for him in the connex, and Claimant proceeded down the ladder using both hands (*H.T. p.104, ll.1-4*). Mr. Bounds explained that Claimant could have taken the stairs, but rather, climbed down the ladder using both hands (*H.T. p.104, l.6*). Mr. Bounds testified that he arranged for a ride for Claimant to obtain treatment at the AFC Clinic, where he failed a drug test (*H.T. p.104, ll.14-17; p.105, l.8*). Mr. Bounds testified that he terminated Claimant over the failing of the drug test, which was supported by the Respondent Employer's drug policy at the time, which is referenced under Respondents' Exhibit T, p.192 (*H.T. p.105, ll.18-20*). Mr. Bounds did testify that consideration is given to other factors when deciding whether to terminate an individual, including work ethic, prior terminations, consistency of coming to work, reliability, etc. (*H.T. p.107, ll.15-24*). Mr. Bounds testified that had Claimant not been terminated for testing positive for marijuana and he had in fact sustained some type of work-related or nonwork-related injury, Employer would have offered him modified duty (*H.T. p.109, l.10*). He further testified that this is supported by the fact they had done so in the past (*H.T. p.108, ll.11-12*).

25. While Claimant testified that he requested an ambulance at the time of the alleged work-related injury, Mr. Bounds testified that at no time did Claimant request an ambulance, but rather he did not even want to go to the doctor (*H.T. 2 p.72, ll.1-9*).

26. Brian Jarrett, Safety Director for Employer at the time of the alleged injury, testified that Claimant worked for a total of three different timeframes for Employer (*H.T. 2 p.13, ll.1-9*). Mr. Jarrett testified that he spoke with Claimant on the date of the alleged injury, October 27, 2017, due to the reporting of an alleged injury and as part of his investigation into the claim (*H.T. 2 p.13, ll.16-24*). Mr. Jarrett testified that Claimant reported to him that he had a previous injury to his shoulder due to a prior car accident and that his shoulder had been bothering him while moving a shoring post (*H.T. 2 p.14, ll.1-10*). Mr. Jarrett testified that Claimant never reported any type of post hitting him in the neck or shoulder, but rather, it was, "along the lines of the shoulder was aggravated, and that again, just kind of an ongoing issue from the—from the car" (*H.T. 2 p.14, ll.19-23*). Mr. Jarrett testified that, "out of an abundance of caution" he offered Claimant medical attention, to ensure that Claimant would be fit for duty (*H.T. 2 p.14, ll.23-25*). Mr. Jarrett testified that he specifically asked Claimant if he had previously injured his shoulder, to which Claimant provided, "a very short answer, he just said, 'yes, sir'" (*H.T. 2 p.29, ll.10-15*). Mr. Jarrett testified that it was his understanding that Claimant's shoulder condition "was kind of a constant issue, through my conversation with him" (*H.T. 2 p.29, ll.20-23*). Mr. Jarrett testified that based on his conversation with Claimant, it was conveyed to him that his shoulder condition was "kind of an on-ongoing thing that he had had. And he came to work that day, that it hurt most days, and that that day he had come to work, and he had done work" (*H.T. 2 p.31, ll.13-18*). Mr. Jarrett testified regarding receipt of the positive marijuana test based on a threshold

established by the department of transportation and that it had not been overturned by an MRO (*H.T. 2 p.40; p.42, ll.14-20*).

27. Mr. Jarrett testified that as Safety Director of Employer, all injuries that require medical attention require a five-panel drug test (*H.T. 2 p.15, ll.7-11*). Mr. Jarrett testified that Claimant underwent such five-panel drug test and tested positive for marijuana. While Mr. Jarrett is no longer employed with Respondent Employer, he testified that while there, he prepared the safety manual (*H.T. 2 p.18, l.23*). Mr. Jarrett testified that based on the section under Respondents' Exhibit, page 212, titled "Drugs and Alcohol," the presence of marijuana in the body is prohibited by the Employer (*H.T. 2 p.18, l.9*). Mr. Jarrett testified that had Claimant not been terminated because of the positive drug test, he would have of course been offered modified duty (*H.T. 2 p.24, ll.6-9*).

28. Mr. Jarrett testified that Claimant was provided modified duty in the early part of 2017 due to nonwork-related medical conditions, which ultimately precluded him from being able to continue work and as such, it was requested that Claimant recuperate and return to work when he was able (*H.T. 2 p.21, ll.1-14*). Mr. Jarrett testified about Employer's light duty program and that they try to encourage modified duty and accommodate, "whenever we can" (*H.T. 2 p.22, ll.14-18*). He added, "the owner of the company goes out of his way to be accommodating to people…you know, we are a second and third chance kind of company" (*H.T. 2 p.23, ll.5-9*).

29. Mr. Jarrett testified that as Safety Director, all supervisors report work-related injuries to him (*H.T. 2 p.24, ll.10-25*). While Claimant testified that he reported an injury occurring in February 2017, when he was allegedly hit in the head with a beam, and another injury in September 2017, when he allegedly sustained a concussion when something hit him in the head, Mr. Jarrett testified that he did not receive notice of either of these alleged incidences (*H.T. 2 p.25, ll.6-16*). To the extent Claimant testified that he was told by Employer to drive himself to the hospital, Mr. Jarrett adamantly refuted such assertion and testified that especially with a head injury, they never would have allowed an employee to drive themselves to receive medical care, and that their procedure is to have someone from the company drive them to a medical facility (*H.T. 2 p.26, ll.1-9*).

30. On October 27, 2017, Claimant went to the AFC Urgent Care Clinic and reported that while lifting something with his right arm, he felt his shoulder slip and is no longer able to raise his right arm. He reported having a prior injury to his right shoulder, which included a rotator cuff tear, labrum tear, and a fractured collarbone (*R. Ex. p.64*). Claimant's immediate reporting of the injury is completely devoid of any history of being hit in the shoulder or neck with a post and is further devoid of being knocked to the ground (*Id*.).

31. On October 30, 2017, Claimant saw Dr. Choudhry, the orthopedic specialist, to whom he reported injuring his shoulder while lifting up a metal post and his shoulder gave out on him (*R. Ex. p.56*). The history to Dr. Choudhry three days after the alleged incident is devoid of any reports of being hit in the neck or shoulder or being knocked to the ground. Of note, Claimant reported to Dr. Choudhry that

his shoulder started hurting in February 2017 while carrying a [beam], however, at hearing, Claimant denied any injury to his shoulder in February 2017 (*H.T. p.58, l.11*).

32. On October 30, 2017, Claimant was terminated for cause due to testing positive for marijuana on the date of injury. Claimant conceded Respondent Employer terminated him due to the positive drug test, which he admitted violated the Respondent Employer's policy (*H.T. p.69, ll.9-16*). While Claimant testified that he found out a few weeks after the positive drug test that he was terminated, it was actually three days later on October 30, 2017 (*R. Ex. p.191*). When presented with this fact, Claimant simply indicated it was hard to remember (*H.T. p.75, l.10*).

33. While Claimant initially denied any attendance issues while employed with Respondent Employer, he ultimately agreed he had attendance issues due to medical conditions before the alleged injury (*H.T. p.68, l.15*).

34. On November 10, 2017, Claimant filed a workers' claim for compensation and reported that his arm buckled while pushing up a shoring post, devoid of any mention of getting hit with the post or falling to the ground (*R. Ex. p.326*).

35. On July 11, 2018, Claimant saw Dr. Reichhardt based upon an agreement of the parties for determining whether an MRI of the right shoulder was reasonable (*R. Ex. F, p.48*). Claimant reported to Dr. Reichhardt that he was injured while putting up a shoring post. He stated that the metal post fell on his neck and shoulder, knocking him to his knees. Dr. Reichhardt noted in his report, "I do not see in the prior medical documentation of the injury that he was hit by the metal post and fell to the ground" (*Id*.). Claimant reported immediate onset of right upper trapezius, right shoulder and right neck pain. He reported the pain radiated down his right arm, into his forearm. Again, Dr. Reichhardt noted that he did not see any discussion of radiating arm pain, numbness or tingling in any of the other medical records (*Id*.). As far as other symptoms, Claimant reported bilateral headaches, right-sided neck pain, pain stretching from his neck to the right shoulder, along the upper trapezius and intermittent tingling throughout the whole right arm. He reported dizziness and lightheadedness, with episodes where his vision goes completely dark and that these vision problems began approximately two weeks after the injury. He also reported right-sided leg numbness and whole right leg numbness, which began two weeks after the alleged injury, and low back pain, which began one week after the alleged injury. As far as his past medical history, Claimant reported to Dr. Reichhardt that he had a prior shoulder injury playing football, but that his symptoms resolved completely four to six months after the surgery and he has had no other shoulder problems (*Id*.). Dr. Reichhardt examined Claimant and reviewed a complete set of medical records. Dr. Reichhardt opined that Claimant presented with a very complex presentation, which was difficult to explain based on his reported work-related injury. Nonetheless, due to the remote chance that Claimant could have sustained a herniated cervical disc, he ordered an urgent cervical MRI, which was normal. Dr. Reichhardt opined that it was reasonable to undergo the right shoulder MRI and referred Claimant for such. With regard to Claimant's myriad of other symptoms, Dr. Reichhardt opined that it was medically probable that all of the other symptoms were unrelated to his reported work-related injury.

36. While Claimant underwent an IME with Dr. Lindberg in May 2018, Dr. Lindberg recommended an MRI before making a final determination regarding causation. Claimant ultimately underwent the MRI and Dr. Lindberg issued a report dated August 27, 2018 (*R. Ex. B, p.2*). Claimant reported that in May 2017, a beam was dropped on him and he injured his back and neck. Then in October 2017, he reported lifting a heavy object overhead, felt a pain in his right shoulder and slipped down with pain and numbness into his right shoulder. Claimant's history is devoid of any reports of being hit in the neck or shoulder by the post, or any reports of being knocked to the ground. Claimant reported that in high school he had a dislocation and reconstruction surgery (*Id*.). Dr. Lindberg conducted a physical examination and extensive medical records review. He concluded that he agreed with Dr. Reichhardt's assessment in relation to Claimant's neurological abnormalities and that Claimant's history was inconsistent with mechanism of injury, time of injury and physical exams throughout the course of his treatment for alleged injuries at work (*Id. at p.6*). Dr. Lindberg opined that Claimant's need for treatment and ultimate surgery was not caused by the alleged injury, as such mechanism of injury is inconsistent with causing a posterior labral tear (*Id*.). He also opined that Claimant's symptoms were inconsistent with and not caused by a small labral tear (*Id*.). He opined that Claimant's other symptoms were bizarre and had nothing to do with the alleged injury (*Id*.).

37. On August 7, 2018, Claimant saw Dr. Yee, his personal physician, with whom he had treated for right shoulder problems in the past and reported right shoulder pain with an onset 10 months prior when his injury was caused by "fall" (*R. Ex. p.166*). Claimant reported that he was lifting a post and it fell on him and hit his shoulder and neck (*Id.*). Six days later on August 13, 2018, Claimant returned to Dr. Yee and reported that, "a heavy object fell and hit his right shoulder 10 months ago" (*R. Ex. p.164*). At hearing, Claimant confirmed the history of the purported mechanism of injury as reported to Dr. Yee of the post [slamming] down on his shoulder (*H.T. p.25, ll.1-3*).

38. On August 13, 2018, the same day Claimant saw Dr. Yee, he also sought treatment with Dr. Milford, his personal Neurologist for various complaints, including right shoulder pain, neck and back pain (*R. Ex. p.35; H.T. p.54, ll.2-11*). Claimant reported that: "last year he started to have neck pain. He's played American football for years and has been in a ***car accident that injured his shoulder*** (emphasis added). Claimant states the pain is more on the right side and it "shoots down into his shoulder" (*R. Ex. p.35*). Claimant presented with depression, entire right side numbness, inability to urinate, black outs and vomiting, vision and focus issues, headaches occurring seven days a week, sensitivity to light, dizziness, memory loss, blurred vision, chest pain, difficulty swallowing, balance disturbance, fainting, hearing loss bilaterally, tinnitus, anxiety, insomnia, fatigue, and lower back pain (*H.T. p.36*). Claimant reported neck pain that radiates to the posterior head and shoulders (Id.). Claimant did not report any type of purported work injury causing any of his complaints.

39. Claimant testified that before October 2017, he also sustained a prior work-related injury when a metal head fell on him, as well as a beam falling on him (*H.T. p.31,*

ll.23-24). However, Claimant testified that he did not pursue these injuries as they were not significant and did not prevent him from being able to work (*H.T. p.32, ll.1-12*). Yet he later testified he had "whole body weakness" for nearly a year after this alleged episode (*H.T. p.61, l.7*). This is consistent with the medical records where Claimant reports ongoing physical and cognitive issues including, but not limited to, diffuse neck and back pain, right sided numbness, ear pain, lower abdominal pain—all of which he reported on March 22, 2017 at Parker Adventist Hospital (*R. Ex. p.97*).

40. Claimant conceded at hearing that he denied any previous neck problems to Dr. Reichhardt (*H.T. p.66, l.6*). But Claimant underwent a cervical spine MRI seven days before the October 2017 alleged injury. Claimant also saw Dr. Milford less than one month after seeing Dr. Reichhardt on August 13, 2018, to whom Claimant presented with ongoing neck pain that he reported started one year prior (*R. Ex. p.35*).

41. Claimant's fiancé, Maria Paula Jimenez Venegas testified that Claimant was not having any health problems between March 2017 and October 2017 (*H.T. p.91, l.16*). But, upon presentation of the medical records, Ms. Jimenez Venegas conceded Claimant was in fact having several health issues which led to Claimant leaving his employment in April 2017 for purposes of recuperation (*H.T. p.92-95*). She testified that Claimant sought treatment with Dr. Milford solely for shoulder surgery. (*H.T. p.97, ll.6-12*). This is incorrect. Ms. Jimenez Venegas did not provide credible testimony about Claimant's medical history or treatment.

42. On September 17, 2018, Dr. Yee performed surgery (*R. Ex. p.336*). Dr. Yee was neither in the chain of referral for providers designated in this claim, nor did he request prior authorization from Respondents to perform the surgery (*H.T. p.12, ll.7-13*).

43. Claimant testified that he learned that his workers' compensation claim had been denied from his lawyer around a year after the alleged incident. However, a NOC was issued on December 26, 2017, less than two months after the alleged injury. (*H.T. p.23, l.25*).

44. When Claimant saw Dr. Reichhardt, he reported using about one gram of marijuana every two to three weeks. At hearing, Claimant admitted to such use (*H.T. p.68, l.18*).

45. At hearing, Claimant testified that on the day of the injury, he tested positive for marijuana and that he knew that he was not allowed to be on the jobsite if he had marijuana in his system (*H.T. p.69, ll.9-16*). He also testified that he was terminated due to violating Respondent Employer's drug policy (*H.T. p.70, l.1*). Claimant testified that he had been terminated and rehired on three different occasions by Employer (*H.T. p.71, l.3*).

46. Mr. Bounds testified that Claimant was terminated for the positive drug test, which violates Employer's policy contained on page 312 of Respondents' Exhibits under "Drugs and Alcohol" - *The use…or presence in the body of illegal drugs, controlled substances, marijuana…is strictly prohibited (*emphasis added*).*

47. Dr. Lindberg testified as an expert in orthopedics, specializing in shoulders (*H.T. p.197, l.13*). Dr. Lindberg testified that he evaluated Claimant in person and had the opportunity to review medical records dating back to 2011 (*H.T. p.137, ll.22-25; H.T. p.138, l.1*). Dr. Lindberg testified that to evaluate Claimant fully, he wanted to obtain an MRI, which was eventually ordered by Dr. Reichhardt (*H.T. p.139, ll.5-7*). Dr. Lindberg opined that after review of the MRI, as well as his physical examination, the purported mechanism of injury "would not have caused a posterior labral tear." Dr. Lindberg explained that the forces described to him were inconsistent with causing a SLAP lesion or a posterior labral tear (*H.T. p.140, ll.5-8*).

48. Dr. Lindberg explained that SLAP lesions are caused by forceful hyperabduction, external rotation and internal rotation, which are severe rotational forces that cause SLAP tears, or a dislocation of the shoulder (*H.T. p.140, ll.10-16*).

49. In support, Dr. Lindberg testified that Claimant's "car accident and rolling a car six times, bike wreck, history of playing football, multiple injuries and the rock climbing fall all have a higher probability of causing a SLAP lesion than did lifting that 30 pound beam" (*H.T. p.143, ll.15-18*). Dr. Lindberg testified that Claimant's histories to the various providers were all "different" (*H.T. p.141, l.4*). He testified that Claimant's reported mechanism of injury and symptoms thereafter were inconsistent with those reported to him (*H.T. p.144, ll.8-25*). Dr. Lindberg testified that inconsistencies noted under Dr. Reichhardt's exam of right shoulder range of motion and spontaneous movement typically indicate symptom magnification (*H.T. p.146, ll.1-7*). Dr. Lindberg testified that his opinions were supported by Dr. Reichhardt's opinion that Claimant's weakness and sensory loss were difficult to explain based upon the reported work injury (*H.T. p.146, l.17*). Dr. Lindberg testified that Dr. Choudhry, the orthopedic specialist who examined Claimant on October 30, 2017, noted discomfort around the AC joint region down to the scapular thoracic, which is inconsistent with a labral tear (*H.T. p.147, ll.1-5*). Based on the report of Dr. Choudhry, Dr. Lindberg opined that there was no concern for a shoulder joint injury (*H.T. p.147, l.14*).

50. Post-hearing Claimant requested that Dr. Hughes review Dr. Lindberg's IME report and Dr. Yee's operative report and provide post-hearing testimony via deposition taken May 20, 2019. Dr. Hughes testified as an expert in occupational medicine. Dr. Hughes testified that some kind of a prior trauma to the shoulder would increase the propensity for further injury to the shoulder (*Dr. H Dep. Tr. p.7, ll.13-15*). Dr. Hughes acknowledged that he did not have the training to answer questions pertaining to diagnosing a labral tear via an MRI with or without contrast, as he acknowledged he is not a radiologist, nor is he an orthopedic surgeon, unlike Dr. Lindberg (*Dr. H Dep. Tr. p.7, ll.23-25*). Dr. Hughes neither examined Claimant, nor did he interview Claimant (*Dr. H Dep. Tr. p.13, ll.1-4*). Dr. Hughes' review of the medical records was limited to the IME report of Dr. Lindberg and Dr. Yee's operative report (*Dr. H Dep. Tr. p.15, l.11*). Dr. Hughes' understanding of the reported mechanism of injury was limited to the operative report, which specifically indicated that a beam fell at work onto Claimant's shoulder and the history provided to Dr. Lindberg that he was lifting a heavy object overhead and it slipped down,

causing pain and numbness into his right shoulder (*Dr. H Dep. Tr. p.13, ll.11-25*). Dr. Hughes conceded that Claimant's reported mechanism of injury to Dr. Reichhardt and Dr. Choudhry was inconsistent with what he outlined in his interrogatories, as well as what he reported on the day of the alleged injury to Nurse Practitioner, Michelle Amacker (*Dr. H Dep. Tr. p.17, ll.18-21; p.18, ll.7-10*).

51. After being presented with Claimant's medical records, specifically concerning the purported mechanism of injury, Dr. Hughes agreed that there were inconsistencies in what happened at the time of the alleged work-related injury (*Dr. H Dep. Tr. p.22, ll.12*). Dr. Hughes acknowledged that Claimant's medical history as reported to Dr. Reichhardt was inconsistent with the medical record documentation (*Dr. H Dep. Tr. p.18, ll.5-6*). Dr. Hughes conceded that he had no knowledge of a motor vehicle accident or collision (*Dr. H Dep. Tr. p.25, ll.16-17)*. Dr. Hughes acknowledged that Claimant's history reported to Dr. Milford and that history provided to Richard Bounds was consistent, in that he injured his shoulder at the time of the motor vehicle accident (*Dr. H Dep. Tr. p.27, ll.20-21*).

52. Dr. Hughes testified that the motor vehicle accident was a possible explanation for the tears that were identified at the time of the surgery (*Dr. H Dep. Tr. p.30, ll.3*). Dr. Hughes testified that he was unaware that Claimant was working light duty due to his right upper extremity symptoms prior to the October 27, 2017 alleged injury. Dr. Hughes acknowledged that he did not even know what a type 2 SLAP tear was and that he would defer to an orthopedist regarding the difference between such tears (*Dr. H Dep. Tr. p.30, l.15; p.31. l.6*). Dr. Hughes testified that it would not take a massive muscle contraction to cause the kind of tear identified at the time of surgery, given Claimant's history of a reconstruction (*Dr. H Dep. Tr. p.31, ll.19-20*). However, Dr. Hughes acknowledged he had not had the opportunity to review Claimant's prior surgical records to obtain the location of where the surgery was actually performed (*Dr. H Dep. Tr. p.31, l.25*). When presented with all of the other symptoms that Claimant initially related to the work injury, Dr. Hughes agreed that none of the other symptoms related to such alleged injury (*Dr. H Dep. Tr. p.38, l.10*). Dr. Hughes conceded that Claimant's shoulder pain is possibly related to his preexisting conditions (*Dr. H Dep. Tr. p.46, l.3*).

53. In response to Dr. Hughes' testimony, Dr. Lindberg testified via deposition on June 13, 2019. Dr. Lindberg testified that Dr. Hughes' understanding of a SLAP tear was incorrect, and it is not a more specific type of labral tear (*Dr. L Dep. Tr. p.4, l.4*). He again opined that the most common way a SLAP tear occurs is with a circumduction motion, like throwing a football or a baseball with force, or falling with great force on an outstretched hand (*Dr. L Dep. Tr. p.4, ll.18-24*). Dr. Lindberg testified that Claimant most probably had a posterior subluxation or dislocation of his humeral head and that that is the most common cause, along with a grand mal seizure, of the type of force that is required to cause the tear identified at the time of surgery (*Dr. L Dep. Tr. p.5, ll.4-10*). He testified, "**there's no way that lifting the shoring post could have caused the posterior dislocation**" (emphasis added) (*Dr. L Dep. Tr. p.5, ll.15-17*).

54. As to the predisposition or weakened shoulder theory as proposed by Dr. Hughes, Dr. Lindberg testified that Claimant's original surgery reflected a labral type I tear

and that the location of the tears at question are completely different entities with different locations (*Dr. L Dep. Tr. p.6, ll.4-9*). He explained that the second surgical procedure in question was not involved at all with the prior location (*Dr. L Dep. Tr. p.6, ll.19*). He explained that at the time of the 2018 surgery, Claimant had a posterior labral tear and that there was nothing wrong with Claimant's posterior labrum at the time of the initial surgery (*Dr. L Dep. Tr. p.6, ll.17-19*). He emphasized that Claimant's acromioclavicular reconstruction the initial operation, "had nothing to do with his joint or his labrum." He explained that the AC joint is actually outside the shoulder joint itself and that inside the shoulder joint is where the labrum is, so his original surgery could not have caused any damage to the labrum (*Dr. L Dep. Tr. p.7, ll.1-7*). Dr. Lindberg testified, "once again, Dr. Hughes demonstrates lack of knowledge of the anatomy of the shoulder joint. The reconstruction of the AC—he had a reconstruction of the AC joint which had nothing to do with his labrum" (*Dr. L Dep. Tr. p.15, ll.24-25; p.16, ll.1-2*). At the time of the AC reconstruction, he also had a debridement of the type I superior labral tear, and that debridement of the labral tear would have nothing to do with a type II SLAP lesion (*Dr. L Dep. Tr. p.5, ll.21-23*).

55. Dr. Lindberg then drafted a diagram of the anatomy and identified the locations of the type I and type II tears, which are in different locations of the shoulder (*Dr. L Dep. Tr. p.7, ll.19-23; Ex. A to the Deposition Transcript of Dr. Lindberg)*.

56. To the extent Dr. Hughes testified that the mechanism of injury reported by Claimant would be enough to cause the labral tear if Claimant had prior trauma to the shoulder, particularly a glenohumeral dislocation, Dr. Lindberg explained that a glenohumeral dislocation can cause a labral tear, but not lifting the post as described by Claimant (*Dr. L Dep. Tr. p.9, ll.5-21*). Dr. Lindberg testified that Claimant has a history of prior glenohumeral dislocations (*Dr. L Dep. Tr. p.9, l.24)*. Dr. Lindberg explained that this was not an aggravation type situation and was not "the straw that broke the camel's back. Not even close." When asked about this theory, Dr. Lindberg opined:

> No, not—not even close. I mean, the straw that broke the camel's back theory is, in this case, completely inaccurate. If he suffered a subluxation of his shoulder, it would be secondary to a prior labral tear. There was no increase in the labral tear. There was no acute labral tear. That doesn't happen that way. This is a very trivial force. That doesn't cause a shoulder dislocation unless you have congenital ligamentous laxity or if you have a prior labral tear with prior dislocation that when—he has a subluxation when he lifted the beam—or the post. So that's a manifestation of his underlying instability. It's not the straw that broke the camel's back.
>
> (*Dr. L Dep. Tr. p.11, ll.4-15*).

57. Dr. Lindberg testified that the mechanism of injury is inconsistent with causing a SLAP lesion or a posterior labral tear (Dr. L Dep. Tr. p.14, ll.20-25). Dr. Lindberg testified:

> Dr. Hughes isn't an orthopedic surgeon. Dr. Hughes doesn't even know what a SLAP tear is. He doesn't know what a type I is. He doesn't know what a SLAP type II lesion is. How can he opine on causality when he doesn't even know what he's opining on a causality of?
>
> (Dr. L Dep. Tr. p.15, ll.13-17)

58. Dr. Lindberg testified about the importance of reviewing prior medical records regarding the body part for which the physician is providing an opinion on causation (*Dr. L Dep. Tr. p.16, ll.3-8*). Dr. Lindberg testified that there were more forces involved in rolling a vehicle six times than lifting a shoring post and that he agreed with Dr. Hughes that it was possible that Claimant sustained the tears identified at the time of surgery when he rolled his car six times (*Dr. L Dep. Tr. p.18, ll.8-18*). He further testified that this etiology was consistent with what Claimant reported to Dr. Milford on August 13, 2018 (*Dr. L Dep. Tr. p.18, l.25*). In sum, Dr. Lindberg testified that rolling a car six times, football, bicycle wreck, rock climbing accident, all of which are much more significant than lifting a shoring post for purposes of causing the tears identified at surgery (*Dr. L Dep. Tr. p.21, ll.12-14*).

59. Based on the evidence presented in this case, the ALJ does not find Claimant to be credible regarding his prior shoulder symptoms, the progression of his shoulder symptoms, and the cause of any increase in his shoulder symptoms.

60. Nor does the ALJ find Claimant's testimony about the purported mechanism of injury and the condition of his right shoulder immediately before the alleged work injury to be credible. Claimant has provided multiple, and inconsistent, versions about how he allegedly hurt his shoulder at work on October 27, 2017. And, the differences between the various versions are great and are not found to be minor and immaterial variations that can occur when someone describes an injury numerous times to different people.

61. The ALJ finds that the opinions of Dr. Lindberg as set forth in his report and during his testimony at hearing and during his deposition on June 13, 2019, to be credible and highly persuasive.

62. Moreover, based on Dr. Lindberg's testimony and expertise as an orthopedic surgeon and command of the anatomy of the shoulder joint and Claimant's underlying conditions for which he was seeking treatment, the ALJ credits his opinions over Dr. Hughes' opinions.

63. The ALJ finds Claimant has failed to establish by a preponderance of the evidence that he suffered a compensable work injury to his right shoulder.

64. Thus, the ALJ is unable to find Claimant has met his burden of proof in establishing that he sustained a compensable injury on October 27, 2017.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant established, by a preponderance of the evidence, that he suffered an injury arising out of and in the course and scope of his employment on October 27, 2017.

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v.* Americold D/B/A Atlas Logistics, W.C. No. 4-960-513-01, (ICAO, Oct. 2, 2015)

However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Atsepoyi v. Kohl's Department Stores*, W.C. No. 5-020-962-01, (ICAO, Oct. 30, 2017). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). *Fuller v. Marilyn Hickey Ministries, Inc., W.C. No. 4-588-675, (*ICAO, Sept. 1, 2006*).*

Determining whether there is a sufficient "nexus" or causal relationship between the claimant's employment and the injury is generally one of fact, which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals*, 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle*, 934 P.2d 861 (Colo. App. 1996).

Claimant failed to establish by a preponderance of the evidence that it is more probably true than not that on October 27, 2017 he sustained any injury arising out of and in the course of his employment that proximately caused an injury necessitating the need for medical treatment or that caused any disability. Even if Claimant had an increase in symptoms on October 27, 2017, any increase in symptoms did not signal an injury to the shoulder. Instead, any increase in symptoms represented the recurrent consequences of his preexisting shoulder problems as reported to both Mr. Jarett and Mr. Bounds and as reflected in the prior medical records, notably the report to Dr.

Milford, his personal neurologist. As found, this conclusion is supported by the credible opinions of Dr. Lindberg with regard to the lack of a mechanism of injury sufficient to cause a tear necessitating the need for any medical treatment.

As found, Claimant's denial of prior shoulder problems is contradicted by histories the Claimant had given to medical providers, which the ALJ finds more reliable than Claimant's hearing testimony because the histories were given for the purpose of receiving the appropriate treatment for Claimant's shoulders and the hearing testimony was for the purpose of receiving workers' compensation benefits. Rather, the testimony of Brian Jarrett, who is no longer with the employer, and that of Richard Bounds is reliable as these individuals have nothing to gain by such testimony. In fact, Brian Jarrett testified he always really liked Claimant and Richard Bounds was a family friend and had worked with Claimant and Claimant's dad for years. These individuals have nothing to gain or lose by offering credible testimony. Claimant admittedly is a poor historian and could not recall specific events, injuries and treatment to his right shoulder, nor did he provide a consistent mechanism of injury to his providers that would support a causal connection between the alleged injury and need for any medical treatment.

As found, Dr. Lindberg's opinions are based on a complete review of Claimant's medical history and therefore based on a greater amount of research and study into the Claimant's specific case, thus, it is more credible than the opinion of Dr. Hughes, who conceded he had not reviewed Claimant's prior medical records. And Dr. Lindberg possesses the expertise as a shoulder surgeon, where as Dr. Hughes admitted to not even knowing the difference between a SLAP I and a SLAP II tear, an integral component to the causation analysis in this case.

Moreover, Dr. Hughes' causation opinions were based, in large part, upon the history provided by Claimant to other providers. And, as found, Claimant is not a reliable or credible historian when relating his prior history and what allegedly occurred on October 27, 2017. Claimant did not provide the various medical providers accurate, consistent, and reliable information about his prior shoulder problems, the progression of his shoulder problems, and the various accidents he was involved in before the alleged incident of October 27, 2017. For example, Dr. Hughes did not know that Claimant was in an automobile accident in May of 2016, which involved Claimant rolling his automobile six times. Dr. Hughes was also unaware of the climbing accident where Claimant fell about ten feet and sought medical treatment. In the end, Dr. Hughes had insufficient and unreliable information to use in forming his opinions. Like a house built on sand, an expert's opinion is no better than the facts on which it is based. *See Kennemur v. State of California*, 184 Cal. Rptr. 393, 402–03 (Cal. Ct. App. 1982). Thus, based on the insufficient and unreliable facts Dr. Hughes used in rendering his opinions, as well as his unfamiliarity with the medical conditions impacting Claimant's shoulder joint as admitted by Dr. Hughes and testified to by Dr. Lindberg, the ALJ does not credit Dr. Hughes' opinions.

Moreover, as credibly testified to by Mr. Bounds, on the morning of October 27, 2017, Claimant asked if he could have the day off so he could spend the day with his "baby's momma" who was coming to town. When Mr. Bounds told Claimant that they were shorthanded and needed him to work, Claimant was adamant that he had to have

the day off to be with his baby's mother. Then, around 11:00 a.m., Claimant told Mr. Bounds he hurt his shoulder and just wanted to go home and rest. When Mr. Bounds started to ask him some questions about the alleged injury, Claimant again said he had wanted off the day off and asked if he could just go home and rest his shoulder. Moreover, when Mr. Bounds indicated that if Claimant was alleging a work injury, he would have to go to the doctor to be evaluated, Claimant stated that it was an old injury and he did not want to go to the doctor - he just wanted to go home and rest. This exchange also establishes Claimant had prior shoulder problems and that his primary goal from the minute he got to work that day was to take the day off.

Therefore, based on the totality of the evidence, the ALJ finds and concludes Claimant has failed to establish by a preponderance of the evidence that he suffered a compensable injury.

ORDER

Based upon the foregoing specific findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claim for benefits is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 9, 2019.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Respondents have demonstrated by a preponderance of the evidence that they are entitled to withdraw their July 5, 2018 General Admission of Liability (GAL) acknowledging Claimant suffered an occupational disease in the form of left middle trigger finger that began on April 27, 2018 during the course and scope of her employment with Employer.

2. A determination of Claimant's Average Weekly Wage (AWW).

3. Whether Claimant has proven by a preponderance of the evidence that she is entitled to receive Temporary Partial Disability (TPD) benefits for the period June 25, 2018 through January 6, 2019.

4. A determination of Claimant's impairment rating for purposes of calculating Permanent Partial Disability (PPD) benefits.

FINDINGS OF FACT

1. Claimant began working for Employer in July 2012 as a meat cutter. The position required Claimant to use a hook with her left hand to pull meat toward her and a knife in her right hand to cut the meat. She developed middle finger swelling and pain shortly after beginning her employment. After receiving conservative medical treatment she began working in Employer's meat-packing department. She subsequently worked in the meat-packing department without restrictions until 2014.

2. Claimant sought a transfer to work on the "kill floor" of Employer's facility. She once again utilized a knife in her right hand and a hook in her left hand to cut and trim carcasses. Claimant noted she only experienced minor discomfort while performing her job duties. In February 2018 Claimant sought a transfer back to the meat-packing department. On approximately April 27, 2018 Claimant developed "locking" in her left middle finger. She subsequently sought medical treatment for her symptoms.

3. On June 8, 2018 Claimant underwent an initial occupational medical evaluation with Marc-Andre R. Chimonas, M.D. at Banner Occupational Health Clinic. Claimant explained that her job duties involved frequent moving of small pieces of meat weighing up to four pounds without any power gripping. Claimant reported increased pain of the MP and PIP joints of the left middle finger with occasional radiation to the volar forearm. She noted that she experiences frequent triggering with extension of the MP joint Claimant remarked that the pain in the MP joint had progressed rapidly within one week of returning to packaging. On physical examination, Claimant exhibited difficulty actively fully flexing all three joints in the left middle finger and there was "obvious palpable and audible triggering of the MP joint." Dr. Chimonas determined that Claimant had advanced trigger finger of the left middle finger. He concluded that it was unlikely that

Claimant satisfied the criteria in the Colorado Division of Workers' Compensation *Medical Treatment Guidelines* (*Guidelines*) for a cumulative trauma disorder. Nevertheless, Dr. Chimonas noted that Claimant's trimming position might satisfy the criteria for a cumulative trauma disorder because it required forceful gripping of a hook with the left hand.

4. On June 22, 2018 Claimant returned to Dr. Chimonas for an examination. Claimant continued to report left third trigger finger symptoms. Dr. Chimonas mentioned that he had spoken to Employer's health and safety manager about Claimant's job duties. He explained that Claimant's duties involved placing meat weighing from 1-3 pounds into a plastic bag several times each minute. The temperature in Claimant's work environment was about 36 degrees. Claimant's job description reflected required grip strength of 5-25 pounds with constant repetitive hand use, hand grip and pinch grip. Dr. Chimonas thus determined that Claimant met the secondary risk factor in the *Guidelines* of cold work below 45 degrees for at least four hours. Furthermore, Claimant engaged in repetitive flexion of her digits. Dr. Chimonas thus concluded that Claimant satisfied the cumulative trauma criteria in the *Guidelines* for the development of trigger finger. He assigned restrictions including working at temperatures in excess of 45 degrees for at least five hours per shift, lifting no more than one pound with her left hand and no lifting greater than 15 pounds with her right hand to avoid cross strain.

5. On July 5, 2018 Respondents filed a General Admission of Liability (GAL) acknowledging Claimant suffered an occupational disease in the form of left middle trigger finger. Claimant subsequently received conservative treatment, including injections, for her symptoms. On August 13, 2018 Claimant underwent a left middle finger A1 pulley release procedure with Nicholas J. Noce. M.D.

6. Claimant continued to visit Dr. Chimonas for regular follow-up appointments. On September 28, 2018 Claimant confirmed that she had been working modified duty that included laundry and light cleaning work. On October 19, 2018 Dr. Chimonas noted that Claimant had made "no improvement" since their last appointment and she continued to be unable to completely extend the PIP and DIP joint of the affected digit. He further noted that her occupational therapy had ended because she was no longer making any progress in her recovery. Dr. Chimonas determined that Claimant had "plateaued" in her recovery and he referred her back to Dr. Noce. By November 9, 2018 Claimant had regained range of motion "quite rapidly" after undergoing additional injections with Dr. Noce.

7. On December 7, 2018 Claimant underwent an independent medical examination with Lawrence Lesnak, D.O. Dr. Lesnak reviewed Claimant's treatment records and conducted a physical examination. He noted full active and passive range of motion of Claimant's left middle finger, including her MCP, PIP and DIP joints. Dr. Lesnak remarked that there was no evidence of any "locking" whatsoever or residual signs of triggering. He commented that Claimant reported ongoing "pulling" sensations in her affected digit but denied the presence of any "locking" sensations. He further noted that Claimant reported significant improvement of her symptoms after her postoperative injection.

8. Relying on the *Guidelines*, Dr. Lesnak concluded that Claimant's left middle finger trigger condition was not caused by her job duties in Employer's meat packing department in April 2018. He explained that under Rule 17 of the *Guidelines*, diagnosis-based risk factors for trigger finger reflect that there is "some" evidence that hand tool use for six hours per day could be a risk factor. He further noted that non-evidence-based risk factors could include repetitive digital flexion for at least four hours per day. However, Dr. Lesnak emphasized that Claimant noted she did not begin experiencing triggering or locking symptoms until February 2018 when she was in a meat packaging position that met neither of the preceding factors. Although Dr. Lesnak agreed with Dr. Chimonas that Claimant's reported responsibilities in her "kill floor" position could "possibly be a risk factor" under the Rule 17 criteria, she commented that her locking symptoms did not begin until two months after she had already left the position. Dr. Lesnak therefore concluded that placing small pieces of meat into bags, without the use of hand tools, would not satisfy the criteria contained in Rule 17 of the *Guidelines*.

9. Dr. Lesnak also determined that no permanent impairment was appropriate because Claimant did not exhibit any evidence of range of motion deficits during his examination. He further commented that no post-MMI medical maintenance treatment would be reasonable, necessary or causally related to any occupational injury. Finally, Dr. Lesnak concluded that permanent work restrictions were not warranted.

10. On January 29, 2019 Dr. Chimonas determined that Claimant had reached Maximum Medical Improvement (MMI). On February 12, 2019 Dr. Chimonas assigned Claimant an 8% left middle finger impairment rating. The rating was based upon normal range of motion for the DIP and PIP joints, but slightly restricted flexion and extension of the MP joint. The impairment converted to a 2% left upper extremity rating. Dr. Chimonas did not assign any permanent work restrictions.

11. On June 6, 2019 the parties conducted the pre-hearing evidentiary deposition of Dr. Lesnak. He reiterated that Claimant suffered from left middle trigger finger. He explained that, under Rule 17, Exhibit 5 of the *Guidelines,* the diagnosis-based risk factors for trigger finger included evidence of hand tool use for six hours or more in an eight-hour workday and non-evidence based risk factors included repetitive digital flexion. Dr. Lesnak noted that Claimant's job duties consisted of standing at a table while placing four to five light pieces of meat into a plastic bag.

12. Dr. Lesnak noted that, since his independent medical examination, he had reviewed Claimant's detailed job description as a "chuck flap hind quarter pack." The job description specifically stated that Claimant did not utilize a hook or knife. The position only involved placing one to one and one-half pound pieces of meat into a plastic bag. Dr. Lesnak reasoned that, because Claimant did not use hand tools or engage in repetitive digital flexion, her work activities did not cause her left middle finger symptoms. He commented that Claimant did not report any symptoms until April 2018 or approximately two months after her return to the meat packaging position.

13. Dr. Lesnak disagreed with Dr. Chimonas' causation assessment. He noted that Dr. Chimonas had identified cold work as a risk factor for the development of trigger finger. However, Dr. Lesnak reiterated that a cold work environment is not a risk factor

for the development of trigger finger under Rule 17 of the *Guidelines*. He also noted that the Rule 17 *Guidelines* are specific to full flexion or continuous repetitive gripping of a handle, rather than grabbing pieces of meat. Thus, Dr. Lesnak determined that the job description of a "chuck flap hind quarter pack" did not meet the specific risk criteria for an occupational disease in the *Guidelines*.

14. The record includes a Physical Demands Summary for Claimant's position as a "Bag Chuck Flap" for Employer. The description provides that the employee stands in front of a work area, grasps the Chuck Flap or meat product with both hands and places the meat into a plastic bag on a worktable. After placing five pieces of Chuck Flap into a bag, the employee grabs the bag and puts it onto the belt line so it can move to the next work area. The average time to perform each job varies from about 15-20 seconds and the rest time between each job is about three seconds. Each piece of meat weighs between one and one and one-half pounds and a filled plastic bag weighs about five pounds. Employees do not use hand tools to perform the job of "Bag Chuck Flap." The Physical Demands Summary also specifies that the position involves constant, repetitive use of the hand; hand grip; pinch grip and pushing or pulling. The grip force strength is 5-25 pounds depending on the weight of each product.

15. For the 13-week period preceding Claimant's date of injury or from January 21, 2018 to April 21, 2018 Claimant earned total wages of $8,431.53. Dividing $8,431.53 by 13 yields an Average Weekly Wage (AWW) of $648.58. An AWW of $648.58 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

16. Respondents have failed to demonstrate that it is more probably true than not that they are entitled to withdraw their July 5, 2018 GAL acknowledging Claimant suffered an occupational disease in the form of left middle trigger finger that began on April 27, 2018 during the course and scope of her employment with Employer. Initially, on approximately April 27, 2018 Claimant developed "locking" in her left middle finger. She subsequently sought medical treatment for her symptoms. After considering Claimant's job duties, Dr. Chimonas noted that Claimant placed meat weighing from 1-3 pounds into a plastic bag several times each minute. The temperature in Claimant's work environment was about 36 degrees. Dr. Chimonas remarked that Claimant's job description reflects required grip strength of 5-25 pounds with constant repetitive hand use, hand grip and pinch grip. He determined that Claimant met the secondary risk factor in the *Guidelines* of cold work below 45 degrees for at least four hours. Furthermore, Claimant engaged in repetitive flexion of her digits. Dr. Chimonas thus concluded that Claimant satisfied the cumulative trauma criteria in the *Guidelines* for the development of trigger finger.

17. Dr. Lesnak disagreed with Dr. Chimonas' causation assessment. He noted that Claimant's job description specified she did not utilize a hook or knife. Dr. Lesnak remarked that the position only involved placing one to one and one-half pound pieces of meat into a plastic bag. He reasoned that, because Claimant did not use hand tools or engage in repetitive digital flexion, her work activities did not cause her left middle finger symptoms. He also noted that Dr. Chimonas had identified cold work as a risk factor for the development of trigger finger. However, Dr. Lesnak remarked that a cold work environment was not a risk factor for the development of trigger finger under Rule 17 of

the *Guidelines*. He also commented that the Rule 17 *Guidelines* are specific to full flexion or continuous repetitive gripping of a handle, rather than grabbing pieces of meat. Dr. Lesnak thus determined that Claimant's work activities did not meet the specific risk criteria in the *Guidelines*.

18. Despite Dr. Lesnak's analysis, a review of Claimant's job description in conjunction with the risk factors for the development of trigger finger delineated in the *Guidelines*, reflect that Claimant's work activities likely caused her to develop left middle trigger finger. The Physical Demands Summary for Claimant's position provides that the employee stands in front of a work area, grasps the chuck flap or meat product with both hands and places the meat into a plastic bag on a worktable. After placing five pieces of meat into a bag, the employee grabs the bag and puts it onto the belt line so it can move to the next work area. The average time to perform each job varies from about 15-20 seconds and the rest time between jobs is about three seconds. Each piece of meat weighs between one and one and one-half pounds and a filled plastic bag weighs about five pounds. Employees do not use and tools to perform the job of "Bag Chuck Flap." Notably, the Physical Demands Summary specifies that the position involves constant: repetitive use of the hand, hand grip, pinch grip and pushing or pulling. The grip force strength is 5-25 pounds depending on the weight of each product.

19. The temperature in Claimant's work area was about 36 degrees and thus constituted a cold work environment. Because cold environment is a Secondary Risk Factor pursuant to Rule 17, Exhibit 5 of the *Guidelines* a causation analysis for trigger finger is required. Digital flexion for four hours each day is listed as a non-evidence-based risk factor under Rule 17, Exhibit 5. The Physical Demands Summary specifies that Claimant's job duties involved constant: repetitive use of the hand, hand grip, pinch grip and pushing or pulling. Claimant's position thus includes an additional risk factor besides a cold work environment. Based on the Physical Demands Summary, a review of the medical records and the persuasive opinion of Dr. Chimonas, Claimant engaged in forceful and repetitive activity for an amount of time that meets the threshold for a cumulative trauma condition. Claimant's employment activities caused, intensified, or, to a reasonable degree, aggravated her left middle trigger finger condition to produce a need for medical treatment. Because Respondents have failed to demonstrate that Claimant's case is not work-related, they are not permitted to withdraw the July 5, 2018 GAL.

20. Claimant has proven that it is more probably true than not that she is entitled to receive TPD benefits for the period June 25, 2018 through January 6, 2019. On June 22, 2018 Dr. Chimonas assigned Claimant restrictions including working at temperatures in excess of 45 degrees for at least five hours per shift, lifting no more than one pound with her left hand and no lifting greater than 15 pounds with her right hand to avoid cross strain. Claimant was not released from the restrictions until she reached MMI on January 29, 2019. However, Claimant's regular job duties involved working at temperatures below 45 degrees and repetitively lifting pieces of meat weighing in excess of one pound. The work restrictions thus impaired Claimant's ability to effectively and properly perform her regular employment. Claimant is thus entitled to receive TPD benefits to the extent she suffered a wage loss during the period June 25, 2018 through January 6, 2019 based on an AWW of $648.58.

21. Claimant suffered a 2% left upper extremity impairment rating as a result of her April 27, 2018 left middle trigger finger injury. On February 12, 2019 Dr. Chimonas assigned Claimant an 8% left middle finger impairment rating. The rating was based upon normal range of motion for the DIP and PIP joints, but slightly restricted flexion and extension of the MP joint. The functional impairment converted to a 2% left upper extremity rating. In contrast, Dr. Lesnak determined that no permanent impairment was appropriate because Claimant did not exhibit any evidence of range of motion deficits during his examination. However, based on Dr. Chimonas persuasive determination, documented range of motion deficits and inability to adequately use her left hand, Claimant suffered a 2% left upper extremity functional impairment.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4. The test for distinguishing between an accidental injury and an occupational disease is whether the injury can be traced to a particular time, place and cause. *Campbell v. IBM Corp.*, 867 P.2d 77, 81 (Colo. App. 1993). "Occupational disease" is defined by §8-40-201(14), C.R.S. as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by

> the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

5. A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, §8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

6. When the respondents attempt to modify an issue that previously has been determined by an admission, they bear the burden of proof for the modification. §8-43-201(1), C.R.S.; see also *Salisbury v. Prowers County School District*, W.C. No. 4-702-144 (ICAO, June 5, 2012); *Barker v. Poudre School District*, W.C. No. 4-750-735 (ICAO, July 8, 2011). Section 8-43-201(1), C.R.S., provides, in pertinent part, that "a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification." Specifically, respondents must prove by a preponderance of evidence that the claimant did not suffer a compensable injury as defined under Colorado law. §8-43-201(1), C.R.S.

7. Rule 17, Exhibit 5 provides an algorithm for evaluating Cumulative Trauma Conditions (CTC) pursuant to the *Guidelines*. In addressing applicability, the *Guidelines* note that "CTC's of the upper extremity comprise a heterogeneous group of diagnoses which include numerous specific clinical entities including disorders of the muscles, tendons and tendon sheaths, nerves, joints and neurovascular structures." W.C.R.P. Rule 17, Exhibit 5, p. 6. In determining a diagnosis when performing a cumulative trauma analysis the *Guidelines* delineate specific musculoskeletal conditions and peripheral nerve disorders. Nevertheless, the Guidelines provide that "[l]ess common cumulative trauma conditions not listed specifically in these Guidelines are still subject to medical causation assessment." W.C.R.P. Rule 17, Exhibit 5, p. 21.

8. The *Guidelines* provide, in relevant part:

> Indirect evidence from a number of studies supports the conclusion that task repetition up to 6 hours per day unaccompanied by other risk factors is not causally associated with cumulative trauma conditions. Risk factors that are likely to be associated with specific CTC diagnostic categories include extreme wrist or elbow postures, force including regular work with hand tools greater than 1 kg or tasks requiring greater than 50% of an individual's

> voluntary maximal strength, work with vibratory tools at least 2 hours per day; or cold environments.

W.C.R.P. Rule 17, Exhibit 5, p. 20.

9. The *Guidelines* include a Primary Risk Factor Definition Table for Force and Repetition/Duration. The Table requires six hours of two pounds pinch force or 10 pounds of hand force three or more times per minute. Other Primary Risk Factors involving Force and Repetition/Duration include six hours of lifting 10 pounds in excess of 60 times per hour and six hours of using hand tools weighing two pounds or more. An additional Primary Risk Factor category is Awkward Posture and Repetition/Duration. The factor requires four hours of wrist flexion greater than 45 degrees, extension greater than 30 degrees or ulnar deviation greater than 20 degrees, six hours of elbow flexion greater than 90 degrees, four hours of supination/pronation with task cycles 30 seconds or less or awkward posture for at least 50% of a task cycle. Secondary Risk Factors require three hours of two pounds pinch force or 10 pounds of hand force three or more times per minute. Other Secondary Risk Factors involving Force and Repetition/Duration include three hours of lifting 10 pounds greater than 60 times per hour and three hours of using hand tools weighing two pounds or more. Finally, Secondary Risk Factors for Awkward Posture and Repetition/Duration include three hours of elbow flexion greater than 90 degrees and three hours of supination/pronation with a power grip or lifting. If neither Primary nor Secondary Risk Factors are present, the *Guidelines* provide that "the case is probably not job related." W.C.R.P. Rule 17, Exhibit 5, p. 24.

10. Rule 17, Exhibit 5 of the *Guidelines* specifically delineates cold working environment as a Secondary Risk Factor. The Guidelines provide that the "risk factor does not stand alone. It is used in combination with other secondary risk factors. Refer to the following Diagnostic-Based Risk Factors Table." W.C.R.P. Rule 17, Exhibit 5, p. 27. The algorithm specifically provides that, if a Secondary Risk Factor is present, a causation analysis should proceed to step 4. W.C.R.P. Rule 17, Exhibit 5, p. 25. If a Secondary Risk Factor does not meet a diagnosis-based risk factor, then a determination must be made about whether other risk factors are present. The Risk Factors Definition Table for trigger finger includes hand tool use for six hours as an evidence-based risk factor and repeated digital flexion for four hours each day as a non-evidence-based risk factor. W.C.R.P. Rule 17, Exhibit 5, p. 32. The algorithm specifies that, if an additional risk factor is present from the diagnosis-based risk factor table that does not overlap the Secondary Risk Factor, "the case may be work related." W.C.R.P. Rule 17, Exhibit 5, p. 25.

11. As found, Respondents have failed to demonstrate by a preponderance of the evidence that they are entitled to withdraw their July 5, 2018 GAL acknowledging Claimant suffered an occupational disease in the form of left middle trigger finger that began on April 27, 2018 during the course and scope of her employment with Employer. Initially, on approximately April 27, 2018 Claimant developed "locking" in her left middle finger. She subsequently sought medical treatment for her symptoms. After considering Claimant's job duties, Dr. Chimonas noted that Claimant placed meat weighing from 1-3 pounds into a plastic bag several times each minute. The temperature in Claimant's work environment was about 36 degrees. Dr. Chimonas remarked that Claimant's job

description reflects required grip strength of 5-25 pounds with constant repetitive hand use, hand grip and pinch grip. He determined that Claimant met the secondary risk factor in the *Guidelines* of cold work below 45 degrees for at least four hours. Furthermore, Claimant engaged in repetitive flexion of her digits. Dr. Chimonas thus concluded that Claimant satisfied the cumulative trauma criteria in the *Guidelines* for the development of trigger finger.

12. As found, Dr. Lesnak disagreed with Dr. Chimonas' causation assessment. He noted that Claimant's job description specified she did not utilize a hook or knife. Dr. Lesnak remarked that the position only involved placing one to one and one-half pound pieces of meat into a plastic bag. He reasoned that, because Claimant did not use hand tools or engage in repetitive digital flexion, her work activities did not cause her left middle finger symptoms. He also noted that Dr. Chimonas had identified cold work as a risk factor for the development of trigger finger. However, Dr. Lesnak remarked that a cold work environment was not a risk factor for the development of trigger finger under Rule 17 of the *Guidelines*. He also commented that the Rule 17 *Guidelines* are specific to full flexion or continuous repetitive gripping of a handle, rather than grabbing pieces of meat. Dr. Lesnak thus determined that Claimant's work activities did not meet the specific risk criteria in the *Guidelines*.

13. As found, despite Dr. Lesnak's analysis, a review of Claimant's job description in conjunction with the risk factors for the development of trigger finger delineated in the *Guidelines*, reflect that Claimant's work activities likely caused her to develop left middle trigger finger. The Physical Demands Summary for Claimant's position provides that the employee stands in front of a work area, grasps the chuck flap or meat product with both hands and places the meat into a plastic bag on a worktable. After placing five pieces of meat into a bag, the employee grabs the bag and puts it onto the belt line so it can move to the next work area. The average time to perform each job varies from about 15-20 seconds and the rest time between jobs is about three seconds. Each piece of meat weighs between one and one and one-half pounds and a filled plastic bag weighs about five pounds. Employees do not use and tools to perform the job of "Bag Chuck Flap." Notably, the Physical Demands Summary specifies that the position involves constant: repetitive use of the hand, hand grip, pinch grip and pushing or pulling. The grip force strength is 5-25 pounds depending on the weight of each product.

14. As found, the temperature in Claimant's work area was about 36 degrees and thus constituted a cold work environment. Because cold environment is a Secondary Risk Factor pursuant to Rule 17, Exhibit 5 of the *Guidelines* a causation analysis for trigger finger is required. Digital flexion for four hours each day is listed as a non-evidence-based risk factor under Rule 17, Exhibit 5. The Physical Demands Summary specifies that Claimant's job duties involved constant: repetitive use of the hand, hand grip, pinch grip and pushing or pulling. Claimant's position thus includes an additional risk factor besides a cold work environment. Based on the Physical Demands Summary, a review of the medical records and the persuasive opinion of Dr. Chimonas, Claimant engaged in forceful and repetitive activity for an amount of time that meets the threshold for a cumulative trauma condition. Claimant's employment activities caused, intensified, or, to a reasonable degree, aggravated her left middle trigger finger condition to produce a need for medical treatment. Because Respondents have failed to demonstrate that

Claimant's case is not work-related, they are not permitted to withdraw the July 5, 2018 GAL.

Average Weekly Wage

15. Section 8-42-102(2), C.R.S. requires the ALJ to base the claimant's AWW on his or her earnings at the time of injury. The Judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001). However, §8-42-102(3), C.R.S. authorizes a judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed methods will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App. 1993). Specifically, §8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993); *see In re Broomfield,* W.C. No. 4-651-471 (ICAO, Mar. 5, 2007). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell,* 867 P.2d at 82. Where the claimant's earnings increase periodically after the date of injury the ALJ may elect to apply §8-42-102(3), C.R.S. and determine whether fairness requires the AWW to be calculated based upon the claimant's earnings during a given period of disability instead of the earnings on the date of the injury. *Id.*

16. As found, for the 13-week period preceding Claimant's date of injury or from January 21, 2018 to April 21, 2018 Claimant earned total wages of $8,431.53. Dividing $8,431.53 by 13 yields an Average Weekly Wage (AWW) of $648.58. An AWW of $648.58 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

Temporary Partial Disability Benefits

17. Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). The term "disability," connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by the claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). A claimant suffers from an impairment of earning capacity when he has a complete inability to work or there are restrictions that impair his ability to effectively and properly perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997).

18. As found, Claimant has proven by a preponderance of the evidence that she is entitled to receive TPD benefits for the period June 25, 2018 through January 6,

2019. On June 22, 2018 Dr. Chimonas assigned Claimant restrictions including working at temperatures in excess of 45 degrees for at least five hours per shift, lifting no more than one pound with her left hand and no lifting greater than 15 pounds with her right hand to avoid cross strain. Claimant was not released from the restrictions until she reached MMI on January 29, 2019. However, Claimant's regular job duties involved working at temperatures below 45 degrees and repetitively lifting pieces of meat weighing in excess of one pound. The work restrictions thus impaired Claimant's ability to effectively and properly perform her regular employment. Claimant is thus entitled to receive TPD benefits to the extent she suffered a wage loss during the period June 25, 2018 through January 6, 2019 based on an AWW of $648.58.

Permanent Partial Disability Benefits

19. Permanent Partial Disability (PPD) benefits do not require a showing of actual wage loss but are instead based on the potential loss of future earning capacity. *Duran v. Industrial Claim Appeals Office*, 883 P.2d 477 (Colo.1994); *see also Hussion v. Industrial Claim Appeals Office*, 991 P.2d 346 (Colo. App.1999) (TTD benefits compensate employee for lost wages, while PPD benefits compensate for the loss of future earning capacity). The Workers' Compensation system is premised on the assumption that the future earning capacity of a partially disabled worker will be less than that of a non-disabled worker. *Business Ins. Co. v. BFI Waste Systems of North America*, Inc. 23 P.3d 1261, 1265 (Colo. App. 2001). The preceding premise forms the basis for calculating permanent partial disability benefits. *Id*.

20. Section 8-42-107(1)(a), C.R.S. limits medical impairment benefits to those provided in §8-42-107(2), C.R.S. when a claimant's injury is one enumerated in the schedule of impairments. The Judge must determine the situs of a claimant's "functional impairment." *Velasquez v. UPS,* W.C. No. 4-573-459 (ICAO Apr. 13, 2006). The situs of the functional impairment is not necessarily the site of the injury. *See In re Hamrick*, W.C. No. 4-868-996-01 (ICAO, Feb. 1, 2016); *In re Zimdars,* W.C. No. 4-922-066-04 (ICAO, Feb. 4, 2015). Pain and discomfort that limit a claimant's ability to use a portion of the body is considered functional impairment for purposes of determining whether an injury is off the schedule of impairments. *In re Johnson –Wood*, W.C. No. 4-536-198 (ICAO, June 20, 2005); *Vargas v. Excel Corp.,* W.C. 4-551-161 (ICAO, Apr. 21, 2005). However, the mere presence of pain in a portion of the body beyond the schedule does not require a finding that the pain represents a functional impairment. *Lovett v. Big Lots,* WC 4-657-285 (ICAO, Nov. 16, 2007); *O'Connell v. Don's Masonry,* W.C. 4-609-719 (ICAO, Dec. 28, 2006).

21. As found, Claimant suffered a 2% left upper extremity impairment rating as a result of her April 27, 2018 left middle trigger finger injury. On February 12, 2019 Dr. Chimonas assigned Claimant an 8% left middle finger impairment rating. The rating was based upon normal range of motion for the DIP and PIP joints, but slightly restricted flexion and extension of the MP joint. The functional impairment converted to a 2% left upper extremity rating. In contrast, Dr. Lesnak determined that no permanent impairment was appropriate because Claimant did not exhibit any evidence of range of motion deficits during his examination. However, based on Dr. Chimonas persuasive determination,

documented range of motion deficits and inability to adequately use her left hand, Claimant suffered a 2% left upper extremity functional impairment.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents' request to withdraw the July 5, 2018 GAL is denied and dismissed.

2. Claimant earned an AWW of $648.58.

3. Claimant shall receive TPD benefits to the extent she suffered a wage loss during the period June 25, 2018 through January 6, 2019.

4. Claimant suffered a 2% left upper extremity functional impairment.

5. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: September 10, 2019.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether the claimant has demonstrated by a preponderance of the evidence that he sustained an injury arising out of and in the course and scope of his employment with the employer on January 8, 2019.

- If the claimant proves a compensable injury, whether the claimant has demonstrated, by a preponderance of the evidence, that medical treatment he has received from Cedar Point Health, In Motion Therapy, and SCL Health Orthopedics (including surgery performed by Dr. Mark Luker), is authorized medical treatment that is reasonable and necessary to cure and relieve the claimant from the effects of the work injury.

- If the claimant proves a compensable injury, whether the claimant has demonstrated, by a preponderance of the evidence, that as a result of his work injury he is entitled to temporary total disability (TTD) benefits from January 11, 2019 through July 14, 2019

- If the claimant proves entitlement to TTD benefits, what is his average weekly wage (AWW)?

FINDINGS OF FACT

1. The claimant is employed with the employer as a Transportation Maintenance Worker I. The claimant's job duties include all manner of highway maintenance. During the winter months, this includes maintaining snow removal equipment.

2. On January 8, 2019, the claimant worked the "swing shift" which is from 4:00 p.m. to 12:30 a.m. On that date, mud, snow, and ice had melted from the snowplows onto the shop floor. The claimant's task was to clean up that debris from the shop floor. The claimant shoveled the debris into a wheelbarrow and then into the bucket of a large loader. Once the bucket was full, the claimant would drive the loader out of the shop to dump the load. He would then repeat this process.

3. The claimant testified that the driver seat of the loader sits approximately eight feet above the ground. In addition, the bucket on this particular loader holds approximately three yards of material.

4. While exiting this loader the claimant held onto a handrail with his left hand while attempting to step down out of the loader. This involves climbing down a small ladder that is not rigid at the two steps closest to the ground. As are result, those bottom steps swing in and under the loader. While exiting the loader in this way, the claimant's left hand extended above his head while he turned his body to see the location of the next step. While in the act of holding his arm up in this manner and

twisting, the claimant heard and felt a "pop" in his left shoulder. The claimant testified that he immediately felt significant pain in his left shoulder.

5. Due to the nature of the swing shift, only the claimant and one other employee, Michael, were on duty at that time. The claimant told his coworker that he had injured his shoulder. The claimant continued to complete his shift, but modified his activities because of pain in his left shoulder.

6. At the next shift change, the claimant informed another employee, Jose P_____, that he had injured his shoulder. Mr. P_____ is a lead worker, but is not considered the claimant's direct supervisor. The claimant testified that no supervisor was on duty until the following morning when the next day shift started.

7. The claimant was first able to speak with his direct supervisor, Mark B_____, on the morning of January 9, 2019. At that time, the claimant informed Mr. B_____ of his injury. The claimant and Mr. B_____ completed an incident report on January 10, 2019.

8. It was on January 10, 2019, that the claimant requested medical treatment from the employer. The claimant testified that the employer instructed him to seek treatment with Surface Creek Family Practice (Surface Creek). The claimant testified that he was not provided with a list of designated medical providers. However, the Employee Incident Statement the claimant signed indicated that he was provided with a provider list.

9. The employer scheduled an appointment for the claimant with Surface Creek for January 11, 2019. On that date, the claimant was seen by Dan Burnell, PA-C and reported that he slightly extended his left arm that resulted in pain in his anterior left shoulder. Mr. Burnell diagnosed the claimant with injury of the muscles and tendons of the left rotator cuff and bicipital tendinitis. Mr. Burnell recommended ice and over the counter pain relievers. In addition, he demonstrated rotator cuff exercises for the claimant to perform at home.

10. A second appointment with Surface Creek was scheduled. However, the claimant was contacted by the staff at Surface Creek and informed that his workers' compensation claim was denied. The claimant was also informed that if he wanted to continue to receive treatment from Surface Creek, the claimant would need to establish care as a new patient and make Surface Creek his personal care provider (PCP).

11. The claimant declined to become a new patient with Surface Creek because he already had a personal care provider at Cedar Point Health Care. After learning that his claim was denied by the respondents, the claimant sought treatment for his left shoulder at Cedar Point Health Care (Cedar Point).

12. The claimant was seen at Cedar Point by Dr. Lars Stangebye on January 25, 2019. On that date, the claimant reported that he had experienced left shoulder pain for two and a half weeks. Dr. Stangebye noted bilateral laxity in the claimant's shoulders and opined that the claimant had a bicep tendon tear. Dr. Stangebye administered an injection to the claimant's left subacrominal bursa and made

recommendations regarding rotator cuff exercises. In addition, Dr. Stangebye ordered a magnetic resonance image (MRI) of the claimant's left shoulder.

13. On February 27, 2019, the claimant returned to Cedar Point and was seen by Dr. Lindsay Meredith. At that time, the claimant reported that his shoulders "dislocate easily" and that he had previously injured his right shoulder, but had never injured his left. Dr. Meredith opined that the claimant had a partial tear in his shoulder that might be "progression of an underlying injury".

14. The claimant testified that the MRI ordered by Dr. Meredith was first denied by the claimant's personal health insurance United Health Care (UHC) pending additional physical therapy. Once the claimant completed further physical therapy, the MRI was authorized by UHC.

15. On March 13, 2019, an MRI of the claimant's left shoulder showed tearing of the posterior labrum and a small paralabral cyst.

16. On March 15, 2019, the claimant returned to Dr. Meredith who noted the MRI results as showing a posterior labral tear. Dr. Meredith referred the claimant for a surgical consultation.

17. On March 27, 2019, the claimant was seen at SCL Health Orthopedics by Daryl Haan, PA-C. Mr. Haan noted that the claimant had multi directional laxity in his left shoulder. Mr. Haan diagnosed a left shoulder posterior labral tear with chondromalacia of the glenoid. In addition, Mr. Haan opined that the claimant would benefit from surgical intervention to include a left shoulder arthroscopy with labral repair, debridement and chondroplasty.

18. On April 5, 2019, the claimant returned to SCL Health Orthopedics and was seen by Dr. Mark Luker. After examination, Dr. Luker diagnosed the claimant with a left shoulder posterior labral tear, a possible left shoulder anterior labral tear, and left shoulder multidirectional laxity. Dr. Luker recommended the claimant undergo surgery to his left shoulder including labral repair and chondroplasty.

19. On April 11, 2019, Dr. Luker performed a left shoulder arthroscopic posterior capsulorrhaphy and labral repair. Following surgery, the claimant underwent physical therapy with In Motion Therapy.

20. On July 2, 2019, the claimant returned to Dr. Luker and reported that his shoulder was stable. Dr. Luker opined that the claimant had returned to baseline and cleared him to return to work on July 15, 2019. The claimant confirmed in his testimony that he was off of work from January 10, 2019 through July 14, 2019, returning to work on July 15, 2019.

21. The claimant testified that he has had treatment for his right shoulder in the past. That treatment related to a work injury and not because of laxity in his shoulder. The claimant testified that his understanding is that he has more mobility in his shoulder joints than an average individual. The claimant also testified that prior to

the incident at work on January 8, 2019, he did not have any pain or other issues with his left shoulder. The claimant has been told that he has laxity in his shoulders.

22. On May 21, 2019, the claimant attended an independent medical examination (IME) with Dr. Lawrence Lesnak. In connection with the IME, Dr. Lesnak reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. The audio recording from the IME was admitted into evidence. In his IME report, Dr. Lesnak recorded the claimant's description of the incident as "[the claimant] was climbing off the front loader while holding onto a handle attached to the front loader with his left hand using the steps on the front loader when he suddenly felt a 'pop' in his left shoulder." Dr. Lesnak also recorded that the claimant stated "he merely had his head turned slightly around looking at the ground with this incident occurred." It is this description of the mechanism of injury that Lesnak relied upon in issuing his opinions.

23. In his IME report, Dr. Lesnak opined that the claimant has a significant amount of joint laxity in his bilateral upper extremities. Dr. Lesnak further opined that although the claimant may have experienced an incident on January 8, 2019, he did not suffer a specific injury. In addition, Dr. Lesnak noted that in his opinion it is unlikely that the claimant's mechanism of injury would result in a left shoulder injury or an aggravation of a preexisting degenerative condition.

24. Dr. Lesnak's testimony at hearing was consistent with his written report. Dr. Lesnak testified that the claimant has a history of hypermobility in his shoulders. In his testimony, Dr. Lesnak questioned the claimant's mechanism of injury. Specifically, Dr. Lesnak noted that the claimant did not slip and did not experience any sudden injury. Dr. Lesnak testified that the claimant would not injure his shoulder from "just looking behind him". In addition, Dr. Lesnak opined that standing while holding the bar at chest level and looking around by rotating his neck would not put stress on the claimant's shoulder joint. Dr. Lesnak noted that the left shoulder MRI showed no acute injury. In addition, Dr. Lesnak testified that the claimant's pain symptoms were in the interior part of his left shoulder, but the MRI showed a tear in the claimant's posterior labrum. Dr. Lesnak testified that the claimant's mechanism of injury would not cause a labral tear; would not aggravate any preexisting pathology; any would not exacerbate a preexisting condition. Dr. Lesnak further testified that the findings on MRI of a labral tear with cyst are evidence of a chronic condition. Dr. Lesnak opined that the surgery performed by Dr. Luker treated that preexisting chronic condition.

25. The claimant testified that at the time of the IME he was approximately one-month post-surgery. In addition, the claimant had only been out of his shoulder sling for approximately one week.

26. The claimant testified that his medical treatment, including the surgery performed by Dr. Luker has been paid for by the claimant and his personal health insurance, UHC.

27. The claimant testified that his pay fluctuates during the year due to the needs of the employer. For example, the claimant has more "on call pay" in the winter months when compared to the summer. In addition, there is a different scheduling

system in the summer. The claimant asserts that the most accurate calculation of his average weekly wage (AWW) would be an average of his wages for an entire year.

28. Based upon the payroll records entered into evidence, from January 2018 through December 2018, the claimant was paid at total of $47,045.10. When this total is divided by 52 weeks, it is equal to $904.71.

29. The ALJ finds that the claimant has demonstrated that it is more likely than not that he suffered an injury to his left shoulder on January 8, 2019. The ALJ is persuaded by the claimant's testimony regarding his mechanism of injury and the resulting injury to his shoulder. In reaching this finding, the ALJ credits the claimant's testimony and the medical records. The ALJ is not persuaded by the opinions of Dr. Lesnak.

30. The ALJ finds that the claimant has demonstrated that it is more likely than not that the medical treatment the claimant has received for his left shoulder, including the April 11, 2019 surgery, is reasonable medical treatment necessary to cure and relive the claimant from the effects of the work injury. In reaching this finding, the ALJ credits the medical records, the testimony of the claimant, and the opinions of Dr. Luker.

31. The respondents argue that the medical treatment the claimant has received from Cedar Point Health, In Motion Therapy, and SCL Health Orthopedics (including surgery performed by Dr. Mark Luker) is not authorized treatment because the claimant's ATP for this claim is Surface Creek Family Practice. The claimant argues that Surface Creek refused to treat him following the denial of his workers' compensation claim. Therefore, it is the claimant's position that he was able to select his own ATP. The ALJ finds that Surface Creek did not refuse to provide the claimant with treatment. The claimant was notified of the steps necessary to establish care as a new patient, to ensure payment for treatment. The claimant had the opportunity to continue treating with Surface Creek, but he elected to seek treatment elsewhere. The ALJ is persuaded by the respondents' argument that Cedar Point Health, In Motion Therapy, and SCL Health Orthopedics (including Dr. Luker) are not authorized providers.

32. The ALJ finds that the claimant has demonstrated that it is more likely than not that that he suffered a wage loss as a result of the January 8, 2019 work injury for the period of January 10, 2019 through July 14, 2019. In reaching this finding, the ALJ credits the medical records, the testimony of the claimant, and the opinions of Dr. Luker.

33. The ALJ relies upon the wage records entered into evidence and calculates that the claimant's AWW at the time of the January 8, 2019 work injury was $904.71.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a

reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2018).

4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment." *See H & H Warehouse v. Vicory, supra.*

5. As found, the claimant has demonstrated by a preponderance of the evidence that on January 8, 2019, he suffered an injury arising out of the course and scope of his employment with the employer. As found, the claimant's testimony and the medical records are credible and persuasive.

6. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

7. As found, the claimant has demonstrated by a preponderance of the evidence that the medical treatment the claimant has received for his left shoulder, including the April 11, 2019 surgery, is reasonable medical treatment necessary to cure and relive the claimant from the effects of the work injury. As found, the medical records, the testimony of the claimant, and the opinions of Dr. Luker are credible and persuasive.

8. Authorization to provide medical treatment refers to a medical provider's legal authority to provide medical treatment to the claimant with the expectation that the provider will be compensated by the insurer for treatment. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995); *In re Bell*, W.C. No. 5-044-948-01 (ICAO, Oct. 16, 2018).

9. Section 8-43-404(5)(a) specifically states: "In all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of the injury, the employee shall have the right to select a physician or chiropractor."

10. Authorized providers include those medical providers to whom the claimant is directly referred by the employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Kilwein v. Indus. Claim Appeals Office,* 198 P.3d 1274, 1276 (Colo. App. 2008); *In re Bell*, W.C. No. 5-044-948-01 (ICAO, Oct. 16, 2018); *In re Patton*, W.C. Nos. 4-793-307 and 4-794-075 (ICAO, June 18, 2010).

11. The issue of whether the selection of an ATP passes to the claimant upon denial of a claim was addressed in *Yeck v. ICAO*, 996 P.2d 228 (Colo. App. 1999). In that case, the claimant was referred to an authorized provider by the employer and the claimant received treatment from that provider. In *Yeck*, the court found that "the right of selection of the physician is not conditioned on an admission of liability". In the present case, the ATP Surface Creek was selected by the employer and the claimant received treatment from that ATP. As found, Surface Creek did not refuse to treat the claimant. Rather, that practice explained the steps necessary to establish care as a new patient, to ensure payment for treatment. The claimant acted unilaterally when he chose to seek treatment elsewhere without requesting a change in his ATP.

12. The claimant relies upon to *Ruybal v. University of Colorado Health Service Center*, 768 P.2d 1259 (Colo. App. 1988) to support his argument that Surface Creek refused to treat him, thereby allowing him to seek another ATP. The claimant's reliance on *Ruybal* is unfounded. In that case, the employer did not offer the claimant medical treatment, so the selection of a provider passed to the claimant by statute. This is distinguishable from the present case as the claimant did receive treatment from Surface Creek and had the opportunity to continue to treat with that provider.

13. As found, the ATP in this case is Surface Creek. Although the treatment the claimant received from Cedar Point and that chain of referrals (including In Motion Therapy, SCL Orthopedics, and Dr. Luker) was reasonable and necessary medical treatment, it was not authorized.

14. Section 8-42-101(6)(b), C.R.S. states in pertinent part:

> If a claimant has paid for medical treatment that is admitted or found to be compensable and that costs more than the amount specified in the workers' compensation fee schedule, the employer or, if insured, the employer's insurance carrier, shall reimburse the claimant for the full amount paid. The employer or carrier is entitled to reimbursement from the medical providers for the amount in excess of the amount specified in the worker's compensation fee schedule.

15. As found, treatment the claimant received from Cedar Point, In Motion Therapy, SCL Orthopedics, and Dr. Luker was not authorized medical treatment. Therefore, the claimant cannot not be reimbursed for out of pocket payments he made to those unauthorized providers.

16. To prove entitlement to temporary total disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a) C.R.S., *supra*, requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by a claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that a claimant establish physical disability through a medical opinion of an attending physician; a claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

17. As found, the claimant has demonstrated by a preponderance of the evidence that he suffered a wage loss as the result of his January 8, 2019 work injury. Therefore, the claimant has successfully demonstrated that he is entitled to TTD benefits for the period of January 10, 2019 through July 14, 2019. As found, the wage records are credible and persuasive.

18. Section 8-42-102(2), C.R.S. requires the ALJ to base claimant's average weekly wage (AWW) on his earnings at the time of the injury. Under some circumstances, the ALJ may determine the claimant's TTD rate based upon his AWW on a date other than the date of the injury. *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). Section 8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO, May 7, 2007).

19. As found, the claimant has demonstrated by a preponderance of the evidence that the appropriate calculation of his AWW is an average of an entire year of wages. As found, the claimant's AWW as of the date of the work injury was $904.71.

ORDER

It is therefore ordered:

1. The respondents shall pay for **authorized** medical treatment of the claimant's left shoulder, pursuant to the Colorado Medical Fee Schedule.

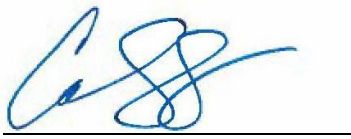
2. Medical treatment provided to the claimant by Cedar Point, In Motion Therapy, SCL Orthopedics, and Dr. Luker is not authorized.

3. The claimant is not entitled to reimbursement for treatment he received from Cedar Point, In Motion Therapy, SCL Orthopedics, and Dr. Luker.

4. The claimant is entitled to temporary total disability (TTD) benefits for the period of January 10, 2019 through July 14, 2019.

5. The claimant's average week wage (AWW) is $904.71.

Dated this 11th day of September 2019.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. **In addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-058-740-002

ISSUES

I. Compensability.

II. Medical Benefits.

III. Average weekly wage.

IV. Temporary partial disability benefits.

V. Temporary total disability benefits.

VI. Authorized provider.

VII. Reimbursement for co-pays, deductibles and funds for out-of-pocket medical expenses.

VIII. Reimbursement to health insurer for medical bills paid.

IX. Reimbursement of vacation, sick, and any other leave.

X. Replenishment of Claimant's Fidelity retirement account.

XI. Penalties for Employer's alleged failure to timely report the claim to the Division and Insurer.

XII. Penalties for Insurer's alleged failure to timely admit or deny liability.

XIII. Penalties for Employer's alleged failure to timely provide Claimant with a list of approved physicians pursuant to Rule 8-2.

STATEMENT OF THE CASE

Claimant alleges an occupational exposure injury due to being exposed to fragrances at work. Claimant contends her exposure to various fragrances at work, which were being emitted by co-workers, caused her to develop chronic headaches and migraines, necessitated the need for medical treatment, and caused her to miss time from work.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. Claimant is a 45-year-old female who worked for the employer as a customer service representative. Her job duties involved taking incoming calls from commercial customers and corresponding with customers. Claimant's workspace was a cubical in an office setting. Claimant's job duties did not require her to be at other workers' cubicles and Claimant was able

to complete her job duties at her desk. Claimant has alleged an occupational exposure with a date of injury of January 17, 2017, as a result of co-workers using scented fragrances while at work. Claimant has not returned to work since December 2017. (Hrg. Tr. 109:19 – 110:8, 112:23-25, 152:2-11; Ex. R; Ex. X).

Claimant's headaches and "triggers" have progressively changed over the course of the claim.

2. In the 10 months leading up to January 2017, Claimant had not had any reaction to scents or smells while working for the employer. Gradually, Claimant began experiencing headaches which she associated with co-workers wearing various scents. However, Claimant also experienced these headaches while she was away from work. She further testified that these headaches gradually worsened over time and, by the time of the hearing, had changed from migraine headaches to exertion headaches. Claimant testified that her exertion headaches could be caused by sneezing, laughing, talking, or anything strenuous. She further testified that smelling perfumes or candles over the holidays or at grocery stores also triggered her migraines along with dryer sheets, detergents, cold weather, and stress. Claimant also testified that smoke from BBQ pits and football game tailgates triggered her migraines along with litigation stress due to her workers' compensation claim. (Hrg. Tr. 33:12-15, 36:7-21, 37:16-24, 73:16 – 74:12, 78:17 – 79:9, 94:16-25).

Claimant did not initially report a work injury. She initially sought time off through FMLA.

3. In January 2017, Claimant reported to her direct supervisor Cesar R____ that she was having migraines and issues with allergies and was seeking treatment and would need to take time off work. Mr. R_____ is a manager with AT&T and supervised Claimant from July 2016 until approximately November 2017. At the time Claimant reported the headaches, she was not eligible for FMLA. Mr. R_____ was under the impression that Claimant was suffering from a personal health condition and looked into offering Claimant a job accommodation through AT&T's ADA process. The job accommodation was approved on February 24, 2017 which included time off work up to 48 hours per month due to her illness or incapacity. Claimant's ADA accommodations were eventually transitioned to FMLA once she was eligible. Claimant continued to take time throughout 2017 under both ADA and FMLA. Claimant ultimately requested that she be permitted to work from home which was denied. At no point prior to September 2017 did Claimant report that she was claiming a work-related injury or otherwise provide medical documentation that she had sustained a work-related injury. (Hrg. Tr. 35:6-9, 44:3-10, 75:1-7, 80:3-19, 108:1-25, 110:12-14, 111:1-3, 115:16 – 118:3, 145:17 – 146:3; Ex. N, p. 239-40, 245-64, 269-72, 276-79, 283-85, 309-322).

Claimant's complaints of co-workers wearing and emitting various scents is not supported by the testimony of her supervisor, Mr. R_____.

4. Claimant complained to her supervisor, Mr. R_____, on numerous occasions that certain co-workers were wearing scents and that such scents were triggering her migraines. Mr. R_____ testified that each time Claimant complained, he took her complaint seriously, even if he could not smell anything. He also testified that when he could not smell anything, he would sometimes have another manager come to the area to see if they could smell anything. A review of various Employer emails submitted by Claimant demonstrate that on one occasion, after Claimant complained about a co-worker wearing a scent, Mr. R_____ had two other managers go to the area. The emails demonstrate that one of the other managers said they could not smell anything and the other one said they could not smell anything excessive or pungent. Mr. R_____ further testified that out of approximately 20 complaints of which he

was aware, he only recalled there being a few occasions where a scent could be detected. Moreover, Mr. R_____ also testified that after repeated complaints by Claimant, against a certain co-worker, that co-worker started to get frustrated because he said he was not using any scents and felt like he was being harassed. The ALJ finds that Mr. R_____ took Claimant's complaints seriously, sought help from other managers to verify Claimant's complaints, and counseled Claimant's co-workers to make sure they were not wearing any scents. And, as can reasonably be expected, a co-worker who was not wearing any scents, but was being accused of such, got frustrated and felt like they were being harassed. Thus, the ALJ finds Mr. R_____' testimony to consistent, and the events he described to be probable, and his testimony to be credible. (Ex. 13; Hrg. Tr. 121-140.)

Claimant used FMLA along with short-term and long-term disability benefits.

5. Claimant testified that during 2017, she did not get paid for the hours and days she had to take off from work and used sick and vacation time instead. Claimant also testified that there were days in 2017 that she missed work for other reasons (e.g. sick and vacation days), however, Claimant was unaware of the specific dates. (Hrg. Tr. 43:8-17, 48:7-15).

6. Claimant subsequently received both short-term and long-term disability benefits. She also testified that she had to "cash out" her 401k. (Ex. P; Hrg. Tr. 70:16-20).

Employer made several accommodations for Claimant without any report of relief from her headaches.

7. In late January 2017, Claimant started reporting that various co-workers were using fragrances, which triggered her migraines. Claimant then discovered that the employer had a policy or guideline with regard to employees using perfume and various fragrances while at work. The policy or guideline provided that fragrances should be undetectable to others when seated at workstations. Claimant reported that she took various steps while at work to limit her exposure to scents, including getting an herb oil to "counteract…synthetic scents." (Hrg Tr. 38:15-16, 43:1-4; Ex. N, p. 230).

8. The employer addressed Claimant's reports of co-workers using cologne or hand lotion in an effort to assist Claimant, including moving Claimant's cubicle several times, sending out emails to the teams, changing out air filters in the building, conducting team meetings, meeting with employees individually, having employees change clothes or wash their hands, and moving co-workers. Despite Claimant's numerous reports, managers were often unable to smell or otherwise corroborate Claimant's complaints and many employees felt that they were being harassed. Regardless of the actions taken by the employer, Claimant continued to report issues, even though many of her co-workers were not located in close proximity to her workspace. (Ex. N, p. 233-38, 242-44, 265-68, 273-74, 286-90, 296-98, 301-07; Hrg. Tr. 121:14 – 127:5, 150:24 – 152:1, 152:8 – 153:24, 158:22 – 159:4).

Claimant filed a workers' claim for compensation on September 27, 2017.

9. On or about September 27, 2017, Claimant completed a Workers' Claim for Compensation alleging a work-related illness due to an allergic reaction to fragrances. This was filed with the Division on October 4, 2017 and assigned W.C. No. 5-058-740. Claimant testified that she was not aware that she had a potential workers' compensation claim until this time. She also testified that prior to this time, she had not told Mr. R_____ or any other supervisor that she wanted to report a work injury, had not provided any medical documentation evidencing a work injury, and had not asked that her employer send her for treatment. Claimant testified that she was not

aware that she may have suffered a work injury and she was unable to identify a specific date that the employer should have been on notice that she was claiming a work injury, but felt that the employer should have understood that she was reporting a work injury back in January 2017, despite the fact that she was not aware she had a potential claim until September 2017. However, Claimant was familiar with the workers' compensation process due to having filed a prior claim. Mr. R_____ testified that he did not learn that Claimant was alleging a work-injury until she filled out a claim for compensation and placed it on his desk in September. Mr. R_____ was under the impression that Claimant's migraines were a personal health condition and he proceeded based on the information Claimant presented to him. (Ex. Q, p. 329; Ex. R; Hrg. Tr. 61:6-21, 84:23 – 86:23, 119:7-16, 120:6-25, 121:1-13).

A Provider List was given to Claimant once the W.C. Claim was reported.

10. On September 28, 2017, Mr. R_____ provided Claimant via email with a list of medical providers in her area in order to be evaluated. Claimant selected Concentra to treat with under the w.c. claim and testified that she treated with both Concentra and another physician to whom she was referred. Claimant was not charged for these visits as they were paid for by Respondents. (Ex. N, p. 280-81; Hrg. Tr. 70:25 – 71:24, 88:23 – 89:5).

The Division assigned two Workers' Compensation numbers for the same claim and various documents were filed under separate numbers for the same claim.

11. On October 10, 2017, the Division issued a letter under W.C. No. 5-058-740 to Claimant indicating that her claim for compensation was received. The letter was copied to Old Republic Insurance Company and provided that a position must be stated within 20 days of the date of the letter. (Ex. 3). On November 13, 2017, the Division issued a letter under W.C. No. 5-058-740 to Claimant and Old Republic Insurance Company indicating that a position statement needed to be filed and that Claimant had a right to file for an expedited hearing. (Ex. 4). A Director's Order was subsequently issued on December 14, 2017 under W.C. No. 5-058-740 ordering Respondents to file a position statement within 15 days. (Ex. 5). Claimant was unable to provide any evidence as to when these documents were received by Respondents, however Claimant was aware that her claim was being investigated and was ultimately denied. (Hrg. Tr. 101:14 – 103:19).

12. A First Report of Injury was filed on November 14, 2017 via EDI and assigned W.C. No. 5-061-909 by the Division. A denial was issued on November 17, 2017 via EDI under W.C. No. 5-061-909. A Notice of Contest was issued on November 21, 2017 and mailed to Claimant. The date of injury was inadvertently listed as September 27, 2017 – which was the date the alleged injury was actually reported to the employer. Because of this, the second W.C. number was generated (W.C. No. 5-061-909). (Ex. Q, p. 330-331; Ex. S, p. 334; Ex. 6).

13. These claims were ultimately merged under W.C. No. 5-058-740 as they both pertained to the same alleged injury. (Ex. Q, p. 329; Ex. V). A second Notice of Contest was mailed to Claimant under the merged claim on January 11, 2018. (Ex. S, p. 339).

14. On February 22, 2018, Claimant initially filed an Application for Hearing and endorsed various issues, including several alleged penalties. This application for hearing was re-filed on September 19, 2018 after ALJ Michelle Jones issued a Bench Order on September 6, 2018, striking Claimant's application due to Claimant and Claimant's attorney's failure to appear at the August 14, 2018 hearing. (Ex. T).

Claimant has a history of headaches and severe allergies for which she received treatment.

15. Claimant testified at hearing that she has both a prior history of sinus headaches and a history of severe allergies. Dr. Ebadi had been her allergist prior to January 2017 and Dr. Ebadi had referred her to Dr. Elina Pales. (Hrg. Tr. 51:23-25, 89:7-14, 93:7-11).

16. Claimant presented to the emergency department on January 16, 2013 with complaints of a 9/10 headache for 3 days with sinus congestion and nausea. It was noted that Claimant had a history of headaches 1-2 times a week. Claimant was to follow-up with her primary care provider for chronic headache work-up. (Ex. K, p. 216-19).

17. On May 21, 2013, Claimant presented to allergist Dr. Ebadi who reported sneezing, nasal congestion, profound fatigue, insomnia, recurrent sinus infections, and "feeling sick all the time." Past medical history was positive for tension headaches, depression, anxiety, sleep apnea, and GERD. Skin testing revealed Claimant was "incredibly allergic to spring, summer, and fall pollen." Dr. Ebadi felt that environmental allergies were contributing to her fatigue, difficulty concentrating and recurrent sinus infections. Medication was prescribed. (Ex. I, p. 187).

18. Claimant contacted Dr. Ebadi's office on October 16, 2013 and reported the shots were making her sick and that she had stopped treatment due to "severe headaches" and fatigue. (Ex. I, p. 194).

19. On November 25, 2014, Claimant treated with Dr. Chaudhary for evaluation of musculoskeletal pain, including chronic fatigue and sleep disturbance. It was felt that Claimant had fibromyalgia, although her pain pattern was atypical. Medication was prescribed. (Ex. J, p. 211-12).

20. Claimant presented to Dr. Ebadi on December 19, 2016 with complaints of worsening sinus symptoms and hives. It was noted that scents increased her sinus symptoms. The reason for the visit was listed as "severe allergy reactions" and Claimant reported swollen face, hives, and severe pressure points throughout her face. There was no mention of migraines. Allergy medication was prescribed. (Ex. I, p. 176-77).

Claimant begins treatment for migraine-type headaches.

21. On January 17, 2017, Claimant presented to Dr. Ebadi due to sinus pain and pressure and headache. Claimant reported sinus headache, tension headache, fatigue, insomnia, anxiety, painful and stiff joints, and fibromyalgia. It was noted that Claimant did not want a CT scan. Norco was prescribed along with Allegra. (Ex. I, 174-75).

22. On February 16, 2017, Claimant presented to Dr. Elina Pales upon referral from Dr. Ebadi. Claimant reported that she had experienced "sinus headache forever" and that she was "allergic to everything outside." Claimant stated reported her *sinus headaches occurred 1 to 2 times per week*. About 2 months prior, Claimant reported that a new headache started with an intense tension pressure and it was occurring approximately 1 to 2 times per week, "almost instead of usual sinus headaches." Claimant noted associated odor and noise sensitivity. A family history of migraines was noted along with a prior history of a concussion. The assessment was migraine without aura, migraine with aura, and tension headache. Neurological examination was normal. Disability paperwork was completed "as requested by patient." Rebound headache was discussed and Claimant was to limit Tylenol. Ibuprofen and amitriptyline were prescribed along with management of allergies with Dr. Ebadi. (Ex. G, p. 137- 138).

23. By March 29, 2017, Dr. Pales noted that Claimant had not yet started amitriptyline and that disability paperwork was again filled out as requested by Claimant. (Ex. G, p. 135-36).

24. On July 24, 2017, Claimant presented to Dr. McElroy, her primary care physician, and reported that she had a sensitivity to strong smells and worked in an environment where her co-workers "wear a lot of perfume." Claimant was given a note indicating a need for a separate work environment. (Ex. H, p. 151-52).

25. On September 6, 2017, Claimant returned to Dr. Pales and reported worsening migraines. She stated that her co-workers' perfumes and colognes triggered her headaches along with stress at work. It was noted that Claimant was not taking amitriptyline because she was unable to tolerate it. Dr. Pales wrote a note for work for Claimant to work in an odor free environment. Verapamil was prescribed and Claimant was told to limit use of Excedrin due to rebound headaches. Disability paperwork was completed at Claimant's request. (Ex. G, p. 133-34).

Dr. Jones requests a causality opinion.

26. On October 26, 2017, Claimant presented to Dr. Randall Jones at Concentra and reported migraines due to co-workers wearing cologne and perfume. Claimant reported that she had no problems during the first 8 months of employment, despite having some exposure. Claimant further reported that "now any exposure anywhere will cause a [headache]." A referral was made for a causality opinion. Claimant was maintained on full duty work. (Ex. E, p. 116-118).

Dr. Reinhard opines that Claimant did not sustain a work-related injury.

27. Claimant presented to Dr. David Reinhard with Colorado Rehabilitation and Occupational Medicine on November 17, 2017 for a causality assessment regarding her migraine headaches. Claimant denied any prior history of migraine headaches or other headache condition, but did report a pre-existing history of numerous allergies. She reported that after 8 months of working for the employer, she started to develop headaches associated with significant nausea and sensitivity to light and sound. Claimant also reported problems with coordination and balance along with memory and concentration. Claimant reported that cologne and perfumes at work triggered her headaches. Dr. Reinhard noted that Claimant was taking Excedrin on a daily basis and "probably got into some problems with medication overuse headache/rebound." His impression was migraine with aura of unclear etiology. Dr. Reinhard opined that he could not causally relate her headaches to her employment to a reasonable degree of medical certainty. He noted that Claimant had been employed for 8 months prior to developing the headaches and that Claimant was experiencing headaches whether at work or not. He noted that it was "quite plausible to consider the possibility that she developed migraine headaches completely independent of her work activities." Dr. Reinhard also opined that daily use of Excedrin could make Claimant's headaches occur more frequently to the point of having a chronic migraine. Dr. Reinhard recommended treatment outside the Workers' Compensation system to include follow-up with her neurologist and a brain MRI. (Ex. D, p. 100-102).

Claimant's brain MRI shows a Chiari 1 malformation.

28. On December 20, 2017, Claimant underwent a brain MRI. The impression was cerebellar tonsillar ectopia (Chiari 1 malformation) and post-inflammatory residua of the paranasal sinuses. (Ex. F, p. 119, 1 D'Angelo, 29:4-11).

Ongoing treatment with Dr. Pales is aimed at treating symptoms related to Chiari Malformation and Claimant continues to report worsening headaches with new triggers despite not working for Employer.

29. Claimant returned to Dr. Pales on December 21, 2017 and reported that she was doing "poorly" and had been out of work for the most part since November 18th. Claimant reported daily migraines associated with visual changes, cognitive slowing, intermittent dizziness, grogginess, sleepiness, nausea, and vomiting. Claimant reported feeling weak and debilitated with an inability to perform activities of daily living. It was noted that Claimant was unable to function on Topamax even with the smallest dose. Claimant reported continued use of Excedrin. Dr. Pales noted the brain MRI showed a Chiari 1 malformation. The assessment included Chiari 1 malformation likely contributing to Claimant's headaches given the intractable and progressive course of her symptoms since the onset, their severity and associated neuropathic changes. Disability paperwork was completed for Claimant to stay off work for 1 month to assess symptomatic and functional improvement. Verapamil was again prescribed along with consideration of Botox injections. If no benefit, Claimant was to consult with the "Chiari Institute" at MC of Aurora. Claimant was to minimize use of Excedrin due to rebound headache. (Ex. G, p. 129-30).

30. On January 17, 2018, Claimant reported only mild improvement and felt that she may be allergic to amitriptyline. She reported that "even slight smells have been triggering headache lately" and that "she changed all of her laundry detergents and soaps" and was staying at home so she would not "encounter smells." Trigger point injections were performed. Claimant was maintained off work for another month. It was again noted that consultation with the Chiari Institute may be needed. (Ex. G, p. 127-28).

31. Claimant continued to report severe and debilitating headaches as of February 13, 2018. Constant fatigue was also reported. A sleep study was recommended and Claimant was maintained off work for another month. (Ex. G, p. 123-26).

32. As of June 13, 2018, Claimant continued to report daily headaches with debilitating migraines. It was noted that Claimant had side effects to propranolol and felt too sleepy on amitriptyline so both medications were discontinued. Botox was discussed, but she was afraid of reactions to the medication. Acupuncture also did not help. Dr. Pales noted that Claimant had failed Topamax, Verapamil, propranolol and amitriptyline and did not want to try a new medication. It was noted that sleep apnea was also possibly contributing to Claimant's symptoms. Claimant was recommended to remain off work unless her workplace would allow her to work from home. (Ex. G, p. 121A-B).

33. On September 7, 2018, Claimant again reported continuing daily, intolerable headaches. It was noted that "stress and physical exertion happen to be the main headache triggers lately." Claimant was referred to a neurosurgeon for consultation about potential skull base surgery for management of Chiari 1 malformation. Botox was again discussed, but Claimant was not interested. Aimovig was prescribed. (Ex. G, p. 120C-D).

34. Claimant returned to Dr. Pales on January 17, 2019 and reported daily headache triggered by exertion of any kind, including laughing, sneezing, exercise, and stress. Aimovig was injected and Claimant was to continue with avoidance of headache triggers. (Ex. G, p. 120A-B).

35. Claimant testified that she has tried several medications for her headaches, but none of them have worked or allowed her to return to work in any capacity. She stated that she was not seeking Botox injections, but wanted to continue treating with her doctor "to get things under control". Claimant also testified that, despite being at home for over a year, her headaches have not improved or subsided. (Hrg. Tr. 96:10 – 98:8).

Claimant has a pattern and practice of seeking disability for various health conditions.

36. In addition to a prior history of headaches and allergies, Claimant's medical records also document a consistent pattern and practice, both prior to and after the alleged work injury, of requesting that her providers declare her disabled and unable to work:

- April 23, 2013: Claimant presented to Dr. Von Lindeman's office and requested FMLA paperwork be completed. (Ex. H, p. 173).
- December 3, 2013: Dr. Von Lindeman contacted Dr. Ebadi's office and requested notes as Claimant was asking for FMLA paperwork to be filled out again. (Ex. I, p. 195).
- February 11, 2014: Debra Hoffman, NP for Dr. Lindeman noted that Claimant presented to the clinic and requested disability paperwork be filled out. (Ex. H, p. 171).
- July 15, 2014: Debra Hoffman, NP documented an encounter with Claimant regarding questions about disability. It was noted that Claimant expressed concern "about the conversation Dr. Von Lindeman had with the Disability office back in April." Claimant informed Nurse Hoffman that she believed she was "disabled and wants to know what additional testing needs to be done." (Ex. H, p. 167-68).
- September 18, 2014: Claimant returned to Debra Hoffman, NP with disability forms. It was noted that Claimant requested temporary disability to cover her for the next 6 months while she continued to seek medical care for her numerous medical issues. Claimant again indicated that she believed she qualified for permanent disability. Nurse Hoffman informed Claimant that she would not sign that Claimant was permanently disabled, although Nurse Hoffman did sign that Claimant could not work her usual job for at least 6 months. (Ex. H, p. 163-64).
- December 15, 2014: Claimant presented to Debra Hoffman, NP for completion of disability paperwork. An additional 6 months of temporary disability was provided. (Ex. H, p. 161-62).
- February 19, 2015: Claimant reported to Debra Hoffman, NP that she was "running out of time to be declared disabled." It was noted that Claimant did not "feel like she can work consistently…she wants to be declared disabled. Wants to know how they can facilitate this." (Ex. H, p. 159).
- February 26, 2015: Claimant contacted Dr. Chaudhary and asked if he would fill out disability paperwork. Dr. Chaudhary indicated that Fibromyalgia was not a rheumatological condition for which he would fill out disability paperwork. (Ex. J, p. 207).
- March 20, 2015: Claimant presented to Dr. Raford for evaluation of Social Security disability. Dr. Raford noted that it was unclear whether the reported diagnosis of Fibromyalgia was in fact valid given Claimant's atypical pattern of symptoms. He requested additional records and informed Claimant that Social Security disability required Claimant to be unable to perform any occupation. (Ex. H, p. 156-58).

- January 23, 2017: Claimant presented to Dr. Ebadi and requested a work note stating that she was dealing with symptoms so she did not lose her job. (Ex. I, p. 199).
- February 3, 2017: Claimant contacted Dr. Ebadi to fill out disability paperwork and ADA Accommodation Medical Evaluation form. Dr. Ebadi's office informed Claimant that this needed to be completed by a neurologist. (Ex. I, p. 200).
- February 16, 2017: Claimant presented to Dr. Pales and reported that she had had "sinus headache forever" and was "allergic to everything outside." Dr. Pales filled out the disability paperwork requested by Claimant. (Ex. G, p. 137-144).
- March 29, 2017, Dr. Pales again completed disability paperwork as requested by Claimant. (Ex. G, p. 135-136).
- September 6, 2017: Dr. Pales filled out additional disability paperwork as requested by Claimant and also indicated that Claimant be placed in an "odor free environment." (Ex. G, p. 133-134).
- November 17, 2017: Dr. Pales filled out disability paperwork as requested by Claimant. (Ex. G, p. 131-132).
- December 21, 2017: Dr. Pales filled out disability paperwork as requested by Claimant. (Ex. G, p. 129-130)

(See also Ex. A, p 31-34).

<u>An indoor air quality investigation reveals no toxic or harmful chemicals or volatile compounds</u>.

37. An indoor air quality investigation and sampling was conducted on March 12, 2018 by Robert Woellner of Quality Environmental Services and Technologies, Inc. (QUEST). Mr. Woellner conducted an indoor air quality inspection and sampling survey at the AT&T call center where Claimant worked. He also conducted monitoring of trace gases, including total volatile organic compounds (TVOCs), as well as sampling for volatile organic compounds (VOCs) toxics-in-air to investigate the indoor air quality concerns. It was noted that Claimant had been located in various cubicles on the first floor. Normal office equipment, one dry-erase board, "aromatherapy" type hand lotion and miscellaneous hand sanitizers were observed. The HVAC system included rooftop air handling units and ducted air supply. Mr. Woellner did not observe any chemical-emitting sources, anomalous odors, visible mold growth, or other environmental concerns. (Ex. B, p. 70-71).
38. A handheld MultiRAE PGM-6228 photo-ionization chemical detector was used to measure airborne concentrations of various gasses and compounds, including TVOCs throughout the first floor and outside the building. No TVOCs were identified and all concentrations were determined to be well within normal and expected values. (Ex. B, p. 71).
39. An air sample was also taken in a six-liter SUMMA canister for the first floor near cubicles where Claimant worked. The air sample was analyzed following method TO-15 which analyzes the broadest range of potential volatile organic compounds at the most sensitive detection limits. This includes testing for the measurement of subsets of the 97 volatile organic compounds (VOCs) that are included in the 189 hazardous air pollutants. Only three compounds were identified and each detected concentration was significantly below the lowest available or published odor threshold value. (Ex. B, p. 72).

40. Based on the investigation and air sampling, Mr. Woellner offered 4 recommendations - conclusions:

> (1) on the first floor, no chemical-emitting sources, anomalous odors, visible mold growth, or other environment concerns were observed;
>
> (2) trace gas concentrations were well within normal and executed values with no anomalies detected;
>
> (3) toxics-in-air sampling identified three VOCs and all three compounds were identified in concentrations that were well within the permissible exposure limits which appeared to be the result of background or regional building material off-gassing, emissions, automobile emissions, and/or construction, occupancy, cleaning, or maintenance activities; all other analytes, including acetone, were not detected at the method detection limit; and
>
> (4) any occupants who continued to experience adverse medical symptoms were recommended to seek medical attention and provide their physician with the air quality report. (Ex. B, p. 73-74).

Robert Woellner testified at hearing in support of his air quality study investigation.

41. Mr. Woellner also testified at hearing as an expert in industrial hygiene, indoor air quality, and environmental sampling. He testified that Quest Environmental was retained in this case by AT&T directly, prior to any litigation, for the purpose of identifying any potential environmental pollutants or chemicals at the AT&T building where Claimant worked. (Hrg. Tr. 163:3 – 167:8, 168:1 – 169:6).

42. Mr. Woellner testified that he used a combination of visual observations to identify sources of indoor air quality emissions and concerns, hand-held instruments to measure the total levels of those materials, followed by an air sample. Mr. Woellner explained that the concerns in this case involved smells which meant that the category being analyzed was airborne chemicals with volatile organic compounds. He testified that anything that smells is comprised of various volatile organic compounds and whether the scent is synthetic or natural, the compound is the same. Mr. Woellner further explained that scents that are in lotions or perfumes are comprised of volatile organic compounds. He testified that there are approximately 1,800 volatile organic compounds that are common in buildings, however only 80 of those are toxic, meaning they do adverse harm to the body at high enough concentrations. Fragrances and deodorizers are not comprised of toxic volatile organic compounds because they are intended to be smelled. Mr. Woellner further testified regarding the various protocols and thresholds for permissible and recommended exposure levels. (Hrg. Tr. 169:16 – 170:2, 173:17-25, 178:8 – 180:18, 184:13-25, 198:17-23).

43. Mr. Woellner testified that the handheld instrument tested for total volatile organic compounds (the combination of all volatile organic compounds together). The detection limit allowed him to measure down to a tenth of a part per million, or 100 parts per billion. The field instrument also helps locate where concentrations are highest and any major areas of concern and then an air sample is taken. The air sample is analyzed under EPA Method TO-15, which analyzes approximately 80 toxic compounds amongst the 1,800 volatile organic compounds that can be detected. Accordingly, the air sample analyzes those compounds that are toxic or hazardous. (Hrg. Tr. 173:23 – 174:4, 175:15 – 176:6, 184:6-11).

44. In this case, the hand held instrument identified 0.0 parts per million of total volatile organic compound. In other words, the hand held instrument did not detect any volatile organic compounds in the various areas of testing. The air sample identified 3 compounds, which Mr. Woellner testified were three of the most common compounds found in air samples and were the product of cleaning materials, cars, and air conditioning materials. However, he noted that these were extraordinarily low concentrations and were much lower than what is typically detected in other locations, such as homes. Mr. Woellner also opined that from an air quality perspective, office buildings tend to be much better than residential buildings due to requiring a fresh air exchange. The end result is that office building air generally has lower chemical concentrations than residential air. (Hrg. Tr. 187:1-4, 189:15-24, 190:8 – 192:3, 193:2-21).

45. Mr. Woellner further opined that Claimant's use of an oil to counteract other smells was ill-advised for someone who is allegedly chemically sensitive. He testified that the oil would still be a volatile organic compound and Claimant was merely "adding chemicals to chemicals." (Hrg. Tr. 199:7-18, 214:13-18). In other words, Claimant's use of scents to prevent her alleged reaction to scents is contradictory.

Dr. Kathleen D'Angelo performs an IME and opines no work related injury.

46. An IME was performed by Dr. Kathleen D'Angelo on May 7, 2018. Claimant's chief complaints included headaches, neck pain, problems thinking, and stress. She denied having any similar or previous problems. Claimant reported "synthetic" scents such as perfumes, colognes, lotions, detergents, and dryer sheets triggered her migraines, along with sugar and fructose, stress, and cold weather. It was noted that light did not affect her headaches, but noise exacerbated her pain. Claimant reported that she would get an "aura" with her migraine if it was severe and continuous. Claimant stated that she had not had any improvement in her migraines despite being off work since December 2017 and was still experiencing daily headaches. Claimant stated that she would get migraines when going grocery shopping or going to the movies if people had on perfume and colognes. (Ex. A, p. 2-8, 25).

47. Claimant reported that she had worked for the employer for some time before her symptoms developed. She also denied any change in what perfumes or scents people were wearing. Claimant also reported experiencing headaches even when working on the weekend and alleged that the scents were saturated in chairs. (Ex. A, p. 9).

48. Based on her review of the medical records and examination of Claimant, Dr. D'Angelo assessed Claimant with Chiari 1 malformation, Fibromyalgia, Anxiety, Post-Traumatic Stress Reaction, and Depression, all of which were not work related. Dr. D'Angelo did not believe there were any work-related diagnoses. Dr. D'Angelo noted that Claimant had a prior history of a closed head injury along with pre-existing complaints of headaches and memory loss (including a history of 1-2 headaches per week), along with a medical history positive for depression, anxiety, tension headaches and fatigue. Claimant also had a strong history of environmental allergies and a diagnosis of stress-induced Fibroymyalga. (Ex. A, p. 13-22).

49. Dr. D'Angelo noted that prior to the alleged date of injury, Claimant had been treating with her personal allergist Dr. Ebadi with complaints of ear and sinus pressure, facial pain, and headaches. When Claimant requested disability paperwork from Dr. Ebadi, Claimant was referred to neurologist Dr. Elina Pales where Claimant reported that she had had "sinus headache forever" and was "allergic to everything outside." Claimant reported that she would suffer sinus headaches 1-2 times per week at baseline, but had developed a new headache associated with odor and noise which occurred 1-2 times per week instead of the usual sinus headaches. Dr. D'Angelo further documented that providers at Concentra referred Claimant to Dr. Reinhard for a causality assessment, and Dr. Reinhard did not believe there was a work related exposure. (Ex. A, p. 23-28)

50. Dr. D'Angelo also based her assessment on the brain MRI which revealed a Chiari 1 malformation. She noted that headache is the hallmark sign of Chiari malformation, but other symptoms can include neck pain, dizziness, vomiting, insomnia, and depression. Dr. D'Angelo noted that Dr. Pales had documented that Claimant's Chiari 1 malformation was likely contributing to all of Claimant's symptoms. (Ex. A, p. 28-29).

51. Dr. D'Angelo further documented that an Air Quality Test had been performed and that no environmental concerns were noted and that trace gas concentrations were all within normal and expected values. (Ex. A, p. 29-30).

52. Ultimately, Dr. D'Angelo opined that Claimant's migraine headaches were incidental and causally unrelated to her work environment or alleged exposure to perfumes and/or fragrances used by co-workers. Dr. D'Angelo further opined that Claimant's copious subjective symptoms could be due to her Chiari 1 malformation and noted that this diagnosis was important in light of Claimant's evolving symptoms. This was especially true given that Claimant continued to report daily headaches despite being out of the workplace and away from work exposure to perfumes, cologne and other scents. Dr. D'Angelo noted that Claimant was employed at the AT&T call center for approximately 8 months prior to the onset of her headaches and that Claimant had multiple visits with her personal physicians prior to alleging that perfumes and scents at work were triggering her symptoms. Dr. D'Angelo opined that she could not link with medical probability Claimant's headaches to her work, work environment, work exposure, or any other air quality issue at the AT&T call center. (Ex. A, p. 30-31).

53. Finally, Dr. D'Angelo opined that there was a significance regarding the consistent pattern of Claimant's repeated requests for disability paperwork from Claimant's providers, which Dr. D'Angelo noted was unchanged before and after the alleged work injury. (Ex. A, p. 31).

Dr. D'Angelo testified that Claimant's congenital Chiari Malformation is the most likely cause of Claimant's symptoms and need for treatment.

54. Dr. D'Angelo testified via deposition as an expert in internal medicine and occupational medicine. Dr. D'Angelo is board-certified in internal medicine and has been Level II accredited since 2001. Her practice consists of almost 100% of occupational medicine. Dr. D'Angelo testified that she has treated many patients with Chiari malformations both as an internist in the emergency department and in private practice. (1 D'Angelo, 3:7 – 4:11; 2 D'Angelo, 100:3 – 101:8).

55. Dr. D'Angelo testified that Claimant reported a gradual onset of headaches approximately 7 to 8 months after working for the employer which Claimant associated with scents and perfumes used by co-workers. Claimant denied any issues in the first 7 to 8 months despite exposure during that time. At the time of her IME, Claimant reported similar issues with exposure to scents outside of the work environment, such as while grocery shopping or in a movie theater, along with scents such as fabric softener sheets and detergent. (1 D'Angelo, 6:10-24, 7:5-17, 50:16 – 51:23).

56. Dr. D'Angelo also explained the difference in various types of headaches. Sinus headaches are associated with frontal and periorbital pain, worsened with bending over. Tension headaches (muscular tension) typically begin in the upper back, thoracic, cervical, or suboccipital region and the pain radiates over the head. Migraine headache are genetic and involve an anatomical issue with nerves in which there is an excess of blood flow to the brain with increased intracranial pressure. Migraines are also associated with prodrome syndrome. Rebound headaches are characterized as "medical overuse headaches" which causes an increase in pain when medication wears off. Chiari headaches are due to Chiari malformation with typical

onset in early adulthood up to age 50 with symptoms including visual disturbances, vertigo, dizziness, faintness and are worsened by exertion. Exertional headaches involve increased intracranial pressure from things such as high blood pressure, a brain tumor, or a Chiari malformation. Dr. D'Angelo also testified that headaches, including the type of headache, the frequency of the headache, and the severity of the headache, are completely subjective and based on the patient's report. (1 D'Angelo 9:3 – 13:3, 43:8 – 44:8).

57. Dr. D'Angelo opined that Claimant's description of her headaches did not sound like a typical presentation of migraines. Dr. D'Angelo testified that the location of the headache (pain to both eyes, over her head, stemming from her neck, scapula and shoulder blades) was "incredibly unusual" for migraines. Dr. D'Angelo also testified that neurological changes (e.g. prodrome "prior to the headache) occur prior to a migraine occurring. Claimant's report of an aura after onset of the headache was also unusual along with her complaints of vertigo and faintness, as those are not typically associated with migraines. (1 D'Angelo 7:18 – 8:10, 13:4 – 15:22).

58. Dr. D'Angelo testified regarding the numerous medications that Claimant had been trialed on and noted that these were standard migraine treatments, however, Claimant had either been unable to tolerate the medications or did not experience any relief. Dr. D'Angelo opined that this raised the question of whether the diagnosis of migraines was correct or whether there was an issue of somatic symptom disorder or malingering. Dr. D'Angelo testified that factors of significance included a pre-existing pattern of requesting time off or using medical help as a means for secondary gain, the presence of litigation, and the fact that Claimant was alleging this as a work-injury. Dr. D'Angelo noted that Claimant had a pattern of arguing for disability long before the work injury and, of significance, Claimant alleged that multiple different conditions caused her disability at different times. (1 D'Angelo 16:13 – 23:11, 24:22 – 27:6).

59. In addition to the foregoing, Dr. D'Angelo opined that the diagnosis of migraines in this case was likely incorrect given Claimant's diagnosis of a Chiari 1 malformation on the brain MRI, which Dr. D'Angelo testified was likely the cause of Claimant's symptoms. Dr. D'Angelo testified that Chiari 1 malformation (cerebellar tonsillectomy) is a genetic and congenital condition which begins at the time of birth. A Chiari 1 malformation allows herniation of the cerebellum through the foramen which causes contraction around the brain tissue and can cause microbleeds which result in increasing intracranial pressure. Dr. D'Angelo testified that the most common symptom is headache, however, the typical onset occurs between ages 20 and 50. Chiari 1 malformation is also associated with worsening, more frequent headaches along with associated symptoms of dizziness, visual changes, muscular weakness, muscular numbness, fatigue, and focal and cognitive issues. Dr. D'Angelo noted that treatment with medications designed for migraines would not provide relief for a Chiari 1 malformation. She further explained that Claimant had a history of headaches which were replaced with new headaches, pre-dating the alleged work exposure and that it was entirely possible that her headaches and other symptoms (such as atypical Fibromyalgia) all along were due to her Chiari 1 malformation. (1 D'Angelo 18:7-11, 23:25 – 24:21, 27:7 – 32:22; 2 D'Angelo 117:1-15).

60. Dr. D'Angelo noted that Claimant's neurologist Dr. Pales had also opined that Claimant's Chiari 1 malformation was likely contributing to Claimant's symptoms given the "intractable progressive course of her symptoms since the onset, their severity, and associated neuropathic changes." (1 D'Angelo 32:11-15).

61. Additionally, Dr. D'Angelo specifically discounted that there was a work exposure which caused or aggravated Claimant's underlying headache condition. Dr. D'Angelo pointed out that with environmental work exposures, there is an expectation that a patient will improve once removed from the work environment. Here, Claimant was removed from work for several months and not only reported no improvement, but reported a worsening of symptoms. Dr. D'Angelo testified

that there are certain environmental contaminants which can cause long-term effects. This had been tested for and did not exist. Further, with environmental precipitants of headaches, once an individual is removed from the environment, the headaches will improve. Dr. D'Angelo also refuted Claimant's allegation that her chronic headaches were due to any prolonged exposure. Dr. D'Angelo noted that long-term effects caused by environmental contaminants were typically pulmonary in nature and she was unaware of any medical research which demonstrated an association with exposure to perfumes and colognes with long-term chronic headaches. Additionally, Claimant's reports that any exposure anywhere now triggers headaches and that Claimant was now experiencing exertional headaches triggered by stress, sneezing, and laughing was further evidence against a work-related exposure. This was further evidence that Claimant's symptoms are related to her Chiari 1 malformation and not due to her work environment. (1 D'Angelo 23:22 – 24:2135:13 – 38:3, 39:8 – 40:18, 40:23 – 41:15).

62. Dr. D'Angelo testified that Dr. Reinhard had also opined that Claimant's headaches were not work related and that ongoing work-up and treatment should be completed with her healthcare providers. Dr. D'Angelo testified that Dr. Reinhard was correct in his assessment and that she agreed with his reasoning. (1 D'Angelo 32:23 – 34:12).

63. In sum, Dr. D'Angelo testified that she had no explanation from an environmental standpoint with regard to the cause of Claimant's headaches and that scents and perfumes are a ubiquitous finding in the environment. She testified that Claimant did not have a work-related diagnosis based on the following:

    - Claimant was in the same work environment for 7 to 8 months and had smelled perfumes without any symptoms;
    - Claimant's description of her headaches was inconsistent with a typical presentation of migraines;
    - The industrial hygienist's evaluation ruled out anything toxic that would have had a deleterious effect on Claimant;
    - Environmental testing did not detect any volatile organic compounds, which would include fragrances and smells;
    - It was not medically possible that perfumes could trigger persistent, worsening, and changing headaches long after any exposure occurred;
    - Claimant's long absence from her work environment did not provide any relief or improvement and instead Claimant reported worsening symptoms with changes in the character of her headaches; and
    - Claimant has a structural abnormality (Chiari 1 malformation) which could cause all of the symptoms Claimant is reporting.

    (1 D'Angelo 41:12 – 42:25, 43:1 – 46:13; 2 D'Angelo 122:24 – 124:8).

64. Dr. D'Angelo also opined that there was no work-related aggravation of Claimant's pre-existing Chiari 1 malformation as that condition cannot be worsened by exposure to perfumes, colognes, or other scents. Dr. D'Angelo testified that Chiari 1 malformation has a history of very classic known structural abnormalities with worsening symptoms and there was no way to environmentally worsen Chiari 1 malformation by breathing in perfumes. She further testified that there are no known triggers for Chiari malformation to become symptomatic. (1 D'Angelo 46:14 – 47:7, 2 D'Angelo 115:3-21).

65. The ALJ finds Dr. D'Angelo's opinions to be consistent with, and supported by, the record as a whole. This includes the medical record and testimonial record of other witnesses. Therefore, the ALJ finds Dr. D'Angelo's opinions to be credible and persuasive.

66. The ALJ does not find Claimant's testimony that her headaches and migraines were caused or triggered by scents at work to be credible or persuasive.

67. The ALJ also does not find Claimant's contention as to the extent and duration of scents that were allegedly perceptible to her at work to be credible.

68. The ALJ finds Claimant has failed to establish that her headaches or migraines were caused, triggered, accelerated, or aggravated by scents at work.

69. The ALJ finds Claimant has failed to establish that her work caused, aggravated, or accelerated, her headaches, migraines, or Chiari malformation.

70. The ALJ finds Claimant has failed to establish a compensable work injury.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the Claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should

consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Compensability

For a claim to be compensable, the Claimant must prove that: (1) the injury arose out of the Claimant's employment, and (2) that the injury was in the course and scope of the Claimant's employment. C.R.S. § 8-41-301(1)(b). The "course of employment" requirement is satisfied when it is shown that the injury occurred within the time and place limits of the employment relation and during an activity that had some connection with the employee's job-related functions. *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991). An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related thereto as to be considered part of the employee's service to the employer in connection with the contract of employment. *Madden v. Mountain West Fabricators*, 977 P.2d 861, 863 (Colo. 1999). Whether an injury "arises out of" employment is determined by looking at the totality of the circumstances. *Lori's Family Dining, Inc. v. ICAO*, 907 P.2d 715, 717 (Colo. App. 1995).

Pursuant to C.R.S. § 8-40-201(14), "occupational disease" means a disease which results directly from the employment or conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside the employment. An occupational disease "occurs" when the disease becomes disabling. *See Union Carbide Corporation v. ICAO*, 128 P.3d 319 (Colo. App. 2005).

Finally, while a pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment, when the Claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAO, August 18, 2005).

The ALJ finds that Claimant failed to establish by a preponderance of the evidence that she sustained a work-related injury in the form of an occupational disease. Claimant worked for the employer for approximately 8 months prior to developing headaches. Further, Claimant has a long-standing and pre-existing history of headaches, allergies and other health conditions. Moreover, The ALJ credits the opinions and testimony of industrial hygienist Mr. Woellner that air quality testing did not identify any toxic chemicals, volatile organic compounds, or other environmental concerns.

The ALJ credits the opinions and testimony of Dr. Kathleen D'Angelo that Claimant's headaches and other various symptoms where not caused, aggravated, accelerated, or triggered by her exposure to any scents at work. The ALJ also credits Dr. D'Angelo's opinion that Claimant's symptoms are more likely directly related to her Chiari malformation, which was demonstrated on her MRI, and that this condition would not have been caused or aggravated by any occupational exposure. Dr. D' Angelo's opinions were consistent with the underlying medical record and the testimonial record of the witnesses that testified at hearing on behalf of Employer.

The ALJ is further persuaded by the opinions and records of Dr. Reinhard and Dr. Pales. Dr. Reinhard conducted a causation assessment and opined that Claimant had not sustained a work-related injury. Claimant's personal neurologist Dr. Pales also opined that Claimant's Chiari 1 malformation was likely causing or contributing to her ongoing symptoms and headaches. The ALJ further finds that the fact that Claimant's headaches have continued and changed, without any improvement, and despite not working for approximately one year, is further evidence that Claimant's headaches and ongoing condition is not causally related to any exposure to scents while at work.

In addition, the ALJ credited the testimony of Mr. R_____ that he could rarely confirm and smell a scent was present as reported by Claimant. Moreover, the ALJ did not credit Claimant's testimony that scents triggered her headaches or migraines. And, the ALJ did not did not credit Claimant's testimony that each time she complained about a scent at work there was actually a scent that was perceptible by Claimant or anyone else.

Therefore, the ALJ finds and concludes Claimant failed to establish by a preponderance of the evidence that her headaches, migraines, or any other condition was caused or aggravated by any exposure to scents at work. Accordingly, Claimant has failed to establish by a preponderance of the evidence that she suffered a compensable work injury in the form of an occupational disease.

II through XIII – (Remaining Issues)

The remaining issues raised by Claimant are moot.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claim for benefits is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail,

as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 11, 2019.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-082-650-002

ISSUES

- Whether Claimant established by a preponderance of the evidence that she suffered a compensable work injury on January 16, 2018.

- Whether the recommended left shoulder surgery is reasonable, necessary and related medical treatment.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Employer is a small parts manufacturer. Claimant works as an Operator II assembling various small parts for Employer.

2. On January 16, 2018 Claimant's work duties included assembling what is known as a C-80. This assembly required Claimant to tighten caps to the end of cables using a wrench in each hand. To tighten the caps, Claimant would push the wrench in her right hand away from her body while simultaneously pulling the wrench in her left hand towards her body.

3. While performing this motion on January 16, 2018, the wrench in Claimant's left hand dislodged from the cap and the pulling force caused Claimant's left arm to jerk and her left hand to slam against her work table. She felt immediate pain from her left fingers up to her upper left arm. She then grabbed her arm, stood up and turned around to speak to her coworker, Pauline J_____.

4. Ms. J_____ also works for Employer as an Operator II assembling small parts. Her work station is directly behind Claimant's. The two work back to back only a few inches apart. Ms. J_____ testified she remembered an incident on January 16, 2018, involving Claimant. Ms. J_____ testified she heard Claimant drop a wrench while working on an assembly. Claimant stood, stated she was in a lot of pain, and then walked away from her work station. Ms. J_____ further testified that a few days later Claimant was still in pain and she told Claimant she should report a work injury to Employer.

5. Claimant did not report the incident, or her left arm pain, to Employer that day because she assumed the pain would subside with time. Rather, she stopped assembling the C-80, and began working on other small parts that were less demanding to assemble.

6. On February 9, 2018 Claimant was evaluated by Dr. Keith Rangel, M.D., for her annual physical. She testified she remembers verbally informing Dr. Rangel she

believed she pulled a muscle in her left upper arm at work. Dr. Rangel did not note this information in the medical record from this visit. Claimant testified Dr. Rangel informed her to follow up with Employer if she felt the need, and that he did not test her left shoulder or refer her for any medical treatment.

7. On March 23, 2018, Claimant reported her January 16, 2018 work injury to her supervisor, Greg G_____, Employer's Operations Area Manager because the pain in her arm continued to worsen.

8. On March 26, 2018 Mr. G_____ and Claimant filled out an Employer's First Report of Incident form.

- Claimant reported pain throughout her left arm up to her left shoulder area which was present for at least a month.
- She stated that she previously mentioned this to her personal doctor during her annual physical.
- Claimant identified Pauline J_____ as a witness to Claimant's injury.
- She noted that her pain began while she was assembling specific cable ends on the C-80.

9. Mr. G_____ testified that after meeting with Claimant he referred the C-80 assembly to be evaluated by Ryan R_____, Employer's Fabrication Specialist, to determine whether he could create a piece of equipment to make assembling the C-80 more ergonomic. He also interviewed Claimant's coworkers Pauline J_____ and Brian Lauzon, about the assembly process. Mr. G_____ testified that Mr. R_____ was successful, and that Employer currently uses the piece of equipment he created.

10. On April 3, 2018, Claimant met with Ryan LL, Employer's Environmental Health and Safety manager, and Derek V_____ to discuss Claimant's injury. She again indicated pain throughout her left arm that began while fastening connectors on the C-80. Mr. LL testified that during the conversation Claimant specifically indicated her injury began while working with the little wrenches required to compress the caps to the cables on the C-80, and that she had since stopped performing this build.

11. On April 6, 2018, Claimant met with Mr. LL again because she was "in tears" at work due to her left arm pain. Mr. LL scheduled Claimant to be evaluated by an occupational medicine doctor at UC Health to address her ongoing left arm issues.

12. Also on April 6, 2018, Mr. LL contacted Insurer to report Claimant's left arm injury. Mr. LL reported Claimant had been experiencing left arm pain for the past three months, and she reported the issue to her primary care doctor during her annual physical. Mr. LL also reported that Claimant indicated her left arm pain began while performing a specific task that she had since discontinued doing.

13. On April 9, 2018, Patrick Quigley, M.D. at UC Health evaluated Claimant. Claimant reported a three month history of left arm pain that began in mid-January when she was tightening cables using little wrenches. Dr. Quigley ordered a left shoulder x-ray and physical therapy. He also placed Claimant on restricted duty.

14. On April 19, 2018 Claimant underwent her first session of occupational therapy (OT) at Rebound Sports & Physical Therapy with Kevin Rhodes. Claimant reported left upper arm pain that began in "early January after twisting a small part on an assembly line."

15. On July 3, 2018, Claimant underwent a left shoulder MRI which indicated extensive bursal sided fraying of the supraspinatus with complete or near complete tear at the leading edge, a split tear of the biceps tendon, possible SLAP tear, and mild degeneration of the AC joint.

16. On January 11, 2019 Claimant underwent a Claimant-sponsored Independent Medical Exam performed by Dr. David Yamamoto, M.D. Dr. Yamamoto opined Claimant suffered an acute left shoulder injury while tightening cables at work on January 16, 2018. He further opined he believed Claimant had a pre-existing weakening of her left shoulder supraspinatus and the jerking motion of the wrench dislodging while pulling it caused the supraspinatus to tear.

17. On January 23, 2019 Claimant was evaluated by her orthopedist Dr. Eric Young, M.D., who recommended she undergo left shoulder surgery. Claimant testified she would like to proceed with this surgery. Respondents did not produce persuasive evidence to the contrary.

18. Claimant testified she had no issue with her left shoulder prior to January 16, 2018. There is no documentation indicating Claimant had any issues with her left shoulder prior to the January 16, 2018 work incident.

19. In her Employer's First Report of Incident form, Claimant also noted that assembling the C-80 this assembly had given her issues for the past 2-3 years. Based on context and the totality of the evidence, the ALJ finds that Respondents construed Claimant's complaint to be one of an occupational disease. For example, they sought to modify the C-80 assembly process and performed an ergonomic evaluation.

20. The ALJ notes that Claimant speaks softly and with a heavy accent. Based on context and the totality of the evidence, the ALJ finds that Claimant believed she had clearly reported a single occupational injury. Due to language barriers and a lack of sophistication in the workers' compensation arena, Claimant did not appreciate that Respondents were treating her claim as occupational disease.

21. The ALJ finds that Claimant established by a preponderance of the evidence that she suffered a compensable work injury on January 16, 2018.

22. The ALJ finds that Claimant established by a preponderance of the evidence that the recommended left shoulder surgery is reasonable, necessary and related medical treatment.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers' Compensation Act (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. § 8-40-102(1), C.R.S. A claimant in a workers' compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201, *supra*. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. § 8-43-201, *supra*. A workers' compensation case is decided on its merits. § 8-43-201, *supra*.

The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. § 8-43-201, *supra*.

A claimant's right to compensation initially hinges upon a determination that "at the time of the injury, the employee is performing service arising out of and in the course of the employee's employment." § 8-41-301(1)(b), *supra*; *Price v. Industrial Claims Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). The "arising out of" test is one of causation which

requires that the injury have its origins in an employee's work-related functions. An injury occurs "in the course of" employment where claimant demonstrates that the injury occurred within the time and place limits of her employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). There is no presumption than an injury, which occurs in the course of employment, arises out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971).

A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004).

Claimant's testimony and accompanying evidence is persuasive and consistent with suffering an acute injury to her left upper extremity on January 16, 2018 while assembling the C-80. Claimant testified to build the C-80 she had to attach caps to the ends of cables by simultaneously using two wrenches to compress the caps to the cables. While pulling the wrench in her left hand it dislodged causing her left arm to jerk and her left hand to slam against her work table. She testified this incident caused immediate pain throughout her left arm, from her fingers to her shoulder area.

Claimant's testimony is strongly supported by the testimony of her coworker Pauline Jaramilo. Ms. J_____ testified she is a coworker of Claimant's who has no special relationship to her. That the two work back to back, only inches apart from each other. She further testified she remembers Claimant suffering an injury in mid-January 2018 while assembling the C-80. She testified she remembers an incident where she heard a wrench loudly strike Claimant's work table, and then Claimant stood up in pain walked away from her work station. Ms. J_____ further testified that days later Claimant was still in pain and Ms. J_____ encouraged her to report the incident to Employer.

Together Claimant and Ms. J_____'s testimony establish that when the wrench in Claimant's left hand dislodged it did so with enough force to cause a loud enough commotion for Ms. J_____ to hear it, stop working, and give her attention to Claimant. That Claimant was in enough noticeable pain that Ms. J_____ remembers how distraught she looked and that it caused Claimant to flee her work station. The probative evidence establishes this event happened and it caused Claimant to be in noticeable pain.

Claimant actions after this event are also persuasive and support the testimony that she suffered an acute injury on January 16, 2018. Claimant credibly testified she altered her work after the January 18, 2016 incident because of the injury it caused to her left arm. Her testimony is supported by the prior statements she made to her direct supervisor Greg G_____, the EHS Manager Ryan LL, and Dr. Quigley. She informed all of them she stopped performing the C-80 build, and other more laborious assemblies, in lieu of less strenuous builds. It makes little sense for Claimant to stop building the C-80, which she has built for years, if an injury did not happen on January 16, 2018.

Dr. Yamamoto's medical opinions are credible and persuasive regarding the causation of Claimant's left shoulder injury. Dr. Yamamoto opined Claimant had preexisting degeneration of the supraspinatus in her left shoulder that the jerking motion caused to tear when the wrench dislodged from the cap. This incident caused the preexisting asymptomatic degeneration to exacerbate resulting in pain, the need for medical treatment, and the need for left shoulder surgery. Dr. Yamamoto's opinions are supported by Claimant's testimony that she had no issues with her left upper extremity prior to January 16, 2018, and the lack of any documented injury or treatment to the left upper extremity prior to January 16, 2018.

The evidence is persuasive and consistent that Claimant suffered an acute injury as a result of an ergonomic flaw in the C-80 assembly process. The probative evidence makes it clear Employer was concerned with the ergonomics of the C-80 assembly after Claimant reported her injury. The conversations with both Mr. G_____ and Mr. LL centered on the ergonomic risks of assembling the C-80. Mr. G_____ marked "ergonomic" as the cause of injury on the First Report of Injury (FROI) form he filled out with Claimant. Mr. G_____ sat with Claimant during the C-80 assembly process, and had Employer's fabrication specialist Mr. R_____ develop a fixture to make the C-80 assembly more ergonomic. Mr. G_____ testified that Employer currently uses the fixture Mr. R_____ developed during the C-80 assembly.

The cumulative evidence is persuasive that Claimant's delayed reporting is the cause of the confusion as to whether she suffered an acute injury or one cause by repetitive motion. Claimant testified she did not immediately report the injury because she thought the pain would go away over time without medical care. She further testified the pain did not go away, and actually worsened over the two-plus-months between the injury happening on January 16, 2018 and reporting it on March 23, 2018.

Below is the evidence that indicates Claimant suffered an acute injury to her upper left extremity while assembling the C-80 on January 16, 2018:

- Claimant's testimony recalling the incident.
- Ms. J_____'s testimony about the incident, hearing the wrench hit the table, and Claimant being in immediate pain that caused her to flee her work station.
- Claimant informed Mr. G_____ on March 23, 2018 when the two filled out the FROI form that her pain began while assembling a specific cap to the end of a cable. This is an obvious reference to compressing the cap to the end of the cables as part of the C-80 assembly.
- Claimant informed the EHS team (Mr. LL and Mr. V_____) on April 3, 2018 that her pain began while fastening connectors. In the context of things, this is another obvious reference to compressing caps onto cables as part of the C-80 assembly.
- Mr. LL testified Claimant stated to him that her pain began while working with small wrenches on the C-80 assembly.
- On April 9, 2018 at Claimant's initial evaluation with Dr. Quigley she reported to him her pain began in mid-January while using little wrenches to fasten cables. Another obvious reference to the C-80 assembly.

- Claimant reported her pain began in mid-January while twisting a small part on an assembly line to Kevin Rhodes, OTR, CTH at her initial therapy session on April 19, 2018.

These are all ways of describing the same incident. These descriptions do not use the same wording, but all contain the same premise: Claimant's left upper extremity pain began as a result of an incident that occurred while compressing caps to cables as part of the C-80 assembly in January 2018.

If Claimant could go back in time and immediately report the injury on January 18, 2018, she would. If she could go back in time and use the exact wording with everyone she reported the incident and injury to, she would. However, she cannot and the confusion that has occurred as a result of her delayed reporting does not outweigh the evidence that strongly indicates an incident happened on January 16, 2018 while Claimant was assembling the C-80 that resulted in immediate pain and functional loss in her left arm that caused her to alter her work thereafter to less strenuous assemblies.

The cumulative evidence establishes Mr. G_____'s and Mr. LL's testimony and statements are not persuasive because they are not entirely consistent.

Mr. G_____ testified he believed Claimant's injury was due to repetitive motion based on poor ergonomics because she reported experiencing left arm pain for over a month without stating a specific incident. This testimony is inconsistent with the FROI form he filled out with Claimant which notes "Martha's primary concern was assembling specific ends onto a cable[.]" Also, in the FROI Mr. G_____ confuses when the injury happened and when Claimant reported the injury to her primary care physician during her annual physical. Mr. G_____ lists the injury happening in February when it happened in January, and Claimant undergoing her physical in January when it occurred in February. Lastly, Mr. G_____ noted and testified that Claimant indicated her left arm pain had been present for the past 2-3 years. To the contrary, Claimant testified she was stating the issue with assembling the cables on the C-80 had been an issue she had experienced for the past 2-3 years. The medical record supports Claimant's testimony because there is no evidence of any prior left shoulder issues prior to January 16, 2018.

Mr. LL testified he understood Claimant's injury to be a gradual onset caused by repetitive motions. This testimony is not supported by the notes he took throughout the investigation of the injury. Nowhere in the EHS team's notes, which Mr. LL is the manager of, does it state that Claimant's injury was believed to be due to repetitive motion with a gradual onset of pain. If it was so obvious Claimant's issue was a gradual onset due to repetitive motions one would expect this to be noted beyond stating there was an ergonomic concern with the C-80 assembly.

Ergonomics and repetitive motion are not synonymous. As Mr. LL testified, ergonomics means to shape the work to the worker, not the worker to the work. The probative evidence indicates after Claimant reported her injury to Employer both Mr. G_____ and Mr. LL became concerned with Hach employees using the small wrenches to tighten the caps to the cables on the C-80. The concern led Employer to ask Mr. Gerbenstein to create a fixture to aid in the cable assembly of the C-80. Mr. LL and Mr.

G_____ testified they were under the impression Claimant's injury was due to repeatedly using the wrenches. However, neither Mr. G_____ nor Mr. LL testified that Claimant reported a repetitive motion injury to them. The notion of a repetitive injury is what both surmised and assumed based on the ergonomic concern raised by Claimant. Claimant believes the same causation mistake happened with Dr. Quigley for similar reasons.

When Claimant began treatment in April 2018 the evidence supports she relayed the same mechanism of injury to Dr. Quigley that she did to Employer. Dr. Quigley noted that Claimant reported experiencing left upper arm pain in mid-January 2018 that began as a result of tightening cables using little wrenches. However, Dr. Quigley mistook what Claimant was trying to relay as an acute injury for one caused by repetitive motion.

Given the circumstances it is understandable why this misunderstanding happened. When Claimant was first evaluated by Dr. Quigley on April 9, 2019 it was almost three months after the injury occurred. She informed him she was a small parts assembler that constructed multiple items per day. She further informed him that she continued to work for the past-three months, and her pain worsened over that time. When examining the cumulative evidence the ALJ understand how both Employer and Dr. Quigley construed this to be a repetitive motion injury when it was actually a witnessed acute injury that occurred on January 16, 2018.

To be clear, Claimant is not alleging that her left hand hitting her work table is what caused her injury. Claimant testified her left arm injury occurred when the wrench in her left hand dislodged from the cable on the C-80 and caused her left arm to forcefully jerk and left hand to strike the table. Hitting the table was simply part of the incident that led to her work injury. This is supported by Dr. Yamamoto's opinion the injury was caused by the sequence of forcefully pulling a wrench when it dislodged and caused her left arm to forcefully jerk and left hand hit her work table.

Thus, the persuasive evidence establishes by a preponderance of the evidence that Claimant suffered an acute injury to her left upper extremity on January 16, 2018 while performing duties that arise out of her employment relationship with Employer and during the course and scope of her Employment relationship.

Medical Benefits – Reasonably Necessary

Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). Whether the claimant sustained his burden of proof is a question of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

The preponderance of the evidence establishes the medical treatment Claimant underwent is reasonable, necessary, and related to her January 16, 2018 work injury. Dr. Yamamoto credibly opined the incident on January 16, 2018 while assembling the C-80

caused Claimant's already weakened supraspinatus to tear. Thus, the recommended surgery is reasonable, necessary, and related to Claimant's January 16, 2018, work injury because it is a result of Claimant's work injury exacerbating her preexisting asymptomatic shoulder condition.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant sustained a compensable work-related injury to her left upper extremity on January 16, 2018.

2. All medical treatment to the left shoulder to date is found to be reasonable, necessary, and related to Claimant's compensable work injury.

3. The recommended left shoulder surgery is reasonable and necessary medical treatment that is related to Claimant's compensable work injury.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 11, 2019

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered an occupational disease in the form of bilateral rotator cuff tears that began on March 20, 2018 during the course and scope of his employment with Employer.

2. Whether Claimant has established by a preponderance of the evidence that the right shoulder surgery recommended by Mark S. Failinger, M.D. is reasonable, necessary and causally related to his March 20, 2018 occupational disease.

FINDINGS OF FACT

1. On August 16, 2017 Claimant began working for Employer as a Sanitation Worker. His job duties involved cleaning and sanitizing various machines and trashcans. Claimant worked approximately eight hours each weekday and five hours on Sundays for a total of about 45 hours per week.

2. Claimant explained that he reported bilateral upper extremity pain to Employer in March and April 2018. The medical records reflect that he initially visited Concentra Medical Centers for an evaluation on October 18, 2018. Claimant reported that he had been working for Employer for about one year. His job duties involved using a pressure water hose to spray and clean trashcans, machine parts and carpets. He initially squeezed a handle on the hose to spray water, but Employer switched to a twist nozzle after Claimant developed bilateral upper extremity pain in his hands, wrists, forearms and shoulders. However, Claimant continued to suffer symptoms after the switch to the twist nozzle. Claimant attributed his symptoms to repetitive work activities. After conducting a physical examination, Karen Larson, M.D. determined that Claimant exhibited right wrist symptoms consistent with Carpal Tunnel Syndrome (CTS), DeQuervain's tenosynovitis and bilateral shoulder impingement syndrome.

3. On November 14, 2018 Claimant underwent an EMG/NCS of his upper extremities. The study revealed subtle evidence of mild CTS in Claimant's right wrist. There was no evidence of left wrist CTS.

4. Dr. Larson referred Claimant to John T. Sacha, M.D. at Concentra Advanced Specialists for an evaluation. At a December 19, 2018 initial visit Claimant reported left shoulder pain that radiated into the left neck and arm area. He also noted numbness and tingling in his right hand. After conducting a physical examination, Dr. Sacha diagnosed Claimant with left shoulder impingement and right CTS. He detailed that Claimant had been holding a high power hose away from his body and developed left shoulder rotator cuff tendinopathy. His use of the power grip on the hose at work also caused him to develop CTS in his right wrist. Dr. Sacha recommended a left shoulder MRI and a right wrist splint.

5. At a subsequent follow-up appointment, Dr. Sacha remarked that the left shoulder MRI revealed a full-thickness supraspinatus tear. He explained that Claimant performed repetitive overhead work that likely caused his left rotator cuff tear. Dr. Sacha thus recommended a one-time surgical evaluation with an orthopedic specialist at Concentra Advanced Specialists.

6. On January 24, 2019 Claimant visited Mark S. Failinger, M.D. at Concentra Advanced Specialists for a surgical evaluation. After performing a physical examination Dr. Failinger diagnosed Claimant with right CTS and an apparent near full-thickness rotator cuff tear. He remarked that he was unable to access the MRI films but Claimant's condition "sound[ed] like" a right rotator cuff tear. In assessing causation, Dr. Failinger was unable to make a definitive determination because he lacked a description of Claimant's job duties. He reasoned that, if Claimant had been lifting moderate to significant weight and perfoming his job duties for the period of time outlined in the Colorado Division of Workers' Compensation *Medical Treatment Guidelines* (*Guidelines*), Claimant's condition "could be" work-related. Dr. Failinger summarized that he would have to consider Claimant's job description and the duration of his work activities to determine whether his condition was work-related. He noted that, if Claimant's symptoms "started in March or April 2018 but only been there for a very short period of time, we would not deem that as work related."

7. After another evaluation with Dr. Sacha, Claimant returned to Dr. Failinger on February 7, 2019. Dr. Failinger reviewed MRI's of both shoulders and determined they exhibited full-thickness anterior supraspinatus tears. He noted that Claimant's right shoulder reflected a larger tear. Dr. Failinger remarked that Claimant had received an injection for his right wrist CTS and deferred to Dr. Sacha for additional CTS treatment. After performing a physical examination and reviewing the right shoulder MRI, Dr. Failinger diagnosed Claimant with a right shoulder medium full-thickness supraspinatus tear. He commented that Claimant wished to proceed with surgery.

8. On February 25, 2019 Claimant returned to Dr. Sacha for an examination. Dr. Sacha diagnosed Claimant with bilateral shoulder impingement and right CTS. The CTS had resolved. He noted that Claimant was waiting to receive authorization for shoulder surgery.

9. On May 23, 2019 Sara Nowotny completed a Job Demands Analysis and Risk Factor Analysis for the position of Sanitation Worker at Employer's facility. She issued a report on May 29, 2019. The Job Demands Analysis specified that Claimant spent 20-30% of his day pushing a cart and pallet jack with mats, parts and bins from the work area to a cleaning station. He then used a hose to clean floors and a squeegee to dry walls. He expended about 15-20% of his workday removing mats from a pallet jack, cleaning them and placing them back on the pallet. Claimant also spent about 15-20% of his day spraying and cleaning bins. Spraying, cleaning and stacking parts consumed about 15-20% of his workday. Finally, Claimant spent about 15-20% of his day pulling and cleaning stacks of trash receptacles. Notably, the bins and trashcans weighed 1-5 pounds, the small mats weighed 6-10 pounds, the medium mats weighed 11-20 pounds and the trash receptacles with meat and machine belts weighed 21-60 pounds.

10. Ms. Nowotny conducted time studies of Claimant's right wrist motion, overhead work activities and shoulder movements. She specifically determined that Claimant spent 3 hours and 59 minutes of cumulative time during his eight-hour work shift engaged in right wrist ulnar deviation, flexion or extension in excess of 30 degrees. Ms. Nowotny further determined that Claimant lifted greater than 10 pounds 108 times per hour or 864 times throughout his eight-hour workday. He also spent 2 hours and 53 minutes of his eight-hour work shift engaged in lifting greater than 10 pounds more than 60 times each hour or using two pounds of pinch force or 10 pounds of hand force three times or more per minute. Relying on the *Guidelines*, Ms. Nowotny did not find evidence of any Primary or Secondary Risk Factors for the development of right wrist or bilateral shoulder symptoms based on Claimant's job duties.

11. On May 27, 2019 Robert W. Watson Jr., M.D. conducted an independent medical examination of Claimant's claim. Claimant recounted that he developed bilateral shoulder symptoms and right wrist pain while performing his job duties at work. His job duties specifically included washing and cleaning, using a hose and lifting trashcans. Initially, he squeezed the hose nozzle with his right hand to spray water. However, a second nozzle only required twisting to spray. Dr. Watson commented that some of Claimant's activities were above shoulder level and others were below the waist. After reviewing Claimant's medical records and performing a physical examination, Dr. Watson diagnosed Claimant with right and left rotator cuff tears with impingement syndrome. He also commented that Claimant suffered right wrist CTS.

12. Dr. Watson explained that Claimant had been working for Employer for about one year and eight months. He noted that Claimant's job duties primarily involved cleaning equipment used in the processing of meat. Claimant's job required lifting and carrying parts weighing 40-50 pounds. Claimant also cleaned and stacked trash containers. However, in the absence of a job site evaluation, the duration of each of his job duties was unclear. Nevertheless, Dr. Watson summarized that Claimant's activities during his eight-hour work shift varied with respect to the use of his upper extremities.

13. Dr. Watson relied on the *Guidelines* in addressing the cause of Claimant's bilateral shoulder symptoms. The *Guidelines* specifically enumerate factors for the development of shoulder pathology. They include the following: (1) overhead work of 30 minutes per day for a minimum of five years; (2) shoulder movement at the rate of 15-36 repetitions per minute and no two second pauses for 80% of the work cycle; and (3) shoulder movement with force greater than 10% of maximum with no two second pauses for 80% of the work cycle. Dr. Watson concluded that it was unlikely Claimant's work activities for Employer caused his bilateral shoulder symptoms. Notably, because Claimant had only been working for Employer for one year and eight months, he did not meet the minimum threshold for a shoulder injury of working overhead for 30 minutes each day for five years pursuant to the *Guidelines*. Second, because Claimant engaged in a variety of job tasks and changed positions, it is unlikely that overhead work would constitute 80% of his work cycle. Based on the *Guidelines*, it was unlikely Claimant's shoulder pathology was related to his job duties for Employer. In considering Claimant's right wrist CTS, Dr. Watson commented that, because Claimant engaged in a variety of tasks throughout his work shifts, it was unlikely that he exceeded any of the criteria for

the development of CTS under the *Guidelines*. He remarked that it was unclear whether Claimant would satisfy the criteria for a Secondary Risk Factor pursuant to the *Guidelines*. Although Dr. Watson reasoned, it was unlikely Claimant's bilateral shoulder and right wrist CTS were related to his job duties, "a formal jobsite evaluation would clarify these issues."

14. On June 16, 2019 Dr. Watson issued an Addendum Report to his independent medical examination after reviewing the Job Demands Analysis performed by Ms. Nowotny. In addressing Claimant's right wrist CTS Dr. Watson noted that Claimant engaged in wrist flexion, extension and ulnar deviation for three hours and 59 minutes during his eight hour shift. Under the *Guidelines*, the minimum threshold is four hours per eight-hour work shift. Furthermore, Claimant only spent 2 hours and 53 minutes of his eight-hour work shift lifting greater than 10 pounds more than 60 times each hour or using two pounds of pinch force or 10 pounds of hand force three times or more per minute. There were also no risk factors for working in a cold environment. Dr. Watson concluded that there were no Primary or Secondary Risk Factors for the development of shoulder pathology under the *Guidelines*. Specifically, Claimant failed to engage in overhead lifting in excess of 30 minutes per day for a minimum of five years. Moreover, Claimant's work activities did not require shoulder movement greater than 15-30 repetitions per minute for more than 80% of a work cycle. Dr. Watson summarized that Claimant did not engage in forceful and repetitive activities for an amount of time that met the minimum threshold in the *Guidelines* for the development of shoulder pathology.

15. On July 8, 2019 the parties conducted the pre-hearing evidentiary deposition of Dr. Watson. Initially, Dr. Watson reiterated that Claimant suffered from bilateral rotator cuff tear impingement syndrome and right wrist CTS. He explained that Claimant's work activities did not satisfy the criteria for a work-related exposure pursuant to the *Guidelines*. Relying on the Job Demands Analysis, Dr. Watson maintained that Claimant did not engage in forceful and repetitive activities for an amount of time that met the minimum threshold in the *Guidelines* for the development of shoulder pathology or CTS.

16. On July 17, 2019 the parties conducted the pre-hearing evidentiary deposition of Sara Nowotny. Ms. Nowotny noted that she did not conduct the Job Demands Analysis over a full eight-hour workday, but instead extrapolated data based on four hours of observation. She explained that she did not observe the presence of any Primary or Secondary risk factors under the *Guidelines*. Ms. Nowotny specifically determined that there were no risk factors for Claimant's bilateral shoulder symptoms or right wrist CTS.

17. Claimant testified at the hearing in this matter. He explained that he began working for Employer in August 2017. He noted that his job duties involved cleaning and sanitizing machines and trashcans. Claimant detailed that, because of his bilateral shoulder symptoms, he no longer performs overhead work including sanitizing machines and lifting spare parts. He also no longer squeezes a handle to spray water from a hose, but uses a twist nozzle because he developed right wrist pain. Nevertheless, Claimant still moves barrels, cleans floors and works eight hours each day.

18. Ms. Nowotny testified at the hearing in this matter. She explained that she observed Claimant's job duties at Employer's facility for four hours. She recorded the frequency and duration of Claimant's activities. Ms. Nowotny prepared a Job Demands Analysis that delineated Claimant's job duties and the time spent on each task. She maintained that Claimant did not satisfy any Primary or Secondary Risk Factors for the development of shoulder or wrist symptoms under the *Guidelines*.

19. On August 5, 2019 the parties conducted the post-hearing evidentiary deposition of Dr. Watson. Dr. Watson reiterated that Claimant suffered from bilateral rotator cuff tear impingement syndrome and right wrist CTS. He explained that Claimant's work activities did not satisfy the criteria for a work-related exposure pursuant to the *Guidelines*. Relying on the Job Demands Analysis, Dr. Watson maintained that Claimant did not engage in forceful and repetitive activities for an amount of time that met the minimum threshold in the *Guidelines* for the development of shoulder pathology. Dr. Watson also noted that Claimant was not forthcoming with him or other physicians in his description of job duties or the onset of symptoms. Accordingly, Claimant did not likely suffer a cumulative trauma disorder to his shoulders while working for Employer during March and April 2018.

20. Claimant has failed to demonstrate that it is more probably true than not that he suffered an occupational disease in the form of bilateral rotator cuff tears that began on March 20, 2018 during the course and scope of his employment with Employer. Although Claimant attributed his bilateral shoulder symptoms to his work activities, a review of his job duties reflects that they lacked the requisite duration, force or repetition to cause a cumulative trauma disorder.

21. Relying on the *Guidelines* in conducting a Job Demands Analysis, Ms. Nowotny did not find evidence of any Primary or Secondary Risk Factors in Claimant's job duties. After conducting time studies of Claimant's work activities, Ms. Nowotny specifically determined that Claimant spent 20-30% of his day pushing a cart and pallet jack with mats, parts and bins from the work area to a cleaning station. He then used a hose to clean floors and a squeegee to dry walls. He expended about 15-20% of his workday removing mats from a pallet jack, cleaning them and placing them back on the pallet. Claimant also spent about 15-20% of his day spraying and cleaning bins. Spraying, cleaning and stacking parts consumed about 15-20% of his workday. Finally, Claimant spent about 15-20% of his day pulling and cleaning stacks of trash receptacles. Notably, the bins and trashcans weighed 1-5 pounds, the small mats weighed 6-10 pounds, the medium mats weighed 11-20 pounds and the trash receptacles with meat and machine belts weighed 21-60 pounds. Ms. Nowotny specifically determined that Claimant spent 3 hours and 59 minutes of cumulative time during his eight-hour work shift engaged in right wrist ulnar deviation, flexion or extension in excess of 30 degrees. She further determined that Claimant lifted greater than 10 pounds 108 times per hour or 864 times throughout his eight-hour workday. He also spent 2 hours and 53 minutes of his eight-hour work shift engaged in lifting greater than 10 pounds more than 60 times each hour or using two pounds of pinch force or 10 pounds of hand force three times or more per minute. Relying on the *Guidelines*, Ms. Nowotny did not find evidence of any Primary

or Secondary Risk Factors for the development of right wrist or bilateral shoulder symptoms based on Claimant's job duties.

22. Dr. Watson persuasively concluded that there were no Primary or Secondary Risk Factors for the development of shoulder pathology under the *Guidelines*. Specifically, Claimant failed to engage in overhead lifting in excess of 30 minutes per day for a minimum of five years. Moreover, Claimant's work activities did not require shoulder movement greater than 15-30 repetitions per minute for more than 80% of a work cycle. Dr. Watson summarized that Claimant did not engage in forceful and repetitive activities for an amount of time that met the minimum threshold in the *Guidelines* for the development of shoulder pathology. Moreover, on January 24, 2019 Dr. Failinger commented that, if Claimant had been lifting moderate to significant weight and perfoming his job duties for the period of time outlined in *Guidelines*, Claimant's condition "could be" work-related. However, Dr. Failinger noted that if Claimant's symptoms "started in March or April 2018 but only been there for a very short period of time, we would not deem that as work related."

23. In contrast, Dr. Sacha explained that Claimant performed repetitive overhead work that likely caused his left rotator cuff tear. However, Claimant began to develop bilateral shoulder symptoms within approximately eight months after beginning employment with Employer. His overhead work thus fell far short of 30 minutes per day for a minimum of five years. Moreover, the Job Demands Analysis reveals that Claimant's work activities did not require shoulder movement greater than 15-30 repetitions per minute for more than 80% of a work cycle. Based on the Job Demands Analysis, a review of the medical records and the persuasive opinion of Dr. Watson, Claimant did not engage in forceful and repetitive activity for an amount of time that meets the threshold for a cumulative trauma condition. He likely did not suffer a cumulative trauma disorder to his shoulders while working for Employer during March and April 2018. Claimant's employment activities did not cause, intensify, or, to a reasonable degree, aggravate his shoulders to produce a need for medical treatment. Claimant's claim is thus denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. The test for distinguishing between an accidental injury and an occupational disease is whether the injury can be traced to a particular time, place and cause. *Campbell v. IBM Corp.*, 867 P.2d 77, 81 (Colo. App. 1993). "Occupational disease" is defined by §8-40-201(14), C.R.S. as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

5. A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, §8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

6. Rule 17, Exhibit 5 provides an algorithm for evaluating Cumulative Trauma Conditions (CTC) pursuant to the *Guidelines*. In addressing applicability, the *Guidelines* note that "CTC's of the upper extremity comprise a heterogeneous group of diagnoses which include numerous specific clinical entities including disorders of the muscles, tendons and tendon sheaths, nerves, joints and neurovascular structures." W.C.R.P. Rule 17, Exhibit 5, p. 6. In determining a diagnosis when performing a cumulative trauma analysis the *Guidelines* delineate specific musculoskeletal conditions and peripheral

nerve disorders. Nevertheless, the Guidelines provide that "[l]ess common cumulative trauma conditions not listed specifically in these Guidelines are still subject to medical causation assessment." W.C.R.P. Rule 17, Exhibit 5, p. 21.

7. The *Guidelines* include a Primary Risk Factor Definition Table for Force and Repetition/Duration. The Table requires six hours of two pounds pinch force or 10 pounds of hand force three or more times per minute. Other Primary Risk Factors involving Force and Repetition/Duration include six hours of lifting 10 pounds in excess of 60 times per hour and six hours of using hand tools weighing two pounds or more. An additional Primary Risk Factor category is Awkward Posture and Repetition/Duration. The factor requires four hours of wrist flexion greater than 45 degrees, extension greater than 30 degrees or ulnar deviation greater than 20 degrees, six hours of elbow flexion greater than 90 degrees, four hours of supination/pronation with task cycles 30 seconds or less or awkward posture for at least 50% of a task cycle. Secondary Risk Factors require three hours of two pounds pinch force or 10 pounds of hand force three or more times per minute. Other Secondary Risk Factors involving Force and Repetition/Duration include three hours of lifting 10 pounds greater than 60 times per hour and three hours of using hand tools weighing two pounds or more. Finally, Secondary Risk Factors for Awkward Posture and Repetition/Duration include three hours of elbow flexion greater than 90 degrees and three hours of supination/pronation with a power grip or lifting. If neither Primary nor Secondary Risk Factors are present, the *Guidelines* provide that "the case is probably not job related." W.C.R.P. Rule 17, Exhibit 5, p. 24.

8. The *Guidelines* also specifically delineate factors for the development of shoulder pathology. They include the following: (1) overhead work of 30 minutes per day for a minimum of five years; (2) shoulder movement at the rate of 15-36 repetitions per minute and no two second pauses for 80% of the work cycle; and (3) shoulder movement with force greater than 10% of maximum with no two second pauses for 80% of the work cycle. Moreover, jobs requiring heavy lifting in excess of 10 times per day over the years may contribute to shoulder disorders. Notably, the *Guidelines* provide that, because of the lack of multiple, high quality studies, each case must be evaluated individually when addressing the likelihood of cumulative trauma contributing to shoulder pathology. W.C.R.P. Rule 17, Exhibit 4, p. 16.

9. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he suffered an occupational disease in the form of bilateral rotator cuff tears that began on March 20, 2018 during the course and scope of his employment with Employer. Although Claimant attributed his bilateral shoulder symptoms to his work activities, a review of his job duties reflects that they lacked the requisite duration, force or repetition to cause a cumulative trauma disorder.

10. As found, relying on the *Guidelines* in conducting a Job Demands Analysis, Ms. Nowotny did not find evidence of any Primary or Secondary Risk Factors in Claimant's job duties. After conducting time studies of Claimant's work activities, Ms. Nowotny specifically determined that Claimant spent 20-30% of his day pushing a cart and pallet jack with mats, parts and bins from the work area to a cleaning station. He then used a hose to clean floors and a squeegee to dry walls. He expended about 15-

20% of his workday removing mats from a pallet jack, cleaning them and placing them back on the pallet. Claimant also spent about 15-20% of his day spraying and cleaning bins. Spraying, cleaning and stacking parts consumed about 15-20% of his workday. Finally, Claimant spent about 15-20% of his day pulling and cleaning stacks of trash receptacles. Notably, the bins and trashcans weighed 1-5 pounds, the small mats weighed 6-10 pounds, the medium mats weighed 11-20 pounds and the trash receptacles with meat and machine belts weighed 21-60 pounds. Ms. Nowotny specifically determined that Claimant spent 3 hours and 59 minutes of cumulative time during his eight-hour work shift engaged in right wrist ulnar deviation, flexion or extension in excess of 30 degrees. She further determined that Claimant lifted greater than 10 pounds 108 times per hour or 864 times throughout his eight-hour workday. He also spent 2 hours and 53 minutes of his eight-hour work shift engaged in lifting greater than 10 pounds more than 60 times each hour or using two pounds of pinch force or 10 pounds of hand force three times or more per minute. Relying on the *Guidelines*, Ms. Nowotny did not find evidence of any Primary or Secondary Risk Factors for the development of right wrist or bilateral shoulder symptoms based on Claimant's job duties.

11. As found, Dr. Watson persuasively concluded that there were no Primary or Secondary Risk Factors for the development of shoulder pathology under the *Guidelines*. Specifically, Claimant failed to engage in overhead lifting in excess of 30 minutes per day for a minimum of five years. Moreover, Claimant's work activities did not require shoulder movement greater than 15-30 repetitions per minute for more than 80% of a work cycle. Dr. Watson summarized that Claimant did not engage in forceful and repetitive activities for an amount of time that met the minimum threshold in the *Guidelines* for the development of shoulder pathology. Moreover, on January 24, 2019 Dr. Failinger commented that, if Claimant had been lifting moderate to significant weight and perfoming his job duties for the period of time outlined in *Guidelines*, Claimant's condition "could be" work-related. However, Dr. Failinger noted that if Claimant's symptoms "started in March or April 2018 but only been there for a very short period of time, we would not deem that as work related."

12. As found, in contrast, Dr. Sacha explained that Claimant performed repetitive overhead work that likely caused his left rotator cuff tear. However, Claimant began to develop bilateral shoulder symptoms within approximately eight months after beginning employment with Employer. His overhead work thus fell far short of 30 minutes per day for a minimum of five years. Moreover, the Job Demands Analysis reveals that Claimant's work activities did not require shoulder movement greater than 15-30 repetitions per minute for more than 80% of a work cycle. Based on the Job Demands Analysis, a review of the medical records and the persuasive opinion of Dr. Watson, Claimant did not engage in forceful and repetitive activity for an amount of time that meets the threshold for a cumulative trauma condition. He likely did not suffer a cumulative trauma disorder to his shoulders while working for Employer during March and April 2018. Claimant's employment activities did not cause, intensify, or, to a reasonable degree, aggravate his shoulders to produce a need for medical treatment. Claimant's claim is thus denied and dismissed.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's claim for Workers' Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: September 11, 2019.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-063-496-003

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on August 22, 2019, in Denver, Colorado. The hearing was digitally recorded (reference: 8/22/19, Courtroom 1, beginning at 1:30 PM, and ending at 3:30 PM).

The Claimant was present in person and represented by [Redacted], Esq. Respondents were represented by [Redacted], Esq.

Hereinafter [Redacted] shall be referred to as the “Claimant." [Redacted] shall be referred to as the “Employer.” All other parties shall be referred to by name.

Claimant’s Exhibits 1 through 11 were admitted into evidence, without objection.. Respondents’ Exhibits A through F were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, which was filed, electronically, on August 28, 2019. On August 30, 2019, Respondents filed objections to Claimant’s proposal. The gravamen of Respondents’ objection is that the ALJ lacks jurisdiction to order an authorized treating physician (ATP) to perform or direct a specific treatment suggested only by an unauthorized physician (presumably Respondents’ independent medical examiner, Michael Rauzzino, M.D.) , under a non-precedent

setting order of the Industrial Claim Appeals Office (ICAO) of 24 years ago, which is misplaced because Dr. Rauzzino agrees with , in principle, with the recommendation of ATP Bryan Andrew Castro, M.D. *See Short v. Property Management of telluride,* W.C. No. 3-100-726 (ICAO, May 4, 1995). After a consideration of the proposed decision and the objections thereto, the ALJ has modified the proposal and hereby issues the following decision.

ISSUE

The issue to be determined by this decision concern whether or not the transforaminal epidural lumbar/sacral injection (ESI) at the L3-4 level is causally related to the admitted injury of November 26, 2017 and reasonably necessary to cure and relieve the effects thereof.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Procedural Posture/Findings

1. On May 8, 2018, Respondents filed a General Admission of Liability (GAL) admitting to medical benefits and at hearing represented to the ALJ that they are currently paying temporary total disability (TTD) benefits for the Claimant's admitted industrial injury of November 26, 2017 (Claimant's Exhibit 3, Bate Stamp (BS) 20.

2. On July 2, 2018, Respondents had the Claimant evaluated by Michael Rauzzino, M.D., whose medical opinion was that the Claimant suffered an acute lumbar disc herniation at L3-L4, in the course and scope of her employment, and that the Claimant would benefit from additional injections or could pursue surgery that would involve a minimally invasive microdiscectomy. (Claimant's Exhibit 10, BS 166).

3. On March 18, 2019, the Claimant filed an "Application for Hearing" endorsing the issue of medical benefits, specifically whether the transforaminal lumbar/sacral epidural injection at the L3-L4 level requested by authorized treating physician (ATP) Bryan Andrew Castro, M.D., was reasonably necessary and causally related to the Claimant's admitted November 26, 2017 injury, as the issue for hearing (Claimant's Exhibit 1, BS 1).

4. On March 25, 2019, Respondents filed a "Response to the Claimant's Application for Hearing," endorsing as an issue whether the request for the L3-L4 transforaminal injection was reasonably necessary and causally related to the Claimant's industrial injury.

5. On June 1, 2019, Respondents had the Claimant evaluated again, this time by Alfred C. Lotman, M.D., who examined the Claimant and whose medical opinion was that the Claimant suffered a "far right L3-L4 disc herniation" in the course and scope of her employment, but that she had reached maximum medical improvement (MMI) and had indicated to him that she was opposed to having a repeat injection at L3-L4 (Claimant's Exhibit 11, BS 172-173)..

Preliminary Findings

6. The Claimant was employed as a bartender and waitress for the Employer at the time of her injury.

7. On November 26, 2017, during the course and scope of her employment, the Claimant sustained an admitted industrial injury to her lumbar spine while moving a keg which was apparently mired in mud, tipping the keg and trying to roll it when she felt a pop in her back and immediate pain in her right buttocks. The Claimant continued to work but was worse by the next morning.

8. Medical records reflect that the Claimant was not able to perform her normal work activities after her injury and that prior to her injury she had always been employed in physical jobs, had worked in construction and in the service industry as a bartender, waitress and cook (Claimant's Exhibit 10, BS 158).

Medical History

9. On December 8, 2017, the Claimant was evaluated by authorized treating physician (ATP) Brian McIntyre, D.O., at Centura Centers for Occupational Medicine (CCOM) in Golden, who assessed the Claimant with a strain of the lower back, consistent with a history of a work-related mechanism of injury and assigned the Claimant temporary work restrictions (Claimant's Exhibit 4, BS 27-29).

10. CCOM referred the Claimant out for an MRI (magnetic resonance imaging) which occurred on January 5, 2018, which MRI reflected:

Multilevel degenerative changes as above described most pronounced within the L3-L4 level right neural foramina where there is a broad-based disc extrusion contributing to moderate right-sided neural foraminal narrowing as detailed. This is probably accounting for the patients' right-sided leg numbness.

(Claimant's Exhibit 6, BS 115).

11. The Claimant continued to treat with the medical providers at CCOM in Golden who eventually referred her out to Douglas C. Wong, M.D., at Panorama Orthopedics & Spine, who became her ATP.

12. On April 11, 2018 the Claimant was evaluated by ATP Dr. Wong who noted:

[Claimant] is a 61 yr female (works at [Employer] who notes right side back and right leg pain and tingling since lifting a Keg on 11/27/18. She denies any issues before that. She has done PT and had an ESI. MRI L spine (H1) shows a right L3-4 far lateral disc herniation. She dos not want any more ESI's. She wants to proceed with surgery, this would be an outpatient right L3-4 far lateral discectomy as an outpatient. (2hrs, Metric set, neuromonitoring)

X-rays do not show any instability

(Claimant's Exhibit 7, BS 117).

13. On April 17, 2018, ATP Dr. Wong's request for surgery was denied because the Claimant's claim at that time was currently under a Notice of Contest. (Claimant's Exhibit 7, BS 121).

14. On May 8, 2018, following the denial of the Claimant's surgery, a General Admission of Liability (GAL) was filed by the Respondents (Claimant's Exhibit 3, BS 20).

15. On June 15, 2019, because the Claimant was concerned with the surgery recommended by ATP Dr. Wong, CCOM sent her out for a second opinion with Bryan Andrew Castro, M.D. (Claimant's Exhibit 9, BS 125), where ATP Dr.Castro stated the following opinion:

Impression/Plan: Large right-sided far lateral disc herniation at L3-L4. At this juncture, she is having ongoing symptoms; however, MRI is several months old. There is a large free fragment component of this disc and actually, the disc herniation may have resolved somewhat in which case the treatment algorithm may have changed. I think it would be reasonable to get her in for a repeat lumbar MRI to better evaluate any neural encroachment or resolution of the disc herniation itself. Additionally, I think an EMG may be considered as well. If the MRI does not reveal a disc herniation currently and/or resolution of the prior disc herniation, I think surgical intervention may not be required. Indeed, the EMG may be positive even if the herniation has resolved, but would not, I think, result in the need for surgery if the MRI does not highlight any ongoing disc and/or nerve root compression.

(Claimant's Exhibit 9, BS 129).

16. On July 2, 2018, the Claimant was evaluated by the Respondents' selected independent medical examiner (IME), Michael Rauzzino, M.D., who reviewed the Claimant's MRI and stated the following opinion:

I reviewed two MRIs of the lumbar spine done at Health Images, one from 01/05/18 and another from 06/20/18. Both of these demonstrate a focal disc protrusion at L3-L4 on the right. This is a foraminal disc herniation, but I do not believe it is a far lateral disc herniation. She otherwise had multilevel degenerative changes that are age appropriate and not terrible.

(Claimant's Exhibit 10, BS 163).

17. Dr. Rauzzino then rendered an opinion that the Claimant had suffered an acute disc herniation at L3-L4 which was work related, that she had no history of a prior back injury and that subsequent imaging ordered by ATP Dr. Castro, showed disc protrusions still present as of June 20, 2018 (Claimant's Exhibit 10, BS 164)

18. Dr. Rauzzino was further of the opinion, in response to the question "what is your diagnosis, prognosis and recommended course of treatment, if any, . . . ?" that:

[Claimant] has an L3-L4 right foraminal disc herniation that is work related. Treatment algorithms could be as follows:

1) She could elect to continue as she is and allow the disc to try to heal on its own; it is slightly smaller than it had been in January but is still significant.

2) She could try another epidural steroid injection in the hope of alleviating her symptoms. [Claimant] had a single epidural steroid injection and this did not provide much relief. It might be worthwhile to repeat the injection once more to see if she gets relief, especially since the disc is getting somewhat smaller. However, if she does not want to pursue injections, she would be left with either living with the symptoms, in which case I believe she would be placed at maximum medical improvement, or she could consider surgical intervention.

3) She could also elect microdiscectomy in minimally invasive fashion. If she elects to proceed with surgery, I would respectfully disagree with Dr. Wong's indication that she would need a far lateral approach; this would be best approached through a standard midline approach given the location of the disc fragment.

4) EMG could also be done to assess the status of the nerve, although she has good motor strength on my examination today.

(Claimant's Exhibit 10, BS 164-165).

19. Dr. Rauzzino also was of the opinion, in response to the question "Do you feel that additional medical treatment and/or surgical intervention is indicated to improve the Claimant's condition? Is the proposed surgery by Dr. Wong related to the incident of November 26, 2017 or is it to correct degenerative changes?" that:

Yes; [Claimant] could benefit from surgery or additional injections.

The surgery proposed by Dr. Wong is related to the acute injury and would treat the L3-L4 acute disc herniation that has been presented on serial studies, albeit decreasingly so.

Surgery would be direct toward injuries related to the work incident of 11/26/17 at the L3-L4 level only and would not be directed to degenerative changes at other levels.

(Claimant's Exhibit 10, BS 165).

20. On September 7, 2018, ATP Dr. Castro noted that "a new MRI highlights an ongoing nerve root encroachment right side

**ATP Dr. Castro also noted:

We gave her the option of repeating the epidural injection. She did not have a ridge last time. I would recommend she do it with sedation this t4eim and get a ridge. **Alternatively, surgical intervention being a microdiscectomy is another option which could be helpful and I think effective because the herniation is still persistent** (emphasis supplied)**.** Lastly, expectant management only and see if this improves on its own is an option although somewhat unpredictable as far it is long-term course. She wants to think about these options and let us know which way she would like to proceed.

(Claimant's Exhibit 9, BS 134).

21. On September 7, 2018, ATP Dr. Castro also initiated a prior authorization request for a microdiscectomy and far lateral decompression of L3-L4 right sided, which was denied and which denial he appealed stating:

The plan is for a microdiscectomy and far lateral decompression of L3-L4, right-sided. She has ongoing **radicular symptoms related directly to the L3-L4 far lateral disc** herniation which she clearly has on MRI. I do not understand the nature of the denial. **This would certain conforms to the Workers' Compensation Guidelines.** We have tried conservative management inclusive of time, PT, and now an injection. There is no indication for further injection if she does not want to proceeded with them. Weakness is not an absolute indication for surgical intervention, i.e., the patient does not present with weakness prior to considering surgical intervention. **Surgical intervention in the form of a microdiscectomy is reasonable for lumbar radiculopathy in the setting of a large disc herniation which the patient has. We will resubmit for a microdiscectomy and decompression right side at L3-L4** (Emphasis supplied)..

(Claimant's Exhibit 9, BS 138)

22. On October 24, 2018, Respondents, after a medical record review, at their request, by Kimberly D. Terry, M.D., certified right L3-L4 laminectomy decompression lumbar surgery under anesthesia (Claimant's Exhibit 9, BS 139).

23. On January 10, 2019, the Claimant was scheduled for surgery with ATP Dr. Castro, which surgery was cancelled by ATP Dr.Castro who requested an additional MRI (*See*, for example, Claimant's Exhibit 4, BS 78 and 9, BS 147).

24. On February 8, 2019, ATP Dr. Castro noted that a review of the new MRI reflected "improvement, in my opinion, of the right-sided L3-L4 far lateral disc herniation. Fortunately, she is not having bad lumbar radiculopathy this time and it appears again on the MRI that the herniation seems to be smaller" (Claimant's Exhibit 9, BS 147).

25. Thereafter, ATP Dr. Castro requested "injection transforaminal epidural lumbosacral injection at L3-L4" which was denied by the Respondents (Claimant's Exhibit 9, BS 150).

26. On June 1, 2019, at the request of the Respondents, the Claimant was examined by independent medical examiner (IME) Alfred C. Lotman, M.D., who expressed the opinion that the Claimant was at MMI and did not need to undergo the L3-L4 injections because she did not desire them. It was Dr. Lotman's opinion that the Claimant had reached MMI and that she should proceed with a "home exercise rehabilitation program" (Claimant's Exhibit 11, BS 173).

27. The Claimant credibly testified that there was a miscommunication with Dr. Lotman and that she was not excited about the pain incurred by the injections, but she desired to pursue them to address the pain and numbness in her right buttock and right leg.

Ultimate Findings

28. The ALJ finds the opinions of ATP Castro and the Respondents' medical evaluator Dr. Rauzzino on reasonable necessity and causal relatedness highly persuasive and credible. The ALJ further finds the opinions of the Respondents' physician Lotman lacking in credibility on the reasonable necessity and causal relatedness of the L3-L4 transforaminal injections. The ALJ finds that the Claimant credibly testified there was a miscommunication and that she desires to pursue the lumbar injection to address the pain in her right lower extremity.

29. Between the conflicting medical and lay opinions, the ALJ makes a rational choice, based on substantial evidence, to accept the opinion that ATP Castro and the Respondents selected physician Rauzzino, on the reasonable necessity and causal relatedness of the L3-L4 transforaminal injection and rejects opinions to the contrary. Both ATP Castrol and the Respondents selected physician Rauzzino established the work-relatedness of the herniated disc, with which even the Respondent examiner Dr. Lotman agrees was caused by the admitted industrial injury. Accordingly, the L3-L4 transforaminal injection is authorized, causally related to the injury and reasonably necessary to cure and relieve the effects of the November 26, 2017 injury.

30. The Claimant has proven by a preponderance of the evidence that the medical care for a lumbar spine involving an L3-L4 transforaminal injection recommended by ATP Castro and conferred in by the Respondents selected physician Rauzzino is causally related to the compensable injury and reasonably necessary to cure and relieve the effects thereof.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, 2012 COA 85. The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the opinions of ATP Castro and the Respondents' medical evaluator Dr. Rauzzino on reasonable necessity and causal relatedness were highly persuasive and credible. As further found, the opinions of the Respondents' IME physician, Dr. Lotman, were lacking in credibility on the reasonable necessity and causal relatedness of the L3-L4 transforaminal injections. Additionally, as found, the Claimant credibly testified that

there was a miscommunication and that she desires to pursue the lumbar injection to address the pain in her right lower extremity.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between the conflicting medical and lay opinions, the ALJ made a rational choice, based on substantial evidence, to accept the opinions of ATP Castro and the Respondents selected physician Rauzzino, on the reasonable necessity and causal relatedness of the L3-L4 transforaminal injection and to reject opinions to the contrary. Both ATP Castrol and the Respondents selected physician Rauzzino established the work-relatedness of the herniated disc, which even the Respondent examiner Lotman agrees was caused by the admitted industrial injury. Accordingly, the L3-L4 transforaminal injection is authorized, causally related to the injury and reasonably necessary to cure and relieve the effects

Causal Relatedness of the Claimant's Compensable Injury for Which The L3-L4 Injection is Reasonably Necessary

c. An "injury" referred to in § 8-41-301 C.R.S., contemplates a disabling injury to a claimant's person, not merely a coincidental and non-disabling insult to the body. *See Henderson v. RSI, Inc*., 824 P.2d 91 (Colo. App. 1991). *Also see Gaudett v. Stationers Distributing Company*, W.C. No. 4-135-027 [Indus. Claim Appeals Office (ICAO), April 5, 1993]. A priori the consequences of a work-related incident must require medical treatment or be disabling in order to be sufficient to constitute a compensable event. If an incident is not a significant event resulting in an injury, a claimant is not entitled to benefits. *Wherry v. City and County of Denver*, W.C. No. 4-475-818 (ICAO, March 7, 2002). In order for an injury to be compensable under the

Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Office*, 919 P.2d 207, 210, 210 (Colo. 1996). An injury "arises out of" employment if it would not have occurred but for the fact that the conditions and obligations of employment placed the employee in a position that he or she was injured." *See City of Brighton v. Rodriguez*, 318 P.3d 496, 2014 CO 7. A manner of conceptualizing the matter is, essentially, that a presumption of work-relatedness may arise when an unexplained injury occurs during the course of employment. However, it is incumbent to show that non-work-related factors caused the injury to avoid compensability. Nonetheless, proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1) (c), C.R.S. *See Faulkner v. Indus. Claim Appeals Office*, 24 P.3d 844 (Colo. App. 2000); *Eller v. Indus. Claim Appeals Office*, 224 P.3d 397, 399 (Colo. App. 2009); *Cabela v. Indus. Claim Appeals Office*, 1 98 P.3d 1277, 1279 (Colo. App. 2008). The question of causation is generally one of fact for determination by an ALJ. *Faulkner* at 846; *Eller* at 399-400. As found, the Claimant has proven that there was a causal link between her left L3-L4 disc herniation and the work-related incident on November 26, 2017. Therefore, she suffered a compensable injury and received authorized, reasonably necessary and causally related medical care and treatment for the injury since November 26, 2017 with little improvement and she has not reached MMI. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, Claimant's medical treatment is causally related to her admitted back injury of November 26, 2017. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment , specifically, the transforaminal epidural lumber/sacral injection (ESI) at the L3-4 level was and is reasonably necessary.

Burden of Proof

d. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits, beyond those admitted. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim*

Appeals Office v.Jones, 688 P.2d 1116 (Colo. 1984). As found, Claimant has sustained her burden.

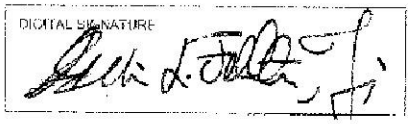
ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents shall pay the costs of all authorized, causally related and reasonably necessary medical care and treatment, including the transforaminal epidural lumbar/sacral injection (ESI) at the L3-4 level, as recommended by authorized treating physician Bryan Andrew Castro, M.D., subject to the Division of Workers Compensation Medical fee Schedule.

B. Any and all issues not determined herein are reserved for future decision.

DATED this 12th day of September 2019..



EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered an occupational disease in the form of bilateral Carpal Tunnel Syndrome (CTS) that began on July 17, 2017 during the course and scope of his employment with Employer.

2. Whether Claimant has established by a preponderance of the evidence that he is entitled to receive reasonable, necessary and causally related medical treatment designed to cure and relieve the effects of his July 17, 2017 industrial injury.

3. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) and Temporary Partial Disability (TPD) benefits for the period July 17, 2017 until terminated by statute.

4. A determination of Claimant's Average Weekly Wage (AWW).

5. Whether Claimant is entitled to a disfigurement award pursuant to §8-42-108, C.R.S.

FINDINGS OF FACT

1. Claimant is a 51-year=old right-hand dominant male who was born on May 24, 1969. Claimant began working for Employer on March 20, 2017 as a Snout Trimmer.

2. Claimant performed his job as a Snout Trimmer on a platform approximately one foot high. The job involved completely removing the snout from a cow. The position specifically required Claimant to trim from the middle of the snout, move to the left, proceed around the snout and finish on the right side.

3. On July 17, 2017 Claimant visited Employer's Occupational Medical Department, complaining of swelling and pain in the left thumb CMC joint. The nurse who evaluated Claimant recommended ice, heat, massage and a 50% reduction in work.

4. On July 25, 2017 Claimant returned to Employer's Occupational Medical Department for further evaluation with Kathleen D'Angelo, M.D. Claimant exhibited full range of motion without pain in his left wrist. There were no ganglions as well as no erythema or swelling. Claimant's left hand was normal with the exception of a nodule on the lateral aspect of the CMC joint. Dr. D'Angelo assessed Claimant with a swollen left thumb and recommended a 50% reduction in work.

5. On August 10, 2017 Authorized Treating Physician (ATP) Carlos Cebrian, M.D. released Claimant from care. He noted that Claimant had reached Maximum Medical Improvement (MMI) with no permanent impairment.

6. On January 3, 2018 Claimant returned to Dr. Cebrian for an evaluation. Claimant reported a three-week history of pain in his left hand as well as numbness in the first, second and third digits. Claimant explained he does not use a tool in his left hand while performing his job, but grabs some of the loose tissue and pulls while he cuts with his right hand. He then washes his hands between each cut. Dr. Cebrian remarked that he had reviewed video of Claimant performing his job and noted the "repetition cycle was not very rapid."

7. On January 30, 2018 Claimant again visited Dr. Cebrian for an examination. Dr. Cebrian assessed left hand pain with swelling of the left thumb MP joint. X-rays revealed mild arthritic changes in the left thumb. Dr. Cebrian diagnosed a left thumb strain with aggravation of underlying osteoarthritis.

8. By April 10, 2018 Dr. Cebrian released Claimant to regular duty employment. He remarked that Claimant's osteoarthritis was not work-related, but work activities may have aggravated his symptoms.

9. On April 17, 2018 Dr. D'Angelo determined that Claimant had reached MMI with no impairment. She directed Claimant to follow-up with his personal physician for osteoarthritis.

10. On September 14, 2018 Claimant visited personal medical provider PA-C Eric Becker at Marathon Clinic. He reported left hand pain, numbness and tingling. Claimant also noted that he had developed a bump over the MCP joint. PA-C Becker diagnosed Claimant with localized arthritis of the left hand and left Carpal Tunnel Syndrome (CTS).

11. On October 10, 2018 PA-C Becker referred Claimant for EMG testing of the upper extremities. He also asked Dr. Cebrian to ""re-examine the left-hand issues with this patient. It appears this may be work-related carpal tunnel."

12. On October 12, 2018 Claimant returned to PA-C Becker and reported that the "pain, weakness, numbness and tingling seem to be getting worse." He remarked that his symptoms "started since taking the current job he [had] at [Employer] and feels this is directly from work." Claimant explained that he used his left hand to hold the mouths of cattle snouts while cutting with the right hand. After he demonstrated how he performed his job, PA-C Becker commented "it is quite concerning that the motion of his left hand is fully flexed throughout his display, which could possibly be the cause to this current condition." He ordered a neurological evaluation and directed Claimant to return to Employer's occupational health facility to discuss the possible relation to his work.

13. Subsequent EMG testing revealed bilateral CTS. The CTS was worse in the left wrist than the right wrist.

14. Dr. Cebrian evaluated Claimant on November 7, 2018. He commented that Claimant's work as a Snout Trimmer involved cutting with the right hand and pulling with his left hand. He remarked that there was not "a lot of force involved in this job with his left hand in order to pull the snout." Dr. Cebrian commented that "his exposure is limited."

In performing a causality assessment, Dr. Cebrian determined that Claimant did not have any Primary or Secondary Risk Factors for the development of a cumulative trauma condition under the Colorado Division of Workers' Compensation *Medical Treatment Guidelines* (*Guidelines*). He thus released Claimant from care.

15. Based on a referral from PA-C Becker Claimant underwent an evaluation at the Eastern Colorado Orthopedic Center. PA-C David Keller diagnosed Claimant with left-sided CTS.

16. On February 26, 2019 Claimant underwent left-sided CTS release surgery. On April 8, 2019 he was released to regular duty employment.

17. On May 22, 2019 Robert W. Watson Jr., M.D. conducted an independent medical examination of Claimant. Claimant reported numbness and tingling in his left thumb, index finger and middle finger beginning in July 2018. Claimant did not recall how the symptoms began because they developed over time. Based on a physical examination and review of the medical records Dr. Watson concluded that Claimant did not satisfy the criteria for the development of bilateral CTS pursuant to the *Guidelines*. In addressing causation, Dr. Watson explained that under the *Guidelines* there is good evidence that a combination of force, repetition and vibration are contributing factors to occupational CTS. Notably, the combination of repetition and force for more than six hours can contribute to CTS. There is also good evidence that a combination of repetition and force with tool use in an awkward position for six hours contributes to CTS. Another good-quality study identified the combination of repetition and force with awkward posture. After reviewing Employer's Physical Demands Summary, Dr. Watson determined Claimant meets the requirements for repetition. However, Claimant did not meet the requirements for force. Dr. Watson referenced other studies that have identified a combination of force and repetition as required factors for the development of occupational CTS. The studies also determined that repetition without force did not contribute to the development of CTS. Finally, Dr. Watson referenced a 2008 study by Rempel that took physiologic measurements of pressures in the carpal canal during repetitive activity and in the static position. The study found that radial and ulnar deviation up to 15% did not sufficiently raise the pressure in the carpal canal to damage the median nerve. Accordingly, Dr. Watson concluded that Claimant's bilateral CTS was not causally related to his work activities as a Snout Trimmer for Employer.

18. The record includes a Physical Demands Summary for Claimant's position as a Snout Trimmer for Employer. Claimant removed snouts from cows by trimming from the middle of the snout, moving to the left, going around the snout and finishing on the right side. There are four steps in completing the job. The employee first cuts on the front of the snout. Second, the employee holds the snout with the left hand and continues cutting. Next, the employee trims around the jawbone and returns to the right side. Finally, the employee completely removes the snout from the cow. The Physical Demands Summary also specifies that the position involves use of the right hand for 38 repetitions per minute and the left hand for 14 repetitions per minute. Claimant did not engage in hand or wrist flexion or extension greater than 15 degrees. Pronation of the right wrist happened less than 33% of the time and did not occur with the left wrist. The

Physical Demands Summary also noted that Claimant exerted zero pounds of grip force with his left hand in performing his job duties.

19. Claimant testified at the hearing in this matter. He explained that, in performing his work duties, he used his left hand to hold the snouts of cows as they moved along the production line while removing the skin of the cow with the right hand. He remarked that he used force to grab and turn the cattle with his left hand. The force included pulling, turning and squeezing. Claimant remarked that he usually repeated the snout-cutting task up to about 350 cows per hour. He thus removed the snouts from an average of 2,400-2,500 cows per day. Claimant noted that his level of force increased because the cattle were frequently bloody and slippery. Furthermore, he used more force and strength with his left hand when his knives were not sharp.

20. Dr. Cebrian testified at the hearing in this matter. He maintained that Claimant suffered from bilateral CTS. Relying on Rule 17, Exhibit 5 of the *Guidelines*, Dr. Cebrian explained that the combination of repetition, force and cycle time in Claimant's duties as a Snout Trimmer failed to meet the causation requirements for CTS. To constitute a cumulative trauma disorder pursuant to the *Guidelines,* Claimant must have worked more than six hours per day with the requisite force and repetition. Dr. Cebrian compared Claimant's job duties with the delineated Primary Risk Factors in the *Guidelines*. He reviewed the Primary Risk Factor Definition Table for Force and Repetition/Duration. Initially, Claimant's cycles per minute constituted insufficient repetition to cause a cumulative trauma condition under the *Guidelines*. Furthermore, Claimant's job activities lacked sufficient force to cause a work-related condition. Specifically, Dr. Cebrian remarked that no significant force is applied to the skin of the cow to avoid damaging the hide. Accordingly, Dr. Cebrian concluded that Claimant did not engage in forceful and repetitive activity at work for an amount of time that meets the minimum threshold in the *Guidelines* for the development of CTS.

21. Dr. Watson testified at the hearing in this matter. He reiterated that Claimant suffered from bilateral CTS. He explained that Claimant's work activities did not satisfy the criteria for a work-related exposure pursuant to the *Guidelines*. Relying on the Job Demands Analysis, Dr. Watson determined Claimant satisfied the requirements for repetition. However, Claimant did not meet the requirements for force. Moreover, Claimant's radial and ulnar deviation in performing his job tasks did not sufficiently raise pressure in the carpal canal to damage the median nerve. Dr. Watson summarized that Claimant's job duties did not satisfy the Primary or Secondary Risk Factors in the *Guidelines* for the development of occupational CTS.

22. Claimant has failed to demonstrate that it is more probably true than not that he suffered an occupational disease in the form of bilateral CTS that began on July 17, 2017 during the course and scope of his employment with Employer. Although Claimant attributed his bilateral CTS to his work activities, a review of his job duties, the medical records and the persuasive opinions of Drs. Cebrian and Watson reflect that his job duties lacked the requisite duration, force or repetition to cause a cumulative trauma disorder.

23. The Physical Demands Summary for Claimant's position as a Snout Trimmer provides that Claimant removed snouts from cows by trimming from the middle of the snout, moving to the left, going around the snout and finishing on the right side. The position involves use of the right hand for 38 repetitions per minute and the left hand for 14 repetitions per minute. Claimant did not engage in hand or wrist flexion or extension greater than 15 degrees. Pronation of the right wrist happened less than 33% of the time and did not occur with the left wrist. The Physical Demands Summary also noted that Claimant exerted zero pounds of grip force with his left hand in performing his job duties.

24. Relying on Rule 17, Exhibit 5 of the *Guidelines*, Dr. Cebrian explained that the combination of repetition, force and cycle time in Claimant's duties as a Snout Trimmer failed to meet the causation requirements for CTS. To constitute a cumulative trauma disorder pursuant to the *Guidelines,* Claimant must have worked more than six hours per day with the requisite force and repetition. Dr. Cebrian compared Claimant's job duties with the delineated Primary Risk Factors in the *Guidelines*. He reviewed the Primary Risk Factor Definition Table for Force and Repetition/Duration. Initially, Claimant's cycles per minute constituted insufficient repetition to cause a cumulative trauma condition under the *Guidelines*. Furthermore, Claimant's job activities lacked adequate force to cause a work-related condition. Specifically, Dr. Cebrian remarked that Claimant did not apply significant force to the skin of the cow to avoid damaging the hide. Dr. Cebrian thus concluded that Claimant did not engage in forceful and repetitive activity at work for an amount of time that meets the minimum threshold in the *Guidelines* for the development of CTS. Similarly, Dr. Watson explained that Claimant's work activities did not satisfy the criteria for an occupational exposure pursuant to the *Guidelines*. Relying on the Job Demands Analysis, Dr. Watson determined Claimant satisfied the requirements for repetition. However, Claimant did not meet the threshold for force. Moreover, Claimant's radial and ulnar deviation in performing his job tasks did not sufficiently raise pressure in the carpal canal to damage the median nerve. Dr. Watson summarized that Claimant's job duties did not satisfy the Primary or Secondary Risk Factors enumerated in the *Guidelines* for the development of occupational CTS.

25. Although PA-C Becker suggested that Claimant's bilateral CTS might be related to his job duties as a Snout Trimmer, he failed to perform a causality assessment. In contrast, Drs. Cebrian and Watson considered the Primary and Secondary Risk Factors in the *Guidelines* in assessing the cause of Claimant's bilateral CTS. A review of Claimant's job duties in conjunction with the persuasive opinions Drs. Cebrian and Watson demonstrates that Claimant did not engage in forceful and repetitive activity for an amount of time that meets the threshold for a cumulative trauma condition. He thus likely did not suffer the cumulative trauma condition of bilateral CTS while working for Employer as a Snout Trimmer on July 17, 2017. Claimant's employment activities did not cause, intensify, or, to a reasonable degree, aggravate his condition to produce a need for medical treatment. Claimant's claim is thus denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers

at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. The test for distinguishing between an accidental injury and an occupational disease is whether the injury can be traced to a particular time, place and cause. *Campbell v. IBM Corp.*, 867 P.2d 77, 81 (Colo. App. 1993). "Occupational disease" is defined by §8-40-201(14), C.R.S. as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

5. A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, §8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the

disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

6. Rule 17, Exhibit 5 provides an algorithm for evaluating Cumulative Trauma Conditions (CTC) pursuant to the *Guidelines*. In addressing applicability, the *Guidelines* note that "CTC's of the upper extremity comprise a heterogeneous group of diagnoses which include numerous specific clinical entities including disorders of the muscles, tendons and tendon sheaths, nerves, joints and neurovascular structures." W.C.R.P. Rule 17, Exhibit 5, p. 6. In determining a diagnosis when performing a cumulative trauma analysis the *Guidelines* delineate specific musculoskeletal conditions and peripheral nerve disorders. Nevertheless, the *Guidelines* provide that "[l]ess common cumulative trauma conditions not listed specifically in these Guidelines are still subject to medical causation assessment." W.C.R.P. Rule 17, Exhibit 5, p. 21.

7. The *Guidelines* include a Primary Risk Factor Definition Table for Force and Repetition/Duration. The Table requires six hours of two pounds pinch force or 10 pounds of hand force three or more times per minute. Other Primary Risk Factors involving Force and Repetition/Duration include six hours of lifting 10 pounds in excess of 60 times per hour and six hours of using hand tools weighing two pounds or more. An additional Primary Risk Factor category is Awkward Posture and Repetition/Duration. The factor requires four hours of wrist flexion greater than 45 degrees, extension greater than 30 degrees or ulnar deviation greater than 20 degrees, six hours of elbow flexion greater than 90 degrees, four hours of supination/pronation with task cycles 30 seconds or less or awkward posture for at least 50% of a task cycle. Secondary Risk Factors require three hours of two pounds pinch force or 10 pounds of hand force three or more times per minute. Other Secondary Risk Factors involving Force and Repetition/Duration include three hours of lifting 10 pounds greater than 60 times per hour and three hours of using hand tools weighing two pounds or more. Finally, Secondary Risk Factors for Awkward Posture and Repetition/Duration include three hours of elbow flexion greater than 90 degrees and three hours of supination/pronation with a power grip or lifting. If neither Primary nor Secondary Risk Factors are present, the *Guidelines* provide that "the case is probably not job related." W.C.R.P. Rule 17, Exhibit 5, p. 24.

8. The *Guidelines* specify that "good" but not "strong" evidence that occupational risk factors cause CTS include a combination of force, repetition, and vibration, or a combination of repetition and force for six hours, or a combination of repetition and forceful tool use with awkward posture for six hours, or a combination of force, repetition, and awkward posture. There is also "good" evidence that the combination of two pounds of pinch or 10 pounds of hand force three times or more per minute for three hours causes CTS. "Some" evidence of occupational risk factors for the development of CTS include wrist bending or awkward posture for four hours, mouse use more than four hours, and a combination of cold and forceful repetition for six hours. Notably, there is good evidence that repetition alone for six hours or less is not related to the development of CTS. W.C.R.P. Rule 17, Exhibit 5, pp. 28-29.

9. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he suffered an occupational disease in the form of bilateral CTS that began

on July 17, 2017 during the course and scope of his employment with Employer. Although Claimant attributed his bilateral CTS to his work activities, a review of his job duties, the medical records and the persuasive opinions of Drs. Cebrian and Watson reflect that his job duties lacked the requisite duration, force or repetition to cause a cumulative trauma disorder.

10. As found, the Physical Demands Summary for Claimant's position as a Snout Trimmer provides that Claimant removed snouts from cows by trimming from the middle of the snout, moving to the left, going around the snout and finishing on the right side. The position involves use of the right hand for 38 repetitions per minute and the left hand for 14 repetitions per minute. Claimant did not engage in hand or wrist flexion or extension greater than 15 degrees. Pronation of the right wrist happened less than 33% of the time and did not occur with the left wrist. The Physical Demands Summary also noted that Claimant exerted zero pounds of grip force with his left hand in performing his job duties.

11. As found, relying on Rule 17, Exhibit 5 of the *Guidelines*, Dr. Cebrian explained that the combination of repetition, force and cycle time in Claimant's duties as a Snout Trimmer failed to meet the causation requirements for CTS. To constitute a cumulative trauma disorder pursuant to the *Guidelines,* Claimant must have worked more than six hours per day with the requisite force and repetition. Dr. Cebrian compared Claimant's job duties with the delineated Primary Risk Factors in the *Guidelines*. He reviewed the Primary Risk Factor Definition Table for Force and Repetition/Duration. Initially, Claimant's cycles per minute constituted insufficient repetition to cause a cumulative trauma condition under the *Guidelines*. Furthermore, Claimant's job activities lacked adequate force to cause a work-related condition. Specifically, Dr. Cebrian remarked that Claimant did not apply significant force to the skin of the cow to avoid damaging the hide. Dr. Cebrian thus concluded that Claimant did not engage in forceful and repetitive activity at work for an amount of time that meets the minimum threshold in the *Guidelines* for the development of CTS. Similarly, Dr. Watson explained that Claimant's work activities did not satisfy the criteria for an occupational exposure pursuant to the *Guidelines*. Relying on the Job Demands Analysis, Dr. Watson determined Claimant satisfied the requirements for repetition. However, Claimant did not meet the threshold for force. Moreover, Claimant's radial and ulnar deviation in performing his job tasks did not sufficiently raise pressure in the carpal canal to damage the median nerve. Dr. Watson summarized that Claimant's job duties did not satisfy the Primary or Secondary Risk Factors enumerated in the *Guidelines* for the development of occupational CTS.

12. As found, although PA-C Becker suggested that Claimant's bilateral CTS might be related to his job duties as a Snout Trimmer, he failed to perform a causality assessment. In contrast, Drs. Cebrian and Watson considered the Primary and Secondary Risk Factors in the *Guidelines* in assessing the cause of Claimant's bilateral CTS. A review of Claimant's job duties in conjunction with the persuasive opinions Drs. Cebrian and Watson demonstrates that Claimant did not engage in forceful and repetitive activity for an amount of time that meets the threshold for a cumulative trauma condition. He thus likely did not suffer the cumulative trauma condition of bilateral CTS while working

for Employer as a Snout Trimmer on July 17, 2017. Claimant's employment activities did not cause, intensify, or, to a reasonable degree, aggravate his condition to produce a need for medical treatment. Claimant's claim is thus denied and dismissed.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's claim for Workers' Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: September 16, 2019.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Has Claimant overcome the DIME opinion of Dr. Shih by clear and convincing evidence that Claimant was at MMI as of May 1, 2019?

II. Was Claimant's MMI status properly rescinded, effective September 21, 2018, in accordance with the opinion of the ATP, Dr. Zaremba?

III. Should the lumbar surgery performed by Dr. Syre on January 25, 2019 be retroactively deemed reasonable, necessary, and related to Claimant's work injury, such that Respondent must now be responsible for reimbursement to the provider?

IV. Has Claimant shown, by a preponderance of the evidence, that a gastric bypass procedure should be authorized as reasonable, necessary, and related to his original work injury?

V. Has Claimant received unemployment, social security, or other similar benefits for which Respondents would be entitled to a statutory offset?

STIPULATIONS

I. As of the hearing date, Claimant is not at MMI. The ALJ accepted this stipulation.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Claimant was employed as an electrical apprentice with Respondent, Elevation Staffing, LLC in Centennial, CO. His began work on January 17, 2016. [*Ex. A*, *p. 1*]

2. Claimant was injured at work on Friday, October 27, 2017, when he and two co-workers were pulling wire by hand through a conduit pipe. Claimant explained that he was pulling the wire across his body diagonally, from shoulder to hip, when the wire suddenly stopped. He felt pain in his low back at that time. Per Claimant, the incident occurred at approximately 9:00 a.m. but he continued working the remainder of the day.

3. Claimant reported his injury to the Employer, after which he was promptly provided with a list of designated medical providers. As he could not reach any designated providers over the weekend, Claimant was evaluated on Monday, October 30, by Dr. Lugliani at Colorado Occupational Partners. The following history appears in

Dr. Lugliani's October 30, 2017 medical report:

> He [Claimant] states that on October 27, 2017, at approximately 9:00 a.m. he was assisting in pulling an electric wire. When the wire got stuck he pulled hard and felt immediate pain in his low back. It radiated to his right gluteus and down his right leg. He has a current complaint of low back pain that he rates 9/10 severity that he describes as achy in nature or stabbing sensation. It is down into his sacrum and down the back of his leg involving his foot. He denies any bowel or bladder incontinence." [*Ex. L, p. 58*]

Dr. Lugliani diagnosed low back pain with right lumbar radicular symptoms. He imposed temporary work restrictions; prescribed pain medication and an anti-inflammatory; and referred Claimant for 4-6 visits of chiropractic treatment. Claimant was instructed to follow up with the clinic on November 2, 2017. *Id* at 59-61.

4. During a follow up appointment on November 2, 2017, Dr. Lugliani reported: "… He has persistent right-sided low back pain, with radiating symptoms down the back of his leg into his foot… He denies any bowel or urinary incontinence … He is experiencing some right lower extremity weakness. He informs me that prednisone has helped a little bit; tizanidine and Norco have had minimal benefit. He is requesting alternative pain medications… I am recommending a combination pain cream… The patient will continue with chiropractic treatment…" [*Ex. L*, *pp. 62-63*] Dr. Lugliani ordered a lumbar MRI and wrote a referral to Dr. Stephen Pehler (spine specialist) for consult. [*Ex. L, pp. 65-66*] Claimant was instructed to follow up with Dr. Lugliani on November 9.

5. The lumbar MRI was performed on November 3, 2017. [*Ex. P, pp. 145-146*] Findings included:

> **1.** Broad-based disc bulge with a large superimposed left posterior paracentral extrusion at L3-L4 which causes severe central canal stenosis with near complete obliteration of the CSF signal within the thecal sac through this level. There is buckling of the nerve roots superior and inferior to this level.
>
> **2.** Mild central canal stenosis at L2-L3 and L4-L5 as detailed above.

6. Clamant did not wait to see Dr. Pehler. .Rather, he presented to the emergency room at Swedish Medical Center on November 7, 2017. [*Ex. N*] The ER records note:

> Pt has had an MRI done at Touchstone Aurora and was seen by Dr. Lougliani, who diagnosed pt with a bulging disc. Patient has not received formal results of his MRI but states the office staff read the report and was informed she [sic] had a bulging disc. He was provided with a copy of his

> disc. He states the pain has gotten progressively worse since onset and is associated with right lower extremity numbness and weakness. Pt has been seen by a chiropractor as well, with a resulting numbness in his left foot … He reports last night he began to experience a burning sensation in his groin. Pt has appt with ortho on November 16th… Currently taking anti-inflammatories and steroid. States opiates and muscle relaxers do not work on him. He's been using marijuana with moderate relief of symptoms." [*Ex. N, pp. 80-81*]

The records further state:

> Last night he started noticing new onset of numbness/tingling in his left foot and burning sensation in his groin. This burning sensation has since resolved… Given his new symptoms he elected to present to the ED. Imaging was performed at Touchstone on 11/3 demonstrating a large L3-4 disc herniation protruding into the canal causing severe stenosis." [*Ex. N, p. 86*]

7. While at the emergency room on November 7, 2017, Claimant had a consult with a neurosurgeon (Dr. Peter Syre): "The (MRI) disc was reviewed by Dr. Syre who recommended surgery today.. "*Informed pt of consult with neurosurgery, he is agreeable to plan for surgery today."* [*Ex. N, p. 82*] At hearing, Claimant confirmed: "And I honestly did not meet Dr. Syre until right before surgery."

8. An operative report dated November 7, 2017 from Dr. Syre documents that Claimant underwent the following surgeries: **1.** L3-4 laminectomies. **2.** L3-4 left discectomy**. 3.** Repair of CSF leak. [*Ex. N, pp. 89-93*]

9. Claimant was discharged from the hospital on November 11, 2017: "… pain controlled on PO dilaudid, scheduled robaxin, Tylenol, valium PRN. Foley d/c'd, urinating without issues; has AFO for right foot drop; advance activity with PT/OT, no need for lumbar brace… okay to discharge from neurosurgical perspective…" [*Ex. N, p. 102*]

10. A lower extremity venous duplex ultrasound performed on November 13, 2017, revealed that Claimant had developed a DVT [deep vein thrombosis] in this right leg following surgery. [*Ex. P, p. 149*]

11. Pinnacol Assurance was not contacted for authorization prior to the November 7, 2017 surgery. They were billed after it had already occurred. That particular surgery was labeled as *emergent* in nature, and Claimant underwent the surgery the same day that he presented to the emergency room. As a result, Pinnacol did agree to pay the medical bills received from the November 7, 2017 surgery.

12. Claimant moved to Colorado Springs in January 2018. At that time, he began treating with a new occupational medicine physician – Dr. Joseph Zaremba at

Emergicare in Colorado Springs. [*Ex. Q*] The initial appointment with Dr. Zaremba was on February 8, 2018. The following history was noted:

> He states that he was pulling a rope from up to down across his body when he felt the pain. He continued to work through the pain. He was at home several days later and fell to the ground secondary to the pain with worsening right leg symptoms, and had stat MRI done and needed urgent surgery. He was told from the MRI he had nerve damage, and had 'obliterated' between L3-4. He had a laminectomy of 11/17. DOI 10/27. He states that the back pain is gone but he has so much nerve damage that it is difficult for him to get around well… He is also having some nighttime urinary incontinence. +weakness in the right leg, and numbness in right leg and a small area on the bottom of the left foot. PMH: Type 2 diabetes mellitus without complications; DVT after surgery, stopped his medication at end of December, R foot drop after surgery." [*Ex. Q. p. 164*]

Dr. Zaremba referred Claimant for EMG/NCV testing to evaluate for radicular cause vs. peroneal cause of the foot drop. [*Ex. Q, pp. 167-168*] He also referred Claimant for a MRI of the lumbar spine, and for an ultrasound of the right leg due to history of recent DVT to see if that was still present. The ultrasound was reported to be negative. [*Ex. P, p. 155*]

13. At hearing, Claimant testified that following his surgery in November 2017 with Dr. Syre, he lost power in his foot, and was numb from his right hip down into the right leg. He developed incontinence and had loss of strength/fatigue in his right quadriceps, which resulted in some falls at home.

14. Claimant had follow up appointments with Dr. Syre in Denver on December 27, 2017 and February 14, 2018. The February 14, 2018 report states:

> He presents today for evaluation of new urinary and bowel incontinence… To review, his preoperative axial low back pain and lower extremity radiculopathy (R>L) have resolved; his preoperative right dorsiflexion weakness remains stable and he uses an AFO for ambulation. Overall, he is pleased with his early outcome. Today he states that since January 1st of this year he has noticed urinary and bowl incontinence… He reports new weakness in his left foot and states he almost fell down the stairs last week because he couldn't get his right foot to 'move.' He has had a few instances of pain in his right foot and right posterior leg. His right foot numbness is stable… states he has an MRI scheduled for this afternoon…" [*Ex. O, p. 112*]

Claimant was referred for a urology work up.

15. A lumbar MRI report dated February 14, 2018 documents the following impressions:

1. Question of a transitional S1 vertebral body with lumbarization. Correlation with plain films of the lumbar spine would be helpful, which could change the disc space level assignments.

2. Moderate spondylosis of the L4-5 disc space with comparable broad-based posterior osteophyte formation, more to the left … There is evidence of moderate to severe segmental neural canal stenosis and minimal, if any, chronic cauda equina compression. Clinical correlation is advised. There is moderate left-sided neural foraminal stenois without evidence of nerve root impingement.

3. Moderate spondlylosis of the L3-4 disc space with a comparable broad-based posterior disc herniation slightly displaced cranially and caudally causing moderate neural canal stenosis without evidence of cauda equina compression.

4. Moderate spondylosis of the L5-S1 and S1-S2 disc spaces without evidence of nerve root impingement or cauda equine compression…"

[*NOTE: During his deposition, Dr. Reiss explained that different radiologists who read the November 3, 2017 lumbar MRI and the February 14, 2018 MRI labeled the spine levels differently.]

16. During a follow up appointment with Dr. Zaremba on February 22, 2018, Claimant was referred to Dr. Biggers for urinary incontinence. Dr. Zaremba commented: "It is unclear why he is having this now, Dr. Syre does not think it is from nerve compression. We are going to refer to a urologist for his opinion." [*Ex. Q. p. 172*]

17. Dr. Zaremba noted temporary work restrictions of maximum lifting of 5 pounds while sitting. In a follow up report dated March 26, 2018, Dr. Zaremba states: "Attending PT regularly. Not working. Taking no medications. He is still having right sided back pain and bilateral hip pain at night that is waking him up. He feels better through the day and his pain will drop to a 3/10… He is still having problems with incontinence. He has not seen urologist…We are going to refer to a gastroenterologist and urologist for opinion…" [*Ex. Q, p. 184*]

18. On April 16, 2018, Dr. Zaremba reported: "He states that he had a recent appointment with the urologist who states he had a bacterial infection, as well as possible nerve damage on his bladder. They will conduct a study today for that specific reason." [Ex. Q, *p. 203*]

19. On May 1, 2018, Dr. Zaremba reported: "…. He states that his back pain is unchanged … He states that the urinary symptom have been improving since seeing Urology. GI physicians are doing a bladder test and pending approval for a colonoscopy… Plan: Continue care with urologist. Referral for FCE [functional capacity evaluation] with Mike Moore. Referring for pool therapy." [*Ex. Q, p. 209*]

20. According to his May 1, 2018 report, Dr. Zaremba placed Claimant at MMI: "Patient is at MMI and he has impairment. Full report to follow by 5/15/18. He has permanent restrictions: No crouching, crawling, climbing, carrying, pushing and pulling. Occasional lifting from knuckle to shoulder level of 5 pounds… He requires **maintenance care** with pool therapy for 8 weeks, gastroenterology followup with colonoscopy x 6 months, urology follow up for 6 months with bladder testing. I also feel he would benefit from a gym membership for 12 months and up to 6 personal training sessions to help him learn fitness skills at his new level of functioning." [*Ex. Q, p. 211*] (emphasis added).

21. A Functional Capacity Evaluation was performed by Michael Moore at Excel Physical & Occupational Medicine on April 27, 2018. [*Ex. U*]

22. On May 10, 2018, Dr. Zaremba issued a report that included Claimant's permanent impairment. Dr. Zaremba summarized Claimant's treatment history to date and why he felt it was appropriate to have placed him at MMI on May 1, 2018. He assigned a 45% combined Whole Person rating. Permanent work restrictions and maintenance care recommendations were reiterated. [*Ex. Q, pp. 215-219*]

23. Respondents then filed a Notice & Proposal for Division IME ("DIME") on June 6, 2018, challenging the impairment rating assigned by Dr. Zaremba. [*Ex. B*]

24. Dr. J. Raschbacher performed an independent medical evaluation at the request of Respondents on June 8, 2018. [*Ex. W*] Dr. Rachbacher reported:

> 41 year old white male, single, with four children ages 20, 20, and then 2 year old twins… He lives alone in a house with his twins. He had twins with his ex-girlfriend, and he has custody of the children… He is not currently working and has not worked since the injury claim date. He states he is a 'full time father.' The twins' mother is around but they are not together anymore. He does all of his activities of daily living. *Id.*

25. Dr. Raschbacher reviewed video surveillance of Claimant." On 5/18/18 he is seen to exit the driver's seat of an SUV with his cane in one hand. He stands and moves next to the SUV and leans to into the back of it, into the second seat… At 12:13 he lift a child into the back seat of the truck, with some forward flexion at the lumbar spine. He appears to put the child in a car seat… On 6/01/18 he is seen to back a vehicle into the driveway and then exit .. At 9:38 at the rear door he bends forward and appears to put the child in a car seat… At 9:50 he gets out of the driver's seat and goes to the rear door and opens it on the driver's side and lifts the child out of the back seat to put the child on the ground… At 10:11 a.m. he has a grocery cart with two children in it. He bends forward and lifts one the children out and then turns to his left and puts the child in in the back seat of the truck and then appears to fasten that child into the sear. He then pushes the cart with the child around the vehicle to the other side, the passenger side, and appears to left that child from the cart and put her into the back at 10:12 … At 10:14 he gets into the driver's seat and drives off."

26. Dr. Raschbacher commented that Claimant's presentation at his office during the IME was not consistent with his level of function in the surveillance video. [*Ex. W, p. 361*] Claimant's level of physical activity and function in the surveillance was noted to be higher than Claimant portrayed during the IME.

27. At hearing, Claimant acknowledged that often exceeds his physical restrictions and he lifts his 3-year-old twins. The work restrictions imposed by Dr. Zaremba was 5 pounds occasional lifting. On cross exam, Claimant denied lifting his twins in and out of vehicles and car seats – although this was commented on by both Dr. Raschbacher and Dr. Zaremba.

28. Dr. Raschbacher opined that Claimant's findings included a large disc herniation at L3-4, with residual nerve root impairment at L5 and S1. He also felt that Claimant had some non-work related peripheral neuropathy findings, likely associated with diabetes. In his June 8, 2018 report, Dr. Raschbacher also commented on MMI status: "I do agree with an MMI date of 5/01/18, by Dr. Zaremba. It appears that his functional status essentially plateaued at that time. Of course, it remains to be seen what type of improvement he will have simply with the passage of time over the next 6 to 9 months, but in terms of his functional status for his injury claim MMI appears to have stabilized as of 05/01/18." [*Ex. W. p. 361*]

29. Dr. Raschbacher assigned a 25% Whole Person rating of the lumbar spine. Regarding permanent work restrictions, he noted: "Permanent work restrictions are appropriate. However, a limit of 5 pounds is not necessary or physiologic. Additionally, he can clearly lift over that per the video surveillance which showed him lifting toddlers from ground level up into car seats and then strapping then in. It would not be unreasonable to suggest a permanent restriction of lifting limited to occasional, and a limit of about 25 pounds… Presentation during the FCE, and subsequent lifting limits of 5 pounds are not physiologic or reasonable or necessary, and he is clearly able to exceed those." [*Ex. W, p. 362*]

30. Claimant continued to follow up with Dr. Zaremba post-MMI. During an appointment on May 24, 2018, Dr. Zaremba stated: "Acute embolism and thrombosis of unspecified deep veins of right lower extremity… *Sergio has an acute DVT of the right leg. He is still at MMI, but does need maintenance care with eliquis 5 mg tablets for 3-6 months, and follow up at Emergicare for 6 months. He also needs coagulation profile testing for clotting disorder. Prescribed Eliquis 5 MG tablet*…" [*Ex. Q, p. 226*] Dr. Zaremba was aware of the new DVT and treated it appropriately. He did not feel that this condition warranted rescinding MMI status at that time, and could be treated under maintenance.

31. In subsequent visits on June 7, 2018, July 18, 2018, August 1, 2018, and August 24, 2018, Dr. Zaremba specifically indicated that Claimant remained at MMI. [Ex. Q, pp. 229-231; 235-238; 240-242] Dr. Zaremba reiterated during these visits that the DVT was being addressed with Eliquis under maintenance. In the August 1st report,

Dr. Zaremba mentioned that Claimant was going on a trip to New Mexico.

32. Dr. Zaremba was provided with the same surveillance video that had been provided to Dr. Raschbacher. In response to a letter dated June 25, 2018 from the claims representative, Dr. Zaremba agreed that on the surveillance video Claimant was lifting more than his permanent restriction on 5 pounds. After considering the video, Dr. Zaremba did adjust Claimant's permanent restrictions as follows: "No crouching, crawling, climbing, occasional lifting 20-30 pounds. No carrying." [Ex. Q, p. 233]

33. Claimant was evaluated by Dr. Rook on August 19, 2018 for purposes of an IME. [*Ex. X*] Dr. Rook noted that Claimant developed problems post-operatively after the first surgery with Dr. Syre: "Postoperatively, the patient developed distal right lower extremity weakness, decreased sensation with altered proprioception, and a right foot drop." [*Ex. X, p. 373*] Dr. Rook disagreed with Dr. Sparr's interpretation from the EMG/NCV testing. [*Ex. X*, *p. 375*] He disagreed with Dr. Zaremba's decision to place Claimant at MMI in May 2018.

34. Dr. Rook discussed Claimant's DVT that arose around that time frame and the prescription for Eliquis medication, as well as Claimant's incontinence issues and ongoing low back and right leg (quadriceps) weakness. Dr. Rook assigned a provisional impairment rating of 47% Whole Person. [*Ex. Q, p. 386*]

35. Dr. Rook disagreed with both Dr. Zaremba and Dr. Shih regarding the May 1, 2018 MMI date. He even disagreed with Claimant's other expert (Dr. Castrejon), who didn't think it was unreasonable for Dr. Zaremba to have placed Claimant at MMI on May 1, 2018.

36. Dr. Rook felt that Claimant's lumbar spine was unstable and that further multilevel spinal fusion was warranted. Dr. Rook testified that Claimant had a "neurosurgical emergency" when he saw him in August 2018. Dr. Rook is the only physician who has suggested that Claimant had an emergent need for further lumbar surgery. Dr. Rook acknowledged that he had not indicated in this IME report that he thought there was an emergent need for surgery. While Dr. Syre's record indicated that the January 25, 2019 was an elective procedure, at hearing Dr. Rook responded: "I don't think it was quite an elective procedure."

37. Dr. Rook acknowledged that he had not reviewed a January 3, 2019 IME report from surgeon Dr. Brian Reiss. When asked whether he would at least be interested or want to be aware of Dr. Reiss's opinion, Dr. Rook stated: "I don't think it would have impacted my decision at all."

38. Dr. Rook testified at hearing that Claimant had a MRI on November 27, 2018 "which was much worse. It showed problems at multiple levels." Dr. Rook acknowledged at hearing that he had not reviewed any radiology films in this case. Rather, he relied upon the written reports.

39. On cross exam, Dr. Rook agreed that the lumbar fusion surgery on January 25, 2019 did not alleviate the need for the AFO or the use of a single point cane. He agreed that the surgery had not alleviated the need for ongoing treatment, including medications, for Claimant's incontinence issues. When asked about his suggestion that a fusion would further stabilize Claimant's spine and decrease falls, but that Claimant has actually experienced increased balance problems since the January 25, 2019 surgery, Dr. Rook testified: "So I don't know if I can render an opinion as to a significant improvement in his function, but I would maintain that it's only been three or four months since a major operation."

40. In his August 19, 2018 report, Dr. Rook commented: "It might be beneficial for this individual to undergo some sort of minimally invasive bariatric surgical procedure for weight loss *prior to* undergoing further spine surgery." [*Ex. X, p. 385*] In Dr. Rook's opinion, significant weight loss "would likely ensure a better outcome to any spine surgery that is performed in the future." Despite Claimant's medical history of obesity, Dr. Rook felt that such a weight loss procedure would not have been needed but for the work injury. [*Ex. X, p. 385*]

41. At hearing, Dr. Rook testified that gastric bypass surgery might decrease his pain levels and improve his function. [At hearing, Claimant testified that he did not even recall talking to Dr. Rook about weight loss]. Dr. Rook confirmed that he had listened to Dr. Castrejon's testimony at hearing, wherein he opined that a bariatric surgery this far removed from the January 2019 surgery date would be likely to be beneficial. Again, Dr. Rook disagreed with Dr. Castrejon.

42. Respondents applied for a Division IME to challenge the 45% impairment rating assigned by Dr. Zaremba. Dr. Shih was selected as the Division IME physician. He evaluated Claimant on August 22, 2018. [*Ex. Y, pp. 387-391*] This occurred a few days after the IME by Dr. Rook. In his report, Dr. Shih identified a lengthy list of records reviewed in conjunction with his evaluation of Claimant. Dr. Shih concurred that Claimant was at MMI as of May 1, 2018. Claimant's range of motion measurements, however, were deemed to be invalid by Dr. Shih. Therefore, Dr. Shih noted that Claimant would need to return for a follow up visit for repeat ROM measurements.

43. Claimant returned to Dr. Shih for the repeat range of motion testing on September 12, 2018. [*Ex. Y, pp. 393-396*] Dr. Shih noted pain behavior, submaximal effort, and inconsistent range of motion measurements. He Shih concluded: "Mr. Garcia is at MMI as of 05/01/18. He has 10% impairment per Table 53IIE for his L3-4 discectomy. I did not see full effort was given in range of motion so there was no impairment for range of motion. He has 17% impairment for the L5 and S1 neurologic deficit (see worksheet). His overall impairment is 25%." [*Ex. Y, p. 394*] Dr. Shih noted at the end of the September 12, 2018 report: "Mr. Garcia states he was seen by his surgeon and further surgery has been recommended. The available medical records do not support a need for further surgery but there **may** be information in the most recent evaluation that would change my opinion regarding that." (Emphasis added) [*Ex. Y, p.*

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44. Claimant returned to Dr. Syre's office on September 11, 2018. [*Ex. O, pp. 124-128*] It cannot be ascertained from this report if Claimant was seen by a Nicole Chasnow, PA-C, or Dr. Syre at that time. The report states:

> He returns today 7 months later. He reports seeing a urologist and being diagnosed with neurogenic bladder. He started taking Myrbetriq for OAB which appears to help. He report resolution of his urinary incontinence… He has intermittent low back pain and stable ongoing right posterior leg and foot numbness and right distal lower extremity weakness. He reports new right anterior thigh pain and right quad and hamstring weakness. He is doing water therapy which does help. He is not taking anything for pain because nothing helps. He has a new lumbar MRI to review. Of note, he is on Eloquis for DVT… His lumbar MRI demonstrates laminectomy defect noted with posterior fluid collection and clumping of nerve roots at the L3-4 level with large posterior vertebral body osteophyte causing canal compression at this level … L2-3 disc/osteophyte complex causing canal stenosis. We believe he likely has L3/4 instability causing increased osteophytic and worsening neural impingement at this level causing his symptoms. We would like to get a lumbar CT for surgical planning but feel he would likely benefit from a L3/4 decompression and a L2-4 interbody fusion. We did discuss that following surgery he would benefit from weight loss to help prevent further deterioration of his lumbar spine and this would best be achieved by bariatric surgery. He will follow up after his CT scan." [*Ex. O, p. 128*]

45. Dr. Zaremba subsequently rescinded Claimant's MMI status *effective* September 21, 2018. In his September 21, 2018 report, Dr. Zaremba noted: "He states his back has been doing worse since his last visit. He describes his pain as 4/10 currently. He saw Dr. Syre on 9/11 and they began talking about surgery for a fusion…Pt is not at MMI…" [*Ex. Q, pp. 250, 252*] At no point did Dr. Zaremba indicate that Claimant was incorrectly placed at MMI in the first instance on May 1, 2018. Rather, he rescinded MMI as of September 21, 2018 due to Claimant's increased complaints at that juncture.

46. Another 2½ months passed before Claimant returned to Dr. Syre's office. The report dated November 27, 2018 indicates that Claimant was having right leg weakness and constipation. [*Ex. O, p. 129*] It was noted that Claimant was using marijuana. Again, it is difficult to determine from the report if Claimant actually saw Dr. Syre that day or a PA-C, (Erin Erickson, PA-C). The report goes on to state:

> Lumbar CT demonstrates large posterior osteophytes at L2-3 and L3-4. Disc collapse and desiccation from L2-S1. Near autofusion at L4-5 and L5-S1 … we recommend a L2-4 decompression and fusion for definitive treatment but recommend follow-up with his PCP regarding his constipation prior to moving

forward with surgery." *Id* at 133.

Dr. Syre's office was not sending these records to Respondents. The fax date at the top of this report indicates that it was faxed on April 18, 2019 [almost 5 months after the appointment]. As reflected by the exchange date at the top of the report, Respondents' counsel then forwarded the report to Claimant's counsel.

47. Claimant was evaluated by Dr. Brian Reiss (spine surgeon) on January 3, 2019 at the request of Respondents. [*Ex. BB*] Dr. Reiss performed a records review and also viewed radiology films. Dr. Reiss opined that. as of January 3, 2019:

> From my review of the imaging studies, I do not see any true instability. I do not see significant enough continued right-sided nerve compression to account for any ongoing right lower extremity symptomatology. The right lower extremity symptomatology is probably secondary to nerve damage. I do not believe his symptomatology would be improved with either a decompression and/or fusion." [*Ex. BB, p. 419*]

48. Dr. Reiss opined that Claimant was not at MMI at the time of his evaluation. [Consistent with Dr. Zaremba having rescinded MMI status effective September 21, 2018.] He agreed that Claimant's bladder and bowel symptoms were related to the work injury. Dr. Reiss suggested treatment of Claimant's symptomatology with some neuro active medication, such as gabapentin. He also recommended that Claimant resume physical therapy core strengthening, aerobic conditioning, stretching and gait assistance along with continued right lower extremity bracing.

49. Dr. Zaremba subsequently prescribed gabapentin for Claimant, per Dr. Reiss's recommendation. The function of this medication was to help treat neuropathic pain.

50. Dr. Reiss's testimony was taken by post-hearing deposition on July 30, 2019. Dr. Reiss is level II accredited and is board certified in orthopedics. He has been practicing in the Denver area since 1988, limiting his practice to disorders of the spine. Dr. Reiss confirmed that as a spine surgeon, he reviews radiology films of the spine. He has performed numerous lumbar spine surgeries, including lumbar fusions. Dr. Reiss was offered as an expert in orthopedic spine surgery, with no objection. Dr. Reiss confirmed that since the time of his IME, he was provided with supplemental or updated records – including (but not limited to) the IME reports of Dr. Rook and Dr. Castrejon. He was also provided with and reviewed the transcript from the parties' June 11, 2019 hearing, which included the testimony of Claimant, Dr. Rook, and Dr. Castrejon.

51. Dr. Reiss testified about the symptoms that Claimant was reporting at the time of his evaluation. He indicated that Claimant was doing no core strengthening, stretching, or aerobic conditioning at that time. Claimant was not taking any medication.

He noted that Claimant was using an AFO on his right ankle, which he explained is a device to substitute for the lack of motor control of the ankle. He was also using a single point cane. Dr. Reiss testified regarding his review of the initial November 3, 2017 lumbar MRI, which showed multiple levels of degenerative change.

52. Dr. Reiss explained that there was a dural tear during the November 7, 2017 surgery by Dr. Syre, causing a CSF leak. This led to a worsening of Claimant's neurologic symptomatology. He explained: "So basically all of the neurologic damage occurred at the time of surgery and was not progressive but was over and done with at the time of surgery." He explained that this neurologic damage included Claimant's increased weakness in his right foot – both in plantar flexion and dorsiflexion, along with decreased sensation. Dr. Reiss further noted: "The spinal stenosis was dealt with appropriately, and according to the imaging studies after surgery, there was adequate decompression of the stenosis and no indication for any further surgery because the stenosis was dealt with."

53. During his deposition, Dr. Reiss discussed the MRI films of February 14, 2018:

> *And basically, that MRI was done with and without contrast, which is important because they have had surgery and you want to know the difference between scar tissue and current and continued nerve compression from something that isn't a scar. And clearly at that level, especially on the right-hand side, there is no continued, no significant nerve compression that would be amenable to any further surgery. There was some darkness on the left side which probably represented the continued spur formation, but he was not having left-side symptoms so that is not important. Not clinically relevant whatsoever.* ***What is important is, the spinal canal formation was sufficiently decompressed and there was no continued right-sided compression of anything and, therefore, there is no indication for further surgery because surgery would be designed to decompress the right-sided nerve roots; but if there is nothing pressing on them, there is no reason to decompress something that isn't there***." [Depo. Tr., pp. 14-15] (emphasis added).

54. Dr. Reiss also testified regarding the lumbar MRI film and report from August 16, 2018. When asked to compare the findings from that MRI to the February 14, 2018 study, he explained:

> The most important thing to note when comparing these two is that there are no post-contrast images. In other words, they did not administer contrast and, therefore, we are unable to compare those images. The pre-contrast images are exactly the same in my opinion. There is no change. If they had administered contrast, it would have probably shown the exact same thing as it did in February, which was that there was an

> adequate decompression and nothing further needed to be decompressed." [*Depo. Tr., p. 15*]

Dr. Reiss discussed the comments by the physician's assistant at Dr. Syre's office, who felt that the August 16, 2018 MRI showed Claimant had L4-4 instability causing increased osteophyte formation. That individual suggested that an L4 through L4 fusion and L3-4 decompression was probable. Dr. Reiss explained that an osteophyte is essentially a bone spur. The presence of osteophytes does not necessary imply instability. Per Dr. Reiss, in most cases osteophytes is just a degenerative process. Dr. Reiss noted: "And in this particular case, it was present prior to his surgery…" *[Depo. Tr., p. 17*] Dr. Reiss testified:

> There is no indication there was any instability to L3-4. There is also no indication there is any increase in osteophyte formation. That is something that would occur over years, not over a period of months, and there is no indication on the imaging studies that were performed that there was any change in the osteophytes that were present. It is pure speculation by a physician assistant. [*Depo. Tr., p. 17*]

55. Dr. Reiss testified about the results of the CT scan of Claimant's lumbar spine from September 20, 2018. He explained why the spur formation would not require additional surgical intervention: "They had already seen that at the time of surgery (referring to the first surgery in November 2017) and they dealt with a decompression on both sides. So even though the spur is present anteriorly, they decompressed him posteriorly on both sides. [*Depo. Tr., pp. 17-18*]

56. Dr. Reiss noted that there were no flexion-extension x-rays done prior to Dr. Syre proceeding with the multilevel fusion on January 25, 2019. Dr. Reiss stated: "… the imaging studies did not include flexion-extension X rays. There is a very small probability that it may have shown something different, and if they wanted to look for true instability, then they would have needed to have done those and not just gone ahead with surgical intervention based upon speculation." [*Depo. Tr., p. 19*]

57. During his deposition, Dr. Reiss elaborated as to the basis for his opinion that further surgery would be unlikely to improve Claimant's right lower extremity symptoms or his bowel and bladder symptoms:

> In order for a decompression surgery to be helpful, there needs to be something there to decompress. They had already decompressed that area, and from my evaluation of the imaging studies, there is no longer any significant compression of any of those nerve roots that would warrant further attempt at decompression. So you cannot improve a neurologic problem for a surgery's sake if there is nothing there to decompress. **Surgery is very unlikely to be helpful.** I don't see an indication there at all… With regard to a fusion, a fusion does not help neurological symptomatology. A fusion is useful for back pain in the

> presence of true instability. Not present. A multilevel fusion for back pain is not indicated per the Colorado Workers' Compensation Guidelines, not recommending more than two levels at most, if any. So, in this particular case, there is no indication that any of those levels were particularly his pain generator. So according to the Colorado Guidelines, you really need to identify clearly the pain generator, which was not done … Conservative care has not been accomplished as far as self-mitigation in this particular case as he is not exercising, which is the most appropriate treatment for back pain, not surgical intervention. In my opinion there is no indication either in my opinion with regard to treating such a patient or per the Guidelines for doing a multilevel fusion for back pain. **It is not indicated for his neurologic symptomatology because a fusion will not change neurologic symptomatology."** [*7/30/19 Depo. Tr., pp. 21-22*] (emphasis added).

58. After reviewing the transcript from the June 11, 2019 hearing, including Claimant's testimony, Dr. Reis does not believe that Clamant has had any significant improvement as a result of the elective lumbar surgery on January 25, 2019: "I don't believe so. I mean, the one thing that has changed, perhaps, is more numbness in the quadriceps, which simply would mask any burning or tingling because now that it is worse, it is numb. So that is certainly not an improvement. His urologic symptomatology was already improving prior to the surgery due to the medical management, so that [improvement] is not the result of the surgery. And I think his neurologic deficit was due to the original surgery and is not going to get any better with any further surgery but may get slightly better over time if he is lucky but not secondary to any further surgery." [*7/30/19 Depo. Tr., pp. 28-29*] Dr. Reiss noted that if Claimant's neuropathic pain is improved, it is likely due to the gabapentin medication – not due to surgery.

59. When asked whether he agreed with Dr. Rook's testimony that Claimant's condition constituted a neurosurgical emergency in terms of the January 25, 2019 surgery, Dr. Reiss responded: "No, I would say he is quite wrong." [*Depo. Tr., p. 25*] Dr. Reiss also disagreed with Dr. Rook's opinion that the surgery on January 25, 2019 was needed to stabilize Claimant's spine. [*Depo. Tr., p. 25*]

60. Dr. Reiss opined that a DVT is something that can be addressed under maintenance care. [*Depo. Tr., p. 27*]

61. Dr. Reiss testified that he disagrees that Claimant should receive a gastric bypass procedure as part of a rehabilitation plan for his work injury. Dr. Reiss opined that a gastric bypass procedure is not medically necessary or indicated in relationship to the work injury. [*Depo. Tr., p. 33*]

62. On January 8, 2019, Dr. Syre's office issued a letter addressed to Claimant: "You have been scheduled for the following procedure: L2-4 redo laminectomies and intradural exploration with L2-3, L3-4 posterior fusion with screws

and rods… Date of surgery: 01/25/2019… Your surgery will be CANCELLED AND RESCHEDULED for the following conditions: - We do not receive medical clearance 2 weeks prior to surgery; - Your insurance plan does not authorize your surgery." [*Ex. O, p. 134*] Pinnacol Assurance was not copied on that letter. It was simply sent to Claimant. An undated document captioned "Swedish Pre-Admit Clinic" addressed to Claimant states: "Dear Sergio A Garcia, You have been scheduled for ***elective surgery*** at Swedish Medical Center…" (Emphasis added) [*Ex. O, p. 136*] Again, Pinnacol Assurance was not copied on or otherwise provided with that information. (emphasis added).

63. At hearing, Claimant was asked if he was given the impression that the lumbar fusion on January 25, 2019 was an emergency procedure. Claimant responded: "No, it wasn't. It was a scheduled operation**.**"

64. Claimant confirmed during his testimony that the January 25, 2019 surgery had been authorized and paid for by Medicaid. Claimant has not received any medical bills.

65. Claimant testified about his personal fear that he might end up in a wheel chair without a fusion. Claimant testified that he decided to undergo further surgery with Dr. Syre on January 25, 2019 because he (Claimant) was optimistic that a second surgery "was going to help everything that has gone wrong up to this point."

66. Ryan Saladin is a Senior Claims Representative at Pinnacol Assurance. Mr. Saladin has been assigned to Claimant's claim since the outset, when the Employer filed the First Report of Injury on October 30, 2017. He was deposed on July 11, 2019. Mr. Saladin confirmed during his deposition that a request for authorization was never received by Pinnacol for the January 25, 2019 surgery by Dr. Syre. [*7/11/19 Depo. Tr, p. 5*] Dr. Syre's office did not send Pinnacol a copy of the operative note. Respondents did not even learn that the January 25, 2019 surgery had taken place under after the fact. [*Depo. Tr., p. 6*]

67. Mr. Saladin confirmed that Pinnacol has never received any medical bills for the January 25, 2019 surgery. Pinnacol has never received a lien from Medicaid requesting reimbursement. [*Depo. Tr., p. 6*]

68. Mr. Saladin further testified that Pinnacol has never received a request for authorization of a gastric bypass procedure from any treating physician in this case. [*7/11/19 Depo. Tr., p. 7*]

69. Mr. Saladin explained that Pinnacol filed a Final Admission of Liability per the DIME opinion of Dr. Shih. [Depo. Tr., p. 5]. A new General Admission was later filed on June 24, 2019, rescinding MMI status effective September 21, 2018 per the opinion of Dr. Zaremba (ATP). [*Depo. Tr., pp. 7-8*]

70. Claimant testified that he underwent a fusion of L2-L5 on January 25,

2019. After that surgery, he still has incontinence (but less severe). His right quad is numb with loss of power, and hi back is numb and tend to "spaz out every once in a while." He has developed increased balance problems since the second surgery on January 25, 2019. He has had further falls.

71. After surgery #2, Claimant testified he still has his right foot drop and continue to wear the AFO (ankle/foot arthrosis) for that problem. He continues to use a single point cane. Claimant has also complained of symptoms in his *upper* extremities. He continues to have problems with sleep.

72. Dr. Miguel Castrejon performed an IME at the request of Claimant's counsel on April 15, 2019, approximately 3 months after Claimant had already undergone the elective lumbar surgery with Dr. Syre under Medicaid. [*Ex. EE*] Like Dr. Rook, Dr. Castrejon is a Physical Medicine and Rehabilitation physician. According to his report, Dr. Castrejon asked Claimant about his condition since the January 25, 2019 surgery with Dr. Syre: "The claimant states that he has experienced improvement following surgery in some area and new symptoms in others…" [*Ex. EE*, *p. 439*]

73. Dr. Castrejon later reiterates in his report: "**The claimant's condition did not significantly improve following surgery**." [*Eh. EE, p. 455*] (emphasis added). At hearing, Dr. Castrejon agreed that after the January 25, 2019 surgery, Claimant still has the right foot drop. He still has increased numbness in the right quadriceps. He still has bowel and bladder issues. He has increased problems/difficulty with balance. He is still using an AFO brace. He is still using a straight cane. Dr. Castrejon testified that a new symptom since the January 25, 2019 surgery is "about balance problem and balance issues, knowing where his legs are because of abnormal sensory of the lower extremities."

74. Dr. Castrejon was aware from the history provided to him by Claimant that Dr. Syre had performed the January 25, 2019 lumbar surgery under Medicaid. Dr. Castrejon confirmed that he did not know the cause of any delay that may have occurred between the time that Dr. Syre mentioned a lumbar fusion in September 2018 and when the surgery was ultimately performed on January 25, 2019. As far as he knows, the delay could have been on the part of Dr. Syre's office.

75. Dr. Castrejon testified that it was his opinion that the need for the second surgery was a direct result of the industrial event. He acknowledged that he had not reviewed any radiology films in this case. In Dr. Castrejon's discussion of his review of the medical records, the report from Dr. Brian Reiss is not mentioned. Dr. Castrejon suggested that he had reviewed reports from Drs. Zaremba, Raschbacher, Reiss, and Rook. He then clarified on cross examination that he was unaware that Dr. Reiss had evaluated Claimant. When asked on cross exam if he would have liked to have had the benefit of reviewing another spine surgeon's (Dr. Reiss's) opinion, Dr. Castrejon responded: "*Yes, I would*." On redirect, Dr. Castrejon testified: "*Well, I'm not a spine surgeon, I am a physiatrist… The opinion of a board-certified spine surgeon certainly is one that would probably prevail*."

76. Dr. Castrejon was asked if he was somehow suggesting that the January 25, 2019 surgery was an emergency procedure. He agreed that, in his experience, if a spine surgeon is recommending emergency surgery, it would be typically be done on the same day or very near the time that it was recommended.

77. Dr. Castrejon suggested that Dr. Raschbacher did not support the second spinal fusion due in large part to his review of surveillance video. [In fact, Dr. Raschbacher did not speak to surgical questions in his report]. [*Ex. W*] Later on cross examination, Dr. Castrejon testified: "And it was not my – recollection that he was actually specifically questioned with regard to the need for (inaudible) lumbar fusion.

78. In his written IME report, Dr. Castrejon opined that Claimant was not yet at MMI. At hearing, however, Dr. Castrejon indicated that he would did not think that Dr. Zaremba placing Claimant at MMI on May 1, 2018 was unreasonable. Dr. Castrejon does not think it was unreasonable that MMI status remained intact until September 21, 2018, when Dr. Zaremba rescinded MMI as of that point. He testified: "***In reviewing my medical file, if I think of the position that Dr. Zaremba was in at the time that he felt the patient was at MMI, it probably would have been medically reasonably to have done so. And I state that with the caveat that that is often times a personal and professional decision that's made – maybe the training of the individua***l."

79. Dr. Castrejon confirmed on cross-examination that he thought it was medically reasonable for Dr. Zaremba to have placed Claimant at maximum medical improvement on May 1, 2018. He went on to say: "*And, subsequent, it was also reasonable to take to take him off MMI as his neurological status progressed and worsened*." Dr. Castrejon agreed that Dr. Zaremba documented in reports from May 1, 2018 thru September 21, 2018 that Claimant remained at MMI during that interim.

80. Dr. Castrejon was asked if he agreed that Dr. Shih's DIME opinion that Claimant was at MMI as of May 1, 2018, and was consistent with the reports of Dr. Zaremba. Dr. Castrejon responded: "*I do think that it's – was – in hindsight as we have here – that it was probably reasonable*."

81. In his report, Dr. Castrejon described Claimant as moderately obese. [*Ex. EE*, *p. 439*] In his IME report, Dr. Castrejon did not render an opinion on the question of a gastric bypass procedure. When asked about bariatric weight loss treatment for Claimant, he testified: "*There was mention of possibly undergoing a bariatric consultation, but I – I do not know or have knowledge if that was ever carried out. But the – I do not feel that that made a positive or negative effect on his (inaudible) outcome*."

82. When asked at hearing whether he felt that a gastric bypass procedure was reasonable this far removed from the January 25, 2019 lumbar surgery, Dr. Castrejon indicated that he did *not* think a gastric surgery at this point was likely to

result in any significant benefit to Claimant. He testified: "*This far, I do not think it – there would be any significant benefit with the bariatric procedure, only because he's post-surgery. I don't think it would make a substantial change*."

83. The issue of offsets was endorsed for hearing. Claimant testified that he applied for SSDI in June or July of 2019, and that he had a hearing in that case about a week prior to the June 11, 2019 worker's compensation hearing. Claimant was told that he could expect a decision within two months. There is currently no information regarding the outcome of the SSDI proceeding.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the Respondents. Section 8-43-201, C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Assessing weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the ALJ. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned

expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002). The ALJ finds Claimant to be credible.

Overcoming the DIME Opinion on MMI, Generally

D. A DIME physician's findings of MMI, causation, and impairment, are binding on all parties unless overcome by "clear and convincing evidence." §8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome the DIME physician's opinion, "there must be evidence establishing that the DIME physician's opinion is incorrect and this evidence establishing must be unmistakable and free from serious doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.,* W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004); *see Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (ICAP, Nov. 17, 2000).

E. "Maximum Medical Improvement" (MMI) is defined as the point when any medically determinable physical or mental impairment as a result of the industrial injury has become stable and when no further treatment is reasonably expected to improve the condition. §8-40-2-1(11.5). A finding of MMI is premature if a course of treatment has "a reasonable prospect of success" and the claimant is willing to submit to the treatment. *Reynolds v. Industrial Claim Appeals Office*, 794 P.2d 1080, 1081-1082 (Colo. App. 1990). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable opinion. *Qual-Med v. Indus. Claim Apps. Office*, 961 P.2d 950 (Colo. App 1998).

Has Claimant overcome the DIME on the issue of MMI?

F. Dr. Castrejon, who also testified as an expert for Claimant, voiced an opinion that was inconsistent with Dr. Rook on the question of MMI. Dr. Castrejon testified that in hindsight, *he did not think that it was unreasonable* for the ATP (Dr. Zaremba) to have placed Claimant at MMI on May 1, 2018. Dr. Shih then concurred with that MMI date. Dr. Castrejon felt it was within the ATP's discretion to then rescind MMI status at the later effective date of September 21, 2018, after the DIME occurred.

G Dr. Rachbacher evaluated Claimant on June 8, 2018. His opinion is consistent with, and further supports, the opinions of the DIME (Dr. Shih) and Dr. Zaremba that Claimant was appropriately placed at MMI as of May 1, 2018.

H. Respondent Insurer timely filed a Final Admission of Liability per the Division IME opinion of Dr. Shih. Respondent Insurer later filed a new General Admission of Liability rescinding MMI status effective September 21, 2018 per the opinion of the ATP, Dr. Zaremba. This GAL was consistent with the medical evidence

at that point in the process. *This does not mean, however, that Claimant was never at MMI in the first instance on May 1, 2018.* The records from Dr. Zaremba between May 1, 2018 and September 21, 2018 clearly state that Claimant remained at MMI until the September 21, 2018 date of service.

I. While Dr. Rook may disagree with the DIME opinion that Claimant was at MMI as of May 10, 2018, it is ultimately a difference of medical opinion, which does not rise to the standard of clear and convincing evidence, and the ALJ so finds. The DIME has not been overcome by clear and convincing evidence of the MMI date of May 1, 2018. Respondents then timely filed a GAL, rescinding MMI effective September 21, 2018, based upon new evidence from the ATP.

Medical Benefits, Spinal Fusion

Did Claimant have a "Neurosurgical Emergency"?

J. Dr. Rook testified that Claimant had a "neurosurgical emergency" and was in need of further spine surgery at the time of the DIME. That is not supported by the medical evidence:

- The correspondence from Dr. Syre's office to Claimant document that the January 25, 2019 surgery an "***elective***" procedure.

- During Dr. Reiss's deposition testimony, he explained why that the multilevel fusion performed on January 25th was not reasonable and necessary. Dr. Rook had not reviewed Dr. Reiss' report, yet took the position that Dr. Reiss' opinion would not change his position.

- Both Dr. Shih (DIME physician) and Dr. Zaremba (ATP) were aware of the medical issues that Dr. Rook emphasized at hearing. Dr. Shih and Dr. Zaremba both felt that Claimant was at MMI, and additional treatment could be addressed under maintenance care.

Reasonable and Necessary

K. Claimant underwent this elective surgery with Dr. Syre on January 25, 2019 for a fusion of L2 through L5. This surgery was authorized and paid for by Medicaid. A request for authorization was never submitted to Pinnacol Assurance, pursuant to Rule 16. Pinnacol has never received any bills associated with the January 25, 2019 surgery, nor have they received a lien or any other indication that Medicaid is now requesting reimbursement. There are no outstanding bills that are ripe and in dispute. Rather, Claimant is attempting to have Pinnacol held retroactively liable for the January 25, 2019 surgery with Dr. Syre that was already covered by Medicaid – despite the fact that Medicaid is not requesting reimbursement.

L. Aside from the January 25, 2019 elective surgery being authorized by Medicaid, was this procedure was reasonably necessary? To the extent that differing

opinions have been voiced by physicians in this case, this ALJ finds the testimony of Dr. Reiss to be the most persuasive. Dr. Reiss is an orthopedic spine surgeon and had the benefit of reviewing the comprehensive medical records, viewing radiology films, and also read the transcript from the testimony offered by Claimant, Dr. Rook, and Dr. Castrejon at the June 11, 2019 hearing. Dr. Reiss has credibly opined that the January 25, 2019 was not reasonably necessary, for the reasons set forth in his deposition testimony, and the ALJ so finds. There was insufficient medical evidence in the record of spinal instability at all. Secondly, the lumbar fusion would not address Claimant's neuropathic symptoms, as there was no evidence of any nerve compression or a pain generator that this fusion could address.

Medical Benefits, Gastric Bypass Surgery

M. Claimant is seeking to have a gastric bypass procedure authorized as part of his Worker's Compensation claim. No provider has submitted a request for authorization to Pinnacol, pursuant to Rule 16. Nonetheless, both Dr. Reiss and even Claimant's retained expert, Dr. Castrejon, do **not** support Claimant's request for the gastric bypass surgery. Dr. Reiss has indicated that the need for such surgery is not reasonably necessary or related to the work injury. Dr. Castrejon has opined that it is unlikely that Claimant would have any significant benefit from undergoing a gastric bypass procedure this far removed in time from his January 25, 2019 surgery.

ORDER

It is therefore Ordered that:

1. Claimant has not overcome the DIME opinion of Dr. Shih that Claimant reached MMI on May 1, 2018

2. After the Division IME, Claimant's MMI status was subsequently rescinded effective September 21, 2018 by the authorized treating physician (Dr. Zaremba). Respondents properly filed a new General Admission of Liability reinstating temporary disability benefits as of September 21, 2018.

3. Claimant's request that Pinnacol Assurance now be found retroactively liable for the January 25, 2019 surgery and responsible for repayment to Medicaid is denied and dismissed.

4. Claimant's Request for authorization of the gastric bypass procedure is denied and dismissed.

5. There is currently no information that Claimant has been awarded social security benefits. Therefore, Respondents are not presently entitled to a statutory offset. However, Claimant has an ongoing duty to update Respondents on the status of his social security claim since the outcome could result in the Respondents' entitlement to a statutory offset.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 16, 2019

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

1. Whether Respondent is in default of § 8-43-409(1), C.R.S. by failing to insure or keep workers' compensation insurance while having employees from August 28, 2014 through July 25, 2018.

PROCEDURAL HISTORY

Petition filed an Application for Hearing in this matter on July 25, 2018. The issue endorsed was "whether Employer/Respondent's workers are employees or independent contractors." The matter was set for hearing but continued by the parties a few times. On December 21, 2018, Petitioner filed a Motion for Partial Summary Judgment and the motion was denied on January 15, 2019. On January 24, 2019, the parties appeared at a scheduled hearing before ALJ Margot Jones and asked for another continuance that was granted. No evidence or testimony was received on January 24, 2019. The matter was reset for March 29, 2019 and was heard by ALJ Michelle Jones.

At the outset of the March 29, 2019 hearing, ALJ Michelle Jones mistakenly believed default per § 8-43-409(1), C.R.S. was the issue for hearing. Petitioner, however, indicated the only issue they applied for a hearing determination on was the question of whether Respondent's workers were employees or independent contractors. Respondent argued that the determination sought had no effect and argued issues endorsed on its Response to Application for Hearing of ripeness and mootness. Respondent sought to have the issue of insurance coverage added to the case to avoid an order addressing only the question of employee versus independent contractor ruling and argued such an order would have no effect.

ALJ Michelle Jones initially denied the request to add the issue of insurance coverage to the case the day of hearing. The March 29, 2019 hearing went forward and was limited to testimony and evidence surrounding the workers and appropriate classification of Respondent's workers. After the March 29, 2019 hearing, ALJ Michelle Jones issued an order dated May 14, 2019 adding the issue of insurance coverage and allowed the parties to set a new hearing to address the insurance coverage issue. The order agreed with Respondent that without adding the issue of insurance coverage, a ruling on employee versus independent contractor status would be merely an advisory opinion with no effect. The order noted that jurisdiction under the WC Act is conferred and allows Petitioner to set the issue of an employer's default for hearing, but that default requires a two-part analysis including both employee status and lack of insurance coverage. The parties chose to schedule an additional hearing regarding the insurance coverage issue, which was held on August 5, 2019.

FINDINGS OF FACT

1. Respondent is a construction company in Colorado that performs primarily roofing and gutter work. Petitioner had investigated Respondent previously and Petitioner believed that Respondent's company had been dissolved.

2. At some point in 2017, Petitioner received a tip and information that Respondent was an active company and that Respondent may be in default of its workers' compensation insurance obligations. The tip came from Pinnacol Assurance.

3. Susan Stenman, an investigator for Petitioner, testified that she was surprised to receive the tip and to be assigned a second case involving Respondent as she believed Respondent's company had been dissolved.

4. Ms. Stenman began an investigation. She first attempted to see if Respondent was actually in business and performed internet searches. She found an active website for Respondent, an updated commercial advertisement, and newer/recent reviews on websites Yelp and Better Business Bureau. She also searched the National Council on Compensation Insurance website to see if Respondent had a current or active insurance policy and found a policy from February 28, 2013 that was cancelled April 19, 2013. *See* Exhibits 1, 2, 3, 4.

5. Ms. Stenman then decided to perform a site visit to see if Respondent was actually in business. On August 23, 2017, Ms. Stenman went to a storefront location along with another investigator from the Division.

6. When they walked in the storefront location for Respondent, the investigators were greeted by Suzanne J_____ who was at a desk near the entrance to the storefront. Ms. J_____ asked if she could help them. The investigators pretended to be interested in roofing repair work. The investigators observed a white board with lists of jobs and other information. They also observed Janet S_____ in an office in the back of the storefront location, and observed the owner Guy T_____ "Sonny" at the location. The investigators obtained business cards for S_____ Constructors and Roofing, LLC listing Janet S_____ as the Office Manager and Suzanne J_____ as the Assistant Office Manager. *See* Exhibit 5.

7. After the August 23, 2017 site visit, Petitioner issued a "Director's Notice to Show Compliance" on August 28, 2017. The Notice required Respondent to respond within twenty days and indicated the Division's belief that Respondent was likely required to but did not have workers' compensation insurance. A compliance questionnaire was attached to the Notice. Respondent was advised to complete and return the questionnaire and attach all workers' compensation certificates of insurance for three years prior to the date of the Notice. The Notice indicated that after the expiration of the twenty days to respond with the compliance questionnaire, the Director would make a finding regarding whether Respondent was required to have workers' compensation insurance, whether coverage had been maintained, and if not, would impose fines and/or

other sanctions. Ms. Stenman testified that she issued the notice and was looking for proof of workers' compensation insurance from August of 2014 through August of 2017 as it appeared to her that Respondent was in business, had employees, and lacked insurance coverage based on her investigation. *See* Exhibit 6.

8. On September 13, 2017, Respondent returned the compliance questionnaire. Respondent indicated in its answers that it had two employees, 5 or 7 contractors, and that its contract employees were independent contractors. Respondent did not attach any workers' compensation policies for the prior three years and indicated on its response that it was "exempt." Respondent attached a spreadsheet to the compliance questionnaire that contained seven entries with names and phone numbers of independent contractors. *See* Exhibit 7.

9. After receipt of Respondent's compliance questionnaire, Ms. Stenman spoke with Respondent's owner Mr. T_____ by telephone regarding the office workers listed on Respondent's compliance questionnaire. They discussed the distinction of employees versus independent contractors. Mr. T_____ indicated to Ms. Stenman that the office workers were covered by workers' compensation through their own policies for which he was reimbursing them. Mr. T_____ indicated his belief that he was in compliance as he was providing workers' compensation insurance for his two office workers through reimbursement.

10. On July 25, 2018, the Director and the Division of Workers' Compensation filed an Application for Hearing. The Application indicated that they had attempted to resolve the issues with Respondent and endorsed as an issue for hearing whether Respondent's workers were employees or independent contractors.

11. A hearing was initially scheduled for January 24, 2019 before ALJ Margot Jones. The matter was continued before any evidence or testimony was received. The matter was rescheduled and heard on March 29, 2019 before ALJ Michelle Jones.

12. At the outset of the March 29, 2019 hearing, from a brief review of the pleadings, the ALJ mistakenly believed default per § 8-43-409(1), C.R.S. was the issue for hearing. However, Petitioner indicated that the only issue they applied for hearing on and were ready to proceed on was a determination of whether Respondent's workers were employees or independent contractors.

13. Respondent noted that they had, in their response to the application for hearing, endorsed ripeness and mootness as they believed there was workers' compensation coverage for the workers. Respondent also argued that the determination sought by Petitioner was a law school type analysis with no real effect. Respondent sought to add the issue of insurance coverage to the issue of employee versus independent contractor status. Petitioner objected to adding the issue of insurance coverage on the day of hearing.

14. The ALJ sustained the objection and limited the issues at the hearing to a determination of whether Respondent's workers were employees or independent contractors. A full day hearing took place.

15. After hearing, by order, the ALJ reversed her decision and added the issue of insurance coverage to the case. The ALJ agreed with Respondent that without adding the issue of insurance coverage, the ALJ would merely be issuing an advisory opinion with no real effect. Under the WC Act, Respondent can have employees and can have independent contractors. The actual controversy includes the issue of both the classification of workers and whether coverage existed for the workers during the applicable time period.

16. The ALJ allowed the parties to set a new hearing on the issue of insurance coverage. The new hearing was held on August 5, 2019 and some additional evidence and testimony was received. The testimony and evidence was limited to the period of time dating three years prior to the Director's Notice to Show Compliance (August 28, 2014) through the date of the Application for Hearing (July 25, 2018).

17. The hearings covered the issue of default, a two part analysis, including both the question of whether Respondent has employees (heard at the 03/29/19 hearing) and the question of whether Respondent lacked the required insurance coverage (heard at the August 5, 2019 hearing).

18. Janet R_____ (maiden name Janet S_____) testified at hearing. Ms. R_____ worked for Respondent from 2012 through 2018, initially as an office worker, and then as an office manager. She answered phones, dealt with customer complaints, ordered permits for jobs, helped schedule jobs, and performed other duties as asked by the owner/manager Mr. T_____ or as asked by the project managers. When she was hired, one of the project managers, Ron G_____ signed her contract/agreement to work for Respondent. Ms. R_____ signed an independent contractor agreement and thought initially that she was hired as a contractor. Ms. R_____ worked generally from 8 a.m. to 5 p.m., although she switched her schedule at one point to come in and leave slightly earlier. Ms. R_____ had her own office at Respondent's storefront location and knew she was expected to work normal business hours. Ms. R_____ was provided with a desk, computer, and supplies needed to perform her job. Ms. R_____ regularly updated a whiteboard that listed all of Respondent's jobs.

19. Ms. R_____ initially was hired as an office worker but became the manager shortly after she began working for Respondent. When she became the office manager, Ms. R_____ talked with an accountant used by Respondent so that she could learn more about QuickBooks as she needed to know how to use their system. Ms. R_____ testified that there were staff meetings she was expected to attend approximately 2 times per month that included the office workers, Mr. T_____, and the project managers. She testified that the meetings were mandatory. Ms. R_____ testified that her employment was at will and she believed she could quit or be terminated at any time. Ms. R_____ performed the payroll for Respondent and paid the bills

including rent, phone, utilities. Ms. R_____ had business cards with Respondent's company name listed on the top, and her name listed as the office manager on the bottom.

20. Ms. R_____ testified that she created her own business entity, home sweet office before she was hired by Respondent. Ms. R_____ testified that the consulting work/at home customer service didn't work out and that she ended up taking the job working for Respondent instead. However, she testified that she considered her work for Respondent initially to be work as an independent contractor. Before 2015, Respondent paid Ms. R_____ by check made out to her business, home sweet office and home sweet office was provided 1099 tax documents. After 2015, Ms. R_____ testified that she was paid to her individual name and given a W-2. Ms. R_____ testified that her duties did not change in 2015 and that it was the same work and same pay by the hour as it was prior to 2015.

21. Ms. R_____ testified that she had a workers' compensation policy for herself that she obtained through Pinnacol Assurance. She testified that she kept the policy current from April 2013 through her resignation from employment with Respondent, paid the premiums monthly, and was reimbursed by Mr. T_____ for the premium costs of her policy. She testified that she was covered by workers' compensation the entire time she worked for Respondent.

22. Suzanne J_____ also testified at hearing. Respondent hired Ms. J_____ in September of 2014 as a part time office worker. Ms. J_____ testified that her duties included answering phones, taking leads for potential jobs, and giving the leads to project managers who would go out and look at/bid the potential roofing jobs. Ms. J_____ also dealt with phone calls dealing with customer complaints. Ms. J_____ testified that she had her own workspace near the front door of Respondent's storefront location and that Respondent provided her with a desk and computer. Ms. J_____ did not provide any of her own supplies. Ms. J_____ testified that she could leave or be terminated at any time and that she considered it to be an at will job. When a project manager has a job under contract, Ms. J_____ helped get the permits pulled, updated the whiteboard, and scheduled inspections when the job was finished. Ms. J_____ also wrote thank you notes and provided warranties to customers on behalf of Respondent. Ms. J_____ does not have an independent business and has never created her own business.

23. Ms. J_____ testified that when she was first hired, she was paid by 1099 and had to take care of her own taxes, but that beginning in May of 2015, she received a W2 with taxes withheld. She testified that she was paid hourly to her own personal name the entire time. Ms. J_____ testified that she had expected work hours during the business day. Ms. J_____ testified that she was trained by Ms. R_____. Ms. J_____ also testified that she has had a workers' compensation insurance policy for herself through Pinnacol Assurance since she began employment in September of 2014. She testified that she pays the premium for her individual policy and that she is reimbursed by Respondent for her monthly premium costs.

24. Ms. R_____ and Ms. J_____ are office workers and were employees while they worked for Respondent. They did not independently engage in any type of individual business and they do not qualify as independent contractors.

25. In addition to the two office workers employed by Respondent, Respondent had several project managers during the period of time at issue. Petitioner also contends that these project managers were employees. Respondent contends that they are independent contractors.

26. Several witnesses described the work of the project managers for Respondent. Ms. R_____ testified that at any given time during her employment they had 3-4 project managers. She testified that project managers were basically salesmen and that when Respondent received a call from a potential customer, the lead was given to a project manager who would try to get the business. The project managers would see customers, measure roofs, provide estimates, and if Respondent was hired for the job, they would get a signed contract and bring it back to the office. Ms. R_____ testified that if the project managers were able to get a signed contract, they handed it in to her. At the office, the once the signed contract was handed it, Ms. R_____ would order permits for the work, create a file, and put the job on the whiteboard to track the progress of the job. Respondent would also find and hire a crew to perform the actual work. Ms. R_____ occasionally would advertise for roofers on craigslist or would use roofers referred to them or that they had used in the past to perform the actual work. Ms. R_____ would all roofers fill out an independent contractor agreement and provide proof of proper insurance coverage. After the project managers converted job leads to signed contract work for Respondent, they were paid by commission, either a percentage of the total job or a flat rate depending on the job type. Ms. R_____ did not supervise the project managers or have supervisory capacity over them despite being the office manager. Ms. R_____ testified that the project managers came and went, that they had 3-4 at any given time, and that each project manager would have their own desk in one big room but that none of them had their own separate offices like the office workers and Mr. T_____.

27. Ms. R_____ testified that staff meetings were held approximately two times per month with the office workers, Mr. T_____, and the project managers. She also testified that safety meetings were held occasionally for the roofing crews/roofers they used and that occasionally product experts on shingles/roof products would come in to discuss new items and that anyone interested could attend.

28. Ms. J_____ testified that as an office worker, she regularly fielded calls from prospective clients and gave the leads to the project managers. She testified that there were approximately three project managers at any given time. She testified that the project managers could take a lead or refuse a lead as they saw fit and that it was up to them as to whether or not they wanted to quote a job and get a signed contract. Ms. J_____ testified that if one of the project managers said no to a job lead, she would try a different project manager. If they all say no to a job lead, she will take the job lead to Respondent owner Mr. T_____. Ms. J_____ testified that when a project

manager got a job under contract, she would order and get the permits for the job, help assign a roofer to perform the job, put the job on the production board, and track the jobs progress at all times. Ms. J_____ testified that if there was a problem with a customer, the project manager would usually handle it. She testified that she often called roofers, checked on inspections, and tracked the schedule of the jobs. Ms. J_____ testified that when the job was done, she wrote thank you cards to the customers.

29. Project manager Ron G_____ testified at hearing. Mr. G_____ testified that he had worked with Respondent for approximately 6-7 years as a project manager and continues to do so. Mr. G_____ first started as a project manager doing gutter estimates on a commission basis. He realized roof jobs paid better commissions and switched to that. Mr. G_____ testified that he works whatever hours he wants and that he takes leads from potential customers and looks at or measures a house and provides an estimate. Mr. G_____ testified that if there are any complaints with a job that he signed the contract on, he handles it but that he will give his advice if asked to other project managers. Mr. G_____ testified that there are two other project managers. Mr. G_____ testified that if a customer likes an estimate and signs a contract for the work, he is paid a commission based either on a percentage of the total work or a set amount depending on the job type. Mr. G_____ testified that the commission percentages were set by Respondent and that they were paid to him after the job was complete and the customer had paid. Mr. G_____ testified that he received job leads from the Respondent's office workers, from friends, or from whomever. Mr. G_____ testified that if he received a lead from Respondent's office but didn't like the location or job type, he wouldn't go and wouldn't quote the job lead and that he could make the decision to follow up or not. Mr. G_____ testified that he has a desk and work station at Respondent's office but that he also works from home. Mr. G_____ testified that he uses his own computer whether he is at the office, at his home, or at a site for an estimate. He testified that the tape measurers used to measure a job are his. Mr. G_____ testified that Respondent does not provide him any benefits and that he pays his own expenses. Mr. G_____ testified that if he has something to do, he will go into the office, but if not, he does not go in and that the time he spends in the office varies.

30. Mr. G_____ testified that Respondent provided him a computer program for performing estimates that he downloaded onto his own computer. Mr. G_____ also wears shirts with Respondent's company name on them when the shirts are clean, although he is not required to and does not always wear the shirts. Mr. G_____ testified that he received no real training from Respondent. Mr. G_____ testified that he attended meetings 1-2 times per year at Respondent's office. Mr. G_____ testified that he had no contract with Respondent and no reason for one. He testified that he does not make any business decisions on behalf of Respondent. Mr. G_____ testified that he has his own LLC, S-Corp, Ron G_____, LLC and that he is not required to and does not work exclusively for Respondent. Mr. G_____ testified that he also works for a Home Owners' Association and does maintenance, maintains dog stations, and does snow plowing. Mr. G_____ testified that he has a business card for the work he does with Respondent and a business card for the work he does with the HOA. Mr.

G_____ testified that he is paid by check made out to him personally for his commission percentages based on contracts signed to have Respondent perform work. Mr. G_____ testified that he is paid by 1099. Mr. G_____ testified that he pays for his own truck, his own fuel, and his own expenses for his work with Respondent because he is working for his own business Ron G_____, LLC and that he believes he is an independent contractor. Mr. G_____ testified that he could quit or be fired from Respondent at any time.

31. Mr. G_____ testified that he currently in the process of buying Respondent's company and signed a contract in January of 2019 to do so. Mr. G_____ took over the lease of the office space. Mr. G_____ testified that he has a workers' compensation policy that now includes two employees (office workers). Mr. G_____ testified that Respondent also owned two trucks that were part of the buy out that he will be taking over.

32. Mr. T_____ also testified at hearing. Mr. T_____ was the owner of Respondent company during the period of time at issue. Mr. T_____ testified that he signed a contract to sell the business in January of 2019. Mr. T_____ testified that Respondent had been a business entity since 1984 and was an LLC. Mr. T_____ testified that when he received the August 28, 2017 Director's Notice to Show Compliance he asked Petitioner why because he believed he was carrying workers' compensation insurance as required. Mr. T_____ testified that Pinnacol would not insure him due to a past situation and that Pinnacol was the only company that would insure a roofing company without paying extreme upfront fees/premiums that he could not afford without going out of business. Mr. T_____ testified that he had his office workers get their own policies that that he reimbursed them monthly for the premium costs. He testified that roofing was all that he knew and that he found a way to make sure his employees were covered. Mr. T_____ testified that he knew his subcontractors performing the roofing work were fully insured because they checked insurance policies before using them, and he testified that he was not worried about his project managers because they were independent contractors who could either carry their own workers' compensation or opt out. Mr. T_____ testified that he could not run his office without help, needed office employees, and after reading the statute decided the office employees could pay for their own policies and he could reimburse them and still be in compliance. Mr. T_____ testified that the he actually paid for all the premiums and that the office workers were always insured. Mr. T_____ testified that he believed he was in compliance. Mr. T_____ also testified that he never had a workers compensation claim or statutory employer claim due to an uninsured subcontractor.

33. Mr. T_____ testified that he had two trucks with his company's name on them that he was trying to transfer to Mr. G_____ as part of the sale of the business. Mr. T_____ testified that if the project managers had a big project or wanted a marked car to help sign a job, they could ask to use his trucks and he would let them. He testified that he paid for business cards for his office workers and his project managers and that they all had Sunny Constructors business cards with their names on them. He testified that he checked the workers' compensation policies of the roofing contractors he used for

jobs and that he guaranteed the work done by the contractors he hired. Mr. T_____ testified that he is a certificate holder and is notified if any of his roofing subcontractors' workers' compensation policies lapse. He testified that if a policy lapses, he will not use that contractor and will tell them to go get the insurance current before paying or assigning a new job to that contractor. He testified that if something was wrong with the roofing contractor's work, he would require his roofing contractor to go back out and fix the problem, or he would hire another roofing company to fix it. Mr. T_____ admitted that his two office workers were employees but testified that they were insured for workers' compensation and that he paid for the insurance as required. Mr. T_____ testified that he would reimburse his project managers for workers' compensation policies that they individually obtained as well, if they chose to have workers' compensation insurance.

34. Mr. T_____ testified that another project manager, Norm F_____, came into the office at will and told Mr. T_____ he wanted to come and go as he pleased.

35. Ms. Stenman testified at hearing that Respondent did not carry workers' compensation insurance as required during the time period at issue from April 28, 2014 through July 25, 2018. Ms. Stenman testified that, as part of her investigation, she checked the insurance database that showed the last time Respondent had workers' compensation coverage was in April of 2013.

36. Matthew Heidrich, an investigator with Pinnacol Assurance, testified at hearing. He testified that Pinnacol would not provide a workers' compensation insurance policy to Mr. T_____ due to a past situation. He testified that a prior investigation revealed that Mr. T_____ had forged a workers' insurance policy with Pinnacol listed, so Pinnacol will not insure Mr. T_____ or write him any type of policy.

37. Petitioner argued that under the WC Act, Employers must carry workers' compensation insurance for their employees. They argue that here, Respondent did not carry insurance but made its employees go out and get their own policies. Even though the employees were reimbursed, Petitioner argues that it is unlawful and against the requirements of the WC Act to require employees to pay for their own policies.

38. Respondent argues that policies were in place to protect the office workers and that Respondent was in a tough spot since he was in an environment where the last resort insurer, Pinnacol, would not insure him. Respondent argues that by reimbursing the office employees, Respondent was supplying and paying for the required workers' compensation coverage.

Conclusions of Law

The purpose of the Workers' Compensation Act of Colorado "the WC Act,", §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. As part of ensuring the overall purpose

of the statutory scheme, the general assembly has found, determined, and declared that it is in the best interest of the public to assure that all employers who fall under the provisions of the WC Act have in effect current policies of insurance or self-insurance for workers' compensation liability. *See* § 8-47-111(1), C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

To ensure all employers who fall under the provisions of the WC Act have in effect current policies of insurance or self-insurance for workers' compensation liability, the Division of Workers' Compensation, within the Colorado Department of Labor and Employment, is required to have a procedure to verify whether all employers doing business in the state of Colorado are in compliance. *See* § 8-47-111(2), C.R.S. When the Division has identified an employer that it believes is not in compliance with article 44 of the WC Act the Division, with the assistance and cooperation of the attorney general, is required to use all available means under the WC Act to ensure compliance. *See* § 8-47-111(2). To that end, Part 4 of Article 43 discusses enforcement and penalties.

Section 8-43-409(1), C.R.S. requires the Director of the Division of Workers' Compensation to investigate upon receiving information that an employer is in default of its insurance obligations. As part of the investigation, the Director may verify that all employees of that employer are insured through the employer's workers' compensation plan. *See* § 8-43-409(1), C.R.S. After investigation, if necessary, the statute states that the Director may set the issue of the employer's default for hearing**.** *See* § 8-43-409(1), C.R.S. In this case, as found above, the Division of Workers' Compensation received information through a tip that Respondent may be in default of its insurance obligations

under the WC Act. As required by statute, the Division performed an investigation. The Division, on August 28, 2017 issued a Director's Notice to Show Compliance requesting information on number of employees and requesting copies of insurance policies. Respondent responded on September 13, 2017 indicating their belief they were exempt. After investigation, the Director's Notice to Show Compliance, and the response to the Director's Notice to Show Compliance, a dispute remained and the issue of Employer's default remains for determination.

Default of insurance obligations under the WC Act requires a two-part analysis, a determination that an employer had employees for whom the employer must carry workers' compensation insurance AND that the employer does not or did not have a policy of workers' compensation insurance in effect. *See* § 8-43-409(2), C.R.S. To determine whether Employer in this case had employees for whom it needed to carry workers' compensation insurance, a determination of worker status (employee versus independent contractor) is necessary.

Employee versus Independent Contractor

Pursuant to §8-40-202(2)(a), C.R.S. "any individual who performs services for pay for another shall be deemed to be an employee" unless the person "is free from control and direction in the performance of the services, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent business related to the service performed." Moreover, pursuant to §8-40-202(2)(b)(I), C.R.S. independence may be demonstrated through a written document.

A necessary element to establish that an individual is an independent contractor is that the individual is customarily engaged in an independent trade, occupation, profession or business related to the services performed. *Allen v. America's Best Carpet Cleaning Services,* W.C. No. 4-776-542 (ICAO, Dec. 1, 2009). The statutory requirement that the worker must be "customarily engaged" in an independent trade or business is designed to assure that the worker, whose income is almost wholly dependent upon continued employment with a single employer, is protected from the "vagaries of involuntary unemployment." *In Re Hamilton,* W.C. No. 4-790-767 (ICAO, Jan. 25, 2011).

The "employer" may also establish that the worker is an independent contractor by proving the presence of some or all of the nine criteria enumerated in §8-40-202(2)(b)(II), C.R.S. *See Nelson v. ICAO,* 981 P.2d 210, 212 (Colo. App. 1998). The factors in §8-40-202(2)(b)(II), C.R.S. suggesting that a person is not an independent contractor include whether the person is paid a salary or hourly wage rather than a fixed contract rate and is paid individually rather than under a trade or business name. Conversely, independence may be shown if the "employer" provides only minimal training for the worker, does not dictate the time of performance, does not establish a quality standard for the work performed, does not combine its business with the business of the worker, does not require the worker to work exclusively for a single entity, does not provide tools or benefits except materials and equipment, and is unable to terminate the worker's employment without liability. *In Re of Salgado-Nunez,* W.C. No. 4-632-020 (ICAO, June

23, 2006). Section 8-40-202(b)(II), C.R.S. creates a "balancing test" to ascertain whether an "employer" has overcome the presumption of employment in §8-40-202(2)(a), C.R.S. The question of whether the "employer" has presented sufficient proof to overcome the presumption is one of fact for the Judge. *Id.*

If the evidence establishes that the worker was performing services for pay, and there is no written document establishing the worker's independent contractor status, the burden of proof rests upon the respondents to rebut the presumption that the worker was an employee. *Baker v. BV Properties, LLC,* W.C. No. 4-618-214 (ICAO, Aug. 25, 2006). The question of whether the respondents have overcome the presumption and established that the worker was an independent contractor is one of fact for the ALJ. *Nelson v. Industrial Claim Appeals Office, supra*. *See Industrial Claim Appeals Office v. Softrock Geological Services, Inc*., 325 P.3d 560 (Colo. 2015) (whether an individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed must be determined by applying a totality of circumstances test that evaluates the dynamics of the relationship between the individual and the putative employer). The analysis in *Softrock* reflects that tribunals must look not only at the nine factors to discern customary engagement in an independent business but must also examine other factors involving "the nature of the working relationship" is equally germane to that question in the context of a workers' compensation matter. *See In re Claim of Pierce*, W.C. No. 4-950-181-02) (ICAO, Sept. 18, 2018).

The evidence establishes that both Ms. R_____ and Ms. J_____ were office workers and employees. They were not free from Respondent's direction and control in the performance of their services. They were not customarily engaged in an independent business related to the services they performed. In fact, they were both office workers and Respondent admits that they were employees necessary for him to run his office. The factors of § 8-40-202(2)(b)(II), C.R.S. also overwhelmingly weigh in favor of an employee determination. Ms. R_____ and Ms. J_____ were paid hourly, assigned business work hours, could be terminated or end employment at will, provided supplies needed to do their job, paid personally (Ms. R_____ was paid both personally and to her business/trade name), and were integrated in Respondent's business operations. Ms. R_____ and Ms. J_____ were an integral part of the daily business operations of Respondent's business. Although both signed independent contractor agreements, the agreements were insufficient to create a presumption of independent contractor status and the agreements lacked basic language and information to create such a presumption. The evidence overwhelmingly supports the conclusion that the office workers were employees of Respondent during their terms of employment.

As found above, Respondent typically had 3-4 project managers at any given time. The project managers were salespersons and performed sales services for Respondent attempting to get business and signed contracts for roofing work. They performed services for Respondent for pay and received pay based on commission rates established by Respondent. As they performed services for pay, they are deemed to be employees unless they are free from control and direction in the performance of services and customarily engaged in an independent business related to the services performed.

The testimony from Mr. T_____, Mr. G_____, Ms. J_____, and Ms. R_____ and the evidence presented establishes that the project managers were generally free from the direction and control of Respondent. They were not required to work exclusively for Respondent, and Mr. G_____ in fact did not work exclusively for Respondent. The project managers' work was not overseen nor did Respondent instruct the project managers on how to perform the work other than provided software to assist in job estimates. The project mangers could take a lead, reject a lead, and schedule on their own time when they wanted to do the estimate for the potential customers. They were not paid hourly or salary rates, but were paid on a commission basis at the completion of a job for which they were the salesperson. They were not provided more than minimal training. They did not have set schedules and were not required to come into the office at any specific times. They were free to come and go as they wished and to schedule the estimates with potential customers as they wished.

Although they were mostly free from direction and control in the performance of their services, the project managers did somewhat combine business operations with Respondent. They would handle customer complaints and track the progress of jobs. They would have to assist in resolving complaints and would not be paid commission until the job was complete and the customer paid. They were required to attend staff meetings with Mr. T_____ and the office workers. They were able to use Respondent's company trucks for job estimate travel if they asked. They were provided and wore shirts with Respondent's name on the shirts. They were paid personally and not paid to a business name or entity. Mr. G_____ signed an independent contractor agreement on behalf of Respondent when Respondent hired office worker Ms. R_____. The project managers were also reimbursed workers' compensation insurance premiums by Mr. T_____, if they chose to individually obtain policies. The project managers did not have contracted periods of work performance, but rather could be terminated at will or leave at will if they wished. They were involved regularly with Respondent's office staff and had desk stations in the storefront office location. Further, even if they were completely free from direction and control in the performance of their services, there is a dearth of evidence indicating that the project managers were also customarily engaged in an independent business relating to the service performed. There is insufficient evidence that the project managers had their own salesperson businesses or that they customarily operated an independent business performing sales work. Rather, the testimony and evidence weighs in favor of a finding that the project managers were salesperson employees of Respondent and were not individual independent contractors operating their own individual sales businesses.

Insurance Coverage

The WC Act requires employers to secure workers' compensation insurance for all employees. *See* § 8-44-101(1), C.R.S. The WC Act also provides that it shall be unlawful for any employer, regardless of the method of insurance, to require an employee to pay all or part of the cost of such insurance. *See* § 8-44-101(2), C.R.S. Employers are required to insure and keep the insurance in force without allowing it to lapse. This is an ongoing requirement and the WC Act requires the Division to either order a defaulting

employer to cease and desist business operations and/or impose fines for every day an employer fails to maintain workers' compensation insurance. *See* § See 8-43-409(1), C.R.S.

As found above, Employer in this case did not secure workers' compensation insurance for all of its employees. Respondent was denied a policy by Pinnacol Assurance and Respondent found it too expensive to procure insurance coverage through a different insurance company. Respondent believed its project managers were independent contractors and provided no coverage for them, other than an offer to reimburse them for individual policies if they chose to get them. Respondent regularly reimbursed its office workers who obtained their own individual policies. However, under the WC Act, Employer cannot require an employee to pay for the cost of insurance. Here, Respondents office employees were paying for the cost of insurance and then were later reimbursed. Although this was a creative way to attempt to comply with the WC Act, Respondent violated the WC Act by failing, as an Employer, to secure and maintain workers' compensation. The burden to obtain a policy and maintain it falls on Employers and cannot be pushed onto employees.

Insurance coverage was not secured or maintained by Respondent for its office workers. Similarly, it was not secured or maintained by Respondent for its project managers. Respondent thus is in default of its obligations to provide insurance for it employees.

Respondent argues that it creatively found coverage for its office employees after Pinnacol Assurance unjustly refused to insure it for workers' compensation. Respondent makes a broad policy argument that Pinnacol cannot refuse to insure any Colorado employer and that since Pinnacol refused in this case, Respondent was stuck. This argument is not persuasive. Initially, Respondent is incorrect as to what is required by § 8-45-101(5)(f), C.R.S. That section states that Pinnacol Assurance shall not refuse to insure any Colorado employer…due to the risk of loss or the amount of premium. It does not require that Pinnacol Assurance issue a policy to a company that previously committed fraud by having a falsified insurance policy listing Pinnacol as insuring the company. Although Pinnacol could have issued a policy and imposed a premium surcharge under § 8-45-106(2), C.R.S., they were not required to issue a policy as Respondent argues.

Respondent points out that he was unable to obtain a workers' compensation policy through other insurance companies without paying a huge surcharge/premium up front. Although this may have forced him out of business or may have been a financial hardship, this does not allow Respondent to thwart or avoid the requirements of the WC Act. Every employer in the state of Colorado is required to provide its employees with workers' compensation insurance coverage. Despite any high premium requests or denials to insure from certain insurance providers, Respondent remains under the requirement. Although Respondent never had a workers' compensation claim during the time period at issue, the fact that it lacked any claims or injuries does not take away the

requirement that it was required to and failed to maintain workers' compensation insurance for its employees.

ORDER

It is therefore ORDERED:

1. Respondent is in default of § 8-43-409(1), C.R.S. by failing to insure or keep workers' compensation insurance while having employees from August 28, 2014 through July 25, 2018.

2. Respondent's office workers and project managers were employees during this time period, and they do not qualify as independent contractors.

3. All matters not determined herein are reserved for future determination.

DATED: September 18, 2019

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

- Whether the claimant has demonstrated, by a preponderance of the evidence, that the spinal cord stimulator (SCS) recommended by Dr. Haley Burke, is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted December 14, 2015 work injury.

- Whether the claimant has demonstrated, by a preponderance of the evidence, that the stem cell treatment recommended by Dr. Haley Burke, is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted December 14, 2015 work injury.

- Whether the claimant has demonstrated, by a preponderance of the evidence, that the ketamine injections recommended by Dr. Haley Burke, are reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted December 14, 2015 work injury.

FINDINGS OF FACT

1. On December 14, 2015, the claimant was injured when she slipped on ice and fell on her left side. The claimant testified that at the time of the slip and fall, she injured her low back, pelvis, left elbow, left hip, and left knee. The respondents have admitted liability for the December 14, 2015 injury. In addition to specific medical treatment discussed below, the claimant's medical treatment has included pain medications, physical therapy, and gait therapy.

2. Following the injury, the claimant's authorized treating physician (ATP) was Dr. David Olson with Pavilion Family Medicine. On May 19, 2016, Dr. Olson noted that the claimant had suffered a labrum tear of her left hip. At that time, Dr. Olson recommended a left hip steroid injection.

3. Subsequently, Dr. Olson referred the claimant to Dr. Thomas Dwyer. On June 9, 2016, the claimant was seen by Dr. Dwyer. At that time, Dr. Dwyer noted that the left hip magnetic resonance image (MRI) taken on the date of the claimant's injury showed a non-displaced tear of the anterior labrum. Dr. Dwyer recommended an active strengthening program.

4. On July 11, 2016, Dr. Olson referred the claimant for podiatry treatment of her foot symptoms. Dr. Olson opined that the claimant had suffered a sciatic injury that was causing the claimant's foot weakness.

5. On September 1, 2016, the claimant was seen by podiatrist, Dr. Terri Schmitt. Dr. Schmitt diagnosed the claimant with bilateral posterior tibial tendinitis, posterior tibial muscle weakness on the left, and increased pronation. Dr. Schmitt opined that these issues could be contributing to the claimant's left hip pain and prescribed orthotic insoles.

6. On September 16, 2016, the claimant returned to Dr. Dwyer and reported continuing pain in her lower back, left buttocks, and left hip. Dr. Dwyer noted that an intra-articular injection did not provide the claimant with relief. On that date, Dr. Dwyer recommended electrodiagnostic (EMG) testing of the claimant's left lower extremity.

7. On December 14, 2016, Dr. Mitchell Burnbaum performed the recommended EMG testing of the claimant's lower left extremity. In his report, Dr. Burnbaum noted it was an unremarkable EMG evaluation.

8. The claimant was referred to Dr. William Faragher by Dr. Dwyer. On February 21, 2017, the claimant was first seen by Dr. Faragher. At that time, Dr. Faragher opined that the claimant's left posterior hip pain was likely emanating from her sacroiliac (SI) joint. In addition, that the claimant's left anterior hip pain was possibly related to an anterior labral tear. Dr. Faragher made a number of treatment recommendations including a walking program, physical therapy, a TENS unit, lumbar traction, and a left SI joint injection.

9. On March 17, 2017, the claimant returned to Dr. Dwyer and reported that that her left lower extremity gave out and she fell down some stairs. As a result, the claimant experienced pain in her right foot with swelling and bruising. Dr. Dwyer reviewed x-rays of the claimant's right foot and noted a fracture of the claimant's right fifth metatarsal. Dr. Dwyer provided the claimant with a walking boot and took the claimant off of work.

10. On March 20, 2017, Dr. Faragher administered the recommended left SI joint injection. Thereafter on May 5, 2017, the claimant reported to Dr. Faragher that that the injection had provided some relief, but had worn off. Dr. Faragher noted that treatment opinions could potentially include PRP[1] or stem cell treatment.

11. On May 11, 2017, the claimant reported to Dr. Olson that the left hip injection provided relief "for a couple of weeks". At that time, they discussed surgical repair of the claimant's left acetabular labrum. Dr. Olson referred the claimant to Dr. Brian White for a surgical consultation.

12. On June 2, 2017, the claimant returned to Dr. Dwyer and reported no improvement in her right foot symptoms. In addition, right foot x-rays showed that the fracture of the claimant's right fifth metatarsal had not changed. Dr. Dwyer determined that new bone formation was "vary sparse" resulting in a nonunion. Dr. Dwyer ordered a computerized tomography (CT) scan of the claimant's right foot to better determine the status of the fracture.

[1] Platelet rich plasma.

13. On July 19, 2017, the claimant first treated with Shawn Harris, PA-C in Dr. White's practice. At that time, Mr. Harris noted the claimant's initial slip and fall. He also noted the fracture to the claimant's right foot. Dr. Harris diagnosed left hip femoracetabular impingement, labral tear, and "some underlying sacroiliac joint issues." Mr. Harris' treatment recommendations included an intra-articular diagnostic injection and possible hip arthroscopy. In the medical record of that same date, Dr. White also noted that a left femoral acetabular arthroplasty would be a way to "take away the mechanical pain and catching."

14. At an appointment with Dr. Olson on July 27, 2017, it was noted that the claimant's right fifth metatarsal was not healing. Dr. Olson instructed the claimant to continue to use her boot and follow up with orthopedics.

15. On August 18, 2017, Dr. John Ribadeneyra assumed ownership of Pavilion Family Medicine. As a result, Dr. Ribadeneyra became the claimant's ATP. The claimant first treated with Dr. Ribadeneyra on August 29, 2017. At that time, Dr. Ribadeneyra noted that the claimant's hip surgery was scheduled for October 2017.

16. On October 9, 2017, Dr. White performed the recommended left hip arthroscopy that included femoral osteoplasty and acetabular rim trimming.

17. On November 3, 2017, the claimant returned to Dr. Dwyer and reported that her right foot symptoms had improved. On that date, Dr. Dwyer determined that the claimant had reached maximum medical improvement (MMI) for her right foot.

18. On March 12, 2018, the claimant returned to Dr. Ribadeneyra and reported that her left hip was "buckling" and she had burning pain in her left thigh and buttock. The claimant also told Dr. Ribadeneyra that there was some belief that she had complex regional pain syndrome (CRPS). On that date, Dr. Ribadeneyra referred the claimant to Dr. Joel Cohen for psychological counseling. Based upon the medical records entered into evidence, the claimant began treatment with Dr. Cohen in June 2018.

19. On April 4, 2018, the claimant returned to Dr. White. At that time, the claimant reported that she continued to have burning pain around her pelvic rim and down her left thigh. Dr. White opined that the claimant could have "an early form of reflex sympathetic dystrophy (RSD) or complex regional pain syndrome (CRPS)." Dr. White also opined that the claimant's symptoms were related to her initial work injury. At that time, he recommended that the claimant see a physician specializing in RSD and CRPS, specifically Dr. Haley Burke.

20. The claimant was first seen by Dr. Burke on April 30, 2018. At that time, Dr. Burke diagnosed the claimant with neuropathic pain in the left lateral femoral cutaneous nerve, left sided ischial bursitis, trochanteric bursitis in the left hip, neuralgia, and chronic pain syndrome. Dr. Burke recommended a lumbar sympathetic nerve block, a left lateral femoral cutaneous nerve block, and a trochanteric bursa injection.

21. On May 10, 2018, Dr. Ribadeneyra referred the claimant to foot surgeon Dr. Waqqar Khan-Farooqi to address the claimant's ongoing foot issues.

22. On May 24, 2018, Dr. Burke noted that the claimant had symptoms consistent with CRPS. Dr. Burke recommended additional nerve blocks. In addition, she referred the claimant for CRPS testing; specifically, QSART[2] and thermography testing.

23. On June 14, 2018, the claimant was first seen by Dr. Khan-Farooqi regarding the fracture to her right fifth metatarsal. Dr. Khan-Farooqi opined that the claimant had a symptomatic malunion of her right fifth metatarsal. He recommended a weight bearing CT scan. In addition, Dr. Khan-Farooqi noted that the claimant could have CRPS and requested the results of the QSART and thermographic testing.

24. On June 25, 2018, a three-phase bone scan of the claimant's pelvis showed abnormal asymmetric uptake in the left acetabulum.

25. On June 28, 2018, the claimant returned to Dr. Burke and reported that the most recent nerve blocks provided relief for approximately three days. On that date, Dr. Burke noted the results of the three-phase scan and recommended an MRI of the claimant's left hip.

26. On July 20, 2018, the MRI of the claimant's left hip showed mild tendinopathy and trace bursitis. In addition, there was evidence of the prior surgical repair and no new tear was suspected.

27. A three-phase bone scan of the claimant's bilateral lower extremities was performed on July 20, 2018. That scan showed "patchy areas of heterogeneous mildly intense increased bony activity within the mid foot bilaterally including activity localized to the middle cuneiform on the right, base of the right second metatarsal and distal first metatarsal in the region of the sesamoid bone." The report also included a notation that the findings were nonspecific, but could be degenerative in nature.

28. On August 2, 2018, the claimant was seen by Dr. Burke who noted the results of the left hip MRI. On that date, Dr. Burke discussed with the claimant the possible use of a spinal cord stimulator (SCS) as a "potential future option" for treatment. In addition, Dr. Burke administered a right posterior tibial nerve block to address the claimant's right foot pain.

29. The claimant returned to Dr. Khan-Farooqi on August 27, 2018. At that time, Dr. Khan-Farooqi noted that the recommended testing for CRPS and not yet occurred. He recommended that the claimant would likely need surgical intervention to treat her right foot. He further recommended either a plantar flexing osteotomy of the right fifth metatarsal or shortening osteotomies of the second through fifth metatarsals.

[2] Quantitative Sudomotor Axon Reflex Test.

30. On October 16, 2018, the claimant was seen by Dr. Tashof Bernton for diagnostic testing for CRPS. In his report, Dr. Bernton noted that the Colorado Medical Treatment Guidelines (MTG) require two positive objective tests for a diagnosis of CRPS. He also noted that the MTG provide that a negative diagnostic test "does not rule out the diagnosis of [CRPS]." Dr. Bernton reported that the claimant's thermography testing was positive for CRPS, while the autonomic testing battery was negative. Dr. Bernton also read the claimant's response to sympathetic nerve blocks as a positive diagnostic test for CRPS. Based upon these test results, Dr. Bernton opined that the claimant does meet the MTG diagnostic criteria for CRPS. Dr. Bernton recommended that the claimant undergo endocrinologic testing. In addition, Dr. Bernton recommended the use of stem cell injections to assist in the healing of the stress fractures in the claimant's feet.

31. On October 17, 2018, the claimant returned to Dr. White and reported that she was diagnosed with "baseline CRPS" and had stress fractures in her feet. Dr. White recommended the claimant see Dr. Paul Miller to address issues with her bone density.

32. The claimant was seen by Dr. Burke on October 25, 2018 and reported increased stinging sensations and leg cramps. On that date, Dr. Burke noted that there were no further orthopedic or surgical treatments available to the claimant. Dr. Burke noted Dr. Bernton's diagnosis of CRPS. In addition, Dr. Burke noted Dr. Bernton's recommendations for testing of the claimant's endocrine system and stem cell injections. Dr. Burke had further discussions with the claimant regarding the use of an SCS.

33. On October 29, 2018, the claimant returned to Dr. Khan-Farooqi who noted that the claimant would not be a surgical candidate until her CRPS was managed. In the medical record of that date, Dr. Khan-Farooqi noted that the claimant would be undergoing a DEXA[3] scan. He also recommended an endocrinologic evaluation.

34. On October 30, 2018, a DEXA bone density studies of the claimant's lumbar spine, neck, and left hip were performed and read as normal.

35. On November 28, 2018, Dr. Burke referred the claimant to an endocrinologist and recommended a psychological consultation related to the recommended SCS. In addition, Dr. Burke requested authorization for stem cell treatment[4] related to the claimant's metatarsal fractures. In the medical record of that date, Dr. Burke opined that the claimant was a "very good candidate for administration of allograft to assist with proper healing of these bony structures especially on the left foot". Dr. Burke also noted "documented and anecdotal evidence for allograft administration for patients with wound healing problems as well as poorly healing and painful orthopedic conditions".

[3] Dual-Energy X-ray Absorptiometry.
[4] This treatment is also referred to as allograft treatment in the medical records.

36. In a medical record dated December 3, 2018, Dr. Ribadeneyra noted that the claimant's QSART testing was positive for CRPS. Dr. Ribadeneyra referred the claimant to Dr. Rothman for an endocrinology consultation. Dr. Ribadeneyra noted Dr. Burke's recommendation for stem cell injections. The medical record indicates that Dr. Ribadeneyra was in agreement with these injections.

37. On December 28, 2018, Dr. Cohen noted that it was his opinion that the claimant was a candidate for an SCS.

38. On January 8, 2019, Dr. Burke requested authorization for a SCS trial. Dr. Burke has also requested authorization for ketamine injections to treat the claimant's CRPS symptoms.

39. On January 31, 2019, the claimant attended an independent medical examination (IME) with Dr. George Schakaraschwili. In connection with the IME, Dr. Schakaraschwili reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his IME report, Dr. Schakaraschwili recommended the denial of authorization of the SCS, stem cell treatment, and ketamine injections. In support of this recommendation, Dr. Schakaraschwili noted that stem cell treatment and ketamine injections are not supported by the Colorado Medical Treatment Guidelines (MTG). With regard to the recommended SCS, Dr. Schakaraschwili opined that the claimant does not clearly have CRPS. Therefore, it was Dr. Schakaraschwili's opinion that the SCS would not be appropriate treatment. Dr. Schakaraschwili noted that although the claimant was diagnosed with CRPS, the QSART testing was negative and the three-phase bone scan showed no evidenced of CRPS.

40. Dr. Schakaraschwili's testimony by deposition was consistent with this written report. Dr. Schakaraschwili reiterated his opinion that there was insufficient evidence to indicate ketamine injections or allograft injections. Dr. Schakaraschwili also noted his opinion that the claimant has not met the MTG criteria for an SCS. In supported of this opinion, Dr. Schakaraschwili noted that there is no evidence of a CRPS diagnosis in the bone scans. In addition, it is Dr. Schakaraschwili's opinion that the diagnostic blocks administered to the claimant were not diagnostic because they were performed simultaneously with other procedures. During his testimony, Dr. Schakaraschwili recommended additional testing including thermogram and QSART testing.

41. On February 20, 2019, Dr. Julia Rifkin performed testing of the claimant's endocrine system. In her report, Dr. Rifkin opined that it was unlikely that there was a metabolic cause of the claimant's metatarsal fractures. Dr. Rifkin also noted that "[i]t is unknown whether or not [CRPS] predisposes a patient to metatarsal fractures."

42. On April 19, 2019, the claimant was seen by Dr. Khan-Farooqi regarding a fracture to her right fourth metatarsal. Dr. Khan-Farooqi opined that a corrective realignment osteotomy would address that fracture, but noted that with the claimant's contralateral fracture (specifically the left third metatarsal) she was likely not stable enough to undergo surgery. As a result, Dr. Khan-Farooqi recommended recovery

sandals to properly cushion the claimant's feet. On that same date, Dr. Khan-Farooqi prescribed "bone growth stimulator" to address the fracture to the claimant's left foot.

43. The claimant testified that her current symptoms include spasms in her low back, tightness in her pelvis, incontinence, changes to her mental abilities (including difficulty with memory and concentration), and bilateral hip pain that radiates down her legs into her toes.

44. The claimant also testified that if she is able to pursue the recommended SCS, she would not need to pursue ketamine treatment.

45. With regard to the spinal cord stimulator (SCS), the ALJ credits the medical records, the claimant's testimony, and the opinions of Drs. Bernton, Burke, Ribadeneyra, and Khan-Farooqi over the contrary opinions of Dr. Schakaraschwili. In addition, the ALJ finds as persuasive the opinions of Drs. Bernton and Burke that the diagnostic testing performed on the claimant is sufficient to support a diagnosis of CRPS pursuant to the MTG. Therefore, the ALJ finds that the claimant has demonstrated that it is more likely than not that the recommended SCS is reasonable medical treatment necessary to cure and relive the claimant from the effects of the admitted work injury.

46. With regard to stem cell/allograft treatment, the ALJ credits the medical records, the claimant's testimony, and the opinions of Drs. Bernton and Burke over the contrary opinions of Dr. Schakaraschwili. The ALJ finds that the claimant has demonstrated that it is more likely than not that the recommended stem cell/allograft treatment is reasonable medical treatment necessary to cure and relive the claimant from the effects of the admitted work injury.

47. With regard to ketamine injections, the ALJ credits the claimant's testimony that if she is able to pursue the recommended SCS, she will not need ketamine treatment. Therefore, the ALJ declines to address the reasonableness and necessity of the recommended ketamine treatment.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2015).

4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

5. The Colorado Workers' Compensation Medical Treatment Guidelines (MTG) are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). The statement of purpose of the MTG is as follows: "In an effort to comply with its legislative charge to assure appropriate medical care at a reasonable cost, the director of the Division has promulgated these 'Medical Treatment Guidelines.' This rule provides a system of evaluation and treatment guidelines for high cost or high frequency categories of occupational injury or disease to assure appropriate medical care at a reasonable cost." WCRP 17-1(A). In addition, WCRP 17-5(C) provides that the MTG "set forth care that is generally considered reasonable for most injured workers. However, the Division recognizes that reasonable medical practice may include deviations from these guidelines, as individual cases dictate."

6. While it is appropriate for an ALJ to consider the MTG while weighing evidence, the MTG are not definitive. *See Jones v. T.T.C. Illinois*, Inc., W.C. No. 4-503-150 (May 5, 2006); ***aff'd Jones v. Industrial Claim Appeals Office*** No. 06CA1053 (Colo. App. March 1, 2007) (not selected for publication) (it is appropriate for the ALJ to consider the MTG on questions such as diagnosis, but the MTG are not definitive); *see also Burchard v. Preferred Machining*, W.C. No. 4-652-824 (July 23, 2008) (declining to require application of the MTG for carpal tunnel syndrome in determining issue of PTD); *see also Stamey v. C2 Utility Contractors et al*, W.C. No. 4-503-974 (August 21, 2008) (even if specific indications for a cervical surgery under the MTG were not shown to be present, ICAO was not persuaded that such a determination would be definitive).

7. As found, the claimant has demonstrated, by a preponderance of the evidence, that the SCS recommended by Dr. Burke is reasonable medical treatment necessary to cure and relive the claimant from the effects of the admitted work injury. As found, the medical records, the claimant's testimony, and the opinions of Drs.

Bernton, Burke, Ribadeneyra, and Khan-Farooqi are credible and persuasive on this issue.

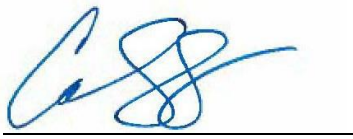
8. As found, the claimant has demonstrated, by a preponderance of the evidence, that the stem cell/allograft treatment recommended by Dr. Burke is reasonable medical treatment necessary to cure and relive the claimant from the effects of the admitted work injury. As found, the medical records, the claimant's testimony, and the opinions of Drs. Bernton and Burke are credible and persuasive on this issue.

9. With regard to ketamine injections, the ALJ declines to address the reasonableness and necessity of the recommended ketamine treatment. As found, the claimant's testimony is credible and persuasive on this issue.

ORDER

It is therefore ordered that the respondents shall pay for reasonable medical treatment necessary to cure and relieve the claimant from the effects of the December 14, 2015 work injury including the spinal cord stimulator (SCS) and stem cell/allograft treatment recommended by Dr. Burke, pursuant to the Colorado Medical Fee Schedule.

Dated this 19th day of September, 2019.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. **In addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

ISSUES

I. Have Respondents, by clear and convincing evidence, overcome the DIME opinion of Dr. Castrejon that Claimant has not reached Maximum Medical Improvement ("MMI")?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Claimant began working for the City of Colorado Springs as a police officer in March of 2008. (Ex. 1). He sustained an admitted compensable injury on December 4, 2017 when a fight occurred while he was making an arrest of a suspect. (Ex. 3).

2. At hearing, Claimant described what occurred at that time, including the mechanism of injuries that he sustained to his neck, mid and low back, left knee and shoulders.

3. Claimant had had a previous right shoulder compensable injury in January of 2010, for which he received physical therapy for a short period of time. There were no ongoing physical issues associated with that injury. (Ex. 10, p. 26).

4. Claimant also sustained a compensable injury on October 28, 2016 at which time he sustained injuries to his neck, mid and low back and a right ring finger dislocation. Claimant received treatment from Dr. Chad Abercrombie, a chiropractor, for those injuries. This included treatment for bilateral trapezius pain extending inferiorly into the levator scapulae and rhomboids, along with treatment for his neck, thoracic and lumbar pain.

5. Claimant was placed at MMI for these injuries on April 11, 2017. However, he had ongoing symptoms, and continued to receive intermittent chiropractic care for his October 2016 injuries from Dr. Travis Curd. (Ex. F).

6. On one visit to Dr. Curd on November 15, 2017, it was noted that pain was noted in both trapezius regions, but left more so than right. Continuing monthly visits were recommended. (Ex. F, p. 64).

7. Claimant acknowledges that prior to his work injury of December 4, 2017, he was still experiencing occasional neck and upper back pain and stiffness, but denies any ongoing shoulder complaints. (Ex. E, F; pp. 59-66).

8. On December 4, 2017, Claimant confronted a suspect who was involved in suspicious activity. While attempting to handcuff the suspect, the suspect turned quickly, forcing the Claimant to his left and a foot chase ensued. The Claimant was able to tase the suspect, but the suspect had heavy clothing on and the suspect was able to break the taser current. Claimant was eventually able to grab the suspect, and a fight occurred with the Claimant and the suspect falling to the ground. The Claimant forcefully brought down his right arm, striking the suspect with the taser. Claimant's left shoulder was punched by the suspect. During the fight, the Claimant recalled a pulling sensation in his right shoulder blade and falling forcefully to the ground on his right side. The Claimant was eventually able to subdue the suspect; however, following the arrest, Claimant noted stiffness in his neck and mid portion of his back.

9. Several hours thereafter the Claimant noted a sharp pain in his left shoulder and a pain in his neck extending into both shoulders and pain in his left knee.

10. The Claimant was initially seen in the Colorado Springs Occupational Health Clinic by P.A. Paula Homberger on December 7, 2017. He under her care until the visit of July 2, 2018 along with the doctors to whom P.A. Homberger referred him. (Ex. G-U).

11. Pain diagrams (rear upper torso view) were filled out on visits to this clinic on the following dates, summarized as follows:

12/7/2017….5/10 pain….mid back, left shoulder, neck (Ex. G, p. 69)

12/28/2017...6/10 pain….neck, upper back, left shoulder, and upper right shoulder (Ex. I, p. 72)

1/4/2018 …6/10 pain…midline neck, scapula region on left and right sides (Ex. 12. P. 244; Ex. L, p. 97)

1/23/2018….5/10 pain…neck, lower back, scapular region on left and right sides (Ex. M, p. 100)

2/7/2018…4-5/10 pain…low back, left shoulder and neck area (Ex. P, p. 107)

4/4/2018…3-4/10 pain….low back, upper mid back/lower neck. (Ex. S, p. 112)

7/2/2018…3/10 pain…low back, neck, upper right shoulder (Ex. U, p. 117)

9/7/2018…5/10 pain…lower right shoulder , and low back (Ex. W, p. 121)

11/2/2018…8/10 pain…..right shoulder, right neck, numbness running down right arm (Ex. Y, p. 125)

12. P.A. Homberger referred Claimant to Dr. Chad Abercrombie, chiropractor, for care and treatment. (Ex. 12, pp. 56-156).

13. On January 2, 2018, Claimant presented to Dr. Abercrombie. Claimant reported that "during an apprehension of a suspect an altercation occurred. He denie[d] any immediate symptoms, however, approximately a few hours later started having neck and upper back pain (ache), left sided with some referral to the right and started having headaches along the left occipital region." Cervical range of motion was limited

in flexion and extension secondary to upper and mid-para-cervical pain at end ranges. Bilateral lateral flexion and rotation were mildly limited with pain in the paracervical regions at end ranges of all planes, left side greater than right. There was increased muscle tone with tenderness across the left *greater than right upper* paracervical musculature including the semispinalis capitis, upper trapezius and levator scapulae. (Ex. J) (emphasis added).

14. On January 24, 2018, Claimant returned to Dr. Abercrombie. Claimant reported a good response to treatment with residual tightness and intermittent aching in the left side of his neck. He stated that tightness and pain were improving in frequency, duration and intensity. There was decreased muscle contracture and improved articular restriction across the left paracervical and cervicothoracic regions. There was an active trigger point along the left trapezial ridge that may have contributed to his neck symptoms. There was tightness along the upper trapezius and levator scapulae on the left. Articular restriction at C7-T1 and C2-3 were improved. There was minimal articular restriction at T3-4. Assessment included "Overall continued improvement with residuals affecting primarily the left cervicothoracic region." (Ex. N).

15. Dr. Abercrombie in his letter dated February 12, 2019, notes: “In review of these records, there has been mention of *right* shoulder and shoulder region symptoms/injury from the incident of December 4, 2017. Mr. Newton was treated in this office for cervical and upper thoracic pain for *both right and left sides* including the region of the *right* shoulder girdle which *became more of a complaint toward the end* of his treatment in my office.” (Ex. 12, p. 56) (emphasis added).

16. During the time that the Claimant was seeing Dr. Abercrombie, he was also receiving massage therapy. (Ex. 12). The reports show intermittent complaints of low back pain, along with the cervical and thoracic pain, but by April, 2018, P.A. Homberger’s notes indicated that low back was worse. Cervical thoracic, right hand contusion, left knee contusion and left shoulder contusion were resolved. The neck was still sore.

17. On July 2, 2018, according to P.A. Homberger, Claimant was complaining of “sharp, *right* thoracic pain *with running*”. Upon examination, P.A. Homberger noted complaints of mild tenderness near the right medical scapular border. The pain diagram noted pain at the neck and both shoulder blades. (Ex. L, p. 97).

18. The Claimant was seen for the first time by Dr. Nicholas Kurz on September 7, 2018. The pain diagrams that the Claimant filled out on that date depicted pain in the low back, *right* neck and shoulder as well as the *right* posterior shoulder below the level of the mid trapezius. Nonetheless, Dr. Kurz placed the Claimant at MMI without impairment, and no maintenance care.

19. At hearing, Claimant testified that the examination by Dr. Kurz was limited, and without any examination of his right shoulder. Dr. Kurz told the Claimant that he could come back for a one-time visit, but not before sixty days.

20. After this exam, Claimant testified that he resumed full duty, but continued to have right sided neck, upper back and right upper extremity pain with radiculopathy.

21. Claimant went back to see Dr. Kurz on November 2, 2018. Dr. Kurz agreed to have an MRI performed "in order to r/o [rule out] any previous issues from his last two claims, but it appears that his current complaints are not related to DOI of 12/04/17, but rather are more likely and to a greater hat (sic) 51% medical probability, *related to his non work related activities.* I will review the results." (Ex. 15, p. 211) (emphasis added).

22. At no point in Dr. Kurz' reports is there any reference to 'non work-related' activities which might cause such symptoms, except for the second [and final] visit of 11/2/2018; "He is getting intermittent R upper thoracic discomfort with non-work related running, which is improved with stretching, as patient states that he participates in non-work related Triathlons and trains frequently." (Ex. Y, p. 123).

23. The MRI was performed on November 5, 2018. The report showed "infraspinatus tendinopathy changes and possibly a small focus of subscapularis tendinopathy versus small tear" and a "questionable type II SLAP tear." Dr. Kurz concluded that these findings were not related to the compensable on the job injury, then told Claimant he should see his own Primary Care Physician for these injuries. (Ex. 15, p. 212).

24. As a result, Claimant went to see Dr. David Weinstein on December 10, 2018. (Ex. 11, pp. 51-54). Physical examination revealed the cervical spine has no midline tenderness with full range of motion. There is no obvious atrophy noted. The patient has a symmetrical trapezius shrug with no evidence of scapular winging. There is no tenderness over the sternoclavicular or acromioclavicular joint. The patient has tenderness over the anterior subacromial space and positive tenderness over the bicipital groove. Range of motion of the right shoulder revealed forward flexion to 180 degrees, external rotation to 70 degrees, and internal rotation to T8. Motor strength was rated at 4/5 with resisted external rotation and abduction. Positive speed's maneuver was noted. Positive impingement testing was noted. (Ex. 11).

25. Dr. Weinstein noted: "He has clear evidence of an *injury* to the right rotator cuff in the form of tendonitis. Fortunately there is no evidence of a full thickness right rotator cuff tear. He also has evidence of right biceps tendonitis. On his MRI scan he has evidence of right superior *labral tearing* involving the biceps anchor which would be consistent with his clinical exam. In addition, there is myofascial inflammation of the right scapular rotators which can be aggravated by compensation from his rotator

cuff/biceps *injury or a primary injury* to the soft tissue muscles in his neck. (Ex. 11, p 53) (emphasis added).

26. Based upon the MRI and his examination and patient history, Dr. Weinstein suggested a course of treatment for the Claimant, which included injections, physical therapy, a physiatry evaluation and additional chiropractic treatment. Further, Dr. Weinstein noted this exchange:

> The patient did ask me if his mechanism of injury would be consistent with his altercation at work, and I told him with him having no other obvious injury this could be consistent with the mechanism of injury he has described. (Ex. 11, p. 54)

27. Following Dr. Kurz' reports, Respondent filed a FAL on November 30, 2018. Claimant timely objected and requested a DIME. Dr. Miguel Castrejon was selected to determine causation, and MMI. If MMI were determined, what impairment rating would be attributable to the injury of December 4, 2017.

28. Prior to the DIME evaluation, the Respondent requested a Rule 8 IME from Dr. Annu Ramaswamy. Dr. Ramaswamy prepared two reports dated January 25, 2019 and May 13, 2019. His deposition testimony was also taken on June 24, 2019.

29. Dr. Ramaswamy noted that Claimant told him that his lower back pain had resolved, but that he had told P.A. Homberger in March of 2018 that with firearms training, he had more pain in the right shoulder and neck region. The Claimant told him that he was concerned when Dr. Kurz put him at MMI on September 7, 2018, as he was still noticing right shoulder discomfort. He was not back to baseline, and had further concerns that no MRI imaging had been performed. (Ex. A, p. 4).

30. Dr. Ramaswamy performed a review of the Claimant's previous medical history from his 2010 and 2016 compensable on the job injuries (Ex. A, pp. 7-13), as well as a chronological evaluation of the medical records from the December 4, 2017 injury. (Ex. A, pp. 13-18). He also performed a physical examination of the Claimant. Dr. Ramaswamy noted that Claimant had ongoing right paracervical/thoracic and posterior shoulder discomfort, likely related to right shoulder impingement. He stated, however, that he was "unable to link the right shoulder impingement diagnosis to the December 4, 2017 incident." (Ex. A. p. 20).

31. Dr. Ramaswamy stated that the Claimant's main clinical issue was right rotator cuff impingement, secondary to rotator cuff tendinitis. He did not think that such impingement was causally related to the work injury of December 4, 2017, as he indicated that if that was the case "one then would expect to see reports of right shoulder discomfort…in the medical records within a few days of the incident." (Ex. A, pp. 21-22)

32. After reviewing the DIME report of Dr. Castrejon, Dr. Ramaswamy issued an addendum report. He disagrees with Dr. Castrejon that the Claimant sustained an injury to the right shoulder or right shoulder girdle musculature in the injury of December 4, 2017 as "one would have expected myofascial pain and shoulder range of motion loss early on after the injury. Instead, the first mention of right shoulder girdle myofascial pain and weakness is not noted until the fall of 2018."

33. Dr. Ramaswamy reiterated during his deposition that the Claimant did not sustain a right shoulder girdle injury or right impingement injury in the incident of December 4, 2017. He did acknowledge that some of Claimant's pain diagrams actually did indicate the presence of right shoulder pain before the fall of 2018.

34. Dr. Ramaswamy also discussed Dr. Castrejon's unique provisional impairment rating. Dr. Castrejon did not provide a cervical Table 53 rating, but rather provided a 5% whole person rating for loss of range of motion in the cervical spine based on a portion of the impairment rating tips. Concerning the right shoulder, he issued a 6% upper extremity impairment based on right shoulder range of motion loss.

35. However, he opined, the Division of Worker's Compensation Impairment Rating Tips, indicate such a rating is only acceptable in cases of *severe* shoulder pathology where it is well justified by the clinician. Dr. Ramaswamy explained that Dr. Castrejon *erred* in providing the rating, as Claimant's physical examination demonstrated rotator cuff impingement and mild range of motion loss in the neck and shoulder, but no indications of *severe* shoulder pathology in the examinations of doctors Weinstein and Castrejon.

36. The Claimant testified that he injured his right shoulder and right scapula during the altercation that he had with the suspect on December 4, 2017. He testified that it was a long altercation with the suspect and that, during the fight, he hit the suspect as hard as he could with his right arm, swinging the taser down and hitting the suspect in the head. He then came down to the ground and "the right side of my body slammed into the ground at that point."

37. Claimant testified that he did tell P.A. Homberger early on about the symptoms that he was having in the right shoulder, like a pinching, and that she gave him some shoulder exercises to do. Dr. Abercrombie was treating the right side of his neck and that he actually did some "kind of massage therapy in my armpit trying to get to the right shoulder."

38. Claimant testified that when he saw Dr. Kurz on September 7, 2018 it was the first time that he had seen him. He told Dr. Kurz that most of the other injuries that he had sustained on December 4, 2017 had resolved but that he was "continuing to have issues with his right shoulder and right scapula…" Claimant testified that Dr. Kurz

did not do any examination of either the right shoulder or right scapula at that time and the total examination by Dr. Kurz took about five (5) minutes.

39. Despite this, Dr. Kurz placed the Claimant at MMI, without impairment, and with no medical maintenance. Claimant stated that at that time he asked Dr. Kurz to have imaging performed due to the ongoing nature of his issues with his right shoulder but that was denied.

40. Dr. Kurz did tell the Claimant that he could have an additional one-time appointment in six weeks. During that time, Claimant stated that his symptoms progressively got worse. He scheduled an appointment which occurred on November 2, 2018. This time Dr. Kurz did perform an evaluation of the right shoulder and scapula, which lasted about a minute, and Dr. Kurz then agreed to have a MRI performed. Upon receipt of the results of the MRI showing pathology in the right shoulder, Dr. Kurz called the Claimant and informed him that the condition was not work-related.

41. The Claimant testified that he did not sustain any additional injures to his right shoulder scapula area between December 4, 2017 and his appointment with the DIME on February 28, 2019. He further testified that he desires to undergo the treatment as recommended by Dr. Weinstein, and supported by Dr. Castrejon, as he wants to get better and perform his job without limitations.

42. Dr. Castrejon performed his DIME examination on February 28, 2019. The DIME report indicates a review of the mechanism of injury, the medical records and a detailed physical examination of the Claimant. Physical examination indicated tenderness in the trapezius and rhomboid musculature as well as the area overlying the levator. Dr. Castrejon identified mild impingement, as well as tenderness at the infraspinatus. (Ex. 10, p. 31).

43. Dr. Castrejon performed an evaluation of the medical records, including the Rule 8 IME report of Dr. Ramaswamy. Dr. Castrejon stated:

> Having had the opportunity to review the mechanism of injury, review the medical file and examine the claimant it is my professional opinion that the claimant's current condition represents the culmination of at least three work related injuries to the shoulder girdle musculature (trapezius, rhomboid, and levator). These injuries were not effectively treating, (Sic). The result has been the development of a 'scapular dyskinesis' contributed to by chronic muscle imbalance and myofascial pain. (Ex. 10, p. 41).

44. Dr. Castrejon further found that the Claimant had a mild impingement, and that the mechanism of injury was consistent with his opinion. He stated that for this type of injury, the treatment rendered to date had been ineffective and inappropriate. Dr. Castrejon believes that in the hands of a skilled physical therapist the condition may

have been significantly less pronounced. (Ex. 10, p. 43). Dr. Castrejon found the Claimant not to be at MMI for his injuries sustained on December 4, 2017.

45. Dr. Castrejon testified at the hearing on August 6, 2019 and was qualified as an expert in the field of physical medicine and rehabilitation. Dr. Castrejon had reviewed Dr. Ramaswamy's deposition. He testified that he was aware of the difference of opinion between him and Dr. Ramaswamy on whether the Claimant sustained an injury to his right shoulder and right scapula musculature on December 4, 2017. Dr. Castrejon stated that Dr. Ramaswamy was incorrect in his understanding of the definition of secondary impingement. Further, he stated that Dr. Ramaswamy was incorrect in his assertion that injury to the right shoulder had not been mentioned prior to the fall of 2018.

46. Dr. Castrejon testified that there is a direct correlation between the mechanism of injury and the Claimant's impingement problem. He provided a description of the anatomy involved in the Claimant's situation. He opined that the condition had not been properly treated, and that it was not until a full-blown impingement developed that it appears that the MRI was performed and the findings of impingement made.

47. At hearing, when asked if Claimant's symptoms met his definition of "severe" [re: Finding of Fact 35, *supra*], Dr. Castrejon replied in the affirmative, as the Rating Tips provide no further concrete definition when one provides a [provisional] impairment rating not using Table 53.

48. Dr. Castrejon, based upon his review of the medical records and his examination, is of the opinion that the December 4, 2017 injury aggravated the preexisting condition from the injury of October 28, 2016, which had not fully healed at the time of the December 4, 2017 injury.

49. Dr. Castrejon agrees with the treatment recommendations made by Dr. Weinstein. He believes the Claimant should undergo trigger point injections, deep tissue massage, and have a cervical MRI and EMG. He then explained the reasons for the additional treatment and evaluations.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers,

without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Assessing weight, credibility and sufficiency of evidence in a worker's compensation proceeding is the exclusive domain of the ALJ. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). In this case, the ALJ finds Claimant to be sincere, forthright, and credible at every stage of the process. He was candid with all medical practitioners, including the independent examiners. He was conscientious in keeping his appointments, and has demonstrated a sincere desire to manage his health, and perform his job without pain or restrictions. He rightfully advocated for himself when his ATP wanted to close his file.

D. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ as well. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968). In this instance, the ALJ finds that there are [as is commonly the case] sincere differences in medical opinion - often driven by sincere differences in medical philosophy - which do not necessarily reflect on one's *credibility.* Rather, the ALJ must determine who is more *persuasive* in their assessments, remaining mindful of the burden of proof.

Overcoming a DIME Opinion, Generally

E. The finding of a Division Independent Medical Examiner (DIME) may be overcome only by clear and convincing evidence. (CRS 8-42-107(8)(c). "Clear and convincing" evidence is stronger than a preponderance, is unmistakable, and is free from serious or substantial doubt. *Martinez v. Triangle Sheet Metal, Inc.* (W.C. 4-595-741, ICAO, October 8, 2008)*, citing Dilco v. Koltnow,* 613 P. 2d 318 (1980). A mere difference of medical opinions is insufficient. *Medina-Weber v. Denver Public Schools* (W.C. 4-782-625. ICAO May 24, 2010). The question whether a party has overcome the DIME by clear and convincing evidence is one of fact for the ALJ's determination. *Metro Moving and Storage Co. V. Gussert,* 914 P.2d 411 (Colo. App. 1995.

F. The decisions of a DIME physician are only to be given presumptive effect when provided by the statute. Maximum Medial Improvement is defined at 8-40-201(11.5), C.R.S. as: "a point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." When a course of treatment has a reasonable prospect of success and a claimant willingly submits to such treatment, a finding of MMI is premature. *See, Reynolds v. ICAO,* 794 P.2d 1080 (Colo. App.1990). The definition of MMI found in the above section contains two components or requirements for a finding of MMI; first, that the condition resulting from the injury be stable and secondly, that no further treatment is reasonably expected to improve the condition. The use of the conjunctive "and" in the definition of MMI connotes that both stability of the condition and the absence of further treatment reasonably expected to improve the condition must be present in order for MMI to exist.

Have Respondents overcome the DIME Opinion on MMI?

The ATP's MMI Determination

G. Claimant initiated the DIME process after being placed at MMI by Dr. Kurz. After the first visit, despite continuing, [but improving, due to chiropractic appointments] complaints of right, upper thoracic pain while running, Dr. Kurz assessed Claimant's complaints to be muscle strains and contusions, all of which were fully resolved. He assigned no work restrictions, no impairment, and no medical maintenance.

H. After Claimant insisted on a second visit, Dr. Kurz attributed Claimant's ongoing complaints to non-work-related causes. The only non-work-related activity in the records is running while training for triathlons. Claimant reported no intervening *injuries.* Dr. Kurz' rationale, it appears, is that since Claimant experiences pain while running, the running itself must, ipso facto, be the injurious *cause* of his ongoing symptoms – to the point of reporting 8/10 pain, and numbness running the entire length of Claimant's right arm. The ALJ finds this reasoning to be highly unpersuasive. Claimant then rightfully advocated for an MRI. When it was finally ordered, some evidence of structural damage was noted. By the time this MRI occurred, there was no

way to determine if such damage was acute in nature, shortly after his work altercation. *As a standalone proposition,* the ALJ finds that Claimant was *not at MMI* when he was discharged by Dr. Kurz, and referred outside the Workers Compensation system.

Dr. Weinstein

I. In summary, Dr. Weinstein found that Claimant has suffered *injuries,* including tendonitis in his right rotator cuff and right biceps. The MRI revealed right labral tearing, and myofascial inflammation of his right scapular rotators-which he felt could indeed by caused by compensating for his rotator cuff/biceps injuries. He found Claimant's symptoms to be consistent with the mechanism of injury, and recommended conservative measures, including injections, physical therapy, a physiatry exam, and more chiropractic treatment. The ALJ finds this to be further evidence that Claimant was not at MMI from his work injury even while in the care of Dr. Weinstein.

Dr. Ramaswamy's IME

J. Dr. Ramaswamy and Dr. Castrejon do not seem to disagree that the Claimant has a medical issue- in the form of an impingement - in his right shoulder region. They do disagree whether that condition is related to the work injury from December 4, 2017. Dr. Ramaswamy's primary argument is that he would have expected a more pronounced presentation early on, immediately after the injury. He is sincerely unable to link Claimant's complaints to the work injury. He also has a sincere disagreement with Dr. Castrejon's provisional impairment rating. The details of the DIME's impairment rating rationale [which the ALJ *provisionally* finds was successfully defended] can wait for another day, as Claimant is not at MMI. Even if Dr. Castrejon's provisional rating rationale is subject to further question, his findings on MMI are found to be persuasive.

DIME Opinion on MMI

K. The DIME report and testimony of Dr. Castrejon are very detailed and explicit in setting forth the medical issues that the Claimant has with the right side of his neck, shoulder, trapezius and scapula. Claimant at the very least sustained an aggravation, in the form of a secondary impingement, to a preexisting condition in that region of his body, as a direct result of this work altercation of December 4, 2017. He still needs medical treatment, and Dr. Castrejon and Dr. Weinstein both agree that conservative treatment is the best approach to take for now. In the best scenario, such conservative measures with a conscientious patient will result in a complete recovery, without the need to debate the merits of an impairment rating at all.

L. A mere difference of opinion regarding the causation of a medically determinable condition as a result of a compensable injury does not rise to the level of overcoming a DIME's opinion by clear and convincing evidence. Substantial evidence supports the findings of the DIME physician on the issue of MMI. Respondent has not sustained his burden of proof of overcoming the DIME opinion.

ORDER

It is therefore Ordered that:

1. The DIME opinion of Dr. Castrejon has not been overcome. Claimant is not at MMI.

2. Respondents shall provide all reasonable, necessary, and related medical treatment in order to return Claimant to MMI.

3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 19, 2019

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

- Compensability.
- Average weekly wage.
- Claimant seeks penalties for "Failure to insure and Failure to file General Admission of Liability and Final Admission of Liability."

FINDINGS OF FACT

1. Employer is a disability-owned business that provides maintenance and logistics services to government facilities in Colorado and other states. Mr. Worley, who owns the majority stake in the company, is legally blind. Ms. Bridget Worley is the vice president and handles most of the day-to-day operations of the company.

2. Claimant worked for Employer maintaining the rest stops on I-25 between Colorado Springs and Pueblo. On April 29, 2016, he slipped on ice and fell while putting garbage into a garbage can. He had tried to clear the ice with a shovel earlier that morning, but the ice reformed because he did not have any salt available. Claimant fell into the trash can on his right side, injuring his right shoulder and ribs.

3. The accident occurred at approximately 10:00 AM. Claimant reported the injury to his supervisor via telephone, and was referred to Emergicare in Pueblo. He was working alone at the time of the accident and no one was available to relieve him, so he worked until the end of his shift at 2:00 PM before going to Emergicare.

4. Dr. J. Douglas Bradley at Emergicare was Claimant's primary ATP. Dr. Bradley initially referred Claimant to physical therapy, which was not helpful. Dr. Bradley then referred Claimant to Dr. Michael Simpson, an orthopedic surgeon, who performed right shoulder rotator cuff repair in September 2016.

5. Claimant participated in approximately eight months of physical therapy after surgery. His symptoms improved but did not completely resolve.

6. Claimant underwent a Functional Capacity Evaluation (FCE) on June 1, 2017. The FCE demonstrated work abilities ranging from sedentary to medium level, depending on the task. The therapist also obtained shoulder range of motion measurements.

7. Dr. Bradley placed Claimant at MMI on June 9, 2017. He assigned permanent restrictions of lifting and carrying up to 20 pounds, but only 10 pounds overhead. He opined Claimant had suffered permanent impairment and noted "PPI due 6/23/2017." The ALJ interprets this to mean Dr. Bradley would complete an impairment

report by June 23, 2017. Dr. Bradley opined Claimant required maintenance care in the form of "Aleve 220mg BID for 3 months."

8. There is no impairment rating report from Dr. Bradley or any other Level II provider in the evidentiary record. The ALJ does not know whether Dr. Bradley ever completed the report, and if so, what the final rating would be. There is no persuasive evidence Employer ever received a copy of an impairment rating report.

9. Employer did not have workers' compensation insurance in effect at the time of Claimant's injury. Ms. Worley credibly testified Employer's insurance policy with Pinnacol Assurance was unpaid and lapsed due to an oversight. Employer usually had workers' compensation insurance except a short period around the time of Claimant's accident. Ms. Worley credibly testified Pinnacol Assurance reinstituted Employer's policy and has continuously insured Employer through the date of the hearing. The ALJ finds Employer's lack of insurance at the time of Claimant's accident was due to an honest mistake, and Employer had no intention to shirk its legal obligation to maintain workers' compensation coverage.

10. Employer ultimately paid a penalty to the Division of Workers' Compensation due to its temporary lack of insurance coverage.

11. Employer did not file a General Admission of Liability or a Notice of Contest regarding Claimant's injury.

12. Employer personally covered Claimant's injury-related medical expenses. Employer's exhibits show it paid more than $24,000 in medical bills to multiple providers. Claimant's health insurance may have paid some charges, but Ms. Worley credibly testified Employer paid every medical bill presented to it. Claimant conceded he had no unreimbursed out-of-pocket medical expenses related to his injury.

13. Claimant did not return to work for Employer after April 29, 2016. He was on restrictions and physically unable to perform his regular job since his initial visit with Emergicare. Although he could not work, Employer continued to pay Claimant's full wages through the date of MMI. In fact, Employer paid full wages until Claimant was formally terminated on January 31, 2018. There is no persuasive evidence Claimant suffered any injury-related wage loss before he was put at MMI.

14. Claimant presented no persuasive evidence he suffered any harm because of Employer's failure to admit or deny liability.

15. At the time of his injury, Claimant worked part-time and earned $9 per hour. He had the potential to work up to 28 hours per week, but his actual hours fluctuated based on the amount of work that needed to be done. Claimant testified he generally worked approximately 24 hours per week. Ms. Worley credibly testified Claimant averaged 24 hours per week, which equates to an average weekly wage of $216.

16. Claimant proved he suffered a compensable injury to his right shoulder on April 29, 2016.

17. Claimant's average weekly wage (AWW) is $216.

18. Claimant failed to prove Employer should be penalized for failure to timely admit or deny liability.

19. Claimant failed to plead his penalty claim for failure to file a Final Admission of Liability with specificity.

20. Claimant failed to prove Employer violated any rule or statute requiring it to file a Final Admission of Liability.

21. Claimant failed to prove a basis for a 50% increase in compensation for Employer's failure to carry workers' compensation insurance at the time of his injury.

CONCLUSIONS OF LAW

A. Compensability

To receive compensation or medical benefits, a claimant must prove he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). As found, Claimant proved he suffered a compensable injury to his right shoulder at work on April 29, 2016.

B. Average Weekly Wage

Section 8-42-102(2) provides compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But § 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that is most appropriate under the circumstances. The entire objective of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993).

As found, Claimant's AWW is $216. Both parties agree Claimant was earning $9 per hour at the time of his accident. Claimant proposes to calculate his AWW based on the maximum 28 hours he could have worked in a week. Thad would result in an AWW of $252. Employer noted Claimant frequently worked less than 28 hours per week, which Claimant conceded in his testimony. Employer averaged Claimant's actual earnings over a period of time and calculated $216 per week. The ALJ concludes Employer's methodology of calculating Claimant's AWW is the most accurate and appropriate.

C. Penalties for failure to admit or deny

Claimant asks that Employer be penalized for "failure to file [a] . . . General Admission of Liability." The ALJ presumes Claimant is referring to penalties under § 8-43-203 for failure to timely admit or deny liability. The employer must admit or deny liability

within 30 days after it learns of an injury that results in "lost time from work for the injured employee in excess of three shifts or calendar days." Section 8-43-101; 8-43-203(1)(a). Under § 8-43-203(2)(a), an employer "may become liable" to the claimant "for up to one day's compensation for each day's failure" to file an admission or notice of contest with the Division.

The phrase "may become liable" means imposition of penalties under § 8-42-203(2)(a) is discretionary. *E.g., Gebrekidan v. MKBS, LLC*, W.C. No. 4-678-723 (May 10, 2007). The purposes of requiring the employer to admit or deny liability are to notify the claimant he is involved in a proceeding with legal ramifications, and to notify the Division of the employer's position so the Division can exercise its administrative oversight over the claim process. *Smith v. Myron Stratton Home*, 676 P.2d 1196 (Colo. 1984). Two important purposes of penalties in general are to punish the violator and deter future misconduct. *May v. Colorado Civil Rights Commission*, 43 P.3d 750 (Colo. App. 2002). The ALJ should consider factors such as the reprehensibility of the conduct and the extent of harm to the non-violating party. *Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005). The penalty should not be constitutionally excessive or grossly disproportionate to the violation found. *Dami Hospitality, LLC v. Industrial Claim Appeals Office*, 442 P.3d 94 (Colo. 2019). The claimant bears the burden of proof to establish circumstances justifying the imposition of a penalty under § 8-43-203(2)(a). *Pioneer Hospital v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005).

Claimant failed to prove Employer should be penalized under § 8-43-203(2)(a). Although Employer did not file an admission of liability, it paid injury-related medical expenses and continued to pay full wages without interruption. The ICAO has previously held that payment of benefits is a mitigating factor the ALJ can consider regarding imposition of a penalty. *Lightle v. Sonic Drive In*, W.C. No. 4-416-066 (June 30, 2000). In *Lightle*, the ICAO noted "[a]rguably, voluntary payment of temporary disability and medical benefits, and the claimant's receipt of these payments, alerted the claimant that she was involved in a proceeding with legal ramifications. Further, these payments may have diminished the financial injury which the claimant would have incurred had the insurer simply ignored all responsibility to the claimant." Here, Claimant presented no persuasive evidence of any prejudice he suffered because of Employer's failure to formally admit or deny liability. In fact, Claimant received a windfall because Employer continued to pay full wages after the accident rather than the lower TTD rate. Claimant proved a technical violation of the statute, with no actual harm. Finally, the ALJ notes Claimant has neither requested nor been awarded any compensation in this matter. He suffered no wage loss so he is not entitled to any TTD. If the reference metric for any penalty is "up to one day's compensation" per day, it seems incongruous and unnecessarily punitive to impose a penalty where the Claimant has not actually been awarded any compensation.

D. Penalties for failure to file a Final Admission of Liability

Claimant also seeks penalties against Employer for "failure to file [a] . . . Final Admission of Liability." The ALJ concludes this claim lacks merit for two reasons. First, Claimant did not specify any rule or statute he believes Employer violated, or identify the provision under which he requests penalties. For purposes of this discussion, the ALJ assumes Claimant seeks penalties under the "general penalty" provision at § 8-43-304(1). But any application for hearing on penalties "shall state with specificity the grounds on which the penalty is being asserted." Section 8-43-304(4). The specificity requirement serves two functions. First, it notifies the alleged violator of the basis of the claim so it may cure the violation within the statutory timeframe. Second, it ensures the alleged violator receives notice of the legal and factual bases for the penalty claim to protect its due process rights to present evidence, confront adverse evidence, and present argument to support its position. *Jakel v. Northern Colorado Paper, Inc.*, W.C. No. 4-524-991 (October 6, 2003).[1] The party seeking a penalty must plead the appropriate statutory section or rule justifying the penalty claim. *Carson v. Academy School District 20*, W.C. No. 4-439-660 (April 28, 2003). A penalty claim may be dismissed if it does not state the grounds for the alleged penalty with sufficient specificity. *E.g.*, *Maragara v. Xerox Business Services*, W.C. No. 4-946-815-02 (January 27, 2015); *Young v. Bobby Brown Bail Bonds*, *Inc.*, W.C. No. 4-632-376 (April 7, 2010); *Marcelli v. Echostar Dish Network*, W.C. No. 4-776-535 (March 2, 2010).

The ALJ concludes Claimant failed to plead his penalty claim with sufficient specificity. The point of the specificity requirement is to ensure the opposing party can readily ascertain *from the initial pleading* the exact factual and legal theory upon which the penalty claim is based. Although Claimant described of the conduct he believes should be penalized, *i.e.*, failing to file a Final Admission of Liability, his application invoked no specific provision of the Act that imposes a penalty, nor referenced any rule or statute requiring Employer to file a FAL. In *Jordan v. Rio Blanco Water Conservancy District*, W.C. No. 4-937-000-01 (June 23, 2015), the Panel held that a party seeking penalties under the general penalty provision must explicitly cite § 8-43-304(1). Noting that the Act contains a variety of penalty sections, the Panel held:

> A statement of the particular penalty remedy sought is a critical element of the grounds for the penalty claim. The direction that the specific grounds for the penalty be identified in the application would include specification of the penalty sought to be applied . . . . The claimant's pleading regarding a penalty claim was deficient to the extent it did not identify § 8-43-304(1) as the statutory penalty section for which she sought a penalty . . . .

Second, Claimant failed to prove Employer violated any rule or statute requiring it to file a FAL at a specified time. WCRP 5-5(E)(1) requires a FAL be filed "within 30 days after the date of mailing or delivery of a determination of impairment by an authorized

[1] These concerns are particularly pertinent in this case, with a *pro se* employer with no legal training who cannot reasonably be expected to fill in the details of a vague penalty claim with its own knowledge of applicable law.

Level II accredited physician . . . .” But WCRP 5-5(A) requires “[w]hen the final admission is predicated upon medical reports, he completed physician’s report of Worker’s Compensation injury form, *a narrative report* and *appropriate worksheets* shall accompany the admission.” (Emphasis added). Although Dr. Bradley completed a WC164 report on June 9, 2017 indicating Claimant had permanent impairment, he did not provide a rating. Instead, he stated the rating report would be forthcoming within two weeks. Claimant presented no persuasive evidence to show Dr. Bradley ever completed the report, whether such a report was ever sent to Employer, and if so, when it was sent. Even assuming Employer received the WC164 form, it could not file a FAL until it received the narrative report and appropriate worksheets. Moreover, under WCRP 5-5(E)(1)(b), Employer can request a DIME within 30 days after the impairment report is sent to it, in which case no FAL is required. Thus, Claimant failed to prove the predicate facts necessary to trigger any duty on Employer’s part to file a FAL, and therefore, did not prove a basis to impose penalties under the general penalty provision.

E. Increased compensation for failure to insure

The statue in effect at the time of Claimant’s injury provides that if the employer had no workers’ compensation insurance at the time of a claimant’s accident, “the amounts of compensation or benefits . . . shall be increased fifty percent.” Section 8-43-408(1) (2015). The fifty percent penalty for failure to insure only applies to indemnity benefits; it does not apply to medical benefits. *Industrial Commission v. Hammond*, 77 Colo. 414, 236 P. 1006 (1925); *Jacobson v. Doan*, 319 P.2d 975 (Colo. 1957); *Wolford v. Support, Inc*., W.C. No. 4-155-231 (February 13, 1998). Claimant suffered no compensable wage loss and did not establish entitlement to any indemnity benefits. Thus, the fifty percent increase under § 8-43-408(1) based on Employer’s lack of insurance coverage is inapplicable.

ORDER

It is therefore ordered that:

1. Claimant’s right shoulder injury on April 29, 2016 is compensable.

2. Claimant’s average weekly wage is $216.

3. Claimant’s request for penalties pursuant to § 8-43-203(2)(a) is denied and dismissed.

4. Claimant’s request for penalties for failure to file a Final Admission of Liability is denied and dismissed.

5. Claimant’s request for increased compensation based on Employer’s failure to insure is denied and dismissed.

6. All issues not decided herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 20, 2019

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Did Claimant prove his worsened psychological condition after he was put at MMI on January 16, 2017 was causally related to his December 10, 2016 industrial accident?

- Did Claimant prove entitlement to TTD benefits commencing March 22, 2017?

- Did Claimant prove entitlement to medical benefits related to psychological treatment beginning March 22, 2017?

STIPULATIONS

1. Claimant's average weekly wage is $500.

2. The risk of an assault was within Claimant's usual work experience as a Detention Officer/Deputy Sheriff.

3. Claimant has not been diagnosed with Post Traumatic Stress Disorder (PTSD).

FINDINGS OF FACT

1. Claimant worked for Employer as a Detention Officer/Deputy Sheriff assigned to the Rio Grande County Jail. He started the job on June 20, 2016. Before that, he had been out of work for approximately two years because of a low back injury suffered in June 2014 while working for a different employer.

2. Patricia Robertson, FNP, has been Claimant's primary care provider since approximately 2007. Nurse Robertson was also Claimant's primary ATP for his 2014 low back injury.

3. Nurse Robertson and Claimant's wife had strongly counseled against taking the job as a Detention Officer because of concerns he could reinjure his back.

4. Claimant was involved in several altercations while working at the jail. Four days after he started the job, he was head-butted in the face by an inmate. He was treated at the Rio Grande Hospital emergency department for minor facial injuries and released. Another incident before Thanksgiving 2016 also resulted in Claimant going to the emergency room. In late November 2016, Claimant was "jumped" by a male inmate. He was taken to the emergency room and diagnosed with a concussion.

5. His current claim arises from a fourth incident, which occurred on December 10, 2016. Claimant and two other deputies were subduing a belligerent female inmate in her cell. During the scuffle, the inmate punched Claimant in the head and face.

6. After the assault, Claimant felt "very dizzy and unbalanced." He was taken to the Rio Grande Hospital emergency department where he complained of severe headache, dizziness, and nausea. Physical examination documented facial abrasions and slight swelling and tenderness of the upper right forehead. The ER physician, Dr. Dana Greene, diagnosed a concussion with loss of consciousness. Dr. Greene excused Claimant from work until December 14, 2016 and advised, "he should have a follow-up appointment with a doctor to clear him for return to full duty."

7. While lying on the gurney in the emergency department, Claimant decided to quit the job at the jail. He realized working as a Detention Officer was "a younger man's game," and the demands of the job required "a much younger man with quicker reflexes." Claimant concluded he was not fit for a job that required frequent physical confrontations with inmates. He thought, "if this woman could take me out, one of the men could — you know, am I going to be able to protect myself in any situation?" As "the newbie" at the jail, Claimant knew he was at risk for other injuries if he stayed there and decided it was not worth the risk. Claimant went to work the next day and resigned his position.

8. Ms. Bressman testified Claimant was "very afraid" and "afraid for his life" if he returned to work at the jail. Claimant similarly testified he was "fearful of my life." The ALJ does not find this testimony persuasive to the extent it is intended to imply Claimant's decision to quit was borne out of an intense fear reaction to the December 10, 2016 assault. While it is reasonable to infer Claimant had some level of worry or concern about the prospect of additional injuries, the ALJ credits Dr. Kleinman's opinion the decision to quit was not driven by a fear response from the assault. The decision to resign his position was not related to the work incident; rather, it was related to Claimant's reasoned decision he was not fit for the job.

9. Employer referred Claimant to Dr. Kent Lofley after the accident. Claimant's initial visit with Dr. Lofley was on December 14, 2016. Claimant reported ongoing concussive symptoms and daily headaches. Claimant denied depression, feeling stress, or personality changes. The physical examination was unremarkable. Dr. Lofley diagnosed a concussion and advised Claimant to take Tylenol as needed for his headaches. Dr. Lofley released Claimant back to work with restrictions on lifting and standing and walking.

10. Claimant returned to Dr. Lofley on December 30, 2016 and reported the headaches had resolved. Claimant told Dr. Lofley he quit his job after the altercation because he did not want to "put himself in harm's way." He reported sleep disturbance but denied depression or feeling stressed. Dr. Lofley prescribed hydroxyzine for sleep and lifted Claimant's work restrictions.

11. At his January 16, 2017 appointment, Claimant admitted to Dr. Lofley he had insomnia and fatigue before the work accident. He was having no further symptoms related to the concussion, so Dr. Lofley put Claimant at MMI and released him from care.

12. Claimant has a lengthy history of depression pre-dating the December 2016 accident. He was the victim of physical, emotional, and sexual abuse as a child, and struggled with suicidal ideation "since he was a teenager." He "worked with a counselor in the 1990's until that counselor was arrested and never went back to due feeling insecure about counseling due to the nature of his last counselor being arrested." There is also an indication in the record he was on antidepressants in 2001.

13. In December 2014, Nurse Robertson started treating Claimant for depression. She diagnosed situational depression that she attributed to ongoing chronic back pain from the June 2014 injury. She started him on sertraline (Zoloft) 100mg daily, and subsequently increased the dose to 150mg. On February 23, 2015, she noted he was still having depression and mood swings. The 150mg dose of sertraline made the depression worse, so Nurse Robertson switched him to Lexapro.

14. On March 25, 2015, Claimant reported minimal improvement in his depression and was still having "dramatic" mood swings weekly where "[he] goes from fine one minute and the next crying like a baby."

15. In June 2015, Nurse Robertson discontinued the Lexapro because Claimant felt it was "not working" and "depression is getting worse." Claimant reported depression, irritability, and crying spells, and often without provocation. She put Claimant back on sertraline.

16. Claimant tried to wean off sertraline on October 1, 2015. His back pain was 1-2/10, and with his pain under control, he wanted to come off the medication.

17. Nurse Robertson's October 29, 2015 report indicates the attempt at weaning failed, and Claimant's mood became significantly worse after the first week at a slightly lower dose. On January 4, 2016, Nurse Robertson stated she expected Claimant would need to remain on sertraline "long term."

18. Claimant discussed the detention officer job with Nurse Robertson on November 30, 2015. She strongly discouraged Claimant from taking the job because of his back injury and history.

19. On February 8, 2016, Claimant reported his depression was worse because his workers' compensation claim had not settled. He was irritable and crying easily despite being "on max dose" of sertraline.

20. Nurse Robertson's July 11, 2016 report indicates Claimant had again tried to wean from his antidepressant and sleep medication. His depression and insomnia got worse, so he resumed his normal dose.

21. Claimant returned to Nurse Robertson on October 12, 2016. His depression was "much improved," and he was enjoying his job at the jail. Claimant was once again trying to wean off the sertraline and had reduced his dose to 100mg per day. He was not sleeping well despite Lunesta.

22. Claimant's prescription records show he never stopped sertraline and stayed at the same dose for several months. He was still taking sertraline at the time of his December 2016 work accident.

23. After he quit his job in December 2016, Claimant did not even consider returning to work until well after the New Year. Ms. Bressman testified, "it was right before Christmas, and everybody knows that the end of the year is just crazy. Really, nobody's even thinking about hiring anyone." In January 2017, Ms. Bressman broached the subject of getting another job, but Claimant said "he needed a little bit more time because he was uncomfortable about leaving the house."

24. Claimant's mental status decompensated severely in late January or early February 2017. He became more and more isolated and unwilling to go out in public. He started living in an unheated pop-up camper parked outside his home.

25. On March 22, 2017, Claimant returned to Nurse Robertson in severe distress. He said, "his life is falling apart. His wife wants to leave him and states 'he's crazy.'" He had no motivation and "still isn't sleeping." His back had started hurting again. Nurse Robertson noted he had resigned his job at the jail because "he felt it wasn't worth jeopardizing his life." Claimant felt he had "lost himself" and wanted to see a counselor. Nurse Robertson increased the Sertraline to 200mg, although she was "not sure this will help." Nurse Robertson made an urgent referral to a therapist. She opined, "I am concerned we are dealing with PTSD. I also think not having a job is wearing on his self-esteem."

26. Increasing the sertraline was not helpful, and Claimant's mental condition continued to deteriorate. He started using marijuana heavily. He became increasingly depressed, paranoid, suicidal, homicidal, and delusional. Claimant took at least two long "camping" trips to the mountains and tried to commit suicide. The family's financial situation got more and more desperate, compounding his psychological problems. At some point in early 2018, his mental state stabilized somewhat and Claimant and his son planned to homestead. This was to include growing and selling marijuana-related products. Ms. Bressman's family (the owners of the property) refused to allow Claimant to grow marijuana on the property, so the family moved to the Arkansas Valley hoping to find land. Claimant's attempts to find employment or income continued to fail.

27. Claimant reached a breaking point in September 2018 when he became abruptly enraged, psychotic, and homicidal about arrangements to sell his camper. On September 17, 2018, he was taken by police to the HRRMC emergency department put on an M-1 hold. He was admitted to the Highlands Behavioral Health Inpatient Psychiatric Unit the next day. He reported auditory hallucinations "all the time," including "arguments in his head" for "years." Other symptoms included depression, suicidal thoughts,

increasing anger, inability to sleep, delusions, paranoia, and homicidal ideation. He reported a history of physical and sexual abuse by his father, which he did not want to discuss. He was prescribed antipsychotics (Zyprexa, Risperdal), a mood stabilizer (Depakote), anti-anxiety medication (Lorazepam), and an antidepressant (Effexor).

28. Claimant was released from the psychiatric hospital on October 1, 2018, but returned on October 4 because of increasing depression, suicidal ideation, anxiety, and irritability. His medications were adjusted, including changing the antipsychotic from Zyprexa to Haldol. He was released on October 12, 2018 and started outpatient treatment. At some point, another antipsychotic medication, Invega, was added to his regimen.

29. Claimant saw Dr. Robert Kleinman for a psychiatric IME on March 19, 2019 at Respondents' request. Claimant displayed significant cognitive impairment and psychomotor retardation, which was probably related to medication but could reflect a lack of effort. His mental status examination score raised was consistent with dementia, which Dr. Kleinman opined was not supported by Claimant's injury or the medical records. When asked why he quit his job at the jail, Claimant replied, "That's a young man's game." Claimant initially indicated he had no mental health issues before the 2016 work injury, but conceded the history when confronted with the medical records. Based on his presentation and inconsistencies in the record, Dr. Kleinman deemed Claimant an unreliable historian. Dr. Kleinman noted Claimant was treated for depression and insomnia before and at the time of the 2016 accident. Despite treatment, he continued to suffer from depression, mood swings, and chronic insomnia. Dr. Kleinman noted,

> Therapy and treatment with a psychiatrist were warranted prior to the injury of 12/10/16. Long-term use of mood stabilizing medications was warranted, as well. If he had seen a psychiatrist for medication management, it is likely that he would have been more effectively treated with mood stabilizing medicines.

30. Dr. Kleinman saw no indication Claimant suffers from PTSD. He thought Claimant's heavy marijuana use contributed to his declining mental state. Dr. Kleinman stated, "with the increased use of cannabis, unstable and improperly treated mood disorder, on top of the stress of marital separation and homelessness, [Claimant] had a psychotic episode."He opined the December 2016 did not cause, aggravate, or exacerbate his pre-existing condition, and his worsened mental reflected "the natural course of an inadequately and inappropriately treated mood disorder."

31. Dr. Kleinman diagnosed bipolar affective disorder, recurrent severe major depression with psychotic features, and cannabis use disorder. Dr. Kleinmant's rationale for diagnosing bipolar disorder was,

> [Claimant] reported that prior to the injury he had mood instability with periods of agitation and irritability followed by depression, with periods of euthymia. He had periods of decreased sleep and increased energy lasting a few days. In the past, he was diagnosed with major depression, though

> with this new information in addition to the recent psychotic episode, it appears that he had a bipolar affective disorder.

32. Dr. Kleinman noted, "[Claimant's] depression and mood instability waxed and waned. At times antidepressants were beneficial, and at other times they made him worse. Efforts to taper off were met with decompensation." He opined, "[Claimant] required treatment for his mental health disorder prior to and regardless of the occupational injury. He does not require any psychiatric treatment relative to the 12/2016 incident." Dr. Kleinman concluded,

> [Claimant's] mental illnesses lifelong and biological. It was inadequately treated until the hospitalization of 2018. Now that he is on proper medications, his mood is stable, but flat with significant side effects. He requires frequent appointments with a psychiatrist for medication management to find a balance between risk and benefit. This treatment, and any accompanying individual and marital treatment, is unrelated to the occupational injury and outside the scope of workers' compensation.

33. Dr. Kleinman testified at hearing, and provided opinions consistent with those expressed in his IME report.

34. Claimant underwent an IME with Dr. Stephen Moe at his counsel's request on April 3, 2019. Claimant displayed a generally flat affect with minimal psychomotor activity. He reported paranoia and some visual hallucinations but did not exhibit signs of psychosis during the interview. Dr. Moe considered Claimant a reliable historian, noting he "provided a coherent narrative of important events in chronological order that, with the help of some cuing that I provided using information contained in his records, was very useful in understanding the course of his feelings, cognition, and behaviors over time." Claimant reported he enjoyed working at the jail and thought it was "fun." He told Dr. Moe he quit the job after the December 2016 assault because,

> [W]hile lying on the gurney in the emergency department, he decided that he could no longer continue to work at the county jail. As to the basis for that decision, he stated he concluded that working at the jail was a "much younger man's game" given the demands of the job. The claimant had also come to realize that as "the newbie" at the jail, he was singled out for abuse and limit-testing.

35. Ms. Bressman confirmed she had strongly urged Claimant to quit because "to continue to put himself in harm's way would be ridiculous." Dr. Moe explored the possibility Claimant's mental decompensation was caused by the concussion, but noted,

> He opined that the effects of the concussion had an influence on his mental state at the time, although he could not articulate how the effects of a concussion mediated his psychiatric symptoms. (I raised the possibility of becoming demoralized by persistent post-concussive symptoms, and also

the possibility that the effect of the concussion on his brain simply caused him to feel depressed, but he did not have an opinion on the matter.)

36. Dr. Moe ultimately concluded Claimant's severe decompensation in early 2017 was a proximate result of the December 2016 accident. He explained his rationale as,

> [Claimant's] injury of 12/10/16 abruptly changed his fortunes for the worse. In suffering a concussion, which followed a previous head-butt injury involving his nose, he reasonably concluded that he would continue to be at risk working at the jail, a conclusion reinforced by his wife. In short, he was rendered too fearful to return to that line of work. [This outcome resulted, regardless of whether the claimant's fear of reinjury is captured by the diagnosis of PTSD (a possibility raised by Patricia Robertson), an Adjustment Disorder, or no psychiatric diagnosis at all.]
>
> In my opinion, the fear about the risk of reinjury was not itself the cause of the enduring psychiatric symptoms that followed. Instead, anxiety related to no longer feeling safe working as a Deputy Sheriff functioned as the spark that ignited a process that generated a sustained negative emotional state. . . . [T]hat process involved the nexus of unemployment and depressive symptoms, each of which was reinforcing of the other. In being rendered unemployed by fear generated by the assault, [Claimant] began to experience the negative effects of a loss of self-esteem, and absence of a sense of purpose, and the loss of a source of gratifying activity, leading to a recurrence of depressive symptoms as first documented by Ms. Robertson. In turn, the return of his depressive disorder effects caused [Claimant] to withdraw from family and others, retreat to an isolated existence of the mountains, and to give up on looking for work.
>
> Accordingly, it is my opinion that the workplace assault was the proximate cause of [Claimant's] mood symptoms and related behaviors (including his suicide attempts) during the first half of 2017, which I would account for with the diagnosis of Major Depressive Disorder, recurrent.
>
> [Claimant's] medical records and the information that he and his wife provided to me depict a stabilization, and even some improvement, in his depressive disorder by the first part of 2018. . . . [H]owever, a series of decisions that grew out of the plan to create a homestead caused the claimant's mental state to slide rapidly downward, culminating in another recurrence of his Major Depressive Disorder, which in late 2018 was accompanied by psychotic symptoms.
>
> Whereas the aggregation of negative outcomes from the various choices that [Claimant] made with his family were the acute drivers of his depressive symptoms in 2018, the impetus for all that followed was the decision to create a homestead. And in my opinion that decision was the product of

desperation created by the claimant's inability to find work in the wake of the loss of his job at the Rio Grande County Jail. As such, his work injury figures into the severe depressive disorder for which [Claimant] obtained a great deal of psychiatric treatment in 2018.

37. Dr. Kleinman's opinions regarding the cause of Claimant's psychiatric decompensation beginning in early 2017 are credible and more persuasive than the contrary opinions offered by Dr. Moe and Nurse Robertson.

38. Claimant failed to prove his worsened psychiatric condition starting in January or February 2017 was causally related to the December 2016 occupational injury.

CONCLUSIONS OF LAW

As a threshold matter, the ALJ concludes the special rules in § 8-41-301(2) regarding mental impairment claims do not apply to this claim because Claimant suffered a concomitant physical injury. The term "physical injury" contemplates an independently disabling injury to the claimant's person, not merely a coincidental and nondisabling insult to the body. *Goudett v. Stationers Distributing Company*, W.C. No. 4-135-027 (April 5, 1993). Claimant suffered a concussion from the December 10, 2016 assault, and was taken off work for three days. Thereafter, Dr. Lofley assigned work restrictions for two weeks. These facts establish a "physical injury" within the meaning of § 8-41-301(2). Accordingly, Claimant's entitlement to the TTD and medical benefits commencing March 22, 2017 is governed by a standard causation analysis.

To obtain disability or medical benefits, a claimant must prove a work-related accident "proximately caused" the condition for which he seeks benefits. Section 8-41-301(1)(c). A claimant must establish a "causal nexus" between the industrial injury and the disability. *Singleton v. Kenya Corp*., 961 P.2d 571 (Colo. App. 1998). The injury need not be the sole cause of a disability, but must be a "significant" factor in that there is a "direct causal relationship" between the injury and the disability or need for treatment. *See Subsequent Injury Fund v. Industrial Claim Appeals Office*, 131 P.3d 1224 (Colo. App. 2006) (defining proximate cause in the context of a death case); *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001) (defining proximate cause in the context of permanent total disability); *Siefried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986) (industrial injury must be "significant causative factor" of permanent total disability); *Krendel v. Hulcher Services*, W.C. No. 4-744-188-03 (November 4, 2014). Where the claimant has from a pre-existing condition, the claimant can still recover benefits if the industrial injury aggravates, accelerates, or combines with the pre-existing condition to cause disability or the need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990).

As found, Claimant failed to prove his psychological decompensation in approximately late January or February 2017 was proximately caused by his December 10, 2016 industrial accident. The post-injury treatment records show no immediate psychological sequela directly caused or aggravated by the work accident. Claimant suffered from depression since at least mid-2014. He also has a history of childhood

abuse and struggled with suicidal ideation “since he was a teenager.” Claimant was actively treating for major depressive disorder and taking high doses of sertraline a few months before the accident. He had tried to wean unsuccessfully from the medication multiple times, most recently in October 2016 (two months before the accident). As Dr. Kleinman explained, sertraline was ineffective at different doses, suggesting problems beyond mere depression, such as an undiagnosed bipolar disorder. Claimant subsequently spiraled into extreme depression and psychosis, and it required Depakote and antipsychotic medications to stabilize his mental state in late 2018. This indicates a genetically based mental health condition as opposed to situational depression or an adjustment disorder. The ALJ credits Dr. Kleinman’s opinion that Claimant’s worsened mental state starting in approximately February 2017 reflected the natural progression of his inadequately treated pre-existing condition, and was not a proximate consequence of the work accident. Dr. Moe does not ascribe the decompensation directly to the accident, such as the effects of a head injury or PTSD. Rather, he opined anxiety about further injury sparked a “reinforcing” cycle of unemployment and worsening depression. Dr. Moe’s theory of proximate cause is unpersuasive. Claimant’s decision to quit was not prompted by any injury-related psychological condition, but was a rational decision based on the realization the job was not appropriate job for him, and that staying there could expose him to other injuries. After quitting, Claimant chose not to look for work for reasons having nothing to do with any lingering effects of the accident. To the extent losing his job triggered or exacerbated Claimant’s downward spiral, it was not causally related to the work injury. Furthermore, the ALJ agrees with Dr. Kleinman that Claimant’s mood disorder would probably have relapsed regardless of the work accident.

While there is no doubt Claimant was severely disabled and required mental health treatment commencing in March 2017, his disability and need for treatment were not proximately caused by the December 10, 2016 accident.

ORDER

It is therefore ordered that:

1. Claimant’s request for TTD benefits commencing March 22, 2017 is denied and dismissed.

2. Claimant’s request for medical treatment for his psychological condition beginning March 22, 2017 is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the

certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 20, 2019

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-085-791-002

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on September 12, 2019, in Denver, Colorado. The hearing was digitally recorded (reference: 9/12/19, Courtroom 1, beginning at 1:30 PM, and ending at 5:00 PM). The official Serbo-Croatian/English Interpreter was Jovo Popara.

Claimant's Exhibits 1 through 7 were admitted into evidence, without objection. The ALJ sustained Respondents' objection to Claimant's Exhibit 8 and it was rejected. Respondents' Exhibits A through O were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant. It was filed, electronically, on September 17, 2019.. On September 19, 2019, Respondents filed objections. After a consideration of the proposed decision and the objections thereto, the ALJ has modified the proposal and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern: (1) whether the Claimant has sustained functional impairment beyond the arm so as to justify conversion of the admitted 15% right upper extremity (RUE) scheduled impairment to a 9% whole person impairment? and, (2 whether the Claimant is permanently and totally disabled.

The Claimant bears the burden of proof, by a preponderance of the evidence, on both issues.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. Prior to August 13, 2018, the Claimant had no ongoing symptoms or functional limitations in her right shoulder (RUE).

2. The Claimant arrived in the United States approximately 20 years ago, coming from Serbia. She is 61 years old, having a date of birth of June 12, 1958. The Claimant has limited English language skills.

3. The Claimant obtained a high school degree in Serbia and since arrival in the United States approximately 20 years ago has performed two jobs, that of a trimmer (of clothing) and that of a housekeeper.

4. On August 13, 2018, the Claimant sustained an admitted compensable injury to her right shoulder and low back in her employment as a cleaner when she was taking garbage outside to place it in the dumpster. While placing the garbage into the dumpster, the Claimant fell and had immediate pain in her right shoulder and low back.

5. The Claimant commenced medical care through the Respondents' designated medical providers at Concentra and was eventually released at maximum medical improvement (MMI) on February 12, 2019, assigned an impairment rating and permanent work restrictions of "may lift up to 10 pounds frequently, may lift up to 25 pounds occasionally, no repetitive overhead lifting with right arm."

6. On March 11, 2019, the Respondents filed a Final Admission of Liability (FAL) adopting the 15% RUE impairment rating assigned by authorized treating physician (ATP) Lynne Yancey, M.D., and leaving the claim open for maintenance medical care [Claimant's Exhibit 3, Bate Stamp (BS) 6-19].

7. On March 20, 2019, the Claimant accepted the FAL but maintained that she was permanently and totally disabled (Claimant's Exhibit 4, BS 20).

8. On March 22, 2019, the Claimant filed an Application for Hearing alleging that her permanent partial disability (PPD) award should be treated as a whole person impairment based on the situs of functional impairment and alleging that she was permanently and totally disabled due to the fact that at "age 60 with a high school education from Serbia and permanent work restrictions," she was unemployable (Claimant's Exhibit 2, BS 1-2).

9. On April 19, 2019, the Respondents filed a Response to Application for Hearing asserting that the Claimant was not permanently and totally disabled and challenging the Claimant's request to convert her extremity impairment rating into a whole person impairment rating.

Medical Treatment Prior to MMI

10. On August 13, 2018, immediately following the Claimant's admitted industrial injury, she was evaluated at the Employer's designated medical provider Concentra by physician's assistant (PA) Ashley A. Gonzalez and provided a working diagnosis of right shoulder strain and strain of the lumbar region (Respondents' Exhibit E, BS 43).

11. On October 12, 2018, the Claimant underwent an MRI (magnetic resonance imaging) of the right shoulder without contrast which reflected a "partial-thickness intrasubstance tear of the supraspinatus tendon at the distal insertion without retraction" and a subacromial-subdeltoid bursitis (Respondents' Exhibit C, BS 22-23).

12. On October 16, 2019, following the Claimant's MRI, her diagnosis from ATP Lynne Yancey, M.D., at Concentra was that of rotator cuff injury, strain of the lumbar region, and pain aggravated by anxiety (Respondents Exhibit E, BS 118).

13. On October 18, 2018, the Claimant was evaluated by Mark Failinger, M.D., at the request of ATP Dr. Yancey, and Dr. Failinger noted:

> Thank you for allowing me to see [Claimant] for consultation for right shoulder. As you know, she is a 60-year-old right-hand dominant. She is from Bosnia, so interpreter is here today. She states she injured her right shoulder back on 08/13/2018 in a job as a housekeeper. She was taking a very heavy trash bin out to a dumpster, and it was very heavy, she states maybe 50-60 pounds and she rolled it up and tried to take some of the trash out to lighten the load, and when she lifted this up, she thinks it weighed 50-60 pounds. She felt some neck and shoulder pain as she did that. The can did slip. She fell onto the can onto her right side. She states she had pain in the right lower hand and right shoulder. She went to Concentra and she was taken

off work. She had physical therapy, but that was canceled. She had an MRI of the right shoulder. She does have somebody looking at her back, it is Dr. Allison Fall, but she had a falling out and apparently no treatment was rendered, she states. She states she has pain in neck and she has pain in the shoulder. She has pain while sitting here it is 8/10 on a 0-10 scale, with 0 being no pain and 10 being the most severe pain you can imagine. There is worse pain with reaching. This is night pain. There are areas of neck pain. There is decreased range of motion and strength.

* * *

IMAGING: MRI of the right shoulder shows some rotator cuff tendinosis and subacromial bursitis.

IMPRESSION:

1. Cervical pain with periscapular pain and pericervical pain.
2. Right shoulder rotator cuff tendinosis.
3. Right shoulder AC joint strain.

RECOMMENDATIONS: With such a diffuse pattern of pain, I would recommended an evaluation by a physiatrist to look at the neck and see if there are things that have to be worked up there.

(Respondents' Exhibit E, BS 124 and 126).

14. On November 13, 2018, as recommended by ATP Dr. Failinger, the Claimant was evaluated by Scott Primack, D.O., a physiatrist who gave a diagnosis of:

DIAGNOSIS:

1. Cervical spine.
   A. At best, there has been a sprain/strain.
   B. MRI essentially unremarkable.
   C. Subjective symptoms as described.
2. Lumbar spine.

A. MRI essentially unremarkable.

B. The patient clearly has nonphysiologic findings.

C. Subjective symptoms as described.

3. Right shoulder.

A. It is apparent that the patient does not have a surgical shoulder.

B. The patient does have a partial thickness rotator cuff tear.

C. Subjective symptoms as described.

DISCUSSION: I had a long conservation through the interpreter with [Claimant and her husband]. I would not provide any type of injection therapy at the level of the shoulder. However, it would allow the patient to have some form of electrical therapy for pain control. This is issue of pain control, however, she will not get better with physical therapy, occupational therapy or any type of surgical intervention.

(Respondents' Exhibit E. BS 131).

15. According to the Claimant, after discussions with her physicians, she chose not to have the injection into her right shoulder.

16. On November 21, 2018, ATP Dr. Yancey kept the Claimant's assessment at that of rotator cuff injury, strain of lumbar region and pain aggravated by anxiety (Respondents' Exhibit E, BS 135).

17. ATP Dr. Yancey also referred the Claimant to Joel Cohen, Ph.D., a clinical psychologist, who on November 27, 2018 noted:

Today through my office at Concentra Advanced Specialists, I had occasion to see [Claimant] for a 45-minute injury-related psychotherapy session. She is accompanied to the office by a professional interpreter. Overall from a behavioral perspective, the client's presentation is essentially unchanged. She continues to walk with a very guarded gate pattern. I did, by the way, see her today with the interpreter, but without her husband. Prior to the visit, I reviewed most recent notes from Dr. Burris and Dr. Failinger. She also saw Dr. Scott Primack, but I could not apparently secure copy of that report, although I have requested one.

> Relative to Dr. Failinger's report by the way, he examined I believe the right shoulder, did not feel as though surgery was warranted, but did offer the option of a steroid injection, although the client chose instead to opt for the use of what she called in Dr. Failinger's presence an electrical stimulator as proposed by Dr. Primack. This was in fact a TENS unit and she brings it with her today. Hence at that point, relative again referring back to Dr. Failinger, she did not want to try the injection. For the record by the way, I defer obviously to Dr. Failinger in relationship to the direction of her medical care and psychologically at least pleased that she is not considered a surgical candidate because her psychological presentation would suggest that there would be major behavioral impediments to surgical response.
>
> * * *
>
> I have to wonder whether or not some of this has to do with behavioral response to pain, over-focus on the pain, anxiety around the situation she finds herself in, coupled with alteration in movement patters, which unfortunately likely as not the muscles tight and potentially painful. Otherwise, I would like to see the client back if only to assist her where possible in terms of accommodating to what the likely outcome of this whole process may be; and if in fact that is the case, then I also may want to involve her husband because acceptance for both may well be a relevant issue.

(Respondents Exhibit E, BS 143-144).

18. On January 24, 2019, the Claimant underwent a Functional Capacity Evaluation (FCE) requested by ATP Dr. Primack which found that the Claimant demonstrated the ability to occasionally lift 2 pounds from waist to shoulder, carry up to 2 pounds, push 6.7 pounds of force and pull 12.5 of force. The Claimant was unable to lift from floor levels due to increased pain levels reflection. Of note, the functional capacity evaluator noted: "[d]uring unaware observation, she did not demonstrate the ability to perform any tasks that she reported unable to perform. Functional movements such as sit to stand transfers, gait mechanics, forward bending, stair climbing etc. were all consistent throughout the testing" (Claimant's Exhibit 6, BS 29)

19. On January 29, 2019, the Claimant was evaluated and released from care by ATP Dr. Primack, who rendered the opinion that the Claimant had a partial rotator cuff tear and, therefore, was entitled to 15% RUE impairment rating, which would

convert to a 9% whole person impairment rating. ATP Dr. Primack stated the opinion, however, that "one could not place any type if impairment to the neck or back given the plethora of inconsistent/non-physiological findings." ATP Dr. Primack assigned work restrictions of safely lifting up to 25 pounds occasionally, 10 pounds frequently and no repetitive lifting with her right arm overhead (Claimant's Exhibit 3, BS 15-16).

20. Following completion of medical care with ATP Psychologist Cohen, ATP Dr. Primack, and ATP Dr. Failinger, ATP Dr. Yancey released the Claimant on February 12, 2019 at MMI with an assessment of "rotator cuff injury, strain of lumbar region and somatic symptom disorder" and adopted ATP Dr. Primack's work restrictions and impairment rating" (Respondents' Exhibit E, BS 169-175).

Respondents' Independent Medical Evaluation

21. Prior to the hearing, Respondents had the Claimant evaluated by Linda Mitchell, M.D., who testified at the hearing consistently with her report. (Respondents Exhibit A) that in her opinion, Dr. Yancey and Dr. Primack were in error to assign the Claimant permanent work restrictions, were in error to assign the Claimant impairment, but confirmed that the Claimant's working diagnosis was that of a right shoulder strain and somatoform disorder. Dr. Mitchell had no specific expertise in psychiatry or psychology, other than a Level II accredited occupational physician's knowledge. Therefore, the ALJ accords minimal weight to the "somataform disorder" working diagnosis.

22. Dr. Mitchell testified on the definition of somatoform disorder and how it involved an injured individual's response to an injury.

23. The ALJ finds the opinions of Dr. Yancey and Dr. Primack, ATP's, more credible and persuasive than the opinions of Dr. Mitchell.

Respondents' Vocational Evaluation

24. The Respondents retained the services of Katie Montoya, vocational expert. Montoya testified at hearing consistently with her report that there was work available to the Claimant in the commutable job market, in spite of the fact that the Claimant had never driven, does not retain a driver's license and would require some job accommodation due to her language (Claimant's Exhibit 7). The ALJ specifically finds that Montoya did, in fact, consider the human factors attendant to the Claimant's situation, however, the ALJ finds the opinions of Cynthia Bartmann, Claimant's vocational expert, more persuasive.

25. During cross-examination, Montoya agreed that if the Claimant was limited to 2 pounds lifting, there are no jobs available in the commutable market. It was a premise to Montoya's opinion, however, that the restrictions assigned to the

Claimant by ATPs Dr. Yancey and Dr. Primack would permit the Claimant to return to her job as a house cleaner and that work was reasonably available to the Claimant. The ALJ rejects this opinion concerning employability because the Claimant cannot drive to assignments, speaks very limited English, is 61 years old and the ALJ does not find Montoya's consideration of the human factors adequately supported or persuasive.

Claimant's Vocational Evaluations

26. At the request of the Claimant, the Claimant was evaluated by Cynthia Bartmann, CCM, CDS (Claimant's Exhibit 4).

27. Vocational evaluator Bartmann testified consistently with her report that when one considers the human factors including the Claimant's age, limited English and work restrictions from her FCE (Functional Capacities Evaluation) that the Claimant was precluded from competitive work in the competitive labor market as a result of her admitted industrial injury.

28. Based on Bartmann's vocational research, personal evaluation of the Claimant and the medical records, she was of the opinion that the Claimant is permanently and totally disabled. In fact, on cross-examination, Bartmann implied that even if the two-pound lifting restriction of the FCE was taken away and the restrictions were only those set forth by ATPs Dr. Primack and Dr. Yancey, the Claimant would still be unemployable at age 61 with her presentation and demeanor in combination with her permanent work restrictions and past work history, inability to drive, and lack of a facility for the English language.

Ultimate Findings

29. Based on the Claimant's un-contradicted testimony, and the opinions of ATPs Dr. Yancey and Dr. Primack, the Claimant has not established that her right shoulder impairment is a whole person impairment. It is implied from ATP Primack's medical record, assigning the impairment, that when he noted that he could not rate the neck or back that he was implying that the 15% extremity impairment rating was appropriate. The ALJ finds the opinions of Dr. Yancey and Dr. Primack vis a vis permanent impairment more credible and persuasive than the opinions of Dr. Mitchell, whose opinions were contrary.

30. Between conflicting vocational opinions, the ALJ makes a rational choice, based on substantial evidence, to accept the ultimate opinion of Cynthia Bartmann, and to reject the ultimate opinion of Katie Montoya.

31. Considering the human factors, which vocational expert Bartmann focused on, in combination with the restrictions from ATPs Dr.Yancey and Dr. Primack, as well as the FCE results (excluding the two-pound lifting restriction), the Claimant has established that she is unemployable in the open, competitive job market on a

reasonably sustainable basis and she is, therefore, permanently and totally disability.

32. Katie Montoya's opinions that there was employment in the commutable labor market, which some employers may modify to accommodate Claimant's limitations, contains too many modifications and does not amount to employment in the open, competitive job market on a reasonably sustainable basis. Therefore, although Montoya considered the human factors in a conclusory fashion, Bartmann's ultimate opinion is more credible than Montoya's ultimate opinion. Thus,

31. The Claimant is 61 years-old, she speaks Serbo-Croatian, she has a high school education from Serbia. She has only worked two jobs since arriving in the United States. In the competitive job market with her current restrictions, and the inability to drive, the ALJ finds that in light of the permanent physical restrictions imposed by Drs. Yancey and Primack, plus the human factors specified herein above, the ALJ determines that the Claimant has proven, by a preponderance of the evidence, that the Claimant is permanently and totally disabled.

32. The Claimant has proven, by a preponderance of the evidence, that she is incapable of earning wages in the open competitive job market in the same, similar, or any employment and she is, therefore, permanently and totally disabled.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, 2012 COA 85. The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or

unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the opinions of Dr. Yancey and Dr. Primack vis a vis permanent medical impairment were more credible and persuasive than the opinions of Dr. Mitchell, whose opinions were contrary. As further found, Katie Montoya's opinions that there was employment in the commutable labor market, which some employers may modify to accommodate Claimant's limitations, contains too many modifications and does not amount to employment in the open, competitive job market on a reasonably sustainable basis. Therefore, although Montoya considered the human factors in a conclusory fashion, Bartmann's ultimate opinion was more credible than Montoya's ultimate opinion.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting vocational opinions, the ALJ made a rational choice, based on substantial evidence, to accept the ultimate opinion of Cynthia Bartmann and to reject the ultimate opinion of Katie Montoya.

Conversion to Whole Person Medical Impairment

c. Where a claimant suffers an injury not enumerated in § 8-42-107 (2),

C.R.S., the claimant is entitled to whole person impairment benefits under § 8-42-107 (8), C.R.S. In the context of § 8-42-107(1), C.R.S., the term "injury" refers to the manifestation in a part or parts of the body which have been functionally impaired or disabled as a result of the industrial accident. *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996); *Martinez v. Albertsons*, W.C. No. 4-692-947 [Indus. Claim Appeals Office (ICAO), June 30, 2008]. The determination of the site of functional impairment is distinct from a claimant's medical impairment rating; and, upper extremity impairment ratings contained in the *AMA Guides* may, or may not, be consistent with the scheduled injury ratings contained in § 8-42-107(2), C.R.S. *See Mountain City Meat Co. v. Oqueda*, 919 P.2d 246 (Colo. 1996). Indeed, there is a disconnect between the statutory schedule ("at or below the shoulder') and the *AMA Guides*. For this reason, the ICAO and the Court of Appeals came up with 'the site of functional impairment" test.

d. When an injury results in a permanent medical impairment not set forth on a schedule of disabilities, an employee is entitled to medical impairment benefits paid as a whole person. See § 8-42-107 (8)(c), C.R.S. Section 8-42-107(1)(a), C.R.S., limits medical impairment benefits to those provided in section (2) where a claimant's injury is one enumerated in the schedule. The schedule of injuries includes the loss of the "*arm at the shoulder*". See § 8-42-107(2)(a), C.R.S. The "shoulder," and "above the shoulder" is not listed in the schedule of impairments. *See Martinez v. Albertsons, supra; Maree v. Jefferson County Sheriff's Department*, W.C.No. 4-260-536 (ICAO, August 6, 1998); *Bolin v. Wacholtz*, W.C.N0. 4-240-315 (ICAO, June 11, 1998).

e. Whether a claimant has suffered the loss of an arm at his shoulder within the meaning of § 8-42-107(2)(a), C.R.S., or a whole person medical impaiby the ALJ on a case by case basis. *See DeLaney v. Indus. Claim Appeals Office*, 30 P.3d 691 (Colo. App. 2000); *Martinez v. Albertson's, supra*; *Keebler Company v. Indus. Claim Appeals Office*, 02CA1391 (Colo. App. 2003) (NSOP).

g. As implied from ATP Primack's impairment rating where he states that the Claimant's impairment rating is 15% extremity and does not include a neck or shoulder rating, Claimant has not established functional impairment beyond the glenohumeral joint. Therefore, the Claimant has failed to prove, by preponderant evidence that a conversion from 15% RUE to a whole person rating is warranted.

Permanent Total Disability

h. An employee is permanently and totally disabled if she is unable to earn any wages in the same or other employment. § 8-40-201(16.5) (a) C.R.S. The "full responsibility rule," applicable to claims for permanent total disability benefits, provides that the industrial injury need not be the sole cause of a claimant's permanent total disability. Under the rule, when an "employer hires an employee who, by reason of a pre-existing condition or by reason of a prior injury, is to some extent disabled, he takes the man (person) with such handicap," and the employer is liable for a "full award of benefits" if a subsequent industrial injury combines with the pre-existing disability to

produce permanent total disability. See *United Airlines, Inc. v. Indus. Claim Appeals Office,* 993 P.2d 1152, 1154-1155 (Colo. 2000). The only exception to the established rule is where the industrial injury is not a significant causative factor in the claimant's disability. See *Seifried v. Indus. Comm'n,* 736 P.2d 1262 (Colo. App. 1986) [the claimant suffered from several pre-existing ailments, and the treating physician opined that the claimant had reached maximum medical improvement, and concluded that the claimant remained disabled because of non-occupational factors].; *Lindner Chevrolet v. Indus. Claim Appeals Office,* 914 P.2d 496 (Colo. App. 1995). *See also Holly Nursing Care Center v. Indus. Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999). As found, The Claimant has proven, by a preponderance of the evidence, that she is incapable of earning wages in the open competitive job market in the same, similar, or any employment and she is, therefore, permanently and totally disabled.

i. In determining whether a claimant is permanently and totally disabled, an ALJ may consider the claimant's "human factors," including the claimant's age, work history, general physical condition, education, mental ability, prior training and experience, and the availability of work that the claimant could perform. *Weld County School District RE-12 v. Bymer,* 955 P.2d 550 (Colo. 1998*); Joslin's Dry Goods Co. v. Indus. Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001). The term "any wages" means more than zero wages. *See Lobb v. Indus. Claim Appeals Office,* 948 P.2d 115 (Colo. App. 1997); *McKinney v. Indus. Claim Appeals Office,* 894 P.2d 42 (Colo. App. 1995). The critical test is whether employment exists that is reasonably available to a claimant under his or her particular circumstances. *Weld County School Dist. Re-12 v. Bymer*, *supra*. This means whether employment is available in the competitive job market, which a claimant can perform on a reasonably sustainable basis. *See Joslins Dry Goods Company v. Indus. Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001). As found, the Claimant has proven that he is incapable of earning wages in the competitive labor market, on a reasonably sustainable basis, and there is no work reasonably available to her. Permanent total disability does not necessarily need to be proven by medical evidence. *See Baldwin Construction, Inc. v. Indus. Claim Appeals Office,* 937 P.2d 895 (Colo. App. 1997). *Calvert v. Roadway Express, Inc.,* W.C. No. 4-355-715 [Indus. Claim Appeals Office (ICAO), November 27, 2002]; *In re Claim of Randy Blocker v. Express Personnel,* W.C. No. 4-622-069-04 (ICAO, July 1, 2013). As further found, the human factors as specified hereinabove compel a conclusion that the Claimant is incapable of earning wages in the open, competitive job market on a reasonably sustainable basis. Therefore, she is permanently and totally disabled.

Burden of Proof

j. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits beyond those admitted by the carrier.. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979).

People v. M.A., 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has failed to prove that a conversion from 15% scheduled RUE to a whole person medical impairment is warranted. Nonetheless, Claimant's medical impairment is subsumed under her permanent total disability.

k. The Claimant has proven, by a preponderance of the evidence that she is permanently and totally disabled (PTD), having reached MMI on February 12, 2019.

l. The admitted average weekly wage (AWW) of $432.36 establishes a PTD weekly benefit rate of $288.24.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Any and all claims for a conversion of 15% scheduled right upper extremity are hereby denied and dismissed.

B. Respondents shall pay the Claimant permanent total disability benefits of $288.24 per week from September 19, 2019 and continuing for the rest of the Claimant's natural life.

C. The payout for the admitted scheduled 15% right upper extremity was at the rate of $310.00 from February 12, 2019 through September 18, 2019. The excess payout, as measured against the permanent total disability benefit rate was $21.26 per week, or $3.04 per day. The period from February 12, 2019 (the beginning of the admitted scheduled payout of $310 per week) through September 18, 2019, a total of 219 days, resulted in an overpayment of scheduled benefits in the aggregate amount of $665.76 for this period of time.

D. Respondents are entitled to a credit of 100% for all scheduled permanent disability benefits paid through September 18, 2019, plus for the excess of $665.76, which may be recovered out of ongoing permanent total disability benefits from September 19, 2019, at the rate of $15.00 per week until satisfied with no interest applicable.

E. Any and all issues not determined herein are reserved for future decision.

DATED this 23rd day of September 2019.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-092-972-001

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

[Redacted],

Claimant,

v.

[Redacted],

Employer,

and

[Redacted],

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on August 1, 2019, in Denver, Colorado. The hearing was digitally recorded (reference: 8/1/19, Courtroom 1, beginning at 8:30 AM, and ending at 12:00 PM).

The Claimant was present in person and represented by [Redacted], Esq. Respondents were represented by [Redacted], Esq. and Gabriel Kalousek, Esq.

Hereinafter [Redacted] shall be referred to as the “Claimant." [Redacted] shall be referred to as the “Employer.” All other parties shall be referred to by name.

Claimant’s Exhibits 1 –10 were admitted into evidence at the commencement of the hearing, without objection. Respondents’ Exhibits A-M were admitted into evidence, without objection.

A transcript of the post-hearing evidentiary deposition of Frederick Scherr, M.D., taken on August 22, 2019, was filed in lieu of his live testimony (herein after referred to a “Scherr Depo., followed by a page number).

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After a consideration of the evidence in record and the facts before the Court, the ALJ hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern: compensability; if this claim is found compensable, whether Claimant has proved that the need for medical treatment was proximately caused by the October 31, 2018 incident; and, whether the Claimant proved that she was discharged for non-medical reasons by her treating physician.

The Claimant bears the burden of proof, by a preponderance of the evidence, on all issues.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Finding

1. At the commencement of the hearing, the parties stipulated and the ALJ finds that "[i]f this claim is found to be compensable, the average weekly wage will be $1,098.87" and the ALJ so finds. Also, "the issue of temporary disability benefits was withdrawn as an issue."

The Incident

2. On October 31, 2018, while working at the University of Colorado Health, the Claimant attempted to ride an on-premise elevator that malfunctioned on its way from the first floor to the ninth. On its way up, at floor eight, the elevator retreated back down to answer a call on the second floor instead of delivering the Claimant to the ninth floor.

3. As evidenced by the elevator security camera tape, the Claimant experienced two jolts while riding the elevator. The jolts occur at 0:29 and 0:54 in the 1:45 minute-long security tape video.

4. The Claimant reacted to the first jolt by scanning her employee badge and pressing the elevator's emergency call button. During her time on the elevator, the Claimant stood in the same spot, and never lost her grasp on her cellphone. When the elevator doors eventually opened on the proper floor, the Claimant exited the elevator.

Medical

5. The Claimant immediately reported the injury to her employer and was seen at the University of Colorado Health Emergency Department within a few hours.

The Claimant complained of pain in her neck and back. Claimant reported that these symptoms started immediately following the incident in the elevator.

6. On November 5, 2018, the Employer completed a First Report of Injury, noting the nature of the Claimant's injury, including that the Claimant reported that the elevator dropped 1-3 floors during the incident.

7. On November 7, 2018, the Claimant visited Dr. Henry Roth, M.D., the Employer's designated authorized treating physician. Following this visit, the Claimant emailed the Employer's Worker's Compensation Program Manager requesting a change of physician, which was denied by the Employer.

8. After filing a Worker's Compensation Claim with her Employer and being denied, the Claimant visited her Primary Care Physician, Kaiser, and subsequently underwent physical therapy, massage therapy, utilized a TENS unit, and had injections to alleviate her neck and back pain.

9. Previously, in 2011, Claimant sought treatment through Kaiser for neck and back issues. These issues were reported by Claimant in 2014, 2015, 2016, and 2017. The Claimant did not seek treatment for neck or back issues from June 2017 until October 2018.

Frederick Scherr, M.D,, Respondents' Independent Medical Examiner (IME)

10. Dr. Scherr performed an IME of the Claimant, at Respondents' request, on June 13, 2019.

11. Dr. Scherr listened to the Claimant's version of the incident and noted that the Claimant reported "her low back, especially the left side, was worse [following the incident] but that it was [her] entire low back as well as the neck and the thoracic back as well." Scherr. Depo. 8, 20-22. Dr. Scherr observed moderate pain behaviors during his examination of Claimant. In his examination of the Claimant, he found very minimal objective findings, but did note diffuse tenderness of the trapezia and around L4 on her left side, and limited range of motion with her back.

12. Ultimately, Dr. Scherr is of the opinion that the elevator incident did not cause the problems with the Claimant's back and neck. By necessary implication, his opinion negates work-relatedness. For the reasons articulated throughout these Findings, the ALJ rejects Dr. Scherr's opinions.

Faranghise S. Bahnage, M.D,, Claimant's Primary Care Physician (PCP)

13. On November 1, 2019, the date after her injury, Claimant consulted with her PCP regarding the elevator incident and her resulting injury. Claimant reported neck and back pain and continued to report the presence of such pain on December 10, 2018 and December 20, 2018.

14. On January 7, 2019, Dr. Bahnage noted Claimant's persistent back pain and ordered a lower back MRI and physical therapy. At various appointments in February and April, 2019, the Claimant continued to report symptoms in her neck and back, and a worsening of those symptoms over time. Throughout these visits, the Claimant continuously reported that she experienced these symptoms since the occurrence of the elevator incident.

Compensability

15. The totality of the credible evidence supports the proposition that the Claimant sustained a compensable injury by virtue of the elevator incident on October 31, 2018.

16. Although the Claimant had experienced pre-existing lower back issues, Claimant had not seen a doctor for over a year prior to her work injury. Claimant testified that she had instant pain and that the incident aggravated her lower back issues. The Claimant sought treatment throughout 2018 and 2019 for her neck and back pain, beginning immediately after the incident.

17. The ALJ finds Claimant's before and after condition is credible and convincing. While the elevator incident does appear to be minor, Claimant immediately reported the incident to her doctor on the day of its occurrence. Claimant testified credibly that she was in shock after the incident and tried to exit the elevator as soon as possible. Claimant testified that the unexpected jolts caused her immediate symptoms, for which she has continuously sought treatment for approximately ten months since the incident.

18. The ALJ find that although there are contrary opinions regarding whether this elevator incident caused Claimant's injury, the ALJ finds Claimant's testimony credible and persuasive. The ALJ finds that Claimant has proven by a preponderance of the evidence that on October 31, 2018, she sustained a compensable injury.

19. the ALJ finds that Claimant has proven by a preponderance of the evidence that the medical treatment she has received through Kaiser is reasonable, necessary, and related to her compensable injury. The ALJ finds that Claimant has proven by a preponderance of the evidence that Respondents, through Dr. Roth, refused to treat her for nonmedical reasons The ALJ finds that Claimant has proven by a preponderance of the evidence that Kaiser is an authorized treating physician.

20. The medical treatment the Claimant has received through Kaiser and Dr. Bahnage is reasonably necessary, and causally related to her compensable injury. The ALJ finds that Claimant has proven by a preponderance of the evidence that Dr. Roth refused to treat the Claimant for non-medical reasons, specifically, because the insurance carrier was denying the claim.

Ultimate Findings

21. The Claimant's testimony was persuasive, credible and supported by the medical records of Kaiser. The opinions of Dr. Roth and Dr. Scherr lacked credibility because of their erroneous assumptions that they could observe no jolt in the elevator nor outward signs of pain manifested by the Claimant. Respondents would have us believe that there is an unknown cause of the Claimant's present condition and that Claimant is disingenuously manufacturing the elevator incident to address her pre-existing condition. A before-and-after evaluation of the Claimant's condition renders this theory implausible.

22. Between conflicting testimony and opinions, based on substantial evidence, the ALJ makes a rational choice to accept the Claimant's testimony as supported by the Kaiser records and Dr. Bahnage of Kaiser, and to reject the opinions of Dr. Roth and Dr. Scherr.

23. The Claimant has proven, by preponderant evidence that she sustained a compensable aggravation and acceleration of her underlying back and neck condition to the point that Claimant required medical treatment resulting from the October 31, 2018 elevator incident.

24. The Claimant's original ATP, Dr. Roth, refused to further treat the Claimant for non-medical reasons, specifically, because the insurance carrier denied the Claimant's claim. Thereafter, Respondents failed to offer the Claimant subsequent medical care and treatment. Thus, the Claimant selected Kaiser for the treatment of her work-related back and neck aggravation and she came under the care of Dr. Bahnage. Consequently, Kaiser became an authorized treater and Dr. Bahnage became the ATP.

25. The Claimant's AWW is $1,098.87.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558

(Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the opinions of Claimant and Dr. Bahnage were more credible and persuasive than the opinions of Dr. Roth and Dr. Scherr. As further found, the Claimant's testimony was persuasive, credible and supported by the medical records of Kaiser. The opinions of Dr. Roth and Dr. Scherr lacked credibility because of their erroneous assumptions that they could observe no jolt in the elevator nor outward signs of pain manifested by the Claimant. As found, Respondents would have us believe that there is an unknown cause of the Claimant's present condition and that Claimant is disingenuously manufacturing the elevator incident to address her pre-existing condition. A before-and-after evaluation of the Claimant's condition renders this theory implausible.

b. In *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997), the Court of Appeals dealt with a situation wherein the injured worker could proceed no further with medical treatment and evaluations because the employer and the treating physician took the position that because the claimant had resigned employment, she was **not** entitled to further evaluations. Ultimately, the Court of Appeals concluded that a medical opinion was not necessary to prove causation because imposing such a requirement would be reading something into the statute that was not there. *See Jacoby v. Metro Taxi, Inc.,* 851 P.2d 245 (Colo. App. 1993). § 8-41-301, C.R.S., which specifies the conditions necessary for a compensability determination (this would include the compensability of a medical procedure or diagnostic tests) does **not** provide that a medical opinion is necessary to make such a determination. As observed in *Lymburn*, to require a medical opinion to support a causality determination would be to read something into the statute that does not exist. Consequently, *Lymburn* remains good law. As found, the Claimant's lay testimony was persuasive and supported by Kaiser records.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting opinions, the ALJ made a rational choice, based on substantial evidence, to accept the testimony of the Claimant and the opinions of Dr. Bahnage, and to reject the opinions of Dr. Scherr and Dr. Roth.

Aggravation of Pre-Existing Condition

c. A compensable injury is one that arises out of and in the course of employment. § 8-41-301(1) (b), C.R.S. The "arising out of" test is one of causation. If an industrial injury aggravates or accelerates a preexisting condition, the resulting disability and need for treatment is a compensable consequence of the industrial injury. Thus, a claimant's personal susceptibility or predisposition to injury does not disqualify the claimant from receiving benefits. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). An injured worker has a compensable new injury **if the employment-related activities aggravate, accelerate, or combine with the pre-existing condition to cause a need for medical treatment or produce the disability for which benefits are sought.** § 8-41-301(1) (c), C.R.S. *See Merriman v. Indus. Comm'n,* 120 Colo. 400, 210 P.2d 448 (1949); *Anderson v. Brinkoff,* 859 P.2d 819 (Colo. 1993); *National Health Laboratories v. Indus. Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992); *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). An injury resulting from the concurrence of a preexisting condition and a hazard of employment is compensable. *H & H Warehouse v. Vicory*, *supra*. *Duncan v. Indus. Claims App. Office*, 107 P.3d 999 (Colo. App. 2004). Even where the direct cause of an accident is the employee's preexisting disease or condition, the resulting disability is compensable where the conditions or circumstances of employment have contributed to the injuries sustained by the employee. *Ramsdell v. Horn*, 781 P.2d 150 (Colo.App. 1989). *Also see* § 8-41-301(1) (c), C.R.S; *Parra v. Ideal Concrete,* W.C. No. 4-179-455 [Indus. Claim Appeals Office (ICAO), April 8, 1998]; *Witt v. James J. Keil Jr.,* W.C. No. 4-225-334 (ICAO, April 7, 1998). As found, the elevator, jolting incident aggravated and accelerated Claimant's underlying back and neck condition, thus, the incident caused a compensable injury.

Compensability

d. In order for an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Office,* 919 P.2d 207, 210, 210 (Colo. 1996). An injury "arises out of' employment if it would not have occurred **but for** the fact that the conditions and obligations of employment placed the employee in a position that he or she was injured." *See City of Brighton v. Rodriguez,* 318 P.3d 496, **2014 CO 7** [presumption that an injury arises out of employment when an unexplained injury occurs during the course of employment]. Thereupon, it is incumbent to show that non-work related factors caused the injury. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1) (c), C.R.S. *See Faulkner v. Indus. Claim Appeals Office,* 24 P.3d 844 (Colo. App. 2000)*; Eller v. Indus. Claim Appeals Office*, 224 P.3d 397, 399 (Colo. App. 2009); *Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277, 1279 (Colo. App. 2008). The question of causation is generally one of fact for determination by an ALJ. *Faulkner* at 846; *Eller* at 399-400. As found, the Claimant sustained a compensable aggravating injury on October 31, 2018, resulting from the elevator incident and this injury arose out of the course and scope of the Claimant's employment for the Employer herein.

Medical Benefits and Authorized Provider

e. Because this matter is compensable, Respondents are liable for medical treatment that is reasonably necessary to cure or relieve the effects of an industrial injury. § 8-42-101(a), C.R.S.; *Snyder v. Indus. Claim Apps. Office*, 942 P.2d 1337 (Colo. App. 1997). To be a compensable benefit, medical care and treatment must be causally related to an industrial injury. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, Claimant proved by a preponderance of the evidence that the medical treatment she has received through Kaiser and Dr. Bahnage for her lower back and neck conditions is causally related to her October 31, 2018 industrial injury. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, Claimant has sustained her burden and proven that the medical treatment she has received through Kaiser and Dr. Bahnage for her lower back and neck conditions is reasonably necessary to cure and relieve the effects of her October 31, 2018 injuries..

f. Finally, because Respondents, through Dr. Roth, denied Claimant medical treatment and refused Claimant medical treatment for nonmedical reasons, Claimant's treatment through Kaiser is not only reasonable, necessary and related but authorized in light of Respondent's refusal to treat Claimant. Kaiser, Claimant's PCP, is an authorized provider. Dr. Roth is not an authorized treating physician. To be

authorized, all referrals must remain within the chain of authorized referrals in the normal progression of authorized treatment. *See Mason Jar Restaurant v. Indus. Claim Appeals Office,* 862 P. 2d 1026 (Colo. App. 1993); *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P. 2d 501 (Colo. App. 1995); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). When an ATP refers an injured worker to his personal physician, under the mistaken belief that the claim was not compensable, the referral was nonetheless within the chain of authorized referrals and, thus, subsequent treatment was authorized. *See Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277 (Colo. App. 2008). In other words, the ATP is refusing to treat for non-medical reasons. Thereafter, if the carrier does not offer a subsequent treater as is the case herein, the injured worker may select a new treater as was done here. The Claimant selected Kaiser and Dr. Bahnage.

g. The Claimant's stipulated and found AWW is $1,098.87.

Burden of Proof

h. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 (ICAO, March 20, 2002). *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained her burden with respect to compensability, that the need for medical treatment was proximately caused by the October 31, 2018 incident, and that she was discharged for non-medical reasons by her treating physician.

ORDER

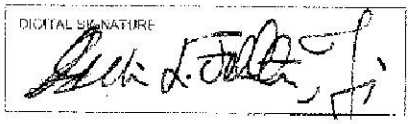
IT IS, THEREFORE, ORDERED THAT:

A. Respondents shall pay all the authorized medical costs of causally related treatment for the neck and back aggravating injuries of October 31, 2018, sustained a consequence of the elevator incident of October 31, 2018, subject to the Division of Workers' Compensation Medical fee Schedule.

B. The Claimant's average weekly wage s $1,098.87.

C. Any and all issues not determined herein are reserved for future decision.

DATED this 23rd day of September 2019.



_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that he sustained a traumatic injury to his lower back arising out of and in the course and scope of his employment with respondent on December 16, 2018?

II. If Claimant has shown that he sustained a compensable traumatic lower back injury, has he proven, by a preponderance of the evidence, that the specific medical benefits provided by C.C.O.M. Pueblo for his low back diagnoses are causally related to, and reasonably necessary to treat, his work injury occurring on December 16, 2018?

III. If Claimant has proven a compensable injury, has he proven, by a preponderance of the evidence, that the specific medical benefits provided by Pueblo Community Health Center are authorized?

STIPULATIONS

Assuming the ALJ finds the injuries to be compensable,

I. Claimant's Average Weekly Wage is $590.00.

II. Claimant would be entitled to Temporary Partial Disability ("TPD") benefits from December 18, 2018 to January 18, 2019.

III. Claimant would be entitled to Temporary Total Disability ("TTD") benefits from January 19, 2019, and ongoing to any applicable offsets. The issue of offsets is not before the ALJ at this time.

IV. Respondents reserved the Workers Compensation Fee Schedule for any awarded medical benefits.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Claimant worked for the Employer as a grocery clerk. This position required a lot of stocking of new products that would arrive at night. Claimant had been working for the Employer for approximately three years prior to December 16, 2018. His date of birth is 3/26/1958. At hearing, Claimant testified that, prior to December 16, 2018, his back never impacted his ability to perform any of his work duties for the Employer.

2. Claimant testified he was on vacation from the Employer for the week before, beginning Sunday, December 9, 2018. Claimant spent most of his time off finishing his Christmas shopping and wrapping presents. He reported no injury to his lower back during this time, nor did he have any pain in his back during his time off.

3. Claimant returned to the Employer's store on Friday, December 14, 2019 to see his upcoming work schedule. This required him to walk up and down a flight of stairs in the store, approximately 15 steps each way. Claimant testified that he had no problems climbing or going down the flight of stairs. He now reports his ability to walk up and down stairs changed dramatically after December 16, 2019.

4. Claimant testified that he began work at approximately 6:00 a.m. on December 16, 2018. On this day, he was instructed by the overnight manager to finish up with the loading by the cooler. Claimant immediately noticed that the cooler was "packed full" due to overstock that was sent to the store. Claimant was also informed that the pallets containing the items had not already been 'broken down', as they typically are when he arrives. This process requires Claimant to use a "U-boat" to put items on so that they can take them to be stocked later. There was little room to maneuver within this space, given how much floor space was occupied by the overstock.

5. Claimant was told to get cartons containing 18 eggs from the cooler into a bunker cooler on the store's sales floor as the bunker cooler was out of cartons containing 18 eggs. Claimant took an empty U-Boat into the cooler to the pallet holding the 18 count egg cartons. There were meat packages on top of the egg cartons. He moved the meat from on top of the eggs onto the U-Boat. Claimant explained he was standing still while grasping the packs of meat in front of him, and then turned to his side to put the packages of meat onto the U-Boat. He moved the U-Boat with meat in it onto the store's floor where another employee took it away. He then unstacked the eggs, two packages at a time. While standing, he 'slid' two packages of eggs at a time down his leg on to the flat top. His turning ability was limited as the eggs were in front of him, and the flat top was at his side. Claimant testified he put eight packages of eggs on to the flat top.

6. Claimant said that he spent approximately 30 to 45 minutes in the cooler performing the activities that he believes caused his injury. He explained that he had to stand, reach in front of him, grab an item, turn, and without moving his feet at all due to the cramped space, then put various items on the U-boat from the pallet. After Claimant had finished loading all his items, he got onto his knees to unload some items where they needed to be. Claimant also spent time on his knees "breaking down" the crates that the eggs came in. When he attempted to stand up, he could not feel his legs, and used his arms to help push himself to a standing position.

7. Claimant recalled the "1:00 o'clock guy" coming in right around this time, thus he believed the incident occurred shortly after 1:00 p.m., because this person would have likely clocked in at 1:00 p.m. Claimant's shift ended at 1:30 p.m. that day. The only symptom Claimant recalled experiencing before walking to the parking lot was the weakness in his legs.

8. Claimant clocked out of work at 1:30pm. He started walking to his car when, suddenly, he felt a ratcheting in his lower back and staggered into a parked car. Claimant said he had sudden, severe pain in his lower back. He did not fall. Claimant did not say he tripped, stumbled, or that anything occurred to cause this pain. It just arose as he was walking normally. He continued to walk, putting his hands on other parked cars for balance, and got to his car. He opened the driver's door, got into the driver's seat, and drove himself home. Claimant's car was parked in the designated area for the employees to park. Claimant did not report an injury at this time. Instead, he went home, knowing he had the next two days off from work. At this time, he hoped he simply strained something in his back which would resolve with rest and home remedies.

9. On cross-examination, Claimant stated he moved less than usual in the cooler to move the meat packages off the egg packages, and to slide the 18 count egg cartons on to the flat top. Claimant affirmed that he felt no lower back pain while working in the cooler, until he was walking in the store's parking lot. When he went to stand up from the well of the bunker cooler after stocking the cartons of 18 eggs in that cooler, he confirmed he eventually able to stand, and he walked away from the bunker cooler without any symptoms at all in his lower back region, legs, or anywhere else. Claimant stated he could have continued to work, but realized he had not taken his second scheduled break. So he chose to stop working, to use his break time. No symptoms caused Claimant to take this scheduled break. Claimant confirmed he worked and walked normally around the store and out into the parking lot, without any symptoms, pain, tightness, or limitations. Claimant described a similar sudden occurrence at home on December 19, 2018, when his legs became weak and gave way, causing him to fall, when he walking down stairs leaving his home. Claimant stated he had experienced pains in this lower back before December 16, 2018, and took ibuprofen or aspirin for those symptoms. Claimant also testified he always wore a lower back belt wrap while working at King Soopers to protect his lower back's muscles.

10. Claimant's symptoms instead worsened, and he sent a text to the grocery manager, "Rowan," informing him that he had injured his back at work and wanted to get in to see a doctor about it. At this time, Rowan simply told Claimant to "Take care of yourself." Claimant testified that Rowan must have informed somebody higher up, as he was subsequently contacted, and was asked to come into work to complete an incident report. Claimant reported to work and met with Steve Barkus, the assistant store manager, to complete the incident report.

11. This incident report, [apparently filled out by Mr. Barkus, but apparently signed by Claimant] stated:

> Bill was in the Dairy cooler, he was working on a split palette and standing in a small area and had to twist his back to move the meat boxes in order to get the eggs he had to stock. He did not feel any pain until he was in the parking lot going to his car after his shift. (Ex. F, p. 74).

Mr. Barkus provided Claimant with a list of medical providers to choose from, and he chose CCOM.

12. Claimant first presented for treatment at CCOM on December 19, 2018. Claimant was examined by Brendon Madrid, NP. (Ex. 5, pp. 55-64). Mr. Madrid documented the following mechanism of injury: "This is a 60-year-old male patient who suffered a low back strain on December 16, 2018. He states on that day he was unloading knee pellets [sic] and eggs in a tight space. He states that after the day Ended [sic] he Clocked [sic] out and when walking to the parking lot to his car he felt a strain in his back. He describes his current symptoms as lower back pain, heart [sic] to stand and walk." *Id.* at 55. Claimant was sitting in a wheelchair in the trauma room awaiting Mr. Madrid. *Id.* at 56.

13. Physical examination revealed tautness to the muscles on each side of his lumbar spine. Claimant was able to bend forward without much difficulty, but standing erect and straight caused moderate discomfort. Claimant was observed to have a slowed gait with mild waddling. He was noted to be using a cane, and was slightly bent forward while walking due to difficulty and discomfort when standing straight up. Claimant was placed on work restrictions and diagnosed with a lumbar strain at this time. Mr. Madrid referred Claimant immediately for physical therapy. *Id.* at 58.

14. Claimant filled out an injury history form upon arrival at CCOM for this first appointment. This form states that he was working, unloading pallets in a cramped area requiring him to turn sideways to perform his job. (Ex. 5, p. 60). Claimant was also provided with a shot of Toradol into his right gluteal muscle. *Id.* at 62.

15. The First Report of Injury states that Claimant believed he was injured due to "twisting when moving product from one location to another." (Ex. 10, p. 119). The additional form completed states that it was not until after Claimant clocked out from his shift, and was walking directly to his car when he had severe pain in his back. On the formal "Employer's First Report of Injury" form completed by Steve Barkus, it states that Claimant was walking to his car and his back went out. It also states, "[Claimant] said he twisted his back while moving boxes that day at work. Strain or injury by lifting." (Ex. H).

16. Claimant was experiencing severe low back pain on December 20, 2018, prompting him to seek treatment from St. Mary Corwin Hospital. (Ex. 4, Ex. D). The reason for the visit was handwritten by Claimant, stating, "Hurt my back at work/King Soopers." *Id.* at 10. The medical report documents:

> 60 y.o. male no significant medical history was working *aching stupors* [sic- let's go with *"at King Soopers"*- the ALJ sure does] on the 16th. Patient was lifting boxes and putting them off to the side in a twisting motion. Patient that this prolonged period of time while at work (sic). Patient states that *after* moving all the boxes he had pain to his lower back with pain shooting down both of his legs. *Patient has no history of back problems.* (Ex. D, p. 56) (emphasis added).

17. Claimant was diagnosed as having acute bilateral low back pain, with bilateral sciatica, along with osteoarthritis of the lumbar spine. *Id.* at 14. A "high sensitivity" neuro exam was performed that revealed 'positive findings of increased pain with bilateral leg abduction.' *Id* at 16. Claimant was advised to continue treating under Workers' Compensation, and to start physical therapy.

18. Claimant returned to CCOM on December 27, 2018, this time using his mother's walker to ambulate. (Ex. 5, p. 66). He was noted to be "a bit more comfortable' than on his initial visit. Claimant's physical examination of his lumbar spine showed moderate to mild discomfort, with no obvious deformities. *Id.* at 67. Approval for physical therapy was still pending at this time.

19. Claimant was first seen by a physician at CCOM, Dr. Daniel Olson, on January 10, 2019. (Ex. 5, pp. 72-77). Dr. Olsen discussed the mechanism of injury for his causation analysis:

> The proposed mechanism was that he was working out [sic] cooler trying to get out some eggs but he had to move several items and he had limited space to maneuver. He therefore had to twist at the wait to maneuver the items. He does not recall any particular spasm, pop, or tweak. He did noticeable [sic] stiffness but he was actually able to continue working. It was only after he was leaving work that he felt a sharp ratcheting type pain in his lower back and since then he's been having a great deal of back pain, difficulty standing and walking. *Id.* at 72.

Dr. Olson recommended physical therapy and noted that it had been three weeks since the original request for therapy, with no approval. *Id.* at 73.

20. In the note from CCOM dated January 10, 2019, Dr. Olson states that it had still been three weeks and therapy had not yet been approved. (Ex. 5, p. 73). Respondents issued a Notice of Contest on January 17, 2019. The Notice stated the claim had been denied due to the injury/illness not being work related. (Ex. 3).

21. After treatment was denied, Claimant sought treatment with his primary care provider – Pueblo Community Health Center ("PCHC"). (Ex. 6). Claimant went to PCHC on January 21, 2019, complaining of ongoing lower back pain. The intake report notes:

> Patient states he had [a] work related injury on 12/16/19. Patient states that he was lifting boxes and putting them to the side in a twisting motion for a prolong [sic] period of time while at work. *Id.* at 78. Claimant reported that he was supposed to undergo physical therapy under his workers' compensation claim, but that was never referred. (Ex. C, p. 36)

The treating provider at PCHC—Paulina Adjei—working under the supervision of Dr. Mark Schwartz, performed a Toradol injection and referred Claimant for his physical therapy. *Id.* at 80.

22. Claimant's physical therapy went through Centura Health's Center for Rehabilitation. (Ex. 7). Claimant's intake notes indicates:

> Bill reports he injured his back while working at King Soopers when he was in the cooler and in a narrow walkway and he lifted from overhead to his right side and left side repetitively, he was unable to turn since the walkway was so narrow. He states when he was leaving work his back gave out on him. His legs also gave out and he fell down to the steps at home on December 19…He has had constant back and leg pain since that time…Pain level ranges from 4-10/10. *Id* at 95.

23. Claimant underwent an Independent Medical Examination ("IME") with Dr. Timothy Hall on February 20, 2019 at the request of his counsel. (Ex. 8). Claimant again denied any history of prior low back problems. Dr. Hall provided a summary of the mechanism of injury on Page 1 of his report. Claimant emphasized to Dr. Hall that "the work he did that day [was] out of the ordinary, not so much with respect to what he was doing, but how much of it and the circumstances/physical environment." *Id.* Claimant did not have pain at the time he was in the cooler, but reported difficulty standing after finishing the activity. Claimant then left work approximately half an hour later, at which time his back gave out as he was approaching his car.

24. Claimant reported to Dr. Hall that he had the next two days off, and felt the pain would go away. When it persisted, he called his supervisor and got in to CCOM for evaluation. Claimant had been treating at CCOM until his claim was denied. *Id.* at 105. Claimant's symptoms at the time of the IME included, but was not limited to, midline

lower back pain radiating laterally down the leg to behind the knee. His right sided leg symptoms were generally worse than the left. *Id.*

25. Dr. Hall's physical examination documented side bending limited by about 50% bilaterally. Claimant was hypertonic throughout his thoracolumbar paraspinal muscles along with tenderness into the gluteals. The psoas was found to be tight and spasming anteriorly. Straight leg testing caused back pain, but no lower extremity symptoms. *Id.* Dr. Hall ultimately diagnosed Claimant with a lumbar strain, pelvic obliquity/postural distortion, degenerative changes in the lumbar area as seen on x-ray, and probable piriformis syndrome. Dr. Hall felt Claimant likely did not have radiculopathy, though it was a possibility based on the information he had at the time. *Id.* Dr. Hall opined that the unusual positioning that Claimant was in and the amount of work that he performed on December 16, 2018 precipitated all of Claimant's symptoms. *Id.* Dr. Hall indicated that Claimant needed an MRI to further define the specifics of his injury. *Id.* at 106.

26. Claimant subsequently underwent an IME with Dr. John Burris, this time at the request of Respondents, on April 2, 2019. (Ex. 9). Dr. Burris took a history that was largely consistent with his prior reported mechanism of injury. Claimant indicated he had difficulty standing up after finishing the activity, but that he was not experiencing lower back pain at the time of the activity. *Id.* at 108. While leaving work, Claimant was walking across the parking lot to his vehicle when he experienced immediate pain across his low back that shot down his legs, ending above the knee. *Id.* Claimant continued to report diffuse pain across his low back with a pins and needles sensation down the sides of his upper legs. *Id.* Dr. Burris reviewed medical records pre-dating the date of injury in this matter. None of the records involved Claimant's lower back. *Id.* at 109-10.

27. Dr. Burris indicated that Claimant's first evaluation on December 19, 2018 was void of any objective findings supporting Claimant's complaints. Dr. Burris ultimately opined that Claimant did not sustain a work-related injury, and that his diagnosis was merely "Nonspecific low back pain." (Ex. 9, p. 114). Dr. Burris felt that Claimant's injury was not work related for a few reasons.

- First, he indicated that there was no "industrial incident" because Claimant was in the parking lot leaving work for the day when Claimant's pain began.
- Dr. Burris also reasoned that because the area Claimant was working in was smaller than usual, he was moving smaller materials than usual, thus requiring less force.
- Dr. Burris also found that Claimant's physical examination was entirely normal. *Id.* at 115.

28. Additionally, Claimant underwent physical therapy, with the last note of record dated March 13, 2019. [20 days before the IME with Dr. Burris]. (Ex. 9, pp. 100-03). Claimant reported being only approximately 60% better at this time. *Id.* at 100. Objectively, it was noted that the left side of Claimant's pelvis was elevated. *Id.* at 101.

29. Dr. Hall testified by telephone at hearing as a Level II accredited expert in the field of physical medicine and rehabilitation. Since authoring his report, Dr. Hall reviewed the IME report of Dr. Burris. He indicated that his opinions remained unchanged, in that Claimant did experience a compensable injury. Dr. Hall felt that Claimant sustained at least a lumbar strain as a direct result of his bending, squatting, lifting, and twisting on December 16, 2018. He explained that there are many ways these activities could cause a lumbar strain:

> Well, there are a couple of different ways. One is simply exceeding the tolerances of local musculature. As muscles fatigue, they become less distensible. They tighten up. And then, if one continues to perform an activity, they simply give out, and then you can have episodes of tearing of …the musculature.
> You can also put pressure loads on areas where the tendons attach to the bones and create microtrauma at these connections of the ligaments and tendons. Those are the two most common sources of this myofascial musculoskeletal pain, which I believe is…part of his problem.
> ….Just excessive loading and weightbearing on the joint space can lead to local inflammation and pain. (Hearing Transcript, pp. 17-18).

Dr. Hall's understanding was that it was not long after Claimant completed his tasks that he walked out towards his car for the day when he felt severe back pain. He opined that the most likely explanation for Claimant's symptoms of pain not striking him until walking through the parking lot was that the inflammatory process in the body was building up to that point.

30. Dr. Hall indicated that inflammation is sometimes slow to build. There is then going to a threshold where the inflammation becomes symptomatic, which in this claim occurred in the parking lot. Dr. Hall summarized that Claimant had no back problems prior, had no difficulty performing the activities of his job prior, and Claimant performed an unusual activity that resulted in back pain. Dr. Hall agreed it is possible that Claimant had "some idiopathic, unrelated, mysterious event" happen in his back, but that it was certainly more likely that his symptoms were caused by the activities in the cooler, as opposed to the spontaneous, idiopathic event in a man with no history of back problems.

31. Dr. Hall testified his exam revealed abnormal posture, loss of lumbar lordosis, limited range of motion, increased muscle tone through the paraspinals, tenderness to palpation in the gluteals, and hypertonicity in the psoas muscles. Specifically, Dr. Hall referenced pelvic obliquity. When certain muscles are strained, muscles in that area respond to that guarding as to unload the injured structure and this

guarding or “postural distortion” creates the perpetual pelvic obliquity problem. Because Claimant’s pelvis is now out of normal alignment, it is creating postural distortion.

32. Dr. Hall acknowledged that he did not ask Claimant what activities he engaged in outside of work, instead focusing on the mechanism of injury. During cross-examination, Dr. Hall testified it is important to know how long after the work activity in the cooler unloading pallets and moving products ended and claimant’s symptoms arose, and what work activities claimant did after his work in the cooler ended. Dr. Hall testified the more time between when the meat and egg package unloading in the cooler finished, and when Claimant was walking to his car in the parking lot, the less likely it is the symptoms of pain in the lower back suddenly appreciated by Claimant in the parking lot are causally related to the work activity of unloading and moving products in the cooler. Additionally, the more work activities Claimant engaged in after unloading the eggs and meat in the store’s cooler and the onset of symptoms in the parking lot, the less likely a causal correlation between the two exists.

33. Dr. Hall further explained that Claimant’s imaging revealed disc space narrowing, vacuum disc phenomenon, and posterior osteophyte formation, all of which can be aggravated by the activities Claimant was performing at work. In summation, Dr. Hall stated, “people normally don’t just, all of a sudden, as they’re walking to the parking lot, have pain that drops them to the ground unless something has happened. I really doubt that this is just, all of a sudden, the slowly evolving degenerative changes, for some mysterious reason, [becoming] symptomatic.” (Hearing Transcript, p. 24). Dr. Hall, was, however, unable to explain the loss of feeling in Claimant’s legs when he tried to get up initially.

34. Dr. Burris testified on behalf of Respondents as a Level II accredited expert in the field of occupational medicine. Dr. Burris testified that it was his opinion that Claimant would either have felt pain right away when there was any strain to any musculature. When one acutely exceeds the musculature’s tolerance, or sustains a muscle strain, one would appreciate symptoms at that time of the extreme fatigue or strain. While the inflammatory response in muscles that Dr. Hall discussed does occur, that inflammatory response takes more than a couple of hours to be appreciated by a patient, not the 30 minutes between Claimant’s work in the cooler on December 16, 2018, and his walking in the parking lot. Symptoms associated with an inflammatory process have a slower onset, and arising and increasing over time, not sudden acute pain as claimant alleges occurred. Alternatively, if it was an inflammatory process as Dr. Hall suggested, then it was his opinion such a process would take more than a “couple of hours” to become symptomatic. When asked about the significance of Claimant’s bilateral leg symptoms, their dissipation, and the significance of it, Dr. Burris indicated that, as Dr. Hall said, “We’re still trying to sort out exactly what the nature of the pain is.” Dr. Burris did acknowledge that Claimant’s testimony at the hearing was in line with what Claimant reported to him during his IME.

35. When Dr. Burris saw Claimant, he had full range of spine motion, no muscle spasms, normal strength in his legs, normal lower extremity reflexes, normal sensation, and no findings on physical exam or testing that would show any injury or

were consistent with any injury. There were no findings that would support any anatomic, physiologic injury. As he wrote in his report, "[M]r. Ryan's subjective complaints do not follow a dermatomal pattern and are out of proportion to his examination which reveals no objective findings." (Resp. Ex. A, pg. 8). He pointed out Claimant's non-specific lower back pain is common, and can arise spontaneously without any inciting event or injury mechanism. Dr. Burris said there is no specific activity that caused claimant's lower back pain and its occurrence on December 16, 2018, was idiopathic. Simply walking in the parking lot was a ubiquitous activity, and did not cause any injury to claimant's lower back or spine. Claimant does not need any medical treatment for, and has no restrictions related to, his work activities on December 16, 2018.

36. Steve Barkus testified at hearing as the assistant store manager for the Employer. Mr. Barkus has worked for the Employer for approximately 30 years; however, he worked at the same store with Claimant for approximately six months. Mr. Barkus indicated he is familiar with Claimant's job as a "stocker" and that the time around December 16, 2018 is "absolutely" busier around the holidays.

37. Mr. Barkus was not working on December 16, 2018. He does not recall what day he spoke to Claimant about his alleged injury, but he estimated it was around December 18 or 19, 2018. He recalled meeting with Claimant at the store to fill out paperwork regarding the incident. Mr. Barkus recalled specifically that Claimant "was unable to come up the stairs." Mr. Barkus testified that he asked Claimant if he recalled any specific incident at work where he injured his back. Claimant responded that he thought it was when he was breaking down the pallet and moving the meat and eggs repeatedly. He did not tell Mr. Barkus of the bilateral leg weakness episode when he stood up at the bunker cooler. On cross-examination, Mr. Barkus acknowledged that he had never heard Claimant complain of back pain prior, nor had he observed Claimant appear to have back pain prior to December 16, 2018.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. § 8-40-102 (1), C.R.S. "Claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer, and a workers' compensation case shall be decided on its merits." *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590, 592 (Colo. App. 1998); *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915, 918 (Colo. App.

1993) Proof by a preponderance of the evidence requires claimant to establish that the existence of a contested fact is more probable than its nonexistence. *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 (ICAO March 20, 2002). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. C.R.S. § 8-41-301 (1) (c); *Faulkner v. ICAO,* 12 P.3d 844 (Colo. App. 2000). In other words, claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores v. Industrial Claim Appeals Office,* 989 P.2d 521 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997).

B. Assessing weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office,* 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things: the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline,* 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved. The ALJ need not address every piece of evidence or every inference that might lead to conflicting conclusions. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P. 3d 385 (Colo. App. 2000). Where a party presents expert opinion on the issue of causation, the weight, and credibility, of the opinion is a matter exclusively within the discretion of the ALJ as the fact-finder. *Cordova v. Industrial Claim Appeals Office,* P.3d (Colo. App. No. 01CA0852, February 28, 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182 (Colo. App. 1990). To the extent that expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441, P.2d 21 (Colo. 1968).

Compensability, Generally

C. To sustain his burden of proof concerning compensability, Claimant must establish that the condition for which he seeks benefits was proximately caused by an "injury" arising out of, and in the course of, his employment. *Loofbourrow v. Industrial Claim Appeals Office,* 321 P.3d 548 (Colo. App. 2011), ***aff'd Harman-Bergstedt, Inc. v. Loofbourrow,*** 320 P.3d 327 (Colo. 2014); § 8-41-301 (I) (b) and (c), C.R.S. The phrases "arising out of" and "in the course of" are not synonymous, and claimant must meet both requirements for the injury to be compensable. *Younger v. City and County of Denver,* 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,*

759 P.2d 17, 20 (Colo. 1988). The “in the course of” requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals,* supra*; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51; 552 P.2d 1033, 1036 (1976). The question of whether an injury "arises out of" employment is a factual question and is to be resolved by considering the totality of the circumstances. Triad Painting Co. v. Blair, 812 P.2d 638, 643 (Colo. 1991). The "arising out of" test is one of causation, requiring the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to employer. *Horodyskyj v. Karanian,* 32 P.3d 470, 475 (Colo. 2001); *Madden v. Mountain West Fabricators,* 977 P.2d 861, 863 (Colo. 1999); *Triad Painting Co. v. Blair,* 812 P.2d 638, 641 (Colo. 1991).

D. Under the Act there is a distinction between “accident” and “injury”. An “accident” is defined under the Act as an “unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual or undersigned occurrence.” § 8-40-201 (1), C.R.S. In contrast an “injury” refers to the physical trauma caused by the accident. *City of Boulder v. Payne,* 162 Colo. 345, 426 P.2d 194 (1967); *see also*, § 8-40-201(2). Consequently, a “compensable injury” is one which requires medical treatment or causes disability. *Id.; Romero v. Industrial Commission,* 632 P.2d 1052 (Colo. App. 1981); *Aragon v. CHIMR, et al.,* W.C. No. 4-543-782 (ICAO, Sept. 24, 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167, 1169 (Colo. App. 1990); *Subsequent Injury Fund v. State Compensation Insurance Authority,* 768 P.2d 751 (Colo. App. 1988); *Romine v. Air Wisconsin Airlines,* W.C. No. 4-609-531 (October 12, 2006). No benefits flow to the victim of an industrial accident unless the accident results in a compensable “injury.” *Romero,* supra; § 8-41-301, C.R.S. Given the distinction between the terms “accident” and “injury,” an employee can experience symptoms, including pain at work, without sustaining a compensable “injury.” This is true even when the employee is clearly in the course and scope of employment performing a job duty. See *Aragon,* supra; *McTaggart-Kerns v. Dell, Inc.,* W.C. No. 4-915-218 (ICAO, May 29, 2014)

E. Simply because a claimant’s symptoms arise after the performance of a job function does not necessarily create a causal relationship. The panel in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-915-218 (ICAO, May 29, 2014) noted, “[C]orrelation is not causation.” Additionally, an incident that merely elicits pain symptoms without a causal connection to the industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989).

F. The determination of whether there is a sufficient "nexus" or causal relationship between claimant's employment and any injury is one of fact which the ALJ

must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). Moreover, the question of whether Claimant met his burden of proof to establish the requisite causal connection between the industrial injury and the need for medical treatment is one of fact for determination by the ALJ. *City of Boulder v. Streeb,* 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

G. The mere fact that a Claimant suffers from a pre-existing condition does not disqualify a claim for compensation or medical benefits if the work-related activities aggravated, accelerated, or combined with the pre-existing condition to produce disability or a need for medical treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Pain is a typical symptom from the aggravation of a pre-existing condition, and the claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment-related activities and not the underlying pre-existing condition. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949). The claimant must prove by a preponderance of the evidence that his symptoms were proximately caused by an industrial aggravation of a pre-existing condition rather than simply the natural progression of the condition. *Melendez v. Weld County School District #6*, W.C. No. 4-775-869 (ICAO, October 2, 2009).

Was this Work Incident a Compensable Injury?

H. Respondents argue that Claimant experienced no symptoms at the time of the alleged incident, and as a result, the symptoms he experienced shortly thereafter while walking to his car are therefore not related. As Dr. Burris states in his report, "there was no 12/16/2018 'industrial incident.' [Claimant] reports developing low back pain in the parking lot after leaving work for the day." However, there is no requirement that a specific, dramatic, incident, occurs for an injury to be deemed compensable. "This Court has many times sustained Commission findings of causation where the testimony indicated that the medical causes of an injury remained shrouded in mystery, *when the evidence as a whole* was sufficient to justify the Commission's legal conclusion that the injury was caused by the employment." *Industrial Commission v. Riley*, 441 P.2d 3, 591 (Colo. 1968) (emphasis added).

I. More recently, the Industrial Claim Appeals Office expounded on this rationale. "We do not dispute that a temporal relationship between an industrial event and the onset of symptoms does not compel the finding of a causal connection between the symptoms and the industrial event. However, the court of appeals has upheld an award of benefits even where the exact medical cause of the injury remains shrouded in mystery, *but the circumstantial evidence as a whole is sufficient to justify the inference that it was work-related." Schultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (November 17, 2000) (emphasis added) (Upholding an ALJ's finding that the DIME did not err in finding the claimant's symptoms that arose six weeks after the date of injury to be causally related to said injury).

J. The ALJ finds that the totality of the evidence suggests Claimant's lower back injury was more likely than not caused by his work activities on December 16, 2018. The ALJ credits the testimony of Claimant and finds him to be credible. There is no record of Claimant having any significant back problems whatsoever prior to December 16, 2018. The assistant store manager for the Employer testified that he had not witnessed Claimant have any difficulties performing his job prior to his arrival at work on December 16, 2018 and that he had never heard Claimant complain of back pain.

K. On this date, Claimant was performing a repetitive activity involving lifting and twisting in a cramped space. One could expect this type of movement to cause Claimant's symptoms, according to Dr. Hall. Respondents argue that Claimant has been inconsistent in reporting his mechanism of injury, thus undermining his credibility. The ALJ does not concur. At various stages of the process, to varying providers, Claimant has been convincingly consistent in what he describes. The fact that certain additional details were not provided (or were not asked, or there were simply insufficient lines to handwrite a narrative) on any given occasion does not mean Claimant's statements were *inconsistent.* The very fact that Claimant's version of events is not readily explained lends him some credence. Had Claimant intended to lie or game the system, he likely could have told something far more predictable.

L. Claimant argues the more likely cause of his sudden severe pain in the parking lot was a direct result of his kneeling, lifting, twisting, etc., while working that day. It was exceptionally busy due to the holidays, and this resulted in a backlog. In turn, this backlog caused 60-year-old Claimant to engage in uncustomary work activities in exceptionally close quarters. Respondents argue that there was no work injury, and that Claimant's degenerative condition(s) spontaneously became symptomatic with no cause whatsoever approximately 30 minutes after Claimant's work activities as described above ended.

M After considering the totality of the evidence, the ALJ finds Dr. Hall's reasoning to be more persuasive than Dr. Burris'. By a preponderance of the evidence, The ALJ finds that Claimant's work activity is the cause for his symptoms that began on December 16, 2018 and have continued through the present. At his age, Claimant had certain degenerative changes, arguably of a pre-existing nature. The ALJ alternatively finds that Claimant's pre-existing degenerative conditions became symptomatic as a direct result of his work activities.

Medical Benefits, Generally

N. Respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of an industrial injury. § 8-42-101 (1)(a), C.R.S. (2009); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P. 2d 362 (Colo. App. 1995). Where a claimant's entitlement to benefits is disputed, the claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337

(Colo.App. 1997). Whether the claimant sustained his burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P .2d 496 (Colo.App. 1997).

Medical Benefits are Reasonable, Necessary and Related

O. As stated *supra*, the ALJ found that Claimant sustained a compensable injury to his lower back. All treatment Claimant has had to date is found to be reasonable, necessary, and related, specifically the treatment with both CCOM and the subsequent treatment from PCHC and referrals from PCHC. Claimant is entitled to ongoing reasonable, necessary, and related treatment for his lower back.

Authorized Treating Physician, Pueblo Community Health

P. There remains a dispute as to whether the treatment Claimant received through Pueblo Community Health Center is the financial responsibility of Respondents. Respondents argue that PCHC was not an authorized provider, therefore any treatment rendered through PCHC or any referrals therefrom would not be the financial Responsibility of Respondents. The ALJ disagrees. The note from CCOM dated January 10, 2019 indicates that the referrals for Claimant's physical therapy had still not been approved after the request was made three weeks prior. Respondents issued their notice of contest one week later on January 17, 2019. There is nothing in the record indicating that Respondents offered Claimant ongoing care after their Notice of Contest was filed and the physical therapy was not approved. Claimant ceased treatment with CCOM after the Notice of Contest was filed, and his physical therapy not being authorized. Claimant therefore went to PCHC on January 21, 2019 and asked for a referral for physical therapy, as previously recommended by Dr. Olsen of CCOM.

Q. The insurer's right to select the treating physician contemplates the insurer will appoint a physician willing to treat the claimant based on the physician's independent medical judgment. See *Lutz v. Industrial Claim Appeals Office*, 24 P.3d 29 (Colo. App. 2000); *Ruybal v. University of Colorado Health Sciences Center,* 768 P.2d 1259 (Colo. App. 1988). Consequently, if the designated treating physician refuses to provide treatment for non-medical reasons, the insurer must designate a new treating physician or the right of selection passes to the claimant. The respondent must appoint a new treating physician "forthwith." *See Lutz v. Industrial Claim Appeals Office, supra; Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987). Whether the authorized treating physician has refused to treat the claimant for non-medical reasons is a question of fact for resolution by the ALJ. *Ruybal v. University Health Sciences Center, supra*. Based on the totality of the circumstances, the ALJ finds that Claimant's ATP refused to treat Claimant after the therapy was not approved and the notice of contest was issued, along with a lack of any notice by Respondents that ongoing conservative care would be approved after the notice of contest was filed. The Notice of Contest, along with the failure to approve conservative care, means Respondents failed to provide Claimant with medical care as required. The right of selection, therefore, passed to Claimant. As such, Claimant was free to choose his own

physician for ongoing care. Pueblo Community Health Center and all referrals therefrom are authorized providers.

ORDER

It is therefore Ordered that:

1. Claimant's injury to his lower back is compensable.

2. Respondents are responsible for all reasonable, necessary, and related treatment for this work injury, including all treatment to date from CCOM.

3. Pueblo Community Health Center is an Authorized Treatment Provider.

4. Claimant's Average Weekly Wage is $590.00

5. Claimant is entitled to TPD benefits from December 19, 2018, through January 18, 2019.

6. Claimant is entitled to TTD benefits beginning January 19, 2019, and ongoing, subject to any applicable offsets, until terminated by operation of law.

7. The insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

8. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 24, 2019

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

1. Whether Claimant was responsible for the termination of her employment and her resulting wage loss and whether her temporary total disability benefits should be terminated as of November 12, 2018.

FINDINGS OF FACT

1. Claimant is a 58-year-old female and was employed by Employer as a manager of personalized living. Employer employed Claimant from approximately 2002 to 2018. Claimant started employment as a receptionist and was promoted to a manager position in May of 2015. *See* Exhibit C.

2. Claimant's job duties as manager included managing the personalized living staff, performing evaluations, ensuring staffing coverage, ensuring that policies were followed, ensuring compliance with state surveys or other regulatory processes, marketing the program, coordinating clinical services for the program and overseeing the billing and scheduling of services, managing documentation process to ensure completeness, accuracy, timeliness, and compliance with guidelines, maintaining knowledge of national and state requirements, using sound judgment and experience to solve problems, and performing other duties as assigned. *See* Exhibit C.

3. On June 26, 2018, while employed as a manager, Claimant sustained a work related injury. Claimant reported that she was transporting a client and a dog when she bent and lifted the dog into a car and had the gradual onset of pain in her low back that became worse that evening and the following days.

4. Claimant reported the injury to her supervisor. Claimant was treated at the emergency department of Boulder Community Hospital on June 30, 2018. Claimant then was treated on July 3, 2018 and July 5, 2018 at Concentra. Claimant has not returned to work since July 5, 2018.

5. On July 9, 2018, Claimant returned to the emergency department of Boulder Community Hospital. Claimant reported ongoing and worsening lower back pain, right greater than left that radiated into her right buttock and right posterior leg. Claimant reported mild weakness in her right leg and that her right leg gave out when she stood. Claimant reported feeling dehydrated because she was unable to care for herself at home due to her pain. On examination, Claimant had tenderness to palpation over the right SI joint and had a positive straight leg raise on the right. A lumbar spine MRI was performed with the impression of: acute extruded right paracentral disc herniation at L4-5 associated with an annular tear; mild compression deformity of the superior endplate of the L5

vertebral body with bone marrow edema; subacute mild compression deformity of L2 vertebral body with probably underlying hemangioma; and left neural foraminal stenosis at L5-S1 due to broad based left foraminal disc protrusion. Claimant was admitted to the hospital. *See* Exhibit 3.

6. On July 11, 2018, neurosurgeon Sharad Rajpal, M.D. performed surgery on Claimant's lumbar spine. The surgery included a right L4-5 hemilaminotomy and micro discectomy. Claimant was found to have an epidural abscess and a CSF leak occurred. Following surgery, a lumbar drain was placed and Claimant was kept flat in bed for several days but then advanced activity.

7. On August 17, 2018, Erika Frieberg, PA evaluated Claimant. Claimant was noted to have been recently readmitted with a possible would infection. Claimant reported that she had been working with physical therapy a lot and thought she was making improvements daily but recently had an incident where she was lifted up aggressively with a gait belt and had worsening lumbar spine pain. PA Frieberg recommended a new MRI. PA Frieberg opined that Claimant continued to improve slowly after a lumbar decompression and wash out. PA Frieberg recommended continued physical therapy and wound care follow up and discussed that Claimant may require decompression and fusion at a later time but would need to clear her infection before placing any hardware. PA Frieberg opined that Claimant could return to work in October with restrictions of: returning October 15, 2018 mid-day with 4 hour work shifts, increasing length of shifts as tolerated; be allowed to take breaks throughout the day as needed to facilitate recovery; no lifting more than 15 pounds; no excessive bending or twisting; activity as pain allows; and use of a desk height chair with no arms or wheels. *See* Exhibit 2.

8. On September 10, 2018, Devin Jacobs, PA evaluated Claimant at Concentra. Claimant reported that since her last visit at Concentra on July 5, 2018, she had worse symptoms and went to Boulder Community Hospital emergency room where she was admitted and a lumbar micro discectomy surgery at L4-5 was performed. Claimant reported that after surgery she was transferred to an inpatient rehabilitation facility and was eventually discharged home on August 26, 2018. Claimant reported that she was told not to return to work until an October follow up. PA Jacobs ordered physical therapy and provided work restrictions of no work until Claimant's follow up. *See* Exhibit 1.

9. On November 12, 2018, Christine Zakar, PA evaluated Claimant. PA Zakar noted that Claimant had been seen at Boulder Community Hospital with evidence of nerve compression from an apparent lumbar disc herniation and underwent a right L4-5 hemilaminotomy and micro discectomy on July 11, 2018. PA Zakar noted that Claimant had not been seen by any provider for two months due to a workers' compensation claim denial and that Claimant reportedly did not know that she had health insurance through her employer. Claimant reported continuous pain, muscle spasms, incontinence, weakness, discomfort in positioning, and severe balance issues causing falls and further injuries. PA Zakar strongly recommended that Claimant start physical therapy for back spasms and gait difficulty. PA Zakar discussed with Claimant that Claimant may require

further imaging and surgical intervention in the future including possible decompression and fusion of the lumbar spine. PA Zakar opined that Claimant would have difficulty performing her job duties. Neurosurgeon Sharad Rajpal, M.D. approved PA Zakar's note and opinions on November 15, 2018. *See* Exhibit 2.

10. On January 14, 2019, the parties to this case signed a stipulation in which Respondents agreed to admit to the compensability of the claim. *See* Exhibit 4.

11. On April 16, 2019, Nancy Strain, D.O. evaluated Claimant. Dr. Strain noted that Claimant's claim was denied and Claimant had limited follow up and no physical therapy. Dr. Strain anticipated that Claimant would reach maximum medical improvement on December 31, 2019. Dr. Strain provided activity status of no work. *See* Exhibit 1.

12. On June 24, 2019, Respondents file a petition to modify, terminate, or suspend compensation. Respondents alleged that Claimant was terminated on November 12, 2018 after an audit where Claimant allegedly falsified documents by signing patients up for unnecessary services to ultimately allow the patients to obtain more reimbursement through insurance. *See* Exhibit B.

13. During her employment with Employer, Claimant underwent many training sessions. The training included significant training in an eRSP system including how to schedule, audit, note, and track client visits. Claimant completed Employer's personalized living foundations course and completed a course titled associate handbook. Claimant acknowledged that she could comply with Employer's business ethics and standards of conduct. Claimant completed basic manager training regarding state regulations, and covering client record content. Training records show and Claimant acknowledged that she was trained in proper client note entries and what was required, including receiving an eRSP manual. *See* Exhibit D.

14. In a July 2009 employee performance review, when Claimant was a receptionist, Claimant was noted to have a tremendous degree of detail in her work and was found to always complete tasks impeccably and quality of work was her highest rating category. Her evaluator noted that Claimant's attention to detail was strong and had contributed to many successes. It was also noted that other co-workers sought Claimant's help on project knowing they would be completed accurately. *See* Exhibit E.

15. Claimant continued to have overall positive employee performance reviews through 2015. *See* Exhibit E.

16. In May of 2015, Claimant was promoted to a manger position. Claimant's employee performance reviews began showing some problems during the next two years. *See* Exhibit E.

17. On August 30, 2017, Claimant was put on an action plan as part of a corrective action. The areas for improvement included leadership, organization/productivity, and eRSP utilization. *See* Exhibit E.

18. At a meeting to go over her action plan on October 4, 2017, Claimant was found to have not followed policy for claiming, scheduling, and documenting visits to clients. Claimant was found to have had an unprofessional leadership approach to a scheduler that did not want to work with Claimant. Claimant's supervisor planned to review in detail a recent eRSP audit and establish a timely plan of correction, planned to review and have Claimant reading "The 5 Languages of Appreciation in the Workplace" with a plan to review techniques to improve her leadership skills with her team. *See* Exhibit E.

19. The audit performed in 2017 showed several errors. On October 11, 2017, Claimant had a meeting with a supervisor where areas of improvement specific to the audit were discussed and documented. Supervisor Terri Dankelman noted that Claimant cared deeply for the residents in her communities but did not appropriately prioritize what needed to be done per her managers' checklist. Claimant was noted to be a good caregiver but concerns existed over Claimant's ability to manage and demonstrate leadership as a personalized living manager. *See* Exhibit F.

20. On February 28, 2018, Claimant received a corrective action from Employer. The corrective action indicated that Claimant was observed talking to associates in an unprofessional manner, not training associates properly, and not managing associates. Claimant was admonished that she was responsible for being a positive member of the team and providing quality customer services to residents and that her behaviors did not contribute to Employer's success. Claimant was reminded of an employee assistance program and was advised that improvement was her choice and that any further violations or any other performance issues may result in further corrective action up to/including termination of employment. *See* Exhibit E.

21. In October of 2018, another regularly scheduled annual audit was performed. Again, errors and concerns relating to Claimant and her entries were found during the audit.

22. On October 15, 2018, Claimant was placed on administrative leave for investigation/follow up of the recent clinical audit. At the time she was placed on administrative leave, Claimant was not working due to her no work restriction and her June 26, 2018 work related injury.

23. On October 22, 2018, a further and more detailed audit was performed and the errors noted were discussed with Claimant.

24. On October 31, 2018, Claimant was interviewed about some of the eRSP coding issues discovered by the October 22, 2018 audit. Claimant indicated in her interview with Employer that she had never provided documents to submit to the VA for billing. Claimant indicated that she understood a medication reminder code to require giving and watching the patient take medications and that if they were just asking a patient if they remembered to take the medications it would only be coded as an aid an

attendance qualifying visit since they weren't actually handing a patient pills. Claimant indicated that she was told a long time ago to use the safety check coding on aid and attendance clients when they weren't providing the service, but just checking to see if the patients did it on their own. Claimant said in the past she also questioned why the visits were coded as safety checks. *See* Exhibit J.

25. On November 7, 2018, November 8, 2018, and November 9, 2018, Employer attempted to contact Claimant to discuss Claimant's employment status. Claimant failed to return the calls and voice messages that Employer left on her voicemail.

26. On November 12, 2018, Claimant was sent a letter of termination. The letter indicated that Claimant had been placed on administrative leave on October 15, 2018 for the investigation/follow up of a clinical audit. The letter indicated that multiple attempts had been made to contact Claimant regarding her administrative leave and employment status including by phone on November 7, 2018, November 8, 2018, and November 9, 2018. Employer indicated they wanted to discuss Claimant's employment status with her in person but had been unable to contact Claimant. The letter informed Claimant that her employment was terminated effective November 12, 2018 for violation of Employer's guidelines for appropriate conduct. A personnel action form/termination form indicated termination for violation of company policy with her termination date listed as November 12, 2018. *See* Exhibit K.

27. A corrective action form dated November 12, 2018 listed "termination of employment" as the corrective action taken. It listed prior corrective actions on August 30, 2017 and February 28, 2018. It indicated that in December of 2015, Claimant had signed up one client for safety checks but listed and instructed the associate to list medication and meal reminder, while not actually doing a medication reminder and just asking the client if he remembered to take the medications. It also indicated that in June of 2018, Claimant signed up a client for services despite the client not needing the services and that Claimant instructed the associates to put in the comments "meal and bathing reminder" as it qualified for aid and attendance benefits through the VA. The instructions indicated the associates were to just chat with the client and make sure he was doing okay, getting to meals, and showering. The corrective action indicated that falsifying records and signing clients up for unnecessary services was a violation of the guidelines for appropriate conduct and that the decision had been made to terminate Claimant's employment. *See* Exhibit K.

28. Patti V_____ testified at hearing. Ms. V_____ is the regional clinical director for Employer. She trains employees on use of the eRSP system. She trained Claimant and advised Claimant that services performed had to match the services billed. She testified that Clamant was aware that entries had to be correct, consistent, and honest and had to match the plan, schedule, and eRSP entry. Ms. V_____ performs annual audits that are regularly scheduled. She testified that she found red flags during her October 2018 audit where something was coded one way but the instructions showed something different. Ms. V_____ testified that the records show Claimant was telling caregivers to chart something they weren't actually doing which is a violation of

procedures. Ms. V_____ testified that there was concern for misconduct as the coding was specific to receive VA benefits when a patient might not be eligible.

29. Ms. V_____ testified that after the initial audit she performed an expanded audit and found four separate clients where the task did not match the coding of the visit and where notes referenced qualification for VA benefits. Ms. V_____ testified that Claimant admitted to writing the instructions, but that Claimant alleged she was told to do so by a former manager. Ms. V_____ was unable to verify that another manager instructed Claimant but testified that Claimant underwent a lot of training and should have known this was a violation or should have clarified with higher-level supervisors what was appropriate.

30. Kimberly P_____ also testified at hearing. Ms. P_____ is the regional human resource business partner/director. She testified that employees are expected to accurately input entries without exception and that it was never permissible to code incorrectly due to the federal false claims act. Ms. P_____ testified that she was advised after an audit that there were suspicious eRSP entries and that she put Claimant on suspension pending further investigation. Ms. P_____ testified that she determined Claimant had entered information instructing associates to falsify care to say they were doing services they were not doing so that the client could bill the VA. Ms. P_____ testified that due to the seriousness of the violation, after investigation, the leaders reviewed the issues and decided to terminate Claimant's employment. Ms. P_____ testified that after attempting to reach Claimant to coordinate a meeting and not receiving a return call, a termination letter was sent to Claimant.

31. Katherine E_____ testified at hearing. Ms. E_____ is the regional director of operations for Employer. Ms. E_____ testified that it is against policy to bill a client for something not done. Ms. E_____ testified that if their notes write something just so a client could seek reimbursement from a federal agency when the services are not actually provided; there is a big problem/fraud to a federal agency. Ms. E_____ testified that Claimant was scheduling the least cost visit but telling staff to document greater services that weren't actually being provided so that the more expensive services could be sent by the client to the VA for reimbursement. Ms. E_____ testified that from her review of the records it clearly looks like Claimant is trying to help clients fraudulently bill. Ms. E_____ testified that there were multiple avenues Claimant could have used to seek help, but that Claimant did not. Ms. Evens testified that Claimant should have known how serious the actions were. Ms. E_____ testified that she thought Claimant was planning to return to work in October of 2018 and that her memory before these issues arose was that Employer was excited because Claimant's job had just been covered by others and that they were looking forward to having a manger return to alleviate the burden on everyone else. Ms. E_____ was unaware of whether Claimant actually returned or whether Claimant received any type of work release or modified job offer.

32. Claimant also testified at hearing. She testified that she injured her low back at work on June 26, 2018 and reported the injury verbally on June 27 and in writing

on June 28. Claimant testified that she did not seek treatment until June 30, 2018 at Boulder Community Hospital emergency room when she was in bad shape and Concentra was closed. Claimant testified that she then treated on July 3 and July 5 at Concentra and worked until July 5, 2018 when she was put on bedrest. Claimant testified that she has not worked since July 5, 2018 and that she has never been given a written request to return to work.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Termination

The termination statutes provide that, in cases where an employee is responsible for her termination, **the resulting wage loss** is not attributable to the industrial injury. *See* § 8-42-105(4), C.R.S.; *In re of Davis*, W.C. No. 4-631-681 (ICAO, Apr. 24, 2006). To establish that Claimant was responsible for her termination, respondents must demonstrate by a preponderance of the evidence that Claimant committed a volitional act, or exercised some control over her termination under the totality of the circumstances. *Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* W.C. No. 4-432-301 (ICAP, Sept. 27, 2001).

Violation of an employer's policy does not necessarily establish the claimant acted volitionally with respect to a discharge from employment. *Gonzales v. Industrial Commission,* 740 P.2d 999 (Colo. 1987). An "incidental violation" is not enough to show that the claimant acted volitionally. *Starr v. Industrial Claim Appeals Office*, 224 P.3d 1056, 1065 (Colo. App. 2009). However, a claimant may act volitionally, and therefore be "responsible" for the purposes of the termination statute, if they are aware of what the employer requires and deliberately fails to perform accordingly. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). This is true even if the claimant is not explicitly warned that failure to comply with the employer's expectations may result in termination. *Pabst v. Industrial Claim Appeals Office,* 833 P.2d 64 (Colo. App. 1992) (claimant disqualified from unemployment benefits after discharge for unsatisfactory performance when aware of expectations, even if not explicitly warned that job was in jeopardy). Ultimately, the question of whether the claimant was responsible for the termination is one of fact for determination by the ALJ. *Apex Transportation, Inc. v. Industrial Claim Appeals Office*, 321 P.3d 630, 632 (Colo. App. 2014).

However, when temporary total disability (TTD) benefits are terminated due to misfeasance that happened prior to the injury, TTD benefits may not be stopped at a point when a Claimant is entirely disabled from all work. Courts have found that wage loss does not "result" from a termination if the injury has totally disabled the claimant such that he is not capable of performing any employment. In that situation, the wage loss stems entirely from the disability caused by the injury, not the claimant's conduct in causing the loss of prior employment. *Selvage v. Terrace Gardens*, W.C. No. 4-486-812 (September 23, 2002); *In re Claim of Frisch*, 101118 COWC, 5-033-012-02.

Similarly, in *Gilmore v. ICAO*, 187 P.3d 1129 (Colo.App. 2008), the claimant was discharged after his work injury because the post-injury blood tests revealed cannabis in his system. This constituted a violation of the employer's policy and the claimant was therefore terminated. The claimant was restricted from all work for the first month after his work injury. The employer declined to pay TTD benefits because the claimant had been terminated for cause pursuant to § 8-42-105(4). The ALJ only stopped the claimant from receiving TTD after he was released to some form of work and provided some work restrictions. **Prior to that point, when the claimant was completely taken off any type of work, but after the date he had been discharged, the claimant was awarded TTD benefits**. Claimant argued that he had to first be offered a modified duty job and then be fired in order for his wage loss to result from his termination. This was not found

persuasive and the court held that once Claimant was released to modified duty employment by an authorized treating physician, Claimant had wage earning capacity and only suffered wage loss because of his termination for violating employer's drug policy. Claimant was awarded TTD benefits for the period of time he was unable to work because of his injuries. Once claimant was released to modified work, the ALJ ordered that the disability benefits ceased. Had claimant not precipitated his termination by engaging in activities that violated employer's no-tolerance drug policy, he could have been offered modified work by employer. The fact that he was not offered modified employment because he had been terminated has no bearing on the critical fact that he was physically able to work. The court therefore concluded that the ALJ properly applied the law when he discontinued claimant's TTD benefits. *Gilmore*, supra at 1132. (Emphasis added); *In re Claim of Frisch*, 101118 COWC, 5-033-012-02

In both Selvage and Gilmore, the total removal of the claimant from work indicated that the claimant's wage loss was a result of the injury and not a result of the termination or discharge from employment. Thus, until the claimant is able to work in some capacity, § 8-42-105(4) cannot be applied to preclude temporary benefits.

Here, Respondents have established by a preponderance of the evidence that Claimant was terminated due to her volitional actions while employed and prior to her work injury. Claimant had twice been on corrective notice/performance plans and Claimant volitionally charted incorrectly. Claimant had the training and knowledge to perform her job to the standards required and she volitionally chose to chart incorrectly. Claimant had prior coaching and performance issues. After the October 2018 audit, serious violations were found that justified her termination. Claimant had the training and resources to adhere to Employer's policies and volitionally chose to chart her own way, outside of Employer's guidelines. Employer could have terminated Claimant even earlier due to Claimant's prior performance issues. However, this third violation and the volitional conduct by Claimant shows that Claimant had some control over the circumstances leading to her termination. Claimant was responsible for her termination on November 12, 2018.

Although Claimant's termination ended her employment with Employer on November 12, 2018, there is insufficient evidence that Claimant has been released to perform modified duty employment or any employment. Due to her June 26, 2018 work injury, Claimant underwent lumbar spine surgery on July 11, 2018. Claimant had complications from this surgery. Although PA Frieberg contemplated on August 18, 2018 that Claimant would be able to return to part time work with restrictions by October 15, 2018, the very next medical record in evidence establishes that Claimant was placed on no work status on September 10, 2018 by PA Jacobs. So in August, the PA treating Claimant contemplated that Claimant would be able to do at least some work by October, but in September and before Claimant ever was officially released to the modified work status, Claimant was again put on no work status by PA Jacobs. Thus, Claimant was never released to modified or regular duty employment and she remained off work. Again, on November 12, 2018, PA Zakar and Dr. Rajpal noted that Claimant would have difficulty performing her job duties. Claimant was not released to modified duty on November 12,

2018 and thus remained on no work status. More recently, Claimant was again noted to be on no work status with the restriction of no work given by Dr. Strain on April 16, 2019. There is no evidence in the record that Claimant has ever been released to modified or regular duty work. Although it was contemplated in August, 2018 that Claimant would be released in October, 2018, Claimant was never released.

Respondents, in their position statement, argue that Dr. Browne released Claimant to modified duty on November 12, 2018. There are no records from Dr. Browne submitted in evidence and Dr. Browne did not testify at hearing. The only reference to Dr. Browne lists her as Claimant's primary care provider in records authored by other providers. The only record from November 12, 2018 in evidence is authored by PA Zakar and was approved by Dr. Rajpal. This record notes Claimant's report of continuous pain, muscle spasms, incontinence, weakness, discomfort in positioning, and severe balance issues causing falls and further injuries. The November 12, 2018 record also notes the opinion that Claimant would have difficulty performing her job duties. It does not release Claimant to modified work duty.

Thus, prior to her termination and due to her June 26, 2018 work injury, Claimant was on no work status and her earning capacity was zero. Claimant's loss of earning capacity, until she is released by an authorized treating physician to some sort of work status, is still entirely due to her June 26, 2018 work injury. Once the Claimant is released to any type of modified or regular duty work activity, her wage loss from that point forward would then be attributable to her at fault termination as Respondents will not offer her modified or regular employment due to her at fault termination. This case is similar, in some ways, to the *Gilmore* case (supra). Like Gilmore, had Claimant not precipitated her termination, Claimant could have been offered modified work by Employer once she is released to regular or modified employment. However, since she engaged in volitional conduct that resulted in her termination, Claimant will not be offered modified employment once she is physically able to work. The discontinuance of any benefits, at the point when Claimant is eventually released to work, will result in wage loss due to her termination and not due to her injury.

ORDER

It is therefore ordered that:

1. Respondents have established by a preponderance of the evidence that Claimant was responsible for the termination of her employment on November 12, 2018.

2. Until Claimant is released to modified or regular employment by an authorized treating provider, her wage loss continues to result from her June 26, 2018 work injury.

3. Respondents are thus not entitled to terminate TTD benefits as of November 12, 2018. TTD benefits shall continue until Claimant is released to modified or regular work status.

4. Any issues not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, *see* section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 25, 2019

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

STATE OF COLORADO
OFFICE OF ADMINISTRATIVE COURTS
Workers' Compensation No. 5-049-992-001

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In the Matter of the Workers' Compensation Claim of:

F,
Claimant,

vs.

R,
Employer,

and

SELF-INSURED,
Respondent.

Hearing was held on August 14, 2019, in Denver, before Administrative Law Judge Margot W. Jones. Claimant appeared in person and was represented by _____, Esq. Respondent appeared through _____, Esq.

The hearing convened at 1:30 p.m. in courtroom 5. Respondent's exhibits A-X and Claimant's exhibits 1-26 were admitted into evidence at hearing.

In this order, F is referred to as "Claimant" and R is referred to as "Respondent."

In this order, "ALJ" or "Judge" refers to the Administrative Law Judge, "C.R.S." refers to Colorado Revised Statutes (2018), "the Act" refers to the Workers' Compensation Act, Sections 8-40-101, et seq., supra, "OAC" refers to the Office of Administrative Courts, "OACRP" refers to the Office of Administrative Courts Rules of Procedure, 1 CCR 104-1, and "WCRP" refers to Workers' Compensation Rules of Procedure, 7 Code Colo. Reg. 1101-3.

ISSUE

Whether Claimant established by a preponderance of the evidence that he is entitled to reasonably necessary and related medical benefits, specifically, physical therapy, chiropractic care, reimbursement for a .22 caliber pistol, yoga,

massage, acupuncture, dry needling, an ergonomic evaluation and nutritional counseling.

FINDINGS OF FACT

1. Claimant is a wildlife officer for Respondent. He is a senior ranger and supervised two other officers and 8-10 non-commissioned workers. His job requires him to be POST certified. Claimant's regular job duties include law enforcement activities, customer service, supervision of subordinates, inspections of boats, campsites and wildlife management.

2. On June 27, 2017, Claimant was involved in a head on motor vehicle accident while driving to work. Claimant was driving his private vehicle while in uniform. He was headed to the main entrance of the Ridgeway State park at the time of the collision. Claimant was not wearing his seat belt.

3. Claimant suffered injuries in the accident including fractures to his right wrist, lower legs and a dislocated hip. Claimant has had multiple surgeries including a hip replacement.

4. Claimant has since returned to work in a light duty capacity. He works between 20 and 32 hours per week. He is not performing law enforcement activities as part of his light duties.

5. Dr. William E. Faragher, M.D. opined that Claimant's right hip symptoms were suggestive of hardware irritation and the hardware has been removed. Claimant failed to establish that any further care related to the right hip is necessary.

6. Claimant is observed on surveillance video recorded on April 5, 2019, at his home for approximately 70 minutes. On the video, Claimant is seen using a power saw, a power drill, a hammer, a crow bar and a hand sander with his right hand. Claimant is seen walking across his lawn while carrying equipment including a shop vac. Claimant is seen cutting pieces of wood with an electric saw while standing up. He is seen on the ground/floor with his legs crossed tearing up flooring materials. Claimant is seen getting up and down from a standing position to a sitting position repeatedly. He is seen working in a squatting position while working at ground level. Claimant is seen walking on uneven grass/ground.

7. Claimant has been able to engage in several different recreational activities since his work injury. He has been camping, boating, sailing, walking, and jogging. He has attended a Bronco football game and walked up stairs in the stadium to his seat. Claimant has done light plyometric (jumping) and has been shooting his .22 caliber revolver at a gun range. On October 30, 2018, Claimant hiked several miles without left hip problems.

8. Respondent has previously authorized numerous sessions of physical therapy in order to rehabilitate Claimant's left wrist, bilateral hips and bilateral lower extremities. Since the work incident, Claimant's function and stamina improved, his range of motion and strength have improved.

9. Claimant was seen in follow up by Dr. Adam Garry Cota, M.D. the surgeon who performed procedures on the right and left tib/fib injuries. In October of 2018, x-rays showed a healed fracture and stable position of the implants on the left leg. As to the right side, there was complete bridging on the bones confirmed by x-ray on March 13, 2019. Claimant's femur fracture was also completely healed.

10. Dr. Frazzetta sent Claimant to Dr. Faragher, an orthopedist, to see if he had other ideas for treatment even though Dr. Faragher was not one of the surgeons who performed surgery on Claimant. Claimant was already obtaining follow up care from his surgeons, Drs. Cota, Gammon and Judkins. Dr. Faragher saw Claimant on January 29, 2019, at Dr. Frazetta's request.

11. At that appointment, Claimant complained of hip pain (2/10) and weakness. However, the physical exam was near normal. The left hip showed no swelling, ecchymosis or deformity, hip strength was 5/5 in all muscle groups tested, sensation was intact, reflexes normal and symmetrical. Claimant's low back range of motion was normal and all special tests for the low back were normal. Testing of the right hip was normal.

12. Additional testing performed by Dr. Faragher on January 29, 2019, of the right and left lower extremity were also normal. The right and left lower extremities did not show tenderness, deformity, or injury. Range of motion was unremarkable. There was no gross instability and strength and tone were normal.

13. Despite the essentially normal results of the examination, Dr. Faragher did think a course of physical therapy (PT) might be useful with a focus on getting Claimant to an upgraded home exercise program. There is no indication that Dr. Faragher knew that by this time Claimant had over 100 PT visits. Dr. Faragher' s notes do not reflect that he had considered what therapy Claimant's primary surgeons had recommended or what Dr. Frazzetta and N.P. Swarts, FNP-C. were recommending.

14. Dr. Faragher did not explain why or how additional physical therapy would bring about further improvement in Claimant's already normal left hip and lower extremity strength and sensation or why the mild pain complaints of 2/10 justified further treatment in excess of the Medical Treatment Guidelines.

15. As of January 7, 2019, Claimant attended 101 physical therapy visits at Mountain View Therapy. He also had 15 cancellations. Claimant met all of his short term goals and all but two of his long term goals including a pain level of 2 or less with all activities of daily living. (ADL) If you consider Dr. Faragher's opinion on January 29, 2019, that Claimant's bilateral hip and lower extremity strength was normal, that goal had also been met. The final goal of the physical therapist was that of Claimant displaying

normalized body mechanics to allow efficient functional mobility in home and community in 12 weeks.

16. In February 2019, Claimant was working on high-level mobility such as jogging and high impact activities including vertical leaps and plyometric.

17. As of April 29, 2019, Claimant had been seen for 108 physical therapy visits with 23 cancellations. It is unclear why Claimant cancelled his appointments.

18. By April 29, 2019, Claimant's formal PT consisted of using an elliptical, light jogging on indoor track, going up and down 28 6" stairs, and fielding a tennis ball the therapist threw against a wall. Claimant attends the gym 2-5 times a week performing independent exercises. Claimant has access to the same equipment at the Montrose Recreational Center as is available in physical therapy. The attendance records at Montrose Recreational Center indicate Claimant's regular attendance.

19. Between January 2019 and April 2019, Dr. Frazzetta, Dr. Faragher and Dr. Coda made multiple and overlapping requests for physical therapy for the hips and lower extremities. These doctors were aware of overlapping requests and did not provide justification for the request.

20. Claimant has reached the final goal of his physical therapists, which is to be functional in the home and the community. The surveillance video taken April 5, 2019 establishes Claimant can take care of his home. Based on Claimant's own report, he has returned to work and community activities like football games and socializing with friends. He is functional in the community.

21. Dr. Cebrian and Dr. Frazzetta both opined that Claimant would have significant permanent impairment. In light of the permanent nature of the injuries, the physicians indicate that Claimant will have some functional limitations and some lingering symptoms.

22. None of the providers recommending additional physical therapy have addressed the specific functional deficits that remain or explained how additional formal physical therapy would remedy that deficit. Respondent timely denied the requests from Drs. Frazzetta, Dr. Cota and Dr. Faragher for therapy. The denials were based on valid medical reasons including lack of exhaustion of therapy that had already been approved, lack of documentation of functional deficit supporting the need for therapy and ready access to an independent home exercise self-directed program.

23. Dr. Cebrian performed an independent medical examination (IME) and concluded that Claimant does not need any further physical therapy.

24. Surgeon Steven Gammon, M.D. saw Claimant on June 4, 2019. Dr. Gammon noted that Claimant is now close to 2 years out from the fixation of his pelvis and his left acetabulum and about 17 months out from the conversion to a left total hip

replacement. On exam, Claimant had no erythema, drainage or fluctuance. He had no tenderness over either hip. Claimant had 5 out 5 strength with hip flexion on both the right and on the left side.

25. Dr. Gammon also found there was 5 out of 5 strength with hip flexion as well as knee, ankle and toe flexion. Extension on both the right and on the left sides was normal. Sensation was intact in both feet. Claimant's pulses and reflexes in both the patella tendons and Achilles tendons were normal. Dr. Gammon did not recommend any treatment for the left hip or lower extremities.

26. Claimant did complain to Dr. Gammon on June 4, 2019, of right sided pain in the sacroiliac area and Claimant did have the hardware removed on the right side to remedy this problem.

27. Prior to the work injury, Claimant had a relationship with chiropractor, Dr. Lundberg. He started seeing Dr. Lundberg in 2012 for occasional low back pain, hip pain and upper back pain. Claimant continued to see the chiropractor until shortly before the work related motor vehicle accident (MVA).

28. The records do not indicate Claimant advised Dr. Frazzetta or N.P. Swarts, FNP-C. that he had sciatica, low back and hip pain and pain prior to the work accident. Consequently, their recommendations for additional chiropractic care to treat sciatica have been made without the opportunity to consider whether Claimant has returned to baseline as to these complaints.

29. On November 12, 2018, Respondent authorized chiropractic care for the right knee and left quadriceps.

30. Dr. Frazzetta recommended 12 chiropractic visits for the right wrist on April 29, 2019. By then Claimant had completed his formal physical therapy recommended by the surgeon, had near normal grip strength in the right upper extremity and was under no physical restrictions from his surgeon. Dr. Frazetta took no formal measurements to document a perceived deficit or explain how additional chiropractic care would fix any actual limitations. Claimant's wrist surgeon had already placed Claimant at maximum medical improvement (MMI) on March 8, 2019, as to the wrist.

31. Dr. Frazetta's recommendation on April 29, 2019, for ongoing chiropractic care for the lower extremities was denied by Respondent. Dr. Frazzetta failed to document objective physical findings that could be corrected with chiropractic care. Claimant had completed substantial physical therapy and was engaging in a rigorous independent exercise regime. Dr. Frazzetta did not document on exam specific deficits that could be corrected with additional chiropractic care justifying additional care of this nature. Therefore, her request was properly denied.

32. Dr. Cebrian has opined that Claimant may still have various aches and stiffness in multiple body parts. However, chiropractic care and other treatments are not

reasonably expected to change this condition. Claimant will continue to have symptoms and will have impairment in the left hip, left ankle, right knee and right wrist. (Exh. A, p. 3). Dr. Cebrian credibly opined that these ongoing subjective complaints do not warrant additional chiropractic care.

33. Claimant testified he started attending Yoga classes when he was still using a cane as a consequence of the work related injury. He testified the yoga classes help him with his balance and flexibility.

34. On February 10, 2019, Dr. Frazzetta has prescribed 10 sessions of yoga for bilateral lower extremities, pelvis and chest. Respondent sent a request for Utilization Review to the insurer. Zaid Fadul, M.D. reviewed Dr. Frazzetta's request and recommended a denial of the treatment. Dr. Fadul attempted on two occasions to speak with Dr. Frazzetta regarding the requests and Dr. Frazzetta never called him back. Dr. Fadul recommended a denial of the yoga because there was insufficient clinical information to support the requested treatment. There was no comprehensive assessment of the treatment completed to date and the patient's response thereto. There was no current, detailed physical examination submitted for review and no notes with documentation of improvement. Therefore, medical necessity is not established in accordance with current evidence based guidelines.

35. On April 12, 2019, Dr. Frazzetta made another request for 6 sessions of yoga. The request was sent to Utilization Review, which denied the request. Again there were no notes submitted which established improvement from prior yoga classes. The yoga instructor kept no notes and is not a physician or non-physician provider under the definition of W.C.R.P.16-3.

36. The Colorado Medical Treatment Guidelines (MTG) indicate that up to eight weeks of yoga may be indicated. Claimant has attended more than 8 yoga classes. Dr. Cebrian credibly opined that formal Yoga classes after February 18, 2019, are not reasonable and necessary. Additional authorization of yoga classes is not shown to be reasonably necessary or related medical treatment.

37. Dr. Timothy Judkins performed a right wrist scapholunate ligament reconstruction with tendon transfer on September 4, 2018. This was an outpatient procedure. Claimant testified that after surgery he underwent physical therapy for the wrist. Claimant testified that he did not complete the full course of post-operative physical therapy because he did not feel he needed it.

38. This is consistent with the physical therapists notes dated March 8, 2019, which documented good functional right upper extremity strength and mobility with minimal complaints of grip strength when shooting with right hand.

39. On March 8, 2019, Dr. Judkins placed Claimant at MMI with respect to the wrist. He released Claimant from care and imposed no specific activity restrictions on the

use of the hand/wrist. As of March 15, 2019, Claimant's right hand grip strength was 96 lbs. and left was 100 lbs.

40. Claimant testified that he required a .22 caliber handgun to perform work hardening. He testified his wrist was too weak and his stance is too unstable to safely shoot his service weapon, which is a .40 caliber.

41. Dr. Cebrian credibly opined that the pistol is not reasonable, necessary or related medical care or treatment. The pistol is not medical care, nor is it incidental to obtaining medical care. The pistol is not durable medical equipment and it is outside of the Medical Treatment Guidelines. Therefore, in order for it to be authorized, Claimant would have been required to seek Prior Authorization per W.C.R.P. 16-6. Claimant did not provide credible evidence of such a request. Dr. Judkins did not write a prescription for a .22 caliber pistol. Claimant did not seek nor obtain prior-authorization from Respondent to purchase the pistol.

42. Therefore, Respondent did not authorize the purchase and there exist no basis for reimbursement of this expense.

43. Claimant seeks nutritional counseling arguing that this counseling is reasonable necessary and related to the work injury. It is found that Claimant has been thoroughly counseled by multiple providers as to the types of food he should eat and avoid and the type of exercise needed to reduce his weight. Claimant has received weight management counseling from his current providers. Additional nutritional counseling is not reasonable, necessary or related to claimant's work injury.

44. In the past, Dr. Frazzetta recommended that Claimant undergo a formal ergonomic evaluation. Dr. Frazzetta did not articulate a reason for the evaluation or how she would use the results of it to provide medical treatment to Claimant. Claimant testified he is working 24-32 hours per week in a light duty capacity. Claimant's job duties are variable. Claimant testified he is not performing any of the law enforcement functions of his regular duties. Dr. Frazzetta has reviewed Claimant's modified job duties and given her written approval for Claimant's modified job.

45. Dr. Cebrian credibly opined that a formal ergonomic evaluation is not reasonable, necessary or related to the work injury. Since none of Claimant's duties are performed in a highly repetitive manner, the evaluation is not necessary. Dr. Frazzetta has not opined that Claimant is suffering from a cumulative trauma condition and has not set forth a reasonable explanation as to why an ergonomic evaluation is necessary.

46. Claimant seeks an order for additional acupuncture, massage and dry needling. Dr. Cebrian credibly opined that none of these passive modalities are reasonable, necessary or related to the work injury. Earlier in the claim, Respondent authorized 6 out of the requested 15 session of acupuncture. Dr. Frazzetta's most recent request for 12 weeks of dry needling was denied because Claimant was functional in his exercise program and no specific deficits were identified.

47. Records from massage therapist Bill Tofflemoyer document that Claimant had 20 massages in the first seven months of 2019. Claimant had 20 sessions of massage from 10-23-17 to 12-26-17. Dr. Frazzetta does not identify a specific improvement in function resulting from such massages.

48. The MTG, W.C.R.P. 17 Exh. 9 suggest that the maximum duration for massage is 2 months. Claimant's massage treatment has extended well beyond that recommended in the guidelines. Further, the MTG, W.C.R.P. 17 Exh. 9, F. 14, discuss the use of passive modalities for treatment and indicate that they are principally effective during the early phases of treatment and are directed at controlling symptoms such as pain, inflammation and swelling and to improve the rate of healing of soft tissues. Claimant is well beyond the acute phase of his injuries.

CONCLUSIONS OF LAW

The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, et seq., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences

from the evidence." *See Bodeneck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull*, 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB,* 565 F.2d 1074 (9th Cir. 1977).

The Colorado Workers' Compensation MTG are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office,* 111 P.3d 549 (Colo. App. 2005). While it is appropriate for an ALJ to consider the guidelines while weighing evidence, the MTG are not definitive. *See Jones v. T.T.C. Illinois, Inc.*, W.C. No. 4-503-150 (May 5, 2006*); aff'd Jones v. Industrial Claim Appeals Office,* No. 06CA1053 (Colo. App. March 1, 2007) (not selected for publication) (it is appropriate for the ALJ to consider the guidelines on questions such as medical diagnosis but the guidelines are not definitive); *see also Burchard v. Preferred Machining,* W.C. No. 4- 652-824 (July 23, 2008) (declining to require application of medical treatment guidelines for carpal tunnel syndrome in determining issue of PTO); *see also Stamey v. C2 Utility Contractors et al*, W.C. No. 4-503-974 (August 21, 2008) (even if specific indications for a cervical surgery under the medical treatment guidelines were not shown to be present, ICAO was not persuaded that such a determination would be definitive).

The totality of the evidence presented at hearing, including the ALJ's observation of Claimant at hearing, establishes that Claimant is now highly functional and capable of a self-directed exercise program. Claimant has demonstrated immense measurable functional improvement since the accident and consistently reports very low levels of pain. Nevertheless, Claimant's authorized treating physicians, Dr. Frazzetta and N.P. Swarts, FNP-C, continue to recommend that Claimant continue chiropractic care, acupuncture, physical therapy, massage therapy, and dry needling.

Dr. Frazzetta and N.P. Swarts repeatedly requested passive modalities for Claimant without identifying objective physical exam findings of measurable deficits and without explaining how the same treatment can reasonably be expected to correct the deficits. Moreover, Claimant's subjective complaints are not credible given the activities recorded on surveillance and his admitted physical activities.

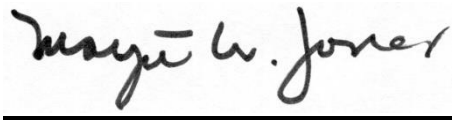
Claimant has failed to establish, by a preponderance of the evidence that additional chiropractic care, physical therapy, massage, Yoga, nutritional counseling, ergonomic evaluation, dry needling or acupuncture are reasonable, necessary and related to the industrial injury.

The claim for reimbursement for the pistol is denied. It is not medical care nor medical equipment.

ORDER

Claimant's claims for additional chiropractic care, physical therapy, massage, yoga, dry needling, nutritional counseling, acupuncture, ergonomic evaluation, and reimbursement for the pistol are denied.

Dated this 26h day of September, 2019



MARGOT W. JONES
Administrative Law Judge
Office of Administrative Courts

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-889-769-04

ISSUES

- Did Claimant prove he was entitled to recover penalties against Respondents for their failure to respond to the pre-authorization request made by Robert Kawasaki, M.D. on January 21, 2016?

PROCEDURAL HISTORY

This case has an extensive procedural history. A hearing was held on May 5, 2016. At issue was Claimant's request for medical treatment with Dr. Kawasaki. The subject matter of that hearing gave rise to the instant claim for penalties. The undersigned ALJ issued Findings of Fact, Conclusions of Law and Order on or about August 26, 2016, which concluded that the treatment recommended by Dr. Kawasaki was reasonable and necessary.

In the Application for Hearing filed on April 27, 2016, Claimant sought penalties against Respondents for alleged violations of the Colorado Workers' Compensation Act, WCRP and various court orders. The claimed penalties included the following:

1. Failure to respond to the June 26, 2015 letter from Claimant's counsel to Respondents' counsel requesting a copy of the claims file.

2. Violation of the Order compelling Respondents to respond to outstanding interrogatories issued by ALJ Felter on March 16, 2016.

3. Violation of the April 7, 2016 Order issued by PALJ Gallivan requiring Respondents to supplement their discovery responses.

4. Failure to respond to the pre-authorization request made by Robert Kawasaki, M.D. on January 21, 2016.

The October 5, 2016 hearing concluded with the ALJ taking under advisement Respondents' Motion to bar Claimant from submitting written and testimonial evidence. This Motion was denied. The ALJ further denied and dismissed Claimant's request for penalties for alleged failure to provide a copy of the claims file, the alleged violation of ALJ Felter's order and PALJ Gallivan's order. This Order was issued without prejudice to a request for sanctions under CRCP 37 and Claimant was allowed to present evidence in support of the request for penalties under category 4, *supra*. When the hearing recommenced on March 13, 2017, at the outset, Claimant's counsel confirmed Claimant was not seeking discovery sanctions.

A Status Conference in the above captioned case was held on July 12, 2019 before Administrative Law Judge Timothy Nemechek. The Status Conference was held

to confirm the remaining issue(s) to be adjudicated and to allow closing arguments to be presented on behalf of Claimant and Respondents.

FINDINGS OF FACT

1. Claimant suffered an admitted industrial injury on February 6, 2012, when he fell on the ice while working for Employer. Claimant injured his neck, back, right shoulder and elbow.

2. Claimant received treatment for the foregoing injuries from various physicians, including Dr. Kawasaki, Albert Hattem, M.D. and H. Andrew Motz, M.D.; who were ATPs.[1]

3. A Final Admission of Liability ("FAL") was filed on behalf of Respondents on November 6, 2014, which admitted for a 24% whole person impairment and an 8% scheduled impairment. This was based upon Dr. Hattem's medical impairment rating. The date of MMI was September 29, 2014. Dr. Hattem recommended maintenance treatment with regard to dental treatment and treatment related to the right elbow and right shoulder. The FAL admitted for "reasonable and necessary medical care related to this work injury, by an authorized treating physician".[2]

4. Claimant testified that after the FAL was filed, his neck got worse and he experienced radiating pain down his right and left arms. He received treatment through ATP, Dr. Hattem. There was no medical evidence in the record which documented Claimant's treatment with Dr. Hattem after September 29, 2014.

5. On April 25, 2015, Claimant underwent an MRI of the cervical spine and the films were read by Eduardo Seda, M.D. Dr. Seda compared the films with the MRI taken on January 31, 2013. Dr. Seda noted the cervical spine had normal vertebral body alignment, with no bony or bone marrow abnormalities. The spinal canal was normal size. Dr. Seda's impression was: stable degenerative disc and joint changes, without cord deformity. There were multiple stable levels with foraminal narrowing, which appeared predominantly bony, except for C5-C7 level, where there was a small new disc component extending into the left foramen.

6. In April 2015, Claimant was injured in a motor vehicle accident, which he testified aggravated the condition of his neck. Claimant initially estimated he had returned to baseline within a month or so of the accident.[3] Claimant then testified he returned to baseline by the time he was evaluated by Dr. Kawasaki in January 2016.

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[1] Claimant's course of medical treatment with these ATPs was set forth in the Findings of Fact, Conclusions of Law and Order issued on August 26, 2016-Exhibit 13.

[2] Exhibit 1.

[3] Hearing Transcript ("Hrg. Tr.") p. 16:11-18.

7. There was no reference to the motor vehicle accident in Dr. Motz' notes. Claimant testified he did not tell Dr. Motz about the MVA, as he had been treating with him before the accident.

8. Claimant received massage therapy from Renee Schwengel, LCMT (dba Stressless Massage Therapy), starting in on July 9, 2015. (These documents referenced a date of accident of April 15, 2015). Claimant received thirty-nine (39) treatments for neck and back pain through May 2, 2016. There was no evidence in the record that Respondent-Insurer had these treatment notes when considering Dr. Kawasaki's request for authorization.

9. Claimant testified he told the massage therapist that he was seeing her strictly for because of the automobile accident and noted that in the history portion. Claimant received massage therapy for his neck and back. He was also treating with a Dr. Odekirk, who was a chiropractor, because of the automobile accident.

10. On January 18, 2016, Claimant returned to Dr. Kawasaki, who noted he had not evaluated Claimant since August 4, 2014. Dr. Kawasaki noted the MRI showed spinal stenosis at the L2-3 level, with some progression of the stenosis when compared to the prior MRI done in 2012. Claimant indicated the pain had been severe in the low back and left anterior thigh region. Claimant also reported increased pain in his left arm.

11. Dr. Kawasaki found tenderness to palpation through the posterior cervical musculature and upper cervical region, with tenderness at the occipital junction. Claimant also had increased pain with cervical extension, flexion and with the Spurling's test. Claimant's lumbar spine revealed tenderness to palpation diffusely. Dr. Kawasaki's impressions were: poly-trauma with multiple injuries; dental trauma; cervicogenic headaches, with the facetogenic pain generators, with diagnostic initial medial branch blocks at C2-3, C3-4 and third occipital nerve; left C7 radiculopathy with a change on MRI taken in July 2015; left lateral epicondylitis; L2-3 stenosis, with L3 radiculopathy.

12. Dr. Kawasaki opined that a diagnostic and potentially therapeutic left C6-7 transforaminal epidural steroid injection would help decipher how much the left C6-7 foraminal disc protrusion was contributing to the patient's pain. Claimant's clinical findings and symptoms were consistent with a C7 radiculopathy and Dr. Kawasaki recommended doing the epidural steroid injections at the C6-7 level first before proceeding with medial branch block and potentially rhizotomy procedures. Dr. Kawasaki also recommended a left L2-3 transforaminal epidural steroid injection, which could be administered at the same time.

13. On January 21, 2016, Shauna Smith (Injection Coordinator-Colorado Pain and Rehab) sent a document entitled "Injection Request to Adj Marchelle Robinson" via facsimile. This requested authorization for a left C6-7 TF ESI and left C3-4 TF ESI with

Dr. Kawasaki. Attached was a written referral, as well as a written description of the proposed procedure, signed by Dr. Kawasaki.

14. Claimant confirmed he did not disclose he was injured in the MVA and said he had undergone a number of diagnostic tests and extensive treatment. The ALJ credited that explanation, in part, but he did not fully explain his failure to tell Dr. Kawasaki of automobile accident.

15. Kelhai J_____ testified as a witness at the hearing. Ms. J_____ is employed by Insurer and was the adjuster to whom this case was assigned.

16. Ms. J_____ confirmed Insurer received a copy of Dr. Kawasaki's office visit notes and the request for authorization. The documents were sent by fax. A claims note, dated January 21, 2016 referenced receipt and review of the January 18, 2016 office notes from Claimant's visit that day with Dr. Kawasaki. The claims notes were admitted into evidence.[4]

17. The claims notes, dated January 26, 2016, indicated Ms. J_____ returned a call to Shawna (sic) at Dr. Kawasaki's office and advised that ESI injections at the cervical and lumbar were not authorized. The second set of medial branch blocks at C2-3 and C3-4 were the only injections that were authorized at that time. The ALJ inferred that this was a complicated request for authorization.

18. Ms. J_____ testified there was an agreement as to maintenance medical benefits after the FAL was filed. She did not believe that the agreement covered treatment for the neck and back, even though that had previously been provided. She was aware that a *Samms* conference had taken place with Dr. Kawasaki and both attorneys. It was Ms. J_____'s understanding that the condition of Claimant's C6-7 was not related to the workers' compensation injury. Part of the reason the cervical ESI was denied was because what she understood Dr. Kawasaki said at the *Samms* conference The ALJ found that Ms. J_____ was a credible witness, this did not excuse the lack of compliance with the WCRP.

19. Ms. J_____ testified that no written denial of the request for authorization was sent by Insurer. Ms. J_____ stated she had not gathered any medical records related to the MVA by January 2016.

20. There was no evidence in the record that documented a written denial was sent to Dr. Kawasaki and the parties in response to the request for authorization.

21. There was no evidence in the record that Respondent-Insurer obtained a review of the request from Dr. Kawasaki by a physician or other healthcare provider.

[4] Exhibit D, p. 35.

22. The ALJ concluded that Ms. J_____ did not provide objective medical evidence to Dr. Kawasaki and the parties upon which she based the denial of ESI injections for Claimant's cervical and lumbar spine in January 2016.

23. Claimant testified he did not receive a letter from either Insurer or Dr. Kawasaki that the procedure had not been authorized.

24. Records from February 9, 2016 evaluation of Claimant by Lawrence Varner, D.O. were admitted into evidence. This evaluation was done in connection with Claimant's injuries from the MVA (the date was listed as April 28, 2015). At the time of the evaluation, tenderness was noted in the anterior chest wall bilaterally, as well as left arm fatigue, weakness and tingling. The costoclavicular maneuver was positive bilaterally, more so on the left than right. Dr. Varner's impression was: left over the right thoracic outlet syndrome, posttraumatic; post-traumatic paraspinal cervical and lumbar myofascial myofascilitis. Dr. Varner requested a diagnostic lumbar MRI and gave Claimant a prescription for outpatient PT for thoracic outlet syndrome exercises, massages and a home stretching program. Flexeril and Ibuprofen were also prescribed.

25. On May 5, 2016, Claimant was evaluated by Dr. Motz. At that time, he was complaining of continued neck pain and radicular symptoms, which he characterized as mild-moderate. Dr. Motz' assessment was cervical disc disorder with radiculopathy, mid-cervical pain. The MRI was reviewed, which showed multiple DDD, as well as significant spinal stenosis, most severe at C4-67. Dr. Motz recommended cervical ESI to be performed by Giancarlo Checa, M.D. There was a written referral from Dr. Motz to Dr. Checa.

26. Dr. Varner saw Claimant for follow-up evaluations on March 8, April 12 and May 10, 2016. At the May 10, 2016 evaluation, Dr. Varner wrote a prescription for a cervical ESI.

27. A request for authorization of a Cervical Interlaminar ESI C4-5-6-7 (three levels) from Greater Colorado Anesthesia dba MD Pain was sent to Ms. J_____ on May 11, 2016.

28. Ms. J_____ sent a letter to Dr. Checa, dated May 20, 2016 denying the request for Cervical Interlaminar ESI C4-5-6-87 [sic]. Attached to the denial letter was a July 10, 2015 report from Dr. Failinger. (The report from Dr. Failinger was admitted into evidence as part of Exhibit D, p.p. 23-26.)[5] The reason given for the denial was that the treatment was for degenerative changes, not the 2012 work injury. The ALJ concluded that this denial of the request for authorization was made in a timely fashion and comported with WCRP 16-11.

29. A claims note from Insurer, dated May 23, 2016 was admitted into evidence. This documented the fact that Ms. J_____ returned a call to Nicole at MD Pain to advise that the request was denied. A claims note from June 9, 2016 was

[5] There was no reference to the April 2015 MVA in Dr. Failinger's report.

admitted into evidence. This note documented that Nicole from MD Pain requested a copy of the denial letter, which was sent.

30. The ALJ calculated there were 185 days between February 21, 2016 (30 days after receipt of the request for authorization) and August 24, 2016 when the authorization of the requested ESIs was ordered by the undersigned ALJ.

31. Claimant proved he was entitled to penalties for Respondent's failure to respond in writing to the request for authorization issued by Dr. Kawasaki. The ALJ determined penalties in the amount of $20.00 per day should be imposed for the violation, given the circumstances of this case.

32. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. (2016). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). The credibility of Claimant, as well as the Ms. J_____ was determinative of the penalty issue.

Penalties

Whether statutory penalties may be imposed under § 8-43-304(1), C.R.S. involves a two-step analysis. The statute provides for the imposition of penalties of up to $1000 per day where Respondent "violates any provision of article 40 to 47 of [title 8], or does any act prohibited thereby, or fails or refuses to perform any duty lawfully

enjoined within the time prescribed by the director or the panel, for which no penalty has been specifically provided, or fails, neglects or refuses to obey any lawful order made by the director or panel". The failure to comply with the procedural rule is a failure to obey an "order" within the meaning of the foregoing section. *Paint Connection Plus v. Industrial Claim Appeals Office*, 240 P.3d 429, 435 (Colo. App. 2010)

Thus, the ALJ must first determine whether the Respondent's conduct constitutes a violation of the Act, a rule, or an order. As a starting point, the ALJ reviewed the WCRP, as it existed at the time of the request for authorization made by Dr. Kawasaki. The procedure for evaluating the request for authorization made by Dr. Kawasaki was governed by WCRP 16-11 (as it existed at the time). That rule provided in pertinent part:

> "16-11 PAYMENT OF MEDICAL BENEFITS
> …
>
> (C) Process for Contesting Payment of Billed Services Based on Medical Reasons
>
> When contesting payment of billed services based on medical reasons, the payer shall:
>
> (1) Have the bill and all supporting medical documentation under section 16-7(E) reviewed by a physician or other health care professional as defined in section 16-5(A)(1)(a), who holds a license and is in the same or similar specialty as would typically manage the medical condition, procedures, or treatment under review. After reviewing the supporting medical documentation, the reviewing provider may call the billing provider to expedite communication and timely processing of the contested or paid medical bill.
>
> (2) In all cases where a billed service is contested for medical reasons, the payer shall send the provider and the parties written notice of the contest within 30 days of receipt of the bill.
>
> The written notice shall include all of the notice requirements set forth in section 16-11(A)(1) and shall also include:
>
> (a) Date(s) of service(s) being contested, if date(s) was (were) submitted on the bill;
>
> (b) If applicable, acknowledgement of specific uncontested and paid items submitted on the same bill as contested services;
>
> (c) Reference to the bill and each item of the bill being contested;

(d) An explanation of the clear and persuasive medical reasons for the decision, including the name and professional credentials of the person performing the medical review and a copy of the medical reviewer's opinion;

(e) The specific cite from the Medical Treatment Guidelines exhibits to Rule 17, when applicable; and

(f) Identification of the information deemed most likely to influence the reconsideration of the contest, when applicable.

(3) Any notice that fails to include the required information set forth in this section is defective. Such defective notice shall not satisfy the payer's 30-day notice requirement set forth in this section.

(4) If the payer is contesting the medical necessity of any non-valued procedure provided without prior authorization, the payer shall follow the procedures given in sections 16-11(C)(1)and (2)."

As determined in Finding of Fact 16-17 and 19, Respondent-Insurer failed to deny the proposed ESI injections in writing, as required by WCRP 16-11(2). There was no dispute that Respondents received the request for authorization from an ATP and did not issue a written denial. (Finding of Fact 19). Respondent also failed to obtain a review by a physician or other healthcare professional, as required by WCRP 16-11(1). (Finding of Fact 21). The ALJ determined the language of the foregoing rule is mandatory and Respondent's failure to follow it constituted a violation.

In this regard, the Colorado Court of Appeals' holding in *Crowell v. Industrial Claim Appeals Office*, 298 P.3d 1014, 1016 (Colo. App. 2012) provides authority for the legal conclusion that a violation occurred in this case. In that case, Claimant sustained an injury that caused a deflated breast implant, which was surgically repaired. Claimant experienced symptoms and the ATP recommended further surgery to replace the implant. Respondents denied the requested surgery for nonmedical reasons under the WCRP. When the case went to hearing, the ALJ determined the question of whether the surgery was purely cosmetic was a medical determination and therefore Employer violated WCRP 16-10 (B). The ALJ imposed a one-time penalty of $500 for the failure to abide by the rule.

Writing for the Court of Appeals, Justice Ney concluded that the ALJ erred in determining that Employer[6] committed only a one-time violation. The Court noted that "as a matter of law" Employer violated Rule 16-10 (B) and both the ALJ and the Panel erred in determining otherwise. *Crowell v. Industrial Claim Appeals Office*, *supra*, 298 P.3d at 1014. The case was remanded for a determination of the amount of penalty to be imposed over the period of time at issue.

[6] Justice Ney's opinion referred to Employer and Insurer collectively as "Employer".

In the case at bar, under the holding of *Crowell v. Industrial Claim Appeals Office*, Insurer failed to abide by the Worker's Compensation Rules of Procedure with respect to Dr. Kawasaki's request and the language is mandatory requiring the carrier's compliance. The ALJ considered Respondent-Insurer's argument that the adjuster contacted the treating physician and verbally denied the request for authorization. No authority was proffered by Insurer to establish that a verbal denial complied with the WCRP. The ALJ was not persuaded that this excused the failure to issue a written denial of the requested authorization. Thus, the failure to issue this denial was a violation of the Worker's Compensation Rules of Procedure and the first prong was met in this case.

Second, the ALJ must determine whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of the Respondent's action depends on whether it was based on a rational argument based in law or fact. *Jiminez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo. App. 2003); *Gustafson v. Ampex Corp*., W.C. No. 4-187-261 (ICAO August 2, 2006), but see, *Pioneers Hospital v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005) (standard is less rigorous standard of "unreasonableness"). However, there is no requirement that Respondent know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth*, 924 P.2d 1094 (Colo. App. 1996).

The question of whether the Respondent's conduct was objectively reasonable ordinarily presents a question of fact for the ALJ. *Pioneers Hospital v. Industrial Claim Appeals Office*, *supra,* 114 P.3d at 99. In the case at bar, the ALJ concluded Respondent's response in failing to authorize the medical treatment was not reasonable. Insurer's denial of the proposed procedure was not in writing and was not based on the report of a medical doctor or healthcare provider. (Findings of Fact 20-22). Also, while there was certainly evidence in the record of a potential intervening cause (motor vehicle accident), there was no evidence that this information was utilized by the adjuster to deny the treatment requested by Dr. Kawasaki. (Finding of Fact 19).

Insurer's conduct with regard to Dr. Kawasaki's request for authorization is mitigated somewhat by the explanation provided by Ms. J_____ that Dr. Kawasaki had expressed an opinion in the context of the *Samms* conference. She testified Dr. Kawasaki indicated that the neck was not related to the work injury. (Finding of Fact 18). As found, this provided some explanation for the lack of written response by Insurer, but not a complete one. The ALJ concluded this did not excuse the failure to follow the rules. In addition, Claimant was also being treated by multiple physicians and the ALJ inferred that this was a complicated request for authorization. (Finding of Fact 17). However, Insurer's subsequent response to the request for the same procedure by Dr. Checa complied with the WCRP. This raises the question why Dr. Failinger's July 10, 2015 report was not used to deny the procedure requested by Dr. Kawasaki. The ALJ concluded that Respondent's conduct was not reasonable and therefore penalties are appropriate in this case.

Finally, the ALJ determined that the amount of penalties should be on the lower end of the range of what is available under § 8-43-304(1), C.R.S. ($20.00 for day each day of the violation). (Finding of Fact 31). This was based, at least in part, on the failure of Claimant to provide Dr. Motz and Dr. Kawasaki with information concerning the automobile accident. (Findings of Fact 7 and 14). The failure by Claimant to provide this information to his ATPs deprived them of relevant and pertinent medical information that could have potentially impacted both treatment recommendations (including the cervical ESIs) and a determination of the relatedness of the neck condition to the work injury. Since neither physician had this information, it is impossible to assess the impact disclosure of this information would have made. Claimant also did not advise Dr. Failinger, who performed an IME on behalf of Respondents. Thus, the ALJ determined that the totality of the circumstances warrant a relatively *de minimis* penalty in this case.

ORDER

It is therefore ordered:

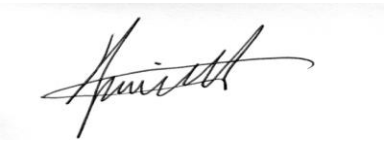
1. Respondent-Insurer shall pay Claimant the amount of $3,700.00 (185 days X $20.00 per day) in penalties for the failure to authorize the treatment recommended by Dr. Kawasaki, which was not denied in writing.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 26, 2019

STATE OF COLORADO



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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable left ankle injury during the course and scope of his employment with Employer on February 9, 2019.

2. Whether Claimant has proven by a preponderance of the evidence that Respondents failed to timely provide a list of at least four designated physicians in compliance with §8-43-404(5)(a)(I)(A), C.R.S. and he is thus permitted to select a treating physician.

3. Whether Claimant has established by a preponderance of the evidence that he is entitled to receive authorized, reasonable and necessary medical treatment for his industrial injury.

4. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period February 10, 2019 until terminated by statute.

5. Whether Respondents have proven by a preponderance of the evidence that Claimant abandoned his position and was responsible for his termination from employment under §8-42-105(4) C.R.S. and §8-42-103(1)(g) C.R.S. (collectively "termination statutes") and is thus precluded from receiving TTD benefits.

STIPULATION

The parties agreed that Claimant earned an Average Weekly Wage (AWW) of $375.00.

FINDINGS OF FACT

1. On February 8, 2019 Claimant began working for Employer as a Dishwasher. On February 9, 2019 Claimant tripped on a floor drain in Employer's kitchen while performing his job duties.

2. Claimant testified that he stepped on the drain, the lid shifted and his left ankle rolled. He explained that he did not fall all the way to the ground, but dropped down to his left side. Claimant noted that he suffered immediate left ankle pain and swelling. He reported the injury to Manager Hildo Salvadore and was sent home. Claimant did not complete an incident report and Mr. Salvadore did not inquire whether he wanted to see a doctor. Claimant went home and iced his ankle.

3. Claimant testified that on February 10, 2019 he reported his injury to Manager Holly Empkey when he first arrived at work. He remarked that Ms. Empkey

inquired about his injury after seeing him limping at the beginning of his shift. Ms. Empkey asked him to complete his morning work and then sent him home. Claimant commented that he discussed seeing a doctor with Ms. Empkey, and they agreed he would go to Urgent Care on the following day. He then finished his morning duties and went home.

4. On February 11, 2019 Claimant visited Gina Nelson, M.D. at Urgent Care for an examination. Claimant reported that he was experiencing sharp left ankle pain. Dr. Nelson remarked that Claimant had previously suffered a left foot fracture and undergone three surgeries. She noted that he normally experienced constant numbness in his small toes and difficulty moving. Dr. Nelson diagnosed Claimant with a left ankle ligament strain. She referred Claimant to a specialist for further evaluation.

5. Claimant called Ms. Empkey shortly after he left Urgent Care. She advised him to stay off work for a few days but to call and let her know how he was doing. Claimant remarked that Mr. Salvadore called him later in the day. He returned the call but had to leave a voicemail.

6. Ms. Empkey testified that on February 10, 2019 she did not notice Claimant limping and he did not report an injury until about one hour into his shift. She inquired whether Claimant wanted to see a doctor, but he declined. On February 11, 2019 Claimant called Ms. Empkey to let her know how he was doing. Ms. Empkey remarked that they agreed he would report to work on February 14, 2019 at 8:00 a.m. However, when Claimant failed to appear on February 14, 2019, Ms. Empkey or Mr. Salvadore attempted to contact him. However, Claimant never returned the call. Ms. Empkey considered Claimant a no call/no show and determined that he had abandoned his job.

7. Claimant explained that he had suffered a prior left ankle injury while living in Costa Rica in May 2016. While attempting to break up a mugging, Claimant suffered stab wounds and a left ankle injury. He returned to New York a few days after the incident. On September 25, 2017 Claimant underwent left ankle arthroscopic surgery. On December 15, 2017 Claimant visited his surgeon and reported continued left ankle pain and swelling. The surgeon recommended continued progression of activities and stated that Claimant's ankle would heal on its own.

8. Claimant testified that, prior to his employment with Employer, he worked for Premium Retail Services converting stores. He remarked that the job required him to remain on his feet for long hours. Claimant commented that he did not have any left ankle symptoms prior to his February 9, 2019 industrial injury and has not received any left ankle treatment since December 2017.

9. On February 21, 2019 Claimant visited David B. Hahn, M.D, for an evaluation. Dr. Hahn recounted Claimant's history of left ankle problems. He detailed that in April 2016 Claimant had been preventing a mugging in Costa Rica when he sustained stab wounds and left ankle fractures. Claimant underwent left ankle surgery in September 2017 and subsequent physical therapy in Syracuse, New York. Dr. Hahn noted that Claimant's left ankle had been doing well until he suffered an injury at work on February 9, 2019. He detailed that Claimant had twisted his left ankle on a drain in

Employer's kitchen. Claimant subsequently suffered significant pain and partial locking of his left ankle. Dr. Hahn remarked that Claimant's left ankle symptoms were similar to what he had experienced prior to his left ankle surgery. After Claimant underwent x-rays, Dr. Hahn performed a physical examination. The examination revealed a very stiff left ankle with mild to moderate swelling. Dr. Hahn determined that Claimant had likely re-injured the area of a psteochondral defect in his left ankle and "might even have a loose body that is presently locking his ankle joint." Dr. Hahn recommended a left ankle MRI and referred Claimant for a surgical evaluation.

10. On February 26, 2019 Claimant underwent a left ankle MRI. The MRI revealed a tiny lateral talar dome osteochondral lesion that measured two by two millimeters.

11. On March 4, 2019 Claimant returned to Dr. Hahn for an examination. Dr. Hahn noted that Claimant suffered a Workers' Compensation injury when he twisted his left ankle on a drain at work. He remarked that Claimant has experienced left ankle problems in the past, but had not suffered any symptoms at work prior to twisting his ankle on February 9, 2019. Claimant reported that his ankle was still hurting and locking. An MRI revealed a small osteochondral lesion in the left ankle. Dr. Hahn reasoned that, because Claimant's ankle was locking and he had undergone surgical repair several years earlier, Claimant would likely require surgical intervention.

12. On March 5, 2019 Claimant visited Alan Ng, DPM at Advanced Orthopedic and Sports Medicine Specialists for a consultation. Dr. Ng reported that Claimant had been referred by Dr. Hahn for "complaints of chronic left ankle pain." He noted that Claimant had suffered an acute left ankle fracture in Costa Rica a few years earlier that "did not quite heal right." Claimant subsequently underwent left ankle surgery. He also recently suffered an acute left ankle sprain that caused severe pain. Bracing, medications and physical therapy failed to improve Claimant's symptoms. Dr. Ng diagnosed Claimant with "OCD lateral talar dome left ankle secondary to multiple acute injuries causing chronic and severe pain." Claimant and Dr. Ng discussed possible surgical repair.

13. On March 25, 2019 Claimant underwent left ankle surgery. Dr. Ng specifically performed a left ankle arthroscopy with extensive debridement and a repair of a large osteochondral defect.

14. On April 4, 2019 Claimant returned to Dr. Ng for an evaluation. Dr. Ng prescribed an immobilization boot. Claimant subsequently underwent physical therapy and transitioned out of the boot into supportive footwear.

15. On June 25, 2019 Claimant returned to Dr. Ng for an evaluation. Dr. Ng noted that Claimant presented to the clinic 10 weeks after a left ankle arthroscopy. Claimant subsequently underwent physical therapy. He reported pain on the left side of his ankle. The symptoms had been chronic and non-traumatic. Claimant commented that the injury had occurred at home. He remarked that his symptoms occur constantly and have worsened. Dr. Ng administered a cortisone injection for continued severe pain.

16. Claimant has demonstrated that it is more probably true than not that he suffered a compensable left ankle injury during the course and scope of his employment with Employer on February 9, 2019. Initially, Claimant explained that he tripped over a drain and twisted his left ankle while working in Employer's kitchen on February 9, 2019. The medical records consistently reflect that Claimant twisted his left ankle in Employer's kitchen and experienced stiffness, locking and discomfort. Although the record reveals that Claimant suffered a prior left ankle injury while living in Costa Rica in May 2016 that required surgical repair, Claimant credibly commented that he did not have any left ankle symptoms prior to his February 9, 2019 industrial injury. He has also not received any left ankle treatment since December 2017. Furthermore, on March 4, 2019 Dr. Hahn determined that Claimant suffered a Workers' Compensation injury when he twisted his left ankle on a drain at work. Notably, he remarked that Claimant has experienced left ankle problems in the past, but had not suffered any symptoms prior to twisting his ankle on February 9, 2019. Accordingly, the February 9, 2019 tripping incident at work aggravated, accelerated or combined with Claimant's pre-existing condition to produce a need for medical treatment.

17. Claimant has proven that it is more probably true than not that Respondents failed to timely provide a list of at least four designated physicians. Claimant credibly explained that he reported his left ankle injury to Mr. Salvadore on February 9, 2019. He also discussed his injury with Ms. Empkey on February 10, 2019. Employer thus had some knowledge of accompanying facts connecting Claimant's left ankle injury with his employment and suggested to a reasonably conscientious manager that the case might involve a potential compensation claim. However, the record is devoid of evidence that Employer provided Claimant with a list of four designated providers. Although Ms. Empkey testified that she offered Claimant medical care but he declined to see a doctor, the bulk of the credible evidence demonstrates that Employer did not refer Claimant for medical care. The right to select a treating physician thus passed to Claimant.

18. Claimant has established that it is more probably true than not that he is entitled to receive authorized, reasonable and necessary medical treatment for his February 9, 2019 left ankle injury. On February 11, 2019 Claimant visited Dr. Nelson at Urgent Care for an examination. Dr. Nelson diagnosed Claimant with a left ankle ligament strain and referred him to a specialist for further evaluation. Claimant subsequently received left ankle treatment from Dr. Hahn and underwent an MRI. Dr. Hahn reasoned that, because Claimant's ankle was locking and he had undergone surgical repair several years earlier, Claimant would likely require surgical intervention. On March 5, 2019 Claimant visited Dr. Ng at Advanced Orthopedic and Sports Medicine Specialists based on a referral from Dr. Hahn. On March 25, 2019 Dr. Ng performed surgery on Claimant's left ankle. Claimant subsequently visited Dr. Ng for follow-up treatment. The record reveals that Claimant's left ankle care constituted authorized, reasonable and necessary medical treatment for his February 9, 2019 industrial injury.

19. Claimant has demonstrated that it is more probably true than not that he is entitled to receive TTD benefits for the period February 10, 2019 until terminated by statute. On February 10, 2019 Claimant visited Urgent Care for his left ankle injury that occurred when he tripped on a drain in Employer's kitchen. Claimant was subsequently

unable to perform his job duties. Claimant has not received a release to return to regular employment or reached Maximum Medical Improvement (MMI). The record thus reveals that his left ankle injury caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss.

20. Respondents have failed to prove that it is more probably true than not that Claimant abandoned his position, was responsible for his termination from employment under the termination statutes and is thus precluded from receiving TTD benefits. Ms. Empkey testified that on February 11, 2019 she spoke to Claimant about how he was doing. She remarked that they agreed Claimant would report to work on February 14, 2019 at 8:00 a.m. However, when Claimant failed to appear on February 14, 2019 Ms. Empkey or Mr. Salvadore attempted to contact him. However, Claimant never returned the call. Ms. Empkey considered Claimant a no call/no show and determined he had abandoned his job. However, Claimant noted he called Ms. Empkey shortly after he left Urgent Care. She advised him to stay off work for a few days but to call and let her know how he was doing. Claimant remarked that Mr. Salvadore called him later in the day. Claimant returned the call but had to leave a voicemail. Despite Ms. Empkey's testimony, the bulk of the records do not support her contention. Claimant continued to receive left ankle treatment, was unable to perform his job duties and ultimately underwent surgery. More importantly, the record reveals that Claimant did not precipitate his employment termination by a volitional act that he would have reasonably expected to cause the loss of employment. Accordingly, under the totality of the circumstances Claimant did not commit a volitional act or exercise some control over his termination from employment. Claimant is thus not precluded from receiving TTD benefits. Accordingly, Claimant shall receive TTD benefits for the period February 10, 2019 until terminated by statute.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the “logical and recurrent consequence” of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant’s symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that “correlation is not causation,” and merely because a coincidental correlation exists between the claimant’s work and his symptoms does not mean there is a causal connection between the claimant’s injury and work activities.

7. As found, Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable left ankle injury during the course and scope of his employment with Employer on February 9, 2019. Initially, Claimant explained that he tripped over a drain and twisted his left ankle while working in Employer’s kitchen on February 9, 2019. The medical records consistently reflect that Claimant twisted his left ankle in Employer’s kitchen and experienced stiffness, locking and discomfort. Although

the record reveals that Claimant suffered a prior left ankle injury while living in Costa Rica in May 2016 that required surgical repair, Claimant credibly commented that he did not have any left ankle symptoms prior to his February 9, 2019 industrial injury. He has also not received any left ankle treatment since December 2017. Furthermore, on March 4, 2019 Dr. Hahn determined that Claimant suffered a Workers' Compensation injury when he twisted his left ankle on a drain at work. Notably, he remarked that Claimant has experienced left ankle problems in the past, but had not suffered any symptoms prior to twisting his ankle on February 9, 2019. Accordingly, the February 9, 2019 tripping incident at work aggravated, accelerated or combined with Claimant's pre-existing condition to produce a need for medical treatment.

Right of Selection

8. Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). However, the Colorado Workers' Compensation Act requires that respondents must provide injured workers with a list of at least four designated treatment providers. §8-43-404(5)(a)(I)(A), C.R.S. Section 8-43-404(5)(a)(I)(A), C.R.S. states that, if the employer or insurer fails to provide an injured worker with a list of at least four physicians or corporate medical providers, "the employee shall have the right to select a physician." W.C.R.P. Rule 8-2 further clarifies that once an employer is on notice that an on-the-job injury has occurred, "the employer shall provide the injured worker with a written list of designated providers." W.C.R.P. Rule 8-2(E) additionally provides that the remedy for failure to comply with the preceding requirement is that "the injured worker may select an authorized treating physician of the worker's choosing." An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. industrial Claim Appeals Office,* 148 P.3d 381, 383 (Colo. App. 2006).

9. As found, Claimant has proven by a preponderance of the evidence that Respondents failed to timely provide a list of at least four designated physicians. Claimant credibly explained that he reported his left ankle injury to Mr. Salvadore on February 9, 2019. He also discussed his injury with Ms. Empkey on February 10, 2019. Employer thus had some knowledge of accompanying facts connecting Claimant's left ankle injury with his employment and suggested to a reasonably conscientious manager that the case might involve a potential compensation claim. However, the record is devoid of evidence that Employer provided Claimant with a list of four designated providers. Although Ms. Empkey testified that she offered Claimant medical care but he declined to see a doctor, the bulk of the credible evidence demonstrates that Employer did not refer Claimant for medical care. The right to select a treating physician thus passed to Claimant.

Medical Benefits

10. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A

preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The claimant bears the burden of demonstrating a causal connection between his industrial injuries and the need for additional medical treatment. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

11. Authorization to provide medical treatment refers to a medical provider's legal authority to treat the claimant with the expectation that the insurer will compensate the provider. *Bunch,* 148 P.3d at 383; *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). Authorized providers include those to whom the employer directly refers the claimant and those to whom an Authorized Treating Physician (ATP) refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Suetrack USA v. Industrial Claim Appeals Office,* 902 P.2d 854 (Colo. App. 1995).

12. As found, Claimant has established by a preponderance of the evidence that he is entitled to receive authorized, reasonable and necessary medical treatment for his February 9, 2019 left ankle injury. On February 11, 2019 Claimant visited Dr. Nelson at Urgent Care for an examination. Dr. Nelson diagnosed Claimant with a left ankle ligament strain and referred him to a specialist for further evaluation. Claimant subsequently received left ankle treatment from Dr. Hahn and underwent an MRI. Dr. Hahn reasoned that, because Claimant's ankle was locking and he had undergone surgical repair several years earlier, Claimant would likely require surgical intervention. On March 5, 2019 Claimant visited Dr. Ng at Advanced Orthopedic and Sports Medicine Specialists based on a referral from Dr. Hahn. On March 25, 2019 Dr. Ng performed surgery on Claimant's left ankle. Claimant subsequently visited Dr. Ng for follow-up treatment. The record reveals that Claimant's left ankle care constituted authorized, reasonable and necessary medical treatment for his February 9, 2019 industrial injury.

TTD Benefits and Responsible for Termination

13. Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability," connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by the claimant's inability to

resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). A claimant suffers from an impairment of earning capacity when he has a complete inability to work or there are restrictions that impair his ability to effectively and properly perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

14. Respondents assert that Claimant is precluded from receiving temporary disability benefits because he was responsible for her termination from employment pursuant to §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. Under the termination statutes a claimant who is responsible for his termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *In re of George,* W.C. No. 4-690-400 (ICAO, July 20, 2006). The termination statutes provide that, in cases where an employee is responsible for his termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAO, Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to his termination if the effects of the injury prevent him from performing his assigned duties and cause the termination. *In re of Eskridge,* W.C. No. 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that Claimant was responsible for his termination, Respondents must demonstrate by a preponderance of the evidence that Claimant committed a volitional act, or exercised some control over his termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if he precipitated the employment termination by a volitional act that he would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* W.C. No. 4-432-301 (ICAO, Sept. 27, 2001).

15. As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive TTD benefits for the period February 10, 2019 until terminated by statute. On February 10, 2019 Claimant visited Urgent Care for his left ankle injury that occurred when he tripped on a drain in Employer's kitchen. Claimant was subsequently unable to perform his job duties. Claimant has not received a release to return to regular employment or reached Maximum Medical Improvement (MMI). The record thus reveals that his left ankle injury caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss.

16. As found, Respondents have failed to prove by a preponderance of the evidence that Claimant abandoned his position, was responsible for his termination from employment under the termination statutes and is thus precluded from receiving TTD

benefits. Ms. Empkey testified that on February 11, 2019 she spoke to Claimant about how he was doing. She remarked that they agreed Claimant would report to work on February 14, 2019 at 8:00 a.m. However, when Claimant failed to appear on February 14, 2019 Ms. Empkey or Mr. Salvadore attempted to contact him. However, Claimant never returned the call. Ms. Empkey considered Claimant a no call/no show and determined he had abandoned his job. However, Claimant noted he called Ms. Empkey shortly after he left Urgent Care. She advised him to stay off work for a few days but to call and let her know how he was doing. Claimant remarked that Mr. Salvadore called him later in the day. Claimant returned the call but had to leave a voicemail. Despite Ms. Empkey's testimony, the bulk of the records do not support her contention. Claimant continued to receive left ankle treatment, was unable to perform his job duties and ultimately underwent surgery. More importantly, the record reveals that Claimant did not precipitate his employment termination by a volitional act that he would have reasonably expected to cause the loss of employment. Accordingly, under the totality of the circumstances Claimant did not commit a volitional act or exercise some control over his termination from employment. Claimant is thus not precluded from receiving TTD benefits. Accordingly, Claimant shall receive TTD benefits for the period February 10, 2019 until terminated by statute.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant suffered a compensable left ankle injury during the course and scope of his employment with Employer on February 9, 2019.

2. Based on Respondents' failure to provide a list of four designated physicians, the right to select a treating provider passed to Claimant.

3. Claimant's medical treatment was authorized, reasonable and necessary for his February 9, 2019 industrial injury.

4. Claimant earned an AWW of $375.00.

5. Claimant shall receive TTD benefits for the period February 10, 2019 until terminated by statute.

6. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you

mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: September 30, 2019.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that he suffered a compensable work injury to his right shoulder, neck, and brachial plexus?

II. If a compensable injury has been shown, is Claimant entitled to all reasonable, necessary, and related medical treatment for said injury, including, but not limited to, the EMG as recommended by Dr. Leggett?

STIPULATIONS

I. Claimant's Average Weekly Wage ("AWW") is $888.46.

II. Claimant's Authorized Treating Provider ("ATP") is CCOM.

The ALJ accepted these stipulations.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Claimant works for the Employer at the La Vista Correctional Facility. He has been employed at this facility from 2006 through the present. Claimant was a Correctional Officer I in late 2018 on the date of injury. Claimant is often required to physically restrain adult inmates. This often entails physically taking the inmate to the ground to be handcuffed.

2. Claimant testified that Employer performs annual defense tactics training to ensure the employees are adequately trained to restrain and defend themselves against combative inmates. Claimant has performed the annual defense tactics course every year since he began working for the Employer. He reports no prior physical difficulties performing the training in the past.

3. Claimant had a previous injury to his right shoulder, that he estimated to have been in approximately 2002 or 2003. He ended up having a "stretched" rotator cuff per his recollection, that resulted with arthroscopic surgery with Dr. David Weinstein. He did approximately six weeks of post-surgical rehabilitation, and indicated that his shoulder "felt great" after treatment had completed.

4. Claimant also had surgery on his neck in November of 2013; however, this surgery was simply to remove a cyst that was growing on the left side of

Claimant's neck. Claimant had no ongoing neck pain after the cyst removal. Claimant denies having any right shoulder or neck symptoms on the morning of December 21, 2018 before he began work that morning.

5. The trainees are required to sign a "Defensive Tactics Participation Form," indicating they are fit to perform the training. Claimant signed this form. (Ex. 10, p. 59). The form warns that the course requires a certain amount of physical strength and agility, and that it can be physically demanding. The course involves "joint manipulations," striking and taking body strikes, and pressure point compression. Examples given on the form of activities to be performed included:

    ● Lift arms above head and kick as high as own waist
    ● Stabilize another person to accomplish a controlled takedown
    ● Use arms, palms of hands, shins, and feet to deliver strikes
    ● Rotate body 90 degrees with feet planted for striking with foot or using a defensive tactic
    ● Get down on one or both knees and up again, unassisted, with multiple repetitions. *Id.*

6. Claimant's training course on Friday, December 21, 2018 began at about 8:00 a.m., and ended at approximately 4:30 p.m. The first two to three hours of the course focused on teaching by the instructors and watching instructive videos. Claimant was partnered up with Sergeant Aering for the physical portion of the training.

7. Claimant testified there was a particular maneuver and takedown done by Sgt. Aering on him during the training course that caused his injuries. He explained that Sgt. Aering approached him from the rear and he asked Claimant to put his hands behind his body and the following transpired:

> I'm instructed by Sergeant Erring [sic] to put -- lean over your upper torso, put your arms behind your back. And what he'll do is he'll grab one -- my right arm with his hand and place a cuff on it. At that point, you're instructed by the instructor to not comply with the officers' request. So you -- at that time you're asked to pull away as if, you know, you're going to try to get away from the officer.
>
> At that point, the officer is instructed to pull your arm and then whip you around and take you down to the floor and place your arm at an approximate 45-degree angle as the inmate is on their stomach. What the officer will then do is squat as your arm is pushed forward toward the body at a 45-

> degree angle, and you see they're holding the -- the instructor will say stop, I want (inaudible) to squat and what they'll do is they'll approach the body in the squat position as your arm is kept up; **that is a pretty extreme angle at the time**.
>
> Then they're asked to bend your arm, the inmate is told by the officer to bend your elbow and put the arm at the small of your back. At which time they will grab the other arm and cuff that with the other arm at that time. (Hearing Transcript, pp 28-29) (emphasis added).

On this occasion, Claimant described these movements as "slow and methodical." When asked what he felt right afterwards, Claimant stated: " Just tightness, a little bit of pain, but I mean, nothing to, you know, it's pretty normal." (Hearing transcript, p. 29)

8. The trainees are required to sign a form at the end of the training session indicating whether they had sustained any injuries as a result of the training. Claimant signed at 4:39 p.m., indicating that he did not incur any injuries as a result of participating in Defensive Tactics training. (Ex. 10, p. 59). Claimant testified that these are the same training maneuvers he had been performing since 2006. He said that it is "pretty normal" to feel sore after this particular training, and he assumed the pain he was experiencing at that time was run-of-the-mill soreness for a 59-year-old man.

9. Claimant testified that he was off work for the next three days, returning to work on Tuesday, December 25, 2018. Claimant spent his three days off relaxing and attempting to treat himself with stretching and ibuprofen. He testified that on December 24, 2018—the date before his return to work—he was still having soreness and tightness in the affected areas.

10. His plan was to return to work on December 25, 2018 and see how his body handled the work given the pain he was still in from the training. If he handled the workday fine, he was not going to file a claim. If the pain did not go away, he intended to file a claim. By the end of the workday on December 25, 2018, the pain had not gone away. Claimant promptly reported the injury the next day.

11. Claimant filled out a detailed First Report of Injury form on December 26, 2018. (Ex. 4, p. 9). Claimant described the incident in his own handwriting as follows:

> On Dec. 21, 2018 at 12:30pm, while practicing defensive tactics training, I was taken down to the mat by my right shoulder, my shoulder was extended a little too far toward my back. The soreness has not gone away and has been bothering me off and on since then." *Id.*

12. Claimant indicated on this form, however, that he did not intend to seek medical treatment. He explained at hearing that he formally reported the injury at this time in case the pain never went away. If the pain did not go away, he would have documentation that he reported the injury. If the pain subsided, then nothing would have come of it. Claimant eventually sought treatment on January 7, 2019 because the tightness and the pain in the shoulder only became more painful over time.

13. Claimant first presented for treatment at CCOM on January 7, 2019, and was evaluated by Brendon Madrid, NP. (Ex. 5, p. 14). He reported that he had suffered a right shoulder injury on December 21, 2018 after being taken down by another coworker during a training exercise. He did not recall a "pop" or any sort of other specific "ouch" moment, but he did feel sore and the soreness had not subsided from December 21, 2018 through January 7, 2019. On this date, he denied any numbness or tingling. Claimant disclosed his 2003 right shoulder injury that required surgery.

14. NP Madrid diagnosed Claimant with a strain of the muscles and tendons of the rotator cuff of the right shoulder. Physical examination also noted tautness to the muscles on the right side of Claimant's neck with reduction in range of motion. *Id.* at 15. Claimant was referred for physical therapy, and prescribed ibuprofen 800mg three times per day and Flexeril at bedtime.

15. The first physical therapy appointment took place on January 8, 2019. (Ex. 6, pp. 33-35). Sally Myers, PT, documents Claimant's reported mechanism of injury along with his corresponding symptoms. Claimant stated to her that he believed he injured himself during the aforementioned defensive tactics training. He reported pain in his right posterior, lateral, and superior shoulder, along with the right side of his neck into the right scapular region. *Id.* at 33. The objective findings regarding the cervical spine included abnormal cervical spine range of motion with pain radiating down to the lateral right shoulder. *Id.*

16. Claimant's next appointment at CCOM was with NP Madrid on January 23, 2019. (Ex. 5, pp. 18-20). Claimant was still complaining of achiness of the right shoulder, along with pain in the lateral and posterior deltoid and neck area. His shoulder pain at this visit was 7/10, 60 to 80% of the time. He did have full range of motion in his shoulders and neck. Claimant was also now complaining of a sensation of pins and needles in his right hand. *Id.* at 18. NP Madrid instructed Claimant to continue with therapy and his medications. *Id.* at 19.

17. Claimant's last authorized physical therapy occurred on February 6, 2019. (Ex. 6, p. 45). Claimant remained concerned about the numbness and tingling he was

experiencing running down the anterior/lateral shoulder and down into his right thumb.

18. An MRI was performed on February 15, 2019 at Open MRI of Pueblo. The results were interpreted by Dr. Charles Domsen, MD. Two **"Impressions"** were noted:

    1. Mild tendonosis in the supraspinatus tendon without tear.
    2. Mild biceps tendonitis without tear.

    A small effusion was also noted in the acromioclavicular joint. (Ex. 7).

19. Claimant was evaluated by Dr. Daniel Olson at CCOM on February 20, 2019. (Ex. 5, p. 24). It was noted that he had been through seven therapy sessions with "no significant improvement." He continued to complain of the numbness and tingling, now with mention of it extending into his thumb and next fingers. Dr. Olson reviewed the MRI of Claimant's shoulder that showed some tendinosis of the supraspinatus and biceps tendon, but no tearing. *Id.* On examination, Dr. Olson noted that Claimant "does have some tight myofascial areas noted in the brachialis of the deltoid." *Id.* at 25. Dr. Olson opined that the cause of Claimant's symptoms were related to his work activities.

20. Dr. Olson stated in his February 20, 2019 note, "I am concerned about the possibility of this being a brachial plexus injury or possibly an axillary nerve injury from the training incident." (Ex. 5, p. 25). Dr. Olson wanted either Dr. Dwight Leggett or Dr. Michael Sparr to evaluate Claimant, and perform an EMG, given Claimant's symptoms and his MRI, which was negative for tears. *Id.*

21. Claimant was evaluated by Dr. Dwight Leggett of Accelerated Recovery Specialists on March 19, 2019. (Ex. 8). Claimant reported a similar mechanism of injury to Dr. Leggett that he had told to his providers and his employer. Dr. Leggett noted that the intensity and frequency of Claimant's pain was getting better; however, the ongoing numbness and tingling had not gotten any better. He also noted that, "While [Claimant] is pleased with his improvement, he continues to have significant weakness into the right arm, as well as changes in the muscle size. There is an area over the lateral aspect of the right elbow where he sees a *tremendous difference in muscle bulk*." *Id.* at 51 (emphasis added). Claimant also reported ongoing neck tightness and intermittent burning coming from the trapezius region.

22. Dr. Leggett concurred with Dr. Olson's assessment:

    > I believe you are quite accurate with your assessment of his injury, with his symptoms being from brachioplexopathy, as well as injury

> to the axillary nerve. Based on [Claimant's] distribution of sensory abnormalities, weakness, and atrophy, I believe that he has injured the posterior cord of the brachial plexus, with profound effect on to the radial nerve." (Ex. 8, p. 53).

23. Dr. Leggett also indicated that examination revealed tightness and irritation into the cervical region, with the numbness and tingling traveling to the thumb, which, per Dr. Leggett, could represent a C6 radiculopathy. Dr. Leggett acknowledged he was only authorized for one evaluation, but it was his recommendation to proceed with an EMG "as soon as possible." *Id.*

24. Claimant's last appointment with an ATP before Respondents terminated treatment (and failed to authorize the EMG) was on March 22, 2019 with Dr. Olson. (Ex. 5, pp. 29-32). Dr. Olson noted that Dr. Leggett agreed with him that Claimant was likely suffering from a brachial plexus injury. Dr. Leggett was putting in for an EMG study.

25. Dr. Olson's final note, under treatment plan, states:

> 1. [Claimant] will undergo EMG testing hopefully soon.
> 2. I will recheck in 4 weeks and hopefully the test has been completed. *Id.* at 30.

26. At hearing, Claimant testified that he never had the EMG completed because it was his understanding that Respondents had denied the EMG and further care. Claimant continues to experience the numbness and tingling from his shoulder down to his right thumb.

27. Dr. Nicholas Kurz performed an IME of Claimant at the request of Respondents on July 1, 2019. (Ex. A). He was accepted at hearing as an expert in family practice and occupational medicine, and is Level II accredited. After reviewing the medial records, examining Claimant, and taking a history from Claimant, he concluded that this training maneuver did not cause a work injury to Claimant's shoulder or neck. He further opined that said maneuvers did not aggravate a preexisting condition.

28. Dr. Kurz based his opinion on the mechanism of injury as reported by Claimant, the delay in onset of symptoms, the "on and off' nature of the reported symptoms, Claimants declining medical treatment, and continuation of Claimant's work duties. Dr. Kurz felt that brachial plexus injuries often result in "cold stingers" or "burners" which typically last a few seconds or minutes. They can last for days on occasion. It was Dr. Kurz' opinion that traumatic rotator cuff injuries, labral tears, and brachial plexus injuries present with immediate complaints and acute issues, not slowly over months. *Id.*

29. Dr. Kurz opined further that one would not expect Claimant's injuries as reported to result from having his arm at a 45 degree angle and placed behind him. He deals with police officers and their training, and said training is padded up and full speed; yet he has not seen a brachial plexus injury. Dr. Kurz opined that Claimant's symptoms are more likely related to degenerative changes from Claimant's prior shoulder injury, and possibly from degenerative changes to his cervical spine. Even if there were some C6 involvement causing Claimant's right arm symptoms, it was not correlated to the work incident of Dec. 21, 2018, nor was the treatment rendered to date related to said work incident. Dr. Kurz opined that Dr. Olsen erred in not sending Claimant to his PCP, outside the Workers Compensation system, on 'day one.'

30. Dr. Timothy Hall performed an IME at the request of Claimant's counsel on July 19, 2019. (Ex. 9). At hearing, he was accepted as an expert in physical medicine and rehabilitation, and is Level II accredited. Dr. Hall's physical examination findings were similar to the examinations of Drs. Olson and Leggett *Id.* at 56. Dr. Hall's "Impressions" were as follows:

> 1. Soft tissue injury/sprain to the shoulder region (resolved)
> 2. Possible brachial plexopathy/thoracic outlet syndrome (resolving).
> 3. Symptoms of numbness in the upper extremity without dermatomal findings.

31. He opined in his report that Claimant should have an MRI of his neck, although that was not "absolutely necessary." He also testified at hearing he felt it reasonable for Claimant to undergo the EMG. Dr. Hall specifically testified that the position Claimant was put in during his training, particularly the internal rotation of the shoulder, put the nerves of the brachial plexus under strain. He opined that this injury was work related. Dr. Hall felt as though Claimant had appropriate treatment, but, "He [Claimant] had a fairly significant injury." *Id* at 57.

32. Dr. Hall testified at hearing. He addressed Dr. Kurz' opinion from his IME report, in which Dr. Kurz opined that a brachial plexus injury would be of high-force, high-impact which would yield immediate pain:

> ….If one had a tear, a complete avulsion of a nerve in the brachial plexus, well, obviously you would have immediate symptoms and very dramatic symptoms. It's clear in this case that that is not the case. He—he did not have a dramatic injury to his brachial plexus. He had what would be considered a fairly mild stretch injury which actually, probably occurs fairly commonly in the world, whereas full blown avulsions of nerves occur very infrequently…..

> Now when you have a lesser intense event, it's not the least bit unusual to not have a lot of symptoms initially to have perhaps, some musculoskeletal symptoms first which would be local discomfort of aching or muscle tightness and the nerve situation to show up later…(Hearing transcript, pp. 17-18)

33. Dr. Hall also addressed the non-dermatomal findings, and how they might relate to a brachial plexus injury:

> Brachial plexus injuries are usually not in – in dermatomal distributions….If you have your lesion really high, sometimes you could get a dermatomal patter, but that's unusual. Most of the problems are usually more distal, and you just don't get dermatomal distribution. But my point is, if the symptoms are from the cervical spine, they're almost always dermatomal, which his are not. (Hearing transcript, pp. 18-19).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Assessing weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the ALJ. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should

consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002).

Compensability, Generally

D. Claimant must prove by a preponderance of the evidence that he is a covered employee who suffered an injury arising out of and in the course of employment. C.R.S. § 8-41-301(1); S*ee*, *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett, 33 P.3d 1230* (Colo. App. 2001). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 592 P.2d 792 (Colo. 1979).

E. An injury occurs "in the course of" employment where Claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" requirement is narrower and requires claimant to show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *Id.*

F. Under the Act there is a distinction between "accident" and "injury". An "accident" is defined under the Act as an "unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual or undersigned occurrence." § 8-40-201 (1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident. *City of Boulder v. Payne,* 162 Colo. 345, 426 P.2d 194 (1967); *see also*, § 8-40-201(2). Consequently, a "compensable injury" is one which requires medical treatment or causes disability. *Id.; Romero v. Industrial Commission,* 632 P.2d 1052 (Colo. App. 1981); *Aragon v. CHIMR, et al.,* W.C. No. 4-543-782 (ICAO, Sept. 24, 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167, 1169 (Colo. App. 1990); *Subsequent Injury Fund v. State Compensation Insurance Authority,* 768 P.2d 751 (Colo. App. 1988); *Romine v. Air Wisconsin Airlines,* W.C. No. 4-609-531 (October 12, 2006). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." *Romero,* supra; § 8-41-301, C.R.S. Given the distinction between the terms "accident" and "injury," an employee can experience symptoms, including pain at work, without sustaining a compensable "injury." This is true even when the employee is clearly in the course and scope of employment performing a job duty. See *Aragon,* supra; *McTaggart-Kerns v. Dell, Inc.,* W.C. No. 4-915-218 (ICAO, May 29, 2014)

G. Simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship. The panel in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-915-218 (ICAO, May 29, 2014) noted, "[C]orrelation is not causation." Additionally, an incident that merely elicits pain symptoms without a causal connection to the industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989).

H. The determination of whether there is a sufficient "nexus" or causal relationship between claimant's employment and any injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). Moreover, the question of whether Claimant met his burden of proof to establish the requisite causal connection between the industrial injury and the need for medical treatment is one of fact for determination by the ALJ. *City of Boulder v. Streeb,* 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant suffered a Compensable Work Injury

I. Respondents argue that Claimant experienced minimal symptoms during the training, and as a result, the symptoms he experienced thereafter are therefore not related. The ALJ does not concur in this instance. There is no requirement that a specific, dramatic, incident, occurs for an injury to be deemed compensable. "This Court has many times sustained Commission findings of causation where the testimony indicated that the medical causes of an injury remained shrouded in mystery, *when the evidence as a whole* was sufficient to justify the Commission's legal conclusion that the injury was caused by the employment." *Industrial Commission v. Riley*, 441 P.2d 3, 591 (Colo. 1968) (emphasis added).

J. More recently, the Industrial Claim Appeals Office expounded on this rationale. "We do not dispute that a temporal relationship between an industrial event and the onset of symptoms does not compel the finding of a causal connection between the symptoms and the industrial event. However, the court of appeals has upheld an award of benefits even where the exact medical cause of the injury remains shrouded in mystery, *but the circumstantial evidence as a whole is sufficient to justify the inference that it was work-related." Schultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (November 17, 2000) (emphasis added) (Upholding an ALJ's finding that the DIME did not err in finding the claimant's symptoms that arose six weeks after the date of injury to be causally related to said injury). In this instance, there is no evidence that Claimant's symptoms arose from either non work-related causes, or due to preexisting conditions.

K. The ALJ finds that the totality of the evidence suggests Claimant's injuries were more likely than not caused by his training on December 21, 2018. The ALJ credits the testimony of Claimant and finds him to be credible-both in his reporting his symptoms to his medical providers, and in his testimony. Claimant underwent defense tactics training and signed a form at the end of the training indicating he did not sustain

any injuries during the training; however, in reviewing the totality of the circumstances, the ALJ finds it reasonable that Claimant did not report an injury at that time as he felt he was experiencing general soreness from the strenuous training-involving *joint manipulation.* As is frequently the case in law enforcement, Claimant's first instinct was to try to 'tough it out,' especially since he was going to be off work for the next few days. Claimant credibly testified that he returned to work for one full day afterwards to test his body to see if he needed to file a formal report of injury. It became apparent to Claimant after his work on December 25, 2018 that his "soreness" could well have been an injury, and he duly reported it forthwith.

L Claimant's ATP, Dr. Olsen, believed his injuries were work-related, and treated him as such. Within the Workers Compensation system, Claimant was referred to Dr. Leggett, who also believed Claimant suffered a work-related brachial plexus injury. The MRI showed no actual tears, but did demonstrate tendonitis of the biceps and tendonosis of the supraspinatus, consistent with the mechanism of injury. Said MRI yielded no information - either way - regarding a possible brachial plexus injury. An EMG as suggested by Dr. Leggett could have told the tale, but it was denied. While Dr. Kurz sincerely believes that a brachial plexus injury would have manifested itself in dramatic fashion, Dr. Hall presents a more nuanced picture, and one which the ALJ finds more persuasive. In this case, it is clear that the nerve was not avulsed completely (which would result in dramatic symptoms, as predicted by Dr. Kurz). Instead, these nerves were subtly stretched, and manifested themselves gradually. Dr. Hall's theory also better explains the non-dermatomal symptoms as described by Claimant. In summary, Claimant has shown, by a preponderance of the evidence, that he suffered a compensable work injury to his right shoulder and brachial plexus, and neck, on December 21, 2018. Said injuries required medical treatment.

Medical Benefits

M. Respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of an industrial injury. § 8-42-101 (1)(a), C.R.S. (2009); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P. 2d 362 (Colo. App. 1995). Where a Claimant's entitlement to benefits is disputed, the Claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo.App. 1997). Whether the Claimant sustained his burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P .2d 496 (Colo.App. 1997).

N. The ALJ has found that Claimant sustained a compensable injury to his right shoulder, neck, and brachial plexus. All treatment Claimant has had to date is found to be reasonable, necessary, and related. Claimant is entitled to ongoing care for his work injuries, specifically, but not limited to, authorization of the EMG for further testing.

ORDER

It is therefore Ordered that:

1. Claimant has suffered a compensable injury to his shoulder, neck, and brachial plexus, which required medical treatment.

2. Respondents shall pay for all reasonable, necessary, and related medical treatment for Claimant's work injuries, including, but not limited to, the EMG as recommended by Dr. Leggett.

3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 30, 2019

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

- Did Claimant prove by a preponderance of the evidence that she is entitled to receive TTD benefits after her admitted work injury?
- Did Respondents prove by a preponderance of the evidence that Claimant was responsible for her termination on February 12, 2019 and therefore not entitled to temporary disability benefits after that date?
- Did Respondents show that Claimant's work-related accident was caused by Claimant's intoxication, thereby entitling Respondents to the statutory intoxication reduction penalty of 50%?
- If Claimant is entitled to TTD benefits, should these be offset against Claimant's receipt of unemployment insurance benefits?

FINDINGS OF FACT

1. Claimant was hired as a sales associate for Employer in December 2018. Claimant had worked in the automotive industry for seven years.

2. Claimant testified she had moved from Boulder to Westminster and had looked at the various dealerships in the area. Part of the reason she applied to be a sales associate with Employer was that she learned, through an online article, that Employer would hire job applicants who test positive for marijuana in drug screenings. Claimant said because Employer no longer tested for marijuana as part of the hiring process, she believed at-home marijuana use would not result in termination. Claimant was not asked about drug use during her interview, but was told there was a pre-employment drug test.

3. Claimant testified that she uses marijuana in her personal time. She also found this helped her anxiety. She stated that she never used marijuana at work.

4. As part of the hiring process, Claimant underwent a pre-employment drug screen. Claimant passed the drug screen, which did not test for marijuana.[1] Claimant testified she did not see the results of the pre-employment drug test and was told she had passed.

5. Stacy S_____ testified on behalf of Employer. Ms. S_____ is employed as the market HR manager and oversees 14 stores. She has worked in that role since 2004, including in the payroll and HR departments. In that capacity, Ms.

[1] Exhibit K.

S_____' job duties include for hiring, termination, benefits, worker's compensation and unemployment. She also responds to issues raised by managers.

6. Ms. S_____ testified employer has a pre-employment drug testing program. It tests for substances such as methamphetamine, opiates and cocaine. In Colorado, the drug screen does not test for marijuana.

7. Ms. S_____ testified new employees are sent a link through Talent Edge and have eighteen (18) documents to sign as part of the on-boarding process. New employees have three days to complete the process. New employees are expected to read the Associate Handbook and there is a specific acknowledgment for the Associate Handbook. The most up-to-date version of the handbook is available on the company's intranet. Ms. S_____ testified that Employer's preference is that new employees review the documents at work so that a manager is always available for any questions.

8. Claimant testified she went through one week of training when she started her employment. Claimant testified Employer's drug policy was not discussed during her training. Claimant said she signed forms online and confirmed that she had access to the Associate Handbook and the employment forms online. Claimant testified that she skimmed the handbook, including the part which detailed Employer's drug policy. Based upon the articles she read, her understanding was the policy prohibited coming to work while under the influence and they were not to have marijuana while on the company premises.

9. On December 29, 2018, Claimant electronically signed an acknowledgement of receipt of the employment handbook.[2]

10. The acknowledgment provided as follows:

"I understand that by clicking the 'Acknowledge' button below I acknowledge that I have read and had access to print this document [the associate handbook], and further that I agree to accept/abide by the terms and conditions of this document. I understand that if I do not wish to agree to this document's terms and conditions or otherwise do not wish to acknowledge receipt of this document, I should not click the 'Acknowledge' button. I further understand that if I do not click the 'Acknowledge' button, I will not be considered for employment with the Company".

11. Employer's Associate Handbook specified Claimant's employment was terminable at-will.

12. Employer's Associate Handbook also had a specific provision that set forth the company's Drug and Alcohol Policy. The policy specified:

Drug and Alcohol Policy

[2] Exhibit 4, p.107.

"Alcohol and drug abuse ranks as one of the major health problems in the United States. You are our most valuable resource, and your safety and health are vital concerns of ours. We are therefore committed to providing a safe working environment to protect you and our Customers, to provide the highest level of service, and to minimize the risk of accidents and injuries.

Restrictions

We prohibit the unlawful possession, use, sale, manufacture, or distribution of illegal substances or other unauthorized or mind-altering or intoxicating substances by any Teammate while on Company premises (including parking areas and grounds) or on Company business. You are prohibited from reporting to work and/or conducting Company business while you are in possession of illegal drugs/alcohol, or have illegal drugs/alcohol in your system, except, as to alcohol, in approved situations. Included within this prohibition are lawfully controlled substances that have been illegally or improperly obtained. This policy does not ban the possession and proper use of lawfully prescribed drugs taken in accordance with the prescription."

13. The policy also had a provision applicable to those states in which marijuana was legalized. It provided:

"While certain states have legalized possession and/or use of marijuana, possession and/or use of marijuana remains illegal under federal law. Therefore, Teammates who possess or use marijuana are still subject to this policy, even in states that have stopped criminal prosecution for, or otherwise claim to 'legalize,' possession or use of marijuana."

14. Employer's Drug and Alcohol Policy also set forth that there would be post-accident drug and acohol testing, as follows:

"**Drug and Alcohol Testing Program**

…

All of our current Teammates are required to be tested for the presence of illegal drugs or alcohol in the event of work-related accidents in which they are involved whether or not they result in bodily injury or property damage, in accordance with state and/or local law. A 'work-related accident' is defined by both the Worker's Compensation Law in effect in the jurisdiction of the Teammate's work location, and/or any physical complaint associated with, or from, a work related activity…"

15. Finally, Employer's policy set forth the discipline to which employees were subject for a violation of the Drug and Alcohol policy. Specifically, the policy stated:

"In addition, except in rare circumstances, if you are injured in the course and scope of your employment and then test positive on a drug or alcohol test, you are considered in violation of this policy. If you test positive on a drug or alcohol test or

refuse to take a post-accident drug or alcohol test, you may forfeit your eligibility for Workers' Compensation benefits. Also, if you refuse to take a drug or alcohol test, in accordance with state and/or local law, you have violated this policy which may result in legal and/or disciplinary action, up to and including termination of employment."

16. The ALJ determined Employer's drug and alcohol policy informed employees they would be subject to discipline, up to and including termination, for a violation of the policy. A positive drug test after a work-related injury was considered a violation of the policy.

17. Claimant testified that she did not expect to be tested for marijuana, given what she knew about Employer. On cross-examination, Ms. S_____ confirmed that she did not specifically tell Claimant she could be terminated for a positive drug test (marijuana). Ms. S_____ did not receive a report at any time that Claimant was intoxicated at work.

18. On February 2, 2019 (Saturday), Claimant was showing customers a car on Employer's lot. She slipped on ice and fell on her right side. She sustained injuries to her right shoulder and elbow, as well as her hip. That same day, Claimant reported this incident to her supervisor, Bob Coldwell. She completed an accident report that day.

19. There was no evidence in the record that Claimant was using marijuana on the date of her accident. Claimant testified she had used marijuana ten (10) days before the injury occurred. Claimant volitionally chose to use marijuana at that time.

20. Claimant testified the effects of the marijuana had worn off by the time she worked again. She worked five shifts before the date of her injury. Claimant stated she was not intoxicated at the time her injury occurred. The ALJ credited Claimant's testimony.

21. There was no evidence in the record that Claimant was intoxicated at the time of her injury. Ms. S_____ testified she never received any reports that Claimant was smoking marijuana or appeared intoxicated on the day Claimant was injured.

22. On February 4, 2019 Claimant took a mandatory urine drug screen and tested positive for marijuana (THC). The ALJ inferred Claimant had THC in her bloodstream when she was injured. The test results was signed by Stephen Kracht, D.O. Claimant did not dispute or challenge the positive drug screen.

23. The ALJ concluded THC intoxication was not the cause of Claimant's work injury.

24. On February 4, 2019, Claimant was evaluated by Trina L. Bogart, M.D. at Concentra, the ATP for Employer. Dr. Bogart's assessment was: right wrist sprain, sprain of right shoulder, sprain of right elbow, sprain of right forearm, lumbar sprain, and

contusion of knee. Dr. Bogart prescribed Claimant Ibuprofen, Prednisone, and Methocarbamol for her injuries. Dr. Bogart also scheduled x-rays of Claimant's right elbow, right wrist, and right humerus.

25. Dr. Bogart also issued work restrictions. Those work restrictions were: may lift up to 2 pounds occasionally; may push/pull up to 2 pounds occasionally; no reaching above shoulders with affected extremity; no use of right upper extremity; should be sitting 50% of the time; no squatting; no kneeling; may not walk on uneven terrain; no climbing ladders; wear sling and splint at all times except to drive and shower.

26. Claimant's work restrictions precluded her from returning to her position and she missed time from work following her injury.

27. Claimant is entitled to TTD benefits from February 2, 2019 to the date of her termination.

28. Claimant was terminated from her sales associate position on February 12, 2019. Claimant met with Mr. Coldwell and an unidentified woman. Mr. Coldwell advised her she was being terminated for the positive drug test.

29. The termination notice cited the portion of the Drug and Alcohol Policy that prohibits the unlawful use of intoxicating substances, as set forth above. Marijuana is an intoxicating substance. The ALJ found Employer's policy prohibited an employee from reporting to work when he or she had illegal drugs in their system. The termination notice stated that based on the above mentioned violation, Claimant's employment was terminated effective immediately.[3]

30. Ms. S_____ testified that if an accident occurs on the premises, it is Employer's policy to ensure it was not due to drugs or alcohol. For that reason, all employees are required to submit to post-accident drug screens and breath alcohol tests. Ms. S_____ stated that if any post-accident drug screen was positive for any substance, the employee is terminated. This occurs in 100% of the cases when there is a positive drug/alcohol test. She testified that although Employer is more lenient with pre-employment testing as concerns marijuana, it follows federal law concerning marijuana following an accident. Ms. S_____ testified that Employer has terminated approximately 6-7 employees in Denver for positive post-accident drug screens this year.

31. Ms. S_____ was not involved in the decision to terminate Claimant.

32. Claimant was responsible for the termination of her employment.

[3] Exhibit 5.

33. On February 22, 2019, a Worker's Claim for Compensation was completed by Claimant. It stated she was injured while showing cars to a customer and injured her right arm, right shoulder and neck, which included a nerve injury.

34. Claimant testified she is still treating for her injuries. This includes physical therapy. Claimant continues to have work restrictions, although these have lessened since her injury.

35. There is no evidence in the record that any authorized treating physician has placed Claimant at MMI.

36. Claimant testified she received unemployment insurance benefits from March 2, 2019 through May 22, 2019, from the State of Colorado at the rate of $234.00 per week. This was confirmed by the records admitted at hearing.[4]

37. Claimant obtained a new job in approximately May 2019.

38. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. §8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792, 800 (Colo. 1979).

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. 2018. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the

[4] Exhibit 8.

evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

Temporary Total Disability Benefits

Claimant is entitled to TTD benefits if the injury causes a disability, the disability causes Claimant to leave work, and Claimant misses more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Claimant must establish a causal connection between a work-related injury and the wage loss to obtain TTD benefits. *Id*. The term disability connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function, and (2) impairment of wage-earning capacity as demonstrated by Claimant's inability to resume her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). Impairment of earning capacity may be evidenced by a complete inability to work, or by restrictions that impair Claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co*., 964 P.2d 595 (Colo. App. 1998).

In the case at bench, Claimant proved by a preponderance of the evidence that she is entitled to TTD benefits from the date of her injury to the date of her termination. As found in Findings of Fact 25-27, Claimant was given physical restrictions by her ATP as a result of the admitted work injury. She missed time from work and lost wages as a result. (Finding of Fact 26). Therefore, Claimant is entitled to TTD benefits up to the date of termination.

Responsibility for Termination

Respondents asserted the affirmative defense of Claimant's responsibility for termination as a defense to TTD benefits. §§ 8-42-105(4)(a), C.R.S., and 8-42-103(l)(g), C.R.S., (the so-called "termination statutes") state that in cases "where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury". Respondents bear the burden of proof to establish the applicability of these provisions. *Witherspoon v. Metropolitan Club*, W. C. No. 4-509-612 (Dec. 16, 2004). Respondents averred that Claimant violated the Employer's policies by her own volitional action and was terminated as a result.

In order to meet their burden of proof, Respondents must show Claimant performed some volitional act or exercised a degree of control over the circumstances resulting in the termination. With such a determination, Claimant can be found to be responsible for his/her termination. *Padilla v. Digital Equipment Corp*., 902 P.2d 414 (Colo. App. 1995), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995); *Gonzales v.*

Industrial Commission, 740 P.2d 999 (Colo. 1987). That determination must be based upon an examination of the totality of circumstances. *Id*.

In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061, 1064 (Colo. App. 2002), the Colorado Court of Appeals construed the foregoing statutes and noted the term "responsible" reintroduced into the Workers' Compensation Act the concept of "fault". In that case, Claimant suffered disabling injuries in a one-vehicle accident when the trash truck he was driving ran off a curve in the road and rolled. Claimant was cited for careless driving. The ALJ determined that although Claimant acted carelessly while working as a driver and caused the accident, he was not responsible for his termination. Claimant was entitled to receive TTD benefits. That interpretation was affirmed by the Colorado Court of Appeals. *Colorado Springs Disposal v. Industrial Claim Appeals Office*, *supra,* 58 P.3d at 1064-1065.

An employee is "responsible" if the employee precipitated the employment termination by a volitional act that an employee would reasonably expect to result in the loss of employment. *Patchek v. Colorado Department of Public Safety*, W.C. No. 4-432-301 (September 27, 2001). "Fault" does not require "willful intent" on the part of the Claimant. *Richards v. Winter Park Recreational Association*, 919 P.2d 933 (Colo. App. 1996) (unemployment insurance); *Harrison v. Dunmire Property Management, Inc.*, W.C. no. 4-676-410 (ICAO, April 9, 2008). Ultimately, the question of whether Claimant was responsible for her termination is one of fact for determination by the ALJ. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129 (Colo. App. 2008).

As a starting point, Employer adopted written policies concerning drug and alcohol use. (Finding of Fact 12). These policies were expressed in the Associate Handbook. The language of Employer's drug and alcohol policy specifically proscribed the presence of illegal drugs in the system of employees. *Id.* There was also a provision addressing use of marijuana in cases states such as Colorado where it had been legalized. (Finding of Fact 13-15). Employer's policies regarding use of drugs were promulgated to new employees, such as Claimant. (Finding of Fact 7). Claimant was expected to review the policies, as part of the new hire process and had access to the handbook. *Id.* Claimant executed an acknowledgment of receipt of Employer's policy and was therefore subject to these rules. (Findings of Fact 8-9).

In addition, Employer's policy provided for post-accident testing when an employee suffered the work injury. (Finding of Fact 15). The specific terms of the policy provided for discipline, including termination, if the post-accident drug test was positive. (Finding of Fact 16).

Under Colorado law, an employer is allowed to adopt personnel policies which prohibit the use of marijuana. The Colorado Supreme Court affirmed the right to do so in *Coats v. Dish Network, LLC*, 350 P.3d 849, 852 (Colo. 2015). In *Coats*, Plaintiff had a medical marijuana card and used it because he suffered from painful muscle spasms. There was no evidence in the record that Plaintiff ever used marijuana at work. Under the employer's policies, employees were subject to random drug testing and Plaintiff

tested positive for marijuana. He was terminated for a violation of employer's personnel policies.

Plaintiff argued he was protected by the Colorado's lawful activities statute, § 24-34-402.5(1), C.R.S. 2018, since he had a medical marijuana card and used marijuana when he was not working. The Colorado Supreme Court held that marijuana use was not protected under the statute, since it was not "lawful" under federal law. *Coats v. Dish Network, LLC*, *supra*, 350 P.3d at 852-853. Because Colorado's lawful activities statute did not extend to marijuana use, Plaintiff could not assert a violation of this provision and bring a civil action for damages, including lost wages or benefits. *Id.*

Similarly, Employer in the instant case adopted policies which restricted the use of marijuana and provided for consequences for such use in the event employee was injured. (Findings of Fact 12-15). When a work injury occurred, if an employee tested positive, that employee was subject to discipline. (Finding of Fact 15). As in *Coats*, Employer defined marijuana as an illegal substance under its policies, utilizing the federal definition. *Coats v. Dish Network, LLC*, 350 P.3d 849, 852 (Colo. 2015) remains good law and no authority was provided limiting its application. Therefore, Claimant's termination was allowable under Colorado law.

As determined in Finding of Fact 19, Claimant volitionally chose to use marijuana despite the proscription contained within the Employer's policies. Even though this recreational use occurred off the premises and not when Claimant was working, nonetheless she was subject to post-accident testing under the terms of the personnel policies. The specific language of the handbook provided that the presence of an illegal substance was a violation of the policy and further the policy defined marijuana as an illegal drug under federal law. (Finding of Fact 13, 15). Employer then terminated Claimant's employment based on a violation of the drug and alcohol policy. (Findings of Fact 28-30).

In *Gilmore v. Industrial Claim Appeals Office*, *supra*, the Colorado Court of Appeals considered a factually similar case where Claimant was terminated for using marijuana. In that case, the ALJ found Claimant was responsible for the termination of his employment and denied his request for continuing TTD benefits. The employer's policy specified it had a drug free workplace program and not employee individuals who test positive for drug use. Claimant testified that he was not told he would be terminated if he failed a drug screening, which occurred. Claimant later admitted that four days prior to the accident, he had smoked marijuana provided to him and his coworkers by a supervisor.

Writing for the majority, Judge Graham noted Claimant's voluntary conduct led to his termination and therefore he was not entitled to TTD benefits. Despite the fact that consumption of cannabis was accepted and the supervisor supplied it to him at the workplace, Claimant accepted and smoked the cannabis of his own volition. Employer's policies were clear regarding the consequences of a violation. The Court affirmed the ALJ's factual determination that Claimant knew or should have known that these actions would result in his termination. *Gilmore v. Industrial Claim Appeals Office*, *supra*, 187

P.3d at 1132-1133. The holding in *Gilmore* impels a similar result in this case, as Claimant was responsible for her termination. (Finding of Fact 32).

The ALJ considered Claimant's argument that she was not responsible for her termination since she did not expect marijuana use to result in loss of employment. Indeed, Claimant testified one of the reason she sought employment with Employer was because of the information that it did not test for marijuana as part of the hiring process. (Finding of Fact 2). Claimant also said there was no discussion regarding Employer's policies during her training, specifically with regard to the use of marijuana. (Finding of Fact 8). Finally, Claimant testified that while she read employer's drug and alcohol policy use in their entirety, she did not read all of the Associate Handbook. (Finding of Fact 8). Claimant was a credible witness.

In effect, Claimant is requesting the ALJ to infer that her subjective belief regarding marijuana use was a reasonable one, despite Employer's written policies. Implicit in this argument is the suggestion that because Employer did not test for marijuana as part of its new hiring process, that practice was inconsistent with a termination for a violation of the Drug and Alcohol Policy where marijuana was present in Claimant's system. Taken to its logical conclusion, if the ALJ were to allow Claimant's failure to fully read the policies and follow their terms, Employer's policies would have no force and effect. As found, Claimant explicitly agreed to Employer's policies with regard to drug use and acknowledged receipt of those policies. (Findings of Fact 9-10). Despite her rationale for taking the job, Claimant was bound by Employer's policies and subject to discipline for a violation. Accordingly, Claimant was "responsible" for her termination in the legal sense of the term. See § 8-42-103(1)(g), C.R.S. 2018, and § 8-42-105(4)(a), C.R.S. 2018.

Intoxication

Employer contends that award of TTD benefits should be reduced by 50% because Claimant's injury resulted from marijuana use. This Court disagrees. Pursuant to § 8-42-112.5, C.R.S. 2018, nonmedical benefits such as TTD benefits are reduced to fifty percent "where the injury results from the presence in the worker's system, during working hours, of controlled substances, as defined in section 18-18-102 (5), C.R.S., that are not medically prescribed….., as evidenced by a forensic drug or alcohol test conducted by a medical facility or laboratory licensed or certified to conduct such tests. If the test indicates the presence of such substances or of alcohol at such level, it is presumed that the employee was intoxicated and that the injury was due to the intoxication. This presumption may be overcome by clear and convincing evidence".

Clear and convincing evidence must be "unmistakable and free from serious or substantial doubt". *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). Causation is also a question of fact for the Administrative Law Judge, and the Administrative Law Judge may make reasonable inferences from the circumstantial evidence presented. *Arenas v. Industrial Claim Appeals Office of State of Colo.,* 8 P.3d 558 (Colo. App. 2000).

In this case, there was evidence of a controlled substance in Claimant's system and therefore Respondents were entitled to the presumption that she was intoxicated at the time of her accident. However, Claimant met the burden of proof by clear and convincing evidence and overcame the presumption that her injury was caused by the marijuana in her system. First, there was no evidence that Claimant was actually intoxicated at the time she was injured. (Finding of Fact 19-21). Claimant credibly testified that she had used marijuana approximately 10 days before her work-related injury. (Finding of Fact 18). Claimant confirmed that she was not feeling the effects of the marijuana and worked several shifts before she was injured at work. There was no evidence that Claimant was in fact under the influence of marijuana when she suffered her work-related injury. (Finding of Fact 20). This fact was corroborated by Ms. S_____ on cross-examination. (Finding of Fact 21).

Second, the ALJ determined THC intoxication was not the cause in fact of the accident in question. (Finding of Fact 23). In this regard, although the toxicology report documented the presence of THC, no other evidence was presented to persuade the ALJ that Claimant was actually intoxicated at the time of her injury. (Finding of Fact 20). This fact was corroborated by Ms. S_____, the management witness who testified on behalf of Employer. (Finding of Fact 21). The specific circumstances of this case persuaded the ALJ that marijuana intoxication did not cause Claimant's industrial injury. Under *Arenas v. Industrial Claim Appeals Office of State of Colo., supra,* 8 P.3d at 562, the ALJ's determination of the legal cause of an injury should be affirmed if supported by substantial evidence. Therefore, Claimant introduced a sufficient quantum of evidence to overcome the statutory presumption and her TTD benefits shall not be reduced by 50%.

Unemployment Offset

Next, Employer contends that Claimant's TTD benefits should be offset by Claimant's receipt of unemployment insurance benefits, pursuant to § 8-42-103 (f), C.R.S. The statute provides:

…

> "In cases where it is determined that unemployment insurance benefits are payable to an employee, compensation for temporary disability shall be reduced, but not below zero, by the amount of unemployment insurance benefits received…"

As found, Claimant received unemployment insurance benefits from March 2, 2019 through May 22, 2019, more than one month after her termination on February 12, 2019. (Finding of Fact 36). Because Claimant received unemployment insurance benefits after her termination, her TTD benefits shall not be offset by her receipt of unemployment insurance benefits.

ORDER

It is therefore ordered:

1. Respondents shall pay TTD benefits from the date of Claimant's injury on February 2, 2019 to the date of Claimant's termination on February 12, 2019.

2. Claimant's claim for TTD benefits after February 12, 2019 is denied and dismissed.

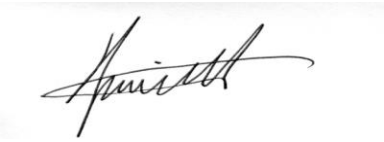
3. Respondent shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 1, 2019

STATE OF COLORADO



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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 1525 Sherman Street, 4th Floor, Denver, CO 80203	
In the Matter of the Workers' Compensation Claim of: **M,** Claimant, vs. **J,** Employer, And **A,** Insurer, Respondents.	▲ **COURT USE ONLY** ▲ **CASE NUMBER:** **WC 5-086-593-001**

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Hearing in this matter was held on July 12, 2019, before Administrative Law Judge Margot W. Jones in Greeley, CO. Claimant was present and was represented by Travis Barbarick, Esq. Claimant required Spanish language interpretation which was provided by Porcia Berry. Respondents were represented by Nicole Porter, Esq. The hearing was digitally recorded beginning at 4:00 p.m. The parties' exhibits 1-9 and A-E, H and I were made part of the record.

In this order, the Judge refers to Marina Rodriguez de Soto as Claimant, to Respondent Employer JBS, LLC, as Employer, and to Respondent-Insurer American Zurich Insurance Company as Insurer. The Judge may refer to Employer and Insurer collectively as Respondents.

Also in this order, the Judge may use the following acronyms: C.R.S. refers to Colorado Revised Statutes (2018); the Act refers to the Workers' Compensation Act of Colorado, sections 8-40-101, et seq., supra; OAC refers to the Office of Administrative Courts; OACRP refers to the Office of Administrative Courts Rules of Procedure, 1 CCR 104-1; and WCRP refers to Workers' Compensation Rules of Procedure, 7 Code Colo. Reg. 1101-3.

ISSUE

- Whether Claimant's right shoulder injury resulted in functional impairment beyond the schedule of impairments listed under section 8-42-107(2)(a), C.R.S. or whether her impairment was limited to her right upper extremity.

STIPULATION OF FACT

1. The parties stipulate and agree that Claimant's average weekly wage is $639.91; and

2. The parties stipulate and agree that Respondents will pay Claimant $2,957.23 as compensation for lost wages resulting from her work injury from June 9, 2017, to August 31, 2018.

FINDINGS OF FACT

1. Claimant is a 37 year old female who began her employment with Employer on April 22, 2014. On June 9, 2017, Claimant reported an injury to Employer complaining of shoulder pain as a result of repetitive motions. Prior to this injury, Claimant worked exclusively as a "Flank Trimmer" for the Employer. Claimant credibly testified that this position required her to pull meat toward her, cut the meat with her right hand and throw pieces of meat over her head. Claimant reported her injury in June 2017, however, Claimant first sought treatment for her injury in January 2018.

2. Claimant began to develop pain and functional loss in her right upper extremity in April 2017, due to the repetitive nature of her job as a flank trimmer. When the pain and functional loss worsened, Claimant reported these issues to Employer in June 2017. Claimant received in-house treatment. Approximately six to nine months after Claimant's pain began, Claimant was referred to Banner Health on January 29, 2018.

3. On January 29, 2018, Claimant completed a "New Patient Questionnaire" and indicated that she experienced pain throughout both arms, right trapezius, and right periscapular area. Records reflect that June 9, 2017, was selected as Claimant's date of injury. Dr. Linda Young diagnosed Claimant with a right shoulder rotator cuff strain, scapular dyskinesia and adhesive capsulitis. Claimant was referred for physical therapy, prescribed over-the-counter medication, and assigned work restrictions. By March 26, 2018, Dr. Young opined the slow progress of Claimant's recovery was likely due to the length of time Claimant's injury was untreated.

4. Claimant received a course of treatment inclusive of physical therapy, massage therapy, dry needling, trigger point injections, subacromial injections, and orthopedic evaluation. Claimant's course of treatment was not confined to Claimant's right upper extremity; nor did she only complain of limitations and pain in her right arm. Physical therapy, dry needling, massage therapy, and injections were all performed beyond Claimant's right glenohumeral joint, including to her left shoulder, cervical and thoracic spine, and the periscapular musculature of the right upper extremity.

5. Claimant began physical therapy on February 5, 2018. Sandra Starkovich, PT, DPT, diagnosed right shoulder rotator cuff strain and scapular dyskinesia. Ms. Starkovich noted in her assessment that Claimant had multiple areas of soft tissue tightness/restriction including in her bilateral shoulders, scapula, rib cage, and thoracic spine, which would require treatment. Ms. Starkovich also opined Claimant's left shoulder was limited and in pain likely due to compensating for the right shoulder. Claimant's last physical therapy session was June 5, 2018. She received treatment to her bilateral shoulders, right trapezius, pectoral, scapula, subscapular area, ribs, and thoracic spine. Claimant's course of physical therapy included treatment beyond her right shoulder to address the limitations and pain beyond the right glenohumeral joint.

6. The same is true regarding Claimant's course of massage therapy. Her initial session with Wendy Castillo, RMT, at Medical Massage of the Rockies was on March 1, 2018, and her last session was June 7, 2018. Her treatment involved massage to Claimant's right upper quadrant, inclusive of the right shoulder, trapezius, scapula, ribs and both the cervical and thoracic spine.

7. On March 26, 2018, Claimant received a right subacromial injection by Dr. Linda Young. On April 25, 2018 Claimant underwent an MRI of her right shoulder that indicated she suffered from a partial thickness tear of the supraspinatus and a low-grade thickness tear of the subscapularis tendon. On May 4, 2018, she was diagnosed with adhesive capsulitis and partial rotator cuff tear by orthopedist Dr. Daniel Heaston, who recommended further conservative treatment before considering surgery.

8. On June 6, 2018, Claimant began pain management with physiatrist Dr. Gregory Reichhardt. Dr. Reichhardt noted pain over Claimant's right periscapular area, particularly the upper trapezius and interscapular area. Dr. Reichhardt diagnosed right periscapular pain, and performed trigger point injections into Claimant's right periscapular area, including the right levator scapula, upper trapezius, and right rhomboid. Dr. Reichhardt recommended Claimant undergo EMG/NCS testing of the right upper extremity. This took place on July 2, 2018, and indicated Claimant was also suffering from claim related mild right median neuropathy at the wrist and probably mild carpel tunnel syndrome.

9. On August 10, 2018, Claimant returned to Dr. Heaston for orthopedic evaluation. Dr. Heaston opined that, while surgery is indicated, Claimant is not a surgical candidate until her shoulder range of motion improved. On this date, Claimant underwent a second right subacromial injection.

10. On August 22, 2018, Claimant returned to Dr. Reichhardt for evaluation. Dr. Reichhardt placed Claimant at MMI. He assigned permanent restrictions and recommended maintenance care. He also assigned a 17% scheduled permanent impairment rating to Claimant's right upper extremity. On August 31, 2018, Dr. Young agreed with Dr. Reichhardt and placed Claimant at MMI as of August 22, 2018, with a 17% scheduled impairment to her right upper extremity.

11. Claimant underwent an independent medical exam with Dr. Stephen Gray on April 30, 2019. Dr. Gray opined Claimant's permanent impairment should be awarded based on the whole person "due to the regional involvement of anatomical structures, primarily musculature and tendons, found proximal to the glenohumeral joint."

12. Claimant relies on Dr. Gray's opinion as medical evidence that her functional impairment is beyond the schedule of impairments, and the 10% whole person impairment opined by Dr. Reichhardt and Dr. Young should be awarded due to the impact of the work injury on parts of the body not on the schedule of impairments. The doctors opined that Claimant experienced functional limitations on the right-sided shoulder girdle, parascapular and cervicothoracic musculature causing a whole person decrease in function.

13. The medical records reflect that the situs of Claimant's admitted work injury is beyond her right shoulder joint and causes impairment to her whole person. It is well documented Claimant received treatment to multiple areas of her body beyond her right shoulder joint to address pain and functional loss to those areas. Claimant also credibly testified to how her admitted work injury negatively impacts her ability to meet the personal, social, and occupational demands of her life. Claimant credibly testified she suffers ongoing pain and functional loss resultant of her work injury. She testified she experiences pain in all planes when moving her right shoulder, including pain into her back and neck. This makes performing personal tasks more difficult, and often prevents her from doing certain things she could do prior to the work injury. She testified the effects of her work injury make simple things likes cleaning and parenting more difficult. That, due to the effects of her work injury, she had to purchase a car with an automatic transmission because the manual transmission caused pain while shifting gears. She credibly testified she experiences pain and weakness while washing and stacking dishes, and that she cannot push the vacuum with her right arm. That taking care of her personal hygiene is more challenging. Also, she is now limited in the activities with her seven year old, such as doing her daughter's hair or playing catch.

14. Claimant's work injury resulted in permanent work restrictions that negatively impact her ability to meet the occupational demands of her job. She works modified duty for Employer. Claimant has a 10 pound restriction to her right upper extremity resultant of her work injury.

CONCLUSIONS OF LAW

1. The purpose of the Act is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. A claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

3. In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the *ALJ. Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S.

4. Section 8-42-107(1)(a), C.R.S. limits medical impairment benefits to those provided in section 8-42-107(2), C.R.S. when a claimant's injury is one enumerated in the schedule of impairments. The schedule includes the loss of the "arm at the shoulder." *See* section 8-42-107(2)(a), C.R.S. However, the "shoulder" is not listed in the schedule of impairments. *See Bolin v. Wacholtz*, W.C. No. 4-240-315 (ICAO, June 11, 1998).

5. When an injury results in a permanent medical impairment not set forth on a schedule of impairments, an employee is entitled to medical impairment benefits paid as a whole person. *See* section 8-42-107(8)(c), C.R.S.

6. Because section 8-42-107(2)(a), C.R.S. does not define a "shoulder" injury, the dispositive issue is whether a claimant has sustained a functional impairment to a portion of the body listed on the schedule of impairments. *See Strauch v. PSL Swedish Healthcare,* 917 P.2d 366, 368 (Colo. App. 1996). Whether a claimant has suffered the loss of an arm at the shoulder under section 8-42-107(2)(a), C.R.S., or a whole person medical impairment compensable under section 8-42-107(8)(c), C.R.S., is determined on a case-by-case basis. *See DeLaney v. Industrial Claim Appeals Office,* 30 P.3d 691, 693 (Colo. App. 2000).

7. The Judge must thus determine the situs of a claimant's "functional impairment." *Velasquez v. UPS*, W.C. No. 4-573-459 (ICAO Apr. 13, 2006). The situs of the functional impairment is not necessarily the site of the injury. *See In re Hamrick,* W.C. No. 4-868-996-01 (ICAO, Feb. 1, 2016); *In re Zimdars*, W.C. No. 4-922-066-04 (ICAO, Feb. 4, 2015). Pain and discomfort that limit a claimant's ability to use a portion of the body is considered functional impairment for purposes of determining whether an injury is off the schedule of impairments. *In re Johnson –Wood,* W.C. No. 4-536-198 (ICAO, June 20, 2005); *Vargas v. Excel Corp*., W.C. 4-551-161 (ICAO, Apr. 21, 2005). However, the mere presence of pain in a portion of the body beyond the schedule does not require a finding that the pain represents a functional impairment. *Lovett v. Big Lots*, WC 4-657-285 (ICAO, Nov. 16, 2007); *O'Connell v. Don's Masonry*, W.C. 4-609-719 (ICAO, Dec. 28, 2006).

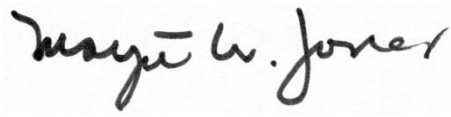
8. On the basis of the totality of the record, it is found and concluded that Claimant's work injury involving the right upper extremity extends beyond the arm at the shoulder. Claimant credibly testified how her admitted work injury negatively impacts her ability to meet the personal, social, and occupational demands of her life. Claimant credibly testified she suffers ongoing pain and functional loss resultant of her work injury. She testified with record support that she experiences pain in all planes when moving her right shoulder, including pain into her back and neck.

9. Claimant proved by a preponderance of the evidence that she is entitled to a whole person impairment rating because her work injury caused functional impairment extending beyond the arm at the shoulder.

ORDER

Claimant is entitled to a 10% whole person impairment rating for her right upper extremity injury.

DATED: October 4, 2019



Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

1. Whether Respondents have produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Mark Winslow, M.D. that Claimant has not reached Maximum Medical Improvement (MMI) from her February 18, 2017 admitted lumbar spine injury.

2. Whether Claimant has demonstrated by a preponderance of the evidence that the disc arthroplasty surgery recommended by Michael Janssen, M.D. is reasonable, necessary and causally related to Claimant's February 18, 2017 admitted industrial injury.

FINDINGS OF FACT

1. Claimant worked for Employer as a Flight Attendant. On February 18, 2017 she suffered an admitted lumbar strain during the course and scope of her employment. Claimant specifically stepped in a pothole while taking a walk between flights. She did not fall, but immediately suffered pain in her lower back.

2. Claimant reported her injury to Employer and was directed to report to Concentra Medical Centers for treatment. Claimant went on vacation after her layover but presented to Concentra on February 27, 2017. She reported that she injured her lower back when she stepped into a pothole and twisted. Claimant advised Jerald Solot, D.O. that she was experiencing radiating pain into her toes. Dr. Solot assessed Claimant with a lumbar strain and referred her for physical therapy.

3. Claimant treated conservatively with little improvement and underwent a lumbar MRI on April 4, 2017. The MRI revealed a small central disc bulge mildly indenting the dural sac without root sleeve deformity. The radiologist's assessment was lumbosacral spondylosis with sacroiliac joint dysfunction and lumbar facet dysfunction at L4-L5, L5-S1 and potentially L3-L4.

4. In May 2017 Claimant visited Allison M. Fall, M.D. for an evaluation. Dr. Fall recommended right side L4-L5 and L5-S1 facet injections with a right SI joint injection and referred Claimant to Robert Kawasaki, M.D. Claimant underwent the SI joint injection with Dr. Kawasaki. Based on her response Dr. Kawasaki recommended L4-L5 and L5-S1 medial branch blocks instead of the facet injections. Dr. Kawasaki administered medial branch blocks in August and September 2017.

5. On July 30, 2017 Kathleen D'Angelo, M.D. performed an independent medical examination of Claimant. Dr. D'Angelo determined that Claimant's underlying degenerative spine disease was aggravated by her work injury and she should proceed

with the injections recommended by Dr. Fall. Dr. D'Angelo concluded that Claimant was not a surgical candidate. She noted that, if the injections were not helpful, then Claimant would reach Maximum Medical Improvement (MMI) after concluding physical therapy. Dr. D'Angelo remarked that aggravation of an underlying condition is a temporary issue and Claimant would not require maintenance treatment after MMI.

6. On October 31, 2017 Claimant visited Michael Janssen, D.O. for an orthopedic evaluation. Dr. Janssen noted that Claimant suffered a twisting injury when she stepped in a pothole. He determined that Claimant suffered vertical instability, dehydration and loss of structural integrity of the posterior annulus at lumbar level L4-L5. Dr. Janssen remarked that Claimant might require a fusion or disc replacement at L4-L5. He planned to speak with Claimant's Concentra physician regarding whether Claimant was a surgical candidate and should undergo a discography.

7. On January 6, 2018 Dr. Fall determined that Claimant had reached MMI. She diagnosed Claimant with the following: (1) chronic pain disorder; (2) lumbar degenerative changes; and (3) the probability that psychological issues played a role in her presentation and perceived disability. Dr. Fall reasoned that surgery was unlikely to benefit Claimant and declined to recommend a discogram. Relying on the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised) (AMA Guides*), Dr. Fall assigned Claimant a 5% whole person lumbar impairment rating pursuant to Table 53. She noted that Claimant's range of motion was self-limited and did not represent her true function. She therefore declined to provide additional impairment for range of motion deficits. Dr. Fall released Claimant to work with no restrictions.

8. On February 12, 2018 Claimant underwent a psychological evaluation with Gary S. Gutterman, M.D. Dr. Gutterman concluded that Claimant was an appropriate psychological candidate for a discogram.

9. On April 12, 2018 Kathy McCranie, M.D. performed an independent medical examination of Claimant. She determined that Claimant's subjective complaints outweighed her objective findings. Dr. McCranie remarked that Claimant had sustained a minor mechanism of injury that caused a lumbar strain. She determined that Claimant's lumbar MRI was essentially normal and reflected only mild degenerative disc disease. Dr. McCranie agreed with Dr. Fall that Claimant had reached MMI. She assigned a 5% whole person lumbar impairment rating pursuant to Table 53. However, Dr. McCranie also assigned a 3% impairment for range of motion deficits. Combining the ratings yields an 8% whole person permanent impairment rating.

10. On May 21, 2018 Claimant underwent a second lumbar MRI. The MRI reflected a central disc extrusion at L4-L5 that had increased in size since the prior MRI and L4-L5 retrolisthesis that was new since the prior MRI.

11. On September 21, 2018 the parties executed a Stipulation. The agreement specified that Respondents would provide a discogram and post-discogram CT scan with Dr. Janssen. The Stipulation also specified that Claimant reached MMI on

January 26, 2018 and suffered a 5% whole person lumbar impairment rating as determined by Dr. Fall.

12. Respondents subsequently filed a Final Admission of Liability (FAL) pursuant to the Stipulation. Claimant challenged the FAL and sought a Division Independent Medical Examination (DIME).

13. On September 25, 2018 Claimant underwent a CT scan and lumbar discography of L3-L4 and L4-L5. After reviewing the discography, Dr. Janssen determined Claimant was a surgical candidate for a disc arthroplasty. He sought surgical authorization but the request was denied.

14. On October 17, 2018 Dr. Gutterman issued a second psychological report. He concluded that Claimant was an appropriate surgical candidate. Dr. Gutterman remarked that there was no reason to preclude surgery based on psychiatric functioning.

15. On February 12, 2019 Mark C. Winslow, D.O. conducted a DIME of Claimant. Dr. Winslow noted Claimant specifically stepped in a pothole while walking between flights. She did not fall, but immediately suffered pain in her lower back. Dr. Winslow diagnosed Claimant with pre-existing "chronic stable clinically quiescent lumbar degenerative disc disease" and an aggravation of her pre-existing condition that caused an "interruption of the integrity of the lumbar disc" because of her work injury. He commented that, if Claimant's degenerative disc disease was aggravated by the work accident and Claimant requires surgery to address the degenerative disc disease, then it is clear the injury caused the need for surgery. Dr. Winslow reasoned that Claimant had exhausted all conservative management and qualified for the surgery recommended by Dr. Janssen. He concluded Claimant had not reached MMI and recommended surgical treatment at the discretion of Dr. Janssen. Dr. Winslow assigned a provisional 20% whole person lumbar rating consisting of 5% pursuant to Table 53 and 16% for range of motion deficits. He obtained and documented valid range of motion measurements of Claimant's lumbar spine pursuant to the *AMA Guides*.

16. On April 20, 2019 Claimant underwent a second independent medical examination with Dr. McCranie. She received updated medical records and reviewed the opinions of Drs. Janssen and Winslow. Dr. McCranie disagreed with Dr. Winslow's assessment that Claimant's degenerative disc disease had been aggravated by the injury. She remarked that Claimant's April 4, 2017 lumbar MRI was essentially normal with no evidence of a discogenic injury. Moreover, Claimant's treating physician Dr. Fall did not determine there had been an aggravation. Dr. McCranie reasoned that Dr. Winslow erred in his assessment of causality when he determined that, because Claimant's degenerative disc disease was aggravated by the work injury and surgery was necessary to address the degenerative condition, the work injury caused the need for surgery.

17. Dr. McCranie considered Dr. Winslow's failure to address the significant differences between Claimant's April 4, 2017 and May 21, 2018 lumbar MRIs. Specifically, the May 21, 2018 MRI revealed a larger L4-L5 disc extrusion and new retrolisthesis. Dr. McCranie determined that any aggravation of Claimant's degenerative disc disease occurred between April 4, 2017 and May 21, 2018 and would thus be unrelated to the February 18, 2017 work injury. She maintained that Claimant had reached MMI. Dr. McCranie also reviewed Dr. Winslow's provisional 20% whole person rating. While she agreed with his 5% rating under Table 53, she disagreed with Dr. Winslow's range of motion measurements. Dr. McCranie commented that Dr. Winslow failed to compare his measurements with those of prior examiners to assess consistency.

18. On July 18, 2019 the parties conducted the pre-hearing evidentiary deposition of Dr. Janssen. Dr. Janssen maintained that Claimant's need for lumbar surgery is causally related to her February 18, 2017 industrial injury. He explained that Claimant suffers vertical instability in which her disc is unable to withstand loads. Dr. Janssen determined that the changes in Claimant's April 4, 2017 and May 21, 2018 MRI's reflect the worsening of her lumbar spine as a result of the February 18, 2017 industrial injury. He detailed that Claimant's disc injury from February 18, 2017 "progresses and collapses and gets further tears in it, and then sometimes starts developing this progressive vertical instability." The May 21, 2018 MRI did not reveal new findings, but simply a progression of the findings from the April 4, 2017 MRI.

19. On August 21, 2019 the parties conducted the post-hearing evidentiary deposition of Dr. McCranie. Dr. McCranie maintained that Dr. Winslow's causation assessment was erroneous. She testified that the findings in Claimant's April 4, 2017 MRI were very common and the literature reflects 77% of women under the age of 50 will have degenerative changes of the lumbar spine. Dr. McCranie commented that the aggravation of degenerative changes requires a mechanism of injury that would change the spine pathology. A traumatic fall or a heavy lifting incident would change spinal pathology, but something as minor as stepping into a pothole would not. Dr. McCranie explained there was a significant difference in the May 21, 2018 lumbar MRI because it reflected a L4-L5 disc extrusion that had only been a disc bulge on April 4, 2017. Claimant now also has retrolisthesis at the L4-L5 level. Dr. McCranie concluded that the changes reflected in the MRIs are not related to Claimant's work injury. The proposed surgery is thus unrelated to the minor February 18, 2017 work injury. Dr. McCranie agreed with Dr. Fall that Claimant reached MMI on January 6, 2018.

20. Respondents have failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Winslow that Claimant has not reached MMI from her February 18, 2017 admitted lumbar strain. Initially, Claimant suffered an admitted lumbar injury when she stepped in a pothole while taking a walk between flights. She did not fall, but immediately suffered pain in her lower back. Dr. Winslow diagnosed Claimant with pre-existing "chronic stable clinically quiescent lumbar degenerative disc disease" and an aggravation of her pre-existing condition that caused an "interruption of the integrity of the lumbar disc" because of her work injury. He commented that, if

Claimant's degenerative disc disease was aggravated by the work accident and Claimant requires surgery to address the degenerative disc disease, then it is clear the injury caused the need for surgery. Dr. Winslow reasoned that Claimant had exhausted all conservative management and qualified for the surgery recommended by Dr. Janssen. He concluded Claimant had not reached MMI and recommended surgical treatment at the discretion of Dr. Janssen. Dr. Winslow assigned a provisional 20% whole person lumbar rating consisting of 5% pursuant to Table 53 and 16% for range of motion deficits. He obtained and documented valid range of motion measurements of Claimant's lumbar spine pursuant to the *AMA Guides*.

21. In contrast, Dr. Fall determined that Claimant had reached MMI on January 6, 2018. She diagnosed Claimant with chronic pain disorder and lumbar degenerative changes. Relying on the *AMA Guides*, Dr. Fall assigned Claimant a 5% whole person lumbar impairment rating pursuant to Table 53. Similarly, Dr. McCranie disagreed with Dr. Winslow's assessment that Claimant's degenerative disc disease had been aggravated by the work injury. Dr. McCranie considered Dr. Winslow's failure to address the significant differences between Claimant's April 4, 2017 and May 21, 2018 lumbar MRIs. Specifically, the May 21, 2018 MRI revealed a larger L4-L5 disc extrusion and new retrolisthesis. Dr. McCranie determined that any aggravation of Claimant's degenerative disc disease occurred between April 4, 2017 and May 21, 2018 and would thus be unrelated to the February 18, 2017 work injury. Furthermore, Dr. McCranie commented that the aggravation of degenerative changes requires a mechanism of injury that would change spinal pathology. Finally, Dr. McCranie noted Claimant reached MMI on January 6, 2018 and disagreed with Dr. Winslow's range of motion measurements because he failed to compare them with the readings from prior examiners to assess consistency.

22. Respondents have failed to demonstrate that Dr. Winslow improperly applied the *AMA Guides* or otherwise erred in concluding that Claimant has not reached MMI. Dr. Winslow explained that Claimant suffered an aggravation of her pre-existing degenerative lumbar spine condition on February 18, 2017. However, Drs. Fall and McCranie disagreed with Dr. Winslow's MMI determination because Claimant's current lumbar condition is unrelated to his February 8, 2017 industrial injury. The disagreement is insufficient to demonstrate that Dr. Winslow's conclusion was clearly erroneous. Notably, Dr. Janssen supported Dr. Winslow's determination by persuasively explaining that the change in Claimant's April 4, 2017 and May 21, 2018 MRI's reflected the worsening of Claimant's lumbar spine as a result of the February 18, 2017 industrial injury. Accordingly, Respondents have failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Winslow's determination that Claimant has not reached MMI is incorrect.

23. Claimant has demonstrated that it is more probably true than not that the disc arthroplasty surgery recommended by Dr. Janssen is reasonable, necessary and causally related to her February 18, 2017 admitted industrial injury. Dr. Janssen explained that Claimant's need for lumbar surgery is causally related to her February 18, 2017 industrial injury. He specified that Claimant suffers vertical instability in which

her disc is unable to withstand loads. Dr. Janssen detailed that the change in Claimant's April 4, 2017 and May 21, 2018 MRI's reflected the worsening of Claimant's lumbar spine as a result of the February 18, 2017 industrial injury. He specifically remarked that Claimant's disc injury from February 18, 2017 "progresses and collapses and gets further tears in it, and then sometimes starts developing this progressive vertical instability." The May 21, 2018 MRI did not reveal new findings, but simply a progression of Claimant's condition from the April 4, 2017 MRI. Moreover, based on a lumbar discography of L3-L4 and L4-L5, Dr. Janssen determined Claimant was a surgical candidate for a disc arthroplasty. Finally. Dr. Gutterman conducted a psychological evaluation of Claimant and concluded that she was an appropriate surgical candidate. Dr. Gutterman remarked that there was no reason to preclude surgery based on psychiatric functioning.

24. In contrast, Dr. McCranie commented that the aggravation of Claimant's degenerative lumbar condition would have required a mechanism of injury sufficient to change spinal pathology. A traumatic fall or heavy lifting would change spinal pathology, but something as minor as stepping into a pothole would not. Dr. McCranie explained there was a significant difference in the May 21, 2018 lumbar MRI because it reflected a L4-L5 disc extrusion that had only been a disc bulge on April 4, 2017. Claimant also has retrolisthesis at the L4-L5 level. Dr. McCranie concluded that the changes reflected in the MRIs are not related to Claimant's work injury. She summarized that the proposed lumbar spine surgery would not be related to Claimant's minor work injury. However, Dr. Janssen persuasively determined that the changes in Claimant's lumbar MRI's were caused by the progression of her February 18, 2017 work injury. Moreover, the record reflects that the proposed surgery is designed to address Claimant's work-related symptoms. Accordingly, the recommended lumbar spine surgery is reasonable, necessary and causally related to Claimant's February 18, 2017 industrial injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings

as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Overcoming the DIME

4. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAO, June 30, 2008); *see Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

5. A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAO, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAO, Apr. 16, 2008).

6. A DIME physician's opinions concerning MMI and impairment carry presumptive weight pursuant to §8-42-107(8)(b)(III), C.R.S.; *see Yeutter v. Industrial Claim Appeals Office*, No. 18CA0498 (Apr. 11, 2019) 2019 COA 53. The statute provides that "[t]he finding regarding [MMI] and permanent medical impairment of an independent medical examiner in a dispute arising under subparagraph (II) of this paragraph (b) may be overcome only by clear and convincing evidence." *Id.* Subparagraph (II) is limited to parties' disputes over "a determination by an authorized treating physician on the question of whether the injured worker has or has not reached [MMI]." §8-42-107(8)(b)(II). "Nowhere in the statute is a DIME's opinion as to the cause of a claimant's injury similarly imbued with presumptive weight." *See Yeutter*, 2019 COA 53 ¶ 18. Accordingly, a DIME physicians opinion carries presumptive weight only with respect to MMI and impairment. *Id.* at ¶ 21.

7. "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable

and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAO, Nov. 17, 2000).

8. As found, Respondents have failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Winslow that Claimant has not reached MMI from her February 18, 2017 admitted lumbar strain. Initially, Claimant suffered an admitted lumbar injury when she stepped in a pothole while taking a walk between flights. She did not fall, but immediately suffered pain in her lower back. Dr. Winslow diagnosed Claimant with pre-existing "chronic stable clinically quiescent lumbar degenerative disc disease" and an aggravation of her pre-existing condition that caused an "interruption of the integrity of the lumbar disc" because of her work injury. He commented that, if Claimant's degenerative disc disease was aggravated by the work accident and Claimant requires surgery to address the degenerative disc disease, then it is clear the injury caused the need for surgery. Dr. Winslow reasoned that Claimant had exhausted all conservative management and qualified for the surgery recommended by Dr. Janssen. He concluded Claimant had not reached MMI and recommended surgical treatment at the discretion of Dr. Janssen. Dr. Winslow assigned a provisional 20% whole person lumbar rating consisting of 5% pursuant to Table 53 and 16% for range of motion deficits. He obtained and documented valid range of motion measurements of Claimant's lumbar spine pursuant to the *AMA Guides*.

9. As found, in contrast, Dr. Fall determined that Claimant had reached MMI on January 6, 2018. She diagnosed Claimant with chronic pain disorder and lumbar degenerative changes. Relying on the *AMA Guides*, Dr. Fall assigned Claimant a 5% whole person lumbar impairment rating pursuant to Table 53. Similarly, Dr. McCranie disagreed with Dr. Winslow's assessment that Claimant's degenerative disc disease had been aggravated by the work injury. Dr. McCranie considered Dr. Winslow's failure to address the significant differences between Claimant's April 4, 2017 and May 21, 2018 lumbar MRIs. Specifically, the May 21, 2018 MRI revealed a larger L4-L5 disc extrusion and new retrolisthesis. Dr. McCranie determined that any aggravation of Claimant's degenerative disc disease occurred between April 4, 2017 and May 21, 2018 and would thus be unrelated to the February 18, 2017 work injury. Furthermore, Dr. McCranie commented that the aggravation of degenerative changes requires a mechanism of injury that would change spinal pathology. Finally, Dr. McCranie noted Claimant reached MMI on January 6, 2018 and disagreed with Dr. Winslow's range of motion measurements because he failed to compare them with the readings from prior examiners to assess consistency.

10. As found, Respondents have failed to demonstrate that Dr. Winslow improperly applied the *AMA Guides* or otherwise erred in concluding that Claimant has not reached MMI. Dr. Winslow explained that Claimant suffered an aggravation of her pre-existing degenerative lumbar spine condition on February 18, 2017. However, Drs. Fall and McCranie disagreed with Dr. Winslow's MMI determination because Claimant's

current lumbar condition is unrelated to his February 8, 2017 industrial injury. The disagreement is insufficient to demonstrate that Dr. Winslow's conclusion was clearly erroneous. Notably, Dr. Janssen supported Dr. Winslow's determination by persuasively explaining that the change in Claimant's April 4, 2017 and May 21, 2018 MRI's reflected the worsening of Claimant's lumbar spine as a result of the February 18, 2017 industrial injury. Accordingly, Respondents have failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Winslow's determination that Claimant has not reached MMI is incorrect.

Medical Benefits

11. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

12. As found, Claimant has demonstrated by a preponderance of the evidence that the disc arthroplasty surgery recommended by Dr. Janssen is reasonable, necessary and causally related to her February 18, 2017 admitted industrial injury. Dr. Janssen explained that Claimant's need for lumbar surgery is causally related to her February 18, 2017 industrial injury. He specified that Claimant suffers vertical instability in which her disc is unable to withstand loads. Dr. Janssen detailed that the change in Claimant's April 4, 2017 and May 21, 2018 MRI's reflected the worsening of Claimant's lumbar spine as a result of the February 18, 2017 industrial injury. He specifically remarked that Claimant's disc injury from February 18, 2017 "progresses and collapses and gets further tears in it, and then sometimes starts developing this progressive vertical instability." The May 21, 2018 MRI did not reveal new findings, but simply a progression of Claimant's condition from the April 4, 2017 MRI. Moreover, based on a lumbar discography of L3-L4 and L4-L5, Dr. Janssen determined Claimant was a surgical candidate for a disc arthroplasty. Finally. Dr. Gutterman conducted a psychological evaluation of Claimant and concluded that she was an appropriate surgical candidate. Dr. Gutterman remarked that there was no reason to preclude surgery based on psychiatric functioning.

13. As found, in contrast, Dr. McCranie commented that the aggravation of Claimant's degenerative lumbar condition would have required a mechanism of injury sufficient to change spinal pathology. A traumatic fall or heavy lifting would change spinal pathology, but something as minor as stepping into a pothole would not. Dr. McCranie explained there was a significant difference in the May 21, 2018 lumbar MRI

because it reflected a L4-L5 disc extrusion that had only been a disc bulge on April 4, 2017. Claimant also has retrolisthesis at the L4-L5 level. Dr. McCranie concluded that the changes reflected in the MRIs are not related to Claimant's work injury. She summarized that the proposed lumbar spine surgery would not be related to Claimant's minor work injury. However, Dr. Janssen persuasively determined that the changes in Claimant's lumbar MRI's were caused by the progression of her February 18, 2017 work injury. Moreover, the record reflects that the proposed surgery is designed to address Claimant's work-related symptoms. Accordingly, the recommended lumbar spine surgery is reasonable, necessary and causally related to Claimant's February 18, 2017 industrial injury.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

.1 Respondents have failed to overcome Dr. Winslow's DIME opinion that Claimant has not reached MMI.

2. The disc arthroplasty surgery recommended by Dr. Janssen is reasonable, necessary and causally related to Claimant's February 18, 2017 admitted industrial injury.

3. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: October 8, 2019.

DIGITAL SIGNATURE:
Peter J. Cannici

ISSUES

- Is the 22% whole person rating assigned by the DIME highly probably incorrect?
- If so, did Claimant prove entitlement to a PPD award by a preponderance of the evidence?

FINDINGS OF FACT

1. Claimant worked as a caregiver at Employer's assisted living facility. Her duties involved assisting elderly and disabled patients with activities of daily living such as bathing, dressing, and bed transfers. The job was physically demanding and required frequent heavy lifting. Claimant had worked for Employer "on and off" for approximately nine years, and continuously for approximately eighteen months before the work accident.

2. Claimant suffered an admitted low back injury on October 13, 2017 while helping a patient get dressed. After getting the patient out of bed, she bent down in an awkward position to pull up his pants. When she started to pull the pants up, she felt a painful pop in her low back. The pain was bad enough Claimant had difficulty standing up straight for a few minutes. She helped the patient to a chair and then reported the injury to her supervisor.

3. Claimant has a history of low back problems that is pertinent to Respondents' arguments regarding impairment. She saw her primary care provider at Peak Vista Community Health Centers on March 5, 2014 for low back pain. The report states, "31 y/o female here c/o worsening low back pain over the last couple months. She states long Hx of low back pain for many yrs possibly related to work injury that she saw a work comp doctor for. She states having some sort of imaging at that time showing DDD. She has not had further avowal since then. She denies pain radiating down legs but occasional numbness in the back of right calf." The pain was described as moderate, fluctuating, and dull, aggravated by activity and alleviated with ibuprofen. Physical examination showed mild tenderness to palpation of the paraspinal muscles, "good" range of motion, negative straight leg raise, and normal strength. The provider ordered x-rays and referred Claimant to physical therapy. She recommended stretching and recommended Claimant return if she failed to improve or got worse. Claimant had the x-rays April 8, 2014, which were "normal." Claimant did not go to physical therapy and her condition improved shortly thereafter.

4. There is no further mention of any low back problems in the medical records until January 16, 2017. On that date, Claimant saw Dr. Randall Jones at Concentra for a work-related injury two days earlier. A resident had pulled Claimant's left arm when she was trying to break up a fight with another resident, causing neck, mid back, and low back pain. The pain was on the left side of her neck and back. Examination of the lumbar spine

showed minimal tenderness in the left paraspinal muscles and full, painless range of motion. Claimant was diagnosed with neck, thoracic, and low back strains. Dr. Jones recommended moist heat and OTC ibuprofen. He reassured Claimant she "should do well" and anticipated she would reach MMI quickly. He imposed no work restrictions.

5. Claimant's symptoms were not much better at her next Concentra visit on January 26, 2017, so Dr. Jones recommended physical therapy. Claimant attended two sessions of PT and stopped going because she felt better. There is no indication she received any further treatment until the October 2017 injury.

6. Claimant testified to episodic low back pain and "soreness" before the October 2017 accident, primarily associated with work activities. The episodes typically resolved quickly without treatment. Claimant testified she performed all the duties of her job without limitation or difficulty before. Claimant's testimony on these points was credible and persuasive.

7. Employer referred Claimant back to Concentra after the October 13, 2017 accident. She saw Dr. Walter Larimore at her initial visit on October 18, 2017. She reported 6/10 pain making it difficult to sleep. Her pain diagram indicated pain in the mid-to-right-side low back and sacral area. Dr. Larimore noted no previous low back pain or injury. Physical examination revealed right-sided muscle spasms and impaired range of motion. Dr. Larimore diagnosed a lumbar strain and prescribed Flexeril and diclofenac. He referred Claimant to physical therapy and imposed work restrictions of no lifting over 20 pounds.

8. Claimant saw Dr. Ronald Peveto on October 20 and October 25, 2017. His physical examinations revealed tenderness and sharp pain on the right side of her low back and limited lumbar range of motion. There was no palpable spasm noted.

9. Claimant attended several physical therapy sessions, which temporarily lessened her low back and SI joint pain. She had to cancel some appointments due to a family emergency and having to move on short notice.

10. On December 5, 2017, Dr. Peveto ordered a lumbar MRI because Claimant was not better and reported shooting pain in her back and legs.

11. Claimant had the MRI on December 6, 2017. It showed bulging discs at L3-4, L4-5, and L5-S1 without evidence of nerve root impingement, and a tear of the L4-5 disc. After reviewing the MRI, Dr. Peveto referred Claimant to Dr. Timothy Sandell, a physical medicine and rehabilitation specialist.

12. Claimant saw Dr. Sandell on December 18, 2017. Physical examination showed diffuse tenderness to palpation of the low back, bilateral SI joints, gluteal muscles, and sciatic notch. The neurological examination was unremarkable. She demonstrated approximately 80-90 degrees of lumbar flexion and 10 degrees of extension, with pain. He diagnosed low back pain with intermittent right lower extremity radicular symptoms and mild disc bulges without nerve impingement at L3-4, L4-5, and L5-S1. He recommended a lower extremity EMG and prescribed a Medrol Dosepak.

13. In January 2018, Claimant reported worsening pain with new shooting pain into her left leg.

14. Claimant returned to Dr. Sandell on January 22, 2018 for the EMG. The Medrol Dosepak had not help and rated her pain 7/10. Dr. Sandell noted the new left leg pain down the back of the leg to the knee. Claimant still had some radiation down the right leg sometimes went to the foot. She noticed numbness in those same areas, but no weakness. The EMG showed no evidence of nerve entrapment or radiculopathy. Dr. Sandell referred Claimant back to physical therapy and requested "a course of dry-needling to see if we can reduce some of the muscular symptoms that I think is the primary underlying cause of her back pain."

15. Claimant followed up with Dr. Peveto on January 26, 2018. Her low back pain was a bit worse since the last visit, and she had developed discomfort in her mid and upper back "due to overcompensation from the lower back." Claimant noted she periodically had to work outside of her restrictions because her clients sometimes could not sustain their weight. Dr. Peveto tightened her work restrictions to lifting no over 10 pounds and no patient care responsibilities that might involve lifting patients. He referred Claimant to Dr. Randy Knoche, for chiropractic, core strengthening, and dry needling.

16. Dr. Knoche evaluated Claimant on February 6, 2018. He was impressed with possible bilateral SI joint dysfunction besides the low back pain. Dr. Knoche diagnosed a lumbosacral sprain and a sacroiliac joint sprain with attendant muscle spasm and inflammation.

17. Dr. Knoche documented myofascial trigger points in the piriformis and gluteus musculature on at least three occasions.

18. Dr. Sandell reevaluated Claimant on February 21, 2018. His examination showed focal tenderness in the lower portion of the SI joints, worse on the left side. He noted, "She has responded somewhat to the tri-needling and the chiropractic care. However, this seems to be helping some of the muscular symptoms in the upper back and lower thoracic region. Her low back pain remains unchanged. I do have a greater concern that there may be a different etiology, such as sacroiliitis." Dr. Sandell recommended a trial of bilateral SI joint injections.

19. Dr. Sandell administered the bilateral SI joint injections on March 16, 2018. Claimant followed up with Dr. Sandell on March 30, 2018, and reported "about 50% pain reduction from the SI joint injections." Her pain had level had decreased to a "2 or 3." Dr. Sandell recommended Claimant return to Dr. Knoche or PT and then transition to a home exercise program. He opined Claimant might need additional SI joint injections if her pain flared.

20. At her April 9, 2018 appointment with Dr. Jones, Claimant reported "marked relief" from the SI joint injection and told Dr. Jones, "she is 75-80% back to normal and states no pain today." Dr. Jones released her to try full duties because her pain was so much better. He opined she could be at MMI in approximately three months depending

on how she tolerated regular duty. He wanted her to follow up with Dr. Sandell in three weeks.

21. Claimant returned to Dr. Peveto on April 13, 2018 and reported "pain in my back feels like sharp and shooting pains getting worse since I got off restrictions." Examination showed sciatic notch tenderness and reduced lumbar range of motion. Dr. Peveto put her back on restrictions of no lifting over 20 pounds, occasional bending, and the freedom change positions periodically to relieve discomfort.

22. Claimant saw Dr. Sandell on April 18, 2018. He opined she might need more SI joint injections but noted her pain "may be calming down with adjustment in activity." He suggested Claimant try aquatic therapy.

23. On May 4, 2018, Dr. Jones advised Claimant to have the SI joint injections and referred her for aqua therapy.

24. Also on May 4, 2018, Dr. Peter Garcia performed a utilization review and recommended Respondents deny the repeat SI injections.

25. Claimant went back to Concentra on May 17, 2018 and saw Dr. George Johnson for the first time. She had an appointment scheduled for May 25 but came in early because her low back and SI joint pain were "extreme" and the medication was not helping. Massage therapy was making the pain worse. Examination of her low back showed diffuse paraspinal tenderness throughout and limited range of motion. Dr. Johnson determined Claimant was at MMI. His rationale was,

> The patient is not getting better. She has had significant PT and chiropractic. She has been on light duty for many months. She has had an MRI and EMG which were both essentially normal. She had bilateral SI joint injections which helped for a short period of time. She has not been able to return to full work. Will close and placed at MMI. Will need permanent restrictions and a rating.

26. Dr. Johnson obtained lumbar range of motion measurements, which he indicated equated to an 18% whole person rating. Despite noting the lumbar flexion measurements were invalid, he included them in the rating anyway, without explanation.

27. Claimant followed up with Dr. Sandell on May 22, 2018. He documented "palpable tenderness over the bilateral SI joints . . . increased pain with extension versus flexion . . . [and] pain with SI joint provocation maneuvers." Dr. Sandell opined,

> I still think it is best that we pursue the SI joint injections . . . She reported doing very well following the SI joint injections that were performed on March 16, 2018. Initially, she felt she had approximately 80% relief. She then returned to work and when she was taken off all work restrictions, she had increase in pain and return of symptoms. Therefore, the injection lasted until she had a significant change in activity that caused reaggravation in probable increased inflammation in the SI joints. Up to that point, she had

> reported improved function and she was able to return to work within her restrictions. She is now under permanent work restrictions and therefore, we are not anticipating return to the previous level of function that caused recurrence of her symptoms.
>
> She had not been using any medications other than Tylenol or anti-inflammatory medications. With the delay in getting some SI joint injections, she has now been prescribed some tramadol for use. She was not requiring tramadol or any stronger pain relief when she had treatment for the SI joint pain. Therefore, I would like to pursue the bilateral SI joint injections . . . .

28. On May 22, 2018, Respondents' claims adjuster asked Dr. Johnson, "if we were to override the UR's decision and approve the repeat injections, would that change the injured worker's permanent restrictions?" Dr. Johnson responded, "I do not think that any treatment will be of much benefit for the patient's condition at this time."

29. Dr. Johnson completed a rating report on June 4, 2018. He gave a 5% specific disorder rating under Table 53(II)(B), combined with 18% for lumbar range of motion, for an overall rating of 22%. Dr. Johnson noted, "not all of the [ROM] measurements were valid" without further discussion. He opined apportionment was not applicable because Claimant had no prior injury. Dr. Johnson assigned permanent restrictions of no lifting over 20 pounds and no repetitive bending at the waist.

30. Claimant was involved in a motor vehicle accident on May 30, 2018. She went to the Memorial Hospital emergency department on June 5, 2018. The report states she "presents with back pain exacerbation onset status post MVC one week ago. The patient was a restrained driver in the front seat of a vehicle that was impacted by another car. Airbags did not deploy. She did not hit her head or lose consciousness. She was able to self extricate and ambulate on scene. Presently, she complains of diffuse back pain and hip pain. . . . She has a history of sciatica." Physical exam showed diffuse tenderness of her neck, mid back, and low back. She was diagnosed with a "neck strain," a "back strain," and "myalgia" and advised to follow up with primary care.

31. Claimant went to Peak Vista Community Health Centers on June 11, 2018. She told the provider, "the motor vehicle accident has aggravated her previous injury." She was prescribed ibuprofen and referred to physical therapy. Claimant returned to Peak Vista on June 19, 2018 and was prescribed meloxicam and prednisone. She did not go to physical therapy. There are no further records of treatment specifically related to the MVA. The ALJ finds the MVA temporarily exacerbated Claimant's low back injury, but she returned to baseline and suffered no permanent aggravation.

32. Respondents requested a DIME to challenge Dr. Johnson's impairment rating. Dr. James Regan performed the DIME on October 19, 2018. Dr. Regan considered Claimant "a solid historian." He noted, "she still has significant pain and I did observe her shifting her weight in the chair (did not impress me as a 'show' but rather learned behavior from a chronic problem)." He agreed with the May 17, 2018 MMI date given by Dr. Johnson. Dr. Regan opined apportionment was not warranted because "she was fine and

at full duty at the time of her injury." He assigned a 5% specific disorder lumbar spine rating under Table 53(II)(B).[1] He also obtained lumbar range of motion measurements, which are internally valid and correspond to a 13% whole person rating. Dr. Regan concluded,

> Her whole person impairment today would be 17%. She reached MMI on 05/17/2018. She seems to have enjoyed some improvement in ROM. For rating purposes, it is appropriate to use the measurements made the day of her MMI visit and accordingly I feel 22% still represents her whole person impairment.

33. The DIME Unit requested clarification of the rating, and on November 19, 2019, Dr. Regan replied,

> I feel her rating should be the one from her date of reaching MMI, with is 22%. The date of MMI is 5/17/2018. My report explains why 22% is the more representative rating, as compared to my rating made 5 months after she had reached MMI.

34. Dr. Lawrence Lesnak performed an IME for Respondents on February 26, 2019. Dr. Lesnak noted mostly normal physical exam findings with only non-localized tenderness around the gluteal regions. Claimant's lumbar range of motion was reduced, but invalid due to "submaximal effort." Dr. Lesnak agreed Claimant was at MMI as of May 17, 2018, but opined she suffered no permanent impairment. He interpreted the medical records as showing "many years" of chronic low back pain before the work accident. He believed Claimant gave "false information" to her ATPs by failing to disclose her prior back problems. He opined "the mere activity of bending over at the waist" to pull up a man's pants would not cause any low back or SI joint injury. Dr. Lesnak believed Claimant's subjective pain complaints did not correlate with any objective findings. He noted the MRI showed no evidence of any acute injury or trauma-related pathology, and the findings were relatively normal for someone over the age of 18 to 20. He opined Claimant's response to the SI joint injections was "completely non diagnostic and non therapeutic." He concluded Claimant had no impairment from the work accident and had returned to baseline regarding her pre-existing "chronic progressive low back pain."

35. Claimant saw Dr. Jack Rook for an IME at her counsel's request on April 9, 2019. On examination, Dr. Rook appreciated severe tenderness to palpation of the bilateral SI joints and "palpable spasm" in the bilateral paralumbar musculature. Lumbar range of motion was decreased in all planes. Dr. Rook disagreed with Dr. Lesnak's argument Claimant's ongoing low back problems merely represent a continuation of a long-standing "chronic" problem. He noted Claimant had minimal pre-injury treatment for low back pain and had no difficulty performing her physically demanding job before October 2017. He emphasized that much of her pain emanates from the SI joints, and there was no indication of any pre-injury SI joint problems. He opined Claimant had a traumatic incident on October 13, 2017 associated with a painful pop in her back and "has

[1] This is the same base rating Dr. Johnson applied.

not been the same since that time." Dr. Rook opined Claimant qualified for a 5% lumbar rating under Table 53(II)(B), combined with range of motion.

36. Dr. Rook and Dr. Lesnak provided testimony to elaborate on their respective opinions. Dr. Rook opined the term "rigidity" in Table 53(II)(b) is synonymous with "stiffness" and can be evidenced by documented range of motion deficits. Dr. Lesnak conceded "[rigidity] really is not a well-defined entity," but disagreed it equates to "stiffness." He offered two contradictory definitions of "rigidity." At hearing, he opined it implies palpable paraspinal muscle "ropiness," but in his deposition he said, "it's a joint restriction or something like that. It may not cause range of motion loss, per se, but something internal and not dealing with soft tissues." Dr. Lesnak opined the treatment records demonstrate no rigidity, and only show subjective pain complaints unsupported by objective findings. He emphasized that "mere subjective complaints" do not qualify for a Table 53 rating without objective findings.

37. Dr. Rook explained Dr. Regan's decision to adopt Dr. Johnson's 22% rating was incorrect because Dr. Johnson's underlying lumbar flexion measurements were invalid. The ALJ agrees this constitutes clear error on Dr. Regan's part. Dr. Rook opined the most appropriate rating is 17% based on the valid range of motion measurements Dr. Regan obtained at the DIME appointment.

38. Dr. Rook's opinions are credible and more persuasive than the contrary opinions of Dr. Lesnak.

39. Dr. Regan's 22% rating is highly probably incorrect.

40. Claimant proved by a preponderance of the evidence she suffered a 17% whole person impairment because of her industrial accident.

CONCLUSIONS OF LAW

A DIME's determination regarding whole person impairment is binding unless overcome by "clear and convincing evidence." Section 8-42-107(8)(C). The party challenging a DIME's conclusions must demonstrate it is "highly probable" that the impairment rating is incorrect. *Qual-Med*, 961 P.2d 590 (Colo. App. 1998); *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).). A DIME physician must rate impairment consistent with the *AMA Guides*. Section 8-42-101(3.7); *Wilson v. Industrial Claim Appeals Office*, 81 P.3d 1117 (Colo. App. 2003). The DIME's deviation from the rating protocols is evidence from which the ALJ can determine the DIME's rating was overcome. *Wilson v. Industrial Claim Appeals Office, supra; McCardie v. Transit Concrete Co*., W.C. No. 4-964-260-01 (January 19, 2018).

Both parties agree Dr. Regan's 22% rating is incorrect. Therefore, the DIME has been overcome by agreement. Even without an agreement, the ALJ concludes the 22% rating is highly probably incorrect because the underlying lumbar flexion measurements were invalid. Dr. Regan's decision to adopt Dr. Johnson's invalid range of motion measurements was clearly wrong.

When a DIME's impairment rating has been overcome "in any respect," the proper rating becomes a factual matter for the ALJ's determination ALJ based on the preponderance of the evidence. *Newsome v. King Soopers*, W.C. No. 4-941-297-02 (October 14, 2016). The only limitation is that the ALJ's findings must be supported by the record and consistent with the *AMA Guides* and other rating protocols. *Serena v. SSC Pueblo Belmont Operating Company LLC*, W.C. 4-922-344-01 (December 1, 2015). In determining the rating, the ALJ can take judicial notice of the contents of the *AMA Guides*, Level II Curriculum, the Division's Impairment Rating Tips (Desk Aid #11), and other such documents promulgated by the Division of Workers' Compensation. *Id*.

The crux of the disagreement here is whether Claimant qualifies for a Specific Disorder rating under Table 53 of the *AMA Guides*. The parties agree a Table 53 rating is a prerequisite to any rating for spinal ROM deficits.

Table 53(II)(B) provides for a 5% whole person rating where the claimant has lumbar "disc or other soft-tissue lesions . . . with medically documented injury and a minimum of six months of medically documented pain and rigidity with or without muscle spasm, associated with none-to-minimal degenerative changes on structural tests."

Claimant proved the required elements for a Table 53(II)(B) lumbar rating are present here. Three Level II physicians (Dr. Johnson, Dr. Regan, and Dr. Rook) agree she qualifies for a Table 53 rating, and their opinions are supported by the evidence of record. Claimant's injury was "medically documented" in a consistent manner by numerous physicians. She has experienced and was treated for low back and SI joint[2] pain for over six months. Multiple physicians noted muscle tenderness to palpation, and at least three providers documented muscle spasm, including Dr. Larimore at the initial visit. The records repeatedly documented decreased range of motion, which satisfies the rigidity criteria. Dr. Lesnak's narrow definition of "rigidity" is not persuasive, particularly because the Level II accreditation materials state, "there is currently not an accepted definition for rigidity, thus the documented need for treatment over 6 months is the main criteria."[3] Dr. Rook's testimony that rigidity can be equated with "stiffness" is persuasive and consistent with common usage. For example, *The American Heritage College Dictionary*, (3d ed. 1993) defines the word "rigid" to include: "1. Not flexible or pliant; stiff." Similarly, *Roget's II The New Thesaurus*, (3d ed. 1995) includes "stiff" as a primary synonym for the word "rigid." Since there is no specific *medical* definition of "rigidity," the ALJ sees no reason to depart from its well-established common meaning.

Dr. Lesnak's opinion that Claimant's ongoing low back pain is merely a continuation of a pre-existing "chronic" condition is not persuasive. His argument is largely predicated on a single note from Peak Vista dated March 5, 2014 referencing a "long Hx of low back pain for many years." But the physical examination on that date was largely benign, with only mild muscle tenderness to palpation, and "good" ROM and lower extremity strength. There was no suggestion of any sacroiliac joint pain. Claimant was

[2] Per the Impairment Rating Tips, SI joint dysfunction is rated as a lumbar spine impairment under Table 53(II)(B) "in most circumstances."

[3] Level II Accreditation Curriculum (rev. 01/2019), "Spine and Pelvis Impairment Ratings, p. 191. https://tinyurl.com/y6y2psfo

given the nonspecific diagnosis “low back pain,” sent for x-rays, advised to use NSAIDs, and referred to physical therapy. Lumbar x-rays on April 8, 2014 were normal and there is no evidence Claimant ever went to therapy. The Peak Vista records after March 5, 2014 make no further mention of low back problems. The lack of treatment corroborates Claimant’s testimony the prior episodes of low back pain were infrequent and self-limiting. Even if Claimant experienced intermittent low back pain between 2014 and 2017, it was not severe enough to require any medical treatment or cause any functional limitations. Claimant worked a physically demanding job without difficulty or limitation until she suffered a minor lumbar strain while breaking up a fight in January 2017. That injury resolved after a couple of therapy sessions, and she was released with no impairment, no restrictions, and no need for follow-up care. By contrast, Claimant has been continuously symptomatic since the October 2017 work accident, and was given permanent work restrictions by the ATP.

The lumbar ROM measurements obtained by Dr. Regan at the DIME were internally valid per the *AMA Guides* criteria, and equate to a 13% impairment. Combined with the 5% specific disorder rating under Table 53(II)(B), Claimant’s overall whole person impairment is 17%.

ORDER

It is therefore ordered that:

1. Insurer shall pay Claimant PPD benefits based on a 17% whole person rating.

2. Insurer shall pay statutory interest of eight percent (8%) per annum on all benefits not paid when due.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 9, 2019

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable work related injury on March 7, 2019.

2. Whether Claimant has established by a preponderance of the evidence an entitlement to reasonable, necessary, and causally related medical benefits including a hernia surgery.

FINDINGS OF FACT

1. Claimant is a 64 year old male who is employed by Employer as an environmental specialist III. Claimant has been employed by Employer since approximately 2006.

2. Claimant works in an office location.

3. On March 7, 2019, Claimant arrived to his office location at approximately 8:00 a.m. Claimant parked in the parking lot and walked a short distance to a stairwell where he entered a door at the parking lot level, and planned to walk up stairs to the floor of his office.

4. The parking lot was snow covered and had slushy ice. This extended into the area of the base of the stairwell inside the door to the stairwell that Claimant entered.

5. Claimant had his lunch box in one hand and a box of bagels in his other hand. At the base of the stairwell, when he was about to start climbing the stairs, Claimant slipped and fell backwards.

6. Claimant fell onto his back and right side and his head struck the wall or the floor. Claimant testified that the fall happened quickly, that he was in shock for a few minutes, and that he then recovered and continued up the stairs to the floor of his office and to his cubicle.

7. Claimant testified that he had pain on the right side of his body, his groin, up his waist and to the right side of his lower back. Claimant testified that his neck and head were sore but that the pain in his neck and head were not as severe as the pain in the right side of his body.

8. Claimant testified that he started work at his cubicle, but that when he got up to use the restroom, he was limping. Claimant testified that a co-worker saw him limping and told him to report his injury and that he reported it to his supervisor.

9. Claimant testified that he was in discomfort for the next several days but thought he would heal normally because everyone trips and is sore, but that after the days passed, his soreness and discomfort turned to more pain and became intolerable. Claimant

10. On March 18, 2019, Claimant was evaluated at Concentra. Claimant reported that he slipped and fell in slush on March 7 and that he hit the right side of his body and head. Claimant reported that 2-3 days later he was fine with no pain, but that since then the pain in the right groin had increased and was radiating to the right lower abdomen and lower back. Claimant reported pain on the right side of his neck worse with turning his head to the right. Claimant reported that his groin area on the right side was hurting on and off. Claimant reported that he had to drive a long distance to work and that using his right leg to driver was exacerbating his condition. On examination, Claimant had tenderness in the right hip, pain in the proximal quadriceps, pain with forward flexion, and pain with extension. Claimant also had tenderness in the right paraspinal and right trapezius muscle and painful right cervical spine rotation. Claimant was assessed with lumbar strain, cervical strain, and groin strain and was referred to physical therapy. *See* Exhibit 5.

11. On March 21, 2019, Claimant was evaluated at Concentra. Claimant reported that he felt worse after physical therapy. Claimant reported right side neck pain, right upper back pain, and right groin pain. Claimant reported that physical therapy exacerbated his lower back pain. Claimant also reported right testicle pain worse when lifting. Claimant reported a history of lower back pain and a prior L5/S1 herniation with conservative management a few years ago that had not completely gone away but that felt better prior to his March 7 fall. An ultrasound was recommended top evaluate for inguinal hernia. *See* Exhibit 5.

12. On March 28, 2019, Claimant was evaluated at Concentra. Claimant reported that massage therapy had helped improve his range of motion and reduced his pain but that he felt like physical therapy was aggravating a prior back injury that he had. Claimant reported neck pain, back pain, and right groin pain. *See* Exhibit 5.

13. On April 3, 2019, John Sacha, M.D. evaluated Claimant. Claimant reported a slip and fall on an icy area at work and that he hit his head and landed on his back. Claimant reported that he had low back and right groin pain and that physical therapy increased his pain. Claimant reported pain in the low back with radiation to the right groin and pain in the right neck with some periscapular pain. Claimant reported a prior work related low back injury in 2009. On examination, Dr. Sacha found cervical paraspinal spasm and segmental dysfunction in the mid cervical spine. On the lower back examination, Dr. Sacha found some lumbar paraspinal spasm, some pain with straight leg raise, and pain with extension and external rotation on the right. Dr. Sacha provided the impression of cervical facet syndrome, posttraumatic in nature, whiplash associated disorder, and lumbar radiculopathy. Dr. Sacha opined that Claimant had some ongoing

pain consistent with lumbar discogenic pain as well as a mild mid cervical whiplash injury. *See* Exhibits 6, D.

14. On April 11, 2019, Claimant was evaluated at Concentra. Claimant reported neck pain, back pain, and groin pain. A cervical spine x-ray performed showed anteriorly fused C4-5, 5-6, and 6-7, typical of deseminated intravertebral sclerotic hyperostosis (forestier's disease). *See* Exhibit 5.

15. On April 17, 2018, Claimant underwent a hernia ultrasound. The impression provided was right sided reducible direct inguinal hernia, containing only fat but no intestines corresponding to Claimant's point of tenderness. *See* Exhibit 8.

16. On April 22, 2019, Claimant was evaluated at Concentra. Claimant reported that an ultrasound a few days prior revealed a right fat containing inguinal hernia and that his pain was not constant but intermittent with movements. Claimant reported that his lower back and right groin hurt getting into and out of the car and that his neck pain as worse with sudden movements. Claimant reported that he had difficulty driving due to the gas and brake pedals and that he had those problems prior to the March 7 fall when his workplace moved to a more distant location, but that it had been even worse since his March 7 fall. Claimant reported that his prior lower back injury was non-surgical. *See* Exhibit 5.

17. On May 2, 2019, John Weaver, M.D. evaluated Claimant. Claimant reported a slip and fall with an acute onset of right groin pain. Claimant reported no prior history of hernias or hernia surgeries and that his pain in the right groin was a 2/10. Dr. Weaver reviewed an ultrasound that showed a 3 X 4 cm right inguinal hernia. Dr. Weaver agreed that Claimant had a right inguinal hernia and likely had a groin strain on top of that. Dr. Weaver noted that Claimant wished to proceed with surgery. *See* Exhibit 7.

18. On May 22, 2019, Dr. Sacha evaluated Claimant. Dr. Sacha noted that a recent MRI of the lumbar spine showed evidence of a possible compression deformity at the L5 level that may or may not be from the March 7 fall and may be a coincidental finding but had some evidence of possible bone marrow edema. Dr. Sacha opined that it also could just be subchondral reactive changes from disc degeneration. Dr. Sacha recommended a one-time bone scan to make sure that it was not a coincidental finding. Dr. Sacha noted mild degenerative changes otherwise in the lumbar spine without significant foraminal or canal narrowing that would not explain the ongoing low back and leg symptoms. Dr. Sacha opined that a recent MRI of the cervical spine showed multilevel degenerative disease and facet spondylolysis with some bilateral foraminal and canal narrowing at multiple levels. Dr. Sacha opined that Claimant may have a mild form of DISH or just advanced degenerative changes. Dr. Sacha opined that full driving was reasonable and that driving required no restrictions despite Claimant's request for no driving restrictions. Dr. Sacha opined that Claimant had moderate to severe pain behaviors. Dr. Sacha recommended Claimant discontinue using a cane and opined that there was no benefit to it and that it was likely causing more symptoms. *See* Exhibits 6, D.

19. On June 26, 2019, Claimant underwent a bone scan. Planar images of the whole body in the anterior and posterior projections were obtained. Mild increased uptake was noted at the sternoclavicular joints as well as at the bilateral shoulders, bilateral knees, and bilateral feet and were opined to be likely degenerative. Asymmetric focal increased radiotracer uptake was seen about an area of irregularity along the right lateral L5 endplates with underlying increased sclerosis and mild volume loss. The mild volume loss and endplate irregularity along the right lateral L5 vertebral body demonstrated increased radiotracer uptake. The reading physician, Rustain Morgan, M.D. opined that the findings were nonspecific but could represent acute to subacute compression deformity at the site. *See* Exhibit 8.

20. On July 8, 2019, Claimant was evaluated at Concentra. Dr. Corson reviewed a note from Dr. Sacha where Dr. Sacha opined that a bone scan showed evidence that an endplate contusion was likely related to the March 7 injury with subacute findings now appearing healed. Claimant reported to Dr. Corson that he was developing new pain in his bilateral lower back with twisting. Dr. Corson opined that Claimant appeared more comfortable than on any prior visit. *See* Exhibit 5.

21. On August 1, 2019, Claimant underwent an independent medical evaluation performed by Tashof Bernton, M.D. Claimant reported that on March 7, 2019 he tripped and fell backwards on his back and hit his head on the wall when going upstairs after walking through lots of slushy ice in the parking lot. Claimant reported there was water and ice inside the door leading from the parking lot to the stairwell. Claimant reported that for the first three days his right side of the abdomen and groin hurt but that he had no neck or lower back pain, but that one week later he started feeling pain in his back and neck and pain in the lower back on the right when getting out of bed that worsened over time. Dr. Bernton noted that Claimant reported a past medical history as not significant to Concentra, when Claimant had past history of both neck and back complaints. Claimant reported to Dr. Bernton that his neck was naturally fused and that his neck hurt every once in a while prior to March 7. Dr. Bernton reviewed cervical spine x-rays from June, 2018 that showed interval progression of prominent osteophytes bridging from C3-4 through C7-T1 consistent with skeletal hyperostosis/Forestier's disease in the cervical spine. Dr. Bernton pointed out that the impression provided was progressing forestier's disease and that Claimant was seen in June of 2018 for back pain, neck clicking/popping worsened with prolonged slouching. Dr. Bernton pointed out a job stress and psychiatric assessment just prior to the March 7 injury and opined that was of significance clinically. *See* Exhibit A.

22. Dr. Bernton pointed out that when Claimant was evaluated by Dr. Sacha, Claimant denied any prior neck pain despite Claimant having had an x-ray in 2018 for neck symptoms where he was found to have forestier's disease. Dr. Bernton opined that there was no work related medical condition consistent with Claimant's current complaints and that there was no basis where a fall at work could have resulted in minimal symptoms immediately, no symptoms for several days, then onset of symptoms a week later with progressive severity. Dr. Bernton opined that Claimant's neck symptoms were consistent

with his pre-existing forestier's disease. Dr. Bernton opined that if Claimant's low back symptoms had been a result of the fall, the symptoms would have been acute and severe as compression fractures due to a fall present with severe pain and muscle spasm acutely and not a week later. Dr. Bernton also opined that the there was no physiologic mechanism by which a fall can cause a hernia. Dr. Bernton thus opined that Claimant did not sustain work related conditions requiring medical treatment or resulting in impairment. Dr. Bernton opined that Claimant had psychologic distress, forestier's disease of the neck, and inguinal hernia, and lumbar pain and radiculitis that all should be treated on a non-work related basis. *See* Exhibit A.

23. Dr. Bernton testified at hearing consistent with his report. Dr. Bernton noted that Claimant had initially reported no symptoms for the first few days after his fall and that he had no neck or lower back pain, with symptoms in the neck and back occurring one week later. Dr. Bernton opined that the reports were not consistent with an acute compression fracture of the lumbar spine and that an acute fracture has marked immediate pain and obvious spasm. Dr. Bernton testified that a compression fracture can be degenerative and happen over time. Dr. Bernton also testified that a compression fracture requires force through the spine and compression that was not consistent with Claimant's mechanism of injury. Dr. Bernton pointed out that Claimant had chronic low back pain with spasms, had MRIs that showed significant degenerative findings, and that in 2018 Claimant was undergoing chiropractic, massage, and physical therapy for the chronic prior complaints. Dr. Bernton testified that Claimant had an assessment in 2015 of groin pain and hernia discomfort in the groin with palpation. Dr. Bernton testified that a hernia in the inguinal area can be due to congenital weakness and that if it is caused acutely it is usually due to increase in abdominal pressure as with lifting. Dr. Bernton testified that falling is not a reasonable pathophysiology to cause an inguinal hernia. Dr. Bernton opined that Claimant did not sustain any injury requiring treatment in this case and that Claimant's fall did not cause an injury.

24. Claimant testified that after his fall he was in discomfort for the first few days, but that the real pain came on as the days passed. Claimant testified that one year prior to the fall, he had MRIs of his neck and back that showed no fractures. Claimant testified that the hernia related discomfort was new after the fall and that he had never had right groin pain before and never had a hernia before. Claimant testified and admitted that he had pain with driving over one hour before his fall, but testified that the fall aggravated his discomfort while driving.

25. Claimant's supervisor Jessica M_____ testified at hearing. Ms. M_____ testified that in May of 2018 Claimant reported that he was having difficulty driving due to groin pain and gout. At that time, Claimant requested he be allowed to work from home or from an office closer to his house. The request was denied.

26. As pointed out by Dr. Bernton, Claimant has a significant prior treatment history. On December 16, 2009, Claimant was evaluated for a permanent impairment rating due to a prior work injury. Claimant reported that he was okay but that he continued to have low back pain, at about a 5/10 increased with twisting movements. Claimant

reported his pain was across the lower back at the beltline usually a little worse on the right than left. Claimant was diagnosed with lumbosacral sprain with resultant chronic low back pain and with a small central disc protrusion at the L5 level. Claimant was released to regular work and it was recommended that he finish physical therapy, complete home exercises, and continue with medications. Claimant was provided an impairment of 11% whole person. *See* Exhibit E.

27. On October 30, 2014, Claimant was evaluated by Cheryl DelosReyes, M.D. Claimant reported occasional pains in his testicles, and back pain. Dr. DelosReyes did not visualize or feel any hernias on general examination, but she assessed back pain and abdominal hernia. Dr. DelosReyes recommended Claimant start dilaudid tablets for his back pain and recommended Claimant obtain an abdominal truss or hernia belt to wear while playing tennis and weight lifting. *See* Exhibit C.

28. On January 6, 2016, Claimant was evaluated at Kaiser and reported bilateral foot pain, groin cramping, and calf muscle cramping. *See* Exhibit B.

29. On June 26, 2016, Claimant underwent an MRI of his lumbar spine that showed mild degenerative changes, no clear evidence for nerve impingement, and minimal changes except for a small midline posterior L5/S1 annular tear. *See* Exhibit B.

30. On June 26, 2016, Claimant also underwent an MRI of his cervical spine that showed C4/5 and C5/6 plus or minus C3/4 anterior end plate fusion with no clear neural compression despite mild spinal canal narrowing. *See* Exhibit B.

31. On October 23, 2017, Claimant was evaluated at Kaiser and reported low back pain. Claimant was given flexeril to use as needed. *See* Exhibit B.

32. On May 9, 2018, Claimant was evaluated at Kaiser and assessed with back pain. It was noted that Claimant had seen the chiropractor twice and that Claimant was advised to get physical therapy. Claimant reported no back injuries and that his back pain would come and go. *See* Exhibit B.

33. On May 29, 2018, Claimant was evaluated at Kaiser and reported bilateral low back pain. Claimant reported a many year history of low back pain in the low central back into the bilateral musculature and reported that a prior MRI showed a disc bulge at L5/S1. Claimant reported that his pain in the low back was a 5/10 worse with walking. Claimant underwent a physical therapy evaluation and was instructed on independent home exercises. It was stated as a goal at physical therapy that Claimant would be able to perform all activities of daily living and his job without limitation in 3-4 weeks and return to tennis without increased symptoms in 6-8 weeks. *See* Exhibit B.

34. On June 25, 2018, Claimant was evaluated at Kaiser. Claimant was diagnosed with low back pain, myofascial pain syndrome, lumbar disc degeneration, and cervical disc degeneration. Claimant reported back pain and neck clicking/popping. Claimant reported his pain was worse with prolonged slouched sitting, bending over with

flexed spine, and standing from slouched sitting. Claimant had paraspinal tenderness with palpation at L4 and L5. *See* Exhibit B.

35. On August 17, 2018, Dr. DelosReyes evaluated Claimant to re-establish care after Claimant had been with Kaiser for the 3 prior years. Dr. DelosReyes noted Claimant's chronic low back pain, anxiety, chronic insomnia, and situational stress. *See* Exhibit C.

36. On August 23, 2018, Dr. DelosReyes evaluated Claimant. Claimant reported that he was stressed out by his job supervisor, not sleeping well, getting more anxious, and getting depressed. Claimant requested medications. Dr. DelosReyes prescribed Lexapro for depression with anxiety. *See* Exhibit C.

37. On October 29, 2018, Dr. DelosReyes evaluated Claimant. Claimant reported he was still under a lot of stress at work. Claimant reported that he was not sleeping well, was achy all over his body, was anxious, had right calf stiffness and metatarsal pains. Claimant reported he had low back pain 2 hours or so after ejaculation but not without ejaculation. Dr. DelosReyes assessed lower extremity pain, low back pain, situational stress, anxiety. *See* Exhibit C.

38. On February 26, 2019, Dr. DelosReyes evaluated Claimant. Claimant reported stress at work and trouble sleeping. Dr. DelosReyes listed Claimant's past medical history to include chronic low back pain, abdominal hernia, and other issues including anxiety and chronic insomnia. *See* Exhibit C.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the

testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v.* Americold D/B/A Atlas Logistics, W.C. No. 4-960-513-01, (ICAO, Oct. 2, 2015). The Act creates a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" contemplates the physical or emotional trauma caused by an "accident." An "accident" is the cause and an "injury" is the result. No benefits flow to the victim of an industrial accident unless the accident causes a compensable "injury." A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.,* W.C. No. 4-650-711 (ICAO, Feb. 15, 2007); *David Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

The claimant must prove causation to a reasonable probability. Lay testimony alone may be sufficient to prove causation. However, where expert testimony is presented on the issue of causation it is for the ALJ to determine the weight and credibility to be assigned such evidence. *Rockwell International v. Turnbull,* 802 P.2d 1182 (Colo. App. 1990); *Marjorie Jorgensen v. Air Serve Corporation,* W.C. No. 4-894-311-03, (ICAO, Apr. 9, 2014). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). *Fuller v. Marilyn Hickey Ministries, Inc., W.C. No. 4-588-675, (*ICAO, Sept. 1, 2006*).*

Claimant has failed to establish, by a preponderance of the evidence that he sustained a compensable injury. Although he fell in the stairwell after slipping on the snowy/slushy ground on March 7, he has failed to establish that this fall caused disability or the need for medical treatment.

Dr. Bernton is credible and persuasive that the fall did not cause any medical condition requiring treatment. The pre-existing medical records and the overall weight of the evidence supports Dr. Bernton's opinions. Claimant has significant pre-existing cervical spine issues including a pre-existing diagnosis of forestier's disease. Claimant failed to disclose his significant cervical spine history when treating for this fall. Claimant also treated extensively for lower back pain prior to this fall. In May of 2018, Claimant reported his back pain was at a 5/10, would come and go, and Claimant underwent physical therapy where he was given home exercises and goals to complete. Additionally, despite denying any prior history of hernias, Claimant was assessed in October of 2014 with an abdominal hernia and it was recommended that he get a truss or belt to use with activity. Claimant further had groin cramping and issues with pain in January of 2016, and requested to be allowed to work from home due to groin pain causing him difficulty driving in May of 2018.

Dr. Bernton is credible and persuasive that if the fall had caused an acute lumbar spine compression fracture, Claimant would have had immediate and severe pain in his lumbar spine. He also is credible that the fracture seen after March 7 could have been a degenerative type fracture due to Claimant's significant lumbar spine degenerative history. The neck symptoms reported after March 7 are also consistent with Claimant's pre-existing condition and history. Finally, Dr. Bernton is persuasive that a fall is not a physiologically likely cause of an inguinal hernia. Claimant had prior assessments of hernia with recommendations to wear a truss or belt and prior mentions of groin pain and cramping made to medical providers and Employer. Claimant has failed to meet his burden. Although it is possible the March 7 fall aggravated Claimant's pre-existing neck, low back, and groin/hernia issues, Claimant has failed to establish more likely than not that it did so. Claimant has failed to show that his need for treatment currently is different or aggravated/accelerated from his need for treatment prior to March 7. Claimant has failed to establish that his fall on March 7 caused any additional disability or need for medical treatment that did not exist prior to March 7. Dr. Bernton is persuasive and his opinion is consistent with the weight of the evidence.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish, by a preponderance of the evidence, that he sustained a compensable work related injury on March 7, 2019. His claim is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, *see* section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 10, 2019

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-935-055-002

ISSUES

I. Whether Claimant overcome the opinion of the Division Independent Examiner, Dr. Kevin Nagamani, that she reached MMI on November 15, 2018.

II. Whether Claimant established she is entitled to maintenance medical treatment.

III. Whether Claimant established she is entitled to an award of temporary total disability from November 15, 2018, until terminated by statute.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. Claimant was injured in an admitted accident on September 7, 2013, in the course and scope of her employment with the Employer. The injury occurred when, while restocking product, a shelf extender fell, landing on the distal portion of the claimant's left foot on the top of her closed toe, closed heel, non-skid shoes. *Hearing Audio; Exhibit C, Bates 30*. The shelf extender which landed on the claimant's foot weighed approximately five pounds. The claimant completed her work shift and went home.

2. Claimant initially presented for care at the Mount San Rafael Hospital Emergency Room on September 8, 2013. The claimant gave a history of pain at a level 10/10, with numbness/tingling/paresthesia to her toes. X-rays were performed and read as showing no fracture or dislocation, with only chronic degenerative changes noted. *Exhibit B, Bates 18, 21*.

3. Claimant subsequently selected Dr. Douglas McFarland as the provider designated to treat her work injury. Dr. McFarland first evaluated the claimant on September 11, 2013. Based on his evaluation, Dr. McFarland assessed a contusion to the left foot and numbness in the left toes. Dr. McFarland imposed work restrictions and prescribed medications. *Exhibit C, Bates 30*.

4. Employer offered Claimant a job within the physician-imposed work-restrictions, which the claimant accepted. On October 8, 2013, Dr. McFarland opined, "She may be at maximum medical improvement in 2 or 3 months, depending on her rate of recovery. I expect that she will regain sensation and function in the foot and I doubt that there would be a role for any surgical intervention." *Exhibit C, Bates 33*.

5. Dr. McFarland restricted Claimant from all work activity on October 29, 2013, based on the claimant's report that Employer was not accommodating the imposed work restrictions. *Exhibit C, Bates 34*.

6. Dr. McFarland referred Claimant to orthopedic surgeon, Dr. Michael Simpson. Dr. Simpson evaluated Claimant on December 9, 2013. Based on his examination, Dr. Simpson assessed claimant as suffering from a contusion to the left foot with residual neuropathic pain. Dr. Simpson also noted the absence of vasomotor changes associated with Chronic Regional Pain Syndrome (CRPS). *Exhibit D, Bates 63*. Dr. Simpson referred the claimant to pain management specialist, Dr. Keith Caughfield.

7. Dr. Caughfield evaluated Claimant on March 8, 2014. Dr. Caughfield documented give-way strength with toe extension, ankle dorsiflexion, plantar flexion and knee flexion and extension. Dr. Caughfield noted the absence of discoloration of the foot or hypersensitivity to touch. He also noted normal hair and nail growth and normal capillary refill. *Exhibit 25*. Dr. Caughfield recommended EMG testing of the left lower extremity, which he performed on April 8, 2014. The EMG was read as a normal study of the left lower extremity, without evidence of peripheral nerve entrapment or lumbar radiculopathy. *Exhibit 25*.

8. Claimant continued treatment with Dr. McFarland. Dr. McFarland referred Claimant for a left foot MRI, which was performed on January 28, 2014. The left foot MRI was read as showing arthritis in the Lisfranc joints, worse in the second and third metatarsal cuneiform joints. Atypical arthritis was suspected, possibly including gout. *Exhibit C, Bates 41; Exhibit E, Bates 71*. Dr. McFarland referred Claimant to Dr. Miguel Castrejon. Dr. Castrejon evaluated Claimant on December 10, 2014. Based on his review of the medical records and his evaluation of Claimant, Dr. Castrejon expressed concern for the presence of sympathetically mediated pain and referred Claimant for diagnostic testing.

9. Claimant underwent a triple-phase bone scan on April 8, 2015. The bone scan was read as showing mildly asymmetric increased left foot arterial and blood pool phase activity and a focus of increased activity in the right midfoot. The final report stated three-phase increased activity over the left foot, which is a nonspecific finding that may be due to severe arthritis, recent traumatic injury, and/or less likely infectious disease. *Exhibit R, Bates 349*.

10. Dr. George Schakaraschwili evaluated the claimant on August 13, 2015, shortly after Claimant had undergone an unrelated surgery to her right foot. Dr. Schakaraschwili documented the absence of visible asymmetry of skin coloration, skin appearance or nail or hair growth. *Exhibit 23*. Dr. Schakaraschwili performed QSART and thermogram testing, which he interpreted as suggestive of a CRPS diagnosis. Dr. Schakaraschwili subsequently referred Claimant to Dr. Stephen Ford for a left lumbar sympathetic block. *Exhibit 23.*

11. Dr. Ford evaluated Claimant on October 5, 2016. On physical exam, Dr. Ford noted Claimant's right foot and ankle appeared warm and swollen in comparison to the left foot. However, Dr. Ford concluded that Claimant's left foot did not have signs or symptoms that would be consistent with CRPS. Therefore, Dr.

Ford declined to perform lumbar sympathetic blocks because Claimant's presentation was not consistent with CRPS. *Exhibit N, Bates 200*.

12. On February 21, 2017, Claimant was evaluated by Dr. Kevin Nagamani for purposes of a 24-month DIME. Based on his review of the medical records and his evaluation of Claimant, Dr. Nagamani opined Claimant was not at MMI. Dr. Nagamani reasoned that Claimant underwent a very long period of immobilization in a boot, but she had not undergone any significant sustained rehabilitative process of the foot. According to Dr. Nagamani, it is very common after a foot or ankle injury to have persistent pain if adequate rehab is not undertaken. Dr. Nagamani noted that Claimant had only undergone two very short courses of physical therapy. The first course was discontinued due to pain. The second course was discontinued secondary to lack of follow-up. Dr. Nagamani noted that on clinical examination, objective physical signs of CRPS were not prominent. He recommended proceeding with an extensive course of physical therapy for at least six weeks. *Exhibit R, Bate 350*.

13. Despite the DIME's recommendations, and her off work status, Claimant did not return to Dr. McFarland until July 11, 2017.

14. On July 11, 2017, Claimant was returned to Dr. McFarland. At this appointment, he noted Claimant complained of constant pain on the medial aspect her left leg from her knee down to the medial part of the dorsum and sole of her foot, including the 1st and 2nd toes. He also noted that she complained of complete numbness on the lateral aspect of her leg from the knee down involving the lateral part of the dorsum and sole of her foot and the lateral 3 toes. In addition, he noted that Claimant stated the sole of her foot was also involved in a similar distribution. At that time, Claimant rated her pain at 7/10. Lastly, during his physical examination, he also noted that although he attempted to test Claimant's reflexes, he had to stop before he could perform a complete examination due to Claimant's pain complaints. There is no indication whether he determined her complaints fit any type of dermatomal pattern or were consistent with her original work injury. However, based on Dr. Nagamani's recommendations, he referred Claimant for 18 sessions of physical therapy, to be completed over a six-week period, three sessions per week. *Exhibit C, Bates 53*.

15. On November 8, 2017, Claimant was seen by Dr. Castrejon. At this appointment, Dr. Castrejon noted Claimant ambulated with an antalgic gait.

16. From February 6, 2018, through February 10, 2018, Respondents obtained surveillance video of Claimant. *Exhibit T*. The surveillance video shows Claimant walking and Claimant appears to be walking in a manner that appears normal for her stated age and build. In the surveillance video, Claimant does not appear to be in any distress and does not appear to walk with an antalgic gait due to her left foot injury. Claimant's presentation on the surveillance video seems to be in stark contrast with her presentation to Dr. McFarland in July of 2017.

17. Despite Dr. McFarland prescribing physical therapy for Claimant, based on the recommendations of the DIME, Claimant did not start the physical therapy for approximately 8 months.

18. Pursuant to the DIME, absent a diagnosis of CRPS, the primary treatment Claimant had to undergo in order to reach MMI was physical therapy. Therefore, absent a diagnosis of CRPS, the DIME physician opined Claimant would be at MMI after undergoing an extensive course of physical therapy for at least 6 weeks. *Exhibit 14, Bates 129,130*.

19. On March 21, 2018, Claimant started the physical therapy Dr. Nagamani recommended in his February 21, 2017, DIME report and subsequently prescribed by Dr. McFarland 8 months earlier. *Exhibit P, Bates 262*.

20. On March 21, 2018, Claimant attended the first physical therapy appointment after the DIME. However, the report demonstrates Claimant was not very eager to actually start and undergo the physical therapy. The report notes Claimant stated she was there only for an evaluation and not for treatment. The therapist indicated the doctor's report accompanying Claimant's prescription for physical therapy stated otherwise, i.e., she was there for treatment. *Exhibit P, Bates 220*.

21. And, although it took Claimant over a year to start the physical therapy recommended by the DIME physician on February 21, 2017, Claimant was paid temporary total disability benefits during that period of time, and ongoing, since she was found to not have reached MMI. *Exhibit A, Bates 1.*

22. On May 1, 2018, approximately 6 weeks after her first physical therapy (PT) appointment, Claimant returned for her second PT appointment. Claimant failed to follow through with Dr. McFarland's prescribed treatment of physical therapy 3 times per week for 6 weeks. Had Claimant followed through with Dr. McFarland's recommendations, she would have completed the prescribed physical therapy by the end of that week.

23. The May 1, 2018, physical therapy report states Claimant indicated she fell in her kitchen last night and hurt her left knee. It is also noted that Claimant rated her pain at 10/10, but denied the need to go to the emergency room. The physical therapist also noted:

> Patient with 10/10 self-reported pain rating, however she is in no signs of distress, is able to bear weight on her (L) LE, able to carry on a full conversation without deviation, and smiled 4 times during treatment session in conversation with PT.
>
> *Exhibit P, Bates 222*.

24. Claimant underwent additional physical therapy on May 3rd, 4th, 11th, 2018. At each of those appointments, the physical therapist specifically noted that although Claimant complained of 10/10 pain, Claimant never appeared to be in any obvious signs of distress. *Exhibit P, Bates 223-229*.

25. On May 18, 2018, Claimant returned to physical therapy. At this appointment, the report notes Claimant had a migraine Wednesday morning, and fell twice that same morning inside her house. Claimant complained of new complaints involving her left foot. The report specifically provides the following:

> Patient/Caregiver comments: Patient states her 2nd toe on her (L) foot is completely numb. She states that now she

> can't feel from the 2nd to her 5th toe. She states that she still has feeling in her (L) big toe, but is concerned that the numbness has now spread to her 2nd toe. She states that she had a migraine Wednesday morning and fell twice inside her house that morning. She states she was able to get up independently from both falls. She rates her pain as 10/10.
>
> Therapist Summary on Status/Progress: Despite her 10/10 pain rating, patient is in no obvious signs of distress, is able to ambulate independently, perform exercises and carry on a normal conversation. Despite (L) ankle DF AROM of -4 degrees, patient was observed to have functional (L) ankle dorsiflexion during ankle pumps and with gait (heel strike on (L) with toes not touching floor). This PT had other PT onsite (Amy Proctor, PT, OPT) observe both of these activities as well. Will send progress report of today's visit to patient's referring physician for review of newly reported symptoms.
>
> *Exhibit P, Bates 232*.

26. On May 15, 2018, Claimant presented to Arkansas Valley Regional Pain Center with complaints of not feeling well and a migraine headache. *Exhibit J, Bates 169*. Claimant also reported "slipping" the last Saturday and Monday in April and her leg bent and she landed on her left knee. There is no indication she slipped due to her prior left foot injury. *Exhibit J, Bates 173*.

27. On May 21, 2018, Claimant returned to PT. At this appointment, Claimant started reporting pain of 10/10 in her left knee. *Exhibit P, Bates 233.*

28. On October 17, 2018, Claimant was evaluated by Dr. Simpson. Claimant gave Dr. Simpson a history of "hurting her knee" and that "caused her second toe to become numb as well". However, Claimant was not complaining of any knee pain. *Exhibit D, Bates 65*. Dr. Simpson assessed "left ankle pain" and opined, "It appears she does seem to have chronic pain syndrome. I do not profess to be an expert in chronic pain, but at this point, I do not see any musculoskeletal abnormalities that would require further interventional procedures and/or surgery. *Exhibit D, Bates 67-68*.

29. On September 23, 2018, in response to interrogatories propounded by the Respondents, following review of surveillance video from February 2018, Dr. McFarland placed Claimant at MMI as of February 7, 2018, with no restrictions and no need for medical treatment to maintain MMI. The ALJ infers and finds that Claimant's presentation on the surveillance video was in stark contrast to Claimant's presentation to Dr. McFarland at the July 11, 2017 appointment, and that the surveillance video was a factor in his decision to place Claimant at MMI. He also noted that after her July 11, 2017, appointment, Claimant failed to attend her next scheduled appointment with him. *Exhibit C, Bates 56*. Claimant's failure to attend her follow up appointment with Dr. McFarland provides additional evidence that Claimant was not interested in undergoing the treatment that was recommended to improve her condition. Claimant's failure to keep her medical appointments and undergo the recommended treatment in a timely manner

further diminishes her credibility as it relates to nature and extent of her symptoms.

30. Claimant returned to Dr. Nagamani on November 15, 2018, for a follow-up Division IME. Claimant gave Dr. Nagamani a history of falling in April while cooking and injuring her left knee. Claimant did not relate the fall to the September 7, 2013, work injury. After reviewing additional medical records since his first DIME, and re-evaluating Claimant, Dr. Nagamani opined Claimant was at MMI as of the date of his evaluation with no further treatment recommendations or maintenance care. It should also be noted that Dr. Nagamani specifically referenced reviewing Dr. Castrejon's August 2018 report. In Dr. Castrejon's August 2018 report, he noted Claimant's fall and injury to her left knee due to her alleged inability to sustain her weight with her left leg. However, despite that information, Dr. Nagamani did not indicate the knee injury was related since he placed Claimant at MMI, limited his diagnosis to her left foot, and did not recommend maintenance medical treatment. Dr. Nagamani, however, did provide Claimant a fourteen percent scheduled impairment for her left foot injury. *See Exhibit R, Bates 353-358*.

31. Respondents filed a February 1, 2019, Final Admission of Liability consistent with Dr. Nagamani's opinions on MMI, impairment, and medical treatment post-MMI. *Exhibit 1.*

32. Dr. Miguel Castrejon testified as Level II accredited physician with expertise in physical medicine and rehabilitation. Dr. Castrejon testified the diagnosis of CRPS had not been excluded in Claimant. Dr. Castrejon also testified that CRPS does not have the type of delineation or distribution of symptoms in a dermatomal fashion as exhibited by Claimant. Dr. Castrejon performed a repeat EMG, which was incomplete. Dr. Castrejon testified that there was an abnormality in the posterior tibial nerve, which would potentially be consistent with a tarsal tunnel syndrome. According to Dr. Castrejon, tarsal tunnel can be treated with physical therapy and anti-inflammatories. Dr. Castrejon did not have the records of the claimant's prior physical therapy available for review. Dr. Castrejon testified that CRPS is a very functionally debilitating condition. Dr. Castrejon did not review Dr. Nagamani's November 15, 2018, DIME report. Dr. Castrejon did not review the video surveillance reviewed by Dr. McFarland and Dr. Cebrian. Dr. Castrejon was unable to make a judgment as to Claimant's MMI status without reviewing all the relevant information.

33. Dr. Cebrian credibly testified that the claimant does not carry the diagnosis of CRPS. *Cebrian Depo., p. 8-9*. Dr. Cebrian credibly testified that Claimant's provisional diagnosis of tarsal tunnel syndrome is not related to the admitted work injury. *Cebrian Depo., p. 15, l. 25; p. 16, ll. 1-12*. Dr. Cebrian credibly testified that based on his review of the surveillance video, Claimant did not appear to be functionally limited. *Cebrian Depo., p. 17, ll. 12-23*.

34. Dr. Cebrian also testified about Claimant's fall on her left knee. He credibly testified that during his IME, Claimant indicated she fell when she turned to take something off the stove and lost her balance. He testified that Claimant did not relate her fall to any numbness in her left foot, which might arguably be related to her work injury. Moreover, he testified that based on his evaluation of Claimant,

the numbness was on the top of her foot, not the bottom or posterior portion of her foot. Therefore, he credibly opined that her fall on her left knee was not related to her work injury. *Cebrian Depo., pp. 11-12*.

35. Dr. Cebrian also credibly and persuasively testified that based on the physical therapy notes, it appeared Claimant's pain complaints – as well as her complaints of limited function regarding her left ankle, were inconsistent with the observations of the physical therapist. *Cebrian Depo., pp. 13-14.*

36. Lastly, Dr. Cebrian credibly and persuasively opined that Claimant does not require any medical treatment to maintain MMI. *Cebrian Depo., pp. 13-14; See also Exhibit Q.* His testimony regarding maintenance medical treatment was consistent with his opinion and conclusion in his July 17, 2019, IME. In such report, Dr. Cebrian credible and persuasively concluded the following:

> No maintenance care is medically reasonable, necessary or related to the 9/7/2013 claim.
>
> a. Ms. DeSantis has had extensive medical treatment without reports of improvement.
>
> b. Neither Dr. McFarland nor Dr. Nagamani recommended any maintenance care.
>
> c. The video surveillance demonstrated Ms. DeSantis was doing better than she reported to her medical providers.

Exhibit Q, Bates 345.

37. Dr. Cebrian's opinions are consistent with the underlying medical record, surveillance video, and findings of many of the other medical providers. Therefore, the ALJ finds Dr. Cebrian's opinions and testimony to be credible and persuasive.

38. The ALJ finds Claimant is not a reliable or credible historian regarding her symptoms. This includes the onset of her symptoms, the extent of her symptoms, and the cause of her symptoms. This is based on the ALJ's review of the surveillance video, medical records, and testimony of Dr. Cebrian, which established various inconsistencies, as well as Claimant's unwillingness to undergo prescribed treatment in a timely manner.

39. Claimant has failed to overcome the opinion of the Division IME regarding maximum medical improvement by clear and convincing evidence.

40. Claimant has failed to establish by a preponderance of the evidence that she is entitled to maintenance medical treatment to relieve her from the effects of her industrial injury or to prevent further deterioration of her industrial injury.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant overcome the opinion of the Division Independent Examiner, Dr. Kevin Nagamani, that she reached MMI on November 15, 2018.

Maximum medical improvement exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. A DIME physician's finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). Under the statute, MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office*, 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office*, 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various

components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007).

A finding that Claimant needs additional medical treatment to improve her injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office*, 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office*, 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc*., W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining Claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Construction Management*, W.C. No. 4-356-512 (ICAO May 20, 2004); *Hatch v. John H. Garland Co.,* W.C. No. 4-638-712 (ICAO August 11, 2000). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. Therefore, the DIME physician's opinions on these issues are binding unless overcome by clear and convincing evidence. *See Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002).

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra.* Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician's finding concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). The question of whether the party challenging the DIME physician's finding regarding MMI has overcome the finding by clear and convincing evidence is one of fact for the ALJ.

As found, Claimant is not a reliable or credible historian regarding her symptoms. This includes the onset of her symptoms, the extent of her symptoms, and the cause of her symptoms. As found above, the ALJ made this finding based on the ALJ's review of the surveillance video, medical records, and testimony of Dr. Cebrian, which established various inconsistencies, as well as Claimant's unwillingness to undergo prescribed treatment in a timely manner.

In this case, the DIME physician, Dr. Nagamani, opined that Claimant's work-related diagnosis is a left foot crushing injury, from which she reached MMI on November 15, 2018. The DIME physician's opinion that Claimant is at MMI is adequately supported by the medical evidence as well as the opinions of Dr. Cebrian and Dr. McFarland. Both the DIME physician, Dr. Nagamani, and Dr. Cebrian, opined Claimant lacked findings on physical examination to suggest CRPS. Moreover, the ALJ finds the opinions of the DIME physician and Dr. Cebrian to be credible and persuasive.

To the extent Dr. Castrejon's opinions are contrary to a finding of MMI, the ALJ does not find his opinions to be credible or persuasive since they appear to be heavily based upon Claimant's subjective complaints and her contention about the onset, development, and extent of her symptoms, which the ALJ does not find credible. Moreover, he did not have and review all of the records that were available to Dr. Cebrian, such as the final DIME report, Claimant's prior physical therapy records, and

the surveillance of Claimant. Like a house built on sand, an expert's opinion is no better than the facts and data on which it is based. *See Kennemur v. State of California*, 184 Cal. Rptr. 393, 402–03 (Cal. Ct. App. 1982).

The ALJ finds and concludes Claimant has failed to overcome the DIME physician's opinion regarding MMI by clear and convincing evidence. Therefore, Claimant reached MMI on November 15, 2018, for her left foot injury.

II. Whether Claimant established she is entitled to maintenance medical treatment.

The need for medical treatment may extend beyond the point of MMI where Claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of her condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expediters Inc.*, 77 P.3d 863, 865 (Colo. App. 2003); *Hobirk v. Colorado Springs School District #11,* W.C. No. 4-835-556-01 (ICAO, Nov. 15, 2012). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that the claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999); *Hastings v. Excel Electric*, W. C. No. 4-471-818 (ICAO, May 16, 2002). Claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915 (Colo. App. 1993); *Mitchem v. Donut Haus*, W.C. No. 4-785-078-03 (ICAO, Dec. 28, 2015). Moreover, an award of *Grover* medical benefits should be general in nature. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003); *Anderson v. SOS Staffing Services,* W. C. No. 4-543-730, (ICAO, July 14, 2006).

Again, and as found, Claimant is not a reliable or credible historian regarding her symptoms. This includes the onset of her symptoms, the extent of her symptoms, and the cause of her symptoms. As found above, the ALJ made this finding based on the ALJ's review of the surveillance video, medical records, and testimony of Dr. Cebrian, which established various inconsistencies, as well as Claimant's unwillingness to undergo prescribed treatment in a timely manner.

As found and stated above, the ALJ finds the opinions of Dr. Nagamani and Dr. Cebrian to be more persuasive that Dr. Castrejon. Dr. Cebrian credibly and persuasively concluded in his report that:

> No maintenance care is medically reasonable, necessary or related to the 9/7/2013 claim.
>
> a. Ms. DeSantis has had extensive medical treatment without reports of improvement.
>
> b. Neither Dr. McFarland nor Dr. Nagamani recommended any maintenance care.
>
> c. The video surveillance demonstrated Ms. DeSantis was doing better than she reported to her medical providers.

Dr. Cebrian also persuasively and credibly testified consistent with his report and again concluded Claimant does not need any maintenance medical treatment due to her work injury.

Therefore, the ALJ finds and concludes that Claimant failed to establish by a preponderance of the evidence that she is in need of maintenance medical treatment for her left foot injury.

ORDER

Based upon the foregoing specific findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant failed to overcome the MMI opinion of Dr. Nagamani, the DIME physician, that Claimant reached MMI on November 15, 2018, for her compensable injury, which is limited to her left foot.
2. Claimant reached MMI for her compensable left foot injury on November 15, 2018.
3. Claimant's claim for maintenance medical treatment is denied.
4. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 11, 2019.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Did Claimant prove he suffered whole person impairment to his right knee or left shoulder?
- Did Claimant prove entitlement to medical benefits after MMI for any of his claims?
- Did Claimant make a proper showing for a change of physician to Dr. Timothy Hall?
- Disfigurement.
- The parties agreed to reserve issues relating to Respondent's claimed overpayment pending the outcome of this hearing.

FINDINGS OF FACT

1. Claimant worked for Employer as a firefighter. He suffered three the admitted industrial injuries that are the subject of this consolidated hearing. The left ankle injury occurred on October 6, 2016 (WC 5-080-777) when Claimant jumped off an elevated surface and landed on a push broom, causing him to roll the ankle. Claimant injured his right knee on November 28, 2016 while performing rehabilitation exercises for the left ankle. He injured the left shoulder using a pike pole to pull material from a ceiling at a fire scene.

2. Claimant has treated at Employer's Occupational Health clinic for all three injuries. His care was primarily managed by Dr. Jay Neubauer and PA-C Paula Homberger, PA-C. He saw Dr. Nicholas Kurz twice, on September 7, 2018 for MMI on the left shoulder and on February 19, 2019 for MMI on the left ankle. He received orthopedic treatment from Dr. Christopher Jones for the knee and shoulder injuries, and Dr. Brad Dresher for the ankle.

Left Ankle — WC 5-080-777 — DOI October 6, 2016:

3. Claimant was initially diagnosed with an ankle sprain and provided conservative treatment. He was ultimately referred to Dr. Brad Dresher, who performed left ankle surgery on June 29, 2018. Dr. Dresher later administered three platelet rich plasma (PRP) injections in the left ankle for persistent symptoms. He discharged Claimant on December 11, 2018.

4. Claimant has a one-time impairment evaluation with Dr. Nicholas Kurz on February 19, 2019. Claimant was "feeling much improved and is ready to be released." Dr. Kurz put Claimant at MMI and assigned an 8% lower extremity rating. He opined no

maintenance treatment was required. Respondent filed an FAL on March 15, 2019 based on Dr. Kurz' report.

Right Knee — WC 5-036-847 — DOI November 28, 2016:

5. Claimant injured his right knee on November 28, 2016 while performing rehabilitation exercises for his injured left ankle. He was referred to Dr. Christopher Jones, who diagnosed a complex medial meniscus tear. On April 18, 2017, Dr. Jones performed an arthroscopic partial medial meniscectomy and chondroplasties of the patella and medial femoral condyle. The surgery helped but did not resolve Claimant's knee symptoms.

6. Dr. Jones wrote to the claims adjuster on August 18, 2017 and explained, "I did discuss the possibility of platelet rich plasma injection treatment for [Claimant's] right knee due to the cartilage damage that he has both on his patella and his medial femoral condyle. . . . He continues to have symptoms that are arthritic in nature . . . consistent with his findings at the time of arthroscopy." He discussed and included copies of "literature that show significant benefit in treating under pages with early degenerative arthritis with platelet rich plasma. . . . The majority of studies have done a series of 3 injections of platelet rich plasma and showed good results up to 2 years out from the procedure. Additionally, these treatments have proven to be superior to viscosupplementation . . . ."

7. Respondent approved one PRP injection, which Dr. Jones administered on September 14, 2017. He noted, "My protocol is usually to do 3 injections in succession, however since work comp is [offering] this treatment I think it is reasonable to reassess in a month and go from there."

8. On November 6, 2017, Dr. Jones reported, "We did a single PRP injection to the right knee about 2 months ago. We had requested a series of 3 injections however only 1 was approved. He felt like it may have helped a little bit but he continues to have pain especially going up and down stairs and especially when he is loaded with weight."

9. Respondent ultimately approved three additional PRP injections, which were done on February 19, February 26, 2018, and March 5, 2018.

10. On June 14, 2018, Dr. Jones discussed the PRP injections and noted, "he has not noticed a huge improvement in his pain but has noticed that he's had less swelling. He still feels pretty limited on a day-to-day basis. Apparently he has a functional capacity evaluation in this going to have some permanent restrictions going forward which will likely result in medical retirement. Dr. Jones also noted, "As we've discussed in the past they certainly do not think we can cure [Claimant] of these problems. Although he certainly has a history of chronic trauma given his job, chondromalacia is a degenerative process which will continue. In the future he can certainly try stem cell injections in the form of bone marrow or umbilical cord products. I'm hopeful he can get many years out of his knee prior to arthroplasty. He'll return to see me as needed regarding his knee."

11. Dr. Neubauer evaluated Claimant on July 17, 2018 and reported, "The patient now presents for evaluation of MMI and impairment rating. He continues to complain of a 2/10 general ache in the right knee which increases to 6/10 with movement/walking or stair climbing. He also has difficulty with kneeling, climbing ladders, and squatting. He continues to use ibuprofen and ice occasionally for pain management. Dr. Neubauer assigned a 14% lower extremity rating. He recommended no post-MMI treatment.

Left Shoulder — WC 5-041-859 — DOI February 25, 2017:

12. Claimant injured his left shoulder while using a "pike pole" to pull down ceiling material at a fire scene on February 25, 2017. He tried conservative care for nearly a year and eventually Dr. Jones performed an arthroscopic rotator cuff repair and chondral debridement of the humeral head on January 2, 2018.

13. Claimant had his final appointment with Dr. Jones for the left shoulder on August 20, 2018. Dr. Jones documented, "He does have pain still at this point. He also has limitations and particularly lifting overhead. He reports he still has trouble pulling hose as a fireman, climbing ladders or certainly lifting ladders overhead." Dr. Jones opined, "going back to work as a fireman is not going to be possible for him. I think he is looking at treatments in the future that may include arthroplasty or replacement. Other options for treating the arthritic component of this would be to consider Visco supplements, PRP or even stem cell treatments." Dr. Jones released Claimant from active care and advised him "to return if pain or symptoms arise."

14. Claimant saw Dr. Kurz for an impairment rating on the left shoulder on September 7, 2018. He reported "an intermittent positional ache in the L shoulder with certain movements and increased discomfort with overhead activities." Dr. Kurz opined Claimant was at MMI with a 13% upper extremity/8% whole person rating.

15. On September 12, 2018, the claims adjuster sent Dr. Kurz a copy of a 2013 Final Admission admitting for a 6% scheduled rating for a previous shoulder injury. Dr. Kurz determined apportionment was appropriate and revised the rating to 10% upper extremity/6% whole person.

16. Claimant underwent several IMEs in conjunction with his Fire and Police Pension Association ("FPPA") medical retirement. He saw Dr. Robert Bess on July 30, 2018. On examination of left shoulder Speed's test, O'Brien's test, and impingement signs were positive. Scapular lift-off test was very painful. The right knee examination was unremarkable. Dr. Bess opined Claimant is "permanently occupationally disabled [because] [h]e is unable to perform the usual and customary duties required of a firefighter."

17. Claimant saw Dr. Messenbagh on July 31, 2018, who focused on the left shoulder and right knee. Regarding the shoulder, Dr. Messenbaugh noted, "he indicated that he was experiencing persistent pain in and about his left shoulder, noted increased pain if he was to lie upon his left shoulder . . . increased pain about his left shoulder with

attempts to abduct and externally rotate his left upper extremity. He stated he was unable to use his left arm above shoulder level even for lifting fairly light weights on an upper shelf. He stated he occasionally took ibuprofen for his left shoulder discomfort." Regarding the knee, Claimant reported persistent "aching" pain in and about the right knee, aggravated by walking, going up and down stairs, and kneeling. Dr. Messenbaugh concluded Claimant was permanently disabled from his occupation as a firefighter because of "limited, painful, restricted function of left shoulder and right knee."

18. Dr. Alfred Lotman examined Claimant for the FPPA claim on August 1, 2018. Claimant described weakness and "clicking and popping" in his shoulder. On examination, Dr. Lotman observed, "a mild degree of deltoid atrophy in his left shoulder more than what would be anticipated in a right hand dominant male." Range of motion was limited in all planes. There was no tenderness or pain about the sternoclavicular or acromioclavicular joints. Claimant reported clicking and popping in the knee, difficulty going up and down stairs, increased swelling with activity, and interference with his sleep. Dr. Lotman noted, "1 to 2+ quadriceps atrophy in his right thigh" and mild effusion. Dr. Lotman opined Claimant was permanently disabled from his occupation as a firefighter.

19. The final FPPA exam was conducted by Dr. Annu Ramaswamy on August 28, 2018. He concurred with the previous examiners' conclusions Claimant is permanently disabled from his job as a firefighter.

20. Claimant underwent a DIME with Dr. William Watson on December 18, 2018 regarding the left shoulder and right knee. He described 4/5 pain in the right knee worse going up and down stairs. He stated he could not perform overhead activities with the left shoulder. Dr. Watson assigned a 17% extremity/7% whole person rating for the knee, and a 1% extremity/1% whole person rating for the shoulder (after apportionment). Regarding medical treatment after MMI Dr. Watson opined,

> [Claimant] has requested the possibility of stem cells for the right knee]. In reviewing rule 17, these have not been approved through the division. He has had some limited success with platelet rich plasma and I believe over the next year this could be repeated two times with three injections into the knee over a period of three weeks.
>
> As far as the left shoulder is concerned, stem cells have not been approved for this entity. He did not get a good result with the platelet rich plasma and I believe the best result would be to continue the Celebrex on a regular basis.
>
> This is all part of maintenance care and will not change the date of maximal [sic] medical improvement. In the future, because of the injuries he has sustained as a firefighter, the shoulder x2 and the knee x1, he may require total shoulder arthroplasty in the future and total knee arthroplasty in the future. Both of these would be related to the original injuries.

21. On March 11, 2019, Respondent filed FALs in both claims based on Dr. Watson's DIME report. Both FALs denied liability for medical benefits after MMI.

22. Claimant saw Dr. Timothy Hall for an IME at his counsel's request on July 3, 2019. Dr. Hall opined,

> Regarding maintenance care, Dr. Watson felt that PRP injections regarding the knee would be appropriate. I agree. I do not understand the rationale for restricting that to a one-year time period. If anything, the situation in his knee is likely to worsen over time and he is going to require management of the situation more in the future than in the next year. I would recommend these maintenance PRP injections in his knee one to two times a year into the foreseeable future. I agree that PRP involving the shoulder is probably not as helpful.
>
> He is probably going to come to knee replacement and shoulder replacement in the future. As per my understanding, this is not really "maintenance" care. It is more an issue of worsening of condition over time, which would require reopening the case and following through with the procedures.

23. Dr. John Burris performed a record review for Respondent on July 29, 2019. He also testified at hearing to elaborate on his opinions and conclusions. Dr. Burris opined there was no basis to rate the shoulder as a whole person impairment because the injury was limited to the "ball and socket" with "no proximal involvement." He pointed out the chondral fissuring Dr. Jones repaired was on the humeral head. He also saw no evidence of functional impairment beyond the leg that would warrant a whole person rating for the knee. Dr. Burris opined Claimant requires no treatment after MMI for the knee or shoulder. He noted PRP injections were not helpful so it made no sense to repeat them. He opined stem cells are outside the MTGs and not supported by medical literature. He provided a similar opinion regarding Claimant's use of CBD oil.

24. Claimant testified that the PRP injections to the knee helped reduce the swelling even though they did not relieve the pain. His testimony in this regard is supported by Dr. Jones' June 14, 2018 report. He would like more PRP injections and wants to try stem cell treatment for the knee. Claimant uses CBD oil for the knee and shoulder, and feels it reduces pain and swelling.

25. Claimant described limitations from the knee such as waking down stairs, difficulty squatting, kneeling and crawling, and inability to run long distances or exercise as he did before the injury. He described no symptoms affecting parts of his body beyond the leg.

26. Claimant testified his shoulder felt "somewhat better" after surgery, but he still has pain in the "anterior part of the deltoid, and inside the joint." He that certain movements cause "popping and grating" inside the joint. He described no proximal symptoms affecting areas such as his neck, trapezius, scapula, or chest. Claimant has

limited use of his left arm because of his residual shoulder pain. For instance, he described difficulty lifting, performing overhead activities, and reaching away from his body. The shoulder soreness worsens with activities such as shoveling snow and maintaining his yard.

27. Claimant failed to prove he suffered functional impairment to his knee or shoulder not listed on the schedule of disabilities. The ALJ credits Dr. Burris' opinions that the functional impairment associated with Claimant's left shoulder and right knee is limited to his arm and leg, respectively.

28. Claimant wants to try Visco supplementation, PRP, and stem cell treatments for the shoulder, as suggested by Dr. Jones. He no longer takes Celebrex or ibuprofen because NSAIDs upset his stomach.

29. Claimant failed to prove he requires any treatment after MMI for his left shoulder. Dr. Jones did not actually recommend viscosupplementation, stem cells, or PRP for the shoulder, but merely listed those as "options . . . to consider." Dr. Burris and Dr. Watson explained stem cell treatment is not recommended under the Lower Extremity MTGs. CBD oil (or other marijuana-derived medicinal) is not an appropriate treatment in a Workers' Compensation claim, notwithstanding any perceived benefit it may provide Claimant. The possibility Claimant may need a shoulder arthroplasty at an undefined time in the future is too speculative to serve as the basis for a general award of medical benefits after MMI. The ALJ credits the opinions of Dr. Burris, Dr. Watson, and Dr. Hall that further injections to the shoulder are not warranted and the only reasonable option at this point would be anti-inflammatories. Because Claimant cannot tolerate and does not take NSAIDs, there is no persuasive evidence he needs any further treatment for the shoulder.

30. Claimant proved entitlement to a general award of medical treatment after MMI for the right knee. The ALJ credits Dr. Watson and Dr. Hall's opinions periodic PRP injections for the knee are reasonably necessary to relieve the effects of his knee injury and prevent deterioration of his condition.

31. Regarding change of physician, Claimant testified overall he received "good care" from Employer's clinic, but he "was told" his issues are "different" from what they are used to, and there may be other treatment modalities available that the providers are not open to. Claimant would prefer a physician who works in the private sector who is more "in tune" with treatment modalities that could help him.

32. Claimant failed to make made a proper showing for a change of physician to Dr. Hall for post-MMI treatment directed to his right knee.

33. Claimant suffered visible disfigurement to his right knee consisting of: (1) two ½ inch diameter arthroscopic surgery scars on the right knee around the patella, (2) a 1 inch long by 1/8 inch wide discolored, irregular surgical scar on the medial aspect of the right knee, (3) a ½ inch long by 1/8 inch wide discolored, irregular surgical scar on the

medial aspect of the right knee. This disfigurement is normally exposed to public view. The ALJ finds Claimant should be awarded $900 for this disfigurement.

34. Claimant suffered visible disfigurement to his left shoulder consisting of: (1) four ¼ inch diameter, discolored, indented arthroscopic surgery portal scars about the left shoulder, and (2) a three-inch long by 1/8 inch wide, indented surgical scar on the lateral left shoulder. This disfigurement is normally exposed to public view. The ALJ finds Claimant should be awarded $1,500 for this disfigurement.

35. Claimant suffered visible disfigurement to his left ankle consisting of: (1) six inch long by 1/8 inch wide discolored, irregular, partially indented, partially raised surgical scar on the lateral malleolus, (2) at least nine associated pairs of suture scars that significantly enhance the noticeability and apparent size of scar #1, (3) a ¼ inch diameter discolored surgical scar immediately adjacent to scar #1, (4) a ½ inch long by 1/8 inch wide discolored surgical scar on the medial aspect of the left ankle. This disfigurement is normally exposed to public view. The ALJ finds Claimant should be awarded $2,600 for this disfigurement.

CONCLUSIONS OF LAW

A. Whole person impairment

Whether a claimant has sustained a scheduled or whole person impairment is a question of fact for determination by the ALJ. *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366, 368 (Colo. App. 1996). The term "injury" as used in the context of permanent partial disability "refers to the manifestation in a part or parts of the body which have been impaired or disabled as a result of the industrial accident." *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366, 368 (Colo. App. 1996). In resolving this question, the ALJ must determine "the situs of the functional impairment," which refers to "the part of the body that sustained the ultimate loss, and not necessarily the situs of the injury itself." *Walker v. Jim Fuoco Motor Co*., 942 P.2d 1390, 1391 (Colo. App. 1997). The claimant must prove a non-scheduled impairment by a preponderance of the evidence. *Cassius v. Entegris*, W.C. No. 4-732-489 (March 26, 2010). The schedule of disabilities refers to the loss of "an arm at the shoulder" and "a leg at the hip." Section 8-42-107(2)(a), (w). Thus, in this case, Claimant must show functional impairment to part(s) of his body other than his "arm" or "leg" to obtain a PPD award based on a whole person rating.

Functional impairment need not take any particular form and "pain and discomfort which interferes with the claimant's ability to use a portion of the body may be considered 'impairment' for purposes of assigning a whole person impairment rating." *Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (June 30, 2008). Referred pain from the primary situs of the initial injury may show functional impairment to the whole person. *E.g., Latshaw v. Baker Hughes, Inc*., W.C. No. 4-842-705 (December 17, 2013); *Mader v. Popejoy Construction Co., Inc*., W.C. No. 4-198-489 (August 9, 1996). For example, referred pain and limitation in the neck, trapezius, and scapular area can cause functional impairment beyond the arm. E.g., *Steinhauser v. Azco, Inc.*, W.C. No. 4-808-991 (January 11, 2012); *Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (June 30, 2008). Similarly,

pain in the low back can represent a functional impairment beyond the leg. E.g., *Nichols v. Lafarge Construction*, W.C. No. 4-743-367 (October 7, 2009) (ankle injury caused problems extending up the entire leg and into the low back); *Webb v. Circuit City Stores, Inc*., W.C. No. 4-467-005 (August 16, 2002) (knee injury caused claimant to limp which led to low back pain and difficulty bending). Although medical opinions may be relevant to this determination, the ALJ can also consider lay evidence such as the claimant's testimony regarding pain and reduced function. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *City Market, Inc. v. Industrial Claim Appeals Office*, 68 P.3d 601 (Colo. App. 2003); *Olson v. Foley's*, W.C. No. 4-326-898 (September 12, 2000).

As found, Claimant failed to prove he suffered functional impairment from his left shoulder or right knee not enumerated on the schedule. The ALJ credits Dr. Burris' opinions that Claimant suffered no functional impairment beyond the arm or leg. Claimant's residual symptoms from the knee injury are confined to the right leg. His shoulder pain is around the anterior deltoid and "inside" the shoulder joint. The ALJ acknowledges Claimant's knee and shoulder injuries caused significant *disability,* including the unfortunate loss of his career. But the dispositive question is whether the claimant has functional impairment of *parts of his body* beyond the "arm" or the "leg." Although activity limitations related to a claimant's impaired body part(s) can be important evidence of non-scheduled impairment (e.g., inability to perform overhead work with a shoulder injury), those limitations must ultimately be tied to bodily structures that have been impaired by the injury. Here, all of Claimant's functionally-impaired body parts are listed on the schedule of disabilities. The limitations Claimant described relating to his shoulder are a function of his inability to use his arm. The same rationale applies to the knee; his disability is caused by limitation in using his leg, not any part of the body proximal to the leg. That Claimant's shoulder and knee impairments combine to produce significant disability is understandable, but is not a basis for whole person impairment absent persuasive evidence of functional impairment beyond his arm or leg.

B. Medical treatment after MMI

The respondents are liable for medical treatment from authorized providers reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101(1)(a); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Medical benefits may extend beyond MMI if the claimant requires maintenance care to relieve symptoms or prevent deterioration of their condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). If the claimant establishes the probability of a need for future treatment, he is entitled to a general award of medical benefits after MMI, subject to the respondents' right to dispute compensability, reasonableness, or necessity of any particular treatment. *Hanna v. Print Expediters, Inc.*, 77 P.3d 863 (Colo. App. 2003). A claimant need not be receiving treatment at the time of MMI nor prove that a particular course of treatment has been prescribed to obtain a general award of *Grover*-type medical benefits. *Miller v. Saint Thomas Moore Hospital*, W.C. No. 4-218-075 (September 1, 2000). Proof of a current or future need for "any" form of treatment will suffice for an award of post-MMI benefits. *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). The DIME's opinion regarding medical treatment after MMI is not entitled to any special weight but is simply another medical opinion for the ALJ

to consider when evaluating the preponderance of the evidence. *See Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Story v. Industrial Claim Appeals Office*, 910 P.2d 80 (Colo. App. 1995). The claimant must prove entitlement to medical benefits after MMI by a preponderance of the evidence. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997).

As found, Claimant failed to prove he requires any treatment after MMI for his left shoulder. Dr. Jones did not actually recommend viscosupplementation, stem cells, or PRP for the shoulder, but merely listed them as "options . . . to consider." Dr. Watson and Dr. Burris explained the MTGs do not recommend stem cell treatment, and the ALJ sees no persuasive basis to deviate from the MTGs in this instance. CBD oil (or other marijuana-derived medicinal) is not an appropriate treatment in a Workers' Compensation claim, notwithstanding any perceived benefit it may provide Claimant. *See* Chronic Pain MTG, Rule 17, Exhibit 9 (eff. 11/30/2017) § (G)(10)(d) ("marijuana use is illegal under federal law and ***cannot be recommended*** for use in this guideline. The Colorado Constitution also states that insurers are not required to pay for marijuana."). The possibility Claimant may need a shoulder arthroplasty in the future is too speculative to serve as the basis for a general award of medical benefits after MMI. The ALJ credits the opinions of Dr. Burris, Dr. Watson, and Dr. Hall that further injections for the shoulder are not warranted, and the only reasonable option at this point would be anti-inflammatories. Because Claimant cannot tolerate and does not take NSAIDs, there is no persuasive evidence he needs any further treatment for the shoulder.

Claimant proved entitlement to a general award of medical treatment after MMI for the right knee. The ALJ credits Dr. Watson and Dr. Hall's opinions periodic PRP injections for the knee are reasonably necessary to relieve the effects of his knee injury and prevent deterioration of his condition. Claimant credibly testified the PRP injections in his knee reduced the swelling in his knee. Dr. Burris' opinion PRP injections are outside the MTGs is inaccurate, because the Lower Extremity MTGs explicitly state,

> There is some evidence that, in the setting of knee OA [osteoarthritis], intra-articular injection with PRP is more effective than HA [hyaluronic acid] or placebo in improving knee function and pain. . . . Therefore, it may be used for patients with significant functional deficits who are not yet eligible for or to forestall an arthroplasty.

Claimant's right knee causes significant functional deficits, including inability to work in his chosen occupation. Several physicians have noted the likelihood Claimant may need a knee arthroplasty in the future. Accordingly, the ALJ is persuaded it is reasonable to allow Claimant access to periodic PRP injections as outlined by Dr. Watson and Dr. Hall.

C. Change of physician

A claimant can request a change of physician "upon the proper showing to the division." Section 8-43-404(5)(a)(VI)(A); *Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996). Section 8-43-404(5)(a)(VI)(A) does not define a "proper showing," and the ALJ has broad discretion to decide if the circumstances justify

a change of physician. *Jones v. T.T.C. Illinois, Inc*., W.C. No. 4-503-150 (May 5, 2006). The ALJ should exercise this discretion with an eye toward ensuring the claimant receives reasonably necessary treatment while protecting the respondents' legitimate interest in being apprised of treatment for which they may ultimately be held liable. *Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999); *Landeros v. CF & I Steel*, W.C. No. 4-395-315 (October 26, 2000). The ALJ may consider a variety of factors including whether the claimant has received adequate treatment, whether the claimant trusts the ATP, the level of communication between the claimant and the ATP, the ATP's expertise and skill at managing a condition, and the ATP's willingness to provide additional treatment. *E.g*., *Carson v. Wal-Mart*, W.C. No. 3-964-07 (April 12, 1993); *Merrill v. Mulberry Inn, Inc*., W.C. No. 3-949-781 (November 1995); *Greenwalt-Beltmain v. Department of Regulatory Agencies*, W.C. No. 3-896-932 (December 5, 1995); *Zimmerman v. United Parcel Service*, W.C. No. 4-018-264 (August 23, 1995). An ALJ does not have to approve a change of physician because of a claimant's personal reasons, including mere dissatisfaction with the ATP. *McCormick v. Exempla Healthcare*, W.C. No. 4-594-683 (November 27, 2007). On the other hand, the ALJ is not precluded from considering the claimant's subjective perception of his relationship with the physician. *Gutierrez v. Denver Public Schools*, W.C. No. 4-688-075 (December 18, 2008).

As found, Claimant failed to make a proper showing for a change of physician to Dr. Hall for his right knee treatment. The ALJ sees no evidence Employer's clinic provided substandard treatment; in fact, Claimant concedes he received "good care" from the clinic. Nor is there persuasive evidence PA-C Homberger is unwilling to provide further treatment. Claimant's speculation regarding potential "other modalities" is not supported by any persuasive medical evidence. The treatment Claimant finds most helpful is CBD oil, which is not a covered benefit under his claim regardless of any ATP's willingness to prescribe it. Dr. Watson and Dr. Hall agree the only viable option at this point is PRP injections. Dr. Jones will likely be the one to administer PRP going forward. Dr. Jones remains authorized and the ALJ sees no reason Claimant could not follow up with him regarding possible PRP injections or other treatments.

D. Disfigurement

Section 8-42-108(1) provides for additional compensation if a claimant is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view." As found, Claimant suffered visible disfigurement to his right knee, left shoulder, and left ankle. The ALJ concludes Claimant should be awarded $900 for disfigurement of his right knee, $1,500 for disfigurement of his left shoulder, and $2,600 for disfigurement of his left ankle.

ORDER

It is therefore ordered that:

1. Claimant's request for a PPD award based on a 7% whole person rating for his right knee is denied and dismissed.

2. Claimant's request for a PPD award based on a 1% whole person rating for his left shoulder is denied and dismissed.

3. Claimant's request for a general award of medical benefits after MMI for his left shoulder is denied and dismissed.

4. Respondent shall cover reasonably necessary treatment to relieve the effects of Claimant's industrial right knee injury and/or prevent deterioration of his condition.

5. Claimant's request for a change of physician is denied and dismissed.

6. Respondent shall pay Claimant $900 for disfigurement of his right knee under WC 5-036-847. Respondent may take credit for any disfigurement previously paid in connection with this claim.

7. Respondent shall pay Claimant $1,500 for disfigurement for his left shoulder under WC 5-041-859. Respondent may take credit for any disfigurement previously paid in connection with this claim.

8. Respondent shall pay Claimant $2,600 for disfigurement of his left ankle under WC 5-080-777. Respondent may take credit for any disfigurement previously paid in connection with this claim.

9. All issues regarding Respondent's claimed overpayment are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 11, 2019

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

Whether Claimant has established by a preponderance of the evidence that he is entitled to return home from an assisted living facility to receive reasonable and necessary attendant care through a provider and from his wife for his admitted April 15, 2010 industrial injuries.

FINDINGS OF FACT

1. Claimant was born on August 29, 1962. He worked for Employer as a Ruminant Nutritionist. Claimant's job duties included traveling to various locations to teach courses in his specialty area.

2. On April 15, 2010 Claimant was struck by a motor vehicle when crossing a street in Birmingham, Alabama during the course and scope of his employment. He sustained catastrophic physical and neurological injuries. Claimant is permanently and totally disabled.

3. Claimant subsequently spent approximately one year in various hospitals and rehabilitation facilities. He then returned to his cattle ranch located about 14-15 miles outside of Akron, Colorado. Claimant lived at the ranch with his wife of 37 years Sandra Campbell and two of their four children. Over time the children moved out of the family home. Claimant and Mrs. Campbell operated the ranch by themselves. However, because Claimant was unable to maintain the ranch after his injuries, Claimant and his wife sold the property. They then rented a home in Sterling, Colorado.

4. Claimant became angry about the sale of the family ranch and his living situation with Mrs. Campbell became untenable. Because Mrs. Campbell provided all of Claimant's necessary attendant care at the time, she was the focus of Claimant's frustration and anger. Mrs. Campbell testified that "things got bad." Claimant yelled at her and became physically aggressive. Eventually, Mrs. Campbell could no longer live with Claimant. Although the couple considered divorce, they instead separated.

5. On December 17, 2016 Claimant underwent an independent medical examination with Kathleen D'Angelo, M.D. Mrs. Campbell attended the evaluation with Claimant. Mrs. Campbell explained that she had been Claimant's primary caregiver for six years. She remarked that she was exhausted and had been the target of Claimant's anger and frustration. Mrs. Campbell had repeatedly requested assistance but was denied. She commented that they had just moved off the ranch because it became "too much." Dr. D'Angelo extensively documented the couple's troubled relationship. She noted that Claimant "requires 24-hour surveillance and care giving."

6. On May 29, 2018 the parties executed a Stipulation. They agreed that Claimant had been placed in an assisted living facility identified as Catherine's Quality of Life Homes on April 28, 2018. The facility is located at 3225 South Reed Court in Lakewood, Colorado 80227. Prior to Claimant's move to Catherine's he had been under the care of Harmony Home located at 703 Holly Drive, Sterling. Colorado. He began care with Harmony on January 16, 2018. Claimant previously received home health care from Mrs. Campbell.

7. On November 2, 2018 Claimant's treating neurologist Hakumat Rai Kakkar, M.D. drafted a letter regarding treatment at Catherine's. Dr. Kakkar explained that Claimant's family was required to drive approximately three hours from Sterling to visit him in Lakewood, Colorado. Claimant reported that he had become more withdrawn and depressed because of the inconsistent and decreased amount of time he was able to spend with his family. Mrs. Campbell was also concerned that the long travel distance had placed a strain on Claimant and his family. Dr. Kakkar determined that Claimant's distance from home negatively affected his health and emotional state. He explained that Claimant would benefit physically and mentally if placed in a facility closer to his family.

8. On November 7, 2018 Claimant visited Gary S. Gutterman, M.D. for an outpatient psychiatric consultation. Mrs. Campbell also attended the meeting. Dr. Gutterman recounted that Claimant suffered a traumatic brain injury while at work on April 15, 2010. Mrs. Campbell explained that Claimant had been relocated from the family home in Sterling, Colorado to an assisted living facility in Lakewood, Colorado. She commented that she was unable to care for Claimant because he became aggressive and angry. Claimant's long distance from his family caused him to feel increasingly depressed. Dr. Gutterman determined that Claimant was suffering an Adjustment Disorder with Mixed Emotional Features including mood liability and depression. He specified that Claimant's mood had become less stable since moving far away from his family home. Dr. Gutterman thus increased Claimant's medications. He concluded that moving to a facility closer to Sterling would help stabilize Claimant's mood.

9. On November 29, 2018 Claimant returned to Dr. Gutterman for a follow-up psychiatric examination. Claimant reported that his sleep cycle had improved. Mrs. Campbell remarked that she took Claimant to the family home in Sterling for 10 days over Thanksgiving. He behaved "quite reasonably." Dr. Gutterman determined that, based on Claimant's successful home trial, it would "be in his best interest to return to his home in Sterling in the near future." Mrs. Campbell noted that "she was very much up for this" if she received adequate medical support in caring for Claimant.

10. On December 4, 2018 Claimant returned to Dr. Gutterman for a psychiatric evaluation. Dr. Gutterman reported that Claimant remained fairly depressed because of persistent limitations and his continued placement in an assisted living facility far from home. He increased Claimant's dosage of psychotropic medications.

11. On February 20, 2019 Dr. Gutterman authored a letter to Claimant's counsel regarding a return to the family home in Sterling. Dr. Gutterman specified "[i]t remains my opinion that it would be in the best interest of [Claimant] from a psychiatric perspective

to leave the facility in Littleton, Colorado where he currently resides and return to living at home." He explained that Claimant and Mrs. Campbell "believe that [Claimant's] depression would lessen if he were able to live at home." Mrs. Campbell remarked that she could "handle" Claimant at home with periodic assistance.

12. On May 23, 2019 Claimant returned to Dr. Gutterman for a follow-up psychiatric examination. Dr. Gutterman noted that Claimant had been home for a couple of weeks and responded extremely well. His mood had noticeably improved. Dr. Gutterman remarked that "[i]t is evident to me that he needs to be at home on a full time basis." He commented that Claimant would probably require evening and nighttime coverage "due to mobility issues and the risk of falling. Otherwise, things probably will go reasonably well."

13. On August 14, 2019 Dr. Gutterman authored a letter after reviewing additional medical records regarding Claimant's care and treatment. He concluded that "[f]rom a review of the records, it remains my opinion that [Claimant] should return to live with Ms. Campbell full time at this point." Dr. Gutterman explained that Mrs. Campbell had returned to employment and had arranged for companion care when she needs a respite three to four days per month. Mrs. Campbell had also arranged various activities for Claimant that would benefit his "overall psychological functioning and add to his quality of life." She further informed Dr. Gutterman that her overall health has improved and she had received positive test results from her oncologist. Dr. Gutterman explained that he had reviewed the December 17, 2016 independent medical examination of Dr. D'Angelo. He commented that, at the time of the evaluation with Dr. D'Angelo, Claimant and his wife were separated. Mrs. Campbell was exhausted and she had her own health conditions. Dr. Gutterman specified that it seemed the question before Dr. D'Angelo was whether Claimant could live independently without returning to Mrs. Campbell. However, if Claimant returned home he and Mrs. Campbell would be living together, Mrs. Campbell had made adequate provisions to care for Claimant, her health had improved and she had "developed strategies to deal with [Claimant's] episodes of regression" that have been effective. Dr. Gutterman summarized that "allowing [Claimant] to have the appropriate structure in the home setting, as well as more social interactions, would not only be helpful to his emotional well-being but would also be the humane measure to take at this time."

14. Mrs. Campbell testified at the hearing in this matter. She remarked that she attempts to visit Claimant at least once every 7-10 days. Depending on traffic, it takes Mrs. Campbell about 2-3 hours to drive to Catherine's. Claimant has not seen his children or grandchildren very often since he moved to the facility. Mrs. Campbell noted that she has brought Claimant home for family visits. She remarked that, since Claimant began treating with Dr. Gutterman, his behavior has changed and he is much calmer than he was when the couple lived together. Mrs. Campbell testified that treatment with Dr. Gutterman has been effective and Claimant's mood has substantially improved. The treatment has resulted in a substantial decrease in Claimant's anger and frustration.

15. Mrs. Campbell testified that she was diagnosed with breast cancer shortly before Claimant's April 15, 2010 industrial injuries. Treatment for her cancer included a

double mastectomy and a hysterectomy. Her treatment extended for several years and she was only recently released from care. Mrs. Campbell explained that isolation with Claimant as his sole attendant care provider for several years exhausted and overwhelmed her. The increased anger and frustration manifested by Claimant after the ranch was sold precipitated the crisis that caused the couple's separation. However, Mrs. Campbell commented that Dr. Gutterman's treatment beginning in the fall of 2018 has resulted in a substantial decrease in Claimant's anger and frustration. Furthermore, Mrs. Campbell obtained mental health treatment for herself. Finally, she recently began working at a part-time job on Tuesdays.

16. Claimant requests that Respondents pay for attendant care services in the family home for 10 hours every Tuesday. Mrs. Campbell noted that she works on Tuesdays and attendant care services will allow her to continue working. Claimant also requests that Respondents pay for attendant care 24 hours per day for four days each month. The arrangement will allow Mrs. Campbell to spend some time each month focusing on her own needs. Third, Claimant has requested $15.00 per hour for eight hours each day for Mrs. Campbell when she provides attendant care services. Mrs. Campbell noted that Claimant requires eight hours each day of direct intervention.

17. Claimant has established that it is more probably true than not that he is entitled to return home from an assisted living facility to receive reasonable and necessary attendant care through a provider and from his wife for his admitted April 15, 2010 industrial injuries. Initially, on April 15, 2010 Claimant suffered catastrophic injuries when he was struck by a motor vehicle in the course and scope of his employment. Claimant requires attendant care 24 hours per day. Mrs. Campbell provided care for Claimant for a number of years at the family ranch. However, the arrangement eventually became untenable when Claimant focused his frustration and anger at Mrs. Campbell. Mrs. Campbell also faced her own health problems, became overwhelmed and the parties contemplated separation after their lengthy marriage. On May 29, 2018 the parties executed a Stipulation and agreed to place Claimant in an assisted living facility identified as Catherine's on April 28, 2018. The facility is located at 3225 South Reed Court in Lakewood, Colorado 80227.

18. On November 7, 2018 Claimant began receiving psychiatric care from Dr. Gutterman. After a number of visits with Claimant and Mrs. Campbell, Dr. Gutterman persuasively concluded that Claimant should leave Catherine's and return to live with his wife. He specified that Claimant had become depressed and suffered mood lability as a result of living in a facility far from his family. Dr. Gutterman explained that Mrs. Campbell had returned to employment and had arranged for companion care when she needs a respite three to four days per month. Mrs. Campbell also arranged various activities for Claimant that would benefit his "overall psychological functioning and add to his quality of life." Mrs. Campbell further informed Dr. Gutterman that her overall health has improved and she had received positive test results from her oncologist. Dr. Gutterman summarized that "allowing [Claimant] to have the appropriate structure in the home setting, as well as more social interactions, would not only be helpful to his emotional well-being but would also be the humane measure to take at this time." Furthermore, Claimant's treating neurologist Dr. Kakkar determined that Claimant's long distance from

home negatively affected his health and emotional state. He explained that Claimant would benefit physically and mentally by being placed in a facility closer to his family.

19. In contrast, Dr. D'Angelo completed an independent medical examination and extensively outlined the couple's troubled relationship. She determined that Claimant requires 24-hour surveillance and care giving. However, Dr. Gutterman explained that he had reviewed Dr. D'Angelo's independent medical examination. He commented that, at the time of the evaluation with Dr. D'Angelo, Claimant and his wife were separated, Mrs. Campbell was exhausted and she had her own health conditions. Dr. Gutterman specified that it seemed the question before Dr. D'Angelo was whether Claimant could live independently without returning to Mrs. Campbell. However, under the current proposal Claimant and Mrs. Campbell would be living together, Mrs. Campbell has made adequate provisions to care for Claimant, her health has improved and she has "developed strategies to deal with [Claimant's] episodes of regression" that have been effective. Finally, Mrs. Campbell credibly explained that she has brought Claimant home for family visits and he exhibited a significantly improved demeanor. She remarked that, since Claimant began treating with Dr. Gutterman, his behavior has changed and he is much calmer than he was when the couple lived together.

20. Based on the persuasive reports of Dr. Gutterman, in conjunction with the opinion of Dr. Kakkar and testimony of Mrs. Campbell, Claimant has established that he is entitled to leave Catherine's assisted living facility and return to his home. Because Claimant requires care 24 hours per day, Respondents shall pay for attendant care services in the family home for 10 hours every Tuesday. Respondents shall also pay for attendant care 24 hours each day for four days per month. Finally, Mrs. Campbell shall receive $15.00 per hour for eight hours each day that she provides attendant care services to Claimant. The preceding care is reasonable, necessary and causally related to Claimant's admitted April 15, 2010 industrial injuries.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as

unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The claimant bears the burden of demonstrating a causal connection between his industrial injuries and the need for additional medical treatment. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

5. Section 8-42-101(1)(a), C.R.S. addresses the provision of medical services and provides:

> Every employer, regardless of said employer's method of insurance, shall furnish such medical, surgical, dental, nursing, and hospital treatment, medical, hospital, and surgical supplies, crutches, and apparatus as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury.

The preceding provision has been applied to compensate injured workers for a variety of related services. See *Bellone v. Industrial Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997) (childcare services); *Suetrack USA v. Indus. Claim Appeals Office*, 902 P.2d 854, 856 (Colo. App. 1995) (home health care services), *Atencio v. Quality Care, Inc.*, 791 P.2d 7, 9 (Colo. App. 1990) (attendant care and housekeeping services). The duty under section 8-42-101(1)(a), C.R.S. includes furnishing treatment for conditions representing a natural development of the industrial injury as well as providing compensation for incidental services necessary to obtain the required medical care. *Country Squire Kennels v. Tarshis*, 899 P.2d 362 (Colo.App. 1995). The duty has also been construed to include treatment of unrelated conditions when the treatment is necessary to achieve optimum care of the industrial injury. *Public Service Co. v. Industrial Claim Appeals Office*, 979 P.2d 584 (Colo.App. 1999); *see In re Walling*, W.C. No. 4-760-050-02 (ICAO, Dec. 10, 2013).

6. When assessing any requested service the "expenses must be for medical or nursing treatment, or incidental to obtaining such medical or nursing treatment." *Country Squire Kennels* 899 P.2d at 363. "In other words, to be considered a medical benefit under the statute, the service must be a medical service that is reasonably necessary for treating the injury or that provides therapeutic relief from the injury's effects." *Nanez v. Indus. Claim Appeals Office*, 444 P.3d 820, 825 (Colo. App. 2018); *see* also Bellone, 940 P.2d at 1117 ("The service must be reasonably needed to cure and relieve the effects of the injury and be related to a claimant's physical needs."). The service must be medical in nature so that it directly relieves the symptoms or effects of the injury or is associated with the claimant's physical needs. *See Kuziel v. Pet Fair, Inc.*, 931 P.2d 521, 522 (Colo. App. 1996). To be compensable as "incidental" to medical treatment, the services must enable the claimant to obtain medical care or be relatively minor in comparison to the medical care and treatment. *Country Squire Kennels*, 899 P.2d at 364. Whether services "are either medically necessary for the treatment of a claimant's injuries or incidental to obtaining such treatment" is a question of fact to be determined by the ALJ. *Atencio*, 791 P.2d at 8; *In re Rajabi*, W.C. No. 5-044-870-01 (ICAO, Aug. 6, 2018)

7. As found, Claimant has established by a preponderance of the evidence that he is entitled to return home from an assisted living facility to receive reasonable and necessary attendant care through a provider and from his wife for his admitted April 15, 2010 industrial injuries. Initially, on April 15, 2010 Claimant suffered catastrophic injuries when he was struck by a motor vehicle in the course and scope of his employment. Claimant requires attendant care 24 hours per day. Mrs. Campbell provided care for Claimant for a number of years at the family ranch. However, the arrangement eventually became untenable when Claimant focused his frustration and anger at Mrs. Campbell. Mrs. Campbell also faced her own health problems, became overwhelmed and the parties contemplated separation after their lengthy marriage. On May 29, 2018 the parties executed a Stipulation and agreed to place Claimant in an assisted living facility identified as Catherine's on April 28, 2018. The facility is located at 3225 South Reed Court in Lakewood, Colorado 80227.

8. As found, on November 7, 2018 Claimant began receiving psychiatric care from Dr. Gutterman. After a number of visits with Claimant and Mrs. Campbell, Dr. Gutterman persuasively concluded that Claimant should leave Catherine's and return to live with his wife. He specified that Claimant had become depressed and suffered mood lability as a result of living in a facility far from his family. Dr. Gutterman explained that Mrs. Campbell had returned to employment and had arranged for companion care when she needs a respite three to four days per month. Mrs. Campbell also arranged various activities for Claimant that would benefit his "overall psychological functioning and add to his quality of life." Mrs. Campbell further informed Dr. Gutterman that her overall health has improved and she had received positive test results from her oncologist. Dr. Gutterman summarized that "allowing [Claimant] to have the appropriate structure in the home setting, as well as more social interactions, would not only be helpful to his emotional well-being but would also be the humane measure to take at this time." Furthermore, Claimant's treating neurologist Dr. Kakkar determined that Claimant's long distance from home negatively affected his health and emotional state. He explained that

Claimant would benefit physically and mentally by being placed in a facility closer to his family.

9. As found, in contrast, Dr. D'Angelo completed an independent medical examination and extensively outlined the couple's troubled relationship. She determined that Claimant requires 24-hour surveillance and care giving. However, Dr. Gutterman explained that he had reviewed Dr. D'Angelo's independent medical examination. He commented that, at the time of the evaluation with Dr. D'Angelo, Claimant and his wife were separated, Mrs. Campbell was exhausted and she had her own health conditions. Dr. Gutterman specified that it seemed the question before Dr. D'Angelo was whether Claimant could live independently without returning to Mrs. Campbell. However, under the current proposal Claimant and Mrs. Campbell would be living together, Mrs. Campbell has made adequate provisions to care for Claimant, her health has improved and she has "developed strategies to deal with [Claimant's] episodes of regression" that have been effective. Finally, Mrs. Campbell credibly explained that she has brought Claimant home for family visits and he exhibited a significantly improved demeanor. She remarked that, since Claimant began treating with Dr. Gutterman, his behavior has changed and he is much calmer than he was when the couple lived together.

10. As found, based on the persuasive reports of Dr. Gutterman, in conjunction with the opinion of Dr. Kakkar and testimony of Mrs. Campbell, Claimant has established that he is entitled to leave Catherine's assisted living facility and return to his home. Because Claimant requires care 24 hours per day, Respondents shall pay for attendant care services in the family home for 10 hours every Tuesday. Respondents shall also pay for attendant care 24 hours each day for four days per month. Finally, Mrs. Campbell shall receive $15.00 per hour for eight hours each day that she provides attendant care services to Claimant. The preceding care is reasonable, necessary and causally related to Claimant's admitted April 15, 2010 industrial injuries.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant shall leave Catherine's assisted living facility and return to his home.

2. Respondents shall pay for attendant care services in the family home for 10 hours every Tuesday.

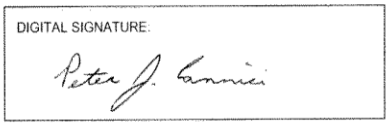
3. Respondents shall pay for attendant care services 24 hours each day for four days per month.

4. Mrs. Campbell shall receive $15.00 per hour for eight hours each day that she provides attendant care services to Claimant.

5. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: October 15, 2019.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 1525 Sherman Street, 4th Floor, Denver, CO 80203	
In the Matter of the Workers' Compensation Claim of: B, Claimant, vs. C Employer, and SELF-INSURED, Respondent.	▲ **COURT USE ONLY** ▲ **CASE NUMBER:** WC No. 5-063.493-003

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Hearing in this matter was held on September 12, 2019, before Administrative Law Judge (ALJ) Margot W. Jones in Denver, Colorado. The hearing was held in Courtroom 4 convening at 8:30 a.m. Claimant was present at the hearing and represented by _____, Esq. Respondent appeared through _____, Esq. The parties' exhibits 1-16 and A-L were made part of the record at hearing.

In this order,B_____ is referred to as "Claimant" and C_____is referred to as "Respondent."

Also, in this order, "ALJ" or "Judge" refers to the Administrative Law Judge, "C.R.S." refers to Colorado Revised Statutes (2018), "the Act" refers to the Workers' Compensation Act, Sections 8-40-101, et seq., supra, "OAC" refers to the Office of Administrative Courts, "OACRP" refers to the Office of Administrative Courts Rules of Procedure, 1 CCR 104-1, and "WCRP" refers to Workers' Compensation Rules of Procedure, 7 Code Colo. Reg. 1101-3.

ISSUES

1. Whether Respondent proved by clear and convincing evidence that the DIME physician's impairment rating is most probably incorrect.

2. Whether Claimant proved by a preponderance of the evidence that her scheduled impairment rating should be converted to a whole person rating because Claimant's functional impairment extends beyond the arm at the shoulder.

FINDINGS OF FACT

1. Claimant is a 27-year-old right-handed female who works as a patrol officer in Respondent's Police Department. On August 12, 2017, Claimant was involved in a takedown of a suspect during the course of her police work. During the struggle, Claimant took the suspect to the ground, and sustained a left upper extremity injury in the process.

2. Claimant was initially seen in the Denver Health Emergency Department (ER). The ER report indicates that Claimant complained of pain in her left shoulder and numbness in the two middle fingers of the left hand. The ER report also indicates Claimant had previously injured the same extremity with similar symptoms in April 2016.

3. Following the ER visit, Claimant was seen at Concentra by Jerald Solot, MD, the authorized treating physician. Dr. Solot initially diagnosed left arm paresthesia and a left shoulder sprain, noted concern for possible nerve injury, and referred Claimant for physical therapy. Claimant did not make significant improvement and was subsequently referred for an MRI.

4. Claimant underwent an MRI of her left shoulder on September 5, 2017, finding: mild infraspinatus fraying, mild congenital glenoid dysplasia, and glenoid chondral fibrillation. The MRI showed no evidence of a traumatic injury to the left shoulder. That same day, Claimant underwent an MRI of her left elbow, finding possible focal ulnar neuritis.

5. Claimant was next seen at Concentra on September 8, 2017, reporting continuing pain in both her left shoulder and elbow. Dr. Solot found that Claimant's shoulder had full range of motion and no pain with movement, but did ache after activity. Claimant's elbow pain was more severe, as was the persistent hand numbness and tingling. As a consequence, Claimant was referred to Alireza Alijani, MD, an orthopedic hand specialist.

6. On September 26, 2017, Claimant returned to Dr. Solot who noted, "She reports improvement in symptoms but still gets tingling in the fourth/fifth digits of the hand and irritation at the elbow with prolonged flexed positions. She denies any pain or discomfort at the shoulder."

7. Claimant was seen by Dr. Alijani on September 29, 2017. At this evaluation, Dr. Aligani diagnosed left elbow ulnar neuropathy and recommended a left upper extremity EMG. Dr. Alijani noted Claimant had full range of motion in her left shoulder and no pain complaints for this joint.

8. Claimant was seen by Dr. Aschberger on October 18, 2017 for EMG testing. Dr. Aschberger found positive EMG results consistent with left ulnar neuropathy at the elbow. Dr. Aschberger examined Claimant's left shoulder and found it to have full range of motion without pain complaints. Dr. Aschberger's left shoulder findings were consistent with Dr. Solot's evaluation on October 24, 2017, at which time there were no left shoulder complaints noted.

9. Claimant next saw Dr. Alijani on November 10, 2017 to review EMG results. Dr. Alijani found the results confirmed left cubital tunnel syndrome and ulnar neuropathy, and recommended a left ulnar nerve transposition.

10. Claimant underwent a left ulnar nerve neurolysis and transposition with Dr. Alijani on December 6, 2017. Claimant had a difficult recovery from surgery. On December 14, 2017 it was noted, "She is still having a lot of pain in the elbow and is still on narcotic medications." On December 16, 2017, Claimant was seen in the Emergency Department for severe elbow pain post-surgery. On December 23, 2017, at a follow-up evaluation with Dr. Solot, Claimant was diagnosed with left arm paresthesia and neurapraxia of the left ulnar nerve, and was referred to John Sacha, MD for a diagnostic injection. Claimant was also hospitalized for two weeks in January 2018 due to cellulitis in her left arm at the surgical site. Hospitalization began on January 4, 2018 with an infectious disease evaluation for probable IV antibiotics. Following the evaluation, Claimant was diagnosed with a likely postoperative wound infection.

11. Claimant was first seen by Dr. Sacha on January 25, 2018. At this evaluation, he performed a left stellate ganglion block and conscious sedation. There was an initial reduction in pain complaints, which Dr. Sacha noted could lead to a diagnosis of complex regional pain syndrome (CRPS). However, Dr. Sacha also noted Claimant had received pain relieving medications as part of the injection, which could also explain an immediate reduction in symptoms. Ultimately, the stellate ganglion block was determined to be non-diagnostic.

12. Claimant next saw Dr. Sacha on February 7, 2018. At this appointment, due to possible diagnostic response to the stellate ganglion block, Dr. Sacha

recommended a triple-phase bone scan for further investigation of CRPS. Dr. Sacha noted Claimant had no left shoulder pain at this evaluation.

13. Claimant underwent the triple-phase bone scan on March 14, 2018. Claimant saw Dr. Sacha on March 19, 2018, in follow up to this scan. The bone scan results showed no evidence of CRPS, an only slight evidence of an incompletely treated infectious process. The latter was consistent with Claimant's January hospitalization for postoperative infection. Dr. Sacha specifically stated, "No evidence of sympathetic mediated pain or CRPS." Dr. Sacha's diagnosis was medial epicondylitis and ulnar neuropathy secondary to medial epicondylitis and continuing therapy was prescribed.

14. On March 23, 2018, Claimant returned to see Dr. Solot. At this evaluation, he had ongoing complaints of elbow pain, specifically complaining of pain into her left triceps, but no complaint of left shoulder pain. On March 26, 2018 Dr. Sacha reevaluated Claimant and recommended ongoing physical therapy. Consistent with Dr. Solot's March evaluation, Dr. Sacha's physical examination noted no allodynia, hyperpathia, or skin trophic changes, and no complaints of left shoulder pain. At this evaluation, Dr. Sacha had formally ruled out CRPS as a possible diagnosis.

15. On April 18, 2018, Claimant was seen by Dr. Sacha who found: Since last being seen, she is doing quite a bit better. She has returned to work at her part time light duty job and this is providing benefit for her. She was seen by infectious disease and there is no evidence of ongoing infection, just some residual inflammation in the area of her medial elbow. At this point, I am very comfortable with how she is doing and I think her prognosis is great. All I recommend from this point on, prior to case closure and hopefully getting her back to full duty, is the one time left medial epicondyle PRP injection – being done by my partner, Dr. Rick Zimmerman, and finishing PT and strengthening, and hopefully in about a four week timeframe, she will be approaching MMI, case closure and full duty.

16. On referral from Dr. Sacha, Claimant received a platelet-rich plasma (PRP) injection in the left elbow from Dr. Zimmerman on May 4, 2018. In evaluating Claimant, Dr. Zimmerman concurred with Dr. Sacha's diagnosis ruling out CRPS. Additionally, Dr. Zimmerman did not note any complaints of left shoulder pain in his physical examination.

17. Dr. Sacha placed Claimant and MMI on June 11, 2018. At MMI, Dr. Sacha recommended a gym/pool pass for Claimant to continue an unsupervised exercise program for post MMI maintenance. Dr. Sacha provided an 8% scheduled left upper extremity impairment due to 2% loss of range of motion and 6% for left ulnar motor loss.

18. On June 15, 2018 Claimant returned to Dr. Solot. He noted no complaints of left shoulder pain, full range of motion in the left elbow, and recommended a trial of full duty. On June 22, 2018, at a follow-up evaluation, Dr. Solot found "The patient endorsing good results from a trial of full duty." Dr. Solot placed Claimant at MMI on June 22, 2018, provided a 6% scheduled left upper extremity impairment for residual left ulnar nerve symptomatology from the elbow, and released Claimant to full duty. As part of his impairment rating, Dr. Solot performed a thorough physical examination of the left upper extremity, found no left shoulder pain and declined to rate the left shoulder for any impairment related to the work incident.

19. Dr. Sacha performed a second impairment rating on July 9, 2018, providing a 10% left upper extremity impairment rating based on 3% for loss of range of motion, 6% for ulnar sensory loss and 3% for motor loss. It is not clear why Dr. Sacha elected to rate Claimant a second time. Regardless, his evaluation is consistent with Dr. Solot's impairment rating and also consistently notes no impairment or pain complaints for the left shoulder.

20. Respondent filed a Final Admission of Liability consistent with Dr. Solot's impairment rating on July 19, 2018. Claimant timely objected to this admission and sought a Division IME.

21. A Division IME was conducted by James Regan, MD on November 30, 2018. Dr. Regan agreed with Drs. Solot and Sacha that Claimant reached MMI on June 22, 2018. However, he provided a 15% left upper extremity rating which diverged from the diagnosis of the treating physicians. Dr. Regan found Claimant had CRPS Type II in her left elbow as a result of surgery as well as impairment to the left shoulder for loss of range of motion. In providing a CRPS diagnosis, Dr. Regan relied on the Budapest Criteria, a series of subjective clinical evaluations. Dr. Regan also appeared to find a difference in extremity temperature, however his report fails to indicate whether or what type of diagnostic equipment was used to perform this analysis.

22. Claimant indicated at hearing that Dr. Regan's deposition testimony would be necessary. However, Claimant ultimately waived the right to take the testimony of Dr. Regan in support of his opinion. The report of Dr. Regan is inconsistent, placing several medical evaluations out of chronological order, failing to explain why objective testing was ignored and failing to explain why Dr. Regan diagnosed conditions in such contradiction to those of the treating physicians.

23. Respondent filed a Final Admission of Liability consistent with Dr. Regan's DIME report on January 3, 2019. Claimant filed an Application for Hearing seeking conversion of the admitted scheduled impairment. In their Response to Application for Hearing, Respondent endorsed overcoming the DIME with respect to impairment.

24. In advance of hearing, Dr. Sacha testified by deposition on May 29, 2019. Dr. Sacha confirmed the steps he took to diagnose Claimant, explaining why Claimant does not have CRPS and is both credible and persuasive. First, Dr. Sacha explained that the January 25, 2018, stellate ganglion block only gave a strong suspicion of some form of sympathetic mediated pain. Ultimately, this injection did not confirm a diagnosis of CRPS. Second, the triple-phase bone scan produced a negative result. Third, Dr. Sacha testified that Claimant lacked the clinical diagnostics for CRPS including her failure to have vasomotor, sudomotor edema or motor trophic symptoms.

25. Dr. Sacha also testified that, per the Medical Treatment Guidelines, the diagnostic components of clinical CRPS require the physician to consider more probable alternate diagnoses (see subsection D). Dr. Sacha credibly testified that the ulnar neuropathy and residual neuropathic pain better explain Claimant's symptoms and are the more likely diagnosis. Dr. Sacha persuasively testified that an impairment rating for CRPS would have been inappropriate; instead the basis for Claimant's impairment is ulnar neuropathy and loss or range of motion due to medial epicondylitis.

26. The testimony of Dr. Sacha is found credible and persuasive. Further, the testimony of Dr. Sacha is found reliable as based on numerous physical examination, review of objective testing and based on methodology consistent with the Medical Treatment Guidelines.

27. Dr. Lesnak performed a records review and independent medical examination of Claimant on March 26, 2019. Dr. Lesnak testified at hearing consistent with his IME report. He provided an analysis consistent with Dr. Sacha's regarding how a diagnosis of CRPS was eliminated. Dr. Lesnak also explained how Dr. Regan's reliance on the Budapest Criteria failed to properly take into consideration Claimant's ulnar neuropathy, a clear and obvious alternate explanation for Claimant's elbow pain. Further, Dr. Lesnak explained that Dr. Regan had ignored the objective findings from Dr. Sacha's testing, which would conclusively rule out a CRPS diagnosis.

28. Dr. Lesnak performed a physical evaluation of Claimant, including a careful evaluation of the left shoulder. Dr. Lesnak found no clinical evidence of symptomatic left shoulder joint pathology, including rotator cuff impingement signs or symptomatic rotator cuff pathology. He found no loss of range of motion, nor loss of strength in the musculature surrounding the shoulder and going into the whole person. Dr. Lesnak testified regarding the lack of left shoulder pain complaints in records of multiple treating physicians and explained that there is not a ratable impairment to claimant's left shoulder.

29. The testimony of Dr. Lesnak is found credible and persuasive. Like Dr. Sacha, Dr. Lesnak based his analysis of CRPS on the Medical Treatment

Guidelines and objective data. Further, Dr. Lesnak's findings are consistent with those of Drs. Sacha and Solot, and take into consideration the repeated observations of the treating physicians throughout their course of treatment.

30. Claimant testified at hearing about her injury, course of care, current levels of pain and functional ability. Claimant testified that she currently has pain in her left shoulder and elbow. Claimant testified to pain radiating into her neck and to some changes in activity due to her pain. Claimant also testified that she works out using the affected arm 5-6 days per week with no adverse effects other than some soreness post-workout.

31. Claimant testified that she can complete her work requirements with no issue and "doesn't think about" the pain while at work. Claimant confirmed in testimony that she can perform all the essential functions of her job, including running up to one mile in order to apprehend a suspect; walk, crawl, run, or climb to reach a vantage point, target, or observation post; use physical force or hand tools when necessary to effect entry into a structure, arm-hand steadiness in order to accurately aim a firearm; and physical ability to subdue and arrest a resisting individual.

32. Claimant also made a physical presentation at hearing, asking the ALJ to observe her shoulders and compare any difference in appearance. On observation, there does appear to be a difference in musculature between Claimant's left and right shoulders.

33. Claimant testified credibly to pain, but not to loss of function beyond the extremity. Claimant did not testify to loss of strength in her whole person, loss of range of motion in her chest or back, or loss of functional ability in her upper torso. Claimant did testify to being physically active, athletic and being able to perform to rigorous functions of a police officer. Claimant's testimony provided no persuasive evidence of loss of function beyond the extremity, instead focusing on pain and loss of function of the extremity.

34. The ALJ credits the opinions of Drs. Sacha, Solot and Lesnak over the opinion of Dr. Regan with respect to Claimant's diagnosis and impairment.

35. The ALJ further finds, based on the totality of the evidence that Claimant has failed to meet her burden of proof to show her shoulder should be converted from a scheduled impairment to that of a whole person impairment.

36. The ALJ finds, based on the totality of the evidence, that Respondent has overcome the opinion of the DIME physician as to Claimant's permanent impairment rating.

CONCLUSIONS OF LAW

1. The purpose of the Act is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case must be interpreted neutrally, neither in favor of either the rights of the claimant or nor in favor of the rights of the respondents, and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

2. Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of the ALJ. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

3. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

4. Section 8-42-107(1)(a), C.R.S. limits medical impairment benefits to those provided in Section 8-42-107(2), C.R.S. when a claimant's injury is one enumerated in the schedule of impairments. The schedule includes the loss of the "arm at the shoulder." *See* Section 8-42-107(2)(a), C.R.S. However, the "shoulder" is not listed in the schedule of impairments. *See Bolin v. Wacholtz*, W.C. No. 4-240-315 (ICAO, June 11, 1998).

5. When an injury results in a permanent medical impairment not set forth on a schedule of impairments, an employee is entitled to medical impairment benefits paid as a whole person. *See* Section 8-42-107(8)(c), C.R.S.

6. Because Section 8-42-107(2)(a), C.R.S. does not define a "shoulder" injury, the dispositive issue is whether a claimant has sustained a

functional impairment to a portion of the body listed on the schedule of impairments. *See Strauch v. PSL Swedish Healthcare*, 917 P.2d 366, 368 (Colo. App. 1996). Whether a claimant has suffered the loss of an arm at the shoulder under Section 8-42-107(2)(a), C.R.S., or a whole person medical impairment compensable under Section 8-42-107(8)(c), C.R.S., is determined on a case-by-case basis. *See DeLaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000).

7. The Judge must thus determine the situs of a claimant's "functional impairment." *Velasquez v. UPS,* W.C. No. 4-573-459 (ICAO Apr. 13, 2006). The situs of the functional impairment is not necessarily the site of the injury. *See In re Hamrick*, W.C. No. 4-868-996-01 (ICAO, Feb. 1, 2016); *In re Zimdars,* W.C. No. 4-922-066-04 (ICAO, Feb. 4, 2015). Pain and discomfort that limit a claimant's ability to use a portion of the body is considered functional impairment for purposes of determining whether an injury is off the schedule of impairments. *In re Johnson –Wood*, W.C. No. 4-536-198 (ICAO, June 20, 2005); *Vargas v. Excel Corp.,* W.C. 4-551-161 (ICAO, Apr. 21, 2005). However, the mere presence of pain in a portion of the body beyond the schedule does not require a finding that the pain represents a functional impairment. *Lovett v. Big Lots,* WC 4-657-285 (ICAO, Nov. 16, 2007); *O'Connell v. Don's Masonry,* W.C. 4-609-719 (ICAO, Dec. 28, 2006).

8. In this case, Claimant has failed to carry her burden to show impairment to a part of the body not located on the schedule. Claimant testified to pain in her shoulder and neck that occurs after activity with occasional flare-ups. However, pain alone does not prove the location of Claimant's impairment. As explained by Dr. Lesnak, Claimant may have referred pain from her elbow into her shoulder. This does not give Claimant a loss of function beyond her extremity and into her whole person.

9. Claimant testified to limits with working out, and changes in her workout regime, but did not testify as to loss of function in her whole person. Claimant testified that she has no work limitations because of this injury and that she is able to engage in a physically demanding job.

10. Claimant's physical presentation at hearing was not persuasive. While Claimant may have muscular differences between her dominate and non-dominate shoulders, this is not evidence of functional impairment, and is not evidence of functional impairment extending into the whole person.

11. Finally, Claimant relies on Dr. Regan's medical report in support of her argument for conversion based on his rating of her left shoulder. As found, Dr. Regan's erred in finding Claimant had a ratable impairment to her left shoulder. As explained by Dr. Lesnak, the medical records were silent on any shoulder injury within a few months of the incident and the radiology of Claimant's shoulder shows no acute injury. Instead, impairment ratings of Drs. Sacha and Solot, which exclude impairment to Claimant's shoulder, are more

reliable evidence of Claimant's true impairment, and provide no evidence of loss of function beyond the extremity.

12. As found, Claimant failed to carry her burden of proof to show her scheduled left upper extremity impairment should be converted to whole person impairment.

13. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; Peregoy v. Industrial Claim Appeals Office, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc.,* W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.*, W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004). The question of whether the DIME physician rating was overcome by clear and convincing evidence presents questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office*, 17 P.3d 202 (Colo. App. 2000).

14. However, in *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998), the court *citing Askew v. Industrial Claim Appeals Office,* 927 P.2d 1333 (Colo. 1996) noted that whether a particular component of the claimant's overall medical impairment was caused by the industrial injury is an inherent part of the rating process under the AMA Guides. Therefore, the Egan court determined that in order to challenge and overcome the causation conclusion by the DIME physician a party must present clear and convincing evidence. However, the Egan court further explained that the statutory scheme, requiring causation questions to be challenged through a DIME, applies only to injuries resulting in whole person impairment. The Egan court concluded that when there is a dispute concerning causation or relatedness in a case involving only a scheduled impairment, the ALJ will continue to have jurisdiction to resolve that dispute.

15. Here, respondent has established by a preponderance of the evidence that Dr. Regan erred in diagnosing Claimant with CRPS. Dr. Regan relied exclusively on the Budapest Criteria in reaching his CRPS diagnosis. In doing so, he ignored the requirement that other more likely diagnoses be ruled out prior to diagnosing CRPS. Claimant's obvious ulnar neuropathy, and treatment for this condition, is the more likely diagnosis. Failing to account for this diagnosis is clear error. Further, Dr. Sacha following the CRPS criteria found in the guidelines, including implementation of objective testing, accurately

concluded Claimant does not have CRPS. Dr. Regan's ignoring of these objective diagnostic tests was in error.

16. Dr. Regan further erred when he concluded that Claimant has a ratable injury to her left shoulder. The medical records were silent on any shoulder injury within a few months of the incident and the radiology of Claimant's shoulder showed no acute injury. The lack of any objective evidence of injury, as explained by Dr. Lesnak in his report, invalidates the finding of Dr. Regan. Further, Dr. Regan provided no explanation why his shoulder rating, based on Claimant's diffuse and subjective complaints, would differ so substantially from the more credible opinions of the treating physicians, Drs. Sacha and Solot, which were made closer in time to both MMI and the injury.

17. The opinions of Drs. Sacha and Lesnak are more credible and persuasive than the opinion of Dr. Regan. Both Drs. Sacha and Lesnak provided thorough explanations on Claimant's actual diagnosis, supported by the medical records and opinions of other physicians, such as Drs. Aschberger, Zimmerman and Solot.

18. As found, Respondent has overcome the opinion of Dr. Regan by a preponderance of the evidence. Claimant has no ratable impairment in her left shoulder and does not have CRPS.

19. Claimant's impairment rating is 6% scheduled impairment of the left upper extremity.

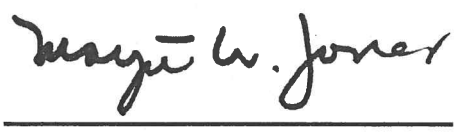
ORDER

1. Claimant has not met her burden of proof with respect to conversion of her left upper extremity impairment, thus Claimant is not entitled to a whole person rating of her left upper extremity.

2. Respondent has overcome Dr. Regan's opinion on causation and impairment by a preponderance of the evidence. Claimant's true impairment, as found by the authorized treating physician Dr. Solot, is 6% scheduled impairment of the left upper extremity.

3. Issues not expressly decided herein are reserved for future determination.

DATED: October 16, 2019



MARGOT W. JONES
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Did Claimant prove he suffered a compensable injury on April 9, 2019?
- Is Claimant entitled to TTD benefits commencing April 10, 2019?
- Who is the authorized treating physician?
- The parties stipulated to an average weekly wage of $1,010.22.

FINDINGS OF FACT

1. Employer operates various mining and aggregate production facilities around Colorado. Claimant was hired in March 2017 as a laborer. He was assigned to operate a water truck at the Riverbend Sand and Gravel plant in Brighton. The water truck sprays water on dirt roads and other areas around the facility to control dust. Operating the water truck is a seasonal task, performed primarily in the warmer months.

2. Employer uses a large conveyor belt to transport raw materials from the mine to be processed. The conveyor passes through a "mud shack" where workers remove clumps of mud or clay that are too large to fit in the machinery. The workers push, shove or lift the clumps off the conveyor belt into an adjacent chute. The clods typically range from approximately the size of a softball to a soccer ball.

3. In February 2018, Claimant was taken off the water truck and assigned the mud shack. Claimant did not like working in the mud shack; he preferred driving the water truck. Claimant's supervisors noticed a change in his attitude and the quality of his performance after being moved to the mud shack. The plant manager, Russell B[Redacted], got the impression Claimant was "trying to get out of jobs he didn't like to do."

4. Claimant alleges he injured his left shoulder, low back, and neck removing a clod of frozen mud and rock from the conveyor belt on April 9, 2018. According to Claimant, the clod was approximately 2 feet wide and 5-6 inches thick. Claimant gave conflicting testimony regarding the alleged mechanism of injury. When first asked how he removed the clod, Claimant described and demonstrated sliding it off the conveyor toward the chute using only his right arm. On follow up questioning, he said he lifted the clod with both hands, turned to the left, and dropped it into the chute. Claimant testified he felt pain in his low back and a "snap" in his left shoulder.

5. On April 9, Claimant told Mr. B[Redacted] and another manager (Preston K[Redacted]) his left arm was bothering him while sorting mud clods. Claimant said his

"whole arm was sore." He mentioned no specific incident or injury and said it was from a pre-existing condition.[1] Claimant said nothing about his low back or neck.

6. Employer referred Claimant to Advanced Care in Fort Lupton to determine his fitness for work. Claimant saw PA-C Shasta Van Sickle at his initial visit on April 9, 2018. Claimant told Ms. Van Sickle he had been feeling pain in his low back and left shoulder since he had been lifting rocks/clay at work "5 weeks ago." He stated, "he does this repetitive activity 8-9 hours every day." He did not mention any specific incident that triggered his symptoms. Nor did he mention any neck pain. X-rays showed degenerative disc disease with foraminal narrowing at L4-5 and L5-S1, but nothing acute. His cervical range of motion was normal and "pain-free." Ms. Van Sickle opined, "Although these are chronic findings, he likely irritated an already underlying issue, which makes injury acute on chronic." She diagnosed lumbar DDD and left AC joint arthritis. Ms. Van Sickle imposed work restrictions of no lifting over 10 pounds and frequent postural changes. Ms. Van Sickle spoke with Claimant's supervisor and advised, "[Claimant] will need to return to his driving job and not this twisting and lifting job that he has been doing."

7. Claimant met with Mr. B[Redacted] and Mr. K[Redacted] on April 10, 2018 to discuss his work status. He could not return to the mud shack or operate the water truck because of the 10-pound restriction. He did not report any work-related injury during the meeting. Claimant was told he would need to pursue physical therapy under his health insurance because he had not claimed a work injury. Claimant was advised Employer does not provide modified duty for non-work-related medical conditions. Because he had not reported a work-related injury, Claimant would need a full duty release before Employer would bring him back to work.

8. Shortly after that, Claimant called Eddie O[Redacted], Employer's HR and safety manager, to ask about filing for short-term disability and FMLA. He said nothing about any work-related injury. Mr. O[Redacted] referred Claimant to Kerri Cook in HR to get the necessary paperwork.

9. Claimant had his first appointment with Back to Action Physical Therapy on April 16, 2018. He provided his Blue Cross Blue Shield health insurance information for billing.

10. Claimant followed up with Ms. Van Sickle on April 23, 2018. The therapy had helped his back but was bothering his shoulder. Examination of his low back and neck were normal, and the only significant findings related to the left shoulder. Ms. Van Sickle indicated, "[his] low back pain has resolved." His shoulder exam suggested possible impingement and Ms. Van Sickle gave Claimant a cortisone injection to "help define AC joint versus rotator cuff etiology." She thought he might need an MRI if his shoulder did not improve.

11. Claimant filled out his portion of the FMLA paperwork on April 28, 2018. He stated he had been doing laborious work for six weeks and "back pain and left shoulder

[1] Several years before, Claimant had surgery and received a permanent impairment rating for a prior work-related left rotator cuff injury.

pain arose from constant compensated form over the material band." There was no mention of any alleged incident on April 9, 2018 (or any other day).

12. On May 3, 2018, Claimant told the physical therapist his low back "feels good."

13. Claimant saw Dr. Kalina Ehrenreich-Piot at Salud Family Health Centers on May 8, 2018, to establish care and have the FMLA physician certification completed. He told Dr. Ehrenreich-Piot his physical problems were from, "4-6 weeks of repetitive lifting of 1-15lbs from side to side at work next to a conveyor belt. After the 2nd or 3rd week of this work, pain began in his left shoulder and right hip." He mentioned no specific injury or incident at work.

14. Claimant called Salud on May 14, 2018 to find out when his FMLA paperwork would be finished. He told the medical assistant, "He feels better and is ready to go back to work but would like to get paid for the time he was not able to work." Dr. Ehrenreich-Piot filled out the form and noted, "during the initial injury he was unable to perform repetitive movements. He is now able to resume these without restriction." She attributed the onset of Claimant's left shoulder and right hip pain to "repetitive use for several weeks at work." She stated his treatment was "now complete" but he may experience intermittent flares.

15. Claimant received five weeks of retroactive STD benefits on or about May 20, 2018.

16. On May 23, 2018, Dr. Ehrenreich-Piot faxed Employer a note that Claimant "may return to work without restrictions."

17. Claimant stayed in regular contact with Employer in April and early May 2018 regarding his status but stopped following up with Employer after Dr. Ehrenreich-Piot released him to full duty.

18. Claimant saw PA-C Deanna Romero at Salud on June 1, 2018. He reported "pain in L shoulder since 4/9/18, was moving a lot of things on conveyor belt, was heavy clay, 8-10 hrs a day x 6 days a wk. Since then has bothered his shoulder."

19. An MRI of the left shoulder on June 21, 2018 showed: (1) mild tendinopathy with low-grade interstitial tearing, but no high-grade or full-thickness tear or muscle atrophy, (2) AC joint capsular edema, consistent with osteoarthrosis or a possible mild AC joint injury, (3) anterior/inferior labral tearing's last maceration with a 1 cm paralabral cyst, and (4) mild glenohumeral joint osteoarthrosis.

20. Claimant received his last STD check on June 25, 2018.

21. The next day, June 26, 2018, Claimant completed a Workers' Claim for Compensation form. He described the injury as "I was picking up clay from a conveyor belt and felt pain in my low back and left shoulder."

22. On or about June 26, 2018, Claimant called Mr. O[Redacted] and asked about the procedure for pursuing a workers' compensation benefits. Claimant reported no specific incident or injury to Mr. O[Redacted] during the call.

23. Claimant's FMLA leave expired on July 2, 2018.

24. Claimant saw Dr. Nirav Shah, an orthopedic surgeon, on July 12, 2018 regarding his shoulder. Dr. Shah noted, "he reports pain that began on 4/__/2018 after moving clay from his truck." Dr. Shah diagnosed a partial rotator cuff tear, AC joint arthritis, and glenohumeral arthritis. He gave Claimant a cortisone injection and asked him to come back in three weeks to assess his response.

25. Claimant followed up with Dr. Shah on August 2, 2018. The injection had not helped, and he reported radiating pain into his neck. Dr. Shah took x-rays, which showed significant degenerative changes in the neck. He ordered a cervical MRI "to evaluate whether this may be cervical in etiology." This report is the first mention in the records of a potential cervical problem.

26. On August 9, 2018, Dr. Shah reviewed the MRI and noted it showed "significant arthritic change with compromise of the spinal canal volume." He recommended an evaluation with one of his partners for potential cervical radiculopathy and impending myelopathy. Dr. Shah opined the symptoms were probably cervicogenic given Claimant's poor response to therapy and injections.

27. Claimant saw Dr. Mathew Gerlach, a spine surgeon, on August 13, 2018. Claimant told Dr. Gerlach, "he has been experiencing neck pain for approximately 4 months with no mechanism of injury." Claimant said the onset of neck and left arm pain was "gradual" and progressively worsened over several months. Dr. Gerlach referred Claimant for a cervical ESI.

28. On September 17, 2018, Dr. Gerlach noted Claimant had received temporary relief from the ESI and recommended a C4-7 anterior cervical discectomy and fusion.

29. Claimant saw Dr. Shah on October 1, 2018 regarding the shoulder. Dr. Shah opined, "he continues to have neck pain and shoulder pain. Previous subacromial and glenohumeral cortisone injections failed to offer any improvement in pain. MRI showed interstitial tendonitis, but no frank tear. As such, I do not believe he would benefit from shoulder surgical intervention."

30. Two weeks later, Dr. Gerlach reiterated his recommendation for a C4-7 fusion. He described the rationale for surgery as,

> Patient's severe spinal stenosis C4-5, C5-6, C6-7 correlates with his radiculopathy. Bilateral hand numbness also likely consistent with early-stage myelopathy also correlating with his severe spinal stenosis.

31. On December 5, 2018, Claimant started seeing Dr. Rebecca Zak at Clinica Family Health. Despite Dr. Shah advising Claimant he was not a surgical candidate for his shoulder, he told Dr. Zak he was scheduled to have shoulder surgery after the neck surgery but lost his insurance and could not proceed. He now had Medicaid and wanted a referral back to orthopedics. Claimant reported "neck pain for several years," with no mention of any neck injury.

32. Claimant saw Dr. Linda Mitchell on December 6, 2018 for an IME at Respondents' request. He complained of neck pain radiating to the left shoulder, and numbness and tingling along the left arm extending to the radial aspect of the forearm. Claimant told Dr. Mitchell "on 04/09/18, he picked up a large chunk of mud and ice and felt a painful pop in his right low back. He states he also injured his left shoulder and his neck at the same time." Dr. Mitchell noted he complained of "a lot of popping in the RIGHT shoulder." Dr. Mitchell opined it was "implausible" Claimant injured his back, neck, and shoulder lifting a chunk of mud and ice at work on April 9, 2018. Based on Claimant's statement he felt a "pop" in his back she indicated he "could have sustained a lumbar strain," but it had resolved by June 1, 2018. She noted Claimant had symptoms consistent with osteoarthritis in both shoulders. She though Claimant "might" temporarily aggravated his pre-existing left shoulder condition, but the symptoms were probably related to cervical spondylosis. She noted spondylosis is common among people over 50 and was not caused or aggravated by Claimant's work.

33. Claimant has a lumbar MRI in February 2019. On March 1, 2019, Dr. Zak noted the MRI showed degenerative disc disease and facet arthropathy. There was "no evidence of nerve root impingement to account for the clinical history of ongoing pain . . . [or anything] that would be amenable to steroid injections or surgery."

34. The testimony offered by Mr. B[Redacted] and Mr. O[Redacted] testimony was credible and persuasive.

35. Claimant's testimony was not credible or persuasive.

36. Claimant failed to prove he suffered a compensable injury on April 9, 2018.

CONCLUSIONS OF LAW

To receive compensation or medical benefits, a claimant must prove he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which he seeks benefits. The Workers' Compensation Act recognizes two types of compensable injuries: accidental injuries and occupational diseases. An accidental injury is "traceable to a definite cause, time and place." *Martin Marietta v. Faulk*, 407 P.2d 348, 444 (Colo. 1965). An occupational disease is not caused by a discrete incident, but results from occupational exposure over time. Section 8-40-201(14). A pre-existing condition does not disqualify a claim for compensation if a workplace accident or exposure aggravates,

accelerates, or combines with a pre-existing condition to produce disability or a need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). The mere fact that an employee experiences symptoms at work does not compel a conclusion that the symptoms were caused by the employment. *Garamella v. Paul's Creekside Grill, Inc.*, W.C. No. 4-519-141 (March 6, 2002). Rather, the claimant must prove the symptoms were proximately caused by their work activity.

Claimant failed to prove he suffered a compensable injury on April 9, 2018. He has underlying pre-existing conditions affecting his left shoulder, low back, and neck, and the MRIs and x-rays show no persuasive evidence of any acute injury. The symptoms he described are probably related to his pre-existing conditions rather than his work activities. Claimant's testimony regarding an alleged accidental injury while moving material from a conveyor belt on April 9, 2018 is not credible or persuasive. Numerous inconsistencies lead the ALJ to this conclusion. Claimant initially told the Employer his left arm was "sore" but did not report low back or neck pain. He said the pain was from a pre-existing condition and did not mention any incident. At the first appointment with PA-C Van Sickle, he complained to left shoulder and low back pain, but there was no indication of any neck issue. Claimant attributed his symptoms to "repetitive activity" at work and said nothing about any specific incident. The next day, he told his supervisors he was not claiming a work-related injury. Shortly after that, he asked Eddie O[Redacted] how to request short-term disability and FMLA leave but reported no work-related injury. He stated on the FMLA paperwork his back and shoulder problems arose from "constant compensation" at work rather than a specific accident. On May 8, 2018, he told Dr. Ehrenreich-Piot his symptoms started after two or three weeks of "repetitive lifting of 1-15 lbs from side to side at work next to a conveyor belt." Again, no mention of a specific incident. Claimant ultimately requested and received STD benefits, and only filed a workers' compensation claim the day after he received the last STD check. The June 26, 2018 Worker's Claim for Compensation form contains the first indication of an alleged accidental injury. Claimant's inconsistent reports continued after he filed the claim. For instance, in August 2018, Claimant told Dr. Gerlach his neck pain started "gradually" approximately four months ago "with no mechanism of injury," and in March 2019, he told Dr. Zak he had neck pain "for several years." But he testified his neck pain started immediately after the alleged incident on April 9, 2018. Claimant told Dr. Mitchell he felt a "pop" in his back when he removed the clod from the conveyor belt, but testified at hearing he felt a "snap" in his left shoulder. These inconsistencies severely undermine the credibility of Claimant's testimony.

Nor did Claimant prove a compensable occupational disease, notwithstanding the opinions of Ms. Van Sickle and Dr. Ehrenreich-Piot that repetitive work activities caused or contributed to his symptoms. First, Claimant filed and litigated his claim as an accidental injury, which suggests not even he considers an occupational disease theory persuasive. More importantly, an occupational disease theory is inconsistent with Claimant's testimony attributing his injuries to a specific incident on April 9, 2018. Ms. Van Sickle and Dr. Ehrenreich-Piot have no knowledge of any potentially injurious cause beyond what Claimant told them. The ALJ does not find Claimant's allegations credible, and therefore does not give any weight to medical opinions based primarily on his statements.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 16, 2019

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Whether Claimant proved by a preponderance of the evidence he sustained a compensable industrial injury.

II. If Claimant proved he sustained a compensable injury, whether Claimant proved by a preponderance of the evidence his medical treatment is authorized and reasonably necessary and related to the industrial injury.

III. If Claimant proved he sustained a compensable injury, whether Claimant proved by a preponderance of the evidence he is entitled to temporary total disability (TTD) benefits from August 22, 2018 and ongoing.

FINDINGS OF FACT

1. Claimant is a 63-year-old male who worked for Employer as an inventory crew member. Claimant's job duties included moving and lifting parts, some of which Claimant estimates weigh over 50-75 pounds.

2. Claimant has a prior history of right shoulder symptoms dating back to at least 2011 when he was diagnosed with right shoulder impingement syndrome and right shoulder joint pain.

3. On May 19, 2016, Claimant presented to his primary care physician John Willard, D.O. for evaluation of his right shoulder and a possible sinus infection. He was diagnosed with, inter alia, shoulder pain and referred to an orthopedist.

4. On June 13, 2016, Claimant presented to David Oster, M.D. with a history of right shoulder pain for several months. Claimant reported the pain began insidiously and he did not recall any specific injury. A July 1, 2016 right shoulder MRI revealed a large rotator cuff tear with retraction. Dr. Oester referred Claimant to Mark Failinger, M.D., who evaluated Claimant on July 20, 2016. Dr. Failinger noted Claimant's "…symptoms developed suddenly while the patient was doing nothing in particular and the pain gradually increased." Claimant saw Cary Motz, M.D. on July 26, 2016, who noted the onset of Claimant's symptoms was not associated with any specific activity and developed gradually over a period of months. Claimant then sought treatment at UC Health where he was seen by Jonathan Bravman, M.D. and Chris Joyce, M.D.

5. On November 2, 2016, Claimant presented to Dr. Joyce with right shoulder symptoms that began approximately nine months prior. Dr. Joyce noted Claimant reported "the onset of symptoms was chronic and that he injured his shoulder during work most likely. He does not recall a specific injury, but several episodes of acute pain in the shoulder while lifting large loads at work." A MRI obtained the same day

demonstrated a large complete right rotator cuff tear, right biceps tear, right subacromial bursitis and right AC arthrosis.

6. On November 25, 2016, Claimant completed documents requesting short-term disability and a leave of absence under the Family and Medical Leave Act (FMLA) in connection with his right shoulder condition. Claimant checked "No" to the question "Was an accident involved?" Dr. Bravman also completed a section of the paperwork. In response to the question, "Did this sickness or injury arise out of patient's employment?" Dr. Bravman checked "No."

7. On December 12, 2016, Claimant underwent a right shoulder rotator cuff repair, biceps tenodesis and distal clavicle resection performed by Dr. Bravman. Claimant's medical treatment and surgery was paid for by Claimant's private health insurance. Claimant underwent post-operative physical therapy and ultimately returned back to work performing his regular job duties.

8. Claimant alleges he sustained an industrial injury to his right shoulder in January or February 2018. Claimant offers January 31, 2018 as the approximate date of injury. Claimant testified that, on or around January 31, 2018, he experienced pain in his right shoulder when lifting a brake pad from a top shelving unit. Claimant did not report the injury to Employer nor seek treatment for the alleged injury until several months later. Claimant continued performing his regular job duties.

9. On March 5, 2018, Claimant presented to his his primary care physician, Dr. Willard, for concerns of strep throat. The medical record for this evaluation contains no mention of right shoulder symptoms or an alleged work incident.

10. On March 14, 2018, Claimant presented to Dr. Bravman with right shoulder complaints. Dr. Bravman noted Claimant had returned to work after his 2016 right shoulder surgery and,

> [H]ad a fairly normal shoulder, though in January he was lifting four to five boxes of brakes overhead and had a tearing or ripping type sensation through the front and anterolateral aspect of the shoulder, from which he has had difficulty recovering and returning. He has had some pain and discomfort.

On physical exam, Dr. Bravman noted slight contour difference of the biceps with reported cramping but no bruising or weakness. X-rays were within normal limits. Dr. Bravman concluded Claimant likely disrupted his biceps tenodesis. He recommended Claimant undergo a repeat right shoulder MRI.

11. On April 4, 2018, Claimant returned to Dr. Bravman, who noted the recent MRI revealed a massive re-tear of the superior rotator cuff with retraction to the glenohumeral joint and biceps tenodesis failure. Surgical options were discussed. Dr. Bravman noted Claimant "states he cannot have surgery until the end of the year…"

12. Claimant testified he mentioned his alleged injury to Kelly Grooms and Martin Schninger in April 2018. He testified he reported the alleged injury to those individuals at that time because he had since seen his physicians and now knew his diagnosis.

13. Kelly Grooms was Claimant's supervisor in 2018. Mr. Grooms testified at hearing and explained Employer's procedure for reporting a work injury. Mr. Grooms testified that an employee is required to report a work injury to a manager within 24 hours of the injury. The manager subsequently completes an incident report and notifies Employer's human resources department. Mr. Grooms testified Claimant did not report any work incident to him in April 2018. He further testified Mr. Schninger did not work at the distribution center in April 2018. Mr. Grooms explained that if Claimant would have reported a work injury to himself or Mr. Schninger, a report would have been filed. Mr. Gross further testified that in July 2018 Claimant mentioned that he was experiencing right shoulder pain. Claimant did not mention the alleged January 2018 incident nor indicate he injured his shoulder at work, despite Mr. Grooms specifically asking him if he believed his condition was work-related. When Claimant asked to be placed on light duty, Mr. Grooms informed Claimant he would need to provide a doctor's note, which Claimant did not do.

14. Claimant testified he continued treating with Dr. Bravman because he did not get a "response" from Employer regarding his work injury. Claimant continued working his regular job duties until being placed on restrictions by Dr. Bravman on August 22, 2018. On August 22, 2018, Claimant returned to Dr. Bravman with complaints or worsening right shoulder pain, particularly over the past week. Dr. Bravman recommended surgical intervention and scheduled Claimant for a right reverse total shoulder arthroplasty on October 8, 2018. He released Claimant to return to work until surgery, with restrictions of no lifting, pushing, pulling, or carrying more than five pounds with the right upper extremity, and no climbing or lifting overhead with the right upper extremity.

15. On August 22, 2018, Claimant completed FMLA paperwork requesting a leave of absence beginning October 8, 2018 in connection with his right shoulder condition. Claim also completed paperwork for short-term disability. Claimant again responded "No" to the question on the form asking if an accident was involved. Dr. Bravman completed the physician's section on the short-term disability form, checking "No" to the question, "Did this sickness or injury arise out of patient's employment?"

16. Joanne Middleton works for Employer as a human resources administrator. Ms. Middleton testified at hearing that, on August 22, 2018, Claimant came in and completed short-term disability and FMLA paperwork and then, five days later, came back in and stated he wanted to file the alleged injury under workers' compensation. She testified August 27, 2018 was the first time Employer was notified of any alleged worker's compensation claim for Claimant's shoulder. Ms. Middleton further testified Employer records do not contain any indication Claimant reported a work injury in April 2018.

17. Ms. Middleton completed an Employers First Report of Injury noting an injury/illness date noted of August 1, 2018. She noted Employer was notified of the alleged injury on August 27, 2018. Regarding the mechanism of injury, Ms. Middleton noted Claimant was counting brake pads that were stacked on a top shelf when he felt pain in his right shoulder.

18. Upon notification of the alleged work injury on August 27, 2018, Employer provided Claimant a list of designated providers the same day, from which he chose Midtown Occupational Health Services.

19. Claimant presented to Lloyd Thurston, D.O. at Midtown on August 27, 2018. Dr. Thurston noted,

> [Claimant] relates the onset of right shoulder pain to moving between 60 and 100 S & S brake pads from the top shelf of a shelving unit. Apparently after this in January or February he felt a pulling sensation in his right shoulder. There was no specific incident where it suddenly heard (sic). The previous right shoulder surgery was not handled through Worker's Comp.
>
> ***
>
> It is not clear to me why he is claiming this work injury now. In early August the right shoulder because abruptly more painful and that's when the surgery was scheduled for 10/5/2018. The patient was unable to explain why he is only claiming the work injury now ~6 months after he states he was injured.

Claimant denied previous workers' compensation injury and was adamant his right shoulder rotator cuff tear is work-related. Dr. Thurston noted Claimant's physical examination was "surprisingly benign." He diagnosed Claimant with a recurrent right shoulder rotator cuff tear, per patient history, but noted he wanted to review Claimant's prior medical records, including the MRI. He continued Claimant on the work restrictions assigned by Dr. Bravman, although he noted he did not see the need for the restrictions at that time.

20. Claimant was scheduled to return to Dr. Thurston for a follow-up appointment on October 19, 2018. Claimant testified he but did not return to Dr. Thurston for evaluation and instead elected to continue treating with Dr. Bravman. Dr. Thurston did not refer Claimant to Dr. Bravman.

21. Claimant completed an Incident Investigation Form on September 10, 2018. For date of incident he wrote "January – Feb" and for date reported he wrote "August 2018." Claimant reported the injury occurred when he was moving brake pads and felt pain in his right shoulder.

22. Doug Jordan worked on the inventory crew with Claimant. Mr. Jordan did not supervise Claimant. In connection with Employer's investigation of the alleged injury, Mr. Jordan completed a witness statement on September 10, 2018. He wrote, "Sometime in Jan or Feb crew was working Rayloc all in different ilses (*sic*). I don't remember date or time and I did not see anything happen. I just remember [Claimant] saying he thinks he hurt himself again. I don't remember the day he told me." Mr. Jordan testified at hearing that in January 2018 he remembered Claimant standing on a ladder and saying "I think I hurt my arm." Mr. Jordan testified he did not see any injury occur.

23. Aaron Battaglia also worked on the inventory crew with Claimant. He did not work in supervisory role. Mr. Battaglia also completed a witness statement on September 10, 2018. He wrote,

> [Claimant] came up too (*sic*) me on a day in January or February said he might of hurt his shoulder. I ask if he need help he said no about 9 week later he said he had MRI & it was tore again then he told me he was gonna (*sic*) wait until October or November to get surgery done. As far as seeing [Claimant] hurting himself I didn't see anything.

Mr. Battaglia testified at hearing Claimant complained of right shoulder pain in January or February 2018. He testified he did not personally witness any injury occur.

24. Claimant worked modified duty until the date of his surgery. Claimant underwent a right total shoulder arthroplasty on October 8, 2018 performed by Dr. Bravman. Claimant testified he returned to work for Employer in April or May 2019.

25. On December 17, 2018, Claimant filed a worker's claim for compensation for his right shoulder listing the date of injury as June 1, 2016. Claimant wrote that the injury occurred lifting or moving something that was too heavy. Claimant testified he is not claiming a work injury with a date of injury of June 1, 2016 and it is not his position he injured himself at work in 2016. However, when asked at hearing why he listed June 1, 2016 as the date of injury on the workers' compensation form, he testified he put that date because he thought work may have contributed to his shoulder symptoms.

26. On December 28, 2018, Dr. Bravman released Claimant cleared to return to light duty on January 2, 2019 with restrictions of no lifting or carrying over 15 pounds to the waist, 5 pounds to shoulder height and no weight over shoulder height. Claimant was also restricted from performing any repetitive reaching activities.

27. At the request of Respondents, Mark Failinger, M.D. performed an independent medical examination (IME) on February 21, 2019, authored a report and then a second report on April 8, 2019 after reviewing additional medical records. Dr. Failinger was offered and accepted as a medical expert in orthopedic surgery with expertise in shoulder conditions as well as being level II accredited at hearing and testified as such.

Dr. Failinger testified and concluded Claimant's condition(s) in his right shoulder were a non-traumatic rotator cuff tear. Dr. Failinger concluded that Claimant had pre-existing right shoulder pathology and symptomatology.

28. Dr. Failinger found there was no specific event that started Claimant's discomfort in his right shoulder. Dr. Failinger concluded and testified Claimant's shoulder likely had difficulty healing or never fully healed after his 2016 surgery, as evidenced by the continuing onset of symptoms shortly after the 2016 surgery. He opined that, in the alternative, Claimant had a recurring degenerative tear that was as a natural progression from Dr. Bravman's 2016 surgery and not as a direct and proximate result of claimant's work activities for Employer. Dr. Failinger opined that, within reasonable medical probability, Claimant's symptoms as well as the tear are due to ongoing degeneration rather than to a specific work event. Dr. Failinger concluded Claimant had an "on-going degeneration of his rotator cuff with waxing and waning symptomatology for at least a 6-7 year period." Dr. Failinger opined that and Claimant's need for surgery in 2018 was due to ongoing degeneration of rotator cuff disease with end stage arthritic changes. Dr. Failinger testified that the 2018 MRI report did not specifically list biceps tenodesis as an impression; however, he did acknowledge that Dr. Bravman mentioned disrupted biceps tenodesis in his report.

29. The ALJ finds the testimony of Dr. Failinger, Mr. Grooms, Ms. Middleton, Mr. Jordan and Mr. Battaglia, as supported by the medical and employment records, credible and persuasive.

30. Claimant failed to prove it is more likely than not he sustained a compensable industrial injury or occupational disease. Accordingly, Claimant also failed to prove entitlement to medical benefits and TTD.

31. Evidence and inferences contrary to these findings were not found credible or persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v.* Americold D/B/A Atlas Logistics, W.C. No. 4-960-513-01, (ICAO, Oct. 2, 2015)

However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment

aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); ***Atsepoyi v. Kohl's Department Stores***, W.C. No. 5-020-962-01, (ICAO, Oct. 30, 2017). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). *Fuller v. Marilyn Hickey Ministries, Inc., W.C. No. 4-588-675, (*ICAO, Sept. 1, 2006*).*

The ALJ concludes the preponderant evidence does not establish Claimant sustained a compensable work injury on or around January 31, 2018. Claimant alleges he felt right shoulder pain while performing work duties sometime in January or February 2018. While the testimony and witness statements of Mr. Jordan and Mr. Battaglia indicate Claimant mentioned something to this effect to them in January or February 2018, no work injury was reported to Employer nor did Claimant seek any treatment. Claimant continued performing his regular job duties for several months. Claimant did not seek medical treatment for his right shoulder until approximately two months after the alleged work injury and did not report his condition to Employer as work-related until approximately eight months after the alleged work injury, on August 27, 2018. Claimant's testimony that he reported the work injury to Mr. Gross and Mr. Schninger is refuted by the credible testimony of Mr. Gross, Ms. Middleton, and the Incident Investigation Form completed by Claimant in which he stated he notified Employer in August 2018. Moreover, a mere five days before Claimant actually notified Employer of the alleged work injury, he and Dr. Bravman completed FMLA and short-term disability paperwork indicating Claimant's condition was not due to an accident or due to his employment. This sequence of events undermines Claimant's credibility.

Additionally, Dr. Failinger credibly and persuasively opined Claimant's condition and need for surgery isthe result of ongoing degeneration of his rotator cuff, unrelated to Claimant's work activities for Employer. The ALJ is persuaded that, to the extent Claimant experienced pain at work on or around January 31, 2018, such pain was the result of the natural progression of Claimant's pre-existing, significant degenerative condition. Based on the totality of the credible and persuasive evidence, Claimant failed to meet his burden to prove his employment proximately caused his symptoms, or otherwise aggravated or accelerated his pre-existing condition.

As Claimant failed to prove he sustained a compensable injury to his right shoulder, the remaining issues of medical benefits, authorized providers and TTD are moot.

ORDER

1. Claimant’s failed to prove by a preponderance of the evidence he sustained a compensable injury to his right shoulder. Claimant’s claim for benefits is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 17, 2019

Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that penalties should be assessed against the respondent pursuant to Sections 8-43-304 and 8-43-305, C.R.S. for the respondent's alleged failure to comply with the terms of the May 9, 2018 settlement agreement and ALJ Mottram's May 8, 2019 order.

FINDINGS OF FACT

1. On October 19, 2017, the claimant suffered an injury while working for the respondent. The claimant's injuries included a traumatic brain injury (TBI). The claimant testified that he has approximately $15,000.00 in unpaid medical bills related to his injury.

2. Following the claimant's injury, the parties entered into a settlement agreement in which the respondent agreed to pay the claimant $15,000.00. The respondent also agreed to make monthly payments of $417.00 for 36 months. On May 9, 2018, the Director of the Division of Workers' Compensation (DOWC) approved the settlement agreement.

3. The records entered into evidence at hearing demonstrate that following the approval of the settlement agreement the respondent paid a total of $1,260.00. The last payment the claimant received in 2018 was in August 2018.

4. On April 11, 2019, the parties attended a hearing held by ALJ Keith Mottram. The only issue at hearing related to the claimant's request for penalties for the respondent's failure to comply with the settlement agreement.

5. On May 8, 2019, ALJ Mottram issued Findings of Fact, Conclusions of Law, and Order in which the ALJ found that penalties were appropriate. ALJ Mottram ordered respondent to pay penalties totaling $1,500.69. In addition, the respondent was provided the option to pay that amount directly to the Division of Workers' Compensation, or to post a bond.

6. On June 17, 2019, the respondent issued two checks to the claimant; one in the amount of $200.00 and the other in the amount of $100.00. It is unclear if those payments were an effort to comply with the settlement or to comply with ALJ Mottram's order. The claimant testified that no other payments have been made by the respondent.

7. On June 20, 2019, the claimant filed an Application for Hearing (AFH) endorsing the issues of penalties for the respondent's alleged violation of the May 9, 2018 settlement agreement and ALJ Mottram's May 8, 2019 order.

8. On July 10, 2019, the Office of Administrative Courts (OAC) served a Notice of Hearing on the parties. The Notice of Hearing provided that the hearing would be held on October 10, 2019, at 8:30 a.m. in Glenwood Springs, Colorado.

9. The respondent did not participate in the October 10, 2019 hearing. Therefore, there is no persuasive evidence on the record to indicate any reasons for the respondent's failure to comply with both the settlement agreement and ALJ Mottram's May 8, 2019 order.

10. The ALJ credits the claimant's testimony and the documents entered into evidence and finds that the claimant has demonstrated that it is more likely than not that the respondent has failed comply with the terms of the May 9, 2018 settlement agreement and ALJ Mottram's May 8, 2019 order.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2017).

4. Section 8-43-304, C.R.S., governs when penalties may be imposed in a workers' compensation matter and provides, in relevant part, that any employer or insurer:

> "who violates any provision of [the Workers' Compensation Act], or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel…, or fails, neglects, or refuses to

obey any lawful order…, shall be subject to … a fine of not more than one thousand dollars per day for each such offense."

This provision has been construed as applying to violation of an order issued by an ALJ. *Giddings v. Industrial Claim Appeals Office,* 39 P.3d 1211 (Colo. App. 2001).

5. Before penalties may be assessed, the ALJ must first determine whether a party has violated any provision of the Workers' Compensation Act or an order. If the ALJ finds such a violation, penalties may be imposed if it is also found that the employer's actions were objectively unreasonable. Section 8-43-304, C.R.S. *City Market, Inc. v. Industrial Claim Appeals Office*, 68 P.3d 601 (Colo. App. 2003); *Pioneers Hospital of Rio Blanco County v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005); *Jimenez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo. App. 2003). The "objective standard" is measured by reasonableness of the insurer's action and does not require knowledge that the conduct was unreasonable." *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 907 P.2d 676 (Colo. App. 1995).

6. An order is defined as including "any decision, finding and award, direction, rule, regulation, or other determination arrived at by the director or an administrative law judge." *See* Section 8-40-201(15), C.R.S. The fine shall be apportioned in whole or part at the discretion of the director or administrative law judge between the aggrieved party and the workers' compensation cash fund created in Section 8-44-112, C.R.S. with the amount apportioned to the aggrieved party being a minimum of fifty percent of any penalty assessed. *See* Section 8-43-304, C.R.S. In addition, Section 8-43-305 C.R.S. provides that each day a party engages in the violation is construed as a separate offense.

7. In this case, the claimant seeks penalties for the respondent's failure to comply with the terms of the May 9, 2018 settlement agreement and ALJ Mottram's May 8, 2019 order.

8. The claimant requests that the ALJ assess penalties against the respondent beginning on the date of the Notice of Hearing (July 10, 2019) through the date of hearing (October 10, 2019). The ALJ calculates that this is a total of 93 days. In addition, the claimant has requested that the ALJ assess the maximum penalty allowed by statute, of $1,000.00 per day.

9. As found, the claimant has demonstrated by a preponderance of the evidence that the respondent has failed to comply with the terms of the May 9, 2018 settlement agreement and ALJ Mottram's May 8, 2019 order. The ALJ concludes that penalties are appropriate. As indicated above, the respondent could be subject to penalties of up to $1,000.00 per day.

10. The ALJ concludes that the respondent's ongoing failure to act in this matter is egregious. Therefore, the ALJ orders the respondent to pay the claimant penalties of $500.00 per day for the period of July 10, 2019 through and including October 10, 2019. The ALJ calculates that this is a total of $46,500.00 ($500.00 per day for 93 days).

ORDER

It is therefore ordered:

1. The respondent shall pay the claimant penalties totaling $46,500.00. No amount of this total shall be apportioned to the uninsured employer fund.

2. The amount of penalties ordered at this time is **in addition** to the amounts due and owing pursuant to the settlement agreement and ALJ Mottram's May 8, 2019 order.

3. The respondent shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. In lieu of payment of the above to the claimant, the respondent shall:

a. Within ten (10) days of the date of service of this order, deposit the sum of $46,500.00 with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to: Division of Workers' Compensation/Trustee. The check shall be mailed to the Division of Workers' Compensation, 633 17th Street, Suite 900, Denver, Colorado 80202, Attention: Gina Johannesman, Trustee; **OR**

b. Within ten (10) days of the date of service of this order, file a bond in the sum of $46,500.00 with the Division of Workers' Compensation within ten (10) days of the date of this order:

i. Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation; or

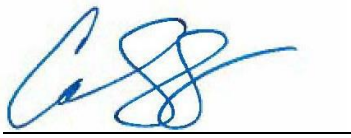
ii. Issued by a surety company authorized to do business in Colorado.

iii. The bond shall guarantee payment of the compensation and benefits awarded.

5. The respondent shall notify the Division of Workers' Compensation of payments made pursuant to this order.

6. The filing of any appeal, including a petition to review, shall not relieve the respondent of the obligation to pay the designated sum to the trustee or to file the bond. Section 8-43-408(2), C.R.S.

Dated this 21st day of October, 2019.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. **In addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

ISSUES

- Did Claimant prove by a preponderance of the evidence he suffered whole person impairment from his June 23, 2017 right shoulder injury?

FINDINGS OF FACT

1. Claimant works for Employer as a tractor-trailer driver and delivery person. He sustained an admitted injury to his right arm and shoulder on June 23, 2017, while pulling a fifth-wheel handle to disconnect a trailer.

2. Initial medical attention focused primarily on Claimant's right biceps, and he had emergency surgery on June 26, 2017 for compartment syndrome. He was off work for a few months while rehabbing the arm. PA-C Kenneth Ginsburg at Concentra put Claimant at MMI and released him to full duty on September 12, 2017.

3. Claimant went back to work but continued having problems with his arm and shoulder. His symptoms progressively worsened and he received authorization to return to Concentra in February 2018. He saw Dr. Daniel Peterson on February 21, 2018, and reported ongoing pain and weakness in the right shoulder. He had multiple positive rotator cuff signs and reduced range of motion in all directions. Dr. Peterson commented, "in truth he should in retrospect have had an MRI of the shoulder to R/O damage to the RTC as well as the biceps tendon rupture."

4. A right shoulder MRI on March 8, 2018 showed significant rotator cuff pathology, including retracted tearing of the supraspinatus and majority of the subscapularis tendon complex, with associated muscle atrophy and fat deposition. After reviewing the MRI, Dr. Daniel Peterson at Concentra referred Claimant to Dr. Simpson, an orthopedic surgeon.

5. Claimant saw Dr. Simpson on April 2, 2018, who opined,

> [Claimant] has a significant full-thickness, increasingly atrophic right rotator cuff tear. In this 52-year-old gentleman, this is quite a difficult issue. At his young age and activity level as far as loading and unloading trailers, I think if there is any way to get an anatomic or close to anatomic reconstruction of his rotator cuff that is the best option for him.
>
> I think the best option for him initially as an arthroscopic evaluation, probable arthroscopic rotator cuff tear and possible superior capsular reconstruction. He understands that this is a very significant blade recovery and can take an extended period of time even upwards of six months or longer before he would be able to go back to driving. He understands this. If there is any way he could transition to a job where he is not loading and

unloading that probably would be in his best interest in the long-term, but at this point we will see how he functions after his reconstruction.

6. On May 3, 2018, Dr. Simpson performed a "complicated" arthroscopic rotator cuff repair and subacromial decompression. He found a "massive" full-thickness tear of the supraspinatus with retraction to the glenoid, detachment and retraction of the infraspinatus, a subscapularis tear, and a complete rupture of the long head of the biceps tendon.

7. Claimant continued to experience severe shoulder pain for several months after surgery. On June 4 and July 18, 2018, Dr. Peterson documented pain all around the shoulder, including tenderness in the bicipital groove, the anterior glenohumeral joint, the supraspinatus muscle, the trapezius, and the greater tuberosity.

8. Claimant participated in extensive post-surgical physical therapy, including numerous documented treatments to his right shoulder blade, upper trapezius, neck, and suboccipital muscles.

9. On August 17, 2018, Dr. Peterson documented weakness of the supraspinatus and subscapularis muscles.

10. Dr. Peterson put Claimant at MMI on September 7, 2018. He was working without restrictions, but Employer had changed his job so he was no longer handling freight. On examination, Dr. Peterson noted tenderness in the bicipital groove, trapezius muscle, and anterior shoulder. Claimant still had biceps and supraspinatus muscle weakness and "generalized hypertonicity." Hawkins, Neer's, and painful arc tests were positive. Dr. Peterson assigned a 12% extremity/7% whole person shoulder rating for range of motion deficits and 6% whole person for skin impairment. The overall combined rating was 12% whole person.

11. Claimant saw Dr. John Raschbacher for an IME at Respondents' request on January 4, 2019. Claimant reported aching and burning pain in his shoulder, aggravated by reaching up. Right shoulder impingement sign was positive. Dr. Raschbacher appreciated weakness with internal and external rotation of the right shoulder. Regarding neck symptoms, Dr. Raschbacher noted, "he has some neck soreness which began 1 ½ to 2 weeks ago. Before that his neck was 'fine.' However, he goes on to state that he had some pain at the right neck from his arm, he thinks. Now the entire back of the neck hurts." Dr. Raschbacher calculated a 12% extremity rating based on range of motion deficits. He "normalized" the rating by measuring the contralateral shoulder. He opined Claimant did not warrant a cervical rating, and there was no for a whole person impairment.

12. Claimant attended a DIME with Dr. Brian Beatty on March 12, 2019. He reported ongoing shoulder pain and difficulty reaching overhead. He was tolerating full-time work with no formal restrictions because "he just drives and no longer has to load and unload the freight." Claimant described pain radiating from the shoulder into his upper arm into his neck. He indicated his symptoms had not changed. Physical examination

showed tenderness over the anterior and lateral aspects of the shoulder along the AC joint, and reduced range of motion. Dr. Beatty assigned a 16% extremity/10% whole person rating based on range of motion. He did not apply normalization.

13. Claimant saw Dr. Jack Rook for an IME at his counsel's request on July 29, 2019. Claimant reported pain throughout the shoulder area, including his right trapezius and neck. Claimant also described episodic right-sided occipital headaches he believed were related to his trapezius and neck pain. Dr. Rook noted the medical records support Claimant's reported symptoms, including reports from Concentra and physical therapy. On examination, Dr. Rook found tenderness to palpation of the anterior shoulder capsule and bicipital groove, the right pectoralis minor, the right side scalenes, right levator scapulae, and supraspinatus. He appreciated "palpable spasm" of the right upper trapezius and right-sided paracervical musculature extending to the suboccipital muscles. Impingement testing was positive and Claimant had weakness with abduction and external rotation. Dr. Rook agreed with Dr. Beatty's rating methodology, although he believed "an argument can be made" for an additional rating for residual crepitation. Dr. Rook conceded the crepitation rating reflected a mere "difference of opinion" and ultimately agreed with the 16% extremity/10% whole person rating assigned by the DIME. Dr. Rook opined Claimant has whole person impairment because he has functional impairment proximal to the right arm. Dr. Rook cited several factors that led to this conclusion, including: (1) pathology affecting the supraspinatus and subscapularis muscles, (2) scapular muscle weakness documented by multiple providers, (3) ongoing reactive spasm in the muscles around the shoulder joint, including the right-sided scapular muscles, levator scapulae, upper trapezius, and paracervical muscles; (4) PT records showing treatment to the right scapular, shoulder, and paracervical musculature, (5) several notations from Dr. Peterson regarding supraspinatus and trapezius tenderness, (6) Dr. Beatty's report documenting shoulder pain radiating into Claimant's neck, and (7) Claimant's description of his ongoing symptoms and areas of his body affected by the injury.

14. Dr. Raschbacher testified via deposition on August 2, 2019 to expand on the opinions expressed in his IME report. He also authored an addendum report on August 10, 2019 disagreeing with Dr. Rook's opinions regarding whole person impairment. Dr. Raschbacher emphasized the situs of Claimant's impairment is the shoulder, and the shoulder's function is movement of the arm.

15. At hearing, Claimant described ongoing shoulder symptoms and limitations consistent with those he described to Dr. Rook. He described pain around the shoulder into his neck. He has difficulty turning his head to look over his right shoulder when driving. He described problems performing overhead activities. Claimant has difficulty sleeping because of shoulder pain, which contributes to daytime fatigue and lethargy. He has modified or stopped performing many recreational activities and tasks around his home.

16. Claimant's hearing testimony describing pain and functional limitations in his neck, trapezius, scapular area was credible and persuasive.

17. Dr. Rook's analysis is persuasive because it is supported by the medical records, his physical examination of Claimant, and Claimant's credible testimony. Dr. Rook's opinions are more persuasive than the contrary opinions offered by Dr. Raschbacher.

18. Claimant proved by a preponderance of the evidence he suffered a 10% whole person impairment because of his June 23, 2017 work injury.

CONCLUSIONS OF LAW

Whether a claimant has sustained a scheduled or whole person impairment is a question of fact for determination by the ALJ. *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366, 368 (Colo. App. 1996). The term "injury" as used in the context of permanent partial disability "refers to the manifestation in part or parts of the body which have been impaired or disabled as a result of the industrial accident." *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366, 368 (Colo. App. 1996). In resolving this question, the ALJ must determine "the situs of the functional impairment," which refers to "the part of the body that sustained the ultimate loss, and not necessarily the situs of the injury itself." *Walker v. Jim Fuoco Motor Co*., 942 P.2d 1390, 1391 (Colo. App. 1997). The claimant must prove a non-scheduled impairment by a preponderance of the evidence. *Cassius v. Entegris*, W.C. No. 4-732-489 (March 26, 2010). The schedule of disabilities refers to the loss of "an arm at the shoulder." Section 8-42-107(2)(a). Thus, Claimant must show functional impairment to part(s) of his body other than his "arm" to obtain a PPD award based on a whole person rating.

Functional impairment need not take any particular form and "pain and discomfort that interferes with the claimant's ability to use a portion of the body may be considered 'impairment' for purposes of assigning a whole person impairment rating." *Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (June 30, 2008). Referred pain from the primary situs of the initial injury may show functional impairment to the whole person, and referred pain and limitation in the neck, trapezius, and scapular area can cause functional impairment beyond the arm. *E.g., Latshaw v. Baker Hughes, Inc*., W.C. No. 4-842-705 (December 17, 2013); *Mader v. Popejoy Construction Co., Inc*., W.C. No. 4-198-489 (August 9, 1996) (pain in shoulders, chest, back, and neck, which restricted claimant's ability to perform overhead activities justified whole person impairment); *Steinhauser v. Azco, Inc.*, W.C. No. 4-808-991 (January 11, 2012) (pain and muscle spasm in scapular and trapezial musculature); *Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (June 30, 2008) (pain affecting the trapezius and difficulty sleeping on injured side). Similarly, pain in the low back can represent a functional impairment beyond the leg. Although medical opinions may be relevant to this determination, the ALJ can also consider lay evidence such as the claimant's testimony regarding pain and reduced function. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *City Market, Inc. v. Industrial Claim Appeals Office*, 68 P.3d 601 (Colo. App. 2003); *Olson v. Foley's*, W.C. No. 4-326-898 (September 12, 2000).

As found, Claimant proved by a preponderance of the evidence he suffered impairment not listed on the schedule. Several factors lead the ALJ to this conclusion.

First, the injury and resulting surgery objectively and permanently altered anatomical structures that extend beyond Claimant's arm. He suffered supraspinatus, infraspinatus and subscapularis tears, which are primarily part of the torso. *E.g., Franks v. Gordon Sign Co.*, W.C. No. 4-180-076 (March 27, 1986) (supraspinatus attaches to the scapula, and is therefore properly considered part of the "torso," rather than the "arm"). Additionally, Claimant had a subacromial decompression, which is performed above the glenohumeral joint, and therefore, above the "arm." *Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (June 30, 2008) ("The [claimant's] subacromial decompression was done at the acromion and the coracoacromial ligament in order to relieve the impingement, which is all related to the scapular structures above the level of the glenohumeral joint"). Although the anatomical site of the injury is not dispositive, it is a valid factor to consider when determining whether a claimant has a scheduled or whole person impairment. *Id*.

Second, the medical records corroborate Claimant's testimony and reflect referred pain from the shoulder into areas such as the trapezius, paracervical muscles, and neck. For example, Dr. Peterson documented pain in the trapezius and supraspinatus muscles on multiple occasions after surgery. Claimant received therapy directed to the right scapula, upper trapezius, neck, and suboccipital muscles. Dr. Beatty noted pain radiating from Claimant's shoulder into his neck. Dr. Rook documented palpable spasm and multiple muscles around the shoulder girdle and neck. The suggestion in Dr. Raschbacher's report that Claimant's neck pain is unrelated and started approximately two weeks before the IME probably reflects a misstatement or misunderstanding because Claimant's proximal symptoms were documented shortly after surgery and continued through Dr. Rook's IME. Claimant's testimony his

Third, the symptomatology associated with Claimant's shoulder injury interferes with his ability to perform various activities, including work, household chores, and sleeping. His ability to reach overhead is compromised, and he still has rotator cuff weakness. Although he is working without formal restrictions, he can only tolerate the work because he no longer has to load and unload freight.

The totality of evidence persuades the ALJ that Claimant's shoulder injury causes functional limitations beyond his arm. Claimant proved he sustained a whole person impairment. Neither party has challenged the DIME's 10% whole person rating, which is binding under § 8-42-107(8)(c).

ORDER

It is therefore ordered that:

1. Insurer shall pay Claimant PPD benefits based on a 10% whole person rating.

2. Insurer shall pay Claimant statutory interest of 8% per annum on all benefits not paid when due.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver,

CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 22 2019

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence he is entitled to reimbursement of the costs of a bed, spa, stove, stove conversion, warranties, concrete work, and electrical work.

II. Whether Claimant proved by a preponderance of the evidence he is entitled to reimbursement of 4,775.2 miles of medical mileage for travel to and from medical appointments from January 14, 2016 through August 27, 2018.

FINDINGS OF FACT

1. Claimant has worked as a firefighter for Employer for over 25 years.

2. On January 12, 2016, Claimant sustained an admitted industrial injury when he fell partway through the second floor of a home while responding to a structural fire.

3. Claimant underwent treatment with authorized treating physician (ATP) Stephen Danahey, M.D. at Concentra. At the initial evaluation on January 14, 2016, Dr. Danahey diagnosed Claimant with a puncture wound of the left knee and a groin strain, referred Claimant for physical therapy and released him to light duty. Claimant continued to treat with Dr. Danahey who subsequently updated his assessment to a strain of right piriformis muscle and sacroiliac joint dysfunction of the right side and referred Claimant for chiropractic treatment. On March 4, 2016, Dr. Danahey ordered an MRI of Claimant's right hip and lumbar spine. Upon review of the MRIs on March 16, 2016, Dr. Danahey referred Claimant to Dr. Aschberger for evaluation of his right hip and low back. Dr. Danahey later referred Claimant to Dr. Schwappach for an orthopedic evaluation and possible hip injection.

4. Claimant first presented to Dr. Schwappach on May 6, 2016. Dr. Schwappach noted Claimant's MRIs revealed L5-S1 central disc protrusion and moderate right hip osteoarthritis. He wrote, "Various treatment options were discussed including but not limited to doing nothing, physical therapy, injections, NSAIDS and surgery. He should have a right hip steroid injection and the same ordered. Depending on the results he may need a right hip arthroscopy."

5. Dr. Danahey reevaluated Claimant on May 9, 2016, noting Claimant saw Dr. Schwappach, who recommended a hip injection. He also noted there was some consideration for right hip arthroscopy. Claimant attended follow-up appointments with Dr. Danahey on May 12, May 27, June 15, June 22, July 20, and August 24, 2016.

6. Claimant also saw Dr. Schwappach on June 22, 2016. Dr. Schwappach noted Claimant underwent a right hip cortisone injection on or about June 13, 2016, which

caused Claimant discomfort. Dr. Schwappach's impression was right hip osteoarthritis and right hip synovitis. He again noted various treatment options were discussed with Claimant, "…including but not limited to the idea of physical therapy and nonsteroidal treatment…compared to right hip arthroscopy with debridement of the hip joint and possible removal of the loose bodies." The final option of total hip arthroplasty was also discussed but was not yet indicated.

7. On August 15, 2016, Dr. Schwappach noted that when he last saw Claimant on August 1, 2016, he requested authorization of a right total hip arthroplasty and had not heard back. The August 1, 2016 medical record referred to by Dr. Schwappach was not offered as evidence at hearing. Dr. Schwappach noted Claimant failed nonoperative management and again recommended a total hip arthroplasty.

8. Claimant returned to Dr. Danahey on August 24, 2016, who noted Claimant was seeking a second opinion from his primary care physician at Kaiser regarding the recommended hip surgery.

9. On August 30, 2016, Jorge O. Klajnbart, D.O. performed an Independent Medical Examination (IME) at the request of Respondent. Dr. Klajnbart diagnosed Claimant with moderate right hip osteoarthrosis with a cam defect with femoroacetabular impingement, documented synovitis with debris. He opined there was no indication for a right total hip arthroplasty.

10. Claimant attended follow-up appointments with Dr. Danahey on September 15, October 13, and November 3, 2016. On October 13, 2016, Dr. Danahey noted the surgery had been denied by Respondent. On November 3, 2016, Dr. Danahey noted Claimant had obtained a second opinion from his primary care physician at Kaiser, who also recommended surgery.

11. Dr. Schwappach reexamined Claimant on November 7, 2016. He continued his recommendation for a right hip arthroplasty. Dr. Schwappach specifically noted he discussed the importance of regular exercise with Claimant and recommended starting or continuing a regular exercise program for good health.

12. On November 19, 2016, Dr. Klajnbart issued an IME addendum after reviewing additional records. Dr. Klajnbart now opined Claimant had severe end-state osteoarthritis and was a candidate for total hip arthroplasty. Respondent subsequently authorized a right total hip replacement with Dr. Schwappach.

13. Claimant saw Dr. Danahey on January 4, 2017 and Dr. Schwappach on January 5, 2017 in anticipation of surgery.

14. Claimant underwent a right total hip arthroplasty on January 9, 2017. Post-operative care included pain management, physical therapy and modified duty. Dr. Danahey kept Claimant off of work through February 7, 2017.

15. Dr. Schwappach performed a post-surgical evaluation of Claimant on January 23, 2017. He noted Claimant was taking tramadol and dilaudid sparingly for pain and continued to take xarleto. Claimant was walking with a cane. Dr. Schwappach further noted he discussed proper wound care with Claimant and instructed Claimant to not use a pool, hot tub or bath for six weeks.

16. Dr. Danahey reevaluated Claimant on February 8, 2017. He noted Claimant continued to see Dr. Schwappach and was undergoing physical therapy. Dr. Danahey also authored a prescription pad note dated February 8, 2017 stating, "A medical bed or spa would be of benefit to his current medical condition." The medical record from the February 8, 2017 evaluation contains no mention of a medical bed or spa.

17. Dr. Schwappach reexamined Claimant on February 23, 2017. He noted Claimant was back to modified duty, walking without assistance and taking Aleve occasionally. He further noted Claimant was completing physical therapy twice per week with significant improvements in range of motion, and swimming several times per week for cardio. Claimant was reaching near resolution of his preoperative symptoms.

18. Claimant continued to see Dr. Danahey on March 8, April 7, May 10, June 7, and July 12, 2017.

19. On April 13, 2017, Dr. Schwappach noted Claimant was doing physical therapy twice a week, dry needling and massages. Dr. Schwappach recommended Claimant continue with physical therapy for six more weeks.

20. Claimant again saw Dr. Schwappach on June 15 and August 17, 2017. On August 17, 2017, Dr. Schwappach noted, "He is exercising 3x a week and completing PT 2x a week with improvement after receiving dry needling treatments. He also uses his tens unit. However, he would like to discuss other options to improve the weakness and pain he is experiencing." He noted Claimant reached maximum medical improvement (MMI) with respect to his right total hip replacement.

21. Claimant attended follow-up evaluations with Dr. Danahey on August 23, November 8, December 1, and December 18, 2017. Dr. Danahey noted Claimant continued physical therapy, was taking Aleve occasionally, getting some dry needling, and using the H-wave. He released Claimant to full duty work on December 18, 2017.

22. On December 27, 2017, Dr. Danahey placed Claimant at MMI with a 34% scheduled impairment rating for his right lower extremity. Dr. Danahey opined no maintenance care was indicated.

23. Respondent filed a Final Admission of Liability on January 8, 2018 admitting for 34% scheduled impairment of the right lower extremity and reasonable, necessary and related medical maintenance benefits.

24. On September 25, 2018, a hearing was held before ALJ Michelle Jones on the issues of conversion, maintenance medical care and disfigurement. ALJ Jones found Claimant was entitled to maintenance medical care and disfigurement for his surgical scar. ALJ Jones further found claimant failed to carry his burden of proof with respect to conversion. She reasoned that Claimant completed and passed a rigorous Fit for Duty Evaluation, demonstrating the ability to complete the essentials functions of a firefighter and exhibiting a lack of overall functional impairment.

25. On February 19, 2019 Claimant, through his attorney, sent a request to respondent for reimbursement for bills from: R&T Concrete, Mile High Spas, Home Depot, Gaston Renovation, and American Furniture Warehouse. In the request for reimbursement, Claimant indicated he purchased the spa and bed at the direction of Dr. Danahey and referenced Dr. Danahey's February 8, 2017 prescription pad note. Respondent challenged Claimant's request for reimbursement via an Application for Hearing.

26. Between August 10, 2016 and December 31, 2016, Claimant made multiple purchases he alleges are related to his recovery from hip surgery and for which he seeks reimbursement. On August 10, 2016 Claimant contracted to have sections of concrete poured at his residence. The concrete work totaled $3,770.00, of which $1,520.00 was for a 10 x 16 section of concrete and materials laid for installation of a hot tub. On August 29, 2016 Claimant purchased an H-wave multifunctional stimulator for $169.84. On September 22, 2016 Claimant purchased a pre-owned 4-person red acrylic cal spa and extended warranty for $4,500.00. On November 2, 2016 Claimant purchased a professional gas range stove and three-year protection plan, totaling $3,255.73. On November 20, 2016 Claimant contracted for services for conversion of his electric stove to a gas stove to accommodate the hot tub. The total cost for service and parts was $2,150.00. On December 31, 2016 Claimant purchased a king-size Gelcare Discovery adjustable mattress with frame and 7-piece sectional leather sofa from American Furniture Warehouse, totaling $3,973.00. Claimant did not seek prior authorization from Respondent for any of the aforementioned purchases.

27. Claimant testified at length at hearing regarding his injuries, course of recovery and interactions with treating physicians. Claimant testified that after Dr. Schwappach recommended surgery, Claimant was in communication with the adjuster on his claim and he was under the impression the surgery would likely be denied. Claimant testified that, due to this belief, he began to make financial arrangements to proceed with the surgery on his own and to purchase items that would aid in his recovery.

28. Claimant testified that, leading up to the surgery, both Dr. Danahey and Dr. Schwappach were aware that he was using a spa at a health club to alleviate his right hip pain. Claimant testified that he first discussed recovery from a total hip replacement with Dr. Schwappach at the June 22, 2016 evaluation. Claimant testified that during his August 15, 2016 evaluation with Dr. Schwappach, "I also talked to him about, you know, the spa is doing great for me. He was like, if it works, just keep doing it." Hrg. Tr. p. 37:15.

29. Claimant testified neither Dr. Danahey nor Dr. Schwappach specifically instructed him to purchase a medical spa or bed. Claimant did not offer testimony of any referral outside the medical records for either a medical spa or bed. When specifically asked if there was a recommendation, Claimant stated, "I was told by two hip specialists, slash, surgeons that these are the recommendations and these are the things that you need to get done," listing only dry needling, TENS unit and H wave. Hrg. Tr. p. 44:14. Instead, Claimant repeatedly testified that the authorized providers, Drs. Danahey and Schwappach, were aware of his treatment regimen and encouraged Claimant to continue doing whatever was working for him. Claimant testified he believed Dr. Danahey supported the use of a medical bed and medical spa in his recovery.

30. Claimant further testified that, based on his conversations with Drs. Danahey and Schwappach, it was his understanding he would not want to be in a flat position during his recovery from surgery. Claimant testified he purchased the bed (with an adjustable base) and the 7-piece leather sectional, which included recliner chairs, so he would not be in a flat position. Claimant further testified that his recovery was only made possible because of his commitment to his recovery as well as his access to the medical bed and spa. Claimant testified that after surgery he spent two weeks on the sofa sectional in the recliners. Following the weeks of rest, Claimant began a rigorous exercise program and included a combination of home exercise and therapeutic medical appointments. Regarding Dr. Danahey's February 8, 2017 prescription pad note, Claimant testified he requested that Dr. Danahey provide a prescription for the bed so he would have documentation to show it was needed to help with his recovery.

31. At hearing, Claimant reviewed several bills submitted into evidence for which he is requesting reimbursement. When asked about the R&T Concrete bill, Claimant initially testified that the bill was entirely related to a concrete pad required prior to installing the spa. He later clarified that only $1,520.00 of the $3,770.00 bill was related to concrete work for the hot tub, while other items listed were for other home improvements.

32. The ALJ specifically finds that the pre-surgery medical records of Dr. Danahey and Dr. Schwappach contain no documentation of Claimant reporting his use of a spa, nor any mention of potential surgical recovery modalities or any reference to a medical spa, medical bed or recliner. With the exception of Dr. Danahey's February 8, 2017 prescription pad note, the post-surgery medical records also contain no mention of a medical bed, spa or recliner.

33. Dr. Klajnbart performed a medical record review and issued a report dated On June 2, 2019. He noted that, based on his review of the medical records, a medical spa and medical bed were not referenced as potential treatment modalities. He opined that a medical spa and a medical bed are not medically reasonable, necessary or related to Claimant's condition. He explained that the Medical Treatment Guidelines include no recommendation for a medical spa or medical bed to aid in recovery from a hip injury or hip surgery. Dr. Klajnbart further noted that there is a difference between a medical spa

and a Hubbard tank, the latter of which is a form of treatment that is only used on a temporary basis for approximately two months by Rule 17, Exhibit 6 of the Medical Treatment Guidelines.

34. Dr. Danahey testified on behalf of Respondent at a prehearing deposition on July 3, 2019. With respect to the February 8, 2017 prescription pad note, Dr. Danahey testified:

> I am remiss in not including that discussion in the note. My memory of how this came about is that he asked me this at the end of the visit and indicated to me that he had some money in which he wanted to purchase either a bed or a spa and that if wrote this note for him, that would assist him in using the money for that particular purpose. I inferred but didn't clarify that this sounded as if it was flexible spending money or something similar.

Hrg. Tr. p.15: 8-18.

35. Dr. Danahey clarified the note was not intended as a prescription, but rather a "note on letterhead," which was not medically necessary, and was not intended "at all" to be covered by the workers' compensation carrier. Dr. Danahey testified he did not recommend Claimant obtain a medical spa or bed as part of his recovery, and did not recall Claimant previously informing him of his use of a hot tub and bed in his recovery.

36. Dr. Danahey further testified he continues to see Claimant for maintenance care. He testified that a medical bed and medical spa are not medically necessary in Claimant's case, explaining that the use of a medical bed or a spa is not accepted as recommended treatment with any demonstrated efficacy regarding hip replacements. He went on to address some of the other specific purchases made by Claimant, including the stove and sectional sofa, stating these were also not medically necessary or reasonable.

37. Dr. Klajnbart testified on behalf of Respondent at a post-hearing deposition on August 20, 2019. Dr. Klajnbart testified consistent with his June 2, 2019 report. He explained that a medical spa is a single-person-use device with jet streams and propulsion devices "keenly intact" with the affected area. He described a medical bed as a twin size bed with handrails and attachments for medical devices. Dr. Klajnbart testified that the hot tub and bed purchased by Claimant were not reasonably necessary to recover from his total hip replacement. Dr. Klajnbart further testified that the 7-piece leather sectional purchased by Claimant was not medical equipment, and was therefore not reasonable and necessary for recovery from his total hip replacement.

38. Claimant is requesting reimbursement for 4,775.2 miles he alleges he incurred driving to and from doctor and physical therapy appointments from January 14, 2016 to August 27, 2018. Claimant testified Exhibit 18 is an accurate summary of the mileage

he incurred. Respondent contests 2,133 of the 4,775.2 requested miles on multiple bases, as detailed in Exhibit I and further discussed below.

39. Respondent contends that, for the following dates, the actual mileage incurred each day is 44.8 miles instead of 60.8 miles, as the appointment times included in the medical records indicate Claimant did not have time to go home and back between his Concentra appointment and his appointment at Denver Fire PT: March 4, 2017, May 27, 2017, April 7, 2017, August 14, 2017, September 22, 2017, December 1, 2017 and December 18, 2017. The ALJ specifically finds March 4, 2017 and May 27, 2017 were not dates included in Claimant's reimbursement request. With respect to December 1, 2017, Claimant requested 20.2 miles for travel from home to Concentra, not the 60.8 miles alleged by Respondent. There is no appointment time to cross-reference for April 7, 2017. On December 18, 2017, the record indicates Claimant's Concentra appointment ended at 8:53 a.m. and his physical therapy appointment began at 10:45 a.m., allowing Claimant enough time to return home in between appointments. Accordingly, Claimant is entitled to the requested mileage for the aforementioned contested dates. With respect to August 14, 2017 and September 22, 2017, Claimant is entitled to 44.8 miles instead of the requested 60.8 miles as the record reflects the only a seven-minute and 30-minute period of time between Claimant's Concentra appointment and physical therapy appointment, which would not allow time to return home and back.

40. The ALJ specifically finds Claimant requested reimbursement for travel to and from physical therapy on dates where the appointments were cancelled or Claimant was a no-show, per the Denver Fire PT appointment list on which Claimant relies. Accordingly, Claimant is not entitled to reimbursement of mileage requested for the following dates: June 1, 2017, June 16, 2017, August 24, 2017, October 2, 2017 and October 16, 2017 (46.6 miles each day, totaling of 233 miles).

41. The ALJ specifically finds Claimant requested reimbursement for travel to and from physical therapy on certain dates that do not correlate with the Denver Fire PT appointment sheet. Accordingly, Claimant is not entitled to reimbursement of the 46.6 miles requested for each of June 22, 2017, July 7, 2017, July 10, 2017 and July 18, 2017 (a total of 233 miles).

42. Respondent contends there are there are no matching Concentra records for the following requested dates: February 2, 2016, May 12, 2016, August 1, 2016, August 18, 2016, October 17, 2017, December 1, 2016, August 14, 2017, September 22, 2017, December 18, 2017. The ALJ specifically finds that, with the exception of February 2, 2016 (20.2 miles), Claimant is entitled to the mileage requested for these dates. Dr. Danahey's May 27, 2016 medical record includes a recheck note for a follow-up that occurred on May 12, 2016. Dr. Schwappach specifically refers to Claimant's August 1, 2016 visit in his August 15, 2016 medical note. The medical records t reference appointments scheduled to take place on August 1, 2016, December 1, 2016, August 14, 2017, September 22, 2017 and December 18, 2017. The medical record from the December 18, 2017 is included in the record.

43. Respondent contends there are 10 dates for which Claimant requests reimbursement for travel to and from physical therapy appointments that do not have corresponding physical therapy records: May 19, 2017, June 9, 2017, June 22, 2017, July 7, 2017, July 10, 2017, July 17, 2017, July 28, 2017, August 14, 2017, August 18, 2017, and September 14, 2017. Five of these dates (June 1, 2017, June 16, 2017, August 24, 2017, October 2, 2017 and October 16, 2017) are listed on the Denver Fire PT appointment sheet as cancellations or no-shows. The other dates are reflected on the Denver Fire PT sheet as appointments with no indication Claimant did not attend as scheduled. Neither party offered physical therapy records into evidence. Accordingly, the ALJ specifically finds Claimant is entitled to the requested mileage for May 19, 2017, June 9, 2017, August 14, 2017, August 18, 2017, and September 14, 2017. As found in Finding of Fact 40, Claimant is not entitled to the requested mileage for June 1, 2017, June 16, 2017, August 24, 2017, October 2, 2017 and October 16, 2017 as the record indicates Claimant did not attend those appointments.

44. Respondent further contends there are 29 dates for which Claimant requests reimbursement where Respondent's pay records indicate Claimant was paid for work that same day. Per a partial transcript from a separate previous hearing, Claimant testified he did not attend appointments during his shifts. Respondents argue Claimant did not attend appointments on these dates, or alternatively, the travel distances would be substantially decreased as Claimant would travel from work locations in Denver to the appointments and back. The specific dates contested by Respondent are: January 27, 2016, February 5, 2016, April 8, 2016, April 29, 2016, May 20, 2016, June 10, 2016, June 22, 2016, July 15, 2016, July 22, 2016, August 1, 2016, August 12, 2016, August 15, 2016, August 24, 2016, September 2, 2016, September 23, 2016, October 14, 2016, November 4, 2016, November 22, 2016, December 1, 2016, December 19, 2016, March 10, 2017, March 17, 2017, April 21, 2017, April 27, 2017, August 10, 2017, October 9, 2017, November 8, 2017, November 17, 2017, November 29, 2017 (total of 1140.2 miles). The ALJ specifically finds Claimant is entitled to the requested mileage for these dates. No evidence was offered as to Claimant's actual work schedule or work locations.

45. The ALJ finds that, of the 4,775.2 miles requested to be reimbursed Claimant has proven by a preponderance of the evidence he is entitled to 4,257 miles.

46. The ALJ finds the testimony and opinions of Drs. Danahey and Klajnbart, as supported by the medical records, more credible and persuasive than Claimant's testimony.

47. Claimant failed to prove by a preponderance of the evidence the items for which he seeks reimbursement were for authorized, reasonable and necessary treatment or incidental to such treatment.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). Our courts have held that in order for a service to be considered a "medical benefit" it must be provided as medical or nursing treatment, or incidental to obtaining such treatment. *Country Squires Kennels v. Tarshis,* 899 P.2d 362 (Colo. App. 1995). A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs.

Bellone v. Industrial Claim Appeals Office, 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO, May 31, 2006). A service is incidental to the provision of treatment if it enables the claimant to obtain treatment, or if it is a minor concomitant of necessary medical treatment. *Country Squires Kennels v. Tarshis,* 899 P.2d 362 (Colo. App. 1995)*; Karim al Subhi v. King Soopers, Inc.,* W.C. No. 4-597-590, (ICAO. July 11, 2012). The determination of whether services are medically necessary, or incidental to obtaining such service, is a question of fact for the ALJ. *Bellone v. Industrial Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO, May 31, 2006).

Section 8-43-404(7)(a), C.R.S. provides that "an employer or insurer shall not be liable for treatment provided pursuant to article 41 of Title 12, C.R.S. unless such treatment has been prescribed by an authorized treating physician." If the claimant obtains unauthorized medical treatment, the respondents are not required to pay for it. *In Re Patton*, W.C. Nos. 4-793-307 and 4-794-075 (ICAO, June 18, 2010); see *Yeck v. Industrial Claim Appeals Office,* 996 P.2d 228 (Colo. App. 1999).

As found, Claimant failed to prove by a preponderance of the evidence he is entitled to reimbursement of costs of the hot tub, concrete work, gas stove, electrical work, bed, sofa and associated costs for labor and warranties and utilities. The preponderant evidence does not establish such costs were for authorized, medically reasonable and necessary treatment related to Claimant's industrial injury. Claimant acknowledges his providers did not instruct him to purchase the items for which he seeks reimbursement. Claimant instead purports that Drs. Danahey and Schwappach were aware of his use of a spa and his intention to purchase a bed and encouraged him to simply continue doing what he was doing. Claimant's testimony does not comport with the medical records or with Dr. Danahey's testimony. Claimant saw Drs. Danahey and Schwappach on several occasions. The sole medical record referencing the use of a bed or spa is Dr. Danahey's February 8, 2017 prescription pad note, which was specifically requested by Claimant only a few weeks before submitting his reimbursement request. The ALJ is not persuaded Drs. Danahey and Schwappach simply omitted references to a spa and bed over the course of multiple evaluations when their records include references to various other treatment and recovery modalities. Dr. Danahey credibly and persuasively testified the prescription pad note did not constitute a referral for medical benefits. Dr. Danahey credibly and persuasively testified he did not recommend that Claimant obtain a spa or bed and did not recall Claimant informing him of the use of a hot tub and bed in his recovery.

Furthermore, Drs. Danahey and Klajnbart credibly and persuasively testified that the items for which Claimant seeks reimbursement are not medically reasonable or necessary. Dr. Klajnbart credibly and persuasively explained that the spa and bed purchased by Claimant do not qualify as a medical spa and a medical bed. Moreover, Dr. Klajnbart testified a medical spa and medical bed are not indicated to aid in the recovery of a hip injury or hip surgery. As the spa is not medically necessary, it follows that the associated costs of a gas stove, stove conversion, utilities, and concrete work are not medically necessary or reasonable. With respect to the sofa, even assuming, *arguendo*, a recliner or sofa was medically necessary in Claimant's case, the argument

that a seven-piece leather sectional is reasonable and necessary is tenuous and unpersuasive to the ALJ. Based on the totality of the credible and persuasive evidence, Claimant failed to meet his burden to prove he is entitled to reimbursement for the requested items.

Mileage

Mileage expenses for travel to attend medical appointments are recoverable as incidental to medical treatment under the Workers' Compensation Act. *Sigman Meat Co. v. Indus. Claim Appeals Office*, 761 P.2d 265 (Colo. App. 1988). "Incidental mileage expenses are those that "would not have been incurred but for the industrial injury." *Daughty v. King Soopers, Inc.,* W.C. No. 3-837-001 (ICAP, Jan. 17, 1996); *see Anderson v. United Airlines,* W.C. No. 4-445-052 (ICAP, Jan. 9, 2004). However, whether particular mileage expenses are reasonable, necessary and incidental to medical treatment is a question of fact for determination by the ALJ. *Krupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002); *Anderson v. United Airlines,* W.C. No. 4-445-052 (ICAP, Jan. 9, 2004).

WCRP Rule 18-6 (E) provides that respondents shall reimburse an injured worker for reasonable and necessary mileage expenses for travel to and from medical appointments at a rate of 53 cents per mile.

As found, Claimant has established by a preponderance of the evidence that mileage expenses for 4,257 miles for which he is seeking reimbursement are reasonable, necessary and incidental to medical treatment. The ALJ is persuaded 4,257 miles were incurred traveling to and from medical appointments with authorized treating providers.

ORDER

1. Claimant's claim for reimbursement of the costs of a bed, spa, stove, stove conversion, warranties, concrete work, and electrical work is denied and dismissed.

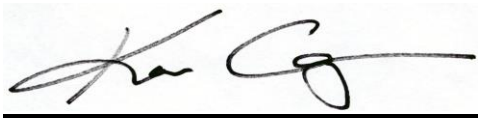
2. Respondent shall reimburse Claimant for 4,257 miles of travel to and from medical appointments at $0.53 cents per mile.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to

the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 23, 2019



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that his *Scheduled* Permanent Partial impairment rating for partial hearing loss should be converted to the *Whole Person* equivalent?

STIPULATIONS

The DIME results are accepted by the parties on the issues of Maximum Medical Improvement and Permanent Partial Disability.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

Background

1. Claimant is employed by Respondent, Colorado Springs Utilities, where he has worked since 2001. Over time, he developed hearing loss resulting of his exposure to loud noise in the work place. Claimant completed an "Employee's Statement of Injury" on June 6, 2018 in which he noted, "…My hearing has deteriorated slowly since I hired on despite using my earplugs, custom molded hearing protection and ear muffs." (Ex. 7, p. 44). In an "Employee Interview" of the same date it was noted that; "…Claimant advised his hearing has deteriorated over the years due to loud noise at work. Claimant advised he does wear earplugs, has custom molded hearing protection and earmuffs when needed. Has worked for CSU [Colorado Springs Utilities] since 2003, Vac truck operator for years which is very loud, exposure to loud noise as Gas Inspector." (Ex. 7, P. 45).

2. Respondent initially denied liability for Claimant's injury on June 13, 2018. (Ex. 7, p. 42).

Stacey Longoria, Au.D.

3. Claimant was seen by audiologist Stacey Longoria, Au.D. on June 27, 2018. She reported, "…Mr. Ferguson is in today for a comprehensive hearing evaluation as part of his Workman's Comp appeal. He reports a bilateral, gradual hearing loss and intermittent tinnitus described as a high frequency buzz. His tinnitus has been present for at least 10 years. He has difficulty hearing and understanding especially in the presence of background noise. He also has difficulty hearing in meetings, hearing on the phone and even stating one-on-one conversations can be

difficult. His hearing loss causes him to be embarrassed and frustrated, withdrawing from social engagements…" (Ex. 6, p. 35).

4. Ms. Longoria noted, "…Mr. Ferguson began working with Colorado Springs Utilities in 2001 as a part time employee working with a VAC truck. He explains the Vac truck as a loud, high-pitched machine. During that time, he wore molded, custom earplugs as well as muffs. He did not have a hearing exam upon being hired. In 2003, he became a full-time employee as an inspector. When he began working as a full-time, permanent employee, his hearing was monitored every year…" *Id.*

5. Ms. Longoria reported the hearing testing results "…are consistent with a sensory hearing loss," and she noted Claimant "…is a candidate for binaural amplification." (Ex. 6, p. 36).

Seth Reiner, M.D. (Respondent's IME)

6. Respondent arranged for Claimant to undergo an IME with ear, nose and throat specialist Seth Reiner, M.D., on August 27, 2018. In the questionnaire paperwork, Claimant listed his current complaints/symptoms as "My hearing loss makes it very hard to communicate with others." (Ex. 4, p. 22). Dr. Reiner reported,

> Mr. Michael Ferguson is a 37 year old male who works for the City of Colorado Springs working on gas lines and pipes. He has a history of progressive hearing loss in both ears with tinnitus. He thinks his hearing loss has progressed over the last 10 years making it difficult to carry on conversations. He says he is very diligent at wearing hearing protection around loud noises at work, which include heavy machinery such as jack hammers, 'Lollipop' machines and the Vacuum truck. He says he loves his job and has been in the same work for over the last 16 years. He tells me that some sounds such as an ambulance or fire truck going by with sirens on usually is very uncomfortable to his ears…" (Ex. 4, p. 18).

7. Dr. Reiner concluded, "…It is my professional opinion that the noise exposure Mr. Michael Ferguson has been exposed to over the last 14 years has contributed to his hearing loss and he would benefit from hearing aids and needs annual audiometric evaluations…" (Ex. 4, p. 21). Dr. Reiner calculated a 30% "percentage of disability" for the right ear, and 41% for left, which combined for 32% "overall hearing handicap." *Id.* Dr. Reiner mentioned that "organic causes" had not been ruled out, and therefore recommended a MRI of the head and temporal bones. *Id at 20.*

8. Claimant underwent "computed tomography of the orbits to rule out foreign body" on September 8, 2018. A small piece of metal was noted in Claimant's left eye. The radiologist reported, "…MRI is contraindicated at this time pending further

evaluation and discussion with ophthalmology. It is my opinion that the small metallic fragment will likely be affected by the 1.5 Tesla MRI magnet." (Ex. 5, p. 31).

9. Dr. Reiner issued an addendum on September 13, 2018. He noted Claimant could not undergo the MRI, but that a CT scan might be useful. He added that; "…After review of the audiograms and calculating the degree of hearing disability, I believe that Mr. Ferguson will benefit from the use of bilateral hearing aids. It is my professional opinion that he may need his hearing aids evaluated every 7-10 years and changed to different models or technologies based on any significant changes to his hearing that are documented with professional audiometric evaluations…" (Ex. 4, p. 21)

10. Per Dr. Reiner's recommendation, Claimant underwent computed tomography of the brain and temporal bones on October 6, 2018. The testing was described as "normal." (Ex. 4, pp. 27, 28).

11. Respondent then filed a General Admission of Liability on October 16, 2018. (Ex. 7, p. 41). That same day, Respondent's designated physician, Dr. Kyle Akers, referred Claimant to audiologist Gene McHugh, EdD. (Ex. 2, p. 13).

Gene McHugh, EdD

12. Dr. McHugh met with Claimant on October 31, 2018. He reported Claimant was being seen for an audiology consultation, with a chief complaint of "hearing difficulty." He reported:

> In 2003, a baseline audiogram was completed which showed high frequency hearing loss in both ears. The hearing loss progressed faster than what is normally expected and [he] is now experiencing communication problems at work and at home…Etiology of the hearing loss is speculative. While noise exposure cannot be ruled out as a contributing factor, it is likely Mr. Ferguson has a genetic predisposition for developing early adult onset sensorineural hearing loss. This opinion is based upon the presence of hearing loss when he began working in 2003." (Ex. 3, p. 16).

13. Dr. McHugh went on to recommend hearing aids, but noted, "…However, based upon the precipitous audiometric scope with clinical deafness at 4000 Hz and above, prognosis with amplification is guarded…" (Ex. 3, p. 16).

14. Dr. McHugh fitted and issued the hearing aids on November 14, 2018. He noted, "These are appropriate hearing aids for the patient's hearing loss. However, it is unlikely the hearing aids will provide a significant improvement in hearing due to the precipitous nature of his hearing loss…" (Ex. 3, p. 15).

15. On November 26, 2018 Dr. McHugh reported, *"2 weeks post-fitting shows patient is doing quite well. Much better than expected. Hearing sounds he has not heard for a long time…Progressing very nicely with present settings. He has already changed the battery twice. No problems. Appears quite satisfied with the results…" Id. at 15.* (emphasis added).

Kyle Akers, M.D. (ATP)

16. On November 28, 2018 the ATP, Dr. Akers placed Claimant at MMI with no impairment and no need for maintenance care. He stated, "Non-work related gradual life-long hearing loss," and, "MMI – Specialist could not establish work relatedness." (Ex. 2, p. 12). Respondent filed a FAL on the same day, denying liability for maintenance care. (Ex. 7, p. 40)

17. Claimant's attorney wrote to Dr. Akers on December 12, 2018 and provided him with a copy of Dr. Reiner's IME report. Counsel pointed out that Respondent had admitted liability for Claimant's hearing loss, and asked the doctor to address Dr. Reiner's opinions about permanent impairment and the need for post-MMI maintenance care. Instead of doing so, Dr. Akers wrote a note on December 17, 2018 that appears to read, "My report, in consultation [with] our [unreadable] is what it is. Do as you like with it." (Ex. 2, pg. 9).

Douglas Scott, M.D. (DIME)

18. Claimant requested a DIME, which was performed by Dr. Douglas Scott on April 18, 2019. Dr. Scott noted Claimant began working for Respondent on October 9, 2001, and "…has binaural hearing loss which has been documented since 2003." (Ex. 1, p. 3). Dr. Scott reported, "Mr. Ferguson told me that he has hearing aids and with hearing aids, his hearing is now fair to good, and he has no ringing (tinnitus) in his ears" (Id. at 3, Ex. H, p. 15). Claimant acknowledged this at hearing.

19. On examination Dr. Scott reported, "With his hearing aids removed, he was able to hear my question in conversational tone of what were his children's ages." *Id.* Dr. Scott diagnosed "sensorineural hearing loss in both ears with a standard threshold shift." *Id. at 4.* He reported Claimant reached MMI on December 10, 2018 "…when Dr. McHugh noted that Mr. Ferguson was doing much better than expected with his hearing aids."

20. Dr. Scott issued a total 23.1% impairment rating for Claimant's binaural hearing loss. He noted this would convert to a total of 8% whole-person impairment. *Id at 6.* He noted no apportionment was appropriate: "Documented hearing loss occurs after he started working for the City of Colorado Springs." *Id. at 5.* Dr. Scott recommended post-MMI maintenance care, including follow-ups with Dr. McHugh, hearing aid maintenance and batteries, and annual audiometric testing.

21. Respondent then filed a FAL on May 8, 2019, admitting to a 23.1% scheduled impairment rating, and to post-MMI treatment. (Ex. 7, p. 39). Respondent then filed a FAL admitting to a "rounded-up" rating of 24% on June 12, 2019. This rating yielded PPD of $9,926.60. *Id. at 38.* Respondent calculated the value of the 24% rating as follows: 24% x 139 weeks = 33.36 weeks x $297.56 = $9,926.60. This is consistent with C.R.S. §8-42-107(2)(hh) and §8-42-107(6)(a) and (b). The former statutory provision provides 139 weeks for "total deafness" and the latter provisions reflect the fact that the weekly compensation rate given Claimant's date of injury (June 6, 2018) is $297.56. Here, Claimant does not suffer from "total deafness," in which case his rating would have been 100%, not 24%. The 24% rating accounts for his partial deafness and Respondent compensated him on that basis.

Testimony of Claimant

22. Claimant testified at hearing that after he received his hearing aids they "definitely made an improvement." He testified he is able to have "reasonable conversations" with other people if they are "loud and direct" and the conversation occurs "in close quarters." He wears the aids from the time he wakes until he goes to bed at night. On two occasions Claimant has forgotten to wear his hearing aids to work. The most recent occurrence about approximately two weeks prior to the hearing date and was on a day that an "all employee meeting" was scheduled at work. The meeting occurred in a large room with 70-80 people in it. Unless the person speaking was directly in front of Claimant, or was using a microphone, he had difficulty hearing and understanding them. Claimant could not hear people speaking on the other side of the room. After the meeting, Claimant asked his wife to bring him his hearing aids and she did so.

23. Claimant explained that in order to have effective conversations with others, he needs to be "face to face" with them. He then can observe the other person's body language and demeanor, and he reads their lips as they speak. If those conditions cannot be met, he has difficulty understanding what is being said. If Claimant goes with his family to a restaurant where there are many people and a lot of background noise, he cannot participate in conversations and explained he "might as well just sit there by myself." He used to visit such establishments (Claimant offered the examples of Red Robin and Texas Road House) with his family more frequently but does not do so anymore due to his difficulty hearing and understanding others.

24. Claimant has curtailed socialization with friends. He used to enjoy going to "sports bars," or to dinner or comedy shows with them but does not do so anymore, giving the example that, "it's kind of pointless when you're waiting for a punch line and you completely miss it and everybody's already laughed and I have to ask my wife what they said." Claimant testified that years ago he enjoyed going to movies with his family, but does not anymore, because it is too difficult to understand what the actors are saying. Now his wife may take his kids to movie while Claimant is at work. Claimant no

longer watches much television at home for the same reason. He does watch some sporting events on television because he is able to "watch the action versus listen to the words" and "if somebody scores a touchdown that's pretty obvious."

25. Claimant is required to participate in meetings at work. He explained that his ability to participate in a meaningful manner "depends on what kind of setting we are in." He gave the example of a meeting he participated in the morning of the hearing. He was able to effectively participate because it was in a closed room, with one person speaking at a time. However, if there are multiple conversations going on, he "loses all of it."

26. Claimant describes living in a rural environment between Colorado Springs and Ellicott. In his spare time, he fishes, rides ATV's, and hikes. He used to enjoy going into the field in the spring or summer with his children to find "antler sheds;" (antlers that have been shed by deer). He would collect and display them at his house. However, there are rattlesnakes in the area, and he can no longer hear their warning "rattle" when he approaches, so he no longer participates in this activity.

27. Claimant testified about communicating with others on the telephone; he has little difficulty if the other person has a "loud, pronounced voice," but has trouble understanding if the person speaks quietly or has a soft voice. He also has difficulty hearing and understanding voice mail messages, and often will have to ask someone else to listen to the message and tell him what it said.

28. Claimant also indicated that no physician has indicated that his hearing impairment affects his speech, or any other body part, and that he has no issues speaking [which the ALJ duly notes from Claimant's demeanor while testifying]. Claimant notes no other physical problems from his hearing loss.

29. In August, 2019 Claimant was promoted to Gas Pipeline Inspector Supervisor, but for now continues to perform duties associated with his "old job" of Gas Pipeline Inspector, which involves primarily outdoor work. He inspects the work of contract crews that install gas and electric products. Such work sites are commonly in areas frequented by automobile traffic. He described a recently completed job in "Skyway," where the street was closed to the public, but open to local traffic. Claimant and his supervisor were walking down the street. The supervisor could hear cars approaching, Claimant could not, and the supervisor had to warn Claimant to get out of the way of the approaching traffic.

30. Claimant has children aged 12, 10 and 4 years. His two oldest children participate in 4H. He no longer attends the 4H meetings with them unless his wife goes along, since he cannot hear the 4H representative speak during the meetings.

31. Claimant participated in interviews of potential candidates to fill his former position. People participating in the interviews were Claimant, three co-workers, plus the job candidate. Nine interviews took place over two days. Claimant did not have trouble communicating during the interviews, but stated that they took place in a small, closed office space with no background noise, and only one person was talking at a time.

32. Claimant has meetings with members of his "team" which consists of seven other employees he supervises. They meet in Claimant's office, twice per week on the average. Claimant has little difficulty communicating if only one person at a time is speaking. He does report difficulty if more than one person is speaking at a time.

Testimony of Bob Greene

33. Bob Greene works for Respondent. He is an Operations Supervisor II. He supervises gas construction crews and pipeline inspectors. He also supervises Claimant, and has known him approximately 17 years. He testified he has had no difficulty communicating with Claimant at work, and opined Claimant has no trouble communicating with the employees he supervises. Mr. Green did not notice Claimant having any problems with communication during the interview process for his replacement on September 23 and 24, 2019; on September 26, 2019, when they discussed by telephone making the job offer to the candidate selected; or on September 27, 2019, when they called the 8 unsuccessful candidates.

34. Mr. Greene later conceded he has noticed Claimant having trouble with communication during various meetings. Until Claimant forgot to wear his hearing aids the day of the "all employee meeting" noted above, Mr. Greene was unaware Claimant even wore hearing aids. Claimant was recently promoted, and his hearing loss has not had any effect on his ability to perform his new job duties. Mr. Greene does not interact with Claimant outside of the work place.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ

has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Further, courts are to be "mindful that the Workmen's Compensation Act is to be liberally construed to effectuate its humanitarian purpose of assisting injured workers." *James v. Irrigation Motor and Pump Co*., 503 P.2d 1025 (Colo. 1972).

Credibility of Witnesses at Hearing

D. Assessing weight, credibility and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

E. In this instance, the ALJ finds both Claimant, and Bob Greene, to be sincere and credible in their respective testimony, free of undue exaggeration or bias.

Conversion, Generally

F. Whether the Claimant sustained a loss that is compensable under the schedule of disabilities in C.R.S. §8-42-107(2), or has sustained whole-person medical impairment compensable under §8-42-10 (8), is one of fact for determination by the ALJ. In resolving this question, the ALJ must determine the situs of the claimant's "functional impairment," and the situs of the functional impairment is not necessarily the location of the injury itself. *Langton v. Rocky Mountain Health Care Corp., supra; Strauch v. PSL Swedish Healthcare System, supra.* Such authority is enumerated in C.R.S. §8-43-207(1). Although the opinions of physicians can be considered when determining this issue, the ALJ can also consider lay evidence such as the claimant's testimony regarding pain and reduced function. *Olson v. Foley's*, W.C. No. 4-326-898 (ICAO, September 12, 2000).

G. There is no requirement that functional impairment take any particular form, and "pain and discomfort which interferes with the Claimant's ability to use a portion of the body may be considered 'impairment' for purposes of assigning a whole person impairment rating." *Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (ICAO, June 30, 2008). "Functional impairment is not merely assessed by medical means but rather can involve an overall assessment of the effect the injury has had on the Claimant's ability to function in terms of movement and in the performance of activities at work and daily living." *Martinez v. Pueblo County Sheriff's Office*, W.C. No. 4-806-129 (ICAO, December 7, 2011).

Conversion, as Applied

H. The situs of Claimant's functional hearing loss is his ears. No physician has indicated his hearing loss affects his speech or any other body part. Claimant has no issues speaking. His movement is unaffected. Claimant did not testify to any other physical problems. The test used to determine whether conversion is appropriate, "situs of functional impairment," presumes a *physical* location of the impairment. *See Black's Law Dictionary* (spec. abridged 8th ed. 2005) (defining situs as "location or position (of something) for legal purposes"). Other than the loss of hearing, all of the other issues about which Claimant testified, both before and since he was fitted with hearing aids, were issues his attorney described as "capacity to meet personal, social, *or* occupational demands." No other *physical impairment* has been shown, nor alleged.

I. As noted by Respondent, if Claimant's capacity to meet personal, social, or occupational demands were sufficient to remove an injury from the schedule, as argued by Claimant here, virtually *any injury* could be removed from the schedule. *Total deafness* of both ears, C.R.S. § 8-42-107(2)(hh), would likely affect most persons' capacity to meet personal, social, or occupational demands, but the General Assembly included it *on the schedule.* In this instance, Claimant lost just under one fourth of his hearing.

J. In *McKinley v. Bronco Billy's*, 903 P.2d 1239 (Colo. App. 1995), the Court of Appeals affirmed the ICAO panel's conclusion that "loss of visual acuity" was encompassed in "blindness." Claimant was therefore limited to an award of benefits pursuant to the schedule of injuries set forth in § 8-42-107(2). The court noted that the Claimant's contrary interpretation would result, in many instances, in a Claimant recovering greater benefits pursuant to § 8-42-107(8)(c.5) with a minor loss of use of an eye resulting from "loss of visual acuity" than could a Claimant with a substantial loss of use from "blindness." *McKinley*, 903 P. 2d at 1242.

K. Claimant's argument here, if accepted, would result in his recovering greater benefits pursuant to § 8-42-107(8) than a claimant who suffered from total deafness of both ears. The ALJ herein cannot presume the General Assembly intended, or even allowed, such anomalous results. As a legal matter, the ALJ finds there is no basis to apply the conversion statute to a partial hearing loss as occurred herein.

L. Assuming arguendo, that Legal Conclusion K, supra, is in error, the ALJ draws this alternative conclusion: The ALJ does not find, by a preponderance of the evidence, that Claimant has even shown that his partial hearing loss has significantly affected his ability to function in activities of daily living. He was promoted at work, despite being fitted for hearing aids. By all medically documented accounts, he got a good result from his fitting. He was able to sit on the hiring committee, with no issues. He even left home on a couple of occasions, driving into work from his rural home east of Colorado Springs, before even realizing he had forgotten to put his hearing aids on. He can participate in meetings with co-workers. The ALJ notes, as does Claimant himself, that his speech is unaffected by this partial hearing loss. The only diminution alleged is that certain aspects of his social and family life are affected by his less- than-perfect hearing. This puts Claimant on similar footing as someone who suffers from arm or leg pain, and who opts out of certain social functions because he prefers to stay home.

M. This is not to trivialize Claimant's loss; it merely has not been shown that, even adopting Claimant's standard of conversion, such standard has been met. Claimant's request to convert his partial hearing loss to the whole person must therefore be denied.

ORDER

It is therefore Ordered that:

1. Claimant's request to convert his scheduled PPD impairment rating for his partial hearing loss to the whole person equivalent is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 24, 2019

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

1. Whether Claimant has overcome by clear and convincing evidence the permanent impairment rating provided by Division Independent Medical Examination (DIME) physician John Burris, M.D.

FINDINGS OF FACT

1. Claimant is a 26-year-old male employed by Employer as a detention deputy.

2. On October 30, 2017, Claimant sustained an admitted compensable injury to his low back and right hip. On that date, Claimant was involved in defensive tactics training. Claimant was on his knees on a mat and was slammed into the mat and landed on by a colleague.

3. Claimant reported the injury to Employer and underwent treatment.

4. On November 1, 2017, Jamie Faught, M.D. evaluated Claimant. Claimant reported right hip and low back pain after being slammed down onto a mat during training. Claimant reported that the person who landed on him was approximately 250 pounds. Claimant reported numbness and tingling on the bottom of his foot. On examination, Claimant had mild right lumbar paraspinous muscle pain and spasm and positive bilateral straight leg raise tests. Claimant had pain with heel walking greater than pain with toe walking on his right side. Claimant underwent x-rays of his right hip and his lumbar spine that were unremarkable except for mild leftward convex curvature of the lumbar spine. Claimant was assessed with lumbago with sciatica right side, and with right hip pain. Physical therapy was recommended. *See* Exhibit 5.

5. On November 30, 2017, Dr. Faught evaluated Claimant. Claimant reported pain in his low back at a 7/10. On examination, Claimant had tenderness to palpation in the lumbar spine at L5 and had a negative straight leg raise. Dr. Faught assessed lumbago with right sided radiculopathy- suspected muscular strain. *See* Exhibit 5.

6. On January 16, 2018, Dr. Faught evaluated Claimant. Claimant reported ongoing low back pain and that he had a pinching sensation with lifting or certain movements. Claimant reported his pain had not worsened, but had not improved. Claimant reported that he planned to start physical therapy that week. On examination, Claimant had tenderness to palpation at the L5 and a negative straight leg raise. *See* Exhibit 5.

7. On January 18, 2018, Claimant underwent physical therapy. Claimant reported his pain was at a 4/10 with his best pain since the injury at a 2/10 and his worst at an 8/10. Claimant reported that Flexeril helped reduce his pain. On palpation, Claimant was found to be most tender at the right L4-L5 facet joint. Claimant's sensation was found equal to light touch but slightly decreased on the right L5. On straight leg raise, Claimant had pain at 45 degrees on the left and at 35 degrees on the right. Claimant had treatment to help decrease pain and muscle spasms. *See* Exhibits 5, 6.

8. On January 23, 2018, January 25, 2018, February 1, 2018, and February 6, 2018, Claimant underwent physical therapy. The assessments noted less pain but right L4-L5 localized lower back pain appearing to be disc related without radiculopathy and right facet versus disc. *See* Exhibit 5.

9. On February 6, 2018, Dr. Faught evaluated Claimant. Claimant reported that physical therapy helped with some improvement for a few hours, but that then the pain returned. Claimant reported that he felt like the pain was moving up the back with some neck pain and headaches. *See* Exhibits 5, 7.

10. On February 28, 2018, Claimant underwent an MRI of his lumbar spine. The findings included mild curvature or scoliosis of the thoracolumbar spine with the convexity to the left, a minimal broad bulge with contact upon the thecal sac at L4-5, and a mild broad bulge without contact upon the thecal sac or nerve roots at L5-S1. The impression provided was minimal broad bulge at the L4-5 and L5-S1 levels. *See* Exhibits 5, D.

11. On March 1, 2018, Dr. Faught evaluated Claimant. Claimant reported ongoing back pain with no change or improvement. Dr. Faught noted the MRI had revealed a mild bulge at L4-5 contacting the thecal sac. Dr. Faught referred Claimant for possible injection. *See* Exhibit 5.

12. On March 30, 2018, Giora Hahn, M.D. evaluated Claimant. Claimant reported an injury five months prior with low back pain since, right greater than left radiating more into this right leg. Claimant reported his pain was at a 3/10 but increased with activity, twisting, bending, or lifting. Dr. Hahn reviewed the February 28 MRI. She opined that it showed only mild degenerative changes with a minimal disc bulge at L4-5 and L5-S1 and opined that there was no noticeable contact on the nerve roots. Dr. Hahn found Claimant to be overweight. Dr. Hahn found significant pain with palpation to the right side of the lower back and opined that was consistent with facet arthropathy. Dr. Hahn also found positive straight leg raising on the right at 20 degrees and that lifting the left leg at about 20 degrees brought about right sided lower back pain consistent with radiculopathy. Dr. Hahn provided the impression that Claimant most likely had a combination of mild radiculopathy perhaps due to the injury itself with pain radiating into the posterior thigh suggestive of the L5 nerve root, possibly also facet arthropathy. She suggested a two level transforaminal epidural injection on the right side at L4-5 and at L5-S1 for both diagnostic and therapeutic purposes. *See* Exhibit 5.

13. On April 23, 2018, Dr. Faught evaluated Claimant. Claimant reported ongoing low back pain and right lower extremity symptoms. Claimant reported that he did not want to do the injections recommended by Dr. Hahn. Dr. Faught recommended nerve conduction testing. *See* Exhibit 5.

14. On June 12, 2018, Jeffrey Siegel, M.D. evaluated Claimant. Claimant reported back pain with vague radiation down the anterior thighs and legs. Dr. Siegel opined that MRI imaging of Claimant's lumbar spine demonstrated some modest bulging disk disease at L4-5 and L5-S1 without any obvious contact upon the exiting neural elements. Dr. Siegel performed motor nerve conduction studies and opined that they were within normal limits. Dr. Siegel noted one exception was a modestly delayed distal latency involving the right tibial CMAP, which was an incident finding and did not correlate with any signs or symptoms. Dr. Siegel opined that there was no evidence of lumbar radiculopathy from testing and that there was no attestation of an L5 or S1 radiculopathy. *See* Exhibits 5, 7, C.

15. On July 6, 2018, Claimant returned to physical therapy. The records note that Claimant had initially received 6 physical therapy treatment sessions with occasional temporary improvement and less pain but that Claimant continued to demonstrate poor sitting posture, had a few no shows, and stopped therapy in February. The therapist noted that since then, Claimant had notably gained weight and continued to demonstrate poor sitting posture into increased lumbar lordosis. Claimant reported pain in his central low back and at the right L5 and SI joints. Claimant reported his pain was at a 4/10 but got up to an 8/10. Claimant reported he was unable to pick up his young daughter, was unable to push a shopping cart for more than 30 minutes, was unable to walk longer than 20 minutes, and was unable to sit in a car to drive more than one hour. On evaluation, Claimant had lumbar flexion and extension within normal limits with limited increased back and leg pain. On lateral flexion, the right was within normal limits and the left was limited due to increased pain. On straight leg raise, the right side was positive at 40 degrees and the left was positive at 60 degrees. *See* Exhibit 6.

16. On July 9, 2018, David Lorah, M.D. evaluated Claimant. Dr. Lorah opined that Claimant's MRI was very benign looking, Claimant's EMG testing was negative, and that Claimant's case looked to be musculoskeletal in nature. Dr. Lorah noted that Claimant had been back to physical therapy for the past month but was seeing some improvement. Therefore, Dr. Lorah did not find Claimant at maximum medical improvement but recommended another 4-6 weeks of physical therapy. On examination, Dr. Lorah found tenderness to palpation in the paraspinous muscles bilaterally and pain with forward flexion greater than extension. Dr. Lorah found a negative straight leg test. *See* Exhibit 5.

17. On July 12, 2018, Claimant underwent physical therapy. Claimant reported he was walking a little better but still having a lot of low back pain. The therapist found Claimant to be extremely tight in the right gluteal and piriformis. *See* Exhibit 6.

18. On July 31, 2018, Claimant underwent physical therapy. Claimant reported his pain was about the same. He was assessed as not responding to therapy and it was noted that he continued to move about slowly with some apparent difficulty. The therapist recommended holding physical therapy until Claimant saw a doctor. *See* Exhibit 6.

19. On August 7, 2018, Dr. Lorah evaluated Claimant. Claimant reported low back pain, which Dr. Lorah opined was primarily axial. Claimant reported tenderness on palpation in the paraspinous muscles bilaterally and reported pain with forward flexion greater than extension. Dr. Lorah found the straight leg raise test to be negative. Dr. Lorah noted that there no plans for additional imaging, injections, or surgeries and that Claimant had plateaued with conservative measures and agreed that his symptoms were stable. Dr. Lorah opined that Claimant was at maximum medical improvement and opined that Claimant would have a permanent impairment. Dr. Lorah sent Claimant for a range of motion and functional capacity evaluation. *See* Exhibit 5.

20. On August 17, 2018, Claimant underwent a functional capacity evaluation and lumbar range of motion testing performed at Peak Performance. Under range of motion measurements, the therapist noted that all results were subject to interpretation by a Level II accredited physician. Under consistency of effort, the therapist noted that it was strongly recommended that the findings from the evaluation be correlated with other objective clinical findings and be subjected to further interpretation and determination of validity by the treating physician. The therapist also indicated that all results indicated that maximum voluntary effort was obtained, and opined that the results were an accurate reflection of Claimant's current functional tolerances. *See* Exhibits 5, 8.

21. On August 31, 2018, Dr. Lorah evaluated Claimant. Dr. Lorah assessed lower back sprain and disc bulging at L4-5 and L5-S1 without impingement. Dr. Lorah opined that Claimant reached maximum medical improvement on August 7, 2018 and that Claimant could return to work in the light work classification category with a maximum lifting of 25 pounds. Dr. Lorah opined that Claimant had a Table 53(II)(b) impairment of 5% and that Claimant had a 7% impairment based on Claimant's limited range of motion around the lumbar spine. Dr. Lorah opined that Claimant's whole person permanent impairment was 12%. Dr. Lorah noted that the formal range of motion measurements were taken at Peak Performance. *See* Exhibit 5.

22. On November 26, 2018, Nicholas Olsen, D.O performed an independent medical evaluation. Claimant reported being injured on October 30, 2017 during a training exercise when he was slammed onto the ground with his partner landing on him. Claimant reported that he had immediate pain in his right hip and lower back on the right side. Claimant reported persistent pain rating at a 7/10 and that lifting anything of significant weight increased his pain. Claimant reported driving aggravates his pain as does lifting his daughter and bending quickly in any direction. Dr. Olsen reviewed medical records and performed a physical examination. Dr. Olsen found significant deconditioning in the lumbar paraspinals with diffuse axial back pain, right greater than left demonstrated on palpatory examination. Dr. Olsen used dual inclinometry to measure range of motion of the lumbar spine. Dr. Olsen found seated and supine straight leg raise

to be markedly limited. Dr. Olsen assessed: lumbar sprain/strain occurring on October 30, 2017 while performing training exercises; status post MRI of the lumbar spine demonstrating a minimal broad based disc bulge at L4-5 and mild broad based disc bulge at L5-S1 without significant central or foraminal stenosis; status post normal EMG study with no evidence of lumbar radiculopathy; unremarkable right hip x-rays; and MMI on August 31, 2018 with a 12% impairment per Dr. Lorah. *See* Exhibit A.

23. Dr. Olsen opined that Claimant had very minimal disc bulges with no evidence of nerve root impingement and he agreed that the MRI was unremarkable. Dr. Olsen found no objective clinical findings on his examination and noted Claimant's inconsistency in range of motion testing. Dr. Olsen opined that Claimant's range of motion did not fit the criteria of plus or minus 10% required for consistent range of motion. Dr. Olsen opined that the results of the straight leg raise and Claimant's effort was non-physiologic given the minimal findings on MRI. Dr. Olsen opined that Claimant had a lumbar sprain/strain with no explanation for the persistent symptoms and opined that you would expect the sprain/strain Claimant had experienced to resolve within weeks of the injury. Dr. Olsen was concerned that Claimant's reports of symptoms were far out of proportion with the minimal findings documented on MRI and opined again that a musculoskeletal strain of this nature would resolve without any permanent impairment. *See* Exhibit A.

24. Dr. Olsen opined that Claimant did not have a Table 53 rating, and that even if you gave Claimant the benefit of the doubt and a Table 53 II-b rating, there were significant inconsistencies in range of motion. Dr. Olsen opined that the range of motion measurements he completed would not be considered valid and that Dr. Lorah's range of motion also would not be valid and included a negative sacral range of motion. *See* Exhibit A.

25. On January 29, 2019, Claimant underwent a Division Independent Medical Evaluation (DIME) performed by John Burris, M.D. Claimant reported low back pain and that at training while engaged in defense tactics, he was thrown onto his right side and a colleague landed on top of him. Claimant reported that he had right hip pain and low back pain but that his hip pain had resolved. Claimant reported he underwent physical therapy that didn't help. Claimant reported that he declined injections. Claimant reported that he was currently working at a restaurant owned by his family and was unable to continue working for Employer due to his injury and permanent work restrictions. Claimant reported 6-7/10 low back pain and indicated that his pain was higher at the evaluation because he drove 4 hours from Parachute to Denver. Claimant reported the pain was aching with episodic sharp/shooting pain down his right leg 5-6 times per day. Claimant reported the pain was improved a little when using a TENS machine and was worse with physical activity of any kind. Dr. Burris reviewed Claimant's medical records following this injury and performed a physical examination. *See* Exhibits 9, B.

26. Dr. Burris opined that Claimant was an obese male with a normal gait and that Claimant was able to complete transfers without hesitation. Dr. Burris opined that there were marked pain behaviors that obscured the examination. Dr. Burris opined that

in the lumbar spine, Claimant had diffuse superficial tenderness with no localized tenderness, no muscle spasm, and no trigger points on palpation. Dr. Burris also opined that the range of motion testing was inconsistent and non-physiologic. Dr. Burris noted that during casual observation, Claimant moved freely and sat on the examination table without any sign of distress but that Claimant self-limited on flexion to 30 degrees and in extension at 10 degrees. Dr. Burris also opined that the side bend bilaterally was done with no pelvic motion. Dr. Burris noted that Claimant had a negative seated straight leg raise, where Claimant raised to 90 degrees bilaterally. Dr. Burris opined that the seated straight leg raise maneuver causes low back pain, but that Claimant reported no leg symptoms. Dr. Burris noted, however, that when Claimant was asked to do the supine straight leg raise, Claimant self-limited to approximately 10 degrees on the left and 0 degrees on the right. *See* Exhibits 9, B.

27. DIME physician Dr. Burris opined that Claimant's current subjective complaints were out of proportion to the nature of the original workplace event, and were out or proportion to Claimant's normal diagnostic testing. Dr. Burris opined that the examination was benign with no objective findings and included a non-physiologic presentation. Dr. Burris opined that based on the negative diagnostic testing and the lack of objective findings on physical examination, he could not establish a Table 53 disorder for Claimant's subjective complaints. Dr. Burris opined that because a Table 53 diagnosis could not be assigned, range of motion testing did not need to be repeated. Dr. Burris opined that the range of motion documented by Dr. Olsen represented findings consistent with what he found on his examination that were inconsistent and invalid. Dr. Burris opined that the range of motion was non-physiologic. Dr. Burris opined that Claimant reached maximum medical improvement on August 7, 2018 when Claimant completed reasonable conservative treatment for his subjective complaints. Dr. Burris opined that diagnostic testing and repeated examinations by Claimant's providers did not identify any objective findings or indications for interventional treatment. Dr. Burris opined that there was no objective basis for an impairment rating or permanent work restrictions. *See* Exhibits 9, B.

28. On June 26, 2019, William Miller, M.D. performed an independent medical evaluation. Claimant reported that he was injured in training when a colleague grabbed him in a bear hug, lifting him up and twisted him, and brought him to the training mat with force onto his right side and hip while simultaneously landing on top of him, causing his duty belt and equipment to jam into his back. Claimant reported that he had immediate pain in the right hip and low back. Dr. William noted that when examined the next day, Claimant had mild right sided lumbar paraspinous muscle pain and spasm upon palpation as well as a positive straight leg raise bilaterally. Dr. Miller reviewed medical records covering the course of Claimant's care in this case. Claimant reported ongoing right sided low back pain, pain in his right buttocks, and occasional pain radiating into the right posterior thigh. Claimant reported that his symptoms were increased with prolonged standing or sitting, especially with driving. Claimant reported that his wife drove him to the evaluation and that they took frequent breaks, trying to stop every 30-60 minutes. Claimant reported a recent 20-pound weight loss with diet and walking. Claimant reported that he did not pursue injections because he had heard bad things and was he could

become worse but reported that he would like more information and maybe return to Dr. Hahn. *See* Exhibit 10.

29. On examination, Dr. Miller found claimant to have a slightly left convex scoliosis of the thoracolumbar spine on general inspection. Claimant was focally tender along the right lumbar segment and overlying the right SI joint. Claimant was less tender overlying the left lumbar segment. Claimant had guarded motion with extension, flexion, and left side bending. Claimant was found to have an equivocal right sided seated leg raise with pain in the back and was able to extend his legs with an approximate 10-degree extension lag. Claimant had no palpable spasm, but had generalized hypertonicity in the gluteal group on the right. Dr. Miller found reviewed the imaging and nerve testing. *See* Exhibit 10.

30. Dr. Miller assessed: lumbar strain, rule out facetogenic pain admixed with discogenic pain; lumbar strain with L4-5 and L5-S1 broad based disc bulges in a 24 year old (at time of injury); paresthesias in the right lower extremity without corroborating findings on MRI/EMG; interrupted sleep secondary to pain; and depression, moderate, situational, occupational, and secondary to chronic pain. Dr. Miller opined that all of his assessments were causally due to the reported work related trauma to the spine that occurred on October 30, 2017. Dr. Miller opined that Claimant had a 9% whole person impairment for loss of lumbar motion. Dr. Miller also opined that Claimant had a Table 53(II)(b) condition and met the criteria for an additional 5% whole person impairment for the lumbar spine. Thus, Dr. Miller opined that Claimant had a 14% whole person impairment. *See* Exhibit 10.

31. Dr. Miller opined that Claimant had consistent objective findings on physical examination documented in the medical records (tenderness, loss of motion, spasm), had objective testing with multilevel disc bulges, quite precocious in a 24 year old, and had prescriptions, evaluation and treatment plans consistent with a lumbar injury. Dr. Miller noted that lumbar injections had been recommended five months post injury and that formal functional capacity evaluation testing showed maximum patient effort with significant physical limitations. Dr. Miller opined that DIME physician Dr. Burris did not follow AMA/DOWC guidelines. *See* Exhibit 10.

32. Dr. Miller opined that Claimant had a Table 53 diagnosis. Dr. Miller opined that Claimant had objective findings with two bulging discs shown on MRI performed when Claimant was a 24 year old. Dr. Miller acknowledged that it would be impossible to know for certain if those bulges were present prior, but that the clinical team evaluating Claimant was impressed enough to provide a Medrol dosepack, prescribe gabapentin, provide work restrictions, and recommend lumbar injections. Dr. Miller opined that Claimant had consistent physical exam findings supporting a Table 53 diagnosis with pain and rigidity. Dr. Miller opined that reproducibility required multiple measurements and more than the three taken by Drs. Olsen and Burris and noted that Dr. Burris did not offer repeat measurements for Claimant which violates the AMA Guides and the DOWC Level II Curriculum and impairment rating tips. Dr. Miller noted that pain, fear of injury, or neuromuscular inhibition may limit mobility by diminishing effort and opined that is what

happened with Claimant. Dr. Miller opined that Claimant should have been afforded the opportunity for additional measurements that day or on subsequent days. Dr. Miller opined that repeated measurements prior to disqualifying range of motion measurements is repeatedly reinforced in the AMA Guides, Level II accreditation curriculum, and impairment rating tips. Dr. Miller quoted the guides and recommendations for multiple sets of measurements being taken before an examiner declares the range of motion results invalid, including providing another visit to repeat. Dr. Miller opined that Dr. Burris and Dr. Olsen each performed three measurements, when the Guidelines mandate a total of 24 measurements (12 each) prior to invalidating lumbar motion. *See* Exhibit 10.

33. Dr. Miller noted that IME providers occasionally reverse impairment ratings by concluding that there is no Table 53 diagnosis. Dr. Miller opined that when they do so they must adequately justify how they have come to conclude that all prior associated diagnoses, evaluations, and treatments from the entire treatment team prior to the IME exam were undertaken in error. Dr. Miller noted that whenever 6 months of treatment of the spine has occurred and a Table 53 zero impairment is assigned, the physician must provide justification for the zero percent rating and that the physician shall be aware that a zero percent rating implied that the treatment was performed in the absence of medically documented pain and rigidity. Dr. Miller opined that it was either ignorance or hubris to dismiss nearly a year of evaluations and treatments from a team of skilled and dedicated providers while negating an injured workers impairment without following the basic tenants of the Guidelines and standards. *See* Exhibit 10.

34. Claimant testified at hearing that after his injury, his right hip pain resolved, but his low back pain still exists. Claimant testified that he has pain and stiffness that has never gone away.

35. Dr. Olsen testified at hearing consistent with his IME report. Dr. Olsen testified that he has no explanation for Claimant's subjective reports since the findings on MRI and EMG do not match. Dr. Olsen opined that the objective tests show that any disc bulges at L4-5 and L5-S1 are not pain generators. Dr. Olsen opined that the range of motion findings were non-physiologic and pointed out that with Dr. Burris, Claimant had a normal seated leg raise at 90 degrees bilaterally but a severely restricted supine leg raise where he indicated 0 degrees of movement on the right and only 10 degrees on the left. Dr. Olsen opined that even if someone had a huge herniated disc, you would expect at least 20 degrees of motion during that maneuver. Dr. Olsen noted that during his examination, Claimant had a seated leg raise of 8 degrees on the right and 10 degrees on the left and opined that there was no explanation for how a few months later with Dr. Burris, Claimant was able to do a 90-degree bilateral seated leg raise. Dr. Olsen opined that Dr. Burris' opinions were consistent with the impairment rating tips and noted that Dr. Burris first decided there was no Table 53 diagnosis.

36. Dr. Olsen testified that Claimant's reports were consistent with a lumbar sprain/strain and agreed that Claimant reported six months of pain. Dr. Olsen testified, however, that Claimant did not have six months of rigidity. Dr. Olsen opined that Dr. Burris provided justification for the 0% impairment rating as required.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Overcoming the DIME on impairment rating

The finding of a DIME physician concerning the claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo.

App. 1995); *Lafont v. WellBridge D/B/A Colorado Athletic Club* W.C. No. 4-914-378-02 (ICAO, June 25, 2015).

As a matter of diagnosis the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003); *Sharpton v. Prospect Airport Services* W.C. No. 4-941-721-03 (ICAO, Nov. 29, 2016). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998); *Watier-Yerkman v. Da Vita, Inc.* W.C. No. 4-882-517-02 (ICAO Jan. 12, 2015); Compare *In re Yeutter*, 2019 COA 53 ¶ 21 (determining that a DIME physicians opinion carries presumptive weight only with respect to MMI and impairment). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000).

The questions of whether the DIME physician properly applied the *AMA Guides*, and ultimately whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000); *Paredes v. ABM Industries* W.C. No. 4-862-312-02 (ICAO, Apr. 14, 2014). A mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO, Mar. 22, 2000); *Licata v. Wholly Cannoli Café* W.C. No. 4-863-323-04 (ICAO, July 26, 2016).

A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAO, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. Rather, deviation from the AMA Guides constitutes evidence that the ALJ may consider in determining whether the DIME physician's rating has been overcome. *See Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117 (Colo. App. 2003); *Logan v. Durango Mountain Resort,* W.C. No. 4-679-289 (ICAO, April 3, 2009); *Linda Vuksic v. Lockheed Martin Corporation* W.C. No. 4-956-741-02 (ICAO, Aug. 4, 2016). Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In re Goffinett,* W.C. No. 4-677-750 (ICAO, Apr. 16, 2008).

Claimant's February 28, 2018 MRI demonstrated a minimal broad bulge at L4-5 and a mild broad bulge at L5-S1. Dr. Hahn opined that there was no noticeable contact

on the nerve root. Claimant's subsequent EMG confirmed that there was no nerve involvement and that the discs at L4-5 and L5-S1 were not pain generators. The MRI was opined to be "very benign" by Dr. Lorah, "unremarkable" by Dr. Olsen, and "normal" by Dr. Burris. The objective MRI and EMG findings are not consistent with Claimant's subjective complaints.

Claimant did not give his best effort during range of motion testing. Claimant was observed casually with Dr. Burris moving freely and sitting on the examination table without any signs of distress, but then greatly limited his motion during flexion, extension and side bending bilaterally. During side bending, Claimant moved with no pelvic motion and was self-limiting. His results of seated versus supine leg raise do not make sense and are non-physiologic. Claimant had similar non-physiologic findings when examined by Dr. Olsen. Claimant's subjective reports thus cannot be relied upon to any degree of certainty, as Claimant does not report accurately and self-limits, producing inconsistent results.

Since Claimant's subjective reports cannot be relied upon, the objective evidence must be examined to determine whether or not Dr. Burris erred in failing to find or assign a permanent impairment rating. Here, there is no objective pathology by MRI or EMG to support Claimant's complaints. As found above, and found persuasive, multiple providers note no nerve root impingement or cause for Claimant's subjective complaints. Treatment continued based on Claimant's subjective reports to providers, but no objective basis for his complaints was established. Range of motion is only necessary and must be completed and applied to an impairment rating only when a corresponding Table 53 diagnosis has been established. Dr. Burris opined that there was no Table 53 diagnosis and therefore, range of motion was not necessary. By rating a zero percent permanent impairment, Dr. Burris implied that the treatment Claimant had received was performed without objective basis and was done based on Claimant's subjective reports. The authorized providers were responding to and attempting to identify and treat Claimant's unreliable subjective reports and his self-limited range of motion.

Claimant has failed to prove by clear and convincing evidence that the zero percent impairment rating given by Dr. Burris is incorrect. All diagnostic testing performed on Claimant to objectively establish the basis for Claimant's low back pain came back as normal. Dr. Burris correctly found no objective indications on his physical examination to support a permanent impairment or to support Claimant's subjective complaints or limited range of motion Claimant showed over the course of his treatment. Dr. Burris opined that there was no Table 53 rating. Dr. Olsen came to a similar conclusion as the DIME physician. Dr. Miller placed a large emphasis on Claimant's subjective reports and the fact that Claimant was treated by multiple providers for almost a year. Although true, the lengthy treatment was based on Claimant's subjective reports to providers who were attempting to figure out what was causing Claimant's pain complaints. Claimant's subjective reports cannot be relied upon to any degree of certainty as Claimant has shown inconsistencies and that he fails to give full or consistent effort. Although his treating providers attempted, over the course of his treatment, to find out what was causing his subjective reported pain, and his self-limited motion, they were unable to objectively

identify a pain generator. The great weight of the evidence shows that Claimant's subjective reports are unreliable at best.

Without Claimant's subjective reports of pain and/or rigidity, the objective indications of a permanent impairment are insufficient to support a Table 53 diagnosis and the evidence in insufficient to show that Dr. Burris erred by failing to provide a Table 53 diagnosis. Impairment ratings are meant for permanent impairment with specific diagnoses and objective pathology. As argued by Respondents, anyone who complained of pain and stiffness of their back for six months would somehow be entitled to a rating if Claimant's unreliable subjective reports and self-limiting were enough. Here, Claimant has failed to overcome the DIME physician's determination that he has no Table 53 diagnosis and has no permanent impairment as a result of his October 30, 2017 injury.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by clear and convincing evidence that DIME physician Dr. Burris erred in providing a zero percent permanent impairment rating.

2. Claimant has no permanent partial disability as a result of his October 30, 2017 work injury. His request to overcome the DIME physician's opinion of zero percent impairment is denied and dismissed.

3. Any issues not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, *see* section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 29, 2019 /s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-588-918-004

ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that the total right shoulder arthroplasty requested by Authorized Treating Physician (ATP) David J. Schneider, M.D. is causally related to his July 22, 2003 admitted industrial injury.

FINDINGS OF FACT

1. Claimant worked for Employer as a Network Technician. On July 22, 2003 Claimant suffered an admitted industrial injury to his left ankle during the course and scope of his employment with Employer. He rolled his left ankle when he attempted to stop his service vehicle from moving in reverse. Claimant specifically injured his peroneal sheath and tendon.

2, Claimant underwent at least 12 surgeries and other treatment modalities following his admitted industrial injury. However, Claimant developed complications from infections and eventually underwent an amputation below his left knee on May 2, 2012.

3. After the amputation Claimant began using crutches more often. On a February 7, 2013 visit with Authorized Treating Physician ATP Jared Foran, M.D. Claimant reported bilateral shoulder pain since he had been using crutches. On March 18, 2013 Claimant noted to ATP David Linn, M.D. that he was suffering pain in both shoulders from using crutches.

4. On June 18, 2018 Claimant visited ATP David J. Schneider, M.D. at Panorama Orthopedics and Spine Center for a left shoulder evaluation. Dr. Schneider noted that Claimant suffered from pain in the left shoulder and primary osteoarthritis in both shoulders. He explained that Claimant "has known cuff tear arthropathy" and is scheduled for left shoulder surgery in a few weeks. Claimant also underwent x-rays of the left shoulder that revealed "degenerative changes with high riding humeral head."

5. On July 13, 2018 Dr. Schneider performed a left shoulder reverse arthroplasty. The procedure was successful and reduced Claimant's pain by about 60%.

6. On March 25, 2019 Claimant contacted Panorama by telephone. He sought additional physical therapy for his left shoulder. Claimant also requested cortisone injections for his right shoulder. Claimant remarked that "he will need to get surgery soon but needs the injection for now." Dr. Schneider approved the procedure and Claimant underwent an ultrasound guided cortisone injection into his right shoulder.

7. On April 10, 2019 Claimant underwent right shoulder x-rays. On April 11, 2019 Dr. Schneider remarked that the x-rays revealed "severe osteoarthritis of the glenohumeral joint." Dr. Schneider diagnosed Claimant with "primary osteoarthritis of the right shoulder." He recommended continued aggressive therapy of the left shoulder and directed Claimant to return in three months for re-evaluation of his right shoulder.

8. On April 22, 2019 Dr. Schneider completed a surgery-scheduling document. The document specified that Claimant suffered from "primary osteoarthritis of both shoulders" and classified the procedure as elective. The document delineated the procedure as a total arthroplasty of the right shoulder.

9. On June 19, 2019 Claimant underwent an independent medical examination with Nicholas K. Olsen, D.O. Dr. Olsen noted that he had initially performed an independent medical examination of Claimant on February 13, 2013. He also conducted additional evaluations. Claimant reported increasing right shoulder pain and that Dr. Schneider had recommended a right shoulder reverse arthroplasty. Dr. Olsen inquired about when Claimant began developing right shoulder symptoms. Claimant responded that he may have injured his right shoulder when he suffered his industrial injury on July 22, 2003. He also noted pain in both shoulders when using crutches after his January 6, 2014 surgery. Claimant recounted various falls, but denied any right shoulder trauma.

10. After reviewing Claimant's medical records and conducting a physical examination Dr. Olsen concluded that the requested total right shoulder arthroplasty was not causally related to Claimant's July 22, 2003 industrial injury. Initially, Claimant was unable to recall a specific date for the onset of his right shoulder symptoms and the medical records did not reflect a right shoulder injury associated with the July 22, 2003 industrial injury. Moreover, the records did not document any direct trauma to the right shoulder during any of Claimant's falls. Although Dr. Olsen acknowledged that Claimant reported some right shoulder symptoms while ambulating on crutches in 2013, the use of crutches "did not contribute or lead to the development of arthritis or the need for surgery." Dr. Olsen explained that, after Claimant's temporary right shoulder aggravation while using crutches in 2013, there was little mention of symptoms in the record until he began to suffer the results of end-stage osteoarthritis in 2019. In fact, imaging of the right shoulder on April 10, 2019 revealed severe osteoarthritis of the glenohumeral joint. Dr. Olsen reasoned that a reverse right shoulder total arthroplasty would be a consideration for treating Claimant's end-stage arthritis but would be covered under commercial insurance. The temporary aggravation of Claimant's right shoulder while using crutches in 2013 did not contribute to his need for surgery. Dr. Olsen explained that Claimant's end-stage osteoarthritis was familial and consistent with age-related degenerative arthritis. Accordingly, Claimant's need for a right shoulder reverse arthroplasty was not causally related to his July 22, 2003 industrial injury.

11. Claimant testified at the hearing in this matter. He acknowledged that he suffers severe osteoarthritis in both shoulders. He maintained that his right shoulder

symptoms have continued to worsen since his July 22, 2003 industrial injury. Claimant detailed his typical activities of daily living from 2009 through the present. He noted that he spends most of the day in a seated position watching television. During a typical day between 2009 and 2019 he sits or lies down approximately 80% of the time. Claimant estimated that from the date of his industrial injury until 2009 he spent about 50% of each day sitting or lying down. When Claimant was not sitting or lying down he alternately used crutches or a wheelchair for mobility.

12. Dr. Olsen testified at the hearing in this matter. He maintained that the proposed total right shoulder replacement surgery was not causally related to Claimant's July 22, 2003 industrial injury. He reiterated that Claimant suffers from degenerative end-stage osteoarthritis. Dr. Olsen remarked that Claimant's degenerative condition can progress in the absence of any trauma. He summarized that Claimant suffers from the natural progression of his pre-existing degenerative osteoarthritis. Dr. Olsen attributed Claimant's condition to genetics and age.

13. Dr. Olsen specifically addressed Claimant's use of crutches. He explained that Claimant alternately used crutches and a wheelchair for ambulation. However, there was simply insufficient "documented time" to cause a permanent change in the natural progression of Claimant's "familial age-related osteoarthritis." Dr. Olsen noted that the crutches may have caused a "temporary increase in his symptoms as it did in 2013 for a period of months." Nevertheless, any temporary increase in symptoms "was not great enough to affect the underlying progression of his osteoarthritis." Accordingly, Dr. Olsen concluded that the total right shoulder arthroplasty requested by Dr. Schneider is not causally related to his July 22, 2003 admitted industrial injury.

14. Claimant has failed to demonstrate that it is more probably true than not that the total right shoulder arthroplasty requested by ATP Dr. Schneider is causally related to his July 22, 2003 admitted industrial injury. Initially, on July 22, 2003 Claimant suffered an admitted industrial injury to his left ankle during the course and scope of his employment with Employer. He specifically rolled his left ankle and injured his peroneal sheath and tendon. After numerous surgeries Claimant developed complications from infections and eventually underwent an amputation below his left knee on May 2, 2012. During 2013 Claimant reported bilateral shoulder pain since he had been using crutches. On July 13, 2018 Claimant underwent a left shoulder reverse arthroplasty.

15. Claimant asserts that Dr. Schneider's request for a total right shoulder arthroplasty is causally related to his July 22, 2003 industrial injury because the use of crutches aggravated his condition. However, the evidence does not support Claimant's contention. Initially, the record is replete with evidence that Claimant suffers from degenerative osteoarthritis in both shoulders. Furthermore, Dr. Olsen persuasively explained that Claimant was unable to recall a specific date for the onset of his right shoulder symptoms and the medical records did not reflect a right shoulder injury associated with the July 22, 2003 industrial injury. Moreover, the records did not document any direct trauma to the right shoulder during any of Claimant's falls. Although

Dr. Olsen acknowledged that Claimant reported some right shoulder symptoms while ambulating on crutches in 2013, the use of crutches "did not contribute or lead to the development of arthritis or the need for surgery." Dr. Olsen explained that, after Claimant's temporary right shoulder aggravation while using crutches in 2013, there was little mention of symptoms in the record until he began to suffer the results of end-stage osteoarthritis in 2019. In fact, imaging of the right shoulder on April 10, 2019 revealed severe osteoarthritis of the glenohumeral joint. The temporary aggravation of Claimant's right shoulder while using crutches in 2013 did not contribute to his need for surgery. Dr. Olsen explained that Claimant's end-stage osteoarthritis was familial and consistent with age-related degenerative arthritis. Dr. Olsen testified that any temporary increase in symptoms "was not great enough to affect the underlying progression of his osteoarthritis." He thus concluded that the total right shoulder arthroplasty requested by Dr. Schneider is not causally related to Claimant's July 22, 2003 admitted industrial injury. Based on the medical records and persuasive opinion of Dr. Olsen, Claimant's current right shoulder condition constitutes the natural progression of his preexisting degenerative osteoarthritis. Claimant's request for a total right shoulder arthroplasty with ATP Dr. Schneider is thus denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §840-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). Although medical evidence is not dispositive of causation, the ALJ may consider and even rely on expert medical opinion in resolving the issue of whether a causal connection exists between the claimant's work and and physical condition. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Davis v. Needles Homeowner's Association*, Inc. W.C. 4-702-329 (ICAO, Apr. 2, 2008). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

5. As found, Claimant has failed to demonstrate by a preponderance of the evidence that the total right shoulder arthroplasty requested by ATP Dr. Schneider is causally related to his July 22, 2003 admitted industrial injury. Initially, on July 22, 2003 Claimant suffered an admitted industrial injury to his left ankle during the course and scope of his employment with Employer. He specifically rolled his left ankle and injured his peroneal sheath and tendon. After numerous surgeries Claimant developed complications from infections and eventually underwent an amputation below his left knee on May 2, 2012. During 2013 Claimant reported bilateral shoulder pain since he had been using crutches. On July 13, 2018 Claimant underwent a left shoulder reverse arthroplasty.

6. As found, Claimant asserts that Dr. Schneider's request for a total right shoulder arthroplasty is causally related to his July 22, 2003 industrial injury because the use of crutches aggravated his condition. However, the evidence does not support Claimant's contention. Initially, the record is replete with evidence that Claimant suffers from degenerative osteoarthritis in both shoulders. Furthermore, Dr. Olsen persuasively explained that Claimant was unable to recall a specific date for the onset of his right shoulder symptoms and the medical records did not reflect a right shoulder injury associated with the July 22, 2003 industrial injury. Moreover, the records did not document any direct trauma to the right shoulder during any of Claimant's falls. Although Dr. Olsen acknowledged that Claimant reported some right shoulder symptoms while ambulating on crutches in 2013, the use of crutches "did not contribute or lead to the development of arthritis or the need for surgery." Dr. Olsen explained that, after Claimant's temporary right shoulder aggravation while using crutches in 2013, there was little mention of symptoms in the record until he began to suffer the results of end-stage osteoarthritis in 2019. In fact, imaging of the right shoulder on April 10, 2019 revealed severe osteoarthritis of the glenohumeral joint. The temporary aggravation of Claimant's right shoulder while using crutches in 2013 did not contribute to his need for surgery. Dr. Olsen explained that Claimant's end-stage osteoarthritis was familial and consistent with

age-related degenerative arthritis. Dr. Olsen testified that any temporary increase in symptoms "was not great enough to affect the underlying progression of his osteoarthritis." He thus concluded that the total right shoulder arthroplasty requested by Dr. Schneider is not causally related to Claimant's July 22, 2003 admitted industrial injury. Based on the medical records and persuasive opinion of Dr. Olsen, Claimant's current right shoulder condition constitutes the natural progression of his preexisting degenerative osteoarthritis. Claimant's request for a total right shoulder arthroplasty with ATP Dr. Schneider is thus denied and dismissed.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request for a total right shoulder arthroplasty proposed by Dr. Schneider is denied and dismissed.

2. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: October 29, 2019.

DIGITAL SIGNATURE:
Peter J. Cannici

_____
Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Whether the respondent hospital was properly joined as a party to this proceeding.

- Whether the language included in the claimant's Application for Hearing pled the issue of penalties with sufficient specificity.

- Whether the claimant has demonstrated, by a preponderance of the evidence, that penalties should be assessed against the respondent hospital pursuant to Sections 8-43-304 and 8-43-305, C.R.S., for the respondent hospital's alleged violation of Section 8-42-101(4), C.R.S. The claimant has requested penalties for the period of June 13, 2019 up to and including October 9, 2019.

FINDINGS OF FACT

1. On July 22, 2017, the claimant suffered an injury while working as a tow truck driver. The injury occurred while the claimant was loading an F250 pickup truck onto her assigned tow truck. To do so, the claimant was lying on the ground attaching the safety chains. At that time, the winch on the tow truck released and caused the truck to roll back. The claimant was underneath the truck when this occurred and one of the tires of the pickup truck rolled onto the claimant's right arm. The claimant was able to remove her arm from under the tire. However, the truck rolled a second time and the tire rolled onto the claimant's chest. The claimant was able to extract herself from out from under the truck and called for help. Bystanders assisted the claimant in calling the respondent employer and emergency services.

2. The claimant initially received medical treatment at Valley View Hospital (VVH) in Glenwood Springs, Colorado. That initial treatment included six days in ICU at VVH. At the time of the accident, the claimant lived in New Castle, Colorado. Subsequently, the claimant moved to Hotchkiss, Colorado. After her move, the claimant transferred medical treatment for her injury to Delta County Memorial Hospital, the respondent hospital in the current case.

3. On September 11, 2018, the undersigned ALJ held a hearing on the issues of: 1) whether the claimant was an employee of the respondent employer; 2) whether she suffered a compensable injury; 3) whether the claimant's medical treatment was reasonable, necessary, and related to that injury; 4) whether the claimant's medical treatment was authorized; 5) whether the claimant was entitled to temporary total disability (TTD) benefits; and 6) whether penalties were to be assessed for the respondent employer's failure to obtain and maintain workers' compensation insurance.

4. On October 11, 2018, the ALJ entered Findings of Fact, Conclusions of Law, and Order (FFCLO) in which the respondent employer was found to have been the employer of the claimant at the time of the July 22, 2017 injury. In addition, the ALJ ordered that the employer was responsible for the payment of medical treatment related to the claimant's work injury. That treatment included treatment the claimant received from Delta County Memorial Hospital.

5. At hearing, the claimant testified that she provided the respondent hospital a copy of the ALJ's FFCLO. The claimant has also provided copies of the FFCLO to collection agencies attempting to collect on behalf of the hospital. However, the claimant has continued to receive bills from the hospital for medical treatment related to her work injury.

6. The claimant also testified that the respondent employer has not paid any amount related to her work injury, as ordered by the ALJ. The claimant testified that to her knowledge the respondent employer has not made any payment to any of her medical providers.

7. On April 10, 2019, the claimant's attorney authored a letter in which he informed the hospital that they were to collect from the respondent employer. In that letter counsel referenced Section 8-42-101(4), C.R.S. which states:

> Once there has been an admission of liability or the entry of a final order finding that an employer or insurance carrier is liable for the payment of an employee's medical costs or fees, a medical provider shall under no circumstances seek to recover such costs or fees from the employee.

8. In addition, the April 10, 2019 letter notified the hospital that they could be subject to penalties pursuant to Sections 8-43-304 and 8-43-305, C.R.S.

9. Ms. B_____ is the hospital's Billing Manager for physician billing. Ms. B_____ explained that the hospital has two billing departments. Those departments are physician billing and facility billing. Ms. B_____ testified that she first became aware of issues surrounding the claimant's bills on May 7, 2019. At that time, Ms. B_____ received the April 10, 2019 letter from the claimant's counsel and a copy of the FFCLO. Based upon her understanding of the FFCLO, Ms. B_____ instructed her staff to send the claimant's bills to the Division of Workers' Compensation (DOWC).

10. At hearing, the hospital provided a copy of a communication from the DOWC in response the hospital's attempts to bill the DOWC. In that communication the DOWC confirmed that the employer did not send any payment to the DOWC; nor did the employer post a bond. In a later communication from the DOWC, it was clarified that even if monies had been paid by the employer to the DOWC, those funds would ultimately be distributed to the claimant and not to any specific medical provider.

11. On June 13, 2019, counsel for the hospital responded to the April 10, 2019 letter from the claimant's counsel. In that reply, the hospital reiterated the information obtained from the DOWC. In that same response, the hospital took the positon that "[the hospital's] only recourse is to resume collection from [the claimant]."

12. Ms. B_____ testified that physician billing has not sent a bill to the claimant since May 7, 2019. A bill was sent to the claimant on that date, which was the same date Ms. B_____ learned of the ALJ's FFCLO. Ms. B_____ credibly testified that the May 7, 2019 bill was generated automatically within the billing system. Records entered into evidence at hearing indicate that the physician billing department has not billed the claimant since May 7, 2019.

13. Ms. B_____ also testified that amounts are owed the claimant's medical treatment. However, Ms. B_____ is "holding" those bills as it is unclear to her where to send the billing. Based upon the information submitted via testimony and evidence, it does not appear to the ALJ that the hospital has sent any billing directly to the employer.

14. Ms. A_____ is the hospital's Business Office Manager. She and her staff handle facility billing. Ms. A_____ testified that she first learned that the claimant has an order regarding her medical bills in July 2019. Ms. A_____ testified that bills are sent to collections through an automated system. Records entered into evidence indicate that some of the claimant's bills from the facility billing department have been turned over to collections.

15. On June 18, 2019, the claimant filed an Application for Hearing (AFH) for penalties for the hospital's alleged violation of Section 8-42-101(4), C.R.S. That application was rejected by the Office of Administrative Courts (OAC) because the case caption listed the hospital as the employer and did not correctly identify the respondent employer.

16. On June 19, 2019, the claimant filed a second AFH endorsing the same penalty issues. This AFH was also rejected by the OAC because the hospital and the respondent employer were identified together as "employer". The staff with the OAC instructed the claimant's counsel to caption the case as identified by the DOWC (ie. the claimant vs. the uninsured respondent employer).

17. On June 20, 2019, the claimant filed a third AFH for penalties for the respondent hospital's alleged violation of Section 8-42-101(4), C.R.S. This application was processed by the OAC as the claimant and employer were properly identified on the case caption. In the June 20, 2019 AFH, "Penalties" was marked as an endorsed issue. In addition, the AFH included the following:

> 8-42-101(4) DELTA MEMORIAL HOSPTIAL; No Recovery from Employee, Once there had been Once there has been an admission of liability or the entry of a final order finding that an employer or insurance carrier is liable for the payment of an employee's medical costs or fees, a

medical provider shall under no circumstances seek to recover such costs or fees from the employee.

18. All of the AFHs filed by the claimant were provided to the respondent hospital. In addition, the hospital was provided notice of the October 9, 2019 hearing.

19. The respondent hospital argues that the claimant has received other medical treatment from their facilities that is unrelated to the claimant's work injury. However, neither party presented evidence clarifying this "other" and allegedly unrelated treatment.

20. The respondent hospital further argues that if they are unable to collect from the claimant and are unable to collect from the DOWC, they are left without recourse. The ALJ is not persuaded by this assertion. The ALJ finds no impediment to the respondent hospital simply collecting from the respondent employer. As indicated by communications entered into evidence, the employer has apparently attempted to file for bankruptcy and the claimant is a creditor.

21. The ALJ credits the claimant's testimony and the evidence entered into evidence and finds that the claimant has demonstrated that the respondent hospital has continued to bill the claimant after receiving notice of the FFCLO. Therefore, the ALJ also finds that the claimant has demonstrated that it is more likely than not that the respondent employer violated the language of Section 8-42-101(4), C.R.S.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (the Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and

action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2017).

4. The respondent hospital first argues that they were not properly joined in this case, and therefore a claim for penalties cannot be asserted against them. The ALJ disagrees. Section 8-43-304, C.R.S., governs when penalties may be imposed in a workers' compensation matter and provides, in relevant part, that:

> Any employer or insurer, or any officer or agent of either, or any employee, **or any other person** who violates articles 40 to 47 of this title 8, or does any act prohibited thereby, or fails or refuses to perform any duty. . . or fails, neglects, or refuses to obey any lawful order made by the director or panel or any judgment or decree made by any court as provided by the articles . . . shall also be punished by a fine of not more than one thousand dollars per day for each offense, to be apportioned, in whole or part, at the discretion of the director or administrative law judge. . .(*emphasis added*).

This provision has been construed as applying to violation of an order issued by an ALJ. *Giddings v. Industrial Claim Appeals Office,* 39 P.3d 1211 (Colo. App. 2001).

5. As one of the claimant's authorized medical providers, the ALJ concludes that the respondent hospital is a subject to the provisions of the Act. Therefore, the hospital can be found to be in violation or in compliance with the Act.

6. The ALJ concludes that the claimant correctly captioned this case as the claimant vs the respondent employer and regarding the respondent hospital. The language of Section 8-43-304, C.R.S. does not require that penalties be asserted against a "party" to the claim. Furthermore, the hospital's reliance on two Industrial Claim Appeals Office (ICAO) orders[1] is unfounded. Neither of those cases are determined on the issue of "joining" a party to a claim. Nor do those cases speak to the procedural process for assessing penalties against a non-party medical provider. The ALJ concludes that the respondent hospital was properly notified of their involvement in the claimant's claim as a medical provider and the claimant's allegations of a statutory violation.

7. The respondent hospital has also argued that the claimant did not meet the specificity requirement in filing the Application for Hearing (AFH) requesting penalties. Section 8-43-304(4), C.R.S., provides that in "any application for hearing for a penalty pursuant to subsection (1) of this section, the applicant shall state with specificity the grounds on which the penalty is being asserted." The failure to state the grounds for penalties with specificity may result in dismissal of the penalty claims. *In re Tidwell*, W.C. No. 4-917-514-03 (ICAO, Mar. 2, 2015).

[1] *Davis v. Cub Foods*, (WC 3-990-098; ICAO 11/20/93) and *Gutierrez v. Startek USA*, (WC 4-842-550-05; ICAO 8/29/14).

8. The purposes of the specificity requirement are to provide notice of the basis of the alleged violation so as to afford the putative violator an opportunity to cure the violation, and to provide notice of the legal and factual bases of the claim for penalties so that the violator can prepare its defense. *See Major Medical Insurance Fund v. Industrial Claim Appeals Office*, 77 P.3d 867 (Colo. App. 2003); *Davis v. K Mart,* W.C. No. 4-493-641 (ICAO, Apr. 28, 2004); *Gonzales v. Denver Public School District Number 1,* W.C. No. 4-437-328 (ICAP, Dec. 27, 2001). In essence, the notice aspect of the specificity requirement is designed to protect the fundamental due process rights of the alleged violator to be "apprised of the evidence to be considered, and afforded a reasonable opportunity to present evidence and argument in support of" its position. *In re Tidwell*, W.C. No. 4-917-514-03 (ICAO, Mar. 2, 2015). *Matthys v. City of Colorado Springs,* W.C. No. 4-662-890 (ICAO, Apr. 2, 2007). Of course, the statute does not prescribe a precise form for pleading penalties, and an ALJ may consider the circumstances of the individual case to determine whether the application for hearing was sufficiently precise to satisfy the statute. *See Davis v. K Mart*, W.C. No. 4-493-641 (ICAO Apr. 28, 2004).

9. As found, the claimant's AFH marked "Penalties" as an endorsed issue. In addition, the AFH included the following:

> 8-42-101(4) DELTA MEMORIAL HOSPTIAL; No Recovery from Employee, Once there had been Once there has been an admission of liability or the entry of a final order finding that an employer or insurance carrier is liable for the payment of an employee's medical costs or fees, a medical provider shall under no circumstances seek to recover such costs or fees from the employee.

10. The ALJ has considered the specific facts of this case and finds that the claimant has met the specificity requirement in the inclusion of the above language in her AFH. The claimant identified that that penalties were sought against the respondent hospital. The claimant also quoted the section of the Act that the hospital is alleged to have violated. The ALJ finds that the hospital was sufficiently notified of the issues to be addressed at hearing.

11. With regard to the issue before the ALJ, the ALJ notes that prior to the assessment of any penalties, the ALJ must first determine whether a party has violated any provision of the Workers' Compensation Act or an order. If the ALJ finds such a violation, penalties may be imposed if it is also found that the employer's actions were objectively unreasonable. Section 8-43-304, C.R.S*. City Market, Inc. v. Industrial Claim Appeals Office*, 68 P.3d 601 (Colo. App. 2003); *Pioneers Hospital of Rio Blanco County v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005); *Jimenez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo. App. 2003). The "objective standard" is measured by reasonableness of the insurer's action and does not require knowledge that the conduct was unreasonable." *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 907 P.2d 676 (Colo. App. 1995). Section 8-43-305,

C.R.S. provides that each day is a separate offense. Therefore, penalties may be assessed of up to $1,000.00 per day.

12. Section 8-42-101(4), C.R.S. provides: “Once there has been an admission of liability or the entry of a final order finding that an employer or insurance carrier is liable for the payment of an employee's medical costs or fees, a medical provider **shall under no circumstances** seek to recover such costs or fees from the employee (*emphasis added*).” The ALJ reads the legislature’s use of the language “shall” and “under no circumstances” to clearly state the intent that a medical provider shall cease all collection against a claimant once there has been an admission of liability or a final order.

13. In this case, the claimant seeks penalties for the hospital’s alleged violation of Section 8-42-101(4), C.R.S. for continuing to seek payment from the claimant for medical treatment. The claimant has requested penalties from June 13, 2019 up to and including the date of hearing, October 9, 2019. The ALJ calculates that this to be a total of 119 days.

14. The respondent hospital points to language found in Section 8-43-304(4), C.R.S. and argues that the claimant’s burden of proof is clear and convincing evidence. The ALJ disagrees with this assertion. Section 8-43-304(4), C.R.S. addresses what is to occur if penalties are alleged, but the violation has been cured. Then, and only then, does the burden of proof increase from a preponderance of the evidence to clear and convincing evidence. Here, there has been no cure of the hospital’s violation as they continue to seek payment from the claimant. Therefore, Section 8-43-304(4), C.R.S. is not applicable in the current case.

15. As found, the respondent hospital has continued to bill the claimant for medical treatment related to her work injury. In addition, the hospital’s facility billing department has turned the claimant’s balances over to collections. As found, these continued attempts to collect from the claimant constitute a violation of the clear language of Section 8-42-101(4), C.R.S. The respondent hospital was notified that they were to no longer pursue collection against the claimant. Nevertheless, they continue to seek payment from the claimant, despite the notification that the respondent employer is responsible for payment of the claimant’s work related medical expenses.

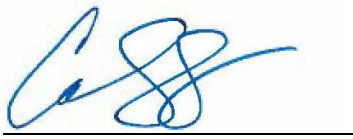
16. The hospital has argued that there are certain bills at their facilities that may not be part of the treatment of the claimant’s work related injury. While that may be the case, the ALJ finds no persuasive evidence on the record to indicate that the hospital has attempted to clarify any non-work related treatment. It is the position of this ALJ that is the responsibility of the medical provider to correctly categorize the claimant’s medical treatment as work related and non-work related. The hospital’s practice of billing the claimant for any and all treatment, despite the clear language of Section 8-42-101(4), C.R.S., further demonstrates the hospital’s clear disregard of the Act.

17. Based upon all of the foregoing, the ALJ concludes that penalties are appropriate in this matter. Given the continued statutory violation, the ALJ orders the respondent hospital to pay to the claimant penalties of $750.00 per day for the period of June 13, 2019 through and including October 9, 2019. This results in total penalties of $89,250.00 ($750.00 per day for 119 days). No portion of this total shall be apportioned to the uninsured employer fund.

ORDER

It is therefore ordered that the respondent hospital shall pay the claimant penalties of $89,250.00.

Dated this 30th day of October 2019.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. **In addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

ISSUES

- Did Claimant prove entitlement to temporary disability benefits, and if so, in what amount?
- Did Claimant prove Respondent must reimburse his private health insurance, Cigna, for reasonably necessary and related medical treatment?
- Did Claimant prove Respondent must reimburse him for out-of-pocket medical expenses?

STIPULATIONS

1. The February 12, 2019 appointment with Dr. Sergiu Botolin, the x-ray performed on February 8, 2019, and seven physical therapy sessions at Colorado Sport and Spine Center were reasonably necessary and related to Claimant's work injury.

2. The hours Claimant missed from work on January 14 through January 18, 2019 were causally related to his work injury.

3. Respondent filed a "medical only" General Admission of Liability on September 3, 2019, the day before the hearing.

4. Claimant's average weekly wage is $1,002.25.

5. Dr. Kurz will be Claimant's authorized treating physician going forward.

FINDINGS OF FACT

1. Claimant works for Employer as an "investment recovery specialist." On January 8, 2019, he developed pain in his neck and right scapular area while replacing batteries on city transit buses. He finished his shift and went home, assuming the pain would subside.

2. Claimant awoke the next morning with severe pain in his neck and right scapula, radiating down his right arm to his fingers. Claimant went into work that day and reported the injury to his supervisor. He asked if he could see a chiropractor he had seen once before. The supervisor allowed Claimant leave work and go to the chiropractor. Claimant missed 3.5 hours from work that day (January 9) because of pain and treatment causally related to the admitted injury.

3. On January 10, Claimant told his supervisor the chiropractic and massage treatment did not help. Claimant's supervisor advised him to file an injury report. Claimant left work 1.15 hours early that day because of pain related to the admitted work injury.

4. On Friday, January 11, 2019, Claimant saw Dr. Kyle Akers, Employer's designated occupational medicine physician. Dr. Akers diagnosed right neck, upper back, and shoulder pain of "undetermined origin," and opined, "this could be a temporary aggravation of a pre-existing, underlying, non-work-related issue." Dr. Akers took claimant off work until his next appointment. Employer paid Claimant full wages on January 11.

5. Claimant missed work from January 14, 2019 through January 18, 2019.

6. Claimant had MRIs of his neck and right shoulder on January 16, 2019. The cervical MRI showed an "acute to subacute" disc herniation with osteophytes causing C6 nerve root compression and muscle spasm. The shoulder MRI showed mild tendinosis, mild osteoarthritis, and questionable mild subacromial/subdeltoid bursitis.

7. Claimant followed up with Dr. Akers on January 18, 2019 to review the MRIs. Dr. Akers thought the shoulder findings were "unremarkable" and warranted no treatment. Dr. Akers opined the cervical findings were chronic and developed over many years. He was under the mistaken impression Claimant had received significant treatment for neck pain before the work accident. Dr. Akers opined the symptoms were less than 50% likely related to Claimant's work. He did not discuss Claimant's work status.

8. Claimant missed work on January 22, 2019 because of the work injury.

9. Claimant called Dr. Akers the morning of January 23, 2019 about his work status. Dr. Akers told Claimant was released from care with no restrictions. Claimant reported to work approximately one hour after speaking with Dr. Akers.

10. Claimant missed 4 hours off work on January 23, 2019 because of the work injury.

11. Claimant typically worked eight-hour shifts, five days per week.

12. Employer did not pay Claimant wages for the time he missed on January 9, 10, 14-18, 22, and 23, 2019. Claimant missed a total of 56.65 hours during that period. He used a combination of sick leave, vacation leave, voluntary time off, and personal leave to cover the time he missed from January 9, 2019 through January 23, 2019.

13. On January 23, 2019, Respondent filed a Notice of Contest and stopped authorized treatment.

14. On February 8, 2019, Claimant had an x-ray that was reasonably necessary to evaluate the work injury. The total charges were $75. Claimant paid a $45 co-pay and Cigna applied a negotiated provider discount of $30, reducing the remainder to $0.

15. Claimant saw his PCP, Dr. Sergiu Botolin, on February 12, 2019. Dr. Botolin referred Claimant to physical therapy to treat the work injury. Dr. Botolin's office billed $423 for the appointment. Claimant's co-pay was $40. Cigna applied a negotiated provider discount of $183.10, and paid the remaining balance of $199.90.

16. Claimant attended seven physical therapy sessions at Colorado Sport and Spine Center from February 19, 2019 through April 9, 2019. The associated charges, discounts, and payments were:

Total Billed:	$2,505.01
Less negotiated provider discounts:	($2,099.01)
Less Claimant co-pays	**($175.00)**
Total paid by Cigna	**$231.00**

17. Claimant's out-of-pocket expense totaled $260 ($45 + $40 + $175 = $260).

18. Claimant attended an IME with Dr. Elizabeth Bisgard on May 20, 2019 at Respondent's request. Dr. Bisgard opined Claimant suffered a work-related injury on January 8, 2019. Dr. Bisgard opined all of Claimant's treatment for the work injury was reasonably necessary and appropriate.

19. Respondent filed a "medical only" General Admission of Liability on September 3, 2019. The GAL did not admit for temporary disability benefits.

20. Claimant's testimony was credible and persuasive.

21. Claimant proved he missed 56.65 hours from work because of his January 8, 2019 work injury before Dr. Akers released him to full duty.

22. Claimant did not miss more than two weeks of work.

23. Claimant proved the February 8, 2019 x-ray, the February 12, 2019 appointment with Dr. Botolin, and the physical therapy sessions were reasonably necessary to cure and relieve the effects of the admitted injury.

CONCLUSIONS OF LAW

A. Temporary disability benefits

A claimant is entitled to TTD benefits if the injury causes a disability, the disability causes the claimant to leave work, and the claimant misses more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The claimant must establish a causal connection between a work-related injury and the wage loss to obtain TTD benefits. *Id*. The term disability connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function, and (2) impairment of wage-earning capacity as demonstrated by the claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). Impairment of earning capacity may be evidenced by a complete inability to work or restrictions that impair the claimant's ability effectively and properly to perform their regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

TTD benefits are not payable for the first three days of lost time unless the period of disability lasts longer than two weeks. Section 8-42-103(1)(a), (b). To calculate whether

an injured employee missed more than two weeks of work, the individual days missed are added rather than simply using the period over which the claimant missed sporadic days. *Mead v. Reinke Wholesale Supply*, W.C. No. 4-930-571 (October 1, 2014).

The persuasive evidence shows Claimant missed 56.65 hours of work because of his work injury. That equates to slightly more than seven days of work (56.65 ÷ 8 hours = 7.08 days). Two weeks of Claimant's regular shifts equals ten working days. Because Claimant missed less than ten days from work, he is not entitled to TTD for the first three days he missed. Thus, Claimant lost 32.65 hours of compensable time from work (56.65 hours – 24 = 32.65 hours).

The stipulated AWW of $1,002.25 equates to an average hourly wage of $25.06 ($1,002.25 ÷ 40 = $25.06). This results in a compensable wage loss of $818.21, after subtracting the three-day wait period. ($25.06 x 32.65 hours = $818.21). Respondent owes Claimant $545.47 in temporary disability benefits ($818.21 x 2/3 = $545.47).

B. Medical expense reimbursements

Section 8-42-101(6)(a) provides,

> If an employer receives notice of injury and . . . fails to furnish reasonable and necessary medical treatment to the injured worker for a claim that is admitted or found to be compensable, the employer or carrier shall reimburse the claimant, or any insurer or governmental program that pays for related medical treatment, for the costs of reasonable and necessary treatment that was provided.

Similarly, WCRP 16-12(F) provides,

> An injured worker shall never be required to directly pay for admitted or ordered medical benefits covered under the Workers' Compensation Act. In the event the injured worker has directly pay for medical services that are then admitted or ordered as covered under the Workers' Compensation Act, the payer shall reimburse the injured worker for the amounts actually paid for authorized expenses . . . .

Claimant and Cigna paid for reasonably necessary medical treatment related to the admitted injury. Claimant is entitled to reimbursement of his out-of-pocket costs, which total $260.

At hearing, the parties expressed uncertainty about whether Respondent's obligation to reimburse Cigna is limited by the workers' compensation fee schedule. The ALJ concludes the plain language of § 8-42-101(6)(a) requires Respondent to reimburse Cigna what it paid to the providers. The statute states, "the employer . . . shall reimburse . . . any insurer . . . that pays for related treatment." There is no mention of the fee schedule. Additionally, the ALJ believes the General Assembly intended to ensure private health insurance carriers or other non-workers' compensation payers (such as Medicaid or Medicare) be made whole if they paid for treatment that should have been covered by

the employer or its insurer. That intent could be thwarted if the employer or carrier's liability were limited to the fee schedule.

Therefore, the ALJ concludes Respondent must reimburse Claimant $260 for his co-pays, and reimburse Cigna $231 for amounts it paid the providers.

ORDER

It is therefore ordered that:

1. Respondent shall pay Claimant $545.47 in temporary disability benefits.

2. Respondent shall pay statutory interest of 8% per annum on all benefits not paid when due.

3. Respondent shall reimburse Claimant $260 for medical co-pays.

4. Respondent shall reimburse Cigna $231 for injury-related treatment.

5. All issues not decided herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 30, 2019

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that she sustained a compensable injury to her left and right cubital tunnel and left and right carpal tunnel?

II. Has Claimant shown, by a preponderance of the evidence, that she is entitled to all reasonable, necessary, and related medical treatment rendered in connection therewith?

STIPULATIONS

If the claim were found to be compensable:

1) Claimant's Average Weekly Wage is $785.65.

2) Claimant would be entitled to 5 days of Temporary Total Disability ("TTD"), plus TTD from May 24, 2019, through August 4, 2019.

The ALJ accepted these stipulations.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Claimant is a 32-year-old, right-hand-dominant female formally employed as a claims specialist for CSAA Insurance Exchange. At hearing, Claimant testified that the onset of symptoms was sometime in December of 2018. She had only recently returned to work, after a lengthy absence, from June 2018 through October 1, 2018, for an unrelated medical issue.

2. Claimant went to her primary care provider, Melody Ronk, P.A.-C., at Dynamic Healthcare Team on February 11, 2019. She reported pain in her wrists, which was worse in the morning. She described burning in her hands, which improved after a few hours, but then she reported random pain during the day. P.A. Ronk reported that Claimant was on chronic narcotic pain medications for an unrelated medical issue, but that they were not helping with her wrist pain. (Ex. T, p. 80).

3. On March 6, 2019, Claimant returned to P.A. Ronk. She now reported that her body aches were getting worse. The muscle relaxers provided at her last visit were of no help; they just made her sick. Her symptoms included joint pain in knees, elbows, hands, and ankles with stiffness and muscle aches all the time, which had been going on for years but always dx [diagnosed] as something else. (Ex. U, p. 83).

4. On March 27, 2019, Claimant underwent EMG and nerve conduction studies. She was diagnosed with moderate-to-severe chronic bilateral carpal tunnel syndrome with no evidence of ulnar neuropathy. (Ex. V, pp. 94-95).

5. Claimant then spoke with her employer, and went to Centura Centers for Occupational Medicine, on April 1, 2019. She was evaluated by Valerie Joyce, F.N.P. N.P. Joyce took a job duties history. Physical examination reveal a positive Tinel's sign and a positive Phalen's sign bilaterally. N.P. Joyce assessed Claimant with bilateral carpal tunnel syndrome and noted: "The cause of this problem does not appear to be work-related" (W, p. 97). Claimant was referred back to her PCP at this time. (Ex. W. p. 99).

6. On April 17, 2019, Claimant presented to Dr. Jeffrey Watson for a surgical evaluation. Claimant reported having numbness and pain along the ulnar side of her hands, right worse than left. Her pain level was 8/10. On examination, Dr. Watson noted that Claimant was in no acute distress. She had a negative Tinel's test bilaterally for the carpal tunnel but she did have a "fairly positive" Tinel's over the bilateral cubital tunnels.

7. Dr. Watson also reviewed the nerve conduction studies, and requested further information, as the EMG did not correlate with the clinical examination. Despite this lack of correlation, he recommended bilateral carpal tunnel release and ulnar nerve transposition. (Ex. Y, pp. 103-04).

8. On May 24, 2019, Dr. Watson performed a right carpal tunnel release and right subcutaneous ulnar nerve transposition. (Ex. Z, p. 106). On June 28, 2019, Dr. Watson performed a left carpal tunnel release and left subcutaneous ulnar nerve transposition. (Ex. CC, p. 115). [At hearing, Claimant testified that she returned to work on August 5, 2019 following these procedures].

Claimant's and Co-workers' Hearing Testimony

9. At hearing, Claimant testified that her shift typically began at 8 a.m., and she was typically finished by 5 p.m. She worked in a call center with a headset and dual monitors (Ex. B, pp 28-29). She had an ergonomic mouse and ergonomic keyboard, with the ability to raise and lower her workstation. For the first 10 minutes in her day, Claimant prepared claims from the previous night. This required her to use the keyboard and the '10-key.'

10. The next part of her day consisted of calling the insured to discuss claims. As Claimant talked on the phone, she entered information on the keyboard and 10-key. She would type out the entire conversation as it was occurring- both the insured's, and her

responses. Both Claimant and her former coworkers (Jennifer Bustos and Earl Emery) acknowledged that they did not type constantly throughout the day; they also used their mouse to navigate pages and fill in blanks. Claimant, Bustos, and Emery all acknowledged that they were not typing at the same time they were using the mouse. Ms. Bustos could not recall there being a "slow period" during the year stating that people get into accidents all the time, which meant she was always busy.

11. Earl Emery worked for Employer from 2005 to 2018 as a claims adjuster in multiple departments. Mr. Emery testified that he would spend around seven hours of a normal shift typing. He further stated that the workload was consistent except for when he could come back from vacation or medical leave. Mr. Emery explained that Employer would not want to leave claims unattended due to an employee going on vacation or taking a leave of absence. To solve this issue, Employer would reassign all claims while the employee was away. Consequently, when the employee returned, there would be zero claims in the file. Mr. Emery testified that it would then take a few weeks for that employee to build up a file with new claims. For these reasons, Ms. Emery stated that if he were to be observed at his job soon after he returned from vacation or medical leave, that the observer would fail to obtain an accurate picture of what his job actually entailed.

12. Claimant explained that her job duties and the amount of typing performed remained consistent with each department. The only department that was different was internal underwriting where she worked for a year. This department handled internal issues, which did not require that she type out and document as much as the other departments. However, she stated that this department still required her to do lots of typing, because she would have to type out all policy changes that would arrive through email or fax.

13. On average, Claimant testified each phone call with the insured took between 30 and 40 minutes, although others were longer. Typically, when she finished, there was nothing else to do on the claim. During her day, she also had to take calls where the insured was calling regarding a total loss of the vehicle. If the claim has not been filed, she has to start it, get the information for the insured, and enter it into the computer. She has two 15-minute breaks during the day and a 1-hour unpaid lunch. Once a month there was a 1-hour team meeting, and every quarter there was a 1-hour department meeting. Jennifer Bustos and Earl Emery confirmed this workday routine. There was periodic overtime, but that was minimal, amounting to two to three hours per week when available. Claimant would often work such overtime.

14. In December of 2018, Claimant began to experience tingling and pain in her bilateral hands. She noticed that the symptoms would get worse the more she typed. The symptoms continued to progress, which led to Claimant notifying her supervisor in the beginning of 2019. Her supervisor did not mention anything about seeing a workers' compensation doctor. Eventually, as the symptoms progressed, Claimant decided to go see her primary care physician, Dr. Watson.

Expert Opinions

15. Dr. Elizabeth Bisgard, MD, performed an Independent Medical Examination on behalf of Respondents (Ex. A, C) She explained that nothing in Claimant's job duties would be a risk factor for cubital tunnel syndrome. Dr. Bisgard indicated that if Claimant's estimates of 7½ hours of typing per day could be substantiated by a jobsite analysis, then she would be borderline for meeting the repetition category for carpal tunnel syndrome. (Ex. A, p. 7). There were two types of carpal tunnel risk factors associated with computer use as outlined in W.C.R.P. 17, Ex. 5 pp. 28-29. Keyboarding is actually not a risk factor where a worker is typing 7 hours or fewer per day.

16. Jill Adams performed a job site analysis on August 15, 2019, by observing Claimant perform her job duties on site. Claimant's job description largely matched what Claimant had previously indicated to Dr. Bisgard, and was based on Ms. Adams' interview with Claimant. (Ex. B, p. 23). Claimant's workstation was the same as when she reported an onset of symptoms.

17. In her report, Ms. Adams noted the following breakdown:

Job Task	**Second per min.**	**Minutes per hour**	**Hours a day**
Keyboard Use	23-25	23-25	3.0-3.5
Mouse Use	25-27	25-27	3.0-3.5

Based on this, Ms. Adams did not find any Primary or Secondary Risk Factors associated with Claimant's job duties. (Ex. B, pp. 25-26). Ms. Adams also provided an analysis of right hand mouse use that indicated roughly 3 hours and 21 minutes per day, which was within the same range shown when she was observing the split in daily tasks between keyboard use and mouse use. (Ex. B, pp. 26-27). In her report, Ms. Adams noted that Claimant had recently returned from medical leave. At hearing, Ms. Adams stated that Claimant informed her on the date of the assessment that she would not be handling as many claims due to her recent return from leave.

18. At hearing, Ms. Adams testified that she did not observe any other employees, nor had she ever performed an assessment on somebody holding the same job as Claimant. Ms. Adams agreed that the medical treatment guidelines instruct job evaluators to consider any change in frequency in occupational or non-occupational tasks. She also agreed that she did not initially take into account that Claimant's recent return to work would affect the overall typing that she would have to do.

19. In her rebuttal testimony, Claimant testified that the job site analysis did not accurately represent her job duties because she was light on work at the time, having just returned

from leave, and before her workload could ramp back up to normal. She testified that when Ms. Adams did her job assessment, she had around ten claims. Claimants testified that she would normally have around fifty claims in her file. Claimant stated that Ms. Adams observed her make one phone call but that the person did not answer the phone. She acknowledged, however, that she did not type at the same time that she used her mouse. Further, she did not use her mouse during the times that she was on the phone entering information into the database.

20. Ms. Adams explained at hearing that the volume of work would be unlikely to alter the results in a significant way. Additionally, she stated that the results do not indicate a lack of activity because of a lack of work; rather they show an even split in the job duties between keyboard use and mouse use.

21. Dr. Bisgard testified at hearing that the medical literature, as presented at her training from Dr. Kathryn Mueller [former medical director for the Division of Workers' Compensation], indicated that patients typically perform poorly in assessing the amount of time each day they spend performing specific tasks at work. Dr. Bisgard confirmed that Claimant has carpel tunnel syndrome in both hands. She also stated that she believed the surgery performed by Dr. Watson was reasonable, necessary, and related to relieve the effects of Claimant's carpel tunnel syndrome.

22. Dr. Bisgard affirmed her opinion that none of Claimant's job duties presented a risk factor for bilateral cubital tunnel syndrome, nor did Claimant's job duties plausibly meet the threshold for bilateral carpal tunnel syndrome. She concluded that to a reasonable degree of medical probability Claimant's occupational disease claims were not cause by her work.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado ("Act"), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). A claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

B. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

C. In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

D. In this instance, the ALJ finds that Claimant, along with Jennifer Bustos and Earl Emery, testified in good faith about their respective work environments to the best of their ability. They made appropriate concessions on cross-examination where appropriate. In the final analysis, however, the ALJ finds that the clinical, systematic, and objective observations of Jill Adams are more persuasive when the fact-finder must precisely apportion the workload. Ms. Adams does this as part of her profession, and no alternate objective quantitative analysis exists in the record. The ALJ is also not persuaded that the timing of her site visit materially affected the results, as Claimant worked steadily while under observation, regardless of what remained in her respective pipeline. In the final analysis, the ALJ finds that Ms. Adams' figures much more closely quantify Claimant's workload than the good-faith estimates of the lay witnesses.

Occupational Disease

E. For an injury to be compensable under the Act, it must "arise out of" and "occur within the course and scope" of employment. *Price v. ICAO*, 919 P.2d 207, 210 (Colo. 1996). An injury occurs "in the course of" employment where claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" requirement is narrower and requires claimant to show a causal connection between the employment and injury such that the injury has its origins in the employee's work related functions and is sufficiently related to those functions to be considered part of the employment contract. *Id*.

F. An occupational disease arises not from an accident, but from a prolonged exposure occasioned by the nature of the employment. *Colorado Mental Health Institute v. Austill,* 940 P.2d 1125 (Colo. App. 1997). Occupational diseases are subject to a more rigorous test than accidents or injuries before they can be found compensable. All elements of the four-part test mandated by the statute must be met to ensure the disease arises out of and in the course of employment.

> "Occupational disease" means a disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment. C.R.S. § 8-40-201(14).

G. A claimant seeking benefits for an occupational disease must establish the existence of the disease and that it was directly and proximately caused by the claimant's employment duties or working conditions. *Wal-Mart Stores, Inc. v. ICAO*, 989 P.2d 251, 252 (Colo. App. 1999). This section imposes additional proof requirements beyond that required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993).

H. The ALJ takes administrative notes of W.C.R.P. 17, Ex. 5 pgs. 28-29, which reads as follows:

DIAGNOSIS-BASED RISK FACTORS

Hours are calculated by totaling the cumulative exposure time to the risk over an 8 hour day. Breaks or periods of inactivity or performing other types of work tasks are not included. Unless the hours are specifically stated below, "combination" of factors described below uses the Secondary Risk Factor Definitions from the Risk Factor Definition Table.

Diagnosis	**Evidence FOR Specific Risk Factors**			**Evidence AGAINST Specific Risk Factors**	**Non-Evidence-Based Additional Risk Factors to Consider.** These factors must be present for at least 4 hours of the work day, and may not overlap evidence risk factors.[1]
	Strong Multiple high quality studies	**Good** One high quality study or multiple adequate studies	**Some** One adequate study		
Carpal Tunnel Syndrome		Combination of force, repetition, and vibration.[2,4] Combination of repetition and force for 6 hours. Combination repetition and	Wrist bending or awkward posture for 4 hrs. ***Mouse use more than 4 hours.*** Combination cold and forceful repetition for 6	***Good evidence - Keyboarding less than or equal to 7 hrs. in good ergonomic position IS NOT RELATED.***	High repetition defined as task cycle times of less than 30 seconds or performing the same task for more than 50% of the total cycle time.[5] Tasks using a hand grip. Extreme wrist radial/ulnar positions or elbows in awkward postures.

		forceful tool use with awkward posture for 6 hours. Combination force, repetition, and awkward posture. Combination of 2-pound pinch or 10-pound hand force 3 times or more per minute for 3 hours.	hours - Frozen food handling	Good evidence- Repetition alone less than or equal to 6 hrs. IS NOT RELATED.	

I. Claimant's own testimony, and the testimony of her witnesses, does not establish any of the primary or secondary risk factors in the Guidelines. Claimant did not type continuously throughout the day, nor did she type and use the mouse simultaneously. Although Claimant disagreed with Ms. Adams' job site analysis, her disagreement was based on the volume of work she performed during the analysis. However, Ms. Adams analysis does not show a lack of activity, but rather a relatively even distribution of activity (between keyboarding and mousing) during the period of observation, with minimal down time between each task. Claimant did not testify that she used her mouse more often during the period of observation than she had in the past, but only that that she did not have a normal volume of work that day. There is no evidence in the record that Claimant used her mouse for over 4 hours in a workday. Further, there is no evidence in the record to suggest that Claimant's workstation was not in an ergonomic position.

J. Similarly, Claimant's symptoms do not account for her long history of joint pain throughout her body as a more likely cause of her issues. Nor does it account for the bilateral nature of her conditions. If her symptoms were from excessive use of the mouse (as opposed to excessive typing), one might expect her symptoms to be to her right hand only.

K. The results of the jobsite analysis, combined with the expert testimony of Dr. Bisgard, persuade the ALJ that an occupational disease has not been shown by Claimant by a preponderance of the evidence.

Medical Benefits

L. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. § 8-42-101. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The claimant

bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990).

M. Claimant did not meet her burden of proof to establish a right to the requested medical benefits. Concerning the bilateral carpal tunnel surgeries, Claimant did not establish that she performs such tasks frequently enough per day to meet any of the risk factors outlined in the Guidelines. Concerning the bilateral cubital tunnel surgeries, Claimant did not establish that any of her job duties would have caused these conditions. While Claimant's surgeries as performed by Dr. Watson were reasonable and necessary, the evidence does not show that such surgeries were related to Claimant's work. Her claim for medical benefits must therefore be denied.

ORDER

It is therefore Ordered that:

1. Claimant's claim for Workers Compensation benefits is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 30, 2019

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

I. Whether Claimant proved by a preponderance of the evidence he sustained compensable industrial injuries on September 17, 2018 (W.C. No. 5-097-097) and October 19, 2018 (W.C. No. 5-091-029).

II. If Claimant proved he sustained compensable injuries whether Claimant proved by a preponderance of the evidence the medical treatment he received was reasonable, necessary and related.

III. If Claimant proved he sustained compensable injuries, determination of Claimant's authorized treating physician (ATP).

IV. If Claimant proved he sustained compensable injuries, whether Claimant proved by a preponderance of the evidence he is entitled to temporary indemnity benefits.

STIPULATIONS

The parties stipulated to an average weekly wage (AWW) of $1,515.05.

FINDINGS OF FACT

1. Claimant is a 31-year-old male who has worked for Employer for 12 years. The last six years Claimant has worked as a forklift operator, driving large pieces of equipment. He testified the equipment vibrated when driven and he experienced variable road conditions, including potholes.

2. Claimant has suffered from low back symptoms since 2008. In June 24, 2008, Claimant's primary care physician diagnosed him with a low back strain after Claimant lifted a pallet at work. Claimant testified he did not receive additional medical treatment or work restrictions and did not miss any time from work due to the incident. Claimant further testified that, between 2008 and 2016, he experienced occasional back pain that he treated with over-the-counter pain medication, but did not seek medical attention or miss any time from work due to his low back condition.

3. On June 14, 2016, Claimant presented to Julie Parsons, M.D. at Employer's authorized provider Advanced Urgent Care with complaints of low back pain after bending over and tying his shoe while at work. Dr. Parsons opined that the act of bending over to tie a shoe is an activity of daily living and is not work-related. She released Claimant to work without any restrictions. Claimant testified he did not miss any time from work due to this incident.

4. On August 9, 2016, Claimant returned to Dr. Parsons with complaints of low back pain and right leg pain and numbness after lifting a block of cement at work. Dr. Parsons diagnosed Claimant with a low back strain, prescribed Claimant medication, and released Claimant to full duty. Claimant continued to treat with medication and physical therapy. Dr. Parsons placed Claimant at maximum medical improvement (MMI) on October 3, 2016 with no permanent impairment or restrictions. Claimant was instructed to finish his remaining physical therapy sessions. Claimant testified he was advised to continue with a home exercise program and stretching. He further testified he may have missed a few days of work due to this incident but not many.

5. Claimant initially testified that, between 2016 and 2018, he experienced back pain two to three times per week, but later testified he only experienced back pain "once in a while" with sitting and vibration after working many hours. Claimant testified he was able to perform his regular duties as a forklift operator between October 2016 and September 2018.

6. Claimant testified that on September 17, 2018 he felt an increase in back pain when the forklift he was driving fell into a pothole in the work yard.

7. On September 17, 2018, Claimant presented to his primary care physician, Salud Family Health Centers (Salud), with complaints of low back pain over the last week. Deanna Romero, P.A. documented,

> 30 yr old male in for c/o back injury, 1 yr ago. Has balls in back that flair (*sic*). Did not have any studies done, was told he had problems with nerve and was sent to PT. Now was feeling back starting and so he started stretching and running, now pain is worse.

The medical record for this evaluation contains no mention of an alleged work incident or work-related etiology. On exam, P.A. Romero noted tenderness to palpation over the lumbar spine and decreased range of motion. Straight leg raise was positive on the left. X-rays taken that day revealed scoliosis and loss of lordosis but were otherwise negative. P.A. Romero gave an assessment of acute right-sided low back pain without sciatica. She prescribed Claimant prednisone and Flexeril.

8. Claimant testified he had been experiencing back pain the week prior to going to the doctor on September 17, 2018. Claimant testified he did home exercises, including stretching and some running, but this did not help the back pain. Claimant testified he did not injure or worsen his back pain while doing his exercises or running. Claimant denied having a back injury one year prior to September 17, 2018 as indicated in the note including any injury lifting something heavy at work.

9. Brian McCarthy, Operations Manager, testified on behalf of Respondents. He testified that on September 18, 2018 he became aware Claimant was asking to go to the doctor for his back. Mr. McCarthy spoke to Claimant, who informed Mr. McCarthy that he was running at home and felt pain in his low back. Mr. McCarthy then took

Claimant to Rachelle Grieve's office and again clarified with Claimant he felt pain at home while running with his children.

10. Mr. McCarthy testified he has worked with Claimant for eight years and has communicated with Claimant in English all the time, discussing many issues. Mr. McCarthy testified he has never had an issue communicating in English with Claimant. Mr. McCarthy further testified he had no doubt or misunderstanding as to Claimant's reported mechanism of injury and that it was not work-related.

11. Rachelle Grieve, Human Resources Manager, testified at hearing on behalf of Respondents. Ms. Grieve testified she met with Claimant and Mr. McCarthy on September 18, 2018 and asked Claimant what caused his back symptoms. Claimant stated he was running with his kids and felt pain in his low back. Ms. Grieve questioned Claimant if anything happened at work and Claimant said no. As Claimant confirmed his condition was not work-related, Ms. Grieve proceeded to provide Claimant information regarding short-term disability. Ms. Grieve testified that the interaction took place in English and there was no possibility Claimant miscommunicated what happened. Ms. Grieve testified she has had numerous conversations with Claimant in English and never had an interpreter present.

12. Claimant testified he did not hurt his back running or playing with his children and denied telling Mr. McCarthy and Ms. Grieve this. He testified his primary language is Spanish and he speaks some English.

13. On September 24, 2018, Claimant attended at follow-up appointment with Lisa Ruschak, M.D. at Salud. Dr. Ruschak noted an initial injury one year prior from lifting something heavy at work with pain returning recently. The medical record contains no mention of a specific incident or cause of Claimant's recent pain. Dr. Ruschak ordered a lumbar spine MRI, which was performed on September 26, 2018. Gregory Broering, M.D. interpreted the MRI results and noted: (1) small right paracentral disc extrusion at L3-4 resulting in mild right lateral recess stenosis without visualized nerve root contact and (2) small midline disc protrusions at L4-5 and L5-S1, mild bilateral lateral recess stenosis at L4-5. Dr. Ruschak subsequently referred Claimant for evaluation at Boulder Neurological Spine and Associates and physical therapy.

14. Claimant returned to work performing his regular job duties on October 15, 2018. Claimant testified when he returned to work he was still experiencing back pain.

15. Claimant saw Allan Nanney, M.D. at Boulder Neurological and Spine Associates on October 15, 2018. Dr. Nanney noted Claimant preferred to communicate in Spanish but spoke "very good" English. Claimant reported a two-year history of low back pain that worsened in the last four weeks. Dr. Nanney noted the lumbar MRI showed L3-4, L4-5 and L5-S1 degenerative disc disease that was moderate for Claimant's age with some mild stenosis at each level. Dr. Nanney diagnosed Claimant with spondylosis with radiculopathy. He agreed with Dr. Ruschak's recommendation for

physical therapy and emphasized core strengthening. He noted that further treatment could include injections, but lumbar fusion was "absolutely not" indicated.

16. Claimant underwent initial evaluation for physical therapy on October 16, 2018. The physical therapist noted the original onset of pain occurred in June 2016 while performing heavy lifting at work, with a subsequent decrease in symptoms until a "recent exacerbation" approximately 4.5 weeks ago. The physical therapist further noted, "Patient reports most recent onset was due to driving forklift for up to 12 hours/day over bumpy/uneven surfaces with lots of potholes." This statement is the first reference in the medical records to alleged work-related etiology of Claimant's recent symptoms. The medical record for this evaluation contains no mention of the specific incident in which Claimant allegedly hit a pothole on September 17, 2018 and jarred his back.

17. Claimant testified that on October 19, 2018 he was driving the "650" forklift moving pipes when he hit a large hole and felt pain in his back and right hip. Claimant testified the pain was worse than the pain he experienced on September 17, 2018. Claimant reported the alleged injury to Employer and was sent for medical evaluation.

18. Mr. McCarthy testified Claimant spoke with him twice after returning to work in October 2018. He testified Claimant asked for financial help to pay for his out-of-pocket expenses for his medical treatment. Claimant informed Mr. McCarthy that he had not yet received short-term disability and that his physical therapy treatment was going to cost him $70.00 per visit. Mr. McCarthy informed Claimant that his medical bills would not be paid for by the company and that everyone pays their own bills. Claimant asked if there was something the company could do to pay for his doctor's bills. Claimant stated he had used his HSA card on his wife's braces and did not think there was anything left on the card. Claimant again expressed that he hoped the company would help him. He indicated he had spoken with other employees and he indicated he would get a lawyer. Mr. McCarthy informed Claimant he would let Ms. Grieve know there was an issue with his short-term disability.

19. Claimant subsequently spoke with Mr. McCarthy on the afternoon of October 19, 2018. Claimant again asked if the company was going to help him. Mr. McCarthy indicated that if Claimant already used his HSA card, then he would have to use his health insurance. Claimant informed Mr. McCarthy that he would have to pay out of pocket for the bills and wanted help. Mr. McCarthy informed Claimant that he paid the same deductible as Claimant and personal insurance was not paid for by the company.

20. At the end of the work day on October 19, 2018, Mr. McCarthy was informed that Claimant had felt pain in his hip while at work and he filed a workers' compensation claim.

21. Claimant saw Alice Nguyen, P.A. at authorized provider Advanced Urgent Care on October 19, 2018 with complaints of bilateral hip leg and groin pain, mostly right-sided. Claimant reported he was driving a forklift backwards and hit uneven ground and

the forklift began to shake back and forth while Claimant was wearing a seatbelt. P.A. Nguyen noted Claimant was still having back pain from a prior work injury and could have exacerbated this. On exam, P.A. Nguyen noted tenderness along the right anterior hip and groin, full range of motion of both hip with minimal pain, and no bruising or inguinal hernias. X-rays of the right hip and pelvis demonstrated no evidence of acute abnormalities. P.A. Nguyen diagnosed Claimant with hip pain and a right hip strain and prescribed gabapentin.

22. On October 31, 2018, Dr. Parsons diagnosed Claimant with a low back strain and referred Claimant for physical therapy.

23. For the work period 9/10/18 to 9/16/18, Claimant worked 40 regular hours and 15.2 hours of overtime. For the work period 9/17/18 to 9/23/18, Claimant worked 3 regular hours and was paid 24 hours in paid time off and 8 hours of vacation time. For the work period 9/24/18 to 9/30/18, Claimant worked 12.3 regular hours. For the two work periods from 10/1/18 to 10/14/18, Claimant did not work any hours. Claimant testified he was unable to work due to his back pain. Claimant denied ever missing 3-4 weeks of work for a low back injury prior to September 17, 2018.

24. On November 14, 2018, Dr. Parsons released Claimant from her care, noting Claimant's claim had been denied.

25. In February 2019 Claimant was working and reported low back pain to a supervisor. Claimant completed an incident report on February 5, 2019. The incident report indicated a date of injury of September 19, 2018 and a mechanism of injury of bouncing around while wearing a seatbelt while driving a forklift on a rough road. The incident report also noted Claimant had a prior injury in 2008 and continued to have pain and then aggravated his injury in 2016.

26. Claimant was sent to authorized provider Concentra Medical Center and saw Darla Draper, M.D. on February 15, 2019. Claimant reported having right hip pain since October 19, 2018. Claimant reported driving a forklift, hitting a bump and the forklift shaking and seatbelt locking, causing right hip pain. Dr. Draper gave an assessment of right groin strain, referred Claimant for physical therapy, and released Claimant to modified duty.

27. On February 20, 2019, Claimant saw John Sacha, M.D. at Concentra. He reported that, on September 19, 2018, he was driving a forklift, hit some bumps and felt an acute onset of low back pain with some right leg numbness and tingling. Dr. Sacha noted a workers' compensation injury in 2008 with chronic low back pain on and off and a workers' compensation injury in 2016 with low back pain and leg pain in the same distribution as Claimant's current symptoms. Dr. Sacha opined Claimant had an exacerbation of his preexisting lumbar radiculopathy and recommended physical therapy and an epidural steroid injection.

28. On May 8, 2019, Lawrence Lesnak, D.O. performed an independent medical examination (IME) at the request of Respondents. Dr. Lesnak reviewed medical records dating back to June 2008 as well as a written statement of Mr. McCarthy, and conducted a physical examination and interview of Claimant. Claimant reported that he experienced acute back pain after driving over a pothole at work on September 18, 2018, and pain in his right groin and low back pain after the forklift he was driving shifted over an uneven surface on October 19, 2018. Dr. Lesnak noted Claimant completed a psychosocial screening examination and reported a very extremely high level of depressive symptoms as well as an extremely high level of somatic pain complaints, indicating Claimant's reported subjective complaints may be exaggerated and unreliable. Dr. Lesnak documented that on physical examination Claimant demonstrated numerous pain behaviors and non-physiologic findings, with absolutely no reproducible clinical exam findings to suggest any type of symptomatic lumbar or sacral radiculitis, radiculopathies or myelopathies whatsoever. Dr. Lesnak concluded there was no evidence of any compensable injury as a result of the alleged September 2018 or October 2018 incidents. He opined that Claimant had a fairly trivial incident on October 19, 2018 that reproduced significant subjective pain complaints. Dr. Lesnak opined that the mechanism of operating a forklift over uneven terrain while wearing a lap belt is not a mechanism of injury that would cause lumbar spine pathology or aggravated pre-existing lumbar spine pathology. Dr. Lesnak further opined that regardless of causality, no further medical treatments, diagnostic testing or interventions would be appropriate as Claimant did not demonstrate any reproducible findings.

29. Claimant underwent physical therapy and, in June 2019, an intraarticular injection, lumbar epidural steroid injection, and transpiriformis sciatic nerve block, none of which provided significant improvement.

30. On August 8, 2019 Caroline Gellrick, M.D. performed an IME at the request of Claimant. Dr. Gellrick reviewed records dating back to June 24, 2008, including Dr. Lesnak's IME report, and physically examined Claimant. She also reviewed photographs Claimant took depicting the terrain at the worksite and a seat of one of the forklifts. Dr. Gellrick noted no interpreters were present at the evaluations by Claimant's providers. Claimant reported to Dr. Gellrick that on September 18, 2018 the forklift hit a big hole causing the forklift to jar and jump, causing compression in his back and neck. Claimant denied reporting to anyone he was running with his daughters and did not know why the provider at Salud said he started stretching and running with worsening back pain for a week. Dr. Gellrick opined that the September 17, 2018 incident aggravated Claimant's lumbar disc degenerative disease and the October 19, 2017 incident further aggravated his back condition with possible development of a hernia. Dr. Gellrick disagreed with Dr. Lesnak's opinion that the reported mechanism of injury would not be expected to cause lumbar spine pathology or aggravation, citing medical literature indicating heavy equipment operation can produce ongoing low back symptoms and increased aggravation of underlying degenerative disc disease. Dr. Gellrick further opined that work-restrictions were appropriate commencing September 17, 2018 and continuing and that Claimant's medical treatment to date was reasonable, necessary and related to Claimant's compensable injuries.

31. Exhibit 15 consists of two photographs taken by Claimant on October 25, 2018. The photographs depict a forklift seat cushion that is torn and partially eroded. Claimant acknowledged the photographs are not of the seat in the forklift he was driving on September 17, 2018 or October 19, 2018. Claimant did not take photographs of the forklift he was driving on those specific dates. Claimant testified he drove the forklift photographed in the pictures approximately three times per week for up to 12 hours per day. Claimant testified the seat pictured in the photographs had been in this condition for a year prior to the picture in October 2018. Claimant testified that the seats and suspension for the forklifts he was driving on September 17, 2018 and October 19, 2018 were also not in good condition.

32. Regarding the work yard terrain, Claimant initially testified it was uncommon for the yard to have potholes and an uneven surface. Claimant first testified that, prior to September 2018, he never had low back pain from hitting potholes. Claimant then testified he had hit some potholes prior to September 2018, but they weren't "that hard." When asked how often he hit potholes prior to September 2018, Claimant testified he tried to avoid the potholes because "they weren't fixing potholes." Claimant then testified there were potholes prior to September 2018 but "not so bad ones," and the potholes were getting worse in September 2018 and October 2018.

33. Dr. Lesnak testified at hearing on behalf of Respondents as an expert in pain management and rehabilitation. Dr. Lesnak testified consistent with his IME report and continued to opine Claimant did not sustain a work-related injury. He explained Claimant had longstanding chronic pain, noting that Claimant could have a flare up of back pain anytime, anyplace, and for any reason, as evidenced by the incident in which Claimant experienced low back pain and numbness and tingling from bending over and tying his shoe. Dr. Lesnak testified that Claimant's MRI showed typical age-related changes throughout the lumbar spine without any acute injury. Dr. Lesnak testified such degenerative findings can cause pain and insidious onset of back pain is very common.

34. The ALJ finds Dr. Lesnak's testimony and opinion, as well as the testimony of Mr. McCarthy and Ms. Grieve, more credible and persuasive than the opinion of Dr. Gellrick and testimony of Claimant.

35. Claimant failed to prove by a preponderance of the evidence the alleged work incidents on September 17, 2018 and October 19, 2018 proximately caused an injury or otherwise aggravated or accelerated a pre-existing condition.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of

proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or

infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v.* Americold D/B/A Atlas Logistics, W.C. No. 4-960-513-01, (ICAO, Oct. 2, 2015)

However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); ***Atsepoyi v. Kohl's Department Stores***, W.C. No. 5-020-962-01, (ICAO, Oct. 30, 2017). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). *Fuller v. Marilyn Hickey Ministries, Inc., W.C. No. 4-588-675, (*ICAO, Sept. 1, 2006*).*

As found, Claimant failed to prove by a preponderance of the evidence he sustained compensable injuries on September 17, 2018 and October 19, 2018. There are multiples inconsistencies in Claimant's testimony and his reports regarding the mechanisms of injury. Claimant initially testified that, between 2016 and 2018, he experienced back pain two to three times per week. Claimant then changed his testimony and stated he only experienced back during this time period once in a while, attributing those instances to experiencing the vibration of the forklift several hours a day. Claimant subsequently testified potholes in the work yard were uncommon, then changed his testimony to state that there were potholes in the yard before September 2018, but they were not bad and he did not experience back pain from them, contradicting his earlier testimony. Claimant then alleged that the potholes worsened in September and October 2018. Claimant's contradictory testimony undermines his credibility.

Additionally, the medical records and testimony of Mr. McCarthy and Ms. Grieve contradict Claimant's contention that he experienced an acute onset of pain on September 17, 2018 as a result of his forklift falling into a pothole. The September 17, 2018 Salud medical record contains no mention of any work-related cause of Claimant's current symptoms, but instead specifically notes Claimant reporting experiencing back flare-ups and worsening back pain after stretching and running. This corroborates the testimony of Mr. McCarthy and Ms. Grieve, who both credibly and persuasively testified Claimant informed them he felt back pain while running at home with his kids and denied any work injury. Between September 17, 2018 and October 15, 2018, Claimant saw P.A. Romero, Dr. Ruschak and Dr. Nanney, none of whom noted any reported work-related incident or cause of Claimant's current symptoms. The first reference in the medical records to Claimant's purported work-related mechanism of injury is the October 16, 2018 physical therapy record, which took place after Claimant returned to work. Additionally, as Claimant had twice before reported alleged work injuries (the shoe tying incident and the concrete lifting incident), Claimant was aware of how to report a work injury and of the process. The ALJ is persuaded that if Claimant had, in

fact, alleged a work-related injury to Employer on September 18, 2018, Employer would have sent Claimant for medical evaluation.

The ALJ is not persuaded there was an issue of miscommunication with the providers or Employer regarding the alleged mechanism of injury. Although Claimant's first language is Spanish, Mr. McCarthy and Ms. Grieve credibly and persuasively testified they always communicated with Claimant in English, and Dr. Nanney noted Claimant spoke "very good" English. Dr. Gellrick noted an interpreter was not present at the evaluations with Claimant's providers. Assuming, *arguendo*, this resulted in some miscommunication regarding the reported mechanism of injury, it does not explain how Claimant was subsequently able to clearly communicate his pothole allegations to providers without an interpreter present at multiple evaluations after October 16, 2018. Mr. McCarthy credibly and persuasively testified that, upon Claimant's return to work in October 2018, Claimant twice approached him requesting Employer's financial assistance for his medical treatment. After Mr. McCarthy informed Claimant his non-work-related medical expenses would not be paid by Employer, Claimant alleged a new work injury. The timing of such allegation is a coincidence at best and suspicious at worst.

Although Dr. Gellrick opined Claimant sustained work injuries on both September 17, 2018 and October 19, 2018, Dr. Gellrick's opinion is premised on Claimant's reports regarding the mechanism of injury which the ALJ does not find credible. Dr. Lesnak credibly and persuasively opined Claimant did not sustain any work injuries and the MRI demonstrated typical age-related degenerative findings. The preponderant evidence does not establish Claimant's employment caused, aggravated or accelerated his condition. Based on the totality of the credible and persuasive evidence, Claimant failed to meet his burden to prove he sustained compensable injuries on September 17, 2018 or October 19, 2018.

As Claimant failed to prove he sustained a compensable injury, the remaining issues of medical benefits, authorized treating physician and temporary disability benefits are moot.

ORDER

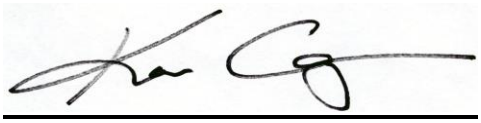
1. Claimant failed to prove by a preponderance of the evidence he sustained compensable injuries on September 17, 2018 and October 19, 2018. Claimant's claims for benefits are denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty

(20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 1, 2019



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

- What is Claimant's average weekly wage (AWW)?
- Did Claimant prove entitlement to TTD from October 15, 2018 ongoing?

FINDINGS OF FACT

1. Claimant works part-time for Employer in the "nursing relief pool." Her duties include transporting patients to medical facilities in Colorado Springs or Denver. She occasionally stays with the patients overnight, resulting in fluctuating overtime.

2. Claimant suffered an admitted injury to her neck, upper back, and right shoulder on September 13, 2018 while transporting a combative patient to Parkview Hospital.

3. Claimant saw Employer's designated provider at Southern Colorado Clinic on September 14, 2018. She reported pain in her neck, upper back, right shoulder, and low back. PA-C Schwartz diagnosed cervical, thoracic, lumbar, and right shoulder "sprains" and "strains." He prescribed cyclobenzaprine and ibuprofen and referred Claimant for massage therapy. He released Claimant to work with no restrictions.

4. Claimant followed up with Dr. Terrence Lakin at Southern Colorado Clinic on September 27, 2018. She reported a 6/10 pain level. She said she was "working without restrictions but feels due to increased pain and working on the men's unit during one-on-one she may benefit from some restrictions." Examination showed spasm and trigger points in the paracervical muscles, pain to palpation of the upper and lower back muscles, and painful shoulder range of motion. Dr. Lakin administered multiple trigger point injections and imposed work restrictions of "please keep off forensic units/high-risk patient contact."

5. Employer offered Claimant modified work answering the phone in the staffing office. Her duties were entirely sedentary and primarily involved picking up the telephone receiver, transferring callers, and writing phone messages by hand.

6. Claimant returned to PA-C Schwartz on October 11, 2018. She reported similar symptoms and pain levels, except her low back was improved. Claimant requested more trigger point injections "because this really helped her." She was working within her restrictions, but told PA-C Schwartz "she wants to get back to her normal duties, as float, feeling intimidated in Staffing office on limited duty." PA-C Schwartz noted, "all I can do is try to get her back into client care, but indicate she should not be primary, i.e., frontline for management of out of control clients, but able to take care of routine care patients."

7. Claimant's supervisor, Frankie M[Redacted], observed Claimant occasionally while she was working modified duty in the staffing office. Claimant never mentioned having any difficulty doing the work and exhibited no signs of pain or discomfort. Ms. M[Redacted] credibly testified she would have changed Claimant's duties if Claimant had indicated the work was bothering her.

8. Claimant was approved for intermittent FMLA leave several months before her work accident. On March 15, 2018, her PCP completed an FMLA form opining Claimant's uncontrolled diabetes, diabetic neuropathy, and chronic foot pain caused flare-ups that prevent her from working 1-4 days per month, 1-4 days per episode. Based on the documentation from Claimant's PCP, Employer approved intermittent FMLA, from February 23, 2018 through February 22, 2019.

9. Claimant stopped working on October 15, 2018 and went out on FMLA leave.

10. Employer's benefits coordinator, Nancy S[Redacted], processed Claimant's FMLA request in October 2018. Ms. S[Redacted] was familiar with Claimant's longstanding need for intermittent FMLA leave because she previously processed FMLA requests for both Claimant's personal medical issues and issues related to Claimant's son. In October 2018, Claimant requested a "block of time" off under FMLA. Claimant gave no indication the FMLA leave was related to the work-related injury, and Ms. S[Redacted] reasonably concluded it was a continuation of Claimant's personal or family medical issues.

11. Ms. S[Redacted] gave Claimant a new FMLA form to take to her doctor but approved FMLA leave effective October 16, 2018 because Claimant had already been approved for intermittent leave through February 22, 2019. Claimant never returned the new FMLA paperwork, so Employer continued to operate under the previously-approved leave.

12. Ms. S[Redacted] spoke with Claimant by telephone on at least one occasion over the next few months regarding her work status. At some point, Claimant asked why she was not being paid workers' compensation benefits. Ms. S[Redacted] said she thought Claimant was out on FMLA for a personal condition, to which Claimant replied, "Oh, that's right." Ms. S[Redacted] encouraged Claimant to apply for short-term disability and left STD application packets for her at the front desk at least twice.

13. Claimant continued treating for the work-related injury over the next several months after taking FMLA leave. No medical report indicates she had stopped working because of the injury, and instead her off-work status was repeatedly attributed to her personal medical condition. For instance, a November 5, 2018 report noted she was "currently not working not due to this injury." The same report stated Claimant had "multiple life stressors, going to court regarding 16 yo son that is truant. On FMLA for son care." On November 27, 2018, PA-C Schwartz noted, "she is currently not working due to being on FMLA from her PCP." Dr. Lakin's December 26, 2018 report stated, "her

company put her on FMLA . . . she has feet peripheral neuropathy and other family stressors with truant son and deaths in family recently."

14. PA-C Schwartz increased Claimant's work restrictions on November 27, 2018 to no lifting over 30 pounds and no repetitive lifting over 10 pounds. The increased restrictions caued no greater impact on her earning capacity because she was already off work on family medical leave. Employer's FMLA approval paperwork advised Claimant she would need "a completed fitness-to-return certification" from her PCP clearing her to perform the essential functions of her job before she could return to work. Because Claimant had voluntarily gone out on FMLA leave rather than injury-related leave, Employer did not offer modified work in response to changing work restrictions.[1]

15. Claimant had an MRI of the right shoulder on January 30, 2019. It showed supraspinatus and infraspinatus tendinopathy with an apparent low grade 8mm x 8mm partial supraspinatus and infraspinatus tendon tear.

16. Dr. Lakin reviewed the MRI report on February 6, 2019, and disussed Claimant's work status with her. He noted,

> She is currently not working. When questioned about this she states her primary care provider does not want her to work as the work environment is too dangerous and she risks reinjury. Questioned whether work could not accommodate restrictions she stated she has not spoken to them. They have just not scheduled her. She states she is off on FMLA.

Dr. Lakin changed Claimant's work restrictions to no lifting over one pound with the right arm. He referred Claimant to Dr. David Weinstein for a surgical evaluation. Dr. Lakin thought Claimant probably did not need surgery, but she had failed conservative care and should have the opportunity to consult with a surgeon. He changed Claimant's work restrictions to no lifting over one pound, pending the evaluation with Dr. Weinstein.

17. Dr. Weinstein ultimately determined Claimant was not a surgical candidate. He recommended she try more PT with dry needling.

18. On March 7, 2019, Claimant's PCP completed a "Fitness-to-Return Certification" form releasing Claimant "to work a full, regularly scheduled day with no restrictions" beginning March 11, 2019.

19. Claimant followed up with Dr. Lakin on March 11, and he liberalized her restrictions to occasionally lifting 5-10 pounds, no over shoulder work, and no excessive use of the uninjured left arm to compensate. Ms. M[Redacted] offered to accommodate the injury-related restrictions from Dr. Lakin and return Claimant to work answering phones in the staffing office. Claimant accepted the modified duty offer and returned to work on March 14, 2019.

[1] Even if Claimant had still been working, no change would have been necessary because the modified duty answering telephones in the staffing office was well within the November 27, 2018 restrictions.

20. Ms. M[Redacted] credibly testified that she took Claimant off the schedule in October 2018 because she went on FMLA leave. Had Claimant not gone out on FMLA, Employer would have accommodated the injury-related work restrictions provided by her ATPs from October 2018 through March 2019.

21. On May 14, and June 10, 2019, Claimant's ATP noted she was working with restrictions and having no issues.

22. Claimant's PCP completed a new FMLA certification form on May 20, 2019. She reiterated the same issues as on the March 2018 form, *i.e*., flare-ups that would prevent Claimant from working 1-4 times per month, 1-4 days per episode. She attributed Claimant's need to miss work to uncontrolled diabetes, diabetic neuropathy, chronic foot pain, and "care for son who needs close supervision – behavior issues." The PCP also cited chronic knee pain and frequent falls. There was no mention of any work-related condition limiting Claimant's ability to work.

23. On June 27, 2019, Claimant told PA-C Schwartz computer work was aggravating her neck pain. He encouraged her to raise her screened eye level so she is not looking down and use good posture and ergonomic technique that her workstation. That report is the first mention in the medical records of Claimant having any difficulty tolerating modified duty.

24. Ms. M[Redacted] was not aware of Claimant's purported difficulty working on a computer, because Claimant never mentioned it. Had she known of the issue, she would have made other arrangements so Claimant did not have to work on the computer. Ms. M[Redacted] reiterated Claimant was predominantly answering phones on modified duty.

25. Claimant again took FMLA leave starting July 7, 2019. She did not ascribe her leave request to any injury-related cause.

26. Employer made another modified job offer on July 16, 2019.

27. On August 5, 2019, Dr. Lakin discharged Claimant for noncompliance, including excessive "no-shows" and rescheduling appointments. He continued Claimant's restrictions until modified by the new ATP.

28. Claimant's new ATP is Dr. Bradley at Emergicare. Claimant saw Dr. Bradley on September 11, 2019, at which time he prescribed gabapentin and cyclobenzaprine. He continued largely the same work restrictions imposed by Dr. Lakin's office.

29. Ms. S[Redacted] and Ms. M[Redacted]'s testimony was credible and persuasive.

30. Claimant failed to prove her missed time and resulting wage loss at any time on or after October 15, 2018 was proximately caused by her industrial injury.

31. Claimant's AWW is $553.83, based on the six pay periods (i.e., 12 weeks) from June 23, 2018 through September 14, 2018. Claimant earned gross wages of $6,645.96 during that period. ($6,645.96 ÷ 12 = $553.83).

CONCLUSIONS OF LAW

A. Claimant's AWW is $553.83

Section 8-42-102(2) provides compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But § 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that seems most appropriate under the circumstances. The entire objective of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993).

The ALJ is not persuaded by either party's AWW calculation. Claimant's proposed AWW of $800 per week substantially overstates her typical earnings. Her weekly earnings in 2018 topped $800 only once, and the rest of her paychecks were much lower. But Respondent's proposed AWW of $498.84 is not persuasive either, because it excludes the pay period ending September 14, 2018, which was Claimant's second-highest pay period of the year. There is no persuasive evidence the industrial injury distorted Claimant's earnings in the period ending September 14, 2018, and therefore no reason to exclude it from consideration.

This ALJ is generally inclined to average the 12-weeks immediately preceding the injury unless there is a persuasive reason to use a longer or shorter period. Here, the ALJ sees no compelling reason to look back further than 12 weeks in calculating Claimant's AWW. Claimant earned $6,645.96 in the six pay periods (i.e., 12 weeks) from June 23, 2018 through September 14, 2018. As found, Claimant's AWW is $553.83.

B. Claimant did not prove entitlement to TTD benefits

A claimant is entitled to TTD benefits if the injury caused a disability, the disability caused the claimant to leave work, the claimant missed more than three regular working days, and suffered an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The claimant must establish a causal connection between a work-related injury and the wage loss to obtain TTD benefits. *Id*.

As found, Claimant failed to prove her work injury proximately caused a wage loss on or after October 15, 2018. The persuasive evidence shows the missed time and resulting wage loss were due to personal issues and not the work injury. Claimant did not mention the work injury when she took FMLA leave in October 2018 or in July 2019. Medical records around October 2018 show no injury-related reason for leaving work. Claimant repeatedly told her ATPs she was on FMLA for non-work-related reasons. When Claimant stopped working in October 2018, Employer was accommodating her injury in a sedentary position far more restrictive than necessitated by her minimal restrictions.

The ALJ is not persuaded Claimant could not tolerate modified duty, particularly since she was simultaneously telling her ATPs she wanted to return to the nursing pool. There is no contemporaneous medical documentation of any injury-related problem working in the staffing office, and the only issue she mentioned was feeling "intimidated." Claimant told no one the job tasks were flaring her symptoms, and Ms. M[Redacted] observed no outward signs of pain or limitation. Claimant's injury-related medical condition would not reasonably have precluded answering phones and taking messages. Moreover, the ALJ is persuaded Mr. M[Redacted] would have immediately changed Claimant's job tasks had she received any indication Claimant could not tolerate answering the phone and taking messages.

ORDER

It is therefore ordered that:

1. Claimant's average weekly wage is $553.83.

2. Claimant's request for TTD benefits commencing October 15, 2018 is denied and dismissed.

3. All issues not decided herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 1, 2019

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that she is entitled to post-MMI medical maintenance medical care as recommended by Dr. Sparr?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Claimant has been employed over 27 years with the City of Colorado Springs as a Senior Maintenance Tech. This work involves trash removal, cleaning bathrooms, hedge trimming, irrigation repair and maintenance, playground monitoring and "anything having to do with maintenance of a park." This is a physically demanding job involving digging, hauling and lifting.

2. Claimant testified that she had changed multiple basketball rims on prior occasions. On May 25, 2016, Claimant was replacing another basketball rim. Claimant removed the last bolt and the entire backboard began unexpectedly falling towards her. While holding the rim, the Claimant jumped off the back of her truck where she had been standing. The Claimant landed on her feet at an awkward angle on concrete and sustained injury to both knees and her lower back.

3. The Claimant was referred for medical treatment to the Occupational Health Clinic for the City of Colorado Springs ("City Clinic"). The majority of her treatment was with Paula Homberger, PA-C for 2016, 2017, and into 2018, according to the DIME report. She had also been referred to an orthopedist, Dr. Walden for conservative treatment during this time. (Ex. B, pp. 7-20).

4. Claimant was later referred to orthopedist Dr. Derek Purcell, MD for further evaluation of her bilateral knee injury. On April 19, 2018, Dr. Purcell recommended conservative treatment only, but indicated, "We discussed at length that this can be a very burdensome problem. She may have a period of time where she improves and then worsens again" (Ex. 4, pp. 31-33).

5. Claimant was also referred to Accelerated Recovery Specialists, Michael Sparr, MD., for further evaluation and treatment. (Ex. 2, p. 3). On July 23, 2018, Dr. Sparr's diagnosis included contusion of left and right knee, degenerative joint disease of the knee, trochanteric bursitis, left hip, sacroiliitis, lumbar facet joint arthropathy and piriformis syndrome. *Id* at 5. Dr. Sparr recommended a combination stem cell platelet rich plasma (PRP) injection, and suggested that a repeat MRI of the left knee may be appropriate at a future date, since "the left knee MRI showed findings suggestive of a small area of stress fracture of the posterior aspect of the lateral tibial plateau". *Id* at 3.

6. Claimant returned to Dr. Sparr on August 21, 2018 for a follow up evaluation. Dr. Sparr again referenced his prior request for PRP and stem cell injections for the left knee, along with deep tissue massage in the hip and buttock, in conjunction with the trochanteric bursa injection. Dr. Sparr performed that injection at the appointment on August 21, 2018. (Ex. 2, pp. 8-10).

7. Claimant's final visit with Paula Homberger, PA-C, was on September 13, 2018 (Ex. A, p. 3). At that time, Claimant demonstrated full range of motion in the lumbar spine without guarding. She also showed good range of motion of both of her knees with very mild crepitus. Claimant continued however, to report achiness in her back and right knee, with constant pain in her left knee and left hip. MMI was anticipated within one or two visits. Claimant was to follow up with Dr. Kurz.

8. The Claimant followed up with Dr. Sparr on October 11, 2018. She indicated to Dr. Sparr that she received beneficial results from the PRP injection and the deep tissue massage. Dr. Sparr anticipated continuing improvement. (Ex. 2, pp. 11-12). As a result, Dr. Sparr ordered a short course of chiropractic treatment, combined with trigger point injections throughout the back, buttock, hip and thigh. In addition, Dr. Sparr recommended continuing physical therapy at the City Clinic, with aggressive deep tissue work. This medical provider again suggested a repeat MRI of the left knee should the left knee pain persist. (Ex. 2, p. 12).

9. Five days later, on October 16, 2018 Claimant was evaluated by Dr. Nicholas Kurz with the City Clinic. In her intake form (Ex. 3, p. 30), Claimant noted that Dr. Sparr had recommended 'pain shot's and chiropractic for back, pelvis, and knees. She stated that she is attending physical therapy once per week, and that it is helping. *Id.* She indicated that she still feels pain in her left knee (3 to 4), right knee (2 to 3), hip (4), and back (2 to 3). Claimant marked her pain diagram consistent with those complaints. *Id.*

10. Despite this, Dr. Kurz placed the Claimant at maximum medical improvement and concluded that all injuries had "resolved". He stated no medical maintenance or impairment rating was appropriate. Dr. Kurz stated in his report that Claimant "was able to complete a full squat w/o c/o" [without complaint]. (Ex. 3, p. 28). Dr. Kurz has evaluated the Claimant on this occasion only. In his narrative, Dr. Kurz notes that Claimant's appointment began at 8:19 a.m., and his notes were electronically signed at 9:07 a.m. [It is unclear from this record if Claimant's *appointment* began at this time, or if this signified the onset of *personal contact* with her, or if this is when he first *reviewed her file*].

11. At hearing, Claimant testified that she was upset and angry after reviewing Dr. Kurz's report "…because everything that was written on that report was false." Claimant stated that she completed a pain diagram at every appointment with the Occupational Health Clinic, including the date of her

appointment with Dr. Kurz. Claimant testified she did not advise Dr. Kurz that her symptoms had 'resolved'. Claimant indicated that when the appointment began, she told Dr. Kurz how she got hurt, and described her symptoms. Then he 'went out of the office and came back in and released me." She thought the appointment lasted "less than ten minutes."

12. Regarding Dr. Kurz' observation that she could perform a full squat, the following exchange took place:

Q In his report, Dr. Kurz says…."Able to do a complete squat without complaint" Agree with that?
A I do not.
…..
Q Describe the squat you did in his office.
A When he was in the office, and he asked me to do a squat, I looked directly at him, and I told him I could not do a squat. And he's like – he tells me to – to at least try. So I ask him is it okay if I hold on to the table that was in the room. And he said, " Do what you have to do ." So as I started to squat down, I actually reached for his hand, to help me back up.

Q All right. And you – are—can you squat by yourself, unassisted?
A No, I can't. (Hearing transcript, p. 18).

13. Claimant further testified that she already had a physical therapy appointment scheduled at the City Clinic for later that same day, but Dr. Kurz cancelled it, and told her she could not go.

14. Respondents filed a Final Admission of Liability consistent with Dr. Kurz' October 16, 2018 report, denying any medical impairment and medical care post-MMI. The Claimant timely appealed by requesting a DIME. Dr. Sharma was selected as the DIME physician and the evaluation occurred on April 5, 2019. (Ex. 5, p. 34).

15. Dr. Sharma, upon providing a detailed review of medical records along with an evaluation of the Claimant, concluded that the Claimant did qualify for impairment ratings. Dr. Sharma assigned a four percent (4%) extremity rating to the right knee, four percent (4%) extremity rating to the left knee and eight percent (8%) whole person impairment for the lumbar spine. (Ex. 5, pp. 55-57; 60-63). Dr. Sharma recommended maintenance medical care in the form of massage therapy and acupuncture, not to exceed twelve visits. (Cl. Ex. 5, pg. 58). Respondents admitted to the impairment ratings provided by Dr. Sharma, but continued to deny maintenance medical care. (Ex. 1, pp. 1-2).

16. Claimant testified that she continues to experience constant pain down the left side as well as low back pain. She has periodic leg numbness and difficulty

sleeping at night. The Claimant testified that her condition has worsened since her medical care was terminated. She is still able to perform her job duties, "but I do them in a very different way." She reports having to intermediate breaks, relax, stretch, and try to "get myself situated." After relaxing, however, she finds it difficult to get up to walk.

17. Claimant, through counsel, indicated that she was not interested in the post-MMI treatment recommended by the DIME, but instead requested the ALJ to order the post-MMI treatment as recommended by Dr. Sparr.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado is to assure quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1).* Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. *Section 8-43-201, C.R.S.* A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979).*

B. In determining credibility, the Administrative Law Judge should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil 3:16.* The Administrative Law Judge, as the fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Trumbull, 802 P.2d 1182, 1183 (Colo. App. 1990).* In this instance, the Administrative Law Judge finds Claimant to be forthright and credible, both to her medical providers, and in her testimony.

C. In accordance with *Section 8-43-215, C.R.S.*, this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the Administrative Law Judge has made credibility determinations, drawn plausible inferences from the record and resolved essential conflicts in the evidence. *See Davidson v. Industrial Claim Appeals Office, 84 P.3d 1023 (Colo. 2004).* This decision does not address every item contained in the record, instead, incredible or implausible testimony or unpersuasive arguable inferences have been

implicitly rejected. *Magnetic Engineering, Inc., v. Industrial Claims Appeals Office, 5 P.3d 385, (Colo. App. 2000).*

Medical Treatment, Generally

D. Respondents are liable for medical treatment reasonably necessary to cure or relieve the effects of an industrial injury. *Section 8-42-101*. Even if the Respondents admit liability, they retain the right to dispute the reasonable necessity or relatedness of any particular treatment, and the mere occurrence of a compensable injury does not compel the Administrative Law Judge to approve all requested treatment. *Snyder v. City of Aurora, 942 P.2d 1337 (Colo. App. 199)7; McIntyre v. KI, LLC., W.C. No. 4-805-040 (July 2, 2010).* The Claimant must prove that an injury directly and proximately caused the condition for which she seeks treatment, and that the treatment is reasonably necessary. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office, 989 P.2d 251 (Colo. App. 1999); Snyder v. Industrial Claim Appeals Office, 942 P.2d 1337 (Colo. App. 1997).*

Post MMI-Maintenance Medical Care, Generally

E. The Claimant has the burden to establish by a preponderance of the evidence that her request for maintenance medical benefits is reasonable, necessary and related to relieve the effect of the industrial injury or to prevent further deterioration of the Claimant's condition. *Grover v. Industrial Commission, 759 P.2d 705 (Colo. 1988), Van Meter v. City Market, Industrial Claims Appeals Office 4-781-504-02-2012).* The question of whether a need for treatment is causally connected to an industrial injury is a question of fact for the Administrative Law Judge.

Post-MMI Maintenance Medical Care, as Applied

F The Claimant has received extensive care since the date of injury. She treated with PA-C Homberger for over two years, and received referrals to two separate orthopedists, along with treatment with Dr. Sparr. She undertook physical therapy, and reported that it was beneficial. Dr. Purcell indicated that Claimant has a "very burdensome problem", and could improve, but then worsen with time. This appears to have been the case with Claimant. A stress fracture of Claimant's left tibial plateau has never been ruled out, nor has an alternative, non-work-related theory been posited for its possible existence.

G. Claimant was actively participating in physical therapy, and was referred by Dr. Sparr for trigger point injections followed by aggressive myofascial release under the direction of Dr. Abercrombie. This referral by Dr. Sparr occurred on October 11, 2018. Five days later, on October 16, 2018, the Claimant was evaluated by Dr. Kurz. This is the only evaluation Dr. Kurz ever performed of the Claimant.

H. On the date of appointment with Dr. Kurz, the Claimant completed a pain questionnaire identifying ongoing pain to the left and right knee, hip and back. On that pain questionnaire, the Claimant noted the recommended treatment by Dr. Sparr involving injections and follow up chiropractic care. The Claimant described this as a ten minute evaluation which resulted in Dr. Kurz placing the Claimant at MMI with no impairment and terminating all maintenance medical care.

I. From the evidence, the ALJ notes that from the beginning of Claimant's appointment, until her notes were electronically signed by Dr. Kurz, took a total of 48 minutes. This would include, ostensibly, a review of over two years of records from PA Homberger, two orthopedists, an MRI, and Dr. Sparr's reports. Then a history from Claimant, a physical examination (the ALJ notes that Claimant's range of motion was noted by Dr. Kurz to be normal-the DIME disagreed), and dictation and review of the physician's narrative. With all due recognition to the workload at the City Clinic, and while Claimant's 10-minute estimate of the appointment might or might not be accurate, the ALJ concludes that inadequate time was spent in evaluating Claimant's post-MMI medical care needs. Her medical issues have *not* resolved.

J. The Claimant credibly testified that her condition has worsened since her medical care was terminated. She detailed how she performs her job differently now as a result of her injuries. She wanted to follow up on Dr. Sparr's and PA-C Homberger's recommendations, but all her post-MMI medical care was summarily terminated after one appointment with Dr. Kurz.

Conclusion

K. Dr. Kurz' termination of the Claimant's medical benefits is not supported by the medical evidence, and his opinion is not persuasive. The ALJ finds that all post-MMI care as recommended by Dr. Sparr to date is reasonable, necessary, and related to cure Claimant of her work injuries. Upon resumption of care with Dr. Sparr, at his option, this would include a follow-up MRI on Claimant's left knee. The Claimant indicates that she is not interested in pursuing the massage and/or acupuncture treatment suggested by Dr. Sharma; therefore the ALJ declines to order that treatment.

ORDER

It is therefore Ordered that:

1. Respondents shall pay for post-MMI medical maintenance care as recommended by Dr. Sparr, to include a 2nd left knee MRI if so recommended.

2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3 All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 4, 2019

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that the right total knee arthroplasty recommended by Dr. Christopher George is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted February 15, 2019 work injury.

FINDINGS OF FACT

1. The claimant suffered an injury while working for the employer on February 15, 2019. The claimant testified that he was in front of the employer's store when he slipped on some ice and fell. The claimant fell onto his right knee and felt a pop. The claimant reported the injury to the employer. At that time, the claimant was directed to the emergency room (ER) for medical treatment. The claimant testified that at the ER, x-rays were taken of his right knee and he was given crutches.

2. The claimant testified that he had a prior injury to his right knee in the 1970's that resulted in a surgery. The claimant also testified that he did not have any right knee pain between his 1970's injury and the slip and fall on February 15, 2019. Additionally, the claimant testified that although he currently takes the medication Tramadol, (and has taken Tramadol for some time), he does so to treat only his left knee pain because he has had a total left knee replacement.

3. Medical records entered into evidence demonstrate that the claimant sought treatment for bilateral knee pain in 2015 with his primary care provider, Dr. Bruce D. Lippman. On September 17, 2015, the claimant saw Dr. Lippman because of right knee pain. The medical record of that date indicates that the claimant had a total left knee replacement. Dr. Lippman also noted that the claimant had bad arthritis in the right knee, necessitating taking four to six Tramadol per day. In addition, Dr. Lippman noted that the claimant "thinks he eventually will need his right knee replaced as well." Thereafter, the claimant was seen by Dr. Lippman on an ongoing basis to treat osteoarthritis of the knee. On March 17, 2017, Dr. Lippman noted that the claimant's "knee continues to give him some pain. Eventually plans on getting a knee replacement."

4. Following the fall on February 15, 2019, on February 16, 2019, the claimant sought treatment with Dr. Lippman. Although Dr. Lippman is the claimant's personal physician as described above, he is also the claimant's authorized treating physician (ATP) for this claim. On February 16, 2019, the claimant reported that he had pain, swelling, and stiffness in his right knee. He also noted that his knee was unstable. At that time, Dr. Lippman diagnosed a right knee sprain and ordered an x-ray.

5. Following the injury On February 16, 2019, an x-ray of the claimant's right knee showed no acute fracture. Subsequently, Dr. Lippman ordered a magnetic resonance image (MRI) of the claimant's right knee and referred the claimant for an orthopedic consultation.

6. On February 22, 2019, an MRI of the claimant's right knee showed the lateral meniscus was absent (likely from surgical resection); complete tear of the mid anterior cruciate ligament (ACL); partial tear or strain of the proximal posterior cruciate ligament; Grade 1 strain of the medial collateral ligament; strain or partial tear of proximal popliteus tendon; probable old fracture of the lateral tibial plateau; severe osteoarthritis of the patellofemoral joint and lateral compartment; mild osteoarthritis of the medical compartment; moderate joint effusion and probably small intraarticular loose bodies; and a Bakers' Cyst.

7. On February 27, 2019, the claimant was seen by surgeon Dr. Christopher George for consultation. At that time, the claimant described his symptoms as increased pain, swelling, and instability. Dr. George reviewed the claimant's x-rays and MRI and opined that the torn ACL was caused by the claimant's fall at work. In support of this opinion, Dr. George noted that the claimant reported no instability prior to the fall, but experienced the onset of instability with the fall. Dr. George administered a cortisone injection to the claimant's right knee. In addition, he recommended a right total knee arthroplasty.

8. On March 7, 2019, the respondents filed a General Admission of Liabilty (GAL) for the claimant's February 15, 2019 injury. However, the respondents have denied authorization for the recommended right knee surgery.

9. On April 16, 2019, the claimant attended an independent medical examination (IME) with Dr. Lawrence Lesnak. In connection with the IME, Dr. Lesnak reviewed the claimant's medical records, obtained a history from the claimant, and completed a physical examination. In his IME report, Dr. Lesnak opined that the claimant possibly suffered a right knee sprain when he fell on February 15, 2019. In addition, Dr. Lesnak opined that the claimant's current right knee symptoms are not related to the fall at work. In support of this opinion, Dr. Lesnak noted that the x-rays of the claimant's right knee showed no acute abnormality and the MRI showed no acute trauma or injury related pathology. Dr. Lesnak opined that the findings on the MRI are evidence of severe chronic osteoarthritis. In addition, Dr. Lesnak noted that while a right total knee arthroplasty would be reasonable treatment of the claimant's condition, it is unrelated to the February 15, 2019 work injury.

10. On August 13, 2019, the claimant attended an IME with Dr. James Lindberg an orthopedic surgeon with a specialty in knees. Dr. Lindberg also reviewed the claimant's medical records, obtained a history from the claimant, and completed a physical examination. In his IME report, Dr. Lindberg opined that the claimant did not suffer an acute injury to his right knee when he fell on February 15, 2019. In support of this opinion, Dr. Lindberg noted that the findings on the claimant's x-ray and MRI are of chronic degenerative changes. Dr. Lindberg agrees with Dr. Lesnak that a total knee

replacement is reasonable treatment for the claimant. However, it is Dr. Lindberg's opinion that the claimant's need for surgery is unrelated to the work injury. In addition, Dr. Lindberg opined that the slip and fall on February 15, 2019 did not aggravate or accelerate the claimant's need for a knee replacement.

11. Dr. Lindberg's testimony at hearing was consistent with his written report. Dr. Lindberg testified that the claimant has longstanding instability in his right knee and longstanding osteoarthritis. Dr. Lindberg also testified that there is no evidence to support the finding of an acute ACL tear at the time of the work injury. Nor did the fall aggravate or accelerate the condition of the claimant's right knee to necessitate surgery.

12. The ALJ credits the medical records and the opinions of Drs. Lesnak and Lindberg over the contrary opinion of Dr. George and finds that the claimant has failed to demonstrate that the recommended right total knee arthroplasty is related to the work injury. While it is clear from the medical records that the claimant needs to undergo a right total knee arthroplasty, that need is not related his slip and fall on February 15, 2019. The ALJ also credits the opinions of Drs. Lesnak and Lindberg that the claimant's fall on February 15, 2019 did not aggravate, accelerate, or combine with the claimant's preexisting right knee condition to necessitate surgery.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2018).

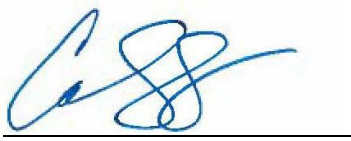
4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

5. As found, the claimant has failed to demonstrate by a preponderance of the evidence that the claimant's need for total right knee arthroscopy is causally related to the February 15, 2019 work injury. As found, the medical records and the opinions of Drs. Lesnak and Lindberg are credible and persuasive.

ORDER

It is therefore ordered that the claimant's request for a right total knee arthroplasty is denied and dismissed.

Dated this 5th day of November, 2019.



Cassandra M. Sidanycz
Administrative Law Judge
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If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. **In addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-979-504-001

ISSUE

I. Whether Respondent proved by a preponderance of the evidence that Claimant no longer needs maintenance medical treatment for her work-related injury of December 30, 2014.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. Claimant has a history involving the idiopathic and abrupt onset of severe and disabling neck pain. Based upon the medical records submitted at hearing, this started in 2003. *Ex. B, p. 14*. As time went on, Claimant also developed chronic headaches and/or migraines.

2. In approximately 2003, Claimant had the idiopathic and abrupt onset of burning pain in her neck. Merely turning her head or sitting for long periods increased her symptoms. These symptoms also affected her ability to work. *Ex. B, p. 14*.

3. On September 5, 2005, Claimant again had the idiopathic and abrupt onset of neck pain, pain in her shoulders, as well as tingling and numbness in her upper extremities. These symptoms developed when she woke up in bed. The medical report indicates:

> [Claimant] is a 34-year-old… who is here for neck pain that started on 9-5-05. She was sleeping and stretched and felt immediate pain in her neck that she describes as a burning pain in her neck and shoulders. *Ex. B, p. 14*.

4. On September 6, 2005, Claimant presented to the emergency room due to continuing neck pain and associated symptoms. Due to her symptoms, she was prescribed cyclobenzaprine and Percocet. Based on the extent of her neck pain and associated symptoms, Claimant was scheduled to see a spinal surgeon. *Ex. B, p. 14*.

5. On September 8, 2005, Claimant was evaluated by Dr. Amit Agarwala, a spinal surgeon. Claimant complained of neck pain, bilateral trapezius pain, as well as tingling and numbness in her upper extremities. At that time, Claimant's symptoms were aggravated by engaging in any physical activities. And, consistent with the cause of her symptoms in 2003, Claimant's neck pain and upper extremity problems, for which she was seeing a spinal surgeon, emerged idiopathically and abruptly. Claimant's symptoms were not caused by a specific accident or injury. Based on his evaluation, Dr. Agarwala took Claimant off work

for 4 days and indicated that if her upper extremity symptoms worsened, he would request an MRI. *Ex. B, p. 14.*

6. After her surgical evaluation, there are no medical records documenting Claimant had ongoing neck problems until her motor vehicle accident in 2008. But, the records do document she suffered from migraines before her 2008 auto accident. *Ex. E, p. 266*.

7. On August 25, 2008, Claimant was involved in a motor vehicle accident in which she was rear-ended and "whipped around" in her vehicle. She injured her cervical spine and upper extremities in the accident, and she aggravated her preexisting headaches. She was diagnosed with a whiplash cervical injury. *Ex. E, p. 266.*

8. On September 10, 2008, Claimant was evaluated by Dr. Kawasaki. At that time, Claimant's focal area of cervical tenderness was in the C5-6 and C6-7 areas. She was diagnosed with cervical facet dysfunction at C5-6 and C6-7 with radiation into the shoulder girdle. Dr. Kawasaki prescribed Claimant chiropractic treatment, acupuncture, and physical therapy. *Ex. E, pp. 267-268.*

9. On October 8, 2008, Claimant returned to Dr. Kawasaki. Although she was feeling better, she still had some left-sided cervical pain and a constant headache. Dr. Kawasaki concluded Claimant continued to have cervical facetogenic pain generation with inflammation to the shoulder girdles and cervicogenic headaches with occipital neuralgia. He also noted Claimant had a history of migraine headaches. *Ex. E, p. 264*.

10. On December 10, 2008, Claimant returned to Dr. Kawasaki. At this appointment, Claimant reported she was doing much better and had almost no symptoms. Therefore, Dr. Kawasaki released her from care, but indicated she should be allowed maintenance care in the form of up to 6 acupuncture and chiropractic treatments, as well as massage therapy, during the next 12 months, for any flairs and to maintain her condition. *Ex. E, pp. 260-261*.

11. On January 21, 2009, the Claimant returned to Dr. Kawasaki for additional treatment because both her cervical pain and headaches had returned and worsened. There is no indication Claimant was involved in a specific incident or accident that caused the onset and reemergence of her neck pain and headaches. However, before returning to Dr. Kawasaki, Claimant had seen her chiropractor, Dr. Gridley, for her increase in symptoms, and based on her complaints, Dr. Gridley ordered and MRI. According to Dr. Kawasaki, the MRI showed multilevel degenerative disc changes, which included broad-based disc protrusions and early disc osteophyte complexes at the C3-C4, C4-C5, and C5-C6. It also demonstrated that at the C4-C5 level, there was a central disc protrusion, which appeared to contact the anterior aspect of her spinal cord but did not displace the cord. During this appointment, she was provided an occipital nerve block for her headaches and was advised to continue chiropractic treatment. *Ex. E, pp. 258-259.*

12. On January 29, 2009, Claimant reported to Dr. Kawasaki that she had temporary relief of her headaches from the occipital nerve blocks, but increased cervical pain after recent chiropractic and acupuncture treatments. Therefore, she was referred to Dr. John Sacha for facet injections. *Ex. E, pp. 256-257*.

13. On February 24, 2009, Dr. Sacha began treating Claimant for the cervical injuries she sustained in the motor vehicle accident and her cervicogenic headaches. At this appointment, Dr. Sacha administered facet injections, medial branch blocks, and occipital nerve blocks. These procedures did not provide any lasting relief, a result that caused Dr. Sacha to recommend against a radiofrequency procedure. *Ex. C, pp. 202-205; Ex. E, p. 254.*

14. On April 17, 2009, Claimant underwent a medial branch block procedure at the C2-3 and C3-4 level that caused her quite a bit of pain but yielded mild improvement of her neck pain and headaches. The pain improvement was not enough to justify a radiofrequency procedure, but she was instructed to continue with her chiropractic and acupuncture treatment, as well as medications for her headaches. *Ex. E, p. 252*.

15. On July 10, 2009, Claimant returned to Dr. Kawasaki after having another cervical MRI, which focused on her upper cervical region. He noted that:

> The patient had a special MRI of her upper cervical region, which showed evidence of grade 3 alar ligament tear and transverse ligament tears at the CI-2 junction. I had discussions with several surgeons in regards to putting the patient on any other treatment options. I spoke with Scott Stanley, MD, who recommended that the patient undergo a cervical flexion/extension CT scan to rule out instability at the atlanto-occipital and atlantoaxial junctions. CT scan was done with flexion/extension views. The films were reviewed today which show no evidence of instability. *Ex. E, p. 249.*

16. Following the evaluation, Dr. Kawasaki noted that he discussed the case with Dr. Sacha, who apparently suggested that the patient undergo atlanto-occipital and C1-C2 facet joint injections. Dr. Kawasaki concluded:

> If she decides to undergo this procedure, it will be set up with Dr. Sacha. There really is no guarantee that this will be helpful to her, although short of this, I do not believe there is much more to offer [Claimant] other than chronic pain medication relief. *Ex. E, p. 250*.

17. On November 4, 2009, Claimant reported continued cervical pain of 4/10 and ongoing weekly headaches, which she rated at 7/10, and stated that sometimes they become so severe she is in tears. Since nothing had provided any long-term relief, Claimant expressed a desire to discontinue treatment and "just learn to live with the headaches and neck pain." *Ex. E, pp. 246-247*.

18. On January 29, 2010, almost three months since her last appointment with Dr. Kawasaki, Claimant had the abrupt onset of severe headaches and ongoing neck

pain. The report from that visit notes Claimant reported "severe, unrelenting" headaches mostly on the right side, along with continued – and increasing cervical pain. She was given additional occipital nerve blocks and prescribed medications for her headaches. There is no indication that any incident caused Claimant's symptoms to increase and resulted in her seeking additional medical treatment. There were no future appointments scheduled. Claimant was merely advised to return on an as needed basis. *Ex. E, pp. 244-245*.

19. On March March 6, 2010, Claimant returned to Dr. Kawasaki. She again had an abrupt increase in her headaches and cervical spine pain. The report from that date indicated Claimant was reporting "severe, unrelenting" headaches that caused her to go to the emergency room. At this visit, Dr. Kawaski noted Claimant appeared very uncomfortable, was stiff throughout the cervical spine, and appeared to be in moderate to severe pain. She was given additional occipital nerve blocks on this date. She was also given a trial of Amerge, a triptan medication, for her headaches. *Ex. E, pp. 242-243*.

20. On April 22, 2010, Claimant returned to Dr. Sacha. He noted Claimant had segmental dysfunction throughout the entire cervical spine, but more so in her upper cervical spine. Based on his assessment, he decided to administer additional injections. *Ex. C, p. 202.* Therefore, on April 29, 2010, Dr. Sacha administered joint injections for the Claimant's cervical facet syndrome and headaches. *Ex. C, p. 200*.

21. On January 10, 2011, Claimant returned to Dr. Kawasaki and complained of a worsening of her cervical pain and headaches. She was given additional occipital nerve blocks, referred for additional cervical injections, and was continued on her Amerge headache medication. *Ex. E, pp. 237-238.*

22. On January 27, 2011, Dr. Sacha administered additional joint injections for the Claimant's cervical facet syndrome and cervicogenic headaches. *Ex. C, p. 198*.

23. On February 4, 2011, the Claimant reported that her cervical pain was 5/10. She was continued on her Amerge headache medication. *Ex. E, pp. 235-236*.

24. On August 3, 2011, Dr. Sacha added cervical traction to Claimant's treatment regimen and continued her chiropractic and acupuncture treatment. *Ex. C, p. 197*.

25. On August 10, 2011, Dr. Sacha reviewed the results of Claimant's new MRI of her cervical spine. The new MRI showed markedly progressed disc bulging at C5-6 as when compared with previous MRI studies, as well as new foraminal and canal narrowing. The MRI also showed significant straightening of the cervical lordosis, disc bulging at C4-5 and C6-7, and facet spondylosis, which were unchanged from the previous MRI study. At that appointment, Dr. Sacha added the additional impression, or diagnosis of "Cervical radiculopathy with new onset/worsening of disc protrusion at C5-6. Therefore, despite there not being any new accidents or incidents, Claimant's cervical spine condition was worsening and now included a disc protrusion at the C5-6 level as well as foraminal and spinal canal narrowing at that level. *Ex. C, p. 194*.

26. On September 16, 2011, Claimant complained of ongoing headaches, and she was referred back to Dr. Sacha for contemplation of additional procedures to address her headaches. *Ex. E, pp. 229-230*.

27. On September 29, 2011, Dr. Sacha performed medial branch neurotomies. *Ex. E, p. 224.*

28. On October 17, 2011, Claimant reported increased pain from the recent medial branch neurotomies performed by Dr. Sacha. She reported a pain level of 6/10. She reported continued use of Amerge. *Ex. E, pp. 227-228*.

29. On December 9, 2011, Claimant reported the onset of additional cervical pain that did not exist prior to the last medial branch neurotomies performed by Dr. Sacha. At this time, Claimant was complaining of pain throughout her entire cervical spine and hypersensitivity. She reported her pain as 5/10. She also reported continued use of Amerge for headaches. *Ex. E, pp. 224-225*.

30. On December 27, 2011, Dr. Kawasaki opined that a cervical fusion surgery was the last resort for resolution of the Claimant's symptoms, and though contra-indicated for a number of reasons, may have to be pursued if Claimant is unable to otherwise control her progressive symptoms. *Ex. E, pp. 222-223*.

31. On February 13, 2012, the Claimant reported "doing somewhat better" with pain 4/10. She continued to have headaches, some of which were severe. She continued to take diclofenac for her neck pain as well as Amerge for her headaches. *Ex. E, p. 218; Ex B, p. 20*.

32. On May 16, 2014, the Claimant returned to Dr. Kawasaki for evaluation and treatment of her ongoing cervical pain and headaches. During his physical examination, Claimant still had symptoms associated with her neck. He continued her use of Amerge for her headaches, and considered using another medication, instead of diclofenac that was being used for her neck pain, since the new medication can also help with migraines. He scheduled her to return as needed for a follow-up examination, or within the next year at the latest. *Ex. E, pp. 216-217*.

33. As of November 25, 2014, the Claimant was taking Amerge on a daily basis for her headaches and diclofenac for her neck pain. *Ex. F, p. 291*.

34. On December 30, 2014, Claimant suffered an admitted work injury, which is the subject of this claim, when she slipped on some snowy steps at work and slid down the stairs. She landed primarily on her bottom and left side. She did not strike her head and she did not tumble down the stairs. *Ex. F, p. 285*.

35. On December 31, 2014, Claimant presented to Dr. Ricky Artist and reported having preexisting chronic neck pain and being on a regimen to control her chronic neck pain that included regular exercise, stretches and taking the anti-inflammatory medication diclofenac nightly in order to sleep. *Ex. A, p.1; Ex. F, p. 286*. The report from Dr. Artist notes that Claimant said she had an acute neck strain on top of her preexisting chronic neck pain. Dr. Artist expected that within a week the aggravation of her chronic neck symptoms would resolve and return to baseline and Claimant would be able to return to her "normal care program for

her neck." At this appointment, Claimant also complained of back pain. *Ex. F, p. 285*.

36. On January 5, 2015, Claimant followed with Dr. Susan Morrison for her work injury. Claimant reported to Dr. Morrison that her neck pain was largely resolved. However, Claimant was having bilateral low back pain. *Ex. F, p. 283*.

37. On January 13, 2015, Claimant returned to Dr. Morrison and reported having ongoing back pain and the recurrence of her neck pain. She was referred for chiropractic and acupuncture treatment. *Ex. F, pp. 278-29; Ex. C, p. 187*.

38. On February 26, 2015, Claimant was referred to Dr. Sacha to take over treatment of her recent work injury. Dr. Sacha opened his report of this date by stating that the Claimant "has a long, complex history of previous neck pain from a motor vehicle accident…" He also confirmed the presence of residual symptoms from that injury. Dr. Sacha concluded that the recent work injury had "flared" both the cervical and lumbar injuries from her motor vehicle accident. He recommended only acupuncture treatment for the cervical spine, and physical therapy and an MRI for her lumbar spine. *Ex. C, pp. 187-188*.

39. On March 12, 2015, Claimant returned to Dr. Sacha. At this appointment, he primarily focused on Claimant's low back, and the only additional treatment he opined on providing Claimant was an epidural injection for her lumbar spine. *Ex. C, pp. 185, 186.*

40. On April 2, 2015, Claimant returned to Dr. Sacha. At this appointment, it appears that the primary condition for which Claimant was evaluated - due to ongoing complaints of low back pain - was her low back. In discussing her low back, he noted Claimant had no significant improvement after 8 sessions of acupuncture and chiropractic treatment. He then prescribed a right L5 and S1 transforaminal epidural steroid injection/spinal nerve root block for diagnostic and therapeutic purposes of her back complaints and physical therapy directed towards her low back and neck. *Ex. C, pp. 183-184*.

41. On May 5, 2015, Claimant returned to Dr. Sacha. In his report, he notes that her workers' compensation claim was denied, but that Claimant wanted to continue with treatment under her private insurance. The report from this appointment does not indicate whether Claimant was still complaining of any cervical problems, even though he did examine her cervical spine and noted his findings. Based on Claimant's decision to treat under her personal insurance, Dr. Sacha continued treating Claimant based on Claimant's symptoms and his findings. At this appointment, he set forth a treatment plan for only her lumbar spine, and not her cervical spine. His treatment plan for her lumbar spine included a right L5 and S1 transforaminal epidural steroid injection/spinal nerve root block for diagnostic and therapeutic purposes. *Ex. C, pp. 181-182*.

42. On May 14, 2015, Dr. Sacha performed the lumbar injections. The report from this date does not note any cervical problems. *Ex. C, pp. 179-180*.

43. On May 27, 2015, Dr. Sacha evaluated Claimant. At this visit, the only issue addressed was Claimant's low back and her associated radicular symptoms in

her lower extremities. At this appointment, Dr. Sacha neither examined her neck nor prescribed any treatment for her neck. He did, however, order an EMG due to her back injury and radicular complaints. *Ex C, pp. 177-178*.

44. On June 11, 2015, Claimant returned to Dr. Sacha. The notes from this appointment indicate he only addressed Claimant's back problems because Claimant was not complaining of any cervical symptoms from her December 30, 2014, work accident. Again, at this appointment, he only assessed Claimant's low back and her associated radicular symptoms in her lower extremities. Based on his examination, he recommended a consultation with an orthopedic surgeon, Dr. Castro, for Claimant's lumbar complaints. He also prescribed additional lumbar injections for diagnostic and therapeutic purposes. And, at this appointment, he again neither examined her neck nor prescribed any treatment for her neck. *Ex. C, pp. 175-176*.

45. On July 8, 2015, Dr. Sacha saw the Claimant and addressed her cervical spine for the first time since his initial appointment in February. He referred to Claimant's cervical issues as an aggravation of her preexisting injury. He recommended chiropractic and acupuncture care for the cervical spine, and discussed the possibility of medial branch blocks and a radiofrequency neurotomy (RF) procedure. *Ex. C, pp. 171-172*.

46. On August 6, 2015, Claimant returned to Dr. Sacha. Due to ongoing cervical symptoms, he recommended a medial branch block with consideration of subsequent RF procedure. He continued her with chiropractic and acupuncture care for the neck in the meantime. *Ex. C, pp. 165-166*.

47. On September 17, 2015, Dr. Sacha performed the RF procedure. *Ex. C, p. 152*.

48. On October 22, 2015, Claimant returned to Dr. Sacha and reported continued pain even after the RF procedure, attendant physical therapy, and addition of topical pain cream to her regimen. *Ex. C, pp. 147-148*.

49. On December 3, 2015, Dr. Sacha reported about 60% improvement in her neck symptoms from the RF procedure. *Ex. C, pp. 143-144*.

50. On January 5, 2016, however, the Claimant reported to her physical therapist that her neck pain remained at 4/10. *Ex. B, p. 24*.

51. On April 13, 2016, Dr. Sacha placed the Claimant at MMI. On this date, Dr. Sacha recommended maintenance treatment in the form of medications, a possible lumbar epidural injection, a gym and pool pass and one possible repeat radiofrequency procedure for the spine. Dr. Sacha anticipated this maintenance treatment period lasting between six months and two years. *Ex. A, pp. 7-8*.

52. On May 12, 2016, the Claimant returned to Dr. Sacha for a maintenance appointment but there was no discussion of any new or worsening cervical symptoms nor any additional cervical treatment recommended. *Ex. C, pp. 118-119*.

53. On July 5, 2016, Dr. Sacha stated that continued maintenance treatment would consist of medications and follow-up appointments for 6 to 12 more months, as

well as a gym/pool pass for 12 months. He did not, however, indicate whether that was for the back, cervical spine, or both. *Ex. C, p. 112*.

54. On August 11, 2016, the Claimant returned to Dr. Sacha and reported less cervical pain and less headaches. She also reported that she had restarted her home exercise program. No treatment for the cervical spine was recommended. *Ex. C, pp. 107-108*.

55. On September 6, 2016, Respondents filed a Final Admission of Liability that admitted for post-MMI medical benefits. *Ex. A, p. 2*.

56. On September 14, 2016, Claimant returned to Dr. Sacha and reported ongoing cervical spine symptoms and headaches. No treatment for the cervical spine was recommended. *Ex. C, pp. 102-103*.

57. On December 1, 2016, the Claimant returned to Dr. Sacha and reported increased headaches with no new trauma or inciting event. In prescribing ongoing use of Amerge for headaches, Dr. Sacha mistakenly stated that she had no previous history of cervical related headaches. *Ex. C, pp. 97-98*.

58. On January 4, 2017, Claimant reported to Dr. Sacha another "intolerable" flare of cervical symptoms, which her physical therapist attributed to a new aggravation, but did not note any particular event that caused the aggravation of her symptoms. More physical therapy appointments were recommended under the workers' compensation claim. *Ex. C, p. 95*.

59. On February 23, 2017, Dr. Sacha performed a repeat RF procedure on Claimant's cervical spine. *Ex. C, p. 87*.

60. On June 15, 2017, Claimant returned to Dr. Sacha, who noted, "She is still having the same neck pain that is unchanged." No further specific treatment was recommended for the cervical spine. *Ex. C, pp. 81-82*.

61. On November 30, 2017, the Claimant returned to Dr. Sacha and noted an increase in her cervical symptoms without any known cause. He recommended acupuncture treatment. *Ex. C, p. 70*.

62. On March 22, 2018, Dr. Sacha performed a third RF procedure on the cervical spine. *Ex. C, p. 61*.

63. On March 30, 2018, Dr. Sacha reported Claimant indicated a 50% to 60% improvement in symptoms from the RF procedure. *Ex. C, p. 59*.

64. On April 5, 2018, however, Claimant reported to her physical therapist that her cervical pain remained at 4/10. *Ex. B, p. 30*.

65. On April 20, 2018, the Claimant told her physical therapist that her cervical pain was "about the same." *Ex. B, p. 30*.

66. On April 26, 2018, however, Dr. Sacha reported 70% improvement on neck pain and 90% with headaches. Additionally, he noted that the Claimant was no longer having any lower back pain. *Ex. C, p. 56*.

67. On May 14, 2018, and without any analysis as to how he concluded such, Dr. Sacha stated that the Claimant's Amerge medication for her headaches should only be covered under her workers' compensation claim through May 2019. *Ex. C, p. 54*.

68. On October 11, 2018, the Claimant returned to Dr. Sacha complaining of increased cervical pain and symptoms. Dr. Sacha referred her for more chiropractic and acupuncture treatment. *Ex. C, p. 50*.

69. On January 10, 2019, the Claimant returned to Dr. Sacha complaining of increased cervical pain and headaches since her last visit despite the resumption of chiropractic and acupuncture treatment. Regardless, Dr. Sacha renewed her prescription for chiropractic and acupuncture treatment. *Ex. C, pp. 48-49*.

70. On January 25, 2019, the Claimant reported to her primary care provider that she was not having any neck pain. *Ex. F, pp. 269-270*.

71. On February 7, 2019, Dr. Sacha administered a trigger point injection for the Claimant's ongoing cervical symptoms. *Ex. C, p. 46*.

72. On February 11, 2019, the Claimant received chiropractic and acupuncture treatment. She reported pain of 4/10 at this time. *Ex. D, pp. 214-215*.

73. On February 14, 2019, the Claimant received chiropractic and acupuncture treatment. She reported pain of 4/10 at this time. *Ex. D, pp. 212-213*.

74. On February 21, 2019, the Claimant received chiropractic and acupuncture treatment. She reported pain of 4/10 at this time. *Ex. D, pp. 210-211*.

75. On February 25, 2019, the Claimant received chiropractic and acupuncture treatment. She reported pain of 4/10 at this time. *Ex. D, pp. 208-209*.

76. On February 28, 2019, the Claimant received the last of her recommended chiropractic and acupuncture treatments. She reported pain of 4/10 at this time. *Ex. D, pp. 206-207*.

77. On March 21, 2019, the Claimant returned to Dr. Sacha and reported no change in her ongoing cervical symptoms despite the recent trigger point injection and completion of her chiropractic and acupuncture treatment. Dr. Sacha recommended use of an inferential unit to control her symptoms. *Ex. C, p. 43*.

78. On July 2, 2019, the Claimant underwent an independent medical examination with Dr. Lesnack. Dr. Lesnack is a board-certified physiatrist. At least 90% of his practice is committed to treating patients for pain disorders. He approximates that 95% to 98% of his patients are treated for work injuries, and he has extensive experience treating cervical injuries. Treatment he administers for neck injuries include chiropractic treatment, massage therapy, acupuncture, facet injections, medial branch blocks and RF procedures. He also regularly treats cervical-related headaches. Dr. Lesnack has been Level II accredited with the Division of Workers' Compensation since 1996. The Claimant agreed that Dr. Lesnack is an expert in physical medicine and rehabilitation medicine. *Lesnack Deposition, pp. 5 – 11; Ex. B*.

79. Dr. Lesnack took a history from Claimant, examined Claimant, and then reviewed her extensive medical records. On physical examination, Dr. Lesnack was unable to reproduce any objective findings to correlate with cervical facet syndrome. Dr. Lesnack concluded that the Claimant's subjective complaints following her work-related injury mirrored those she was making beforehand as related to her 2008 motor vehicle accident. He concluded that the Claimant has had non-therapeutic responses to all three of the RF procedures performed by Dr. Sacha. Furthermore, he concluded that she gained no significant long-term relief of her cervical symptoms or headaches from any of the extensive treatment modalities used in treating her work-related injury. He also documented that she is no longer suffering from low back or leg symptoms. Dr. Lesnack ultimately concluded that "to a reasonable degree of medical probability, none of her current symptomology appears to be related to the occupational incident that occurred on December 30, 2014, relating to her neck, headaches or upper extremity complaints." *Ex. B, pp. 33, 36*.

80. Accordingly, Dr. Lesnack opined that "there is absolutely no medical evidence to suggest that the patient requires any further post MMI medical maintenance treatments whatsoever that would pertain to the 12/30/2014 occupational incident." *Ex. B, p. 36*.

81. On July 18, 2019, the Claimant returned to Dr. Sacha complaining of a "marked increase" in her cervical pain despite the recent use of the inferential unit. Dr. Sacha made plans for a fourth RF procedure. *Ex. C, pp. 40-41*.

82. On August 22, 2019, Dr. Sacha recounted that his request for a fourth RF procedure was denied. He commented that the procedure was aimed at different cervical areas than those he treated in relation to the 2008 motor vehicle accident. *Ex. C, p. 38*.

83. On September 10, 2019, the parties took the evidentiary deposition of Dr. Lesnack. Primarily, Dr. Lesnack had the opportunity to review additional reports from Dr. Sacha dated May 16, 2019, July 18, 2019 and August 22, 2019. He testified that these reports did not change any opinions from his previously issued report. *Lesnack Deposition, pp. 12-13*.

84. Dr. Lesnack testified that the Claimant's motor vehicle accident of 2008 had a greater impact on her neck than the work-related accident. *Deposition, pp. 43-44.*

85. Dr. Lesnack testified that despite what Dr. Sacha's recent report says, Dr. Sacha did treat the lower portions of the cervical spine that are now at issue prior to the Claimant's work-related accident in 2014. *Lesnack Deposition, pp. 14-15*.

86. Dr. Lesnack testified that Dr. Sacha is currently attempting to treat the same primary areas of the cervical spine that showed bulging discs on the 2011 MRI study. *Lesnack Deposition, pp. 16-17*.

87. Dr. Lesnack testified that Dr. Sacha's most recent examination of the Claimant did not reveal any objective evidence of ongoing cervical facet syndrome. He

also testified that any diagnosis of "whiplash" disorder is unrelated to the Claimant's work-related injury. *Lesnack Deposition, pp. 17-19*.

88. Dr. Lesnack testified that use of inferential units for cervical symptoms is unlikely to produce any improvement beyond the first several months of an acute injury, and he would not expect it to have recently provided any relief to the Claimant. *Lesnack Deposition, pp. 20-21.*

89. Dr. Lesnack testified that the trigger point injection administered by Dr. Sacha in February 2019 had no therapeutic impact, largely because the combination of medication administered by Dr. Sacha is not known to be effective. *Deposition, pp. 22-25*.

90. Dr. Lesnack testified that the Claimant gained nothing significant from the most recent trial of chiropractic and acupuncture treatment, and he was not surprised to see a lack of efficacy with these passive modalities this far into treatment. *Deposition, pp. 25-26*.

91. Dr. Lesnack testified that the DOWC Medical Treatment Guidelines require an 80% improvement in symptoms from a RF procedure before consideration of repeating such a procedure, a mark that was not met by Claimant. He testified that the records indicate no significant improvement from the previous RF procedures. He testified that even absent any causation questions; another RF procedure would not be indicated. *Deposition, pp. 27-29*.

92. Dr. Lesnack testified that the effectiveness of RF procedures reduces dramatically with each repeat procedure. Moreover, he has found that in his practice, and after performing these procedures on his patients for approximately 17 years, he only has a 1.7 percent repeat rate for these procedures as a treating physician. He went on to testify that if the procedure is done the right way, on the right patient, and for the right reason, the nerves should not grow back and the pain should not come back. He concluded by stating:

> Now, the more the symptoms come back after that, then you really need to start thinking: Are those symptoms coming from those joints?"
>
> *Deposition, pp. 31-33*.

93. Dr. Lesnak also testified that his review of Dr. Sacha's records, which Dr. Sacha contends demonstrates Claimant has had diagnostic and therapeutic responses to the prior RF procedures, do not make sense, physiologically. For example, Dr. Lesnak testified that Dr. Sacha performed a RF procedure March 22, 2018, and when he evaluated Claimant on March 30, 2018, 8 days after the procedure, she reported a 50-60 percent reduction of her symptoms. On its face, it would appear the RF was the right procedure, at the right level, and for the right condition. However, Dr. Lesnak credibly and persuasively testified that it takes at least three weeks for the nerves to die off and stop working. Therefore, Claimant's reported response, 8 days later, is neither diagnostic nor therapeutic. As Dr. Lesnak explained, Claimant's report of decreased symptoms could be a residual from the anesthetic or it could be a placebo effect. *Deposition, p. 32.*

94. Moreover, on April 26, 2018, Claimant saw Dr. Sacha and he noted her neck pain was 70% better and her headaches were 90% better. But, on May 16, 2018 and May 30, 2018, the physical therapy reports indicate she's having fairly intense headaches and neck pain. *Deposition p. 33.*

95. Dr. Lesnack testified that Dr. Sacha has not undertaken the appropriate diagnostic measures to ensure that a RF procedure is likely to give relief. These diagnostic procedures are done to see if the cervical pain is coming from the joints instead of nerve issues. *Deposition, pp. 31-32.*

96. Dr. Lesnack testified that if he were treating the Claimant he would discontinue all treatment modalities and instead have her focus upon home exercises and strengthening. This recommendation would be borne of the fact that she has had extensive treatment for her condition for over a decade without any sustained relief. *Deposition, pp. 34-37*.

97. Dr. Lesnack testified that the Claimant's chronic neck pain resulting from her 2008 motor vehicle accident is never going to go away. Her cervical condition was not going to resolve even if she had not suffered a work-related accident that temporarily aggravated it. *Deposition, pp. 34, 36-37*.

98. The ALJ finds Dr. Lesnak's opinions as set forth in his report and testimony to be credible and persuasive for a number of reasons. First, Dr. Lesnak's opinions are consistent with the majority of the medical record. Claimant began having significant neck pain as early as 2003. And, by 2005, her neck pain was so severe, she was evaluated by a spinal surgeon. Claimant ultimately went on to develop chronic headaches as well. Claimant's neck pain and headaches initially emerged without any inciting events. Then, in 2008, Claimant was involved in a motor vehicle accident that caused an increase in Claimant's chronic and severe neck pain and headaches. Between the motor vehicle accident and just before the December 30, 2014, work accident, Claimant's neck symptoms and headaches waxed and waned. A review of the medical records does not strongly suggest that the treatment provided during that time was effective in altering and reducing her symptoms. And, although there was a slight decrease in her reported symptoms shortly before the incident at work, and Claimant complained of an increase immediately after the incident at work, her symptoms continued to wax and wane as before. Moreover, Claimant treated with Dr. Sacha from approximately March of 2015 to July of 2015, (almost 4 months) without the need for Dr. Sacha to address and direct much, if any, treatment towards her neck. In essence, it appeared that by February of 2015, her neck symptoms had returned to baseline and were no worse than before the work accident and that continued until her complaints to Dr. Sacha involving her neck and headaches increased – without an inciting incident - in July of 2015.

99. The ALJ does not find Dr. Sacha's opinion that Claimant needs ongoing treatment due to her December 30, 2014, work accident to be persuasive for a number of reasons. For example, on August 22, 2019, Dr. Sacha issued another report indicating he was aware Dr. Lesnak performed an IME and determined the

RF procedure was not indicated, but that he had yet to receive and review the IME. Dr. Sacha, concluded his report by stating:

> We will obtain it, and there will be an addendum to this dictation going over all of the specifics of it. In the meantime, the patient has pending litigation on this case with a hearing set for September. *Ex. C, p. 38*.

Despite Dr. Sacha stating that he would obtain Dr. Lesnak's IME, review the IME, and issue an addendum "going over all of the specifics of it" – he failed to issue an addendum addressing any of the issues raised by Dr. Lesnak.

100. In addition, as credibly testified to by Dr. Lesnak, Dr. Sacha indicated Claimant had a diagnostic and therapeutic response to the prior RF procedures. However, Dr. Lesnak credibly testified that Claimant's response, based on its timing, and recurrence of symptoms, was far from being a diagnostic and therapeutic response.

101. Moreover, Dr. Sacha's primary contention for treating Claimant's chronic neck pain under this claim is that he previously treated the upper portion of Claimant's cervical spine and now he is treating the lower portion of her cervical spine. But, even if that is true, the mere provision of treatment to a different portion of her cervical spine presumes the work accident caused the need for the treatment he is providing. As credibly testified to by Dr. Lesnak, Claimant has neither had a diagnostic nor therapeutic response to the majority of the injection and RF treatment provided by Dr. Sacha. Therefore, the mere location he is treating, based on Claimant's continued complaints, is not persuasive in establishing that Claimant actually injured that portion of her spine on December 30, 2014 and that her current symptoms are causally related to her work accident. As noted earlier, after her auto accident, Claimant underwent a new cervical MRI in 2011. The new MRI demonstrated the progression of cervical findings, which included a new disc protrusion at the C5-6 level as well as foraminal and spinal canal narrowing at that level, without any inciting event. In essence, Claimant's cervical spine condition, as demonstrated on the MRI, was getting progressively worse on its own, without any external incidents or accidents. See *Ex. C, p. 194*.

102. Claimant did not provide any testimony at the hearing. Therefore, Claimant did not provide any testimonial evidence to mitigate or negate the underlying facts and information relied upon by Dr. Lesnak in rendering his opinions.

103. The ALJ credits Dr. Lesnak's opinions and finds them credible and persuasive. Therefore, based on the totality of the evidence, and the credible opinions of Dr. Lesnak, the ALJ finds that none of Claimant's current symptomology is related to the occupational incident that occurred on December 30, 2014, relating to her neck, headaches or upper extremity complaints.

104. The ALJ finds Respondent has established, by a preponderance of the evidence, Claimant does not need any additional medical treatment to relieve her from the effects of her December 30, 2014, work accident.

105. The ALJ finds Respondent has established, by a preponderance of the evidence, Claimant does not need any additional medical treatment, due to her December 30, 2014, work accident, to maintain her status or prevent a deterioration of her condition.

106. The ALJ finds Respondent has established by a preponderance of the evidence, Claimant is not entitled to maintenance medical treatment due to her December 30, 2014, work accident.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

This ALJ's factual findings may concern only evidence and inferences found to be dispositive of the issues involved. This ALJ is not bound to address every piece of evidence or every inference that might lead to conflicting conclusions, and is found to have rejected evidence contrary to his findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Furthermore, the relative weight and credibility to be assigned expert opinions is the ALJ's province as fact-finder. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d186 (Colo. App. 2002). To the extent expert opinions are subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the opinions. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

Maintenance Medical Benefits

The Respondent is liable for medical treatment from authorized providers that is reasonably necessary to cure or relieve the employee from the effects of the industrial injury. Section 8-42-101(1)(a); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

The Respondent's obligation to provide medical benefits to cure the industrial injury, however, terminates at MMI. Thereafter, the Respondent is only responsible for medical benefits to relieve Claimant from the effects of her industrial injury, or maintain or prevent a deterioration of Claimant's condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988).

Where a respondent attempts to modify an issue that previously has been determined by an admission, it bears the burden of proof for such modification. *See* Section 8-43-201(1), C.R.S.; *see also Barker v. Poudre School District*, W.C. No. 4-750-735 (March 7, 2012). Here, because the Respondent has previously filed an FAL admitting for maintenance medical benefits, under § 8-43-201, C.R.S., Respondent has the burden to show by a preponderance of the evidence why it is no longer responsible for maintenance medical benefits in general.

A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of either claimants or respondents. § 8-43-201, C.R.S.

In this case, Respondent has met its burden. Based on the totality of the evidence, Respondent established that it is probably true that no further medical treatment is reasonably necessary to maintain or prevent deterioration of Claimant's work-related injury or relieve her from the effects of her work-related injury. The chiropractic and acupuncture treatment most recently prescribed and completed did not seem to alter her symptoms in any meaningful way. The trigger point injection most recently administered by Dr. Sacha did not seem to alter Claimant's symptoms in any meaningful way. In addition, the inferential unit recently prescribed to Claimant did not seem to alter her symptoms in any meaningful way. As credibly and persuasively opined by Dr. Lesnak, Dr. Sacha's current request for a fourth RF procedure is contraindicated for several reasons, including a lack of therapeutic response from the previous three procedures. The likelihood of success from a fourth RF procedure is very low as per the credible and persuasive testimony of Dr. Lesnack.

The inability of this most recent regimen of treatment to relieve Claimant's neck pain and headaches is generally consistent with the course of treatment provided to Claimant since she first developed neck pain and headaches in 2003 and 2005. As testified to by Dr. Lesnak, her chronic cervical condition and chronic headaches are more likely than not going to continue to progress, and nothing is going to halt the deterioration of these conditions.

Dr. Sacha originally contemplated maintenance treatment lasting as little as six months but no more than two years. Even his most recent extension of the need for the Amerge headache medication expired in May 2019. These opinions coalesce with those of Dr. Lesnack in demonstrating that the Claimant is best served at this point in time, over three years after being placed at MMI, by discontinuing medical treatment and focusing instead on home exercises and strengthening.

Furthermore, even if Claimant needs continued treatment for her cervical symptoms and headaches, it is probably true that the need for that treatment is no longer related to her work injury. Dr. Sacha recently attempted to differentiate his current treatment recommendations from the cervical areas treated prior to the work injury. But, Claimant was diagnosed with cervical dysfunction throughout C5-7 approximately one month after her 2008 motor vehicle accident. Moreover, when Claimant underwent a repeat MRI in 2011, the new MRI demonstrated the progression of cervical findings, which included a new disc protrusion at the C5-6 level as well as foraminal and spinal canal narrowing at that level. Furthermore, this progression of her chronic cervical spine condition occurred without any inciting event. And, these are the same cervical areas that Dr. Sacha now seeks to treat.

Moreover, the maintenance regimen that Claimant has followed since being placed at MMI for her work injury mirrors the maintenance regimen she was given in December 2008 to maintain her motor vehicle accident injuries.

After three years of maintenance treatment for her motor vehicle injuries, Dr. Kawasaki indicated that the Claimant had exhausted all treatment modalities for the cervical spine without lasting success, leaving only the option of a very complicated fusion surgery to relieve her progressing symptoms. The Claimant was treating with Dr. Kawasaki for her motor vehicle injuries as of May 2014, and the evidence demonstrates that her cervical symptoms and headaches were chronic and had not abated at the time of her work injury.

When Claimant was treated the day after her work injury, her physician estimated that the aggravation of her cervical symptoms would resolve within a week and she would return to her cervical baseline at that point. Claimant reported such a resolution approximately one week later. Other than eight acupuncture appointments, there was no treatment of the cervical spine for the first six months following the work injury.

There is no appreciable difference between the Claimant's cervical condition and headaches before her work injury and after her work injury. It was appropriate to treat the Claimant for a temporary aggravation of her motor vehicle injuries, and the Claimant has received ample medical treatment in that regard. The totality of the evidence makes it more probable than not, however, that the treatment provided by Respondent returned Claimant to her prior baseline long ago and that the treatment being recommended at this time is not causally related to treat the effects of her work injury.

Moreover, Claimant did not appear at hearing or otherwise offer any testimony to contradict this conclusion.

Respondent established by a preponderance of the evidence that no further medical treatment is reasonably necessary to maintain or prevent deterioration of Claimant's work-related injury or relieve her from the effects of her work-related injury. Therefore, the ALJ finds and concludes Respondent established by a preponderance of the evidence that Claimant is no longer entitled to a general award of maintenance medical treatment.

ORDER

It is therefore ordered that:

1. Respondent has proven by a preponderance of the evidence that medical treatment is no longer reasonably necessary and causally related to the Claimant's work-related injury of December 30, 2014.

2. Respondent's admission for post-MMI medical benefits of September 6, 2016 is withdrawn, and Respondent is no longer responsible for medical treatment for Claimant's work-related injury of December 30, 2014, absent a statutory reopening.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service;

otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 5, 2019

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Respondents have established by a preponderance of the evidence that Claimant's temporary total disability (TTD) benefits should be suspended from May 28, 2019 through July 19, 2019.

FINDINGS OF FACT

1. Claimant is a 57-year-old female employed by Employer as an airline pilot. Claimant has worked for Employer in that position for approximately 19 years.

2. On or about March 11, 2019, Claimant piloted an airplane with older style seats for an extended period of time. Claimant testified that over a three day period she had 22 total hours of seat time, including 14.5 hours of flying time. Throughout the flights, Claimant was repeatedly struck in the back by a square metal bar lumbar support during periods of turbulence. Claimant testified that when she returned to Denver she had extreme low back pain.

3. Claimant reported the injury to Employer and began treatment at Concentra. *See* Exhibit 7.

4. On March 15, 2019, Claimant was evaluated and was given work restrictions of no lifting over 5 pounds, pushing and pulling up to 5 pounds, no reaching above shoulders with the affected extremities, occasional bending standing and walking. Additional restrictions stated that Claimant was unable to fly an airplane. *See* Exhibit 5.

5. On April 18, 2019, Jay Reinsma, M.D. evaluated Claimant. Claimant's work restrictions were lifting up to 15 pounds occasionally, up to 3 hours/day; pushing/pulling up to 20 pounds occasionally; no reaching above shoulders with affected extremity; and no reaching behind with affected arm. *See* Exhibit 5.

6. Respondents were unable to accommodate Claimant's work restrictions and she has not returned to work for Employer since March 11, 2019.

7. On March 25, 2019, Respondents filed a General Admission of Liability admitting to TTD benefits from March 12, 2019 and ongoing. *See* Exhibits 1, A.

8. On May 20, 2019, F. Mark Paz, M.D. performed an Independent Medical Examination. Dr. Paz reviewed Claimant's reported history, reviewed medical records, and performed a physical examination. Dr. Paz opined that Claimant was intolerant of sitting for an extended period and that the subjective physical limitation she reported

would be inconsistent with performing usual duties as a pilot. Dr. Paz opined that based on Claimant's reported subjective physical limitations, Claimant would be intolerant of sitting for longer than 30 minutes. Dr. Paz opined that the mechanism of injury in this case was inconsistent with the diagnoses and that it was not medically probable that Claimant's conditions were aggravated or accelerated as a result of the March 11, 2019 referenced date of injury. Dr. Paz recommended review of prior records including a 2018 motor vehicle accident and a 2011 work related cervical injury. *See* Exhibits 6, M.

9. Claimant is the co-owner of EES, a business that takes people on safaris in South Africa. Claimant is also a photographer and she teaches customers how to take photographs with their own cameras while out on safari. Claimant reported that she completed five safari trips in 2018 and that seven were scheduled for 2019. Claimant reported that the physical activities during the safaris are limited to walking, standing, sitting, and teaching others what to do with their cameras.

10. Prior to her March 11, 2019 admitted work injury, Claimant was scheduled to travel to South Africa for safari trips. Claimant had requested time off work to travel in order to attend two of the 2019 trips her company had scheduled. After her admitted March 11, 2019 injury, Claimant discussed the trip with her medical providers. Claimant testified that they were okay with her going as long as she stayed within her restrictions and continued with her home exercise program.

11. On May 23, 2019, Mark Winslow, D.O. evaluated Claimant. Claimant reported being upset and angry that she was injured and was missing out on life events and had sustained a ridiculous loss of income as well as faced delays in referrals. Claimant reported her upcoming trip to South Africa that had been planned for over a year. Dr. Winslow opined that the trip may do Claimant some good and certainly was not likely to cause harm. Claimant had previously reported that when on safari she was quite relaxed and comfortable and did not carry a backpack, hike, or travel in a way that would put stress son her back. *See* Exhibit 8.

12. On May 24, 2019, Dr. Reinsma responded to questions asked by Insurer on a case manager update form. Dr. Reinsma opined that Claimant was stable enough with her injury to make the long journey to South Africa. Dr. Reinsma opined that as long as Claimant continued to use appropriate body mechanics as she had been instructed, the travel should not result in further injury. Dr. Reinsma opined that the travel and activities while in Africa should not cause exacerbation of Claimant's symptoms if Claimant continued to use appropriate body mechanics. Dr. Reinsma noted that Claimant would be working as a photography instructor and would not be carrying any equipment, would be in a motor vehicle, and would not be hiking. Dr. Reinsma opined that it was acceptable that Claimant would not be treating with a provider for an extended period of time and he opined that Claimant should do well if she continued to perform her home exercise program. Dr. Reinsma opined that although she was physically capable to travel to Africa with her personal photography business on safari, Claimant was not physically able to return to work full duty. He opined that the physical demands of Claimant's occupation required her to be in certain positions and to apply a significant amount of

force in those positions, which Claimant would not encounter during her trip. Dr. Reinsma restricted Claimant to no lifting or carrying over 15 pounds; limited use of her upper extremities; no pushing or pulling over 30 pounds; frequent standing and walking; and no bending or squatting. *See* Exhibit 4.

13. Claimant traveled to South Africa on May 28, 2019 and returned to the United States on July 19, 2019. During that time, Claimant was able to complete and help show photography to clients on all seven scheduled safaris for the business she co-owns.

14. Claimant testified that EES was formed in 2016 and completed its first safaris in 2017. In 2018, the company completed five safaris. In 2019, the company completed seven safaris and the goal and schedule is to have 20 safaris in 2020.

15. On May 28, 2019, Claimant left Denver and took a 9-hour flight to Frankfurt, Germany, followed by a 12-hour layover and a 10-hour flight to Johannesburg, South Africa. Claimant testified that while flying, she would sit for 2-3 hours before getting up to stretch in the galley. Claimant testified that during her layover, she walked the airport, did her home exercise program, and slept in the sky lounge. Claimant testified that her luggage was light because she had a room in South Africa where she kept most of her clothing and that her camera bag she carried weighed approximately 12 pounds. Claimant testified that she asked for assistance lifting her luggage into the overhead bins and did no lifting.

16. Claimant testified that prior to her admitted March 11, 2019 injury, she planned to attend two safaris in 2019. She testified that since she could not return to work as a pilot, she decided to stay in South Africa and attend all seven safaris. Claimant returned to the United States on July 19, 2019.

17. The safaris took place in open air Toyota Land Cruisers with ten passenger bucket-style seats. Claimant testified that they would go out three hours in the morning and then three hours in the evening. Halfway through each three hour outing, they took a 20-30 minute coffee/bathroom break. Claimant testified that they traveled on well-maintained dirt roads and periodically went off road to get closer to wildlife.

18. As the co-owner of the company, Claimant also performed marketing tasks, made sales/information calls to prospective clients, and taught photography to clients while they were out on safari.

19. Claimant testified that she did not receive wages or earn income from her company. She testified that although the company paid for her flight and lodging, the company decided to reinvest their small profit margin back into the company to help it grow in its first few years of formation. Claimant testified that she therefore did not earn any wages. Claimant also testified that in prior years, she paid for her own flight and used personal money to pay for various equipment for the company.

20. On June 12, 2019, Respondents filed a Petition to Modify, Terminate, or Suspend Compensation and requested permission to terminate TTD benefits from June 1, 2019. Respondents listed that Claimant was working through her business that operates safaris in Africa as the basis for filing the petition. *See* Exhibits 2, B.

21. On June 18, 2019, Claimant objected to the petition. On June 21, 2019, Respondents applied for hearing on the issue. See Exhibits 3, C, D.

22. The sole issue for determination is whether Respondent can suspend TTD benefits during the time Claimant was in South Africa on safari from May 28, 2019 through July 19, 2019.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Temporary Total Disability

To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* Sections 8-42-(1)(g), 8-42-105(4); *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S. Whether an injured worker is disabled is a factual question for the Administrative Law Judge. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997).

Respondents argue that this case is similar to the case *In the Matter of the Claim of David M. Matus*, that denied and dismissed the claimant's request for TTD benefits. W.C. No. 4-740-062, (ICAO July 13, 2010). In that case, the ALJ determined that the claimant did not suffer a disability or actual wage loss due to the claimant's business records which revealed business earnings and expenses throughout the period of alleged disability. *Id.* ICAO held that the ALJ was free to consider the business income as suggesting employment because the business profits were attributable in part to the claimant's efforts. *Id.* In that case, however, the Claimant was initially injured while working in construction. After the injury, the Claimant continued to perform work activities related to construction projects. The ALJ concluded that the Claimant had not suffered a disability as Claimant was not only able to, but actually did resume his prior work (although with different employers). The ALJ found that Claimant's business records, including earnings and expenses, established that Claimant was not disabled or medically incapacitated and was able to perform his regular pre-injury employment.

Here, Claimant's regular pre-injury employment was as an airplane pilot. Claimant, during the period of time at issue, was under medical restrictions and she had loss and restriction of her normal bodily function. There is no question that she was unable to

perform her normal duties piloting airplanes during the period of time at issue. Since she was unable to perform her normal work duties her wage earning capacity was greatly impaired. Claimant did not earn any wages during the period of time at issue. Unlike the claimant in the Matus case, Claimant has been unable to return to her regular pre-injury employment. Claimant has not been able to resume her prior work activities.

Respondents' argument seems to place emphasis on whether or not Claimant was totally disabled. Even assuming she was only partially disabled (as Respondents seem to implicate) and was able to work her "other job" while on safari since it fell within her work restrictions, Claimant was still unable to perform her primary job. Her primary job was outside her work restrictions. Assuming Respondents' argument is persuasive, Claimant would be considered partially disabled and her injury would still be the cause of her disability, medical restrictions, and partial wage loss since it prevented her from performing her primary job. Thus, if Respondents' argument were persuasive, Claimant would be still entitled to an award of Temporary Partial Disability (TPD) benefits based on the difference between the claimant's AWW at the time of injury and the earnings during the continuance of the temporary partial disability. Here, there were no earnings to subtract out as Claimant made a business decision to reinvest any profits from her company. There is no evidence there is a surplus of profits to make that an unreasonable decision and Claimant is credible as to why she earned no wages. Therefore, even if Respondents' arguments were accepted and Claimant were found to be only partially disabled and not totally disabled from employment, the result would be the same.

Respondents' arguments overall are not persuasive. Claimant in this case is entitled to TTD benefits during the period of time at issue. Claimant is medically incapacitated which has impaired her wage earning capacity as demonstrated by her inability to resume her airline pilot work. Claimant's work restrictions impair her ability to effectively and properly pilot an aircraft. Claimant has not returned to regular or modified employment. Respondents have failed establish that TTD benefits should be terminated between May 28, 2019 and July 19, 2019.

ORDER

It is therefore ordered that:

1. Respondents have failed to establish by a preponderance of the evidence that Claimant's temporary total disability (TTD) benefits should be suspended from May 28, 2019 through July 19, 2019.

2. Any issues not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the

Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, *see* section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 7, 2019 /s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that she suffered a compensable right elbow injury during the course and scope of her employment with Employer on April 25, 2018.

2. Whether Claimant has established by a preponderance of the evidence that she is entitled to receive authorized, reasonable and necessary medical treatment for her right elbow injury.

FINDINGS OF FACT

1. Claimant worked for Employer as a Bus Monitor. On April 25, 2018 Claimant was riding on a school bus while performing her job duties. While attempting to prevent a fall after the driver suddenly applied the brakes, Claimant steadied herself against the driver's seat with her right hand. Claimant experienced right hand pain as a result of the incident.

2. Claimant first sought medical treatment for her injuries on May 10, 2018. Claimant reported that about two weeks earlier she had been working as an assistant on a bus when the driver "push[ed] on the brakes very suddenly." To prevent a fall she "steadied herself against the back of his seat with her right hand." She suffered right hand pain. A physical examination by Authorized Treating Physician (ATP) Robert Broghammer, M.D. revealed decreased range of motion of the right hand and wrist because of pain. X-rays of the right wrist were negative. Dr. Broghammer diagnosed Claimant with a contusion and pain in the right hand. He determined that the April 25, 2018 work incident caused Claimant's right wrist symptoms.

3. On May 15, 2018 Claimant returned to Dr. Broghammer for an examination. In addition to right wrist pain, Claimant reported right elbow symptoms. She noted that her wrist and elbow pain began after the April 25, 2018 work accident. Dr. Broghammer diagnosed Claimant with a contusion and pain in the right hand. He determined that the "cause of this problem is related to work activities."

4. On July 30, 2018 Claimant visited Colorado Orthopedic Consultants based on a referral from ATP Dr. Broghammer. Claimant specifically received treatment from Timothy Abbott PA-C for Craig A Davis, M.D. PA-C Abbott recounted that Claimant injured her right wrist and elbow when she was at work helping a student on a bus. The bus suddenly stopped, Claimant reached in front with her right hand and suffered a sudden forceful extension of the wrist. She subsequently underwent physical therapy that only provided slight relief. PA-C Abbott diagnosed Claimant with right carpal tunnel syndrome, a scapholunate sprain/strain, lateral epicondylitis of the right elbow and numbness/tingling. He administered a right elbow injection and scheduled an EMG.

5. On August 9, 2018 Claimant underwent an independent medical examination with Jonathan Sollender, M.D. Claimant reported that she injured her right wrist and elbow while working as a transportation educational assistant. When the bus suddenly stopped Claimant "was unprepared and ran her right hand into the seat ahead of her." After reviewing Claimant's medical records and performing a physical examination Dr. Sollender diagnosed Claimant with DeQuervain's tenosynovitis of the right radial wrist and non-work-related bilateral carpal tunnel syndrome. He explained that Claimant suffers from DeQuervain's tenosynovitis as a result of striking or extending her right wrist when the bus suddenly stopped. However, Claimant did not exhibit any physical examination findings to support a diagnosis of right elbow lateral epiconbdylitis "beyond tenderness to pressure." Claimant did not have any of the "typical exam features to support that diagnosis."

6. On March 4, 2019 Claimant returned to Dr. Davis for an evaluation. He diagnosed Claimant with right DeQuervain's syndrome and right lateral epicondylitis. Dr. Davis explained that both of the diagnoses were causally related to Claimant's April 25, 2018 bus incident. He specified that the diagnoses "were a direct result of her work-related accident when she was on a bus and it stopped suddenly causing her to reach out and catching herself with her right hand. She has had pain at the wrist and elbow ever since." Dr. Davis recommended surgical treatment including a right wrist DeQuervain's release and lateral epicondyle release at the right elbow.

7. On March 15, 2019 Claimant returned to Dr. Broghammer for an evaluation. Dr. Broghammer noted that Claimant continued to experience right wrist pain. He also remarked that Claimant's right elbow condition was causally related to her April 25, 2018 industrial injury. Dr. Broghammer commented that Dr. Davis had also determined Claimant's right elbow condition was related to her work accident. He explained that he "could see that a hyperextension of the wrist could also strain the common extensor tendon and resulting epicondylitis." After reviewing Claimant's medical records, Dr. Broghammer determined that Claimant first reported her elbow symptoms on May 15, 2018 or shortly after her industrial injury. He reasoned that Claimant's right elbow condition was "more likely than not related to the original injury."

8. On March 26, 2019 Dr. Davis authored a letter regarding Workers' Compensation coverage for Claimant's lateral epicondylitis. He explained that he had been treating Claimant since July 30, 2018 for her April 25, 2018 industrial injuries. Dr. Davis recounted that, while Claimant was helping a student on a bus as part of her job duties, she reached out with her right arm to catch herself after the bus suddenly stopped. Claimant injured her wrist and elbow. Dr. Davis remarked that Claimant has experienced right wrist and elbow symptoms since the accident, but the "wrist symptoms have overshadowed the elbow to some extent." He explained that Claimant has had excellent responses to steroid injections in both her wrist and elbow. Dr. Davis commented that "the diagnosis of lateral epicondylitis is quite clear based on the location of her pain and her response to injections." Additionally, her mechanism of injury is entirely consistent with injury at the lateral epicondyle given that she caught her entire body weight with her right hand." He remarked that Claimant has been approved for surgery for her

DeQuervain's syndrome and recommended surgical treatment of the lateral epicondyle at the same time.

9. On August 22, 2019 Respondents filed a General Admission of Liability (GAL) recognizing that Claimant suffered a right wrist injury on April 25, 2018. The GAL did not acknowledge that Claimant suffered a right elbow injury on the day of the work accident.

10. On September 13, 2019 the parties conducted the evidentiary deposition of Dr. Sollender. Dr. Sollender maintained that Claimant's lateral epicondylitis was not causally related to her April 25, 2018 work accident. He explained that Claimant's mechanism of injury would not likely have caused any right elbow problems. Dr. Sollender also emphasized that Claimant did not report any right elbow symptoms until approximately three weeks after the work accident. Moreover, when Dr. Sollender first saw Claimant on August 9, 2018 she exhibited tenderness over the right elbow, but provocative maneuvers were negative for lateral epicondylitis. His examination thus did not support a diagnosis of lateral epicondylitis.

11. Dr. Sollender detailed that Claimant's description of the April 25, 2018 bus incident did not support a diagnosis of lateral epicondylitis. He explained:

> I can't come up with a reasonable biomechanical reason why she would have elbow pain after a wrist injury, especially with one that her wrist is put in a posture of extension which would normally cause those tendons and muscles that extend the elbow to be in a relaxed position and not stressed by an injury.

He summarized that he did not believe Claimant's "right elbow condition can be brought up as a reasonable occupational injury from this date." Dr. Sollender further remarked that extending the wrist upon a fixed object supporting the arm relaxes the muscles and tendons in the elbow. He summarized that a forced wrist extension would not cause elbow trauma because the elbow would be in a relaxed position and not tear or inflame tendons.

12. Claimant has failed to demonstrate that it is more probably true than not that she suffered a compensable right elbow injury during the course and scope of her employment with Employer on April 25, 2018. Initially, Claimant explained that, while assisting a student on a bus, the driver suddenly stopped. To prevent a fall she steadied herself against the back of the driver's seat with her right hand. Claimant initially reported only right wrist symptoms as a result of the accident. However, by May 15, 2018 she also mentioned right elbow pain and was diagnosed with lateral epicondylitis. ATP Dr. Broghammer subsequently concluded that Claimant's right elbow symptoms were causally related to the April 25, 2018 bus incident. Furthermore, Dr. Davis commented that the diagnosis of lateral epicondylitis was clear based on the location of Claimant's pain and her response to injections. He additionally noted that Claimant's mechanism of injury was consistent with damage to "the lateral epicondyle given that she caught her entire body weight with her right hand."

13. In contrast, Dr. Sollender persuasively concluded that Claimant's lateral epicondylitis was not causally related to the April 25, 2018 bus incident. He explained that Claimant's mechanism of injury would not likely have caused any right elbow problems. Dr. Sollender emphasized that Claimant did not report any right elbow symptoms until approximately three weeks after the work accident. Moreover, when Dr. Sollender first saw Claimant on August 9, 2018 she exhibited tenderness over the right elbow, but provocative maneuvers were negative for lateral epicondylitis. Dr. Sollender further remarked that extending the wrist upon a fixed object supporting the arm relaxes the muscles and tendons in the elbow. He summarized that a forced wrist extension would not cause elbow trauma because the elbow would be in a relaxed position and not tear or inflame tendons. Dr. Sollender simply could not determine how Claimant suffered an injury to her right elbow based on her description of the work accident. Based on the medical records involving the delayed reporting of elbow symptoms and the persuasive opinion of Dr. Sollender regarding the mechanism of injury, Claimant has failed to demonstrate that her work activities on April 25, 2018 aggravated, accelerated or combined with her pre-existing condition to produce a need for medical treatment.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that she suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re*

Swanson, W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. As found, Claimant has failed to demonstrate by a preponderance of the evidence that she suffered a compensable right elbow injury during the course and scope of her employment with Employer on April 25, 2018. Initially, Claimant explained that, while assisting a student on a bus, the driver suddenly stopped. To prevent a fall she steadied herself against the back of the driver's seat with her right hand. Claimant initially reported only right wrist symptoms as a result of the accident. However, by May 15, 2018 she also mentioned right elbow pain and was diagnosed with lateral epicondylitis. ATP Dr. Broghammer subsequently concluded that Claimant's right elbow symptoms were causally related to the April 25, 2018 bus incident. Furthermore, Dr. Davis commented that the diagnosis of lateral epicondylitis was clear based on the location of Claimant's pain and her response to injections. He additionally noted that Claimant's mechanism of injury was consistent with damage to "the lateral epicondyle given that she caught her entire body weight with her right hand."

8. As found, in contrast, Dr. Sollender persuasively concluded that Claimant's lateral epicondylitis was not causally related to the April 25, 2018 bus incident. He explained that Claimant's mechanism of injury would not likely have caused any right elbow problems. Dr. Sollender emphasized that Claimant did not report any right elbow

symptoms until approximately three weeks after the work accident. Moreover, when Dr. Sollender first saw Claimant on August 9, 2018 she exhibited tenderness over the right elbow, but provocative maneuvers were negative for lateral epicondylitis. Dr. Sollender further remarked that extending the wrist upon a fixed object supporting the arm relaxes the muscles and tendons in the elbow. He summarized that a forced wrist extension would not cause elbow trauma because the elbow would be in a relaxed position and not tear or inflame tendons. Dr. Sollender simply could not determine how Claimant suffered an injury to her right elbow based on her description of the work accident. Based on the medical records involving the delayed reporting of elbow symptoms and the persuasive opinion of Dr. Sollender regarding the mechanism of injury, Claimant has failed to demonstrate that her work activities on April 25, 2018 aggravated, accelerated or combined with her pre-existing condition to produce a need for medical treatment.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's request for Workers' Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: November 7, 2019.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that her Average Weekly Wage ("AWW") should be increased, based upon completion of her training as a Medical Assistant, said training having been completed prior to reaching Maximum Medical Improvement?

II. Has Claimant shown, by a preponderance of the evidence, that Respondents should pay penalties for violation of W.C.R.P 6-1(A)(1)? If so, what is an appropriate penalty?

STIPULATIONS

Two stipulations were announced by the parties at hearing:

I. If a penalty is imposed, the penalty period would run from April 29, 2019 through May 28, 2019.

II. Respondents will amend the language in the Final Admission of Liability to provide for a general award of Post-MMI medical maintenance benefits.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. On May 5, 2018, Claimant sustained an admitted low back injury while assisting with a patient lift. She went to the emergency room that day. X-rays and a CT scan were negative. (Ex. A, pp. 1-2).

2. On May 9, 2018, Claimant presented at CCOM-Pueblo complaining of low back pain and left leg pain. She was prescribed ibuprofen and Flexeril. Physical therapy was recommended, and she was placed on two-pound push/pull, lift/carry restrictions. (Ex. A, pp. 4-6).

3. Over the next several months, Claimant received conservative treatment including physical therapy, chiropractic care, medications, and acupuncture. MRIs of her low back and left hip were negative.

4. On September 10, 2018, Respondents filed a General Admission for Liability ("GAL") admitting to a stipulated average weekly wage ("AWW") of $236.52 with a corresponding temporary total disability ("TTD") rate of $157.68. TTD payments were backdated effective to 5/6/18. (Ex. O, p. 71). The adjuster who processed this GAL

was Connie Cridlebaugh. This resolved the issues that Claimant had endorsed for hearing on a prior hearing application. (Ex. O, p. 74).

5. The ATP, Dr. Daniel Olson, noted on February 5, 2019 that the SI-Joint injections provided by Dr. Dwight Leggett were inconclusive in identifying a pain generator. Dr. Leggett recommended against surgery, instead opting for medial branch blocks to identify facet-mediated pain, if any. (Ex. C, pp. 18-19).

6. On April 15, 2019, Claimant underwent a Functional Capacity Evaluation ("FCE"), which placed Claimant in the light duty category. (Ex. G. pp. 31-35). In the narrative for this FCE, it was noted: "She has just *completed training* for Medical Assistant" *Id.*

7. On April 24, 2019, Dr. Leggett noted 0% improvement following the medial branch blocks. (Ex. H, p. 36). Dr. Leggett noted no functional improvement with aggressive treatment. He opined that Claimant was not a good candidate for a radiofrequency ablation or SI-joint fusion. (Ex. H, pp. 37-38).

8. Based on Claimant's lack of response to treatment, Dr. Olson placed Claimant at MMI on April 26, 2019. (Ex. I, pp. 39-40). Under TREATMENT PLAN, he noted:

> 1. Dr. Leggett had no further suggestions.
> 2. She is at maximum medical improvement.
> 3. *Impairment report will be dictated separately.*
> 4. She will require the tramadol for the next 12 months. *Id at 40* (emphasis added).

9. On April 29, 2019, the newly assigned claims adjuster, Melissa Casady, filed a General Admission of Liability. (Ex. P, p. 75). TTD was to end 4/25/19. This GAL noted: "Claimant found to be at MMI 4/26/19. GA filed to terminate TTD *pending receipt* of PPD narrative." *Id* (Emphasis added).

10. In a subsequent report dated May 22, 2019, Dr. Olson prepared his impairment rating. He assigned a 15% whole person rating for Claimant's lumbar spine. (Ex. J, pp. 45-49). He assigned permanent work restrictions of lifting up to 20 pounds, overhead lifting up to 20 pounds, carrying 25 pounds, pushing and pulling 35 pounds and allow for frequent position changes. *Id at 45.* He recommended maintenance medical benefits of tramadol for 12 months.

11. On May 28, 2019, Claimant filed an Application for Hearing endorsing a general penalty for violation of W.C.R.P. 6-1(A)(1).

12. That same day the adjuster, Melissa Casady, filed a Final Admission of Liability ("FAL"), admitting to both the maintenance medical care recommended by Dr. Olson and to the 15% whole person impairment rating assigned by him. TTD remained admitted for the period ending 4/26/19. (Ex. Q, p. 81).

Testimony on Average Weekly Wage

13. Katy Frazier testified on Claimant's behalf at the hearing. She is the Director of Employment Services for Parkview Medical Center in Pueblo ("Parkview"). This position involves management of all hiring and recruiting at Parkview. Ms. Frazier testified that a contingent job offer was made to Claimant for a Medical Assistant ("MA") position. The position would have paid $15.73 per hour for 40 hours per week [Equating to an AWW of $629.20 and a TTD rate of $419.47]. Ms. Frazier testified that an MA license was mandatory for this position.

14. This MA position was contingent on completion of Parkview's Work Steps Physical Capacity Test. When an applicant has permanent work restrictions, Parkview reaches out to the authorized treating physician to determine whether a candidate is physically safe to perform the testing. Ms. Frazier testified that Dr. Olson notified Parkview, upon request, that Claimant was not safe to perform the Work Steps Physical Capacity Test.

15. Ms. Frazier explained that the Medical Assistant position was categorized as a heavy lifting position. Physical capacity testing, therefore, required the applicant to lift at least 60 lbs. of a 110 lbs. test dummy.

16. Ms. Frazier testified that a second position was offered to Claimant of medical scheduler. This position would pay $14.48 per hour for 40 hours per week [Equating to an AWW of $579.20, and a TTD rate of $386.13]. It did not have any physical requirements. An applicant does not have to have an MA license to qualify for the scheduler position, but preference is given to applicants with some post-secondary education.

17. Claimant testified that prior to the injury she typically worked 20 to 24 hours per week as a CNA at St. Mary Corwin Hospital. Claimant completed her ten-and-half months of training to be an MA, and was training while on leave due to her workers' compensation injury.

18. Claimant disagreed with Ms. Frazier concerning the physical requirements of the MA position. She testified that she would not have gone through the ten months of MA training while she was out on leave, if the future position was as physically demanding as the CNA position had been. Claimant testified that she was currently working at Pueblo Community Health Center as an MA. She was now making $13.43 per hour for 40 hours per week, which equated to an AWW of $537.20 and a TTD rate of $358.14. She would be starting her position as a scheduler on October 21, 2019 with yet a different rate of pay.

Testimony on Temporary Total Disability/Penalties

19. Claimant testified that when her TTD stopped, she fell behind on her rent and was late on her electric and gas bills. She testified that she had to take out an $800.00 loan to cover rent. She testified that she was now only behind on her electric bill, but that she

had a repayment plan in place with the power company. She never requested a lump-sum payout from the $15,137.28 in PPD that Respondents admitted to.

20. Claimant also testified that she began to fall behind on her bills once she was out on leave in May of 2018. During this time, she had help from her Aunt, Grandmother, and the father of her kids. Even after she began receiving PPD payments, she continued to need help including family members to watch her kids while she looked for work.

21. Melissa Casady testified that she was the claims adjuster assigned to this case. She had taken over for a prior claims adjuster in the beginning of 2019. She testified that she paid TTD up through Claimant's MMI date. She mistakenly filed the GAL stopping temporary benefits based on the MMI date. She explained that she had been a claims adjuster for over 10 years, but she had only been working in Colorado for two months at the time. She did not realize that temporary benefits could not be stopped where a claimant reached MMI, but had permanent work restrictions. At the time of filing the GAL, she only had the statement of MMI from Dr. Olson, but no impairment narrative or impairment worksheets. She tried to remedy her error as soon as it was brought to her attention.

22. On cross-examination, Ms. Casady apologized to Claimant for the error, and she apologized to Mr. Saunders for her mistake. She acknowledged that she did not reach out to apologize to Claimant at any time prior, as the case was then in litigation, and she did not wish to contact a represented party. When asked if she reached out to Claimant's attorney to ask permission to apologize, she acknowledged that she had not done so.

23. Ms. Casady also explained that at the time of the work injury Claimant's AWW was $129.60 because of her part-time status. The parties subsequently agreed to a higher AWW of $236.52, and Respondents had filed a corresponding GAL on September 10, 2018.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

a. The purpose of the Workers' Compensation Act of Colorado ("Act"), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). A claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

b. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

c. In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

d. In this instance, the ALJ finds each of the three witnesses who testified to be sincere and credible in their testimony. Katy Frazier accurately outlined the history of the MA position initially offered to Claimant, and her perception of the demands of that job. While differing with Katy Frazier on the comparative demands of the MA position, Claimant accurately outlined the completion and her reasoning for finishing her MA training, her attempts to upgrade her position, and the losses she incurred as a result of the untimely discontinuation of her TTD payments. Melissa Casady made a mistake in processing this claim, but the ALJ finds her explanation to be forthright in explaining how it occurred, her attempts to rectify the error, and finds her apology in court to be sincere (and not untimely, under the circumstances).

Average Weekly Wage

e. C.R.S. § 8-42-102(3), grants an ALJ discretionary authority to recalculate the AWW in some other manner if the prescribed methods will not fairly calculate the wage in view of the particular circumstances. *Pizza Hut v. ICAO*, 18 P.3d 867 (Colo. App. 2001) allowed the ALJ to calculate AWW based on the higher wage earned at the time of MMI to more fairly compensate the claimant for his future loss of earnings. The Pizza Hut panel noted that

> Moreover, a significant wage increase that occurs post-injury does not establish a lack of impairment, nor does it mean that the claimant has not

> suffered a future wage loss related to the impairment….Additionally, contrary to employer's argument, the potential impact that claimant's impairment and his physical restrictions may have on his future nursing career represents a reasonable and appropriate circumstance to be considered by the ALJ in assessing the fairness of the calculation of the average weekly wage. This is particularly so given claimant's testimony as to the possible limitations he may face. Id at 870.

f. The courts have recognized that while the ALJ may exercise his or her discretion under C.R.S. § 8-42-102(3) that discretion must be premised on relevant evidence in the record. For example, in *Avalanche Indus. v. Clark*, 198 P.3d 589 (Colo. 2008) and in *Pizza Hut*, each claimant was earning a higher wage during the period that he or she would have been eligible for receiving temporary benefits. The evidence of an increased earning capacity and the consequent greater impact on permanent wage loss was therefore *tangible and measureable* prior to MMI.

g. In this case, the ALJ finds that Claimant's potential earning capacity has been shown to be sufficiently *tangible and measurable* to adjust her AWW accordingly. Claimant had completed her training prior to reaching MMI, with a clear eye towards taking on a higher-paying, less physically demanding role. While Claimant argues, interestingly, that an MA position does not involve the same physicality as that of a CNA, her inability to perform the MA role at Parkview (as a direct result of her work injury) is what *best establishes her potential earning capacity, absent her work injury.* ***The Parkview MA job was hers, until it wasn't.*** While still physical, the MA job at Parkview recognized the additional skills and knowledge Claimant had acquired, all prior to reaching MMI. The Pueblo job market, at least vis-à-vis Parkview, paid an hourly wage of $15.73 for a 40-hour week for a newly minted MA- who could pass the pre-employment physical.

h. Had Claimant not actually been preliminarily *offered* this Parkview MA job, the ALJ would have found the medical scheduler position to be a sufficiently *tangible and measurable representation* of her AWW, based upon Claimant's additional skill acquisition. In this case, however, the ALJ concludes that Claimant's AWW is $15.73 x 40 = $629.20.

Penalties, Generally

i. C.R.S. § 8-43-304(1) provides for penalties against an employee, employer or insurance carrier who does any of the following: "(1) violates any provision of the . . . Act; (2) does any act prohibited by the Act; (3) fails or refuses to perform any duty lawfully mandated within the time prescribed by the director or the Panel; or (4) fails, neglects, or refuses to obey any lawful order of the director or the Panel." *Pena v. ICAO*, 117 P.3d 84 (Colo. App. 2004).

j. Whether statutory penalties may be imposed under § 8-43-304(1) C.R.S. involves a two-step analysis. The statute provides for the imposition of penalties of up to $1000 per day where the insurer "violates any provision of article 40 to 47 of [title 8], or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined

within the time prescribed by the director or the panel, for which no penalty has been specifically provided, or fails, neglects or refuses to obey any lawful order made by the director or panel…"

k. Thus, the ALJ must first determine whether the insurer's conduct constitutes a violation of the Act, a rule, or an order. Second, the ALJ must determine whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of the insurer's action depends on whether it was based on a rational argument based in law or fact. *Jiminez v. Industrial Claim Appeals Office,* 107 P.3d 965 (Colo. App. 2003); *Gustafson v. Ampex Corp.,* W.C. No. 4-187-261 (ICAO,. Aug. 2, 2006). There is no requirement that the insurer know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo. App. 1996).

l. The question of whether the insurer's conduct was objectively reasonable ordinarily presents a question of fact for the ALJ. *Pioneers Hospital v. Industrial Claim Appeals Office,* 114 P.3d 97 (Colo. App. 2005); *see also Pant Connection Plus v. Industrial Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010). A party establishes a prima facie showing of unreasonable conduct by proving that an insurer violated a rule of procedure. *Pioneers Hospital v. Industrial Claim Appeals Office, supra*. If the claimant makes such a prima facie showing the burden of persuasion shifts to the respondents to show their conduct was reasonable under the circumstances. *Pioneers Hospital v. Industrial Claim Appeals Office, supra, Human Resource Co. v. Industrial Claim Appeals Office,* 984 P.2d 1194 (Colo. App. 1999).

Penalties, as Applied

m. In this case, Respondent-Insurer has not even attempted to show that its conduct, vis-à-vis its adjuster, was objectively reasonable. Termination of Claimant's TTD benefits, in violation of W.C.R.P 6-1(A)(1), was objectively unreasonable, and the ALJ so finds. Penalties must be assessed in this case. The parties have stipulated that the penalty period runs from April 29, 2019 through May 28, 2019, for a period of 30 days. After reviewing the evidence, the ALJ finds such stipulation to be reasonable and justified.

Unpersuasive Argument-Apologies

n. The ALJ is not persuaded by Claimant's assertion that the adjuster failed to timely and sincerely apologize for her mistake. The ALJ finds that Ms. Casady is sincere in her apology conveyed during the hearing, and wishes this episode had not occurred. Further, (assuming an oral apology is even relevant at any point), the ALJ is not persuaded that the timing of said apology was somehow too late. Had Ms. Casady reached out to Claimant to apologize, this would have created its own set of issues of ex parte contact-and could have then been argued as an aggravator. Had Ms. Casady taken the highly irregular step of calling Claimant's attorney to convey her regrets, nothing would have changed. As noted in Claimant's own brief "….Not to mention that the adjuster being sorry does not help Ms. Ortiz in any way." The ALJ finds this apology argument in aggravation to be highly unpersuasive and of marginal relevance, at best.

Unpersuasive Argument-Failure to Mitigate

o. Respondents imply that Claimant could/should have mitigated her damages by simply accepting a lump sum payment in order to pay her bills. The ALJ is unmoved. As noted in Claimant's brief, Claimant should not have had to choose between paying bills and taking a discounted lump sum, which she otherwise did not wish to do. Moreover, as noted, Claimant should certainly not have to accept a lump sum and thereby forfeit her ability to litigate her AWW issue (and in this case, successfully). The ALJ finds this argument in mitigation to be impertinent to the penalty issue.

Relevant Factors in Aggravation

p. As a result of Respondent-Insurer's error, Claimant suffered actual harm, to wit: she was denied TTD benefits for approximately one month for which she was otherwise entitled. This caused a ripple effect in her personal finances, causing late payments, and the need to borrow money to make up the shortfall.

Relevant Factors in Mitigation

q. While it has been found that actual harm resulted from Insurer's conduct, the ALJ finds that the adjuster *did not act willfully,* or in bad faith in terminating TTD benefits as she did. Indeed, while Claimant was "not ready" for TTD to end when it did, had the ATP's Impairment ratings accompanied his MMI report, TTD payments would have properly ended right when they did. There is never a good time for TTD payments to end, but end they must, sometimes abruptly, assuming the legal requirements are met. The adjuster's conduct in this case was **negligent**. She failed to spot the red flag, due to her inexperience with Colorado. She had the option of seeking out advice from someone versed in Colorado Workers Compensation law (internally or externally), but did not. It appears she relied upon her experience with other states, which apparently do not have a corresponding Rule 6-1(A)(1).

r. There is no evidence in the record that the adjuster acted in accordance with anything other than an *attempt* to follow the Rules *as she understood them,* and in accordance with practices set forth by Insurer. She did not "go rogue", nor did Insurer as an entity. Once her error was caught, it was *remedied forthwith.* There is *no evidence* of a *pattern* of misconduct here, nor any fraudulent or defiant behavior. It was a mistake of law. Based upon the testimony elicited, this incident has served as a learning experience for Insurer, and a similar mistake is not likely to repeat itself in the future. This litigation, and resultant Order should suffice to deter similar conduct in the future by Insurer.

s. A similar occurrence occurred in *Maria Adakai v. St. Mary Corwin Hospital, W.C. 4-619-954 (ICAO 2006).* TTD was prematurely terminated by the Insurer, in violation of the predecessor of Rule 6-1(A)(1). In *Adakai,* however, the adjuster terminated TTD based upon a verbal, hearsay, MMI report. Here Ms. Casady had *written confirmation of MMI.* There was no assertion of fraud in either instance. Further, the *Adakai* panel felt that the ALJ could have inferred that Insurer in that case had a pattern of terminating TTD

upon receiving verbal notice of MMI- the ALJ makes no such inference in this case. Further, the *Adakai* panel inferred that that the ALJ found a high degree of *reprehensibility* in that Insurer's conduct. The ALJ makes no similar finding here.

t. The *Adakai* panel emphasized that the ALJ should examine (1) the reprehensibility of the conduct, (2) the disparity between the harm to the claimant and the penalty, and (3) the difference between the penalty and civil damages that could be imposed in comparable cases. In this instance, the ALJ finds that the reprehensibility of Insurer was low in comparison with *Adakai.* Further, while Claimant suffered some harm as a result, said harm was quickly mitigated upon discovery of the error. As in Adakai, there is no civil penalty with which to compare the penalty to be imposed. Taking all the foregoing into account, the ALJ finds that a penalty of $150 per day is proportionate and adequate to address the conduct of Insurer in this case.

Gross Disproportionality Test

u. The Colorado Supreme Court has adopted the "gross disproportionality" test for determining whether a regulatory fine violates the Excessive Fines Clause. *Colorado Dept. of Labor & Empl. v. Dami Hospitality, LLC*, *supra* (hereinafter *Dami Hospitality*). In Concluding that corporations were protected from the imposition of excessive fines pursuant to the Eighth Amendment, the Court provided:

> In sum, we hold that the Eighth Amendment does protect corporations from punitive fines that are excessive. The appropriate test to apply in assessing whether a regulatory fine violates the Excessive Fines Clause is the "gross disproportionality" test. In assessing proportionality, a court should consider whether the gravity of the offense is proportional to the severity of the penalty, considering whether the fine is harsher than fines for comparable offenses in this jurisdiction or than fines for the same offense in other jurisdictions. In considering the severity of the penalty, the ability of the regulated individual or entity to pay is a relevant consideration. And the proportionality analysis should be conducted in reference to the amount of the fine imposed for each offense, not the aggregated total of fines for many offenses. *Dami Hospitality*, *Id.* at 103.

v. The "excessive fine" at issue in *Dami Hospitality* was an $841,200 penalty imposed by the Division of Workers' Compensation for failure to carry workers' compensation insurance. This fine was levied against a limited liability company that owned and operated a motel; however, the *Dami Hospitality* Court made it clear the proportionality analysis must consider each individual daily offense, not the aggregate of the multiple daily, singular offenses. *Id.* at 102. In assessing proportionality, the Court also noted that the ALJ should "consider whether the gravity of the offense is proportional to the severity of the penalty, considering whether the fine is harsher than fines for comparable offenses in this jurisdiction or than fines for the same offense in other jurisdictions." *Dami Hospitality*, *at 38.*

w. In this instance, the ALJ finds that the penalty of $150 per day is not grossly disproportionate to the infraction committed. Insurer can easily absorb said penalty, which totals $4,500. Further, Claimant can easily be made whole by the imposition of this penalty.

ORDER

It is therefore Ordered that:

1. Claimant's Average Weekly Wage is $629.20.

2. Respondents shall amend their FAL to include an award of medical maintenance benefits.

3. Respondents will pay penalties at the rate of $150 per day, for a cumulative amount of $4,500.

4. Pursuant to § 8-43-304(1) the penalty assessed is apportioned between Claimant and the Colorado uninsured employer fund created in § 8-67-105. Fifty percent (50%) of the penalty assessed shall be paid to Claimant and the remaining fifty percent of the penalty assessed shall be paid to the Colorado uninsured employers fund.

5. The insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 8, 2019

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that the right knee surgery recommended by Dr. Richard Cunningham is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted September 8, 2018 work injury.

FINDINGS OF FACT

1. The claimant is employed with the employer as a housekeeper. The claimant's job duties include all aspects of cleaning condominiums at her assigned work location. The claimant testified that in her role as a housekeeper she changes and makes up beds, cleans bathrooms, vacuums, sweeps, and mops.

2. On September 8, 2018, the claimant was performing her normal job duties, including changing linens in bedrooms. The claimant testified that she was carrying a stack of linens in her arms while walking up carpeted stairs to make the beds. While walking up the stairs the claimant felt a pop and heat in her right knee. The claimant reported this incident to the employer.

3. Subsequently the claimant received medical treatment with Colorado Mountain Medical, the authorized treating provider (ATP) for this claim. The claimant was first seen at Colorado Mountain Medical on September 10, 2018. At that time, the claimant was seen and reported that she had pain around her right kneecap and felt that her knee was unstable. Dr. Eric Olson noted that the claimant reported that the pop was in the anterior of her right knee. Dr. Olson opined that the claimant had a possible meniscus injury and referred the claimant to physical therapy. In addition, Dr. Olson determined that the claimant could work, but with restrictions.

4. On September 28, 2019, the claimant returned to Dr. Olson and reported that physical therapy was helping her symptoms. However, the claimant reported that she had swelling and discomfort along the medial joint line. At that time, Dr. Olson ordered a magnetic resonance image (MRI) of the claimant's right knee. In addition, he referred to the claimant to Vail Summit Orthopaedics and Neurosurgery.

5. On October 2, 2018, an MRI of the claimant's right knee showed diffuse degeneration of the medial meniscus with focal oblique horizontal tear of the body segment and possible free edge tearing of the inner posterior horn.

6. On October 4, 2018, the claimant was seen by Dr. Richard Cunningham with Vail Summit Orthopaedics and Neurosurgery. The claimant reported that she felt a pop and immediate heat in her right knee at the time of her injury. On exam, Dr. Cunningham noted that the claimant walked with a normal gait, had mild knee effusion, and tenderness along the medial joint line. Dr. Cunningham noted that the claimant's

MRI and his exam indicated a right medial meniscus tear. In addition, Dr. Cunningham also noted that as the claimant had no prior right knee issues, it was his opinion that the claimant's right knee pain was coming primarily from the medial meniscus. He recommended the claimant undergo surgical intervention of a right knee arthroscopy with partial medical meniscectomy, lysis of adhesions, and chondroplasty.

7. The respondents asked physician advisor, Dr. Jon Erickson, to review the surgical request. In a review dated October 12, 2018, Dr. Erickson recommended denial of the surgery. In support of his position, Dr. Erickson noted that the MRI showed no evidence of an acute injury, but did show preexisting abnormalities. In addition, Dr. Erickson noted that the claimant's mechanism of injury of walking up stairs would not result in an injury. Based upon the opinion of Dr. Erickson, the respondents denied authorization for the right knee surgery.

8. On October 15, 2019, Dr. Cunningham requested that the respondents reconsider the denial. In a letter of that date, Dr. Cunningham asserted that the claimant's description of the September 8, 2018 incident was an acute injury. In addition, Dr. Cunningham pointed to the MRI results of a focal oblique horizontal tear of the body segment of the medial meniscus and his findings on exam.

9. In response to Dr. Cunningham's letter, on October 19, 2018 Dr. Erickson again reviewed the surgical request. Dr. Erickson reiterated his opinion that the meniscus tear seen on the MRI was not acute. He again recommended denial of the surgery and the respondents continued to deny authorization.

10. Dr. Erickson reviewed the surgical request for a third time on February 8, 2019. At that time, Dr. Erickson continued to recommend denial of the surgery. However, he recommended that an expert in musculoskeletal radiology review the MRI.

11. On June 11, 2019, the claimant attended an independent medical examination (IME) with Dr. James Lindberg. In connection with the IME, Dr. Lindberg reviewed the claimant's medical records, obtained a history from the claimant, and completed a physical examination. In his IME report, Dr. Lindberg opined that the claimant's right knee condition is preexisting. He agreed with Dr. Erickson that walking up stairs would not cause a meniscus tear. In Dr. Lindberg's opinion, the claimant's symptoms are caused by the underlying and preexisting arthritis and degenerative tear in the claimant's right knee. Dr. Lindberg also noted in his IME report that he did not have the MRI images to review.

12. On July 18, 2019, Dr. Lindberg was provided the MRI imaging for review. Upon his review, Dr. Lindberg noted that there were degenerative changes in the posterior medical meniscus of the claimant's right knee, but no tear. Dr. Lindberg again agreed with Dr. Erickson that the claimant's right knee condition is chronic. Dr. Lindberg also recommended that another physician review the MRI. Dr. Lindberg's testimony by deposition was consistent with his written reports.

13. In his testimony, Dr. Lindberg testified that he reviewed the MRI and did not find evidence of a meniscal tear. Dr. Lindberg also noted that the claimant has

arthritis in her knee that is chronic and preexisting. Dr. Lindberg testified that the condition of the claimant's right knee was not caused by an acute injury. With regard to the recommended surgery, Dr. Lindberg testified that it would not be successful in addressing the claimant's arthritis. Dr. Lindberg also testified that the claimant has be taking the medication Celebrex, which is nonsteroidal anti-inflammatory medication that is used to treat arthritis. In addition, the claimant is taking glucosamine chondroitin which treats arthritis and joint pain.

14. Based upon the recommendation of Drs. Erickson and Lindberg, the respondents asked musculoskeletal radiologist, Dr. Elizabeth Carpenter, to review the MRI of the claimant's right knee. On August 5, 2019, Dr. Carpenter noted that there were degenerative changes in the medial meniscus, but no definitive meniscal tear. Dr. Carpenter also found no findings of an acute injury. The respondents continue to deny authorization for the recommended right knee surgery.

15. The ALJ credits the medical records and the opinions of Drs. Erickson, Lindberg, and Carpenter and finds that the claimant did not suffer a meniscus tear. The ALJ further credits the opinions of Dr. Lindberg over the contrary opinions of Dr. Cunningham and finds that it is more likely than not that the current condition of the claimant's right knee was not caused by an acute injury on September 8, 2018. The ALJ also finds that it is more likely than not that the action of stepping on the stairs on September 8, 2018 did not aggravate or accelerate the preexisting condition of the claimant's right knee so as to necessitate surgery.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and

bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2018).

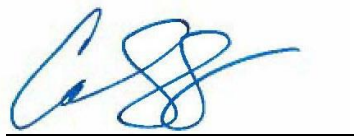
4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

5. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that the recommended right knee surgery is causally related to the September 8, 2018 work injury. As found, the claimant has failed to demonstrate, by a preponderance of the evidence that the act of walking up stairs on September 8, 2018 aggravated or accelerated the preexisting condition of the claimant's right knee to necessitate surgery. As found, the medical records and the opinions of Drs. Erickson, Lindberg, and Carpenter are credible and persuasive.

ORDER

It is therefore ordered that the claimant's request for right knee surgery is denied and dismissed.

Dated this 13th day of November 2019.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. **In addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-074-789 & 5-091-579

ISSUES

- Whether Claimant's admitted and closed April 6, 2018 claim should be reopened based on a change of condition in accordance with § 8-43-303(1), C.R.S.

- Whether Claimant sustained a compensable injury to her lower back and left leg in the course and scope of her employment on October 02, 2018.

- Whether Respondents unilateral termination of medical benefits for non-medical reasons passes the right of selection of physician to the Claimant.

STIPULATIONS

- If W.C. No. 5-091-579 is reopened, or if W.C. No. 5-074-789 is found to be compensable, Claimant's average weekly wage is $388.23.

- If temporary total disability is awarded under either claim, Claimant was off work from October 3, 2018 to March 4, 2019.

- If Claimant worked any partial shifts during this time period Respondents may take credit for the time worked.

- The parties agreed to resolve temporary partial disability owed, if any.

FINDINGS OF FACT

1. Claimant worked for Employer in the kitchen at Swanson Elementary School. She testified that on April 6, 2018 she injured her low back and experienced pain down her left leg while lifting boxes of apples. Claimant had no difficulty performing her job duties during the 2016-17 school year and the 2017-18 school year until the April 6, 2018 incident.

2. Respondents provided Claimant medical treatment at Midtown Occupational, with Dr. Steinmetz and his referral Dr. Lesnak. Claimant was by Drs. Steinmetz and Lesnak diagnosed Claimant with a lumbar sprain. Claimant underwent massage and physical therapy and saw Dr. Jason Gridley for limited chiropractic treatment.

3. On April 23, 2018 Respondents filed a General Admission of Liability for this injury (W.C. No. 5-074-789), and began paying temporary disability benefits. On June 1, 2018 Respondents filed a second General Admission of Liability indicating that Claimant has returned to work on May 22, 2018 at full duty and full wages.

4. On July 16, 2018, Dr. Steinmetz found Claimant to be at MMI by without impairment. Respondents filed a Final Admission of Liability dated July 17, 2018 consistent with Dr. Steinmetz's opinion. Claimant did not object to the Final Admission (W. C. No.: 5-074-789).

5. Claimant returned to work the following school year without restrictions. She testified that she was able to perform all of her job duties after having the summer months off to rest. Claimant said that she was off for the summer but did return to work when the new school year started in August, 2018.

6. Claimant was able to return to her previous position and to do everything required of her until she sustained a new injury on October 2, 2018, while lifting boxes containing cartons of milk. Claimant testified that she was responsible for preparing breakfasts for the classrooms. This included taking the cartons of milk to the classrooms. She picked up the box and turned to place it in the refrigerator when she felt a sharp pain in her back. She reported the injury and Employer sent her to Midtown Occupational for treatment. Dr. David Orgel treated Claimant, noting that she indicated pain into her left thigh and buttock. The doctor placed Claimant on a 5 pound lifting restriction and referred her for physical therapy. Dr. Orgel observed that Claimant had consistent objective findings at that first appointment.

7. Employer was not able to meet Claimant's restrictions and, per the parties' stipulation, Claimant did not return to work until March 4, 2018.

8. Claimant testified that symptoms from her October 2 injury were worse than that those from her earlier injury. With the October 2 injury she has experienced pain down her left leg and numbness in three of her left toes. These left sided radicular symptoms represent a new and different problem than what she had experienced previously.

9. Dr. Orgel referred her to Dr Chan for EMG testing, and ordered a current MRI. Dr. Orgel noted that the MRI confirmed "a bilateral S1 radiculopathy described as a left central disc protrusion with annular tearing impinging the left greater than right S1 nerve root at L5-S1."

10. Dr. Orgel then referred Claimant to Dr. Brian Castro for a surgical consultation. Dr. Castro did not recommend surgery at that time, but Dr. Chan recommended an epidural steroid injection at the S1 level for diagnostic and therapeutic purposes.

11. Respondent scheduled Claimant to see Dr. Mark Failinger through Contigrity Group for a Respondent's IME. Dr. Failinger authored a report dated February 7, 2019. He opined that Claimant was still symptomatic from her first injury in July of 2018 when Dr. Steinmetz and put at MMI and released her to unrestricted duties. Dr. Failinger opined that Claimant had no new symptoms or pathology related to the October 2, 2018 injury. Rather, "this appears to be ongoing symptomatology from a previous work incident of April 2018." He placed Claimant at MMI as of her prior appointment with Dr. Chan on January 2, 2019.

12. Claimant continued therapy and treatment with Drs. Chan and Dr. Orgel until March, 2019. Neither of her authorized treating physicians opined that she was at MMI. In fact, Dr. Orgel's last report dated March 6, 2019 provides that he did not believe Claimant would not be at MMI for "2 months."

13. Claimant testified that Respondent cancelled her February 20, 2019 therapy appointment. Dr. Orgel's February 20, 2019 report notes that he was continuing to prescribe physical therapy two times per week and massage therapy one time each week. He also recommended a follow up surgical consultation with Dr. Castro. Dr. Orgel's last appointment note is dated March 6, 2019.

14. Dr. Castro saw Claimant for follow up and recommended a new MRI to check for worsening of Claimant's neural impingement.

15. No persuasive evidence supports a finding that Claimant was provided the treatment Dr. Orgel recommended or the MRI Dr. Castro recommended.

16. Claimant testified that when Respondent stopped her treatment, she was still in pain and unable to perform her regular work duties. She worked until May 31, 2019, and has been off since that time. Claimant remains on restrictions from her authorized treating physician.

17. Claimant testified that she had a previous car accident in 2014 that involved treatment to her neck and right shoulder. She received treatment into 2015. Denver Health medical records dated August 17, 2016 indicate Claimant had no musculoskeletal complaints at that time. Subsequent Denver Health notes show some complaints of lower back pain but Claimant's primary treatment involved her cervical region. Claimant testified that she treated for pain in her feet related to diabetes, and for her neck from her 2014 whiplash injury. She did not recall receiving significant treatment for her lower back, and that she had been able to work full duty the four years prior to her work injuries without complaint. While Claimant reported some low back soreness, her Denver General records show that her treatment focused predominantly on her neck.

18. Claimant's 2016 MRI showed "mild lumbar disc disease without neurologic compression." By April 4, 2017 the Denver Health records reflect Claimant only complained of cervical pain from the 2014 accident.

19. Claimant testified that she felt better in July 2018 when she was released from the first injury, and the summer of 2019 after the second injury. After her first work injury, she was able to take some time off in the summer of 2018 and felt good enough to go back to work full duty, which she dis until her second injury. After her second injury, Claimant has continued to have pain into her leg and does not feel that she could return to full duty work.

20. Claimant continues to have significant pain in her low back and down her leg, with numbness of three toes.

21. Respondents stopped treatment unilaterally prior to any of her authorized treating physicians placing her at maximum medical improvement.

22. The ALJ is not persuaded by Dr. Failinger's MMI date, or his ultimate opinion that Claimant's problems are pre-existing, or flow from her prior admitted work related injury.

23. Because Respondents terminated Claimant's medical treatment for non-medical reasons prior to her being placed at MMI, Claimant may choose a physician to continue her care. Respondents are liable for continuing medical care with the provider of Claimants choice until she is placed at MMI by her new authorized treating physician.

CONCLUSIONS OF LAW

The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. § 8-40-102(1), C.R.S. A Claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. § 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits, § 8-43-201, C.R.S. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. See *Magnetic Engineering, Inc. v. Indus. Claim Apps. Office*, 5 P.3d 385, 389 (Colo. App. 2000).

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999 (Colo. App. 2004). Here Claimant has shown by a preponderance of the evidence that the injury she suffered October 2, 2018 aggravated or accelerated the pre-existing admitted lower back injury that she suffered April 6, 2018.

Reopening

Section 8-43-303(1), C.R.S. authorizes an ALJ to reopen any award within six years after the date of injury on a number of grounds, including error, mistake, or a

change in condition. *Heinicke v. Industrial Claim Appeals Office*, 197 P.3d 2209 (Colo. App. 2008); *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). A change in condition refers either "to a change in the condition of the original compensable injury or to a change in Claimant's physical or mental condition which can be causally connected to the original compensable injury". *Chavez v. Industrial Comm'n*, 714 P.2d 1328, 1330 (Colo. App. 1985). The reopening authority granted ALJs by section 8-43-303, C.R.S. "is permissive, and whether to reopen a prior award when the statutory criteria have been met is left to the sound discretion of the ALJ". *Cordova v. Industrial Claim Appeals Office*, supra, 55 P.3d at 189. The party seeking reopening bears "the burden of proof as to any issue sought to be reopened". § 8-43-303(4), C.R.S. As the *Heinicke* Court noted, reopening is proper where a showing can be made that "Claimant's physical or mental condition is causally connected to the original compensable injury". *Heinicke v. Industrial Claim Appeals Office*, supra, 197 P.3d at 223. Here Claimant suffered a new injury or aggravation of the underlying condition October 2, 2018. She had been placed at MMI with no restrictions and no impairment by her authorized treating physician. She was able to return to work in the kitchen and do everything asked on her by the employer prior to the October 2, 2018 injury, therefore the ALJ finds that Claimant has proven a new compensable injury, rather than a worsening of condition, related to the prior injury.

Refusal to treat for non-medical reasons

CRS 8-43-404(10) (a) states:

> If an authorized physician refuses to provide medical treatment to an injured employee or discharges an injured employee from medical care for nonmedical reasons when the injured employee requires medical treatment to cure or relieve the effects of the work injury, then the physician shall, within three business days from the refusal or discharge, provide written notice of the refusal or discharge by certified mail, return receipt requested, to the injured employee and the insurer or self-insured employer. The notice must explain the reasons for the refusal or discharge and must offer to transfer the injured employee's medical records to any new authorized physician upon receipt of a signed authorization to do so from the injured employee. The director or any administrative law judge of the office of administrative courts has jurisdiction to resolve disputes regarding whether a refusal to provide medical treatment or a discharge from medical care was for medical or nonmedical reasons.

Claimant testified that her therapy was stopped, and then she was not allowed to continue treatment with Employers designated physicians. No persuasive evidence establishes Claimant was at MMI. Rather, persuasive evidence in Dr. Orgel's records indicates that he did not anticipate Claimant would reach MMI for another two months. Further, the ALJ finds no indication that the physicians who refused to treat were doing so for medical reasons. The ALJ finds that Claimant's ATPs failed to continue to treat Claimant for non-medical reasons. The ALJ further finds and concludes that Respondents have not established by a preponderance of the evidence that they complied

with the statutory requirement that they provide written notice of refusal or discharge. Therefore, the ALJ finds and concludes that the right to select a physician for continued treatment passed to Claimant.

ORDER

It is therefore ordered that:

1. Claimant has proven by a preponderance of the evidence that she injured her lower back and left leg in the course and scope of her employment with the Respondent on October 2, 2018. Because the ALJ has specifically found that Claimant sustained a new injury or aggravation of the underlying condition on that date, Claimant's petition to reopen is denied.

2. Claimant has not been placed at maximum medical improvement but she did return to work, with restrictions, March 4, 2019. Respondents shall pay to the Claimant temporary total disability at the rate of $258.82 from October 3, 2018 to March 3, 2019.

3. Respondents shall provide medical benefits to Claimant under the Colorado Workers' Compensation Act.

4. All issues not determined herein are reserved for future determination.

DATED: November 13, 2019

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section §8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm .

ISSUES

1. Whether Respondents have proven by a preponderance of the evidence that Claimant committed a volitional act that led to her termination of employment so that she is not entitled to receive TTD benefits?

2. Whether Claimant is entitled to reinstatement of her TTD benefits?

FINDINGS OF FACT

1. Claimant began her employment with employer as a Certified Nursing Assistant (CNA) in October, 2016. Shortly thereafter, Claimant began to violate Employer's attendance and call-off policies. Employer issued an Education Acknowledgment on March 7, 2017. Employer retrained Claimant on its call-off procedures.

2. Claimant continued to have issues adhering to Employer's attendance and call-off policies. Again on November 29, 2017, Employer issued an Education Acknowledgment. As part of Claimant's retraining, Employer's attendance policy and call-off procedures were reviewed with Claimant. Claimed signed a copy of the policy on November 29, 2017. Her signature indicated she understood the policy including the consequences for a no call/no show. Specifically, that a single no call/no show would be grounds for termination.

3. On February 24, 2018, Claimant violated the no call/no show policy. Claimant's supervisor, Crystal R_____, testified at hearing that Employer decided to terminate Claimant's employment. Ms. R_____ met with Claimant on February 28, 2018 to advise Claimant of her termination. However, Claimant pleaded for her job and Employer gave her another chance. Employer placed Claimant on a 30 day action plan during which she was to have no attendance violations and was advised that any further no call/no shows would result in termination. Ms. R_____ testified that Claimant understood any further no call/no shows would result in termination.

4. On April 27, 2018, Claimant sustained an admitted work injury to her left wrist. She presented to Concentra for treatment and her provider assigned temporary work restrictions. Ms. R_____ testified Claimant accepted modified duty within her work restrictions.

5. Ms. R_____ testified that in addition to being one of Claimant's supervisors, she was also Employer's workers compensation coordinator. In that role, she would monitor injured workers' work restrictions and modified duty. Ms. R_____ testified that she would meet with Claimant following her visits with her workers' compensation providers to discuss her work restrictions and modified duty. Ms.

R_____ routinely asked Claimant if she was having difficulty performing her modified duty and Claimant advised she was fine and could continue working the modified duty.

6. Claimant continued to work modified duty until August 3, 2018, when she again violated Employer's no call/no show policy. Ms. R_____ testified she tried to reach Claimant on her telephone regarding the no call/no show, and Claimant did not answer or return her messages. Ms. R_____ testified that due to Claimant's August 3, 2018 no call/no show, and the fact she had previously been warned another no call/no show would result in termination, Employer decided to terminate Claimant effective August 3, 2018.

7. Claimant acknowledged at hearing that she decided to no call/no show on August 3, 2018 and that she knew Employer would terminated her as a result. Claimant testified she no call/no showed because she no longer wanted to work for Employer.

8. At the time of Claimant's termination, her work restrictions were maximum lifting 5 lbs with left arm, maximum lifting right arm 10 lbs, and total push/pull maximum of 20 lbs.

9. Claimant underwent surgery with Dr. Tracy Wolf on August 29, 2018 and was placed on "no work" status. Respondents initiated TTD benefits as of August 29, 2018 due to the surgery and Claimant's status.

10. On September 10, 2018, Claimant's provider returned her to her pre-termination restrictions of maximum lifting 5 lbs with left arm, maximum lifting right arm 10 lbs, and total push/pull maximum of 20 lbs.

11. Claimant underwent a second surgery with Dr. Wolf on April 11, 2019, and was again taken off work.

12. On July 10, 2019, Claimant's provider returned her to her pre-termination restrictions of maximum lifting 5 lbs with left arm, maximum lifting right arm 10 lbs, and total push/pull maximum of 20 lbs.

13. Ms. R_____ testified at hearing that Employer was able to accommodate Claimant's restrictions at the time of her termination. Ms. R_____ further testified that, but for Claimant's attendance policy violation on August 3, 2018, Employer would have been able to provide her with modified duty within her restrictions on September 10, 2018 and July 10, 2019.

14. The ALJ finds Ms. R_____'s testimony of to be credible and persuasive. Employer trained Claimant multiple times regarding appropriate attendance and call-off procedures. Employer also advised Claimant that any further violations would result in termination. The ALJ finds credible and persuasive Ms. R_____'s testimony that Employer would have been able to accommodate claimant's work restrictions on September 10, 2018 and July 10, 2019, but for her termination.

15. The ALJ finds persuasive Claimant's testimony that she decided to no call/no show on August 3, 2018, knowing it would lead to her termination, because she no longer wanted to work for employer.

16. The ALJ finds Claimant committed a volitional act which led to her termination and loss in wages.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

General Legal Principles

The purpose of the Workers' Compensation Act of Colorado (Act), §8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. §8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. §8-43-201, C.R.S.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Claimant Was Responsible For Her Termination

The termination statutes provide that in cases where a temporarily disabled employee is "responsible for termination of employment, the resulting wage loss shall not be attributed to the on-the-job injury." The concept of responsibility reintroduces the concept of "fault" as it was used in termination cases prior to *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002). Hence, the issue is whether the claimant

engaged in volitional conduct which was the cause of the termination. Conduct is volitional if the claimant exercised some degree of control over the circumstances leading to the termination in light of the totality of the circumstances. See *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1994); *Aguilar v. Matrix Logistic, Inc.*, W.C. No. 4-473-075 (December 5, 2002).

Under the circumstances, there is persuasive evidence that Claimant was responsible for her own termination from employment due to her volitional decision to no call/no show on August 3, 2018. As found, Claimant committed a volitional act when she decided to no call/no show because she no longer wanted to work for employer. Accordingly, Claimant is not entitled to TTD benefits following her termination.

Reinstatement of Temporary Total Disability Benefits

The claimant may only be entitled to a reinstatement or continuation of temporary disability benefits after being terminated for cause if it is determined that the ensuing wage loss is attributable to a worsened condition causally related to the work injury and not to the termination. See *Anderson v. Longmont Toyota, Inc*., 102 P.3d 323, 326 (Colo. 2004) ("We hold that section 8-42-105(4) bars TTD wage loss claims when the voluntary or for-cause termination of the modified employment causes the wage loss, but not when the worsening of a prior work-related injury incurred during that employment causes the wage loss."). Whether a worsened condition caused a claimant's wage loss is a factual question to be determined by the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186, 191 (Colo. App. 2002).

Claimant was taken off work on August 29, 2018, due to surgery with Dr. Wolf, and Respondents appropriately initiated TTD benefits. Claimant was returned to her pre-termination restrictions of maximum lifting 5 lbs with left arm, maximum lifting right arm 10 lbs, and total push/pull maximum of 20 lbs. on September 10, 2018. These restrictions remained in place until Claimant was again taken off work for surgery with Dr. Wolf on April 11, 2019. Claimant remained off work until July 10, 2019, when she was again returned to her pre-termination restrictions of maximum lifting 5 lbs with left arm, maximum lifting right arm 10 lbs, and total push/pull maximum of 20 lbs.

Claimant's wage loss from August 29, 2018 to September 9, 2018 and from April 11, 2019 to July 9, 2019, was attributable to a worsening of her work related condition. However, Claimant's wage loss following her termination on August 3, 2018 to August 28, 2018 was due to her termination for a no call/no show. Employer had modified duty available that was within Claimant's restrictions on September 10, 2018. Claimant's no call/no show, and subsequent termination, prevented Employer from accommodating Claimant's restrictions and paying her wages. Thus, it was Claimant's volitional act of the no call/no show which led to the wage loss from September 10, 2018 to April 10, 2019. Likewise, Employer had modified duty available that was within Claimant's restrictions on July 10, 2019 but was unable to offer Claimant this modified duty and pay her wages due to her termination. Claimant's volitional act of the no call/no show led to her wage loss from July 10, 2019 and ongoing.

Claimant is entitled to TTD benefits from August 29, 2018 to September 9, 2018 and from April 11, 2019 to July 10, 2019. Claimant is not entitled to TTD benefits from August 3, 2018 to August 28, 2018, September 10, 2018 to April 10, 2019, and July 10, 2019 and ongoing, because she violated Employer's attendance policies which led to her termination and the resulting wage loss.

When Employer was able to offer Claimant modified duty within her restrictions, but was unable to do so due to Claimant's termination, it was no longer Claimant's work injury which caused her wage loss and instead was due to Claimant's volitional act which led to her termination.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. Respondents have proven by a preponderance of evidence that Claimant is responsible for her termination on August 3, 2018.

2. Claimant is entitled to TTD benefits from August 29, 2018 to September 9, 2018 and from April 11, 2019 to July 9, 2019.

3. Claimant is not entitled to TTD benefits from August 3, 2018 to August 28, 2018, September 10, 2018 to April 10, 2019, and July 10, 2019 and ongoing because she was responsible for her termination and the resulting wage loss.

DATED this 13th day of November, 2019.

/s/ Kimberly Turnbow
Kimberly Turnbow
Administrative Law Judge

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STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 1525 Sherman Street, 4th Floor, Denver, CO 80203	
In the Matter of the Workers' Compensation Claim of: , Claimant, vs. , Employer, and , Insurer, Respondents.	▲ COURT USE ONLY ▲ **CASE NUMBER:** **WC 5-050-347-01**

ORDER FOLLOWING REMAND
FINDING OF FACT, CONCLUSION OF LAW AND ORDER

Following a February 1, 2018, hearing, the Administrative Law Judge entered a Corrected Order on May 3, 2018, which denied Claimant the right to request a division-sponsored independent medical examination (DIME). Claimant appealed the ALJ's Corrected Order to the Industrial Claims Appeal Office (ICAO) and, on June 14, 2019, a panel of the ICAO reversed the ALJ's denial and remanded the claim to the ALJ to enter an order reinstating the Claimant's Notice and Proposal to Select a DIME and the Application for a DIME. This Order Following Remand is entered pursuant to the ICAO remand order.

Claimant appeared at hearing and was represented by Mark Simon, Esq. Respondents appeared through Bradley J. Hansen, Esq. Respondents' exhibits A through H were admitted into evidence.

In this order, Charlotte S_____ will be referred to as "Claimant," X_____ will be referred to as "Employer," G_____ will be referred to as "Insurer" and the Insurer and Employer collectively will be referred to as "Respondents."

ISSUE

Whether Claimant is permitted to move forward with a DIME despite the ruling and order from PALJ Barbo denying her request.

FINDINGS OF FACT

1. Claimant sustained a work-related injury on March 10, 2017, but did not have any compensable lost time from work. Claimant treated conservatively for the injury and was eventually placed at maximum medical improvement (MMI) on June 7, 2017 by Dr. John Burris with no impairment.

2. A final admission of liability (FAL) was filed on July 13, 2017, by the claims adjuster based on the findings of Dr. Burris of MMI and no impairment. Temporary disability benefits were denied as claimant did not have any compensable lost time. Respondents admitted to medical maintenance benefits per the opinion of Dr. Burris.

3. On July 26, 2017, claimant filed an objection to the FAL along with a notice and proposal to select an independent medical examiner.

4. On August 18, 2017, respondents filed a motion to strike claimant's DIME process. Prehearing Administrative Law Judge (PALJ) Michael Barbo granted Respondents' motion to strike the DIME. The motion was granted without prejudice

5. Claimant subsequently filed an Application for Hearing on October 13, 2017, to appeal the order of PALJ Barbo before this Administrative Law Judge. On May 3, 2018, the undersigned ALJ served on the parties a Corrected Order affirming the Prehearing ALJ's order granting the motion to strike. An appeal to ICAO followed.

6. On June 14, 2019, ICAO reversed the ALJ's order of May 3, 2018, and remanded the claim to the ALJ for entry of an order reinstating the claimant's Notice and Proposal to Select a DIME and the Application for a DIME.

7. Consistent with the ICAO order of June 14, 2019, it is found that claimant's Notice and Proposal to Select a DIME and the Application for a DIME are reinstated.

CONCLUSIONS OF LAW

1. As the ICAO has reversed the May 3, 2018, Corrected Order of the ALJ and remanded the matter to the ALJ for entry of an order reinstating the

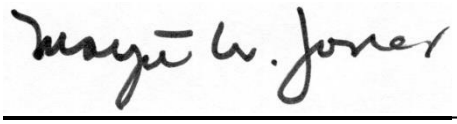
claimant's Notice and Proposal to Select a DIME and the Application for a DIME, it is concluded that the Notice and Proposal to Select a DIME and the Application for a DIME are hereby reinstated.

ORDER

IT IS ORDERED:

1. Claimant's Notice and Proposal to Select a DIME and the Application for a DIME is hereby reinstated.

DATED: November 14, 2019



MARGOT W. JONES
ADMINISTRATIVE LAW JUDGE

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ISSUES

- Whether the claimant has demonstrated, by a preponderance of the evidence, that he sustained an injury arising out of and in the course and scope of his employment with the employer on March 22, 2019.

STIPULATIONS

- If the claim if found compensable, the parties stipulated that the respondents are liable for reasonable medical treatment that is necessary to cure and relieve the claimant from the effects of the work injury.

- If the claim if found compensable, the parties stipulated that the claimant's average weekly wage (AWW) would be $2,404.70.

- If the claim if found compensable, the parties stipulated that the claimant would also be entitled to temporary total disability (TTD) benefits for the period of March 23, 2019 through May 26, 2019.

FINDINGS OF FACT

1. The employer operates a coal fire electrical plant. The claimant has worked for the employer for more than 28 years. His primary position is that of a mechanic and welder in the operations department. The claimant's job duties include maintaining equipment at the power plant.

2. The claimant testified that while he was at work on March 21, 2019, he was moving large sheets of plywood across the floor. The claimant testified that although this was normally a two-person task, on that date he moved a number of plywood sheets by himself. In addition, the claimant was also assigned to clean "studs" in the plant. This task involves using a wheel grinder or a wire brush while on one's knees. The claimant testified that during his shift on March 21, 2019, his hips did not "feel right".

3. The claimant also testified that at approximately noon on March 21, 2019 he informed the mechanic supervisor, Dwayne Z_____, that moving the plywood had hurt him and he asked to no longer work on his knees. However, the claimant returned to his job duties and worked the remainder of his shift on March 21, 2019.

4. The claimant returned to work on March 22, 2019 and worked until approximately 5:30 p.m. The claimant testified that he worked slower on that date and it was a "struggle" to perform his job duties. The claimant testified that over the course of

his shifts on March 21 and March 22, 2019 he spent approximately 12 hours working on his knees.

5. At approximately 5:30 p.m. on March 22, 2019, the claimant informed Mr. Z_____ that he needed to leave. The claimant testified that he was in so much pain that he was unable to fully change out of his work clothes and needed assistance to walk. The claimant's spouse arrived at the employer's location to take the claimant home. However, the claimant sought medical treatment at emergency department at The Memorial Hospital at Craig.

6. The March 22, 2019 emergency department medical record indicates that the claimant reported his symptoms as pain in his right buttock that radiated into his bilateral thighs. In addition, the claimant reported that the onset of his symptoms had been gradual over the last two hours. Dr. Tinh Huyn ordered a magnetic resonance image (MRI) of the claimant's lumbar spine. The MRI showed diffuse degenerative changes without spinal compression. Dr. Huyn opined that the claimant had a possible musculoskeletal strain and diagnosed right sided sciatica. Dr. Huyn prescribed flexeril and prednisone.

7. On March 26, 2019, the claimant sought treatment with his primary care provider, Dr. Jonathan Hamilton. The claimant reported to Dr. Hamilton that his symptoms had developed gradually after working on his knees for several hours. The claimant described his symptoms as pain in his hips and his low back. At that appointment, the claimant was using crutches to ambulate. Dr. Hamilton prescribed diazepam and hydrocodone-acetaminophen. In addition, Dr. Hamilton referred the claimant to a specialist and physical therapy.

8. On March 28, 2019, the claimant was seen by Jessica Nyquist, NP with the spine department of Memorial Regional Health. The claimant reported to Ms. Nyquist that his pain started following long hours of kneeling. The claimant arrived at his appointment using crutches. At that time, the claimant's symptoms were pain in his legs (right greater than left) with numbness, tingling, and weakness in his lower extremities. Ms. Nyquist diagnosed lumbar spondylosis with myelopathy and recommended an MRI of the claimant's lumbar spine.

9. At the direction of the employer, the claimant was seen at UC Health on March 28, 2019. At that time, the claimant was seen by Greg Holm, PhD/Nurse Practitioner. The claimant reported to Dr. Holm that he worked on his knees for 10 hours on March 22, 2019 and experienced gradually worsening burning pain in his lower back into his buttocks and hips. Dr. Holm noted that the recent MRI of the claimant's lumbar spine was normal. Dr. Holm also noted some concern regarding the possible diagnosis of piriformis syndrome and referred the claimant to Dr. Alexis Tracy.

10. The claimant was first seen by Dr. Tracy on April 1, 2019. At that time, the claimant described his mechanism of injury as experiencing severe hip, low back, and leg pain after working on his knees for 12 to 14 hours. On April 1, 2019, the claimant reported his pain as 10 out of 10. Dr. Tracy noted that the claimant's x-rays and MRI results were normal. Dr. Tracy recommended a computed tomography angiogram (CT angiogram) of the claimant's abdomen and pelvis.

11. The claimant returned to Dr. Hamilton on April 2, 2019 and reported continuing symptoms. These symptoms included numbness into his entire foot from his right buttock region. In the medical record of that date, Dr. Hamilton noted that the MRI did not identify the claimant's pain generator. Dr. Hamilton also noted that the claimant reported right leg numbness when Dr. Hamilton palpated the claimant's left lower lumbar region. Dr. Hamilton also noted that such a reaction "was not possible."

12. On April 2, 2019, the claimant returned to Dr. Holm and reported some improvement in his symptoms. However, the claimant also reported fasciculation (muscle twitching) in the right proximal anterior thigh, which Dr. Holm noted was a new symptom. Dr. Holm also noted that he had spoken with Dr. Tracy who conveyed that the claimant did not have piriformis syndrome. Dr. Holm agreed with the recommendation that the claimant undergo a CT angiogram. Dr. Holm opined that the claimant's symptoms could be work related.

13. On April 12, 2019, the recommended CT angiogram of the claimant's abdomen, pelvis, and bilateral lower extremities was performed. The findings were normal.

14. On April 15, 2019, Dr. Tracy discussed the normal results of the CT angiogram with the claimant. At that time, the claimant informed Dr. Tracy that he was "doing better everyday [*sic*]" and could stand and walk for longer periods. Dr. Tracy recommended that the claimant pursue physical therapy.

15. On April 18, 2018, the claimant returned to Dr. Hamilton. On that date, the claimant reported that he had intended to ask for a "light duty release" because he had been feeling better. However, the claimant also reported that his back pain had worsened after he stood on concrete to grill the previous night. Dr. Hamilton referred the claimant to physical therapy. Dr. Hamilton also noted that the claimant's condition was "confusing".

16. On April 22, 2019, the claimant started physical therapy at Pearson Physiotherapy. On that date, the claimant reported to John Pearson, PT that he his symptoms were "[m]uch better with prescription of medicine for anxiety, and spasms."

17. On May 2, 2019, the claimant was again seen by Dr. Hamilton who opined that there could be an anxiety component to the claimant's symptoms. In the medical record of that date, Dr. Hamilton noted that the claimant seemed better. On May 22, 2019, the claimant returned to Dr. Hamilton and reported that he was doing much better

and had completed physical therapy. On that date, Dr. Hamilton released the claimant to return to full duty.

18. On May 24, 2019, the claimant returned to Dr. Holm and reported that it was his belief that he was injured from moving plywood sheets. However, Dr. Holm noted that the mechanism of injury reported at their first appointment related to a long period of working on his knees. In that same medical record, Dr. Holm noted that Dr. Frederick Scherr had recommended a "fit for duty exam". In the medical record of that date, Dr. Holm noted that the claimant's various providers could not find any objective pathology to explain the claimant's symptoms. Dr. Holm also noted that there was some indication of "anxiety and functional overlay". The claimant testified that he did not see Dr. Holm between April 2, 2019 and May 24, 2019 because his workers' compensation claim had been denied.

19. On August 15, 2019, an Essential Function Test was performed and suggested that the claimant could fulfill his normal job duties.

20. Also on August 15, 2019, the claimant was seen by Dr. Scherr. At that time, the claimant reported that he was not experiencing any lumbar back pain. Dr. Scherr diagnosed the claimant's condition as "[l]umbar strain work related now resolved". In addition, Dr. Scherr placed the claimant at maximum medical improvement (MMI) with no permanent impairment and no permanent work restrictions.

21. The claimant testified regarding injuries he sustained in 2014 and 2015 while employed with the employer. With regard to the 2014 injury, the claimant testified that he was lifting a ladder and injured his low back. The claimant also testified that after that injury, he had work restrictions and was assigned to work in the employer's training center. It was while he was working at the training center that the claimant had severe hip and back pain that caused him to collapse and he was transported to the emergency room. The claimant also testified that he experienced another low back injury when he was showing a new employee around. The claimant testified that he fully recovered from the 2014 and 2015 injuries and was able to perform all of his normal job duties.

22. The medical records entered into evidence provide further information about the claimant's prior work injuries. On June 24, 2014, the claimant was seen by Dr. Holm because he suffered an injury while moving a ladder at work. Dr. Holm noted that the claimant had sharp pain "at the mid/left side of his lower back" that radiated into the claimant's buttock and hip. At that time, Dr. Holm diagnosed the claimant with left sacroiliitis. The claimant continued to see Dr. Holm for treatment related to the 2014 incident.

23. On August 28, 2014, the claimant reported to Dr. Holm that he could not walk or use stairs. At that time, Dr. Holm noted that the claimant's "discomfort is more at the bilateral ASIS [anterior superior iliac spine] toward the inguinal ligaments." Thereafter, on September 11, 2014, the claimant reported numbness and tingling down both legs, front and back. In the medical record of that date, Dr. Holm noted that the

claimant was describing “a nondermatomal stocking and glove pattern”. On September 25, 2014, Dr. Holm noted that an MRI of the claimant’s lumbar spine was “essentially normal with only some degenerative changes”. Dr. Holm further noted that there was no explanation for the claimant’s complaints of numbness.

24. On October 8, 2014, the claimant treated with Dr. Scherr for his continuing low back pain. At that time, Dr. Scherr diagnosed persistent low back pain, with an unknown pain generator. On January 28, 2015, Dr. Scherr noted that the claimant’s symptoms had resolved and released him to full duty without restrictions.

25. With regard to the current case, on June 18, 2019, the claimant attended an independent medical examination (IME) with Dr. John Raschbacher. In connection with the IME, Dr. Raschbacher reviewed the claimant’s medical records, obtained a history from the claimant, and completed a physical examination. In his IME report, Dr. Raschbacher opined that the claimant was not injured at work. In support of this opinion, Dr. Raschbacher noted that there is no objective evidence to support that an injury occurred. Dr. Raschbacher’s testimony at hearing was consistent with this written report.

26. Mr. G_____ is a shift supervisor for the employer. Mr. G_____ testified that he notified the claimant that he would be working “straight days” during a scheduled outage. This outage was scheduled to last three weeks. The claimant was given the option of reporting to work on March 21, 2019 or on March 22, 2019. The claimant reported to work on March 21, 2019.

27. With regard to his work schedule in late March 2019, the claimant testified that he normally worked “shift”, but was asked to work “days”. The claimant explained that “shift” involves working seven nights and then seven days of 12-hour shifts. This was the claimant’s normal schedule for work. In March 2019, the claimant was notified that he would be moved to days during a scheduled plant outage. The claimant also testified that during an outage employees earn overtime. As a result, the claimant believes that he ultimately lost money when he did not return to work after March 22, 2019 because he would have earned overtime during the outage. The respondents argue that the claimant alleged a work injury on March 22, 2019 because he was displeased with the unexpected change to his work schedule. The ALJ is not persuaded by this assertion.

28. The ALJ credits the medical records and the opinions of Dr. Raschbacher and finds that the claimant has failed to demonstrate that it is more likely than not that he suffered an injury at work on March 22, 2019. The ALJ specifically credits Dr. Raschbacher’s opinion that there is no objective evidence to support that an injury occurred.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (the Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2018).

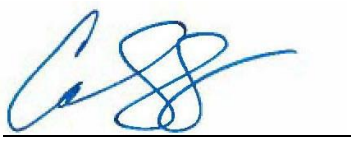
4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment." *See H & H Warehouse v. Vicory, supra.*

5. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that he suffered an injury that arose out of an in the course and scope of his employment for the employer. The ALJ finds no persuasive evidence on the record that the claimant suffered an aggravation or acceleration of a preexisting condition. As found, the medical records and the opinions of Dr. Raschbacher are credible and persuasive.

ORDER

It is therefore ordered that the claimant's claim for workers' compensation benefits is denied and dismissed.

Dated this 14th day of November 2019.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. **In addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

ISSUES

- Did Respondents overcome the DIME's whole person impairment rating by clear and convincing evidence?

FINDINGS OF FACT

1. Claimant suffered an admitted injury on September 6, 2013 when a flatbed tow truck ran over his right leg. He underwent extensive treatment including right knee surgery in January 2016 for peroneal nerve entrapment and a lateral meniscus tear. He continued to experience unrelenting neuropathic pain affecting his right leg, and was ultimately diagnosed with complex regional pain syndrome (CRPS). He received minimal sustained benefit from sympathetic blocks and underwent an unsuccessful spinal cord stimulator (SCS) trial in late 2016.

2. Dr. John Raschbacher conducted a 24-month DIME on March 29, 2019. He determined Claimant reached MMI on May 25, 2018. Dr. Raschbacher noted Claimant's severe CRPS "involves, in essence, the entire right lower extremity." Physical examination showed obvious vasomotor and trophic changes throughout the leg to the mid-thigh. Claimant has severe allodynia and can barely tolerate even light touch on the leg. His right knee is permanently fixed in a 90-degree contracture because of CRPS-related dystonia. Claimant retains no useful function of his right leg. He cannot bear weight on the right leg and uses two axillary (underarm) crutches to ambulate. Claimant considered using a wheelchair, but is reluctant because "he feels every little bump."

3. Dr. Raschbacher assigned a 60% whole person impairment rating for CRPS. He calculated the rating based on the "Station and gait" section of Table 1 on page 109 of the *AMA Guides*. That section contains several categories corresponding to different ratings, broken down as follows:

Can stand but walks with difficulty	5-20%
Can stand but walks only on the level	25-35%
Can stand but cannot walk	40-60%
Can neither stand nor walk	65%

Dr. Raschbacher noted, "there is no absolutely clear correlate to [Claimant's] condition" within those categories. He ultimately concluded,

> [Claimant] is able to stand and can certainly move about with crutches. One could argue that he is able to stand, but walk on the level with use of crutches. However, use of these assistive devices is actually not covered as far as I am able to tell in the permanent sections under station and gait.

> My medical opinion is that an appropriate level for him is that he is able to stand but cannot walk, producing a range of 40 to 60%. While he is able to ambulate with the use of crutches, he is nonweightbearing on the right lower extremity. One could certainly make an argument for using the lesser value of 25 to 35%, but given the severity of his CRPS I think it reasonable to use the 60% value from this particular classification. Based on the above reasoning, my medical opinion is that he has a 60% whole person rating.

4. Dr. Allison Fall performed an IME and several Rule 16 peer reviews for Respondents during the pendency of the claim. On August 15, 2019, Dr. Fall reviewed Dr. Raschbacher's DIME and issued a report critiquing the rating. She also testified at the hearing to elaborate on the opinions expressed in her report. Dr. Fall agreed it was appropriate to use the "station and gait" table, but disagreed with Dr. Raschbacher's choice of the 40-60% rating category. Dr. Fall opined Dr. Raschbacher should have used the category denominated "can stand but walks only on the level," which corresponds to a rating of 25-35%. She noted amputation of the leg at the hip equates to a 40% whole person rating, and "it would not make sense" to give Claimant a higher rating than would apply to a complete amputation. Dr. Fall disagreed with Dr. Raschbacher's decision to disregard Claimant's use of crutches when grading the extent to which his ability to walk is impaired. Dr. Fall opined ratings must account for treatment that lessens the effects of the injury, such as medications. Specifically, she stated,

> [W]hen we rate somebody at MMI, we rate them at their best. So if they come in and have a spasm in their back and they can't move, we don't rate them. If they come in and they haven't taken their pain meds that thereon, regular pain meds, that's not the appropriate time to rate them initially. We take them as they are at their best with treatment. So we wouldn't take somebody's crutches away and say okay, were going to rate you. So the crutches are part of the treatment that he has received it to get him to this level where he is ambulatory.

5. Dr. Fall opined the 40-60% category is intended for someone who is "wheelchair bound." Because Claimant can ambulate with the assistance of crutches, she believes Dr. Raschbacher clearly erred in his rating.

6. Respondents failed to overcome Dr. Raschbacher's rating by clear and convincing evidence. As Dr. Raschbacher pointed out, there is no "absolute" clear-cut rating methodology applicable to Claimant's situation. Both physicians presented cogent, reasonable arguments in support of their respective positions. Dr. Fall did not point to any definitive authority for her position that Claimant's rating must be based on his ability to ambulate with crutches. Dr. Raschbacher has a contrary interpretation of the *AMA Guides*. The ALJ sees this as an issue about which reasonable physicians can disagree. Accordingly, Dr. Fall's opinions represent "mere differences of opinion" and do not rise to the level of clear and convincing evidence.

CONCLUSIONS OF LAW

A DIME's determination regarding whole person impairment is binding unless overcome by "clear and convincing evidence." Section 8-42-107(8)(C). Clear and convincing evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). The party challenging a DIME's conclusions must demonstrate it is "highly probable" that the impairment rating is incorrect. *Qual-Med*, 961 P.2d 590 (Colo. App. 1998); *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).). A "mere difference of medical opinion" does not constitute clear and convincing evidence. *E.g., Gutierrez v. Startek USA, Inc*., W.C. No. 4-842-550-01 (March 18, 2016).

As found, Respondents failed to overcome Dr. Raschbacher's rating by clear and convincing evidence. There is no dispute Claimant lacks any useful function of his right leg. The primary disagreement is how to account for the fact he can move about with the assistance of crutches. The ALJ knows of no specific authority on this question, and the parties have cited none. Dr. Fall's opinion is based on reasonable logic, but the ALJ is inclined to agree with Dr. Raschbacher's analysis, for two reasons. First, PPD benefits are based on medical impairment, not disability. Claimants can – and often do – experience disability because of their injuries, but the primary issue when computing the rating is the extent to which their body has been impaired. Claimant's leg is essentially useless because of the permanent contracture; it has no remaining useful function on its own and prevents him from walking. The fact that Claimant can use assistive devices to mitigate some of the disabling effects of his impairment does not lessen the extent to which his leg is impaired from a medical standpoint.

Second, in a definitional sense, Claimant cannot "walk." The *American Heritage Steadman's Medical Dictionary* (1995) defines the verb "walk" as, "To move over a surface *by taking steps* with the feet . . . ." (Emphasis added). Similarly, the noun form of "walk" is defined as, "The gait of a human in which *the feet are lifted alternately* with one part of a foot always on the ground." (Emphasis added). Therefore, from a strictly linguistic perspective, Claimant does not "walk," even with his crutches. It is more accurate to say he "moves about." That supports Dr. Raschbacher's decision to use the 40-60% category.

Finally, the heightened standard of proof is a critical factor here. A dispute over a DIME rating is not a level playing field on which all opinions receive equal weight. Rather, the field is tilted in favor of the DIME, whose opinion receives presumptive weight and can only be overcome by clear and convincing evidence. Here, two experienced Level II physicians disagree on whether to rate Claimant's impairment before or after the benefit of assistive devices is considered. When there are two or more reasonable paths to a rating, the choice between competing options falls within the DIME's zone of discretion, and contrary opinions by other physicians represent "mere differences of opinion." Absent a hard and fast rule, the ALJ sees this as an issue about which reasonable physicians can disagree. Thus, Dr. Fall's opinion does not constitute clear and convincing evidence.

ORDER

It is therefore ordered that:

1. Insurer shall pay Claimant PPD benefits based on a 60% whole person rating.

2. Insurer shall pay Claimant's statutory interest of 8% per annum on all benefits not paid when due. The

3. All issues not decided herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 14, 2019

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-088-516-002

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

,

Claimant,

v.

,

Employer,

and

,

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on September 11, 2019, in Denver, Colorado. The hearing was digitally recorded (reference: 9/11/19, Courtroom 1, beginning at 1:30 PM, and ending at 2:30 PM).

The Claimant was present in person and represented by [Redacted], Esq. Respondents were represented by [Redacted], Esq.

Hereinafter [Redacted], shall be referred to as the "Claimant." [Redacted], shall be referred to as the "Employer." All other parties shall be referred to by name.

Claimant's Exhibits 1 through 8 were admitted into evidence, without objection. Respondents' Exhibits A through H were admitted into evidence, without objection. During the presentation of evidence, the Claimant submitted Claimant's Exhibit 9, which was sound recordings from Claimant's work station occurring on February 20, 2019 at 5:16 PM, February 7, 2019 at 7:20 PM, and February 28, 2019 at 6:29 PM. The recordings were provided to opposing counsel and were attached to the

Opening Brief on a flash drive, contained in the official file. There was no objection to the recordings.

At the conclusion of the hearing, the ALJ established a post-hearing briefing schedule. Claimant's opening brief was filed on October 25, 2019. Respondents' answer brief was filed on October 30, 2019. No timely reply brief was filed, and the matter was deemed submitted for decision on November 5, 2019.

ISSUES

The issue to be determined by this decision concerns whether the Claimant sustained a compensable occupational disease to wit, a job-related hearing loss; and, if so, whether he is entitled to medical treatment, including hearing aids, for such occupational disease.

The Claimant bears the burden of proof, by a preponderance of the evidence, on the designated issue and on the collateral issues relative thereto.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The parties stipulated and the ALJ finds that the Claimant has not lost time from work due to his hearing loss allegations and that, if the claim is found compensable, the Claimant is entitled to an average weekly wage (AWW) of $1,085.

2. Respondents filed a "Workers' Compensation – First Report of Injury or Illness" dated September 27, 2018, wherein they allege that [Claimant], a journeyman pressman for the Employer, "says he has hearing loss likely stemming from being around loud printing press hearing protections provided" (Claimant's Exhibit 3, Bate Stamp (BS) 6).

3. On October 4, 2018, the Respondents filed a "Notice of Contest" alleging that there was "further investigation for scheduling independent medical evaluation" (Claimant's Exhibit 5, BS 13).

4. On October 9, 2018, the Claimant filed a "Worker's Claim for Compensation" alleging that 29 years of loud noise in the press room had resulted in hearing loss and he attached a report of a hearing test which occurred on September 19, 2018, reflecting that the his condition had deteriorated since his "first test/baseline" on August 23, 1995 (Claimant's Exhibit 4, BS 7-8).

5. On October 21, 2018, the Claimant filed an "Application for Hearing" requesting medical benefits for "hearing loss from a very loud work environment."

6. On November 12, 2018, Respondents filed a "Response to Application for Hearing" alleging lack of causality.

Background

7. The Claimant is a 64-year-old male. He has worked, and continues to work, for the Employer as a pressman for approximately 30 years, having commenced employment in October of 1989.

8. The Claimant testified that in his work as a pressman the Employer has had two locations, the first occurring at 38th and Fox, which location transferred to 58th and Washington in 2007. The Claimant testified that the location at 58th and Washington, when it first started, had 5 press machines and is now down to 4. The Claimant testified that the press machines create the newspaper which is distributed to residents in the State of Colorado. The Claimant indicated that his job as a pressman was to work in the "reel room," working on the machines and loading the machines with paper which appeared in rolls, which rolls could weigh up to 2 tons.

9. The Claimant credibly testified over his 30 years of employment with the Employer he has been provided with foam ear plugs to place in his ears, but that often times those plugs would need to be removed to communicate with co-workers.

10. The Claimant credibly testified that when the ear plugs were removed, they could not be immediately placed back in the ear because the Claimant would need to wash his hands before inserting new ear plugs into the ear because if he did not wash his hands first, ink would get on the ear plugs and then the ink would be placed into his ear.

11. Over the years the Claimant has requested hearing muffs, which would be easier to remove and then place back on, but none were ever provided. The Claimant played three audio recordings of sound from the reel room. The first that was played occurred on February 20, 2019 at 5:16 PM; the second occurred on February 7, 2019 at 7:20 PM; and, the third occurred on February 20, 2019 at 6:29 PM. The first recording was of a three-quarter ton reel of paper being placed into the press machine. The second recording was of a full reel being placed in the press machine and the third was of an alarm that starts once a press machine begins production. While playing the sounds for the ALJ, the Claimant visibly showed discomfort with the sounds.

12. Over the Claimant's working life, he has had comprehensive hearing tests provided at the Employer's request. The Claimant's first hearing test occurred on August 23, 1995 (Claimant's Exhibit 6, BS 17) and his last test occurred on September 19, 2018 (Claimant's Exhibit 4, BS 8).

Claimant's Testimony

13. The Claimant testified that after receiving his most current test and having people "yell at him all the time," he submitted a hearing loss claim to the Employer.

14. The Claimant's hearing tests reflect that his hearing loss is worse in the right ear than the left ear. The Claimant credibly testified that he removed the right earplug more than the left ear plug, because he is right-handed. The hearing test from September 19, 2018, found at Exhibit 4, BS 20, reflected that the Claimant's hearing loss was in the range of 85, whereas the hearing loss in the left is only at 75 (Claimant's Exhibit 4, BS 20).

15. During cross-examination, Respondents discussed with the Claimant medical records from his private physician in August of 2016, reflecting that the Claimant had been diagnosed with severe hearing loss from an ENT doctor (Respondents' Exhibit H, BS 34). The Claimant stated that he had no memory of that diagnosis, but did not seek hearing aids in 2016. According to the Claimant, his hearing loss has progressed over the years.

Respondents' Requested Audiological Independent Examination by Theresa Small, Au.D.

16. The Claimant's testimony is consistent with the findings of the Respondents' retained expert Theresa H. Small, Au.D., who indicates that the majority of changes in the Claimant's hearing in both ears has occurred since 2015 to 2016 (Claimant's Exhibit 8, BS 25). Respondents' expert, Dr.Small, correctly sets forth that the Claimant was required to use push-in hearing protection, and the Claimant was required to remove the earplugs at times, while in hazardous noise, for communication.

17. Nonetheless, it was Dr. Small's opinion that the Claimant's hearing loss was "not likely related to occupational noise exposure," but "due to his personal medical condition and age-related hearing loss." It was her recommendation that the Claimant "not remove the hearing protection for communication while in hazardous noise," and that the Claimant was to consult with his personal physician to get hearing aids (Claimant's Exhibit 8, BS 26).

18. The deposition of Dr. Small occurred on October 10, 2019, and in that deposition, Dr. Small stated that she was not retained to perform environmental noise assessment, but took the Employer's representation that the press machines operate at a decibel level of 85 to 86 decibels, at face value.

19. It was Dr. Small's testimony that six and one-half to eight hours of exposure to 85 to 86 decibel levels would cause a hearing loss and that the exposure did not need to be on a consistent basis. Nonetheless, it was her opinion that, although the Claimant had worked for the Employer for over 30 years and had been exposed to those decibel levels when required to remove his foam hearing plugs, the Claimant's hearing loss was more indicative of age-related hearing loss and not that caused by loud noise.

20. It was also Dr. Small's opinion that on a conservative basis, the foam ear plugs properly inserted would only reduce the decibel level by 10 decibels.

21. Finally, it was Dr. Small's opinion that a flat-line hearing loss is generally more indicative of age and not noise exposure, but could be indicative of noise exposure in some situations. Dr. Small testified her opinion would not be changed if she listened to loud noises which the Claimant had recorded in the press room.

Respondents' Arguments

22. Respondents' arguments attempt to paint a circumstantial picture, based primarily on conjecture. For instance, Respondents' argue that because the Claimant waited at least ten years, from May 2008 to September 2018, to file a worker's compensation claim stating that his hearing loss was due to being around loud presses, despite his annual hearing tests showing hearing loss as far back as May 2008. As found herein above, the Claimant stated a credible and compelling reason for not filing a workers' compensation claim for ten years. In his 2017 hearing test, the findings were moderate loss in both ears for speech frequencies and moderate severe loss in both ears for high pitch sounds. This test remained unchanged from the 2016 test.

23. Without the benefit of expert genetic opinion, Respondents' argue that the Claimant's twin brother has hearing loss and wears hearing aids. The Claimant's twin brother, however, fired rifles in the military and was an avid hunter, which the Claimant was not. This argument pushes the circumstantial envelope beyond the bounds of credulity.

25. Claimant's testimony that he finally decided to report his hearing loss as work-related in September 2018 because he was tired of people yelling at him is in fact credible, contrary to Respondents' argument. Respondents argue that the Claimant's claim is not credible and it is unfair to the Employer, who provided foam ear plugs, however, the Claimant's request for ear muffs apparently fell on "deaf ears."

Ultimate Findings

26. The Claimant's credible and undisputed lay testimony plays a significant role in determining the proximate cause and relatedness of the Claimant's need for hearing aids and of the Claimant's hearing loss.

27. The ALJ finds, based in part on the opinion in *Lymburn v. Symbios Logic* 952 P.2 831(Colo. App. 1997), that the opinion of a treating physician/provider on the cause of a claimant's industrial injury is not a requirement for establishing a workplace injury. The Claimant's testimony and production of the sounds on the work floor, in combination with the fact that the Claimant credibly testified he has never hunted, used a lawn mower, or been exposed to loud noises outside of the workplace, leads to the inescapable conclusion that the Claimant's hearing loss is from the loud noises that the Claimant has been exposed to over 30 years of working for the Employer. The sound recordings and the Claimant's testimony create a compelling circumstantial picture and is sufficient, by itself, despite Audiologist Small's causality opinion to the contrary. The Claimant has proven by a preponderance of the evidence that his hearing loss was caused by his exposure at work.

28. Although Dr. Small concedes the Claimant's hearing loss, she also conceded that she was not engaged to deal with environmental noise exposure, which renders her ultimate opinion on lack of causality inadequately based and supported. Therefore, the ALJ finds Audiologist Dr. Small's ultimate causality opinion lacking in credibility.

29. Between the conflicting opinion of Audiologist Dr. Small and the Claimant, the ALJ makes a rational choice to accept the Claimant's history and opinion, based on substantial evidence, and to reject Dr. Small's ultimate causality opinion.

30. According to Audiologist Sr. Small, ordinary people are not exposed to the levels of noise that the Claimant experiences in the work place. The ALJ concludes that the hazard of high decibel noise exposure is more prevalent in the Claimant's work place than in everyday life or in most other occupations. Dr. Small also persuasively explained that hearing loss is frequently due to prolonged noise exposure and that the other risk factors for hearing loss applicable to the Claimant probably do not apply in this case, thus, calling Dr. Small's ultimate causality opinion into question. The Claimant's hearing loss was due to exposure to noise at work.

31. The Claimant had no hearing loss prior to his employment with the Employer and it has significantly worsened over the years as compared to his baseline levels. The ALJ is not persuaded by Dr. Small's opinions that the Claimant's employment was irrelevant to his development or progression of hearing loss. Dr. Small's opinion failed to consider whether the Claimant had been exposed to noise levels above 85 db in the work place in the past. The Claimant has worked for the Employer for 30 years. Further, the ALJ finds that the Claimant has never used firearms. The ALJ is also not persuaded that the Claimant's loss is due to a propensity to develop diabetes or to aging. There is no persuasive, underlying proof that Claimant's hearing loss isc due to a propensity for diabetes or aging. Rather, the Claimant's hearing loss was caused by his exposure to noise in the work place.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558

(Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, based in part on the opinion in *Lymburn v. Symbios Logic* 952 P.2 831(Colo. App. 1997), the ultimate opinion of a treating physician/provider on the cause of a claimant's industrial injury is not a requirement for establishing a workplace injury. The Claimant's testimony and production of the sounds on the work floor, in combination with the fact that the Claimant credibly testified he has never hunted, used a lawn mower, or been exposed to loud noises outside of the workplace, led to the inescapable conclusion that the Claimant's hearing loss is from the loud noises that the Claimant has been exposed to over 30 years of working for the Employer. The sound recordings and the Claimant's testimony created a compelling circumstantial picture and was sufficient to establish a work-related hearing loss, by itself, despite Audiologist Small's causality opinion to the contrary. Although Dr. Small conceded the Claimant's hearing loss, she also conceded that she was not engaged to deal with environmental noise exposure, which renders her ultimate opinion on lack of causality inadequately based and supported. As found, her ultimate causality opinion lacked credibility, whereas the Claimant's testimony was highly credible, compelling and corroborated, in part, by the sound recordings illustrated in Claimant's Exhibit 9.

b. In *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997), Ultimately, the Court of Appeals concluded that a medical opinion was not necessary to prove causation because imposing such a requirement would be reading something into the statute that was not there. *See Jacoby v. Metro Taxi, Inc.,* 851 P.2d 245 (Colo. App. 1993). § 8-41-301, C.R.S., which specifies the conditions necessary for a compensability determination (this would include the compensability of a medical procedure or diagnostic tests) does not provide that a medical opinion is necessary to make such a determination. As observed in *Lymburn,* to require a medical opinion to support a causality determination would be to read something into the statute that does not exist. Consequently, *Lymburn* remains good law today. As found, although the Claimant's undisputed testimony was corroborated by sound recordings of his work environment and the test results from his annual hearing test, which is required by the

Employer, the Claimant's lay testimony alone painted a compelling circumstantial picture that the need for the presently recommended hearing aids is attributable to an aggravation/acceleration of his hearing condition.

Substantial Evidence

c. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, the Claimant's undisputed testimony outweighed Audiologist Dr. Small's ultimate opinion concerning causality. Therefore, between the conflicting causality opinion of Audiologist Dr. Small and the Claimant, the ALJ made a rational choice to accept the Claimant's history and opinion, based on substantial evidence, and to reject Dr. Small's ultimate causality opinion.

Compensability of Occupational Disease/Hearing Loss/Aggravation/Acceleration

d. A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. § 8-41-301 (l)(b), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991).

e. "Occupational disease" is defined by § 8-40-201(14), C.R.S., as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

f. The above section imposes additional proof requirements beyond that required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). The existence of a preexisting condition does not defeat a claim for an occupational disease. *Id.* A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id*. Once a claimant makes such a showing, the burden shifts to respondents to establish both the existence of a non-industrial cause and the extent of its contribution to the occupational disease. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

g. As found, the Claimant established that he sustained a compensable occupational disease, which consists of bilateral sensorineural hearing loss. At least two physicians have recommended that the Claimant use hearing aids. As Dr. Small pointed out, ordinary people are not exposed to the levels of noise that the Claimant experiences in the work place. The ALJ concludes that the hazard of high decibel noise exposure is more prevalent in the Claimant's work place than in everyday life or in most other occupations. Dr. Small also persuasively explained that hearing loss is frequently due to prolonged noise exposure and that the other risk factors for hearing loss applicable to the Claimant probably do not apply in this case. The Claimant's hearing loss was due to exposure to noise at work.

h. The Claimant had no hearing loss prior to his employment with the Employer and it has significantly worsened over the years as compared to his baseline levels. The Judge is not persuaded by Dr. Small’s opinions that the Claimant's employment was irrelevant to his development or progression of hearing loss. Dr. Small’s opinion also failed to consider whether the Claimant had been exposed to noise levels above 85 db in the work place in the past. The Claimant has worked for the Employer for 30 years. Further, the Judge acknowledges that the Claimant has never used firearms. The Judge is also not persuaded that the Claimant's loss is due to a propensity to develop diabetes or to aging. Rather, the Claimant's hearing loss was caused by his exposure to noise in the work place.

Causal Relatedness/Reasonable Necessity of Medical Treatment

i. An employer must provide an injured employee with reasonably necessary medical treatment to "cure and relieve the employee from the effects of the injury." § 8-42-101(1) (a), C.R.S. The employee must prove a causal relationship between the injury and the medical treatment for which the worker is seeking benefits. *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337, 1339 (Colo. Ct. App. 1997). Treatments for a condition not caused by employment are not compensable. *Owens v. Indus. Claim Appeals Office,* 49 P.3d 1187, 1189 (Colo. Ct. App. 2002). An industrial accident is the proximate cause of a claimant's disability if it is the necessary precondition or trigger of the need for medical treatment. *Subsequent Injury Fund v. State Compensation Insurance Authority,* 768 P.2d 751 (Colo. App. 1988). In order to prove that an industrial injury was the proximate cause of the need for medical treatment, an injured worker must prove a causal nexus between the need for treatment and the work-related injury.

Singleton v. Kenya Corp., 961 P.2d 571 (Colo. App. 1998). It is for the ALJ, as the fact-finder, to determine whether a need for medical treatment is caused by the industrial injury, or some other intervening injury. *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). Respondents are liable for the "direct and natural consequences" of a work-related injury, including consequential injuries caused by the original compensable injury. *See Travelers Ins. Co. v. Savio,* 806 P.2d 1258 (Colo. 1985). The chain of causation, however, can be broken by the occurrence of an independent intervening injury. *See* 1 A. *Larson, Workers' Compensation Law,* section 13.00 (1997). As found, the aggravation/acceleration of the Claimant's hearing loss is in the direct, proximate chain of causation from the Claimant's workplace exposure, thus, the Claimant's need for the hearing aids is causally related.

j. Medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the recommendation for bilateral hearing aids is reasonably necessary to cure and relieve the effects of the September 2018 hearing loss claim.

Burden of Proof

k. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained his burden on compensability and medical benefits.

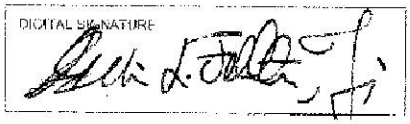
ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents shall pay all the costs of medical and audiological care and treatment for the Claimant's bilateral hearing loss, including the costs of hearing aids, subject to the Division of Workers' Compensation Medical Fee Schedule.

B. Any and all issues not determined herein are reserved for future decision.

DATED this 15th day of November 2019.



EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

ISSUE

Whether Claimant has established by a preponderance of the evidence that his scheduled 15% right upper extremity impairment should be converted to a 9% whole person rating.

FINDINGS OF FACT

1. Claimant is a 46-year old male who sustained an admitted industrial injury to his right shoulder on January 13, 2018. While setting up banquet tables during the course and scope of his employment with Employer, three of the tables tipped over and struck him on the right shoulder.

2. Claimant subsequently received conservative care and physicians performed diagnostic testing. On April 25, 2018 Claimant underwent a right shoulder arthroscopy with Michael Hewitt, M.D. The surgical notes revealed a "full-thickness anterior supraspinatus tear with minimal retraction, subacromial impingement, acromioclavicular arthroplathy, and advanced long head tendinopathy with superior labral tear."

3. After surgery Claimant underwent physical therapy and received pain medications. However, Claimant failed to respond and experienced problems with pain management.

4. On May 29, 2018 Claimant underwent a psychological evaluation with Joel Cohen, Ph.D. Dr. Cohen noted that Claimant exhibited poor pain tolerance, "heightened pain sensitivity" and his pain behaviors were "at least moderate, if not moderate-to-severe at times." He summarized that "[d]iagnostically, [Claimant's] presentation is most consistent with an injury-related diagnosis of minimum adjustment reaction with anxious mood and I would suggest very clearly that there is a somatoform element to his pain."

5. On June 25, 2018 Claimant returned to Dr. Cohen for an evaluation. Dr. Cohen commented that Claimant "engages in a significant level of guarding, bracing in particular, and fear-based avoidant pain behavior. He is so threatened at the prospect of pain, that it is very obvious that he is totally neglecting the right upper extremity."

6. On September 11, 2018 Claimant visited Authorized Treating Physician (ATP) Fredric Zimmerman, D.O. for an examination. Dr. Zimmerman remarked that Claimant had received trigger point injections to the right upper quadrant without significant benefit. He explained that Claimant demonstrated a "very slow recovery and minimal if any improvement functionally after his right shoulder surgery."

7. On September 17, 2018 Claimant again visited Dr. Cohen for an examination. Dr. Cohen explained that Claimant "remains somatically preoccupied, guarded and braced relative to the right shoulder, and in light of the fact that he would not move his arm, I am not at all clear that doing anything is going to appreciably alter his condition."

8. Claimant did not subsequently respond to physical therapy, counseling or trigger point injections. On November 27, 2018 he returned to ATP Dr. Zimmerman for an examination. Dr. Zimmerman noted that Claimant exhibited "pain out of proportion with general myofascial pain, positive fibromyalgia screen and anxiety complicated with depression interfering with the rehabilitation process." He determined that Claimant had reached Maximum Medical Improvement (MMI). Relying on the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised) (AMA Guides*) Dr. Zimmerman assigned an 18% right upper extremity impairment rating based on range of motion deficits. The impairment converted to an 11% whole person rating.

9. On November 29, 2018 Claimant visited Stephen Danahey, M.D. Claimant reported worsening right shoulder pain. Dr. Danahey agreed with Dr. Zimmerman's MMI and impairment determinations.

10. On January 16, 2019 Claimant underwent an independent psychiatric examination with Gary S. Gutterman, M.D. After reviewing Claimant's medical and psychological history, Dr. Gutterman concluded "i]t appears that [Claimant] probably is experiencing a Somatic Symptom Disorder based on his pain complaints and limited mobility which does not appear to have anatomical corroboration… I did not schedule a follow-up with [Claimant] given what appears to be somatic preoccupation and his lack of response to treatment with Dr. Cohen as well as any psychotropics prescribed to date."

11. Respondents' challenged Dr. Zimmerman's impairment determination and sought a Division Independent Medical Examination (DIME). On April 14, 2019 Claimant underwent a DIME with Charles Wenzel, D.O. Claimant reported he had been working modified duty and developed left shoulder pain because he avoided using his right arm. Dr. Wenzel noted that Claimant mentioned diffuse pain with light palpation throughout his spine and bilateral shoulders. After reviewing Claimant's medical records and performing a physical examination, Dr. Wenzel remarked that Claimant exhibited "pain behaviors and/or somatoform elements" that caused him to avoid using the right shoulder. In assessing Claimant's permanent impairment, Dr. Wenzel explained that Claimant's range of motion measurements were not "physiologically credible due to significantly decreased range of motion as compared to his baseline due to Claimant's noted new onset left shoulder pain."

12. In performing range of motion measurements, the *Impairment Rating Tips* specify that the DIME physician may exercise discretion in using another physician's range of motion measurements when they are more physiologically credible. However, in using another physician's ratings, the DIME physician must clearly justify reasons for a deviation. *See Desk Aid #11, DIME Panel Physician Notes* 2. Dr. Wenzel thus used

the range of motion measurements documented in four physical examinations with Drs. Zimmerman and Danahey during September and October 2018. Relying on the *AMA Guides*, Dr. Wenzel assigned Claimant a 15% right upper extremity impairment rating for range of motion deficits that converted to a 9% whole person impairment.

13. On May 18, 2019 Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Wenzel's 15% right upper extremity impairment rating. Claimant objected to the FAL and filed an Application for Hearing seeking to convert the scheduled rating to a whole person impairment.

14. On May 28, 2019 Claimant returned to Dr. Zimmerman for an evaluation. Dr. Zimmerman remarked "[h]e continues to guard his right upper extremity as usual. Shoulder range of motion remains self-limited. Left-sided range of motion is within normal limits. He continues to have pain out of proportion to mild palpation in the interscapular regions bilaterally."

15. On July 30, 2019 Claimant again visited Dr. Zimmerman for an evaluation. In examining the bilateral upper quadrants Dr. Zimmerman noted "increased muscular tone and trigger points in the left upper trapezius, cervicothoracic paraspinal and levator scapular muscle." Dr. Zimmerman administered trigger point injections in the left upper quadrant. He recommended a follow-up appointment in four to six months.

16. Claimant testified at the hearing in this matter. He explained that he suffers functional impairment and pain in areas of his body that extend beyond his right arm. He specifically remarked that he feels pain in his chest, scapula and shoulder when he uses his right arm. Moreover, when he turns his head to the left, he experiences pain on the right side of his neck, the top of his right shoulder and in the clavicle.

17. Claimant has failed to establish that it is more probably true than not that his scheduled 15% right upper extremity impairment should be converted to a 9% whole person rating. Initially, Claimant suffered an admitted industrial injury to his right shoulder on January 13, 2018. He subsequently underwent a right shoulder arthroscopy. The medical records from numerous treatment providers since Claimant's surgery are replete with somatic complaints, pain behaviors, inconsistent range of motion measurements and poor efforts to participate in medical treatment. Moreover, Claimant did not mention any pain or functional impairment beyond the right arm at the shoulder until he underwent a DIME on April 14, 2019.

18. During a psychological evaluation with Dr. Cohen on May 29, 2018 Claimant exhibited poor pain tolerance, pain behaviors and a "somatoform element to his pain." On November 27, 2018 Dr. Zimmerman noted that Claimant demonstrated "pain out of proportion with general myofascial pain, positive fibromyalgia screen and anxiety complicated with depression interfering with the rehabilitation process." In an independent psychiatric examination Dr. Gutterman determined that Claimant was "experiencing a Somatic Symptom Disorder based on his pain complaints and limited

mobility which does not appear to have anatomical corroboration." At the DIME, Dr. Wenzel noted diffuse pain with light palpation throughout Claimant's spine and bilateral shoulders. However, Dr. Wenzel could not obtain accurate range of motion measurements because of Claimant's pain behaviors.

19. Since the DIME, Claimant has only mentioned symptoms beyond the right shoulder area when Dr. Zimmerman noted diffuse out of proportion complaints in the interscapular region in May and left shoulder pain in July 2019. The medical records reveal that Claimant has repeatedly reported somatic pain symptoms that lacked an anatomical basis. Despite Claimant's hearing testimony of pain in the chest, scapula, and right side of his neck, the bulk of the persuasive medical evidence reveals that Claimant's symptoms do not extend beyond the right arm. The situs of Claimant's functional impairment is thus in his right upper extremity and not off the schedule. Therefore, Claimant has failed to establish that it is more probably true than not that he has functional impairment beyond the schedule of disabilities. Accordingly, Claimant's request for conversion of his 15% right upper extremity scheduled impairment rating to a 9% whole person rating is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Section 8-42-107(1)(a), C.R.S. limits medical impairment benefits to those provided in §8-42-107(2), C.R.S. when a claimant's injury is one enumerated in the schedule of impairments. The schedule includes the loss of the "arm at the shoulder." *See* §8-42-107(2)(a), C.R.S. However, the "shoulder" is not listed in the schedule of impairments. *See Bolin v. Wacholtz*, W.C. No. 4-240-315 (ICAO, June 11, 1998). When an injury results in a permanent medical impairment not set forth on a schedule of impairments, an employee is entitled to medical impairment benefits paid as a whole person. *See* §8-42-107(8)(c), C.R.S.

5. Because §8-42-107(2)(a), C.R.S. does not define a "shoulder" injury, the dispositive issue is whether a claimant has sustained a functional impairment to a portion of the body listed on the schedule of impairments. *See Strauch v. PSL Swedish Healthcare*, 917 P.2d 366, 368 (Colo. App. 1996). Whether a claimant has suffered the loss of an arm at the shoulder under §8-42-107(2)(a), C.R.S., or a whole person medical impairment compensable under §8-42-107(8)(c), C.R.S., is determined on a case-by-case basis. *See DeLaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000).

6. The Judge must thus determine the situs of a claimant's "functional impairment." *Velasquez v. UPS,* W.C. No. 4-573-459 (ICAO Apr. 13, 2006). The situs of the functional impairment is not necessarily the site of the injury. *See In re Hamrick*, W.C. No. 4-868-996-01 (ICAO, Feb. 1, 2016); *In re Zimdars,* W.C. No. 4-922-066-04 (ICAO, Feb. 4, 2015). Pain and discomfort that limit a claimant's ability to use a portion of the body is considered functional impairment for purposes of determining whether an injury is off the schedule of impairments. *In re Johnson –Wood*, W.C. No. 4-536-198 (ICAO, June 20, 2005); *Vargas v. Excel Corp.,* W.C. 4-551-161 (ICAO, Apr. 21, 2005). However, the mere presence of pain in a portion of the body beyond the schedule does not require a finding that the pain represents a functional impairment. *Lovett v. Big Lots,* WC 4-657-285 (ICAO, Nov. 16, 2007); *O'Connell v. Don's Masonry,* W.C. 4-609-719 (ICAO, Dec. 28, 2006).

7. As found, Claimant has failed to establish by a preponderance of the evidence that his scheduled 15% right upper extremity impairment should be converted to a 9% whole person rating. Initially, Claimant suffered an admitted industrial injury to his right shoulder on January 13, 2018. He subsequently underwent a right shoulder arthroscopy. The medical records from numerous treatment providers since Claimant's surgery are replete with somatic complaints, pain behaviors, inconsistent range of motion measurements and poor efforts to participate in medical treatment. Moreover, Claimant did not mention any pain or functional impairment beyond the right arm at the shoulder until he underwent a DIME on April 14, 2019.

8. As found, during a psychological evaluation with Dr. Cohen on May 29, 2018 Claimant exhibited poor pain tolerance, pain behaviors and a "somatoform element to his pain." On November 27, 2018 Dr. Zimmerman noted that Claimant demonstrated "pain out of proportion with general myofascial pain, positive fibromyalgia screen and anxiety complicated with depression interfering with the rehabilitation process." In an independent psychiatric examination Dr. Gutterman determined that

Claimant was "experiencing a Somatic Symptom Disorder based on his pain complaints and limited mobility which does not appear to have anatomical corroboration." At the DIME, Dr. Wenzel noted diffuse pain with light palpation throughout Claimant's spine and bilateral shoulders. However, Dr. Wenzel could not obtain accurate range of motion measurements because of Claimant's pain behaviors.

9. As found, since the DIME, Claimant has only mentioned symptoms beyond the right shoulder area when Dr. Zimmerman noted diffuse out of proportion complaints in the interscapular region in May and left shoulder pain in July 2019. The medical records reveal that Claimant has repeatedly reported somatic pain symptoms that lacked an anatomical basis. Despite Claimant's hearing testimony of pain in the chest, scapula, and right side of his neck, the bulk of the persuasive medical evidence reveals that Claimant's symptoms do not extend beyond the right arm. The situs of Claimant's functional impairment is thus in his right upper extremity and not off the schedule. Therefore, Claimant has failed to establish that it is more probably true than not that he has functional impairment beyond the schedule of disabilities. Accordingly, Claimant's request for conversion of his 15% right upper extremity scheduled impairment rating to a 9% whole person rating is denied and dismissed.

ORDER

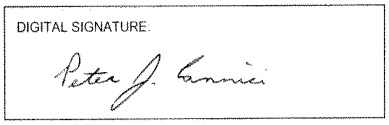
Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request to covert his 15% right upper extremity scheduled impairment to a 9% whole person rating is denied and dismissed.

2. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: November 15, 2019.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

PROCEDURAL HISTORY

In an order dated October 2, 2019, Designee Clerk Gabriela Chavez granted the parties stipulated motion to continue hearing and consolidate claims W.C. No. 5-106-473 & W.C. No. 5-094-916, involving the same respondent but different claimants.

ISSUES

I. Whether Respondent limited maintenance care in the March 15, 2019 and May 29, 2019 Final Admissions of Liability and therefore failed to comply with Section 8-42-107(8)(f), C.R.S.

II. Whether Claimant in W.C. No. 5-094-916 is entitled to a disfigurement award.

FINDINGS OF FACT

1. The Division promulgates the standard Final Admission of Liability (FAL) form (form WC4) to be used by insurers. As indicated in the bottom left-hand corner of the form, the Division revised a version of this form effective 1/15/19. The section regarding maintenance care reads, "Admit to Maintenance Care after MMI? □ Yes □ No Pursuant to Dr. _____'s medical report dated _____."

2. The Division again revised form WC4 in March[1] 2019. The section regarding maintenance care was revised to read: "Admit to Maintenance Care after MMI? □ Yes □ No **If no,** pursuant to Dr. _____'s medical report dated _____." (emphasis added).

W.C. No. 5-094-916

3. Claimant sustained an admitted industrial injury on November 20, 2018. On February 12, 2019, Claimant's authorized treating physician (ATP), Stephen Danahey, M.D., placed Claimant at maximum medical improvement (MMI) with a 31% lower extremity impairment rating and no permanent work restrictions. Regarding maintenance treatment Dr. Danahey wrote, "For maintenance care, one or two visits over the next year with the surgeon would be appropriate, if needed. Additionally 6 visits of physical therapy, to use as needed, would also be appropriate."

4. On March 15, 2019, Respondent filed a FAL on the WC4 revised 1/15/19. In the maintenance care section, Respondent checked "Yes" to admit to post-MMI maintenance care, and completed the blank sections to read, "Pursuant to Dr. Danahey's medical report dated 2/15/2019." Under the section titled "Remarks and

[1] The form does not list the specific date of revision, only "03/19."

basis for permanent disability award" Respondent wrote, "Per Dr. Danahey's attached impairment rating report dated 2/15/19. Any and all benefits and penalties not specifically admitted in this final admission of liability are hereby specifically denied."

5. The ALJ visually observed Claimant's right knee at hearing and finds that, as a result of his November 20, 2018 work injury, Claimant has a visible disfigurement to the body consisting of a scar measuring ½ inch in length on the right knee. The scar is well-healed with minimal discoloration. Additionally, Claimant has three porthole scars on his right knee that are well-healed and only minimally perceptible.

W.C. No. 5-106-473

6. Claimant sustained an admitted industrial injury on June 21, 2018. On April 26, 2019, ATP Samuel Chan, M.D. placed Claimant at MMI with a 3% whole person impairment (after apportionment). Under "Assessment and Recommendations" Dr. Chan wrote, in relevant part, "For maintenance care, the patient may have 1 additional medial branch radiofrequency rhizotomy over the course of the next 8 months, if at all necessary. Otherwise, no further diagnostic or therapeutic interventions are necessary. The patient is at maximum medical improvement. No new medications were provided."

7. On May 29, 2019, Respondent filed a FAL on the WC4 form revised 1/15/19. In the maintenance care section, Respondent checked "Yes" to admit to post-MMI maintenance care, and completed the blank sections to read "Pursuant to Dr. Chan's medical report dated 04/26/2019." Under remarks Respondent wrote,

> Per attached report from Dr. Chan dated 4/26/19, injured worker (IW) reached MMI on 4/26/19 with an 8% whole person (WP) rating. After apportionment based upon attached documentation, Dr. Chan notes 3% WP rating. IW at full duty. Any and all benefits and penalties not specifically admitted in this final admission of liability are hereby specifically denied.

Additional Findings

8. Claimants objected to the FALs in a timely manner and filed Applications for Hearing on the issue of "Maintenance care per 8-42-107(8)(f)."

9. No evidence was offered indicating a particular medical benefit is in dispute in either claim or has been denied by Respondent.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the

necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

FAL and Maintenance Treatment

Section 8-42-107(8)(f), C.R.S. provides, "In all claims in which an authorized treating physician recommends medical benefits after maximum medical improvement, and there is no contrary medical opinion in the record, the employer shall, in a final admission of liability, admit liability for related reasonable and necessary medical benefits by an authorized treating physician." An award of award of maintenance medical benefits should be general in nature. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003); *Anderson v. SOS Staffing Services,* W. C. No. 4-543-730, (ICAO, July 14, 2006).

In cases where the respondents file a FAL admitting for ongoing medical benefits after MMI they retain the right to challenge the compensability, reasonableness, and necessity of specific treatments. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003); *Oldani v. Hartford Financial Services,* W.C. No. 4-614-319-07, (ICAO, Mar. 9,

2015). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School District No.11*, W.C. No. 3-979-487, (ICAO, Jan. 11, 2012); *Ford v. Regional Transportation District,* W.C. No. 4-309-217 (ICAO, Feb. 12, 2009. The question of whether the claimant has proven that specific treatment is reasonable and necessary to maintain her condition after MMI or relieve ongoing symptoms is one of fact for the ALJ. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Claimants contend Respondent filed the wrong version of the FALs and should have included the language "mandated" by Section 8-42-107(8)(f), C.R.S. Claimants further contend that, by specifically denying every benefit not specifically admitted, Respondent limited a general award of maintenance care. The ALJ disagrees.

Although Respondent did not file the most recent version of the FAL form, the FALs filed were on the form promulgated by the Division and revised two months prior. The versions of the form are substantially similar other than the aforementioned change in language in the section regarding maintenance care. The ALJ is not persuaded that, in these circumstances, Respondent's filing of a prior version of the WC4 form renders the FALs void or necessitates filing new FALs.

As found, Respondent checked "Yes" on the FALs, admitting to post-MMI maintenance treatment. Although the 3/19 version of the WC4 form includes language implying an insurer should now only refer to an ATP's report if denying maintenance care, WCRP Rule 5-5(A)(1) provides that when an FAL is predicated upon medical reports, "The admission shall make specific reference to the medical report by listing the physician's name and the date of the report on the remarks section of the admission." The ALJ is not persuaded Respondent's reference to the ATP's report in each FAL limited the award of maintenance care to only the specific treatment mentioned in the ATP's report. The reference to the ATPs' reports can be reasonably interpreted as an attempt to comply with the WCRP Rule 5-5(A)(1). Further, the ALJ is not persuaded Respondent's denial of specific benefits not admitted to limits the maintenance treatment. By checking "Yes" Respondent admitted to a general award of reasonable and necessary maintenance care related to the work injury pursuant to Section 8-42-107(8)(f), C.R.S. The ALJ further notes Claimants did not allege nor provide evidence of any specific maintenance benefit that is at issue or has been denied by Respondent.

Disfigurement

Section 8-42-108(1), C.R.S. provides that a claimant is entitled to additional compensation if he is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view."

As found, Claimant in W.C. No. 5-094-916 has some scarring as a result of his compensable injury. The ALJ concludes Claimant should be awarded $250.00 for that disfigurement.

ORDER

1. The March 15, 2019 and May 29, 2019 FALs provide an open admission for maintenance care as required. Claimant's request that Respondent file new FALs specifically stating admission for related reasonable and necessary maintenance treatment is denied and dismissed.

2. Respondent shall pay Claimant in W.C. No. 5-094-916 $250.00 for his disfigurement. Respondent shall be given credit for any amount previously paid for disfigurement in connection with this claim.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 19, 2019

Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she sustained a work related injury or occupational disease to her bilateral upper extremities.

2. Whether Claimant has established by a preponderance of the evidence an entitlement to a general award of reasonable and necessary medical benefits to treat her bilateral upper extremity condition.

3. Whether Claimant has established by a preponderance of the evidence an entitlement to temporary total disability (TTD) benefits from October 5, 2018 to November 7, 2018 and from May 28, 2019 to July 15, 2019.

STIPULATIONS

1. Claimant's average weekly wage at the time of the alleged injury or occupational disease was $884.39.

2. Claimant's was off work due to bilateral upper extremity surgery from October 5, 2018 to November 7, 2018 and from May 28, 2019 to July 15, 2019.

FINDINGS OF FACT

1. Claimant is a 58 year old female who is employed by Employer as a mailroom services specialist. Claimant has been employed by Employer for approximately 12 years. *See* Exhibit H.

2. Claimant's assigned job duties are varied and include sorting mail, arranging for pickup of outgoing mail, pushing mail carts, opening doors, placing mail in bins for distribution, disposing of junk mail, and driving a vehicle to deliver packages. *See* Exhibits C, H.

3. Claimant testified that on a daily basis she checks the loading dock for packages, loads and locks before couriers get there, sorts all the mail by hand from tubs brought in, and that she then loads mail tubs onto a cart that she pushes throughout the building to deliver mail to each floor.

4. Claimant testified that prior to being a mailroom services specialist, she worked for Employer as a courier and that in addition to the sorting and delivering of mail within a building, she was on the road and driving for approximately 4 hours per day.

Claimant testified that she slowly gave up her driving routes to a courier company that Employer chose to use. Claimant stopped driving for Employer in May of 2019.

5. Employer's human resources business partner, Jean I_____, testified at hearing. Ms. I_____ supports Claimant's work group. Ms. I_____ testified that Claimant performs a wide variety of tasks, has a lunch break and assigned break periods, and has ample time to socialize while moving throughout the office building. Ms. I_____ testified that Claimant is not an efficient employee, has been coached by her manager about socialization, and estimated that Claimant probably performs actual work duties 4-5 hours out of her 8 hour day. Ms. I_____ testified that when Claimant was also driving as a courier, the driving was just within the local area and estimated the time spent driving as 2.5-3 hours. Ms. I_____ disagreed with Claimant's estimate of spending 4 hours driving and noted that the distance between the building locations where Claimant would have traveled would not have taken 4 hours as Claimant testified.

6. Claimant alleges that she sustained bilateral long trigger finger as a result of her job duties. Claimant alleges the onset date of injury as July 13, 2018.

7. Prior to the July 13, 2018 alleged onset date of her claimed work injury, Claimant was evaluated once for her left upper extremity finger pain.

8. On August 3, 2017, David Bierbrauer, M.D. evaluated Claimant. Claimant reported left finger pain with popping and clicking for the last 3-4 weeks. Claimant reported a concern for possible trigger finger of her left middle finger. Dr. Bierbrauer noted that Claimant exercised daily including hiking, cycling, and swimming and that she had a moderate activity level. Dr. Bierbrauer found tenderness over the A1 pulley with popping during flexion and extension of the left long finger. Dr. Bierbrauer assessed left middle finger trigger finger. Dr. Bierbrauer performed an injection, advised Claimant to resume use of her finger, and advised Claimant to return when necessary. *See* Exhibit A.

9. Claimant testified at hearing that the first symptoms she had in 2017 including clicking in the left middle finger and included the finger getting stuck when straightened. She testified that after the injection, all symptoms went away for almost a year, and then came back in the left and right hand.

10. On July 12, 2018, Claimant was evaluated by David Conyers, M.D. Claimant reported bilateral middle finger issues. Claimant reported that she had an injection in her left middle finger one year prior, and that her symptoms had returned in the last couple of weeks. Claimant also reported that her right side started having similar symptoms. Claimant reported a moderate exercise level including swimming, biking, hiking, walking, and lifting weights. Dr. Conyers noted that Claimant had longstanding problems with her left long finger and that her prior injection gave her significant improvement until three months ago. Dr. Conyers noted that Claimant did a lot of mailroom work, some keyboard and mouse work, but mostly carrying heavy packages and doing mail delivery. Dr. Conyers also noted that Claimant did a lot of driving and

gripping the steering wheel. Claimant reported her belief that the trigger fingers may be work related. Dr. Conyers found on examination that the left long trigger finger was advanced. Dr. Conyers performed an injection on the right long flexor tendon and noted that Claimant knew what to expect post injection. Dr. Conyers recommended a left long trigger finger release surgery and he requested authorization for the procedure. *See* Exhibit B.

11. On July 13, 2018, David Orgel, M.D. issued a physician advisory report. Dr. Orgel opined that it was prudent to get a job demands analysis to determine causation. Dr. Orgel also opined that it was somewhat unusual to have long trigger fingers in the absence of other activities and he wondered if instead of the diagnosis being trigger finger, if Claimant had an early Dupuytren's. Dr.Orgel opined that if it was early Dupuytren's, it obviously would not be a work related problem. *See* Exhibit D.

12. On July 18, 2018, Felix Meza, M.D. evaluated Claimant at Concentra. Claimant reported pain in her right and left middle fingers due to overuse and she reported that she had been diagnosed elsewhere with having trigger finger. Claimant reported no known injury and denied outside causation including sports, hobbies, accidents, or external employment. Claimant reported the onset of bilateral trigger fingers of her middle fingers following repetitive activities at work including moving carts, opening metal doors, opening and sorting mail. On the Physician's Report of Worker's Compensation Injury report, Dr. Meza noted Claimant's description of injury was "over the last 12 years, grabbing metal door handles, picking up full main buckets, grabbing steering wheel (3 hr rte), holding handles on mail cart, sorting, opening high volume of letters, trigger finger." Dr. Meza recommended a work site evaluation to assist in determination of causality. *See* Exhibit C.

13. On August 3, 2018, a Job Demands Analysis/work site evaluation (hereinafter JDA) was performed by Mr. Howard Fallik at Genex. Mr. Fallik went on site to the Employer, met with the claimant and took her history, and then directly observed claimant performing her assigned job tasks. Claimant reported that various activities were likely traceable to the onset of the identified problems of bilateral trigger finger including a lot of gripping in her position. Claimant reported gripping the steering wheel of the company vehicle, handles of baskets, a cart, and stacks of mail. Mr. Fallik noted Claimant's essential functions included 20-25% of her position spent driving a company vehicle to deliver or pick up mail. He noted 20-30% of her position involved opening envelopes, sorting and collating mail, placing mail in bins and carrying or pushing with a cart to departments and individuals for distribution, disposing junk mail, and recording registered mail. Mr. Fallik documented some of her Claimant's tasks with photographs in his report. The JDA he performed also breaks down and categorizes claimant's essential functions and physical demands by frequency, weight, and duration. *See* Exhibit E.

14. The JDA did not identify any primary risk factors for causation of bilateral trigger finger present in Claimant's position. The JDA also did not identify any secondary risk factors. *See* Exhibit E.

15. On August 8, 2018, Kristyn Magulak, NP evaluated Claimant at Concentra. Claimant reported that her right hand was much improved following her recent injection. Claimant reported that she had longstanding issues with her left hand and did not receive an injection on the left as she had one done a year ago. Claimant reported working as a mail specialist with a lot of gripping/grasping. Claimant was referred to hand physical therapy. NP Magulak noted that the plan was to work on getting authorization for surgery on the left middle trigger finger. Concentra did not yet have the result of the JDA. *See* Exhibit C.

16. On August 15, 2018, Davis Hurley, M.D. issued a Physician Advisory report. Dr. Hurley opined that after a review of medical records from Dr. Conyers, the JDA, and the designated provider note, Claimant's bilateral trigger fingers did not appear to be work related. Dr. Hurley recommended denial of the claim. He opined that there was no significant risk factor identified in the JDA or the job description and opined that the work was without excessive pinch of the digits for more than three hours. Dr. Hurley agreed with the treatment provided by Dr. Conyers, but opined it was not work related. *See* Exhibit F.

17. On August 20, 2018, Claimant was evaluated by Dr. Conyers. Claimant reported longstanding problems with her left long finger and that an injection last August brought about significant improvement until about three months ago. Claimant reported having trouble now with her right long finger as well. Claimant reported that she did a lot of mailroom work as well as a lot of driving and gripping the steering wheel. Claimant felt like the long trigger fingers may well be work related and Dr. Conyers agreed with Claimant based on the job description and length of exposure. Dr. Conyers noted that Claimant would file a workers' compensation case. *See* Exhibit 1.

18. On October 5, 2018, Dr. Conyers performed a left long finger trigger release surgical procedure and provided cortisone injections to Claimant's right index and right middle fingers. *See* Exhibits1, B.

19. Three weeks following surgery, Claimant was noted to have scar tissue thickness and some signs of early Dupuytren's disease in the palm of the left hand. She was also noted to have some signs of early Dupuytren's disease on her right hand as well. *See* Exhibit B.

20. Eventually, a right long finger trigger release surgery was also recommended by Dr. Conyers. *See* Exhibit 1.

21. On December 20, 2018, Jonathan Sollender, M.D., issued an IME report on behalf of Pinnacol Assurance. Dr. Sollender examined Claimant, took a history from Claimant, and reviewed the medical records and JDA. Dr. Sollender opined that Claimant was not exposed to the type of risk factors in her daily work to have stressed her arms/hands to the point of developing her condition. Dr. Sollender opined that the left hand trigger finger dating back to 2017 and the more recent right hand trigger finger were not work related. *See* Exhibit G.

22. Dr. Sollender opined that no provider had provided causal analysis or the steps necessary for causal analysis. Dr. Sollender performed an analysis by reviewing the diagnosis, the job duties and the JDA. Dr. Sollender compared Claimant's duties to the primary and secondary risk factor tables. After analysis he concluded that Claimant's work was not responsible for her bilateral trigger finger condition. *See* Exhibit G.

23. On March 22, 2019, Dr. Sollender testified by deposition. He opined that Claimant had no primary or secondary risk factors. He also testified that it appeared that Dr. Conyers only had Claimant's subjective reports that her job was repetitive and that Dr. Conyers did not perform a causation analysis

24. On May 7, 2019 Dr. Meza at Concentra issued a report. He noted that he had last seen Claimant on July 18, 2018 when he recommended a work site evaluation. Dr. Meza noted that he did not evaluate Claimant on May 7, 2019 but was just issuing a report after being asked to review the case and evaluate the worksite evaluation that had been performed on August 3, 2018. Dr. Meza noted he had reviewed the worksite evaluation and opined that there were no primary or secondary risk factors that fit within the Colorado Division of Workers Compensation cumulative trauma guidelines, and therefore Claimant did not meet criteria for causation as a work related injury. Dr. Meza agreed with Dr. Conyers' treatment recommendations, but recommended that Claimant pursue treatment outside of Workers Compensation. He released Claimant from care and opined that she could work full duty and had no permanent impairment. *See* Exhibit C.

25. On July 18, 2019, a second JDA was performed by Mr. Fallik from Genex. He again opined that there were no primary or secondary risk factors present in Claimant's job. *See* Exhibit E.

26. On August 12, 2019, Dr. Sollender issued an addendum to his initial IME report after reviewing the second JDA. In relevant part, the addendum provides: "my opinion remains unchanged in that she meets no occupational risk factors for any cumulative trauma condition of her upper extremities from the work she does. The 2nd JDA confirms her job is neither repetitive, forceful, awkward, computer intensive, vibratory or cold exposed. I continue to recommend denial of this claim as her complaints are non-occupational in nature based on objective testing of her job position." *See* Exhibit G.

27. On September 26, 2019, Dr. Conyers testified by deposition. Dr. Conyers testified that Claimant was very specific and the he was very specific when asking what her job duties were. Dr. Conyers testified that he felt Claimant not only did repetitious hand activity but a fair bit of strenuous hand activity. Dr. Conyers testified that if you have left long trigger finger, you are at increased risk of developing right long trigger finger. Dr. Conyers testified that he was careful to ask Claimant about home activities and he noted she reported not playing softball, tennis, or riding a bike. Dr. Conyers opined that none of the off work activities seemed to be a factor and that he felt with the activities Claimant was doing at work, her conditions were directly related to her work activities. He didn't think that a JDA would be helpful or necessary.

28. Dr. Conyers testified that he eventually performed surgery on both the left and right long finger trigger fingers. Dr. Conyers testified that the medical treatment guidelines were just guidelines and that his opinion was that Claimant's trigger fingers were more likely than not occupationally related. He testified that even if Claimant did casual biking and weightlifting he did not believe that those activities would rise to the level where his opinion would change.

29. Dr. Sollender testified at hearing. He testified that it was important to look at the totality of the evidence to make a conclusion including Claimant's subjective history, the JDA, and the job description. Dr. Sollender testified that JDAs are more reliable than a claimant's recollection of job duties. He noted that claimants can overestimate their exposure to certain risk factors whereas a JDA actually measures amounts. He testified that in this case Claimant's duties were not repetitive and that she was not even close to meeting time or threshold requirements for even secondary risk factors.

30. Dr. Sollender testified that driving a car 3-4 hours per day and gripping a steering wheel did not cause bilateral trigger finger. He opined that if it did, the medical community would expect a large segment of the population that commutes long distances on a daily basis to have this condition and they do not. Dr. Sollender testified that Claimant's job was not repetitive, forceful, and/or awkward and that he agrees with dr. Meza and Dr. Hurley that Claimant's bilateral trigger finger condition was unrelated to her work. He also testified that the conditions were not aggravated and/or accelerated by her job duties for Employer. Dr. Sollender testified that trigger finger has various conditions and that some of the population simply gets the condition without a known cause.

31. Claimant testified at hearing. She testified that it was primarily her prior position as a courier and not the position as a mailroom services clerk that she believes caused her bilateral trigger finger. Claimant testified that she drove approximately 3-4 hours per day when she worked as a courier. Claimant testified that the JDA gave a basic layout of her job but didn't accurately reflect her overall job duties.

32. The opinions of Dr. Meza, Dr. Sollender, and Dr. Hurley are found credible, persuasive, and consistent with the weight of the evidence. Dr. Conyers relied heavily on Claimant's subjective reports of her job duties, which were not substantiated by the JDA or by the testimony of Ms. I_____.

33. Claimant's job is not repetitive, awkward, or forceful. Claimant has failed to establish that her bilateral trigger fingers were caused by her employment.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See*

§ 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Claimant is required to prove by a preponderance of the evidence that the conditions for which she seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. *See* § 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection

is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

An occupational disease is a disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment. *See* § 8-40-201(14), C.R.S. A claimant seeking benefits for an occupational disease must establish the existence of the disease and that it was directly and proximately caused by the claimant's employment duties or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P. 2d 251 (Colo. App. 1999); *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). In deciding whether the Claimant has met his burden of proof, the ALJ is empowered to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002).

Claimant has failed to establish, by a preponderance of the evidence, that her bilateral upper extremity conditions are directly and proximately caused by her employment duties or her working conditions. The symptoms that claimant believes are causally related to her employment with Employer are just as or more likely the result of her outside of work activities or some other unknown cause. As found above, two JDA's were performed by observing Claimant do her actual job as a mailroom services specialist. The JDA's concluded that Claimant's position does not meet the requirements under the Medical Treatment Guidelines for any primary or secondary risk factors. The amount of time that Claimant spends performing work activities has not been shown to be significant enough to cause bilateral trigger finger. The testimony of Ms. I_____ that the JDA's and formal job description are accurate representations of claimant's job duties for the Employer is found credible and persuasive.

Claimant testified at hearing that that she believed it was her job as a courier for Employer that primarily caused her bilateral trigger finger. She argues that this makes the JDA's invalid and/or irrelevant. However, as found above, the initial JDA noted that driving was 20-25% of Claimant's position. Dr. Sollender credibly explained why driving would not be a causal factor in this case, even accepting Claimant's testimony. Further, Ms. I_____ credibly testified that the amount of time spent driving was in the local area. Further, the driving was broken up by delivery and pick up stops and did not involve not continuous gripping. Ms. I_____ was very credible in describing Claimant's typical shifts and the work volume with varied tasks and actual work time at less than 8 hours per day.

Claimant has failed to show that her employment proximately caused her bilateral trigger finger condition. It is just as likely or more likely that claimant's bilateral condition is the natural progression of an inherent non-work related condition and/or due to her outside of work activities. Claimant has failed to meet her burden to establish a causal

relationship to her employment or employment duties. Claimant was equally exposed to hazards that could have caused and. The opinions of Dr. Meza, Dr. Sollender, and Dr. Hurley that her condition is unrelated to her work are found credible and persuasive. The opinions of the doctors are consistent with the JDA, the testimony of Ms. I_____, and the Medical Treatment Guidelines. Claimant has failed to meet her burden.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by a preponderance of the evidence that she sustained a work related injury or occupational disease to her bilateral upper extremities. Her claim is denied and dismissed.

2. As she has failed to establish a work related injury or occupational disease, Claimant's request for medical benefits and temporary total disability benefits is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, *see* section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 21, 2019 /s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-960-859-006

ISSUES

I. Whether Claimant established by a preponderance of the evidence that her claim should be reopened.

II. If Claimant's claim is reopened, whether she is entitled to medical and temporary total disability benefits.

III. Whether Claimant is entitled to travel and lodging expenses incurred in participating in the DIME process.

IV. Whether Claimant is entitled to be reimbursed for the cost of the deposition transcript of the DIME physician.

V. Whether Claimant is entitled to reimbursement for certain medical expenses incurred after the DIME.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. On September 2, 2014, Claimant suffered a compensable injury to her right ankle. At the time of her injury, Claimant was 51 years old. Currently, Claimant is 56.

2. On September 3, 2014, Claimant presented to OnPoint Urgent Care and was seen by Dr. Rogg for right ankle pain. Claimant stated that on September 2, 2014, she was at work wearing 4-inch heels and inverted her right ankle and developed right sided ankle pain. The report indicates Claimant specifically said, "she did not actually fall." Moreover, Claimant did not report any pain or symptoms involving her right hip, upper leg, knee, or lower leg. Her symptoms were limited to her right ankle.

3. Dr. Rogg noted Claimant presented with an abnormal gait and stated she was too tender to walk on her right foot. Dr. Rogg observed minimal swelling around Claimant's foot and ankle. Dr. Rogg ordered foot and ankle x-rays, which were normal and did not show any evidence of soft tissue swelling, bony abnormalities, or fractures. Based on her evaluation of Claimant, and the x-rays, Dr. Rogg diagnosed Claimant with a right ankle sprain. She provided Claimant crutches, a CAM walking boot, and prescribed Percocet. She did not assign Claimant any work restrictions. *Respondents' Exhibit A, pages 1 – 5*.

4. On September 4, 2014, Claimant returned to OnPoint asking about a work note and restrictions. She claimed Dr. Rogg told her she could take 10 days off from work due to her sprained ankle. They reviewed her chart and there was no indication Dr. Rogg provided Claimant any work restrictions or indicated Claimant should take any time off from work. Therefore, they requested another physician

at OnPoint, Dr. Leep, to review the matter. Dr. Leep also concluded Claimant did not require any work restrictions. Dr. Leep did, however, agree to provide Claimant a work excuse for September 3rd and 4th, with Claimant returning to work on September 5, 2014. *Respondents' Exhibit A, pp. 4,5*.

5. On September 8, 2014, Claimant was seen at Concentra. Although Claimant denied falling when she first sought medical treatment on September 3, 2014, at this appointment, it is noted Claimant reported she was coming down some stairs, fell, and twisted her ankle. Moreover, although Claimant only had right ankle pain at her first appointment, Claimant's pain complaints expanded and now allegedly involved her right hip, right upper leg, right knee, right lower leg, and right ankle. Furthermore, at this appointment, Claimant was noted to be in severe distress, tearful, and reported a pain score of 8-9/10. Based on Claimant's complaints, additional X-rays were taken and were again found to be normal. A foot and ankle MRI was also ordered. *Respondents' Exhibit A, pp. 1-11*.

6. On September 10, 2014, an MRI was taken of her foot and ankle. The MRI of her foot was essentially normal with no evidence of fracture, dislocation or stress fracture. The MRI of the right ankle did show what was read as complex longitudinal tears of the distal tibial tendon in the foot noted with tenosynovitis along with longitudinal tear of the peroneus longus tendon above the malleolus. No fracture or bone marrow contusion was demonstrated. The MRI reports, however, do not indicate the clinical relevance of the findings. *Respondents' Exhibit C, pp.1 – 2.*

7. Claimant was referred to an orthopedist, Dr. Myers for her right ankle sprain. At the September 16, 2014 visit, Dr. Myers noted that her complaints on exam were mostly of pain in the arch of her foot. She had been wrapping the ankle and was wearing a boot. His examination of her right lower extremity showed diffuse tenderness, with sensation to light touch globally decreased. His assessment was enthesopathy of ankle and tarsus, unspecified. *Respondents' Exhibit D, pp.1 – 3*.

8. At the September 16, 2014, evaluation, and for reasons unknown to Dr. Myers, Claimant left his office before he could complete his examination and discuss his opinion with Claimant based on his examination and reading her MRIs. In his report, Dr. Myers noted:

> Unfortunately, Ms. Davis left the office before I was able to complete her evaluation. I stepped out to review the MRI images. We are having difficulty accessing them at Denver Integrated Imaging. Before I was able to return to the room, Ms. Davis had left. I called Dr. Bums to discuss Ms. Davis's case. My recommendation would be for continued immobilization and to begin physical therapy. I am happy to see Ms. Davis back in the office if she wishes to return for additional evaluation.

Respondents Exhibit D, p. 4.

9. On September 18, 2014, Claimant returned to Concentra and was evaluated by Dr. Burns. Dr. Burns noted that Claimant stated that she left Dr. Myer's surgical evaluation before it was completed because it "took 2 hours." Claimant also requested a note for her flight back to Atlanta "so she can be seated in an area where she can elevate her leg." Dr. Burns' assessment was right ankle sprain, foot contusion, and tear of the tendon of the right ankle. She did not, however, indicate whether the tendon tear was related to the work injury, whether it was consistent with the alleged mechanism of injury, whether the finding had any significance and was symptomatic, or whether it was consistent with a natural degenerative process and not related to the work incident. Dr. Burns concluded Claimant was to follow up for care in Atlanta where she lived. *Respondents' Exhibit B, p.13*.

10. On October 8, 2014, Claimant was evaluated by Dr. Beskin at Peachtree Orthopaedic Clinic in Georgia. The mechanism of injury was reported as Claimant was going down stairs, and another lady tried to grab her badge from her shirt and in the process she mis-stepped on the stair twisting her right foot and ankle. At this appointment, Claimant stated she did not fall, which was consistent with her initial reports, but inconsistent with a subsequent report. Her pain was localized at the lateral aspect of the ankle and in the big toe area mostly plantar and in the distal arch. Minimal, if any, pain in the medial ankle. Clinical exam showed mild swelling at the lateral aspect of the right ankle with tenderness along the peroneal tendons. ROM was guarded by pain. Dr. Beskin did not think there was any significant instability. Foot swelling was minimal. X-rays showed the ankle mortise was well maintained and appeared stable. Clinical correlation with the MRI findings showed there was not much pain referable to the posterior tibial tendon area and the reported tear may not then be clinically significant. She was tender over the peroneal tendons but the MRI study showed relatively benign findings and that then might represent a chronic tendinopathy rather than an acute injury. There was no urgency for surgical intervention and he recommended PT and increased activities out of the boot she had been wearing. *Respondents' Exhibit E, pp. 1 – 3*.

11. From Dr. Beskin's perspective, Claimant's pain was out of proportion to the x-ray and MRI findings. *Respondents' Exhibit E, p. 4*.

12. On October 22, 2014, Claimant returned to see Dr Beskin. He had ordered a DVT Doppler study and that was negative. Claimant was seven weeks post-accident and was complaining of pain involving the entire right leg; that therapy was not helping; and that as she did not have pain medications she was clenching her teeth such that she'd broken a crown in one of her molars. *Respondents' Exhibit E, p. 7.*

13. On exam, Dr. Beskin noted relatively normal appearance, temperature, and color symmetric between the right and left side. Tape measurements revealed little if any discrepancy at the ankle and calf. Claimant complained of pain with any range of motion of her toes, ankle, knee or hip. *Respondents Exhibit E, p. 7*.

14. Dr. Beskin reviewed the imaging studies and noted that as the abnormal signal in the peroneus longus was relatively mild, it was unlikely to cause the amount of pain Claimant exhibited. He also stated that Claimant was only mildly symptomatic at the posterior tibial tendon where there was abnormal signal as well. *Respondents Exhibit E, p. 7*.

15. Dr. Beskin noted that Claimant's symptom presentation did not correlate with his examination. He also noted that there was a lack of objective findings to support Claimant' presentation and pain complaints. Dr. Beskin concluded that, in his opinion, Claimant's complaints were not supported by his findings. He also noted that there was some difficulty communicating with Claimant, and he recommended she find another treater because he was not comfortable taking care of her. Therefore, he discharged her from his practice. *Respondents Exhibit E, page 7*.

16. On November 11, 2014, Claimant saw Dr. Scott at Roswell Resurgens Orthopaedics. Her complaints were swelling, pain, a sense of imbalance and numbness and tingling to the toes. She had a significant antalgic gait and avoided pressure on the affected right leg. On exam, her calves were symmetrical. Mild swelling was noted only in the right ankle. The right foot and ankle were diffusely tender. Right ankle x-ray showed maintained ankle mortise. The diagnosis was an ankle pain. She was referred to PT and a pain management consult to, in part, rule out/evaluate early RSD related to her complaints of severe ankle pain post her ankle sprain. *Respondents' Exhibit F, p. 1* – 3.

17. On December 2, 2014, Claimant again saw Dr. Scott. He (just like Dr. Beskin) stated Claimant's pain seemed out of proportion to the nature of injury. The pain started at the ankle and radiated up the leg. He reviewed the ankle MRI taken in Colorado and stated he was unsure how her current pain complaints which were more lateral at the ankle and below the tip of the fibula related to those findings. *Respondents Exhibit F, pages 5* – 6.

18. On January 2, 2015, Dr. Scott noted Claimant was scheduled to see Dr. Joel for sympathetic blocks. Dr. Joel was with the Pain Anesthesia Group across the street, and he had referred her there. *Respondents Exhibit F, page* 7.

19. On January 30, 2015, Dr. Scott noted Claimant was to continue pain management with Dr. Joel. She was more comfortable on exam and not having nearly the pain levels she had presented with before. *Respondents Exhibit F, page 9*.

20. On April 13, 2015 Dr. Scott noted Claimant presented with continued pain. He also noted Claimant indicated she has had some falling lately. Based on his examination and review of her MRI, he did not see any indications for surgery. *Respondents Exhibit F, page 10*.

21. On April 8, 2015, Claimant had an IME with Dr. Rizor. This was performed at the request of Respondents. Dr. Rizor reviewed Claimant's medical records as well

as a copy of the Colorado Treatment Guidelines (*Guidelines*) covering Complex Regional Pain Syndrome. *Respondents' Exhibit V*.

22. In his report, he noted that at the time this incident, Claimant was employed as an investigator for an auto insurance company. He further noted that Claimant was a licensed independent claim examiner and she has a master's degree in psychology and business administration. *Respondents' Exhibit V*.

23. Based on his examination, Dr. Rizor noted:

    - The skin of the lower extremity showed normal and symmetrical color.
    - There were no trophic (related to nutrition) changes in the skin or nails.
    - The hair on both legs had been shaved. There were no gross differences in skin temperatures between the two extremities.
    - There was extensive amounts of adipose (fatty) tissue in both lower extremities with the amount of adipose tissue in the right leg being greater than the left, making the right lower extremity in general appear larger than the left.
    - There was no apparent edema (swelling from water) in the lower extremities, with no pretibial pitting and no evidence of swelling in the toes. *Respondents Exhibit V*.

24. Dr. Rizor assessed Claimant for CRPS using the diagnostic criteria set forth in the Colorado Treatment *Guidelines*. While subjective findings were present, objective results were not. As such, Dr. Rizor concluded the diagnosis of CRPS was not supported. *Respondents Exhibit* V.

25. His assessment was Claimant had a tendon sprain with disuse changes secondary to immobilization and use avoidance behaviors. He recommended future treatment should focus on PT and perhaps cognitive/behavioral pain management to address fear of movement. He also concluded that pain medications were not appropriate for her condition and that she was capable of full time employment. *Respondents' Exhibit V*.

26. On July 1, 2015, a nerve conduction study/EMG ordered by Dr. Scott in May, was performed by Dr. William Lichtenfeld. The study/EMG demonstrated evidence of a right tarsal tunnel syndrome. However, there is no indication whether this finding is consistent with, or was caused by, her work injury. There was no evidence of peripheral neuropathy or lumbar radiculopathy. On exam, there was allodynia, e.g. a subjective response of pain that is out of proportion to what would be expected – such as pain from lightly touching the skin, which does not normally provoke pain. Objectively, Dr. Lichtenfeld did not find any temperature change or atrophy involving Claimant's right foot. *Respondents Exhibit H*.

27. On July 7, 2015, Claimant returned to Dr. Scott so he could reevaluate Claimant, go over the results of her EMG, and make treatment recommendations. The EMG and NCV testing showed no evidence of peripheral neuropathy or

radiculopathy but some evidence of tarsal tunnel syndrome. However, Dr. Scott indicated that based on Claimant's pain complaints, the results of the EMG and NCV, and his examination of Claimant, surgery was still not recommended due to the broad and diffuse nature of Claimant's pain complaints. *Respondents Exhibit F, pages 12 – 13*.

28. On August 12, 2015, Dr. Scott indicated Claimant was much improved post sympathetic block and tarsal tunnel injection with Dr. Joel. *Respondents Exhibit F, page 18.*

29. On September 11, 2015, Claimant was seen by Dr. Scott. He noted in his report that during that examination, Claimant indicated -she had a spasm in the arch of her foot that made her fall and that she hit her head and suffered a slight injury to her left eyebrow. *Claimant's Exhibit H***.**

30. On October 9, 2015, Dr. Scott noted Claimant continued with significant ankle pain although better than she was a few months ago. Although she already had an EMG, he noted that she needed "a neurology evaluation for EMG looking for evidence of any permanent nerve damage." After that, he noted that she would have to follow up and finish with Dr. Joel and get rated for permanent impairment. He further noted that a FCE might be helpful. He again stated that he did not think Claimant was a candidate for any surgery. Dr. Scott did, however, welcome additional opinions from orthopedic foot and ankle experts or other practitioners. As far as work restrictions, he concluded she could do a desk job where she sat and did not have to do any lifting, carrying or climbing. *Respondents Exhibit F, page 19*.

31. On December 24, 2015, Dr. Joseph Freschi, a neurologist, issued a report after reviewing Claimant's EMG studies of her right lower extremity. He concluded that:

> In summary, these electrodiagnostic studies were entirely normal and showed no evidence of peripheral nerve impairment in the right lower extremity.

Respondents Exhibit G.

32. On January 15, 2016, Dr. Scott noted Claimant went in for an FCE but she was unable to participate to the full extent of the test so it was stopped. His care was at an end. He had nothing surgical to offer. Dr. Scott noted that Claimant's MRI had showed a possible peroneal tear, but yet her symptoms were not localized to that structure. Therefore, the MRI findings were not clinically relevant. *Respondents Exhibit F, page 21*.

33. On February 12, 2016, Claimant returned to Dr. Scott. His report from that visit noted that on exam, Claimant's pain complaints were wide spread over her leg. He also noted that some of her pain complaints continued to have an element of nonphysiologic pain. *Respondents Exhibit F, pages 23 – 24.*

34. On July 29, 2016, a lower extremity venous doppler study was conducted. The test showed normal venous flow in the right lower extremity with no evidence of any abnormalities. *Respondents Exhibit I.*

35. On August 26, 2016 Dr. Scott noted that at the last visit, Claimant's pain was very specific but at this appointment she indicated that her pain had broadened out again. Dr. Scott noted that he wanted to talk to Dr. Joel about the spinal cord stimulator. He also wanted a repeat higher quality ankle MRI to determine if there were tears at the peroneal tendons. He noted that she could be a possible candidate for surgery based upon the MRI results. *Respondents Exhibit F, page 27.*

36. On September 6, 2016, Claimant underwent another right ankle MRI. The MRI demonstrated peroneal tenosynovitis without an associated tear and other mild findings without a tear. *Respondents Exhibit J.*

37. On September 13, 2016, Dr. Scott noted (again) that Claimant's pain had expanded. The new MRI was reviewed with her. He noted that Claimant found it to be contradictory in that the test results (recent right ankle MRI) pointed to "nothing is wrong with her." While the MRI was read as not showing any tears in any tendons or ligaments, Dr. Scott looked at it and he noted he could not see the peroneus longus very well and while that was distal to where her pain complaints were, he could not tell if that was damaged. He asked the radiologist to re-review the MRI and he agreed re the peroneus longus could not be seen very well. She was offered to undergo an inversion tilt laxity ankle x-ray, but she refused. Again, Dr. Scott concluded that surgery was not appropriate. *Exhibit F, pages 29 – 31.*

38. On October 11, 2016, Dr. Scott noted Claimant reported being in extreme pain and that additional treatment options were limited. He wanted to speak with Dr. Joel to see if there were any other options available. Dr. Scott reiterated again that Claimant's pain complaints were much too broad to consider surgery. *Respondents Exhibit F, page 32.*

39. On November 15, 2016, Claimant returned to Dr. Scott and was placed at MMI. Dr. Scott noted Claimant had not seen Dr. Joel since the summer when he provided her ketamine injections. Claimant indicated that the injections might have made a slight improvement, but concluded that overall they did not help much. Dr. Scott noted that he spoke with Dr. Joel who stated he had nothing else to offer and that Claimant was not a candidate for a spinal cord stimulator. During his examination, he noted that Claimant indicated that due to her ankle injury, she has fallen many times, and fell in the lobby that day, because it feels like her "leg gives way." He also noted that his exam regarding Claimant's ROM [range of motion] was very self-limited. Dr. Scott also looked for signs of CRPS, and specifically concluded that he found "no trophic changes in the leg, ankle, or foot compatible with CRPS at this time." Based on Claimant's pain complaints and falls, he ordered x-rays and personally reviewed them, and found them to be normal. He ultimately concluded that Claimant was two years post injury with pain complaints on both sides of her ankle and that no surgery or additional treatment was needed. Therefore, he placed Claimant at MMI with an impairment rating for ankle range of motion deficits. *Respondents Exhibit F, pages 34 – 35*.

40. On December 1, 2016, Dr. Roth reviewed Dr. Scott's rating data. Dr. Roth opined that based on the limited information he had, no rating was appropriate as the injury, an ankle sprain, should have healed without complications within 4 to 6 weeks, if a grade 1 sprain, and no later than 4 to 6 months, if a grade 3 sprain, post event. He concluded that there was no physiological correlation to explain Claimant's pain complaints and in the absence of such in Colorado, impairment cannot be based on pain complaints alone. *Respondents Exhibit L*.

41. On December 6, 2016, Respondents filed a Final Admission of Liability (FAL) based on Claimant being placed at MMI by Dr. Scott, and Dr. Roth, assigning an impairment rating of 0%. The FAL noted that Respondents had admitted for, and paid, $25,005.14 in medical benefits and $101,263.80 in temporary total disability benefits. The FAL also noted there was an overpayment of $1,889.25, and that maintenance medical treatment was denied. Lastly, Respondents denied liability for maintenance medical treatment. *Respondents' Exhibit P*.

42. On January 18, 2017, Claimant returned to Dr. Joel for pain management. At this appointment, Dr. Joel documented his physical exam findings and diagnosis as follows:

> Her right thigh and calf are swollen significantly. Her skin is shiny over the calf. She has allodynia and hyperpathia as well as temperature changes in the right lower extremity. I do feel that the patient does have CRPS.

Respondents' Exhibit U, page 5.

43. Claimant challenged her placement at MMI and 0% impairment rating through the Division Independent Medical Examination (DIME) process. Dr. Ginsburg was selected to perform the DIME.

44. In order to attend the March 23, 2017, DIME appointment, Claimant traveled from Georgia to Colorado. The roundtrip mileage to attend the DIME was approximately 2,763.8 miles. Claimant has requested to be reimbursed for such mileage in the amount of $0.51 per mile, which totals $1,409.54. Claimant is also asking to be reimbursed for lodging expenses in the amount of $462.93. *Claimant's Exhibits O-P.*

45. On March 23, 2017, Dr. Ginsburg performed a DIME. He noted that throughout the course of his exam, Claimant exhibited a good deal of pain behavior. Moreover, contrary to the recent findings documented by Dr. Joel, Dr. Ginsburg's examination of her "lower extremities revealed no significant differences in appearance or palpation comparing the right and left sides." He specifically noted in his report that he took a great deal of time to inspect and feel her lower extremities, inspecting them from a variety of angles, and he saw no significant differences. He did not take measurements, but he noted neither did Dr. Joel. While Dr. Joel stated Claimant presented to him with a slow and shiny right lower extremity with temperature differences, Dr. Ginsburg did not appreciate that "at all" on his examination. *Respondents Exhibit M, pages 8 – 9*.

46. He did note there was an IME that found no evidence for complex regional pain syndrome (CRPS) but he did not have that document. *Respondents' Exhibit M, page 9.*

47. Dr. Ginsburg found it interesting that Dr. Joel's reported observations of Claimant's lower extremities that included large amounts of lower extremity visual and temperature changes, which seemed to be markedly more prominent as time progressed, did not fit his observations upon exam. *Respondents' Exhibit M, page 9*.

48. Dr. Ginsburg also found it interesting that Dr. Joel applied all of the therapeutic modalities he suggested initially including sympathetic block and ketamine infusion and he stated she might have improved, but apparently, she did not improve. *Respondents' Exhibit M, page 9*.

49. Claimant also told Dr. Ginsburg during her IME that her injury has caused her to fall numerous times and resulted in various injuries and conditions that require additional treatment, such as a trigger finger in her right hand that occurred when she fell in Dr. Scott's office. *Respondents' Exhibit Q, page 2*.

50. He concluded his report by reiterating that: "Again, I am impressed with my view of the patient's appearance compared to that of Dr. Joel." *Respondents' Exhibit M, page 10.*

51. In his deposition, Dr. Ginsburg noted that Dr. Joel was the only one of Claimant's many treaters who had made and noted these observational findings. *Ginsburg Deposition, page 34, lines 20 – 25; page 35, lines 1 – 6. Respondents Exhibit Q*.

52. Dr. Ginsburg also found it interesting that there are criteria, or tests, which should be performed or at least attempted to document the presence of CRPS, when appropriate, and that those were not done. Therefore, the process for diagnosing CRPS set forth in the Medical Treatment Guidelines, Exhibit 7, Complex Regional Pain Syndrome, was not followed. *Respondents' Exhibit M, page 9-10*.

53. Despite not having a diagnosis for CRPS that was supported by the Colorado Medical Treatment Guidelines, and despite not being able to see the observational findings noted by Dr. Joel in his January 18, 2017, report, Dr. Ginsburg placed Claimant at MMI as of 1/1/17 with a 10% whole person impairment rating for CRPS, spinal cord, nervous system, station and gait. After concluding Claimant had CRPS and providing her a rating for CRPS, he then admitted in his report that his conclusion was ". . . less than satisfactory to me and it may be less than satisfactory to others reading this report." He further concluded that Claimant needed to maintain her medications for about 1 year and then she should treat with her PCP. Moreover, by placing Claimant at MMI, he rejected the notion that her alleged falls were related to her ankle injury and required additional treatment. *Respondents Exhibit M, page 9*.

54. On July 3, 2017, Claimant underwent a DEXA axial skeleton, bone density study. The findings were within normal limits. *Respondents Exhibit* K.

55. On July 6, 2017, Claimant returned to Dr. Ginsburg, the DIME physician, so he could perform repeat range of motion testing and complete the DIME. He noted that just as in his earlier report, Claimant not only did not improve with treatment, she seemed to have gone from being ambulatory to a far more restricted circumstance in her functional activity. He therefore believed there were, based on what he saw at each visit with Claimant, "significant elements of non-physiological problems." At this appointment, Claimant again stated that she expected Dr. Ginsburg to suggest additional evaluations and treatments for her upper extremity problems, which she alleges are due to falling because of her ankle and therefore part of her original injury. Despite her contention that her ankle injury has caused her to fall, and caused additional injuries, Dr. Ginsburg appears to have not thought the subsequent falls were related to her work injury and again confirmed Claimant reached MMI on January 1, 2017. *Respondents Exhibit M, pages 14 – 16*.

56. In order to attend the July 6, 2017, follow up DIME appointment, Claimant traveled from Georgia to Colorado. The roundtrip mileage to attend the follow up DIME was also approximately 2,763.8 miles. Claimant has requested to be reimbursed for such mileage in the amount of $0.51 per mile, which totals $1,409.54. Claimant is also asking to be reimbursed for lodging expenses in the amount of $154.35. *Claimant's Exhibits O-P*.

57. WCRP 17, Exhibit 7 contains the Complex Regional Pain Syndrome, Medical Treatment Guidelines (the *Guidelines*).

58. Under the general principles set forth in the *Guidelines*, "positive patient response" is defined as: "Positive results are defined primarily as functional gains that can be objectively measured. Objective functional gains include, but are not limited to: positional tolerances, range-of-motion, strength, endurance, activities of daily living, ability to function at work, cognition, psychological behavior, and efficiency/velocity measures that can be quantified. Subjective reports of pain and function should be considered and given relative weight when the pain has anatomic and physiologic correlation. Anatomic correlation must be based on objective findings." (Emphasis supplied) *Respondents Exhibit N, page 4.*

59. The *Guidelines* go on to provide the following:

- CRPS I is defined as a "syndrome that usually develops after an initiating noxious event, is not limited to the distribution of a single peripheral nerve, and appears to be disproportionate to the inciting event. It is associated at some point with evidence of edema, changes in skin, blood flow, abnormal sudomotor activity in the region of the pain, allodynia, or hyperalgesia. These conditions are defined at page 7. (Emphasis supplied) *Respondents Exhibit N, pages 6 -7*.

- A physical examination should include changes in appearance including trophic changes, changes in hair and nail growth, muscular atrophy, changes in skin turgor, swelling and color changes. *Respondents Exhibit N, page 9*.

- Temperature evaluations should be based on objective testing and while differences of 1 degree Celsius may be significant, such also commonly occur with other pain complaints. *Respondents Exhibit N, page 10*. Moreover, the temperature findings may need to be interpreted cautiously as they do not reflect a stress on the sympathetic system. *Id., at page 19*.
- Edema is an important finding in CRPS. Its presence should be described in detail by the physician and when possible verified with objective testing such as volumetric testing or bilateral circumference measurements, usually performed by therapists. *Respondents Exhibit N, page 10*.
- Sensory Evaluation: A detailed sensory examination is crucial in evaluating a patient with chronic pain complaints, including the presence of allodynia and the anatomic pattern of any associated sensory abnormalities to light touch, deep touch, pain, and thermal stimulation. Quantitative sensory testing may be useful. *Respondents Exhibit N, page 10*.
- Evaluation of Non-physiologic Findings: Determine the presence of the following: variabilities on formal exam including variable sensory exam; inconsistent tenderness, and/or swelling secondary to extrinsic sources. Inconsistencies between formal exam and observed abilities of range-of-motion, motor strength, gait, and cognitive/emotional state; and/or observation of inconsistencies between pain behaviors, affect and verbal pain rating, and physical re-examination can provide useful information. *Respondents Exhibit N, page 10*.

60. Per the diagnostic criteria and procedures section of Exhibit 7, of the *Guidelines*, the "Diagnosis of CRPS continues to be controversial."… "Clinical criteria alone are not dependable nor necessarily reliable and require objective testing." … "Based on the relatively common finding of temperature discrepancy in non-CRPS patients with chronic pain, a stress test thermogram should be used." … "In a similar manner, the QSART provides an autonomic stress that is measurable." …. "In addition, patient response testing can be problematic in a medical legal setting. Thus, more objective tests are used for confirmation of CRPS." *Respondents Exhibit N, pages 12 – 14.*

61. The *Guidelines* also note that:

- Significant harm can be done to individuals by over-diagnosing CRPS and subjecting patients to the side effects and potential morbidity of multiple sympathetic blocks, invasive procedures, or chronic medications, as well as psychological effects from the diagnosis. In order to safe guard against such harmful outcomes, patients should have objective testing to verify their diagnosis before such procedures are considered and/or are continued after the initial diagnosis. Several reviews on the subject have identified the need for more objective measurements. Therefore, individuals must have a confirmed

diagnosis of CRPS to receive these procedures. *Respondents Exhibit N, page 14*.

62. Under the Colorado *Guidelines*, in order for a practitioner to make a diagnosis of CRPS, the patient must meet certain diagnostic criteria, including a clinical diagnosis and at least two positive diagnostic tests from trophic tests – comparative x-rays of both extremities or a triple phase bone scan; or infrared stress thermography; or QSART or sympathetic blocks. *Respondents Exhibit N, page 15*.

63. In his deposition testimony Dr. Ginsburg admitted that to his knowledge, none of these tests - triple phase bone scan, QSART etc. - were performed in this matter. *Ginsburg deposition, page 36, lines 13 – 25; page 34, lines 1 – 2*.

64. He candidly admitted that his opinion about CRPS was made knowing full well that it conflicts with the mandates set forth in the treatment Guidelines. *Ginsburg deposition, pages 42 – 45*; and that Dr. Joel was the only treater who diagnosed Claimant having CRPS. *Ginsburg Deposition, page 44, lines 20 – 23*.

65. Based on Dr. Ginsburg's admission during his deposition that he diagnosed Claimant with CRPS, knowing that such diagnosis was not supported by the testing recommended in the *Guidelines,* and that his observations did not match Dr. Joel's observations of Claimant's lower extremity, which included swelling, a shiny appearance, and difference in temperature, the ALJ does not find Dr. Ginsburg's opinion that Claimant developed CRPS due to her work injury to be credible or persuasive.

66. Moreover, the ALJ does not find Dr. Joel's opinion that Claimant has CRPS and should be treated with ketamine to be credible or persuasive. It appears one of Dr. Joel's frontline treatment modalities for CRPS is the use of ketamine, via infusions. However, ketamine infusions are not recommended in Colorado as treatment for patients validly diagnosed with CRPS. The *Guidelines* provide:

> There is some evidence that in CRPS I patients, low dose daily infusions of ketamine can provide pain relief compared to placebo. The relief, however, faded within a few weeks. Studies have not shown any functional improvements in patients with CRPS treated with ketamine infusions. Because their potential harm, as described below, outweighs evidence of limited short-term benefit in patients with CRPS, NMDA receptor antagonists are not recommended. Less harmful therapies with longer term effects are available.
>
> . . .
>
> Due to the potential harm and limited short-term benefit in patients with CRPS, ketamine NMDA receptor antagonists are ***not recommended*** since less harmful therapies are available (emphasis in original).

Respondents Exhibit N, page 30.

67. Dr. Joel practices at the North Fulton Pain & Spine Center. He has completed an anesthesiology residency and a fellowship with concentrations in chronic pain management and anesthesia. *Respondents Exhibit Q, Exhibits A – D*.

68. He published an article in MDAtlanta.com about the benefits of ketamine infusion therapy. *Respondents Exhibit Q, Exhibits A – D*.

69. Despite the Colorado *Guidelines* not recommending low dose ketamine infusions due to the limited functional improvements demonstrated by the infusions, combined with the potential harm, Dr. Joel discusses the alleged success of high dose infusions allowed in other countries, which he does not name. He notes that:

> During the inpatient and outpatient infusions, a benzodiazepine is administered to avoid the negative side effects of Ketamine. The patient is continuously monitored and recovered before discharge. Outside the U.S., because it is not FDA-approved in the country, patients are placed into Ketamine comas for five to seven days. These patients are induced, intubated, ventilated and administered 500 to 700mg of Ketamine per hour. The clinical research studies have shown success rates anywhere from 80 to 100 percent. The most effective method is the coma method followed by the inpatient and outpatient methods.

70. The ALJ, however, does not find Dr. Joel's opinion that Claimant has CRPS to be credible or persuasive for a number for reasons. First, even though Dr. Joel documented Claimant's right lower extremity exhibited swelling, shiny skin, and varied in temperature when compared to her other extremity, Dr. Ginsburg was unable to confirm any of those findings during his initial examination. Second, the *Guidelines* do not recommend the use of low dose ketamine infusions for treating CRPS because of the potential harm, limited short-term benefit, and the lack of "Good Evidence" or "Strong Evidence," as defined in the *Guidelines*, supporting the use of Ketamine to treat CRPS. Despite the *Guidelines* indicating there is a lack of "Good" or "Strong" scientific evidence supporting the use of ketamine for treating CRPS, Dr. Joel contends that clinical research studies have shown success rates anywhere from 80 to 100 percent. He goes on to state that the high dose "coma method," where a person is put in a coma for 5-7 days and administered high doses of ketamine, is the most successful. *Respondents' Exhibit Q*. Thus, because Dr. Joel's contention regarding what the scientific evidence establishes regarding the effective use of ketamine to treat CRPS is inconsistent with what the Colorado *Guidelines* contend, such factor significantly discredits his opinions. In other words, the ALJ credits the Colorado *Guidelines* over Dr. Joel regarding the use of ketamine and the data necessary to support a diagnosis of CRPS.

71. On May 7 and June 4, 2018, the parties attended a Hearing before ALJ Margot Jones. The issue for determination was Respondents attempt to overcome the DIME's finding that Claimant had CRPS related to her admitted ankle sprain.

72. On May 17, 2018, between the two hearings with ALJ Jones, Claimant paid $166.00 to Stevens-Koenig Reporting for a copy of the transcript of Dr. Ginsburg's April 5, 2018, deposition testimony. *Claimant's Exhibit R*.

73. On August 22, 2018, Claimant underwent an MRI of her lumbar spine. The reason the MRI was ordered was listed as "chronic pain syndrome." The impression was:

> Multilevel facet arthropathy, up to moderate L4-LS and L5-Sl. Recommend correlation with patient's symptoms and physical exam to assess if a component of patient's presentation could be related to facetogenic pain.
>
> No disc herniation to result in high-grade spinal canal stenosis.
>
> Up to mild neural foramina! stenosis at L3-L4 and L4-L5 as described above.
>
> Partially imaged, presumed cyst in the left kidney however indeterminate by this study. Correlation with previous and/or follow-up renal ultrasound is recommended, if clinically necessary.

Claimant's Exhibit F.

74. On August 22, 2018, Claimant also underwent an MRI of her cervical spine. The reason the MRI was ordered was listed as "cervical radiculopathy." The impression of that MRI was:

> Degenerative disc disease with spondylosis at multiple levels.
>
> At CS-6, there is moderate to severe right foraminal stenosis due to uncovertebral joint and facet hypertrophy.

Claimant's Exhibit F.

75. In an Order dated August 23, 2018, ALJ Jones found Claimant's diagnosis of CRPS was not supported by the record and that Respondents had proven, by clear and convincing evidence, that Claimant's symptoms and presentation did not establish grounds on which a CRPS diagnosis could be made. Therefore, ALJ Jones determined Respondents overcame the opinion of Dr. Ginsburg. *Respondents Exhibit X.*

76. Claimant timely appealed that Order, but then voluntarily withdrew her Appeal. Therefore, Claimant reached MMI for her work related injury on November 15, 2016. In addition, Respondents did not admit for maintenance medical treatment. Thus, Respondents were not obligated to provide any type of medical treatment after November 15, 2016.

77. On August 29, 2018, Claimant paid $360.00 to Mobile Thermographic Imaging to undergo a Thermography to assist in determining whether Claimant has CRPS. *Claimant's Exhibit Q*.

78. On November 4, 2018, Claimant was evaluated by Dr. Bernard Drexinger, based upon a referral from Dr. Joel. Dr. Drexinger was providing a second opinion, for Dr. Joel, as to whether Claimant has CRPS. In his report, Dr. Drexinger indicates:

> Her thermogram reports were quite ambiguous…. These were later reviewed at the hospital on the Northside PACS system.

However, Dr. Drexinger does not indicate whether the thermogram provides any data that would support or contradict a finding of CRPS in his November 4, 2018, report.

Dr. Drexinger goes on to say:

> Upper extremity triple phase bone scan shows definite decreased uptake both at the wrist and elbow on the right in all views on delayed phase. Lower extremity is ***technically difficult*** but definitely asymmetric ***both consistent*** with CRPS/RSD. I would consider the upper extremity diagnostic (emphasis added).
>
> *Claimant's Exhibit B*.

79. Dr. Drexinger does not discuss and explain how those findings are consistent with a diagnosis of CRPS and actually establishes a diagnosis of CRPS. Moreover, he does not discuss whether the lack of any other findings is inconsistent with a diagnosis of CRPS. *Claimant's Exhibit B*.

80. On February 12, 2019, Claimant returned to Dr. Drexinger to fill out disability paperwork and review the results of her thermogram. His report from this appointment provides:

> Her thermogram report is reviewed. ***It does state consistent with CRPS/RSD***. I have reviewed the pictures and it does ***appear*** to be asymmetric (emphasis added).

He then concludes:

> I agree completely with complex regional pain syndrome [CRPS] or the older term reflex sympathetic dystrophy [RSD].

81. Dr. Drexinger then provides a diagnosis. However, the diagnosis he provides is for "Complex regional pain syndrome I of right upper limb." He does not provide such diagnosis for the right lower extremity, which is allegedly her primary concern and the extremity that Dr. Joel noted various observational findings, which could not be seen or observed by Dr. Ginsburg. *Claimant's Exhibit B.*

82. The ALJ does not find Dr. Drexinger's conclusion that Claimant has CRPS to be credible or persuasive for a number of reasons. First, Dr. Drexinger indicates Claimant's "thermogram reports were quite ambiguous." A review of the

thermogram report indicates it is anything but ambiguous. The report specifically provides:

> The right anterior ankle and dorsal feet are warm. This may be joint related or ligamentous. The distal extremities and particularly the forefeet and the digits are cool. This finding is consistent with (***but not diagnostic of***) CRPS/RSD (emphasis added).
>
> **. . .**
>
> Distal extremity findings on both sides **may** have relevance to the history of CRPS / RSD (emphasis added).

Therefore, the ALJ finds that the thermogram reports are quite clear and that findings are merely consistent with, but not diagnostic of, CRPS.

83. Second, Dr. Drexinger indicates the bone scan of Claimant's right upper extremity shows:

> [D]definite decreased uptake both at the wrist and elbow on the right in all views on delayed phase.

However, the bone scan report provided by Claimant, dated September 20, 2018, indicates that the mild decreased uptake involves the thumb, CMC, interphalangeal, and elbow joints. There are no findings around the wrist. Moreover, the impression of the radiologist who read the bone scan indicates the findings are consistent with a degenerative etiology and suggests that correlation with radiographs might be helpful. Absent from the bone scan report is any indication that the findings are indicative of CRPS. *See Claimant's Exhibit D.*

84. In addition, Dr. Drexinger indicates the bone scan of Claimant's lower extremities demonstrates that:

> Lower extremity is technically difficult but definitely asymmetric. *Claimant's Exhibit D*.

However, the ALJ's review of the September 18, 2018, bone scan shows that the radiologist who reviewed the scan found that:

i. The dynamic flow phase does not demonstrate asymmetric hyperemia or increased flow to either calf region;

ii. Delayed static imaging demonstrates mild increased activity about the right tarsometatarsal articulation likely osteoarthritic in nature; and

iii. Increased activity about the left first MTP joint osteoarthritic in nature.

The overall impression was:

i. Unremarkable dynamic and immediate blood pool phases of the exam.

ii. Mild delayed static activity centered around about the left first MTP and right tarsometatarsal aticulations likely osteoarthritic in nature.

Thus, the radiologist did not indicate the findings were consistent with CRPS. The radiologist indicated the findings were consistent with osteoarthritis.

85. Third, Dr. Drexinger failed to explain how the findings that he contends are "consistent" with a diagnosis of CRPS support his opinion that Claimant has CRPS. Even if some of the findings are "consistent" with CRPS, Dr. Drexinger failed to set forth his reasoning for ultimately concluding Claimant does have CRPS. Merely having a finding that may be consistent with a specific medical condition does not mean it is more likely than not the person has the specific medical condition.

86. Claimant then filed an Application for Hearing on January 24, 2019 seeking to reopen her case for additional medical care and disability benefits. Due to procedural issues, the Application was refiled on April 30, 2019.

87. On April 24, 2019, Claimant was seen by Dr. Amit Patel for right middle finger trigger finger and a cyst. Dr. Patel noted Claimant has noticed catching and locking of her right middle finger for the past 2 years as well as a painful cystic mass over the volar aspect of her middle finger at the palmardigital crease. There is no indication her trigger finger was caused by her original ankle injury or due to any of the falls Claimant alleges she sustained due to her work injury. *Claimant's Exhibit EE*.

88. On July 5, 2019, Claimant underwent an MRI of her right foot. The impression was: "Normal Lisfranc ligament complex. No right foot injuries identified." *Claimant's Exhibit AA*.

89. On July 18, 2019, Claimant underwent an MRI of her right ankle. The impression was:

> Predominant tendinopathy of the peroneal longus tendon at the level of the retromalleolar groove, corresponding to the level of the externally placed vitamin E marker demarcating site of most pain. No tendon tear is seen.
>
> Additional posterior tibialis navicular insertional tendinosis and flexor hallucis tenosynovitis.
>
> Isolated atrophy within the abductor digiti minimi, can be seen in setting of Baxter's neuropathy. Chronic clinically.
>
> Sequela of remote ligamentous lateral inversion ankle injury.

Claimant's Exhibit BB.

90. There is neither a medical opinion setting forth the cause of the findings noted on the July 18, 2019 MRI of her right ankle, nor the relevance of the findings noted on the ankle MRI, if any.

91. On August 9, 2019, Claimant underwent an MRI of her thoracic spine. The reason for the MRI is listed as "pain." The impression was:

> Disc herniation to the right at T10-11 with right foraminal narrowing.
>
> No fracture.

Claimant's Exhibit CC.

92. There is no credible or persuasive medical opinion that associates Claimant's thoracic disc herniation with Claimant's original work injury or any of her alleged falls, which Claimant contends are related to her work injury. In addition, there is no credible or persuasive medical opinion that indicates the thoracic disc herniation has any clinical relevance to Claimant's pain complaints and symptoms and requires any treatment.

93. The ALJ does not find Claimant to be a credible or reliable historian.

94. The ALJ does not find Claimant to be credible or reliable regarding the extent of her injury, the extent of her pain, the extent of her symptoms, and the occurrence, cause and extent of subsequent falls she alleges are due to her initial work injury.

95. Claimant is not found to be credible or reliable for a number of reasons including, but not limited to, the following:

- First, when Claimant presented for medical treatment at OnPoint on September 3, 2014, the day after the accident, she stated that she was at work and wearing 4-inch heels and inverted her right ankle and developed right sided ankle pain. At that first appointment, the records note Claimant specifically stated that she did not fall. Moreover, Claimant did not report any pain or symptoms involving her right hip, upper leg, knee, or lower leg. Her symptoms were limited to her right ankle, which would be consistent with an ankle sprain. And, Dr. Rogg did not provide Claimant any work restrictions, because none were necessary. The next day, September 4, 2014, Claimant returned to OnPoint and requested to be taken off work for 10 days. Claimant alleged the initial physician who treated her, Dr. Rogg, said she could take 10 days off from work. Since Dr. Rogg was not in that day, another medical provider reviewed her chart and noted there was no indication Dr. Rogg took Claimant off work for 10 days, or intended to take Claimant off work for 10 days. The provider then had another physician, Dr. Leep, review the matter and Dr. Leep determined Claimant did not have to be off work, but did give her an excuse from work for the day as well as the prior day. Therefore, Claimant's contention that Dr. Rogg indicated she could be off work for 10 days for a sprained ankle is not credible and her attempt to get additional time off work by misrepresenting what Dr. Rogg said is evidence of Claimant being deceitful.

- Second, Claimant returned to OnPoint for medical treatment on September 8, 2014. At this appointment, Claimant alleged she actually fell. Moreover, at

this appointment, Claimant's symptoms expanded to include her right hip, right upper leg, right knee, right lower leg, and right ankle. Furthermore, at this appointment, Claimant was noted to be in severe distress, tearful, and reported a pain score of 8-9/10. There was no explanation for why her symptoms should be expanding at this time, especially since the working diagnosis was a sprained ankle. This expansion of symptoms is inconsistent with the expected symptoms of an ankle sprain.

- Third, due to Claimant alleging she was in severe pain, and rating it at 8-9/10, an MRI was ordered and she was referred to a surgeon, Dr. Myers. On September 16, 2014, Claimant was evaluated by Dr. Myers. Dr. Myers physically examined Claimant. However, in order to complete his evaluation, Dr. Myers left the room to review Claimant's MRI findings. While Dr. Myers was reviewing Claimant's MRI films, she decided the examination was taking too long and left. Therefore, when Dr. Myers returned to the examining room to discuss the matter with Claimant, she was not in the room. Dr. Myers did, however, complete his report and noted that the MRI findings were not consistent with her complaints and that her pain complaints were out of proportion to the radiographic and MRI findings. This behavior tends to discredit the extent of Claimant's pain associated with her ankle sprain because it is not reasonable for someone to leave the office of a medical provider, especially a specialist such as a surgeon, who might be able to diagnose the problem and recommend and/or provide treatment to reduce her pain, without letting the specialist complete their examination and explain their findings.

- Fourth, Claimant moved to Georgia and began treating with Dr. Beskin. On October 8, 2014, Claimant was evaluated by Dr. Beskin. He noted that based on his examination, the MRI findings were relatively benign and might represent a chronic tendinopathy and not an acute injury. In the end, he concluded her pain complaints were out of proportion to the x-ray and MRI findings. Claimant returned to see Dr. Beskin on October 22, 2014. He again noted Claimant's symptom presentation did not correlate with his examination. He also noted that there was a lack of objective findings to support Claimant' presentation and pain complaints. Dr. Beskin concluded that, in his opinion, Claimant's complaints were not supported by his findings. He also noted that there was some difficulty communicating with Claimant, and he recommended she find another treater because he was not comfortable taking care of her. Therefore, he discharged her from his practice. The ALJ infers from that the problem Dr. Beskin had communicating with Claimant was due to Claimant's unwillingness to accept his opinion regarding the lack of findings to support her complaints of chronic pain and disability.

- Fifth, when Claimant saw Dr. Burns on September 18, 2014, Claimant requested the doctor to write a note so she could be seated in an area on the plane back to Atlanta where she would be able to elevate her leg during the flight. Such a request for this type of accommodation seems unreasonable

for an ankle sprain and based on the other medical opinions that indicate Claimant's pain complaints were not supported by the clinical findings.

96. Claimant's work injury is limited to a right ankle sprain.

97. Claimant failed to establish by a preponderance of the evidence that her work injury caused her to develop CRPS.

98. Claimant failed to establish by a preponderance of the evidence that her work injury, which is limited to a right ankle sprain, has worsened and that she is in need of additional medical treatment to cure her from the effects of her work injury.

99. Claimant failed to establish by a preponderance of the evidence that her work injury, which is limited to a right ankle sprain, has worsened and resulted in additional disability.

100. Claimant failed to establish by a preponderance of the evidence that her work injury, which is limited to a right ankle sprain, has worsened and that she is in need of additional maintenance medical treatment to relieve her from the effects of her work injury or to prevent deterioration.

101. Claimant failed to establish by a preponderance of the evidence that her work injury caused subsequent falls and necessitated the need for additional medical treatment or caused any additional disability.

102. Because the ALJ has found Claimant suffered only a right ankle sprain, the ALJ has rejected Claimant's contention that the laundry list of conditions, some of which are merely findings on various tests, are related to her work injury. Therefore, the ALJ has found that Claimant has failed to establish that these other conditions or findings are causally related to her work injury. These conditions or findings include, but are not limited to, the following:

- Systemic illness
- Lisfranc and Metatarsal injury or her right foot
- Tarsal tunnel of her right foot
- Trigger Finger and cyst
- Inter-vertebral disc degeneration – lumbar region, osteoporosis, and cervical disc degeneration
- Thoracic spine issues
- CRPS of upper and lower extremities

103. Based on the totality of the evidence, the ALJ finds Claimant has failed to establish by a preponderance of the evidence that she is in need of any additional medical treatment to cure or relieve her from the effects of her work injury, which is limited to a right ankle sprain.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

Claimant shall have the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. However, Claimant is not required to present medical evidence to prove the cause of her condition or whether it has worsened. *See Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997); *Apache Corp. v. Industrial Commission*, 717 P.2d 1000 (Colo. App. 1986). Pertinent lay testimony may support a finding of causation and the worsening of a condition despite conflicting medical evidence or testimony. See Lymburn v. Symbios Logic, 952 P.2d 831 (Colo. App. 1997); *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App.

1990). Moreover, the ALJ is under no obligation to credit medical testimony, even if such testimony is unrebutted. *Cary v. Chevron U.S.A., Inc*., 867 P.2d 117 (Colo. App. 1993).

I. Whether Claimant established by a preponderance of the evidence that her claim should be reopened.

a. Reopening based upon a change in condition.

Claimant has failed to establish by a preponderance of the evidence that her case should be opened based upon a change in her condition. Section 8-43-303(1), C.R.S. provides that a worker's compensation award may be reopened based on a change in condition. In seeking to reopen a claim, Claimant shoulders the burden of proving her condition has changed and that she is entitled to benefits by a preponderance of the evidence. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Osborne v. Industrial Commission*, 725 P.2d 63, 65 (Colo. App. 1986). A change in condition refers either to a change in the condition of the original compensable injury or to a change in Claimant's physical or mental condition that is causally connected to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082, 1084 (Colo. App. 2002). A "change in condition" pertains to changes that occur after a claim is closed. *In re Caraveo,* W.C. No. 4-358-465 (ICAO, Oct. 25, 2006). Reopening is warranted if Claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Industrial Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000); *Dorman v. B & W Construction Co.,* 765 P.2d 1033 (Colo. App. 1988). The determination of whether Claimant has sustained her burden of proof to reopen a claim is one of fact for the ALJ. *In re Nguyen,* W.C. No. 4-543-945 (ICAO, July 19, 2004).

As set forth in the FAL, dated, December 6, 2016, Claimant was placed at MMI on November 15, 2016, provided a 0% impairment for her work related injury. Moreover, Respondents did not admit for maintenance medical treatment. And, despite going through the DIME process, Claimant was unsuccessful in challenging the closure of her case pursuant to the December 6, 2016, FAL. As found by ALJ Jones, Respondents overcame the opinion of the DIME physician, and her case remained closed.

As found, Claimant's work related injury is limited to a sprained right ankle. Claimant failed to establish by a preponderance of the evidence that her sprained right ankle has worsened and caused the need for additional medical treatment or resulted in additional disability.

Although Claimant contends that her work accident and injury caused her to develop CRPS, the ALJ finds and concludes Claimant has failed to establish by a preponderance of the evidence that she has CRPS and that such condition is causally related to her work injury.

The ALJ also finds and concludes Claimant has failed to establish by a preponderance of the evidence that her work injury caused her to fall numerous times and that those falls have resulted in additional injuries that require medical treatment or caused additional disability.

The ALJ also finds and concludes Claimant has failed to establish by a preponderance of the evidence that her work injury resulted in anything other than a right sprained ankle.

Therefore, based on the totality of the evidence, the ALJ finds and concludes Claimant has failed to establish by a preponderance of the evidence that her condition has worsened and that her claim should be reopened.

b. Reopening based upon a mistake.

The power to reopen is permissive, and is therefore committed to the ALJ's sound discretion. Further, the party seeking to reopen bears the burden of proof to establish grounds for reopening. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); Barker v. Poudre School Dist., W.C. No. 4-750-735 (ICAO, Mar. 7, 2012).

Reopening of a closed claim may be granted based on any mistake of fact that calls into question the propriety of a prior award. Section 8-43-303(1), C.R.S.; *See Richards v. Industrial Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000); *Standard Metals Corp. v. Gallegos*, 781 P.2d 142 (Colo. App. 1989). When a party seeks to reopen based on mistake the ALJ must determine "whether a mistake was made, and if so, whether it was the type of mistake which justifies reopening." *Travelers Insurance Co. v. Industrial Commission*, 646 P.2d 399, 400 (Colo. App. 1981).

A mistake in diagnosis has previously been held sufficient to justify reopening. *See Standard Metals Corp. v. Gallegos*, 781 P.2d 142 (Colo.App.1989)(under circumstances where there is a mistake in diagnosis because the medical technology available to the treating physician at the time of the initial order is limited, a petition to reopen based on a mistake of fact may properly be granted).

Moreover, at the time a final award is entered, available medical information may be inadequate, a diagnosis may be incorrect, or a worker may experience an unexpected or unforeseeable change in condition subsequent to the entry of a final award. When such circumstances occur, Section 8-43-303, C.R.S. provides recourse to both Claimant and Respondents by giving any of the parties the opportunity to file a petition to reopen the award. The reopening provision, therefore, reflects a legislative determination that in ‘worker's compensation cases the goal of achieving a just result overrides the interest of litigants in achieving a final resolution of their dispute.’ *Standard Metals Corp. v. Gallegos, supra*, 781 P.2d at 146 (quoting *Grover v. Indus.Comm'n*, 759 P.2d 70 (Colo.1988). Further, as stated in 8 A. Larson, *Larson's Workers' Compensation Law* § 131.05 [2] [b], at 131-62 (2004):

> [T]he desirability of preserving a right to reopen for genuine mistake seems too self-evident for argument. In the nature of things, there are bound to be many occasions when even

> the most thorough and [skillful] diagnosis misses some hidden compensable condition. Should the claimant then be penalized because of an erroneous disposition, either by award or settlement, when the only fault lies in the imperfections of medical science?

Berg, supra at 273 (emphasis in original).

In this case, the ALJ finds and concludes Claimant failed to establish by a preponderance of the evidence that there has been a mistake in diagnosing the injuries and conditions caused by her work accident. As found, Claimant's work injury is limited to a right ankle sprain and such condition does not require any additional medical treatment and has not become more disabling. Claimant failed to establish that she has CRPS and that the CRPS was caused by her work injury, and that there was a mistake regarding the diagnosis of CRPS. Claimant has also failed to establish by a preponderance of the evidence that there was a mistake regarding any other diagnosis.

Therefore, Claimant has failed to establish by a preponderance of the evidence that there was a mistake in diagnosis related to her work injury and that her case should be reopened.

II. If Claimant's claim is reopened, whether she is entitled to medical and temporary total disability benefits.

Claimant has failed to establish that her case should be reopened. Therefore, Claimant is not entitled to any additional medical or disability benefits.

III. Whether Claimant is entitled to travel and lodging expenses incurred in participating in the DIME process.

Claimant is seeking reimbursement for travel and lodging expenses she incurred to participate in the DIME process. Her expenses include the cost to drive to Colorado for the DIME as well as lodging expenses.

Section 8-42-101(1)(a), C.R.S. requires Respondents to pay for expenses which are incidental to obtaining reasonable and necessary medical treatment. Mileage expenses are compensable if "incidental to" obtaining medical treatment. *Country Squire Kennels v. Tarshsis*, 899 P.2d 362 (Colo. App. 1995); *Sigman Meat Co. v. Industrial Claim Appeals Office*, 761 P.2d 265 (Colo. App. 1988); *Industrial Commission v. Pacific Employers Insurance Co*., 120 Colo. 373, 209 P.2d 908 (1949). Thus, mileage expenses and lodging are treated in the nature of a medical benefit.

However, the DIME procedure is not for the purpose of treatment. Rather, it "serves an evidentiary function in the process of litigating disputes …" *Fisher v. University of Colorado Health*, W.C. No. 5-041-216-01 (December 6, 2018.) Thus, the DIME process is a litigation process and not a medical benefit. Therefore, mileage and lodging expenses incurred while pursuing a DIME is not a medical benefit or incidental

to obtaining medical treatment. Consequently, such expenses are not a compensable benefit and cannot be recovered by Claimant.

IV. Whether Claimant is entitled to be reimbursed for the cost of the deposition transcript of the DIME physician.

Claimant contends Respondents failed to provide her a copy of the transcript of Dr. Ginsburg's deposition testimony pursuant to Section 8-43-203(4), C.R.S. Claimant further contends that because Respondents failed to provide her a copy of the transcript, and she ultimately decided to pay the court reporter to obtain a copy, Respondents are responsible for reimbursing Claimant for the cost of obtaining the transcript.

Section 8-43-203(4) provides:

> Within fifteen days after the mailing of a written request for a copy of the claim file, the employer or, if insured, the employer's insurance carrier or third-party administrator shall provide to the claimant or his or her representative a complete copy of the claim file that includes all medical records, pleadings, correspondence, investigation files, investigation reports, witness statements, information addressing designation of the authorized treating physician, and wage and fringe benefit information for the twelve months leading up to the date of injury and thereafter, regardless of the format. If a privilege or other protection is claimed for any materials, the materials must be detailed in an accompanying privilege log.

Claimant's claim for reimbursement, however, fails for a number of independent reasons. First, there is a lack of credible and persuasive evidence that she mailed a written request for a copy of the claim file – and if she did, if the request was made before or after the deposition of Dr. Ginsburg was transcribed. In addition, there was no credible and persuasive evidence submitted that the deposition transcript was in the 'claim file" or whether it was in the attorney's "litigation file" when the written request, if any, was made.

Second, the section of the statute at issue discusses providing the contents of the "claim file" and identifies certain documents such as "medical records, pleadings, correspondence, investigation files, investigation reports, witness statements, information addressing designation of the authorized treating physician, and wage and fringe benefit information." Thus, the statute does not address deposition transcripts and therefore does not apply to deposition transcripts.

Third, if Claimant thought Respondents had a legal obligation to provide her a copy of the deposition transcript pursuant to this statute, Claimant could have filed a motion to compel production of the deposition transcript, but she did not.

Fourth, the general rule, established expressly by the Workers' Compensation Act and the Colorado Rules of Civil Procedure, is that a party must obtain copies of deposition transcripts directly from the court reporter upon the payment of a reasonable

charge, and not from opposing counsel. Pursuant to Section 8-43-213(2), C.R.S. a party is responsible for obtaining a transcript of a deposition, at their cost, by ordering it from the court reporter. This is consistent with the general rule, established expressly by the Colorado Rules of Civil Procedure, which provides that a party must obtain copies of deposition transcripts directly from the court reporter upon the payment of a reasonable charge, and not from opposing counsel. *See* C.R.C.P 30(f). The Colorado Rules of Civil Procedure contemplate that a deposition will be taken before a properly appointed [court reporter], who will transcribe and seal the deposition and forward it to the attorney who arranged for the transcription. *See* C.R.C.P 30(f)(1) and 30(f)(2). Moreover, the rules provided that any party may obtain a copy of any deposition transcript from the [court reporter] who conducted the deposition upon the payment of a reasonable charge. *See* C.R.C.P 30(f)(2).

Consequently, the Claimant has provided neither legal nor factual support for her request for reimbursement. Based on the foregoing, the ALJ will not address Respondents' waiver argument.

V. Whether Claimant is entitled to reimbursement for certain medical expenses incurred after the DIME.

Section 8-42-101(1), C.R.S. requires the Employer to provide medical benefits to cure or relieve the effects of the industrial injury, subject to the right to contest the reasonableness or necessity of any specific treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). The Employer's obligation continues until the Claimant reaches MMI. MMI is defined as the point in time when the claimant's condition is "stable and no further treatment is reasonably expected to improve the condition." §8-40-201(11.5), C.R.S. However, the Claimant may receive medical benefits after MMI to maintain her status or prevent a deterioration of her condition. *See Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988).

Claimant seeks reimbursement for the $360.00 she paid to Mobile Thermographic Imaging to undergo a thermography on August 29, 2018. Claimant underwent the test, after being placed at MMI and closure of her case, to assist in determining whether she had CRPS and whether her condition had worsened.

In this case, Claimant reached MMI on November 15, 2016, and her case was closed pursuant to the December 6, 2016, FAL, in which Respondents did not admit for maintenance medical benefits. Moreover, Claimant has failed to reopen her case. Therefore, Respondents are not liable for the thermography Claimant underwent in 2018. Therefore, Claimant has failed to establish by a preponderance of the evidence that she is entitled to reimbursement for the cost of the thermography.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claim remains closed.
2. Claimant's claim for additional medical and disability benefits is denied and dismissed.
3. Claimant's claim for reimbursement for travel and lodging expenses is denied and dismissed.
4. Claimant's claim for reimbursement for the cost to purchase the deposition transcript of Dr. Ginsburg is denied and dismissed.
5. Claimant's claim for reimbursement for medical expenses, which includes the thermography, incurred after being placed at MMI and closure of her claim, is denied and dismissed.
6. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 22, 2019.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether the claimant has demonstrated, by a preponderance of the evidence, that on February 12, 2018 she suffered an injury arising out of and in in the course and scope of her employment with the employer.

- If the claimant proves a compensable injury, whether the claimant has demonstrated, by a preponderance of the evidence, that the medical treatment the claimant has received is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury.

- At hearing, the parties reserved the issue of average weekly wage (AWW).

- At hearing, the parties stipulated that the left thumb surgery performed by Dr. Randall Viola on June 22, 2018, is not related to the February 12, 2018 incident and the claimant is not requesting payment for that surgery.

FINDINGS OF FACT

1. The claimant is employed with the employer as a ski instructor. On February 12, 2018, the claimant was working for the employer giving a lesson to a client. On the final run of the day, the claimant stepped off the gondola while wearing her ski boots and carrying her poles in her left hand and her skis her right hand. The claimant stepped from the gondola onto a rubber mat that was on the concrete flooring. However, the mat was in a puddle of water. When the claimant stepped onto the mat, it slipped and caused the claimant to fall. The claimant testified that she fell onto a concrete surface on her left side, striking her left hip and left hand. The claimant was able to complete her shift on that date because it was the last run of the day.

2. The claimant reported the incident to the employer the next day, February 13, 2018. The claimant was instructed to attend "safe fit" for medical treatment. Subsequently, the employer instructed the claimant to seek medical treatment with Vail Occupational Health.

3. The claimant was first seen at Vail Occupational Health on February 26, 2018 by Lucia London, CNP. At that time, the claimant reported pain in her left hand and left hip. Ms. London recorded the claimant's left hand pain as 3 out of 10, and her left hip pain as 3 out of 10. Specifically, with regard to the claimant's left hip, Ms. London noted that the claimant had no clicking, popping, instability, swelling, or bruising.

4. Ms. London diagnosed a lumbar spine strain and a left hand contusion, with possible osteoarthritis exacerbation. For the claimant's left hand issues, Ms. London referred the claimant to Dr. Randall Viola, because the claimant had previously treated with Dr. Viola related to left hand symptoms. In addition, Ms. London ordered x-rays of the claimant's left hip and lumbar spine. Ms. London released the claimant to work full duty with no restrictions. The claimant continued to work without restrictions through the remainder of the ski season.

5. On April 4, 2018, the claimant sought treatment with her primary care physician, Dr. Jonathan Feeney. The medical record of that date describes the claimant's complaint as bruising. Dr. Feeney noted that the claimant had "fairly extensive bruising down her left posterior lateral side" as well as left SI joint pain. Based on the claimant's report, Dr. Feeney seemed to opine that the bruising was related to the claimant's February 12, 2018 fall. He recommended the use of nonsteroidal anti-inflammatory medications. In addition, Dr. Feeney recommended a DEXA bone density scan.

6. On April 10, 2018, Ms. London referred the claimant to Dr. Nathan Cafferky for consultation regarding the claimant's left hip.

7. On April 20, 2018, an MRI of the claimant's left hip showed mild osteoarthrosis, an intralabral cyst in the anterior superior labrum, muscular edema in the quadratus femoris, and mild to moderate tendinosis of the left gluteus minimus and gluteus medius. The radiologist noted that there were similar findings on the claimant's right hip.

8. On May 2, 2018, Dr. Randall Viola performed a right thumb metacarpophalangeal joint fusion.

9. On May 3, 2018, the claimant was seen by Dr. Cafferky. At that time, the claimant reported aching posterior buttocks pain that occasionally radiated into her distal posterior thigh. On exam, Dr. Cafferty noted tenderness of the claimant's left sacroiliac (SI) joint. Dr. Cafferky described the claimant's left hip as "healthy appearing". In addition, he noted that the imaging of the claimant's left hip showed degenerative changes similar to those in her right hip. Dr. Cafferky opined that the claimant's symptoms were more consistent with her lumbar spine. As a result, Dr. Cafferky ordered an MRI of the claimant's lumbar spine and referred the claimant to Dr. Scott Raub.

10. On May 9, 2018, an MRI of the claimant's lumbar spine showed mild left foraminal stenosis at the L4-5 level with a mild disc bulge and mild to moderate left facet joint osteoarthritis. In addition, the radiologist noted mild right foraminal stenosis at the L5-S1 level.

11. On May 11, 2018, the claimant was seen by Dr. Alisa Koval at Vail Occupational Health. Dr. Koval noted Dr. Cafferky's referral to Dr. Raub to address the

claimant's lumbar spine. Dr. Koval recommended the claimant continue physical therapy and massage therapy.

12. At the request of the respondent, on May 14, 2018, Dr. Jonathan Sollender performed a review of the claimant's medical records. In his report, Dr. Sollender opined that surgery on the claimant's left thumb was not reasonable, necessary or related to the industrial injury. In support of this opinion, Dr. Sollender noted that prior to the claimant's injury she had treated with Dr. Viola for symptoms related to degenerative arthritis in her left thumb. In May 2017, Dr. Viola recommended the claimant undergo surgery to her left thumb. At that time, the claimant opted to postpone surgery until after the 2018-2019 ski season.

13. On May 15, 2015, the claimant was by Dr. Raub. At that time, the claimant reported that she had continuing left buttock pain with pain into her left lumbrosacral area, but no radicular pain. Dr. Raub opined that the claimant's symptoms would not be addressed with treatment of her lumbar spine. During this appointment, the claimant asked Dr. Raub about PRP[1] injections. Based upon that discussion, Dr. Raub referred the claimant to Dr. David Karli.

14. The claimant was first seen by Dr. Karli on June 13, 2018. On that date, the claimant described her left hip pain as aching, grinding, and dull. In addition, the claimant described her left hip pain as a five out of ten. Dr. Karli recommended and administered a PRP injection to the claimant's left hip.

15. On June 22, 2018, Dr. Viola performed surgery on the claimant's left thumb and left wrist. The surgery included a left thumb carpometacarpal joint fusion, left wrist volar carpal ganglion excision, and left thumb trigger release.

16. On July 6, 2018, the claimant returned to Dr. Koval and reported that she experienced an improvement in her symptoms following the PRP injection.

17. The claimant testified that Dr. Karli administered a second PRP injection in November 2018. Both of the PRP injections have been denied by the respondent. The claimant testified that she personally paid for the PRP injections because her personal insurance does not cover PRP treatment.

18. On September 25, 2018, the claimant attended an independent medical examination (IME) with Dr. John Burris. In connection with the IME, Dr. Burris reviewed the claimant's medical records, obtained a history from the claimant, and completed a physical examination. In his IME report, Dr. Burris opined that the claimant did not suffer any injuries when she fell on February 12, 2018. In support of this opinion, Dr. Burris noted that the claimant has a long history of treatment of the preexisting conditions for the same body parts she asserts were injured. Dr. Burris also opined that the claimant's fall on February 12, 2018 did not aggravate or accelerate the claimant's preexisting and chronic conditions. Dr. Burris noted that the claimant continued to work full-time and without restrictions immediately following the injury and thereafter.

[1] Platelet rich plasma.

19. Dr. Burris' testimony at hearing was consistent with his written report. In his testimony, Dr. Burris reiterated his opinion that the claimant was not injured on February 12, 2018. With regard to the PRP injections, Dr. Burris noted that the Colorado Medical Treatment Guidelines (MTG) do no provide for PRP as treatment of hip symptoms.

20. The claimant testified that by December 26, 2018, her hip symptoms had resolved, and she was released by all of her doctors.

21. The ALJ credits the medical records and the opinions of Dr. Burris. The ALJ also credits the medical records of Dr. Koval over the contradictory reports of Dr. Feeney and finds that the claimant has failed to demonstrate that it is more likely than not that she suffered an injury on February 12, 2018. Although the claimant experienced an incident in which she fell, she did not suffer an injury necessitating treatment. Nor did the incident on February 12, 2018, aggravate, accelerate or combine with a preexisting condition to warrant the need for medical treatment.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2017).

4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where

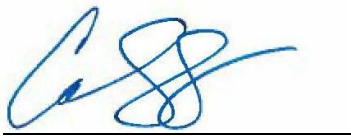
the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment." *See H & H Warehouse v. Vicory, supra.*

5. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that she suffered an injury arising out of and in the course and scope of her employment with the employer. The claimant was not injured on February 12, 2018. Furthermore, the ALJ concludes that the incident on February 12, 2018 did not aggravate, accelerate, or combine with any pre-existing condition to warrant treatment. As found, the medical records and the opinions of Drs. Burris and Koval are credible and persuasive.

ORDER

It is therefore ordered that the claimant's claim for workers' compensation benefits related to a date of injury of February 12, 2018, is denied and dismissed.

Dated this 26th day of November 2019.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. **In addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

ISSUES

The respondent has admitted that the claimant suffered a work injury on December 30, 2018, in which she injured her lumbar spine.

The issue raised by the claimant is whether the claimant has demonstrated, by a preponderance of the evidence, that medical treatment other than that of her lumbar spine (including treatment of her cervical spine, neurological symptoms, and vision) constitutes medical treatment that is reasonable, necessary, and related to the December 30, 2018 work injury.

At the hearing, the parties reserved the issue of average weekly wage (AWW).

FINDINGS OF FACT

1. The claimant is employed with the employer as a ski instructor. On December 30, 2018, the claimant was skiing with one of her students when she was hit from behind by an out-of-control skier. The claimant testified that she was hit with enough force to cause both of her skis to come off. The claimant testified that she fell backwards onto her buttocks, continued to fall, felt her neck snap, and then struck her helmet on the ground. The claimant was transported off the ski run by toboggan.

2. The claimant testified that she immediately received medical treatment at the emergency department at Vail Health. The emergency department record for December 30, 2018 indicates that the claimant complained of headache from striking the back of her head and pain "along her back from neck down to tailbone." The claimant was diagnosed with a head injury, a neck strain, and multiple contusions. On that date, x-rays of the claimant's cervical spine showed no acute injury.

3. At the emergency department, Dr. Diana Hearne initially assessed work restrictions for the claimant. However, Dr. Hearne noted "[w]hen patient saw the restrictions on workman's comp form, she became concerned and requested that these be changed. Initially, given the degree of discomfort she claims from this fall and injury, I felt that she may need to limit her activities until cleared by occupational health. . . Patient states she does not feel she is injured that bad and feels that she could return to full work." Dr. Hearne acquiesced and released the claimant to work without restrictions.

4. The claimant testified that she understood that the body parts injured on December 30, 2018 included her head, neck, back, and tailbone. The claimant also testified that she had a concussion.

5. Prior to the claimant's December 30, 2018 incident, she received treatment from Dr. Alisa Koval following a February 12, 2018 incident. At that time, Dr.

Koval was also the claimant's authorized treating physician (ATP) for the current claim. On January 11, 2019, the claimant was seen by Dr. Koval and described being struck by another skier. Dr. Koval specifically recorded "[t]he force of the impact caused her bindings to eject, and she ended up falling to her left side, landing on her buttocks and her head ([plus] helmet) hitting the ground (no [loss of consciousness])."

6. The claimant reported her symptoms to Dr. Koval as myofascial pain in her left buttock, left hip, and low back region, as well as in her upper back and neck. Dr. Koval concluded, "Lori is experiencing some generalized myofascial pain in her neck, back, and left hip/buttock region. My sense is that a short course of [physical therapy] and [massage therapy] will be helpful." Dr. Koval placed the claimant on modified duty from January 11, 2019 through January 16, 2019, and released the claimant to full duty on January 17, 2019. The claimant continued to work full duty, without restrictions, after that date.

7. On January 25, 2019, the claimant returned to Dr. Koval. In the medical record of that date, Dr. Koval opined that the claimant's fall onto her buttocks on December 30, 2019 would not cause hip symptoms.

8. On January 31, 2019, the respondent filed a General Admission of Liability (GAL) related to the December 30, 2018 injury.

9. On February 13, 2019, the claimant was seen by optometrist, Dr. Matthew James. At that time, the claimant reported that her vision was not the same following the December 30, 2019 incident. Dr. James noted that the claimant's ocular health was "normal".

10. The claimant returned to Dr. Koval on February 22, 2019 and reported vision issues. Dr. Koval noted that the claimant was seen by an optometrist and confirmed that the claimant's vision was "fine".

11. The claimant was seen by Dr. Koval on March 29, 2019. At that time, Dr. Koval opined that the claimant's ongoing neurological complaints did not relate to the December 30, 2018 injury. However, Dr. Koval also concluded that the claimant's lumbar spine symptoms were related to the work injury. Dr. Koval ordered a magnetic resonance image (MRI) of the claimant's lumbar spine.

12. On April 4, 2019, the claimant underwent an MRI of her lumbar spine which showed small disc bulges without canal stenosis at L3 through S1 levels. In addition, the MRI showed mild lower lumbar facet arthrosis with left L4-5 facet joint effusion and synovitis; mild to moderate left L4-5 and right L5-S1 foraminal stenosis, with possible nerve root contact.

13. On April 30, 2019, the claimant sought treatment with Dr. Scott Raub, who had provided her with treatment related to the February 2018 incident. In the medical record of that date, Dr. Raub noted that the claimant was seen by Dr. David Karli, who had administered a low back injection. The claimant also reported to Dr. Raub that Dr. Evans had administered injections to her neck. Neither of these injections were

recommended by Dr. Koval. Nor did Dr. Koval refer the claimant to Drs. Raub, Karli, or Evans during this claim.

14. Subsequently, the parties designated Dr. Jonathan Feeney as the claimant's ATP. The claimant was first seen by Dr. Feeney on June 27, 2019. The medical record of that date identifies the claimant's issues as "persistent concussive symptoms". At that time, the claimant reported headaches when she worked on a computer and significant neck pain. The claimant informed Dr. Feeney that she had previously seen Dr. Evans who administered injections to the claimant's neck in February and June. Dr. Feeney recommended that the claimant continue with physical therapy.

15. On July 19, 2019, the claimant returned to Dr. Feeney and reported ongoing neck pain, facial pain, and nausea. At that time, Dr. Feeney referred the claimant to Dr. Evans for further evaluation. In the medical record of that date, Dr. Feeney included a diagnosis of a closed head injury. However, he noted the date of injury as January 4, 2006.

16. On August 26, 2019, the claimant returned to Dr. Feeney who noted the claimant's date of injury as February 12, 2018. The ALJ notes that Dr. Feeney's records confusingly reference treatment related to both the February 2018 incident and the December 30, 2018 injury.

17. As referenced in the April 30, 2019 medical record with Dr. Raub, the claimant has received various neck and back injections that were administered by Dr. Evans. The claimant testified that these injections were helpful in treating her symptoms. The claimant also testified that the injections administered by Dr. Evans were paid for by her personal health insurance. The claimant testified that she would like these injections to be authorized by the respondent. She would also like Dr. Evans to be considered an authorized provider for this claim.

18. The ALJ credits the medical records and opinions of Dr. Koval and finds that that the claimant injured only her lumbar spine on December 30, 2018, as admitted by the respondent. The ALJ also finds that the claimant has failed to demonstrate that it is more likely than not that treatment of her cervical spine, neurologic symptoms, and vision is reasonable, necessary or related to the work injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation

case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2018).

4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

5. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that treatment of her cervical spine, neurologic symptoms, and vision is reasonable, necessary or related to the work injury. As found, the medical records and opinions of Dr. Koval are credible and persuasive.

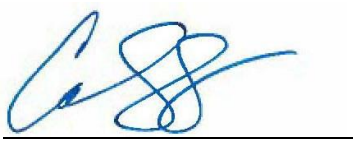
ORDER

It is therefore ordered:

1. The claimant's request for medical treatment of her cervical spine, neurologic symptoms, and vision is denied and dismissed

2. All matters not determined here are reserved for future determination.

Dated this 26th day of November, 2019.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
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ISSUES

- Did Claimant prove, by a preponderance of the evidence, that Dr. Bradley erred by "normalizing" Claimant's scheduled impairment rating by comparison to the contralateral joint?

- Did Respondent prove a basis to withdraw its admission of liability for medical benefits after MMI?

FINDINGS OF FACT

1. Claimant injured his left knee in the course and scope of his employment as a corrections officer on December 9, 2017.

2. On October 12, 2018, Dr. David Walden performed arthroscopic meniscectomies and chondroplasties.

3. Claimant's ATP, Dr. J. Douglas Bradley, put Claimant at MMI on January 9, 2019. Dr. Bradley assigned a 13% lower extremity rating. Left knee range of motion deficits equated to a 12% impairment. But Claimant also had reduced range of motion in the uninjured right knee, corresponding to a rating of 9%. Dr. Bradley "normalized" the left knee range of motion impairment to 3% by subtracting the 9% deficit from the right side (12% - 9% = 3%). Combined with 10% extremity impairment for meniscectomy, Dr. Bradley calculated a final lower extremity rating of 13%.

4. Dr. Bradley testified via deposition on October 1, 2019. Dr. Bradley typically normalizes extremity ratings by comparison to the contralateral joint unless the claimant had a prior injury or other condition that would affect motion of the joint. He opined the ROM deficits in Claimant's uninjured right knee reflect the "normal status of his knees." Dr. Bradley conceded normalization is not discussed in the *AMA Guides*, but explained the DOWC has been teaching normalization in the Level II training course for many years.

5. Respondent filed a Final Admission of Liability on May 3, 2019 based on Dr. Bradley's 13% scheduled rating. The FAL also admitted from medical benefits after MMI. Claimant timely objected to the FAL, and requested a hearing on PPD benefits. Claimant did not object to the issue of post-MMI medical benefits, so the issue closed.

6. Claimant's post-hearing brief indicates he does not contest Respondent's request to withdraw the admission for medical benefits after MMI.

7. Dr. Bradley's testimony regarding his rating methodology is credible and persuasive.

8. Claimant failed to prove he is entitled to a rating above the 13% rating calculated by Dr. Bradley.

CONCLUSIONS OF LAW

A. PPD benefits

Permanent impairment ratings for injuries on or after July 1, 1991 must be "based on" the *AMA Guides to the Evaluation of Permanent Impairment* (3d ed. rev. 1991) ("AMA Guides"). Section 8-42-101(3.7). Whether a rating physician correctly applied the *AMA Guides* is a question of fact for the ALJ. *Metro Moving and Storage v. Gussert*, 914 P.2d 411 (Colo. App. 1995). Where, as here, the Claimant suffers a purely scheduled impairment, the claimant must prove entitlement to a rating by a preponderance of the evidence. *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691 (Colo. App. 2000).

Claimant's sole challenge to Dr. Bradley's rating relates to normalization of the range of motion component, which Claimant argues conflicts with the *AMA Guides*. Claimant concedes the Director's authority to promulgate rules regarding impairment ratings, but asserts "Desk Aid #11 – Impairment Rating Tips" operates as a *de facto* rule adopted outside the required rulemaking process.

The ICAO has considered, and rejected, similar arguments regarding the rating tips on multiple occasions. *E.g*., *Kromer v. State of Colorado*, W.C. No. 4-965-485-03 (July 6, 2017); *Wyatt v. SSC Pueblo Belmont Operating Company, LLC,* W.C. No. 4-936-417-02 (November 24, 2015); *Kurtz v. JBS Carriers*, W.C. No. 4-797-234 (December 7, 2011).

The ALJ finds the ICAO's decision in *Kurtz v. JBS Carriers*, W.C. No. 4-797-234 (December 7, 2011), *aff'd Kurtz v. Industrial Claim Appeals Office*, Colo. App. No. 11CA2561 (October 18, 2012) (NSOP) persuasive and dispositive. The Claimant in *Kurtz* suffered a right leg injury. His final impairment rating included hip range of motion deficits. The ATP and the DIME had normalized the claimant's rating by comparison to the contralateral hip, and the claimant requested the full range of motion rating without normalization. Claimant's arguments here are not appreciably different from those raised – and rejected – in *Kurtz*. The Panel noted the impairment rating tips are not part of the AMA Guides, but may be relevant to assessing the weight the ALJ gives a physician's rating. The Panel held,

> [T]he use of a contralateral measurement in assessing the claimant's permanent impairment did not violate the AMA Guides, 3rd Edition Revised, or the Workers' Compensation Act or Rules. While the AMA Guides, 3rd Edition Revised does not comment on the contralateral measurements for assessing impairment, we conclude that it is also proper to look to the director's impairment rating tips for purposes of assessing a claimant's permanent impairment rating. *See Sanco Industries v. Stefanski*, 147 P.3d 5 (Colo. 2006) (extending deference to Workers' Compensation Division's interpretation of the Act as set forth in Interpretive Bulletin).

> Pursuant to the director's impairment rating tips, the contralateral joint is a better representation of the patient's preinjury state than the AMA Guides population norms in some cases. We further note that pursuant to § 8-42-101(3.5)(b), C.R.S., the Director of the Division of Workers' Compensation shall maintain the impairment rating system. The regulatory interpretations of the Director generally are entitled to a degree of deference. *See Lenox v. United Airlines*, W.C. No. 4-616-469 (June 2, 2006) (affording "great weight" to director's interpretive bulletin on AMA Guides).

The Panel also rejected the argument that the rating tips are invalid as a matter of law because they were not promulgated through the formal rulemaking process. The Panel cited § 24-4-103(1), which states the notice and comment provisions "[do] not apply to interpretive rules or general statements of policy, which are not meant to be binding as rules . . . ." The Panel noted the Director's established practice of issuing "advisories or guidelines . . . regarding the practical applications of the Act," and held, "the impairment rating tips contained in the Desk Aid are merely guidance regarding the assessment of permanent impairment ratings. It is not binding as a rule of the Division." Accordingly, the Panel saw no legal impediment to the rating physician or an ALJ relying on the rating tips.[1]

Nor is the ALJ persuaded by Claimant's argument Dr. Bradley misinterpreted and mechanically applied the Division's guidance because he thought it is a binding rule. Admittedly, Dr. Bradley testified that, "the State actually tells us to do that," which suggests he may not fully appreciate the discretionary nature of the procedure. But he also testified he knows of no statute or rule *requiring* normalization. More important, Dr. Bradley's possible misapprehension had no practical impact on his final rating, because he believes normalization is appropriate in Claimant's case. Dr. Bradley opined,

> [T]here was mild arthritis. He was taking medicine for arthritis before he was injured. So we were determining that he had some arthritis. He's almost 60 years old, he had some arthritis, some limitations, unless he was a – you know, an avid yoga – or worked out, or really worked on all of his joints, maintaining full range of motion . . .
>
> Q. So that would be . . . a specific condition that makes the normalization procedure really appropriate, right?
>
> A. That is correct.

The persuasive evidence shows Dr. Bradley would have normalized Claimant's range of motion regardless of whether he thought doing so was mandatory or discretionary. Any potential error in Dr. Bradley's understanding of the Division's guidance was harmless.

[1] The Court of Appeals subsequently affirmed *Kurtz* in an unpublished opinion. *Kurtz v. Industrial Claim Appeals Office*, Colo. App. No. 11CA2561 (October 18, 2012) (NSOP). The court emphasized that Desk Aid #11 expressly leaves the decision whether to use contralateral range of motion testing to the rating physician's discretion.

B. Withdrawal of admission for post-MMI medical benefits

Claimant's has conceded Respondent's request to withdraw the admission for post-MMI medical benefits.

ORDER

It is therefore ordered that:

1. Claimant's request for additional PPD benefits above the 13% scheduled rating admitted by Respondent is denied and dismissed.

2. Respondent's request to withdraw prospectively its admission for medical benefits after MMI is granted. Post-MMI medical benefits are now closed, subject to statutory reopening.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 27, 2019

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Whether the claimant has demonstrated, by a preponderance of the evidence, that she suffered an injury or occupational disease arising out of and in the course and scope of her employment with the employer.

- If the claimant proves a compensable injury, whether the claimant has demonstrated, by a preponderance of the evidence, that medical treatment she received from Glenwood Medical Associates was reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury.

FINDINGS OF FACT

1. The claimant was employed with the employer as a prep cook. The claimant's job duties included preparing food and serving customers.

2. The claimant testified that on April 2, 2019 she was completing her job duties for the day. This included cleaning the steamers and tortilla press. The claimant explained that the tortilla press is a heavy piece of equipment that is difficult to reach. The claimant testified that while she was reaching up to open the tortilla press, she felt a pop in her right shoulder and a hot flash up her right arm. As it was the end of her shift, the claimant completed her duties as scheduled and went home.

3. The claimant testified that she had pain in her right shoulder overnight and into the next day. The claimant also testified that when she arrived a work on April 3, 2019, she notified a manager, Brenda, that she was injured by the tortilla press. The claimant testified that Brenda moved her from the hot line to the cold line. However, this did not help reduce the claimant's right shoulder pain.

4. Due to her continuing right shoulder symptoms, the claimant sought treatment with her primary care provider, Corrine Johnson, PA, with Mountain Family Health Centers. The claimant was seen by Ms. Johnson on April 4, 2019, and reported pain in her right shoulder with an onset of two months prior. The claimant did not report an acute injury, but mentioned that she had to lift heavy items at work. The claimant also told Ms. Johnson that she was fired from her job with the employer. Ms. Johnson opined that the claimant had right shoulder tendonitis and recommended Toradol and Lidoderm patches.

5. On April 9, 2019, an x-ray of the claimant's right shoulder showed no shoulder separation, dislocation, or acute fracture.

6. On April 22, 2019, the claimant returned to Ms. Johnson and reported that her right shoulder pain was radiating into her neck. The claimant described the pain as aching, dull, and throbbing. At that time, Ms. Johnson opined that the claimant was injured at work due to repetitive lifting. In addition, Ms. Johnson administered an intraarticular joint injection to the claimant's right shoulder.

7. On May 8, 2019, the claimant submitted a Worker's Claim for Compensation form with the Division of Workers' Compensation (DOWC). On that form, the claimant described the cause of her injury as "repetitive lifting broken steams for weeks". The claimant did not report a specific incident or injury.

8. On May 21, 2019, the claimant was seen at Glenwood Medical Associates by Dr. Dennis Eicher. At that time, Dr. Eicher recorded the appointment as an initial workers' compensation "work up". The medical record of that date lists repetitive lifting as the cause the claimant's injury. Dr. Eicher opined that the claimant had a possible rotator cuff tear. He recommended physical therapy and pain medications.

9. On June 4, 2019, Dr. Eicher ordered a magnetic resonance image (MRI) of the claimant's right shoulder. The MRI was performed on June 20, 2019, and showed a questionable low grade partial thickness tear of the anterior supraspinatus; mild infraspinatus and inarticular long head biceps tendinosis; mild AC joint osteoarthritis; and mild subacromial subdeltoid bursitis.

10. Thereafter, on July 2, 2019, Dr. Eicher diagnosed the claimant with a rotator cuff tear and referred her to Glenwood Orthopedics for consultation. On August 12, 2019, the claimant was seen at Dr. Ferdinand Liotta with Glenwood Orthopaedic Center. At that time, Dr. Liotta diagnosed the claimant with arthritis of the acromioclavicular joint and tendonitis of the long head of the right biceps brachia. However, Dr. Liotta opined that the claimant did not need surgical intervention. In addition, he opined that the claimant has a "significant cervical spine issue" and ordered an x-ray and an MRI of the claimant's cervical spine.

11. On June 13, 2019, Howard Fallik, Vocational Case Manager, conducted a Job Demands Analysis of the claimant's position with the employer. In his June 14, 2019 report, Mr. Fallik noted that he found no risk factors in the claimant's job duties that would lead to an repetitive use injury of the claimant's shoulder. Mr. Fallik's testimony at hearing was consistent with his written report.

12. On July 10, 2019, the claimant's counsel submitted a Worker's Claim for Compensation form with the DOWC on the claimant's behalf. In that document, an April 2, 2019 acute injury was described as: "[o]pening the steamer, lifting the handle, and felt a crack in my shoulder. Repeated this activity several time (*sic*) and the popping and the pain became worse." The body parts identified as affected by the injury were listed as the claimant's right shoulder, neck, elbow, wrist, and hand.

13. Medical records entered into evidence demonstrate prior treatment of the claimant's shoulders, back, and neck. For example, on April 4, 2015, the claimant treated at Mountain Family Health Centers for generalized muscle and body pain. At that time, the claimant had pain in her trapezius and bilateral rhomboids. Thereafter, the claimant was taking Gabapentin and Naproxen.

14. On May 8, 2015, May 15, 2015, and June 22, 2015, the claimant reported low back pain. Ms. Johnson recommended the claimant undergo physical therapy. On June 22, 2015, the claimant continued to use Naproxen and was also prescribed Lidoderm patches. On September 15, 2015, the claimant began physical therapy treatment with Grand River Health. The medical record of that date lists the claimant's complaints as back and right shoulder pain.

15. Subsequently, the claimant began to report neck pain. On February 15, 2016, the claimant was seen by Ms. Johnson who diagnosed the claimant with cervicalgia. On February 13, 2018, the claimant was seen at Mountain Family Health Centers by Natasha Ellwood, PA-C. At that time, the claimant reported right shoulder pain that she had experienced for 17 years.

16. The ALJ credits the medical records entered into evidence and finds that the claimant has failed to demonstrate that it is more likely than not that she suffered an acute injury or an occupational disease while employed with the employer. The claimant first described her injury as a repetitive use injury that developed over time. Later, the claimant alleged a specific acute injury involving a pop in in her shoulder. The ALJ does not find the claimant's testimony to be credible or persuasive. In addition, it is clear that the claimant has long-term right shoulder and neck issues. The ALJ finds no persuasive evidence in the record to support a finding that the claimant suffered an aggravation or acceleration of those preexisting conditions while working for the employer.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to

a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2018).

4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment." *See H & H Warehouse v. Vicory, supra.*

5. The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by Section 8-40-201(14), C.R.S. as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

6. A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, Section 8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

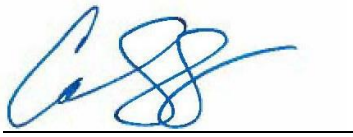
7. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, April 10, 2008). Simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. See *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, October 27, 2008).

8. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that she suffered an injury or occupational disease arising out of and in the course and scope of her employment with the employer. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that her working conditions aggravated or accelerated preexisting conditions in the claimant's right shoulder and/or neck. As found, the medical records are credible and persuasive.

ORDER

It is therefore ordered that the claimant's claim for workers' compensation benefits is denied and dismissed.

Dated this 2nd day of December 2019.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. **In addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that the lumbar spinal fusion surgery he requests is reasonable, necessary, and related to his admitted work injury of 12/6/2016?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

Work Injury of December 6, 2016

1. Claimant works as a correctional officer for the Employer. On December 6, 2016, Claimant was called to an incident in the San Carlos Gym, where an offender attacked another officer. Claimant attempted to stop the offender. Claimant ended up rolling around on the floor with the offender in his efforts to stop the attack, with other officers landing on top of the Claimant in efforts to subdue the offender. After the offender was finally restrained, Claimant attempted to stand up. He was helped to a workbench by other correctional officers. At that time, Claimant reports feeling burning on his right side all the way down to his feet. This is an admitted claim.

Claimant's Medical History, Pre-injury

2. On October 1, 2010, Claimant's primary care nurse practitioner noted an exacerbation of Claimant's low back pain with radiculopathy. Claimant characterized his pain as constant, moderate in intensity, sharp, and aching. Claimant related his symptoms to a head on motor vehicle accident in which the damage to his vehicle was extensive. Claimant was diagnosed with low back pain – exacerbation. His prescription for Percocet was refilled. (Ex. K, pp. 64-65)

3. On September 19, 2011, Claimant's primary care nurse practitioner noted chronic neck and back pain requiring a refill of Claimant's chronic pain medications, including Percocet. (Ex. K, pp. 66-67)

4. On October 18, 2011, Claimant was referred to Audubon Surgery Center for a surgical evaluation for his congenital lumbosacral spondylolysis. (Ex. K, p. 68)

5. On June 11, 2012, Claimant reported his third work-related injury to his back stemming from a take down. (Ex. K, p. 69) When Claimant obtained medical treatment for that injury on June 12, 2012, Claimant was diagnosed with a lumbar strain from fighting an offender for an extended period of time. *Id* at 70. Claimant reported significant pain at the L4-5 level of his low back with radiculopathy. In his past medical

history, Claimant noted his prior (non-work-related) discectomy; however, he stated that he had no pain until 'last night'. *Id.*

6. On July 9, 2012, Claimant had a lumbar MRI, which revealed post-surgical removal of the disc protrusion at L5-S1, but continued disc protrusion at L4-5. (Ex. K, pp. 71-72)

7. On November 24, 2013, Claimant was seen for an impairment rating for a March 4, 2013 work-related injury to his ankle. (Ex. K, p. 73) Under "Previous Injury History", it notes that Claimant had a severe motor vehicle accident in 1993 which resulted in multiple injuries. Those injuries required surgery on both hands, his back, his left knee, and his cervical spine, leaving him with residual chronic pain in his neck and his back, for which he takes 8 Percocet 10/325 mg/per day as prescribed by his primary care nurse practitioner. *Id.*

8. On September 16, 2013, Claimant was seen for right leg pain/weakness while going down stairs. Claimant also reported low back discomfort over the last several days. It was noted that Claimant has a history of "chronic severe low back pain". (Ex. K, pp. 75-76)

9. On January 3, 2014, Claimant filed an Application for a Division Independent Medical Examination in his work-related ankle claim. The DIME physician was to address the relatedness of his left knee, lower back, and hips to his March 4, 2013 work injury. (Ex. K, p. 80)

10. On May 20, 2014, Claimant was seen at Emergicare for left shoulder pain. He also reported chronic neck and back pain. Claimant reported having been on long-standing narcotic pain medicine and taking 240 Percocet a month, but being down to 90 Percocet (10/325 mg) a month at that time. Dr. Simpson was concerned about radiculitis/radiculopathy either from his prior work related injuries, or from the chronic gradual changes of his preexisting lumbar issues. (Ex. K, pp. 82-83)

11. On May 22, 2014, Claimant had an initial consultation at Colorado Rehabilitation & Occupational Medicine for his March 4, 2013 ankle injury. Claimant reported having achy, stabbing pain in his back since December 2013 (after his discectomy) despite having had no injury at that time. Claimant noted that he had been referred out for an MRI for his low back by another physician. Dr. Brunsworth issued a diagnosis of 'low back pain', along with a diagnosis for Claimant's ankle injury. (Ex. K, pp. 84-87)

12. On June 26, 2014, Claimant was seen in the emergency room for his ankle injury. It is noted in that report that Claimant has chronic back/neck pain. (Ex. K, p. 89)

13. On July 15, 2014, Dr. Douglas Bradley noted a history of chronic back pain, as well as a low back strain in June 2012 resulting in a prescription for Percocet. Physical examination revealed decreased range of motion in Claimant's lumbar spine. (Ex. K, pp. 95-97)

14. On November 4, 2015, Claimant underwent a consultation with Dr. Mark Meyer for chronic pain syndrome and lower back pain. It was noted at this time that Claimant was taking 5mg/325 mg Percocet. (Ex. K, p. 101)

15. On November 19, 2015, Claimant underwent a Psychological Evaluation to determine the appropriateness of undergoing a spinal cord stimulator trial for Claimant's ankle injury. Claimant reported pain in his left ankle, pain in his left leg, and pain in his back, for which he uses Percocet. At that time, Claimant was experiencing minimal to mild depression, mild anxiety, average somatic distress, and high functional distress. (Ex. K, pp. 103-105)

16. On January 12, 2016, Claimant was seen by Dr. Meyer for lumbar radiculopathy, left foot pain, and chronic pain. (Ex. K, p. 107)

17. On January 14, 2016, Claimant had a thoracic MRI, which continued to show disc protrusions at T6-7, T7-8, and T9-10 but also showed disc protrusions at T5-6, T8-9, T11-12, and T12-L1. (Ex. K, p. 109). There was no imaging or analysis of his lumbar spine.

18. On February 23, 2016, Claimant was seen by Dr. Olson for left ankle pain, left leg pain, and low back pain. Claimant's prescription for Percocet was refilled. (Ex. K, pp. 111-112) On March 28, 2016, Claimant was again seen by Dr. Olson for left ankle pain, left leg pain, and low back pain. *Id.*

Claimant's Treatment following his work injury of December 6, 2016

19. Claimant obtained treatment for his work related injury the same day at CCOM. (Ex. C) At that time, Claimant reported taking Percocet and having a "pain patch" prescribed by his primary care physician for chronic back pain. Claimant was diagnosed with a lumbar sprain as a result of his work injury. *Id* at 9.

20. Claimant received conservative treatment for his lumbar sprain, until July 24, 2019 when Dr. Olson discussed the possibility of a lumbar fusion surgery. (Ex. 1, p. 2) On July 24, 2017, Dr. Bess noted that Claimant had a history of prior L4-5 discectomy now with L4-5 and L5-S1 degeneration. (Ex. F, p. 16). Claimant described to Dr. Bess a history of progressively worsening low back pain since December 6, 2016. *Id.* At that time (and during his deposition), Dr. Bess stated that an "option" for Claimant would be a lumbar fusion surgery (as well as a non-work related cervical surgery). (Ex. F, p. 18) Dr. Bess noted that if Claimant wanted to pursue surgery, he recommended that Claimant undergo surgery on his neck first since the recovery time is quicker. *Id.*

Attempts at Diagnosing the Pain Generator

21. Respondent obtained a Utilization Review and an Independent Medical Examination from Dr. Rauzzino. He was denied the recommended lumbar fusion surgery. (Ex. G, H) Both the physician (Richard Lutz, DO) who performed the Utilization Review and Dr. Rauzzino opined that one of the reasons the recommended

surgery was not appropriate was because Claimant's pain generator has not been identified. (Ex. G, p. 21, Ex. H, p. 37).

22. Following Respondent's denial of the lumbar fusion surgery, Claimant has attempted to identify his pain generator. Claimant had a CT myelogram on August 23, 2018 that revealed no acute abnormality; only mild degenerative, spondylotic changes throughout the spine. (Ex. I)

23. On October 5, 2018, the ATP, Dr. Olson, noted that "[t]his will be somewhat difficult decision for the surgeon, as there is no clear-cut spinal stenosis…[t]here does not appear to be an obvious surgical lesion for the lumbar spine." (Ex. C) Dr. Rauzzino agreed, stating that there has not been an acute structural injury to Claimant's spine that would require surgery. The CT myelogram shows chronic degenerative changes and the amount of stenosis is mild to moderate and does not appear to be acute. (Ex. H, pp. 36-37).

Dr. Michael Rauzzino's IME

24. Dr. Michael Rauzzino, MD, of Front Range Spine and Neurosurgery, performed an independent medical evaluation of Claimant for Respondent on October 31, 2017. (Ex. H) As part of that evaluation, Dr. Rauzzino reviewed Claimant's current and prior medical records. Claimant denied a history of chronic low back pain to Dr. Rauzzino, stating that after his discectomy, he had no further back issues. (Ex. H, pp. 30-31). Claimant also told Dr. Rauzzino (and testified at hearing) that he takes Percocet for his foot/ankle pain. *Id*.

25. Claimant described to Dr. Rauzzino that his current complaints were of back and leg pain. *Id* at p. 31. Claimant completed a pain diagram, noting pain throughout his neck, shoulders, and arms as well as in the area of his waist and down both legs. The only area where he did not indicate pain was in the anterior and posterior chest/torso and his mid-back. Dr. Rauzzino explained that this was non-radicular, diffuse pain that would not respond well to surgery.

26. Dr. Rauzzino also opined that he did not believe a fusion surgery would decrease Claimant's pain complaints, or increase his function. He did not believe that it was realistic that Claimant would return to work as a correctional officer after a lumbar fusion surgery. *Id* at p. 37. Dr. Rauzzino explained that there is no good explanation for Claimant's diffuse, axial and bilateral, non-radicular pain. He opined that Claimant's complaints are out of proportion to what one would expect given the radiographic findings. Dr. Rauzzino noted that "[i]t is difficult to imagine what injury would have occurred that would have caused [Claimant] to go from having had none of these complaints to the extent of his current complaints, especially in the absence of acute structural injury on lumbar and cervical studies."

27. Dr. Rauzzino reviewed the Diagnostic Indications and the Pre-operative Surgical Indications outlined in the Medical Treatment Guidelines for spinal fusion. He testified at deposition that those conditions have not been met. One of the

requirements is a psychosocial evaluation. There is no psychosocial evaluation in the record since Claimant's work injury. Based on Claimant's results from the Computerized Outcomes Management Technologies testing performed by Dr. Rauzzino, Dr. Rauzzino's opinion that there may be an underlying psychological issue precluding Claimant's recovery. Due to the noticeable differences between Dr. Rauzzino's and Dr. Castrejon's examinations of Claimant, and the results of Claimant's November 19, 2015 psychological evaluation, he opined that a psychosocial evaluation should be performed prior to another invasive surgery.

28. Claimant has continued to work full duty, without restrictions, as a correctional officer since June 26, 2018. (Exhibit B) Claimant told Dr. Rauzzino that he believes he will be able to return to work as a correctional officer following the lumbar fusion surgery. (Ex. H, p. 31) Dr. Rauzzino testified at hearing that he did not think that was realistic. Dr. Rauzzino is a board certified, Level II accredited, neurosurgeon who has performed hundreds of fusion surgeries. Dr. Rauzzino testified that if Claimant were his patient, he would not recommend the surgery.

Dr. Miguel Castrejon's IME

29. Dr. Miguel Castrejon performed an Independent Medical Evaluation for Claimant on December 6, 2017. (Ex. 5). Dr. Castrejon is Level II accredited, but he is not a spinal surgeon. Dr. Castrejon did not offer an opinion on whether the surgery recommended by Dr. Bess is reasonably necessary or causally related to Claimant's December 6, 2016 work injury. Rather, he recommended additional testing. At his deposition on 12/5/2018, Dr. Castrejon testified that "there is no documentation in the medical file between 2012 and 2016 of any radicular symptoms or documentation of back pain. (Castrejon Depo. p. 9). Dr. Bess also admitted during his deposition that he did not appear to have all of Claimant's prior medical records. (Bess Depo. p. 29)

30. Dr. Castrejon testified that Claimant's back has chronic changes, but that he was asymptomatic prior to this incident. (Castrejon Depo. p. 13) Dr. Castrejon critiqued Dr. Rauzzino for not performing a causation analysis under what he describes as eight factors for determining whether an injury arose out of and in the course of employment. (Ex. 5) He also questioned Dr. Rauzzino's physical examination, noting that he questioned whether they were examining the same patient. (Ex. 5, p. 192)

31. In a follow-up IME report dated January 9, 2018, Dr. Rauzzino stood behind his examination and noted that the signs Dr. Castrejon described of increased reflexes in the lower extremity, wide-based gait, etc. are not related to the lumbar spine but are upper motor neuron signs, not lower motor neuron signs-which one would expect with a lumbar injury. (Ex. H, p. 40).

Deposition of Dr. Robert Shay Bess

32. The referred spinal surgeon, Dr. Bess testified by deposition on September 30, 2019. Dr. Bess testified that he suggested a lumbar fusion, as an option, for Claimant's "degeneration" at L4-5 and L5-S1 with back and leg pain, but noted:

Q …..Explain to me the treatment that you've recommended.

A We talked about it. *I wouldn't say I recommended it.* We talked about what some options could be and then kind of left it up to Jack.

Really, in this scenario, *it's not a medical necessity.* It's purely for quality of life. Patients will be much better without having surgery if they can avoid it. But if nothing is working, *it's an option for him.* (Bess Depo, p. 13) (emphasis added).

33. In Claimant's case, a fusion surgery would 'hopefully' reduce his pain and decrease the amount of opiates he is taking. (Bess Depo. pp. 13, 15) Dr. Bess said the surgery could increase his function but that it was mainly to reduce pain and decrease opiate intake. (Bess Depo. p. 15)

34. Dr. Bess testified that patients that are on preoperative opioids have a high risk of maintaining them postoperatively. (Bess Depo. p. 15) Claimant has been taking Percocet for his chronic neck and back pain for a minimum of 10 years, since at least 2009. (Ex. K, p. 56)

35. Dr. Bess testified (consistent with Dr. Rauzzino) that the optional surgery will not likely eliminate all of Claimant's symptoms. (Bess Depo. p. 22) Dr. Bess also testified that if a patient had pain before and the pain has been progressively getting worse, then any changes between prior MRIs and subsequent CT scans would more likely be progressive in nature. (Bess Depo. p. 23) Dr. Bess further testified that it is possible that the changes shown on Claimant's CT scan are all degenerative and that it is possible the protrusion shown prior to Claimant's work related injury progressed naturally into the herniation shown on the subsequent CT scan (which is consistent with Dr. Rauzzino's testimony). (Bess' Depo. p. 24).

36. When asked if the findings of the CAT scan taken 12/21/2016 showed findings that were acute in nature, Dr. Bess replied:

A. They [CAT scans] don't comment on the chronicity of it. And it's very difficult to comment on chronicity based on a CT scan, because CT scans don't pick up edema or swelling. So only an MRI scan can do that to my knowledge. (Bess Depo, p. 10).

37. When asked if the CAT scan (Ex. 3, pp. 121-123) was "consistent with [Claimant] getting into an altercation and rolling around on the floor with an inmate", Dr. Bess replied:

A. *I can't say that.* It's hard to put those two and two together. I could say that those findings would probably be consistent with pain, but *it's hard for me to say that that altercation would cause those findings on the imaging*. (Bess Depo, p. 9) (emphasis added).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado is to assure quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1).* Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as the fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990) Moreover, the ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion).

C. In this instance, the ALJ finds Claimant to be sincere, if not wholly persuasive, in his testimony. Further, the ALJ finds that each medical expert offering opinions has done so in good faith, and with a sincere effort to provide the ALJ valuable expert information. As such, the ALJ will determine these issues on the basis of *persuasiveness*, and not *credibility* per se. As but one example, it appears that neither Dr. Castrejon nor Dr. Bess had a complete or accurate medical history of Claimant's prior back issues – which are numerous. Such lack of information renders their opinions less persuasive.

D. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Medical Benefits, Reasonable and Necessary, Generally

E. Claimant bears the burden of establishing entitlement to medical treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). Once a claimant has established a compensable work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

Reasonable and Necessary, as Applied

F. Claimant's own IME physician, Dr. Castrejon, did not offer an opinion on whether the surgery recommended by Dr. Bess is reasonably necessary or causally related to Claimant's December 6, 2016 work injury. Rather, he recommended additional testing. Dr. Rauzzino was clear in his opinion that such surgery was not reasonable or necessary, and was not likely to address Claimant's complaints. He felt that such procedure would render it unlikely that Claimant would be able to continue (as he has to date) as a correctional officer following a lumbar fusion. The Utilization Review physician found insufficient evidence of a pain generator to move forward with a lumbar fusion. Finally, the physician referred for the procedure, Dr. Bess himself, was equivocal at best: *"I wouldn't say I recommended it."* "Really, in this scenario, *it's not a medical necessity*…it's an *option* for him" (Finding of Fact #32).

G. Based upon the expert testimony, the ALJ finds that Claimant has not shown, by a preponderance of the evidence, that the lumbar fusion he desires is reasonable and necessary to cure him of the effects of the condition he suffers from.

Medical Benefits, Related to Work Injury, Generally

H. Further, a Claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949). Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability were caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those that flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970).

Related to Work Injury, as Applied

I. Claimant no doubt suffers (and has for quite some time) from diffuse back pain, and radicular symptoms. While a pain generator has yet to be adequately

identified to justify this procedure, the weight of the evidence also fails to show that Claimant's condition was proximately caused by his work injury. He has suffered similar symptoms for years, and this admitted work injury, while traumatic to Claimant, cannot be said to be the cause of Claimant's current symptoms. Here again, the ALJ finds Dr. Rauzzino to be more persuasive that Dr. Castrejon, especially since Dr. Castrejon apparently did not have the pertinent records for his medical history. The evidence shows that it is more likely than not that Claimant, unfortunately, suffers from degenerative conditions, perhaps years in the making. Once again, the testimony of Dr. Bess simply fails to carry the day for Claimant. Dr. Bess could not say that the CAT scan showed an acute injury. Further, while such imaging findings were probably consistent with pain, *"…it's hard for me to say that that altercation would cause those findings on the imaging"* (Finding of Fact #37).

J. Taking all the evidence into account, Claimant has not shown, by a preponderance of the evidence, that the condition he now suffers from is proximately caused by his admitted work injury of 12/6/2016.

ORDER

It is therefore Ordered that:

1. Claimant's request for the lumbar spinal fusion surgery is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 3, 2019

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

OFFICE OF ADMINISTRATIVE COURTS

STATE OF COLORADO

W.C. No. 5-092-665-001

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS.

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

[Redacted],

Claimant,

v.

[Redacted]

Employer,

and

[Redacted],

Insurer/Respondents.

On or about October 1, 2019, Respondents filed their Motion for Summary Judgment. Pursuant to OACRP, Rule 17, a response to Respondents Motion was due within 20-days, or by October 22, 2019. No timely response to Respondents' Motion was filed as of October 22nd, the 20th day. Therefore, the matter was deemed submitted for Summary Judgment on October 23, 2019. The matter is set for hearing on December 3, 2019. The hearing is hereby vacated.

The Claimant is self-represented. Respondents are represented [Redacted], Esq.

Hereinafter [Redacted] shall be referred to as the "Claimant." [Redacted] shall be referred to as the "Employer." All other parties shall be referred to by name.

ISSUE FOR SUMMARY JUDGMENT

The issue before the ALJ is whether there is a genuine issue of disputed material fact concerning whether Claimant's claim is closed because he did not file a timely objection to the Final Admission (FAL), mailed to Claimant on August 16, 2019. There is a presumption of receipt because the Postal Authorities did not return the FAL as undeliverable and the ALJ finds that the Claimant received the FAL. An objection was due by September 16, 2019, and a Notice and Proposal and Application for a Division Independent Medical Examination (DIME) was due on the same date in order to challenge the date of maximum medical improvement (MMI) of July 1, 2019, specified in the FAL. Neither items were timely filed.

UNDISPUTED FACTS/FINDINGS

Based on Respondents' Motion for Summary Judgment and the attachments to that Motion, the ALJ makes the following Findings of Fact:

1. The Claimant sustained an admitted injury to his right and left arm on October 21, 2018, when he was involved in a grease fire.

2. The Claimant's authorized treating provider, (ATP), Darla Draper, M.D., placed the Claimant at MMI on July 1, 2019, and assigned a scheduled right upper extremity (RUE) impairment rating of 12%. Respondents filed a FAL consistent with Dr. Draper's rating and MMI date on August 16, 2019 (Exhibit A, attached to Motion).

3. Claimant did not file a timely objection to Respondents' August 16, 2019, FAL, and did not file a timely Notice and Proposal or an Application for a DIME in order to challenge the admitted MMI date, which were due no later than September 16, 2019.

4. On September 4, 2019, the Claimant filed an Application for Hearing endorsing the issues of compensability, reasonable necessary medical treatment, TTD, and PPD (Exhibit B). The ALJ hereby finds that an Application for Hearing cannot substitute to circumvent the objection and DIME process to challenge a FAL.

Ultimate Findings

5. No timely Objection and Notice and Proposal for a DIME having been filed, the Claimant's claim is closed.

6. There is no disputed issue of genuine material fact herein.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Summary Judgment /General

a. Summary judgment may be sought in a workers' compensation proceeding. *See Fera v. Indus. Claim Appeals Office,* 169 P.3d 231, 232 (Colo. App. 2007). Pursuant to Office of Administrative Courts Rules of Procedure (OACP) Rule 17, 1 CCR 1101-3, "any party may file a motion for summary judgment seeking resolution of any endorsed issue for hearing." The OAC Rule allows a party to support its Motion with affidavits, transcripts of testimony, medical reports, or employer records. A motion for summary judgment may be supported by pleadings, depositions, answers to interrogatories, and admissions on file. C.R.C.P. 56; *See also Nova v. Indus. Claim Appeals Office*, 754 P.2d 800 (Colo. App. 1988) (C.R.C.P. and C.R.E. apply insofar as they are not inconsistent with the procedural or statutory provisions of the Act). As found, the Respondents' Motion for Summary Judgment is supported by exhibits.. As further found, there were no timely response to Respondents' Motion for Summary Judgment.

b. Summary judgment is appropriate when the pleadings show there is no genuine disputed issue of material fact and the movant is entitled to judgment as a matter of law. C.R.C.P. 56(c); *Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (Colo. 1988). This rule allows the parties to pierce the formal allegations of the pleadings and save the time and expense connected with trial when, as a matter of law, based on undisputed facts, one party could not prevail. See *Drake v. Tyner*, 914 P.2d 519 (Colo. Ct. App. 1996). As found, the Motion for Summary judgment and the attached Exhibits establish that the facts in the present case are undisputed in showing that there was no timely objection to the FAL nor was there a timely Notice and Proposal for a DIME to challenge the admitted MMI date,.

c. Once the moving party shows specific facts probative of a right to judgment, it becomes necessary for the non-moving party to set forth facts showing that there is a genuine issue of material fact that would require a hearing. *See Miller v. Van Newkirk*, 628 P.2d 143 (Colo. App. 1980). The failure of the opposing party to satisfy its burden entitles the moving party to summary judgment. *Gifford v. City of Colorado Springs*, 815 P.2d 1008 (Colo. App. 1991). As found, Claimant did not respond in a timely manner to contend that there are genuine disputed issues of material fact. As further found, there is no genuine issue of disputed, material fact. The failure of the opposing party to satisfy its burden entitles the moving party to summary judgment. *Ballesteros v. Westaff, Inc.*, W.C. No. 4-475-838 [Indus. Claim Appeals Office (ICAO), November 24, 2008].

Summary Judgment/Case Specifics

d. An issue is ripe for hearing when it is "real, immediate, and fit for adjudication." *Olivas–Soto v. Industrial Claim Appeals Office,* 143 P.3d 1178, 1180 (Colo. App. 2006). "The term 'ripe for hearing' refers to a disputed issue concerning which there is no *legal impediment* to immediate adjudication. Thus, the statutory

reference to 'ripeness' recognizes that although a party may be able to present a legitimate factual dispute…the law itself may impose a barrier to adjudication of the dispute pending the completion of a legal or procedural process." *Casias v. City of Longmont,* W.C. No. 4-357-048 (ICAO, August 16, 2004).

e. Disputes related to MMI are governed by § 8-42-107(8), C.R.S., which requires a DIME when either party disputes the MMI determination of an ATP. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo.App.2002). The Colorado Supreme Court has stated that the DIME procedure is "the only way for an injured worker to challenge the treating physician's findings -- including MMI...." *Whiteside v. Smith*, 67 P.3d 1240, 1246 (Colo. 2003). This applies to a challenge to an ATP's MMI determination. A timely objection is required to challenge a scheduled rarting, even if the challenge is based on a higher scheduled rating.

f. An injured worker has thirty days after a FAL is filed to file an objection to the FAL and a Notice and Proposal for a Division Independent Medical Examination. § 8-43-203(2)(b)(II)(A), C.R.S. An uncontested FAL automatically closes a case as to the issues admitted in the FAL. § 8-43-203(2)(b)(II)(A), C.R.S. This statutory scheme is designed to promote, encourage, and ensure prompt payment of compensation to an injured worker without the necessity of a formal administrative determination in cases not presenting a legitimate controversy. *Dyrkopp v. Indus. Claim Appeals Office*, 30 P.3d 821 (Colo. App. 2001); *Cibola Construction v. Indus. Claim Appeals Office*, 971 P.2d 666 (Colo. App. 1998).

g. As found, pursuant to § 8-43-203(2)(b)(II)(A), C.R.S., the Claimant had until September 16, 2019, to object to Respondents' August 16, 2019, FAL and file a Notice and Proposal for a Division Independent Medical Examination. Neither item was timely filed.

h. The issues endorsed in Claimant's Application for Hearing are compensability, reasonable and necessary medical benefits, TTD, and PPD. Claimant did not endorse *Grover* medical benefits. Claimant failed to timely object to Respondents' August 16, 2019, FAL Therefore, the Claimant'

'i. Pursuant to OACRP, Rule 16B, the Respondents' counsel states that he conferred with the Claimant regarding this Motion and the Claimant indicated that he objects to the Motion.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondents' Motion for Summary Judgment is hereby granted.

B. The Final Admission of Liability, dated August 16, 2019, closes the Claimant's claim as to the issues admitted therein.

C. The December 3, 2019 hearing is hereby vacated.

DATED this 15th day of November 2019.

_____

EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203**.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. (as amended, SB 09-070). For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at**

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-059-799-001

ISSUES

I. Whether Claimant is entitled to disfigurement benefits.

II. Whether the fifty percent safety rule violation should apply to Claimant's disfigurement benefits.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. On March 1, 2016, Claimant sustained an admitted injury resulting in the loss of his right upper extremity just above the elbow.
2. A hearing was previously held on May 10, 2018 on the issues of whether Claimant's injury was caused by a safety violation pursuant to §8-42-112(1)(b); and, whether the injury was caused by a controlled substance violation pursuant to §8-42-112.5(1). In his Order, entered on June 28, 2018, ALJ Cannici determined that Claimant's injury was caused by a safety rule violation pursuant to §8-42-112(1)(b) allowing Respondents to reduce Claimant's non-medical benefits by fifty percent. ALJ Cannici declined to make a final determination on the controlled substance violation.
3. At the November 11, 2019, hearing, the only evidence put on record, regarding disfigurement, was the evaluation performed by the ALJ in which the ALJ viewed Claimant's disfigurement. Neither party objected to anything that transpired during this evaluation.
4. Claimant's work injury resulted in the amputation of his right upper extremity just above the elbow. The amputation left a stump, just above where his elbow was, with extensive scaring on the stump and an indentation of the stump.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

A. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a

fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) ; *People v. M.A*., 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

B. Section 8-42-108(2)(c) allows for additional compensation in the form of disfigurement benefits when a claimant sustains a disfigurement in the form of "Stumps due to loss or partial loss of limbs."

C. Here, the ALJ finds that claimant's work injury resulted in an amputation of his right upper extremity, just above his right elbow, that left a stump. There is also extensive scaring on the stump and an indentation on the stump. Based upon this, and all other observations made by the ALJ during the disfigurement evaluation, the ALJ awards Claimant $9,678.66 in disfigurement benefits.

D. Section 8-42-112(1)(b) states "that compensation provided for in articles 40 to 47 of this title shall be reduced fifty percent where injury results from the employee's willful failure to obey any reasonable rule adopted by the employer for the safety of the employee."

E. Because the statute mentions disfigurement benefits in Section 8-42-112, the Act mandates that a safety rule violation apply to all non-medical benefits including disfigurement benefits.

F. Accordingly, the ALJ finds that the safety rule violation, and the 50% reduction, is applicable to Claimant's disfigurement award.

G. Claimant's disfigurement award of $9,678.66 is reduced by 50%, pursuant to Section 8-42-112(1)(b), to $4,839.33.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents shall pay Claimant $4,839.33 in disfigurement benefits.

2. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail,

as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 3, 2019.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Did Claimant prove he suffered a compensable injury on November 28, 2018?
- If Claimant proved a compensable injury, the parties stipulated he is entitled to TTD benefits from November 18, 2018 through December 19, 2018.
- If Claimant proved a compensable injury, the parties stipulated the medical treatment he received, including emergency surgery at S. Joseph's Hospital, was reasonably necessary to cure and relieve the effects of the injury.

FINDINGS OF FACT

1. Claimant works for Employer as a diesel mechanic. He developed groin and testicular pain at work on November 28, 2018 while installing a fuel tank on a bus. Installation of a fuel tank is physically demanding and requires lifting and exerting force overhead, bending, stooping, crouching, and twisting into awkward postures.

2. The bus was raised on a lift and Claimant was working underneath it to secure the fuel tank straps. He was pressing upward and stood up from a crouched position when he felt pain in his groin.

3. The pain intensified and became severe over the next 20-30 minutes. Claimant took a break and went into the restroom to examine his groin. His right testicle was very painful and noticeably swollen.

4. Claimant reported the symptoms to his supervisor, who directed him to the St. Joseph Hospital emergency department. An ultrasound showed probable testicular torsion, and Claimant was evaluated by Dr. Justin Green, the on-call urologist. Dr. Green confirmed testicular torsion and recommended immediate surgery. Claimant was taken to the operating room and underwent emergency surgery with Dr. Joseph Dall'Era.

5. On November 30, 2018, Claimant saw Dr. Brenden Matus, Employer's designated occupational medicine provider. Dr. Matus opined the testicular torsion was not work-related and advised Claimant to follow up with his personal physicians outside the workers' compensation system.

6. Claimant missed approximately four weeks from work after the surgery. He returned to work on December 20, 2019.

7. Claimant followed up with Dr. Dall'Era on February 13, 2019. During the appointment, Claimant asked Dr. Dall'Era's opinion regarding causation of the testicular torsion. Dr. Dall'Era opined,

> He asks if this could have been a result of his work. I reviewed etiology of torsion is typically a congenital issue that predisposes twisting of the testicle around its blood supply due to deficiency in the fixation within the scrotal cavity. The inciting event *may* have been heavy straining while lifting heavy objects at work. There are also cases of spontaneous testicular torsion without identifiable event. Surgical findings do not, and would not be expected to support either etiology.

8. Claimant saw Dr. Richard Heppe, a urologist, for an IME at Respondent's request on July 8, 2019. Dr. Heppe noted Claimant had recovered well from the surgery, with no ongoing sequelae or further need for treatment. Regarding causation, Dr. Heppe opined,

> Although this happened at work, I do not feel that this injury is work-related. Testicular torsion can occur at any time, with or without activity. Testicular torsion often affects patients while they are sitting and completely at rest. I do not feel that the fact that [Claimant] was working overhead put him at increased risk for this testicular torsion to occur, and I feel that this could have happened to him at any time.

9. Dr. Heppe testified via deposition on September 6, 2019 to elaborate on the opinions expressed in his IME report. Dr. Heppe explained testicular torsion is generally associated with a congenital anatomic abnormality called a "bell clapper" deformity. In this condition, the testicles are not properly attached to the tissue inside the scrotum, but instead are "free floating." This makes the testicles susceptible to twisting from normal muscle movements during activities of daily living (including sitting down). Dr. Heppe reiterated his opinion Claimant's testicular torsion is not work-related. He explained,

> [T]here is no evidence in the medical literature of any particular physical activity that puts somebody at increased risk for torsion. Testicular torsion . . . can occur at any time. And actually, typically most classically occurs when the patient is sedentary, just sitting on a couch or sitting in class or watching TV. So it can really occur at any time. There is not a particular motion or physical activity that's going to put somebody at increased risk.

10. Dr. Heppe agreed the treatment Claimant received, including the emergency surgery, was reasonably necessary, but opined none of it was work-related.

11. Dr. Heppe's opinions are credible and persuasive.

12. Claimant failed to prove he suffered a compensable injury. The persuasive evidence shows the testicular torsion Claimant experienced on November 28, 2018 reflects the natural progression of his pre-existing congenital condition, without contribution from his work activity.

CONCLUSIONS OF LAW

To receive compensation or medical benefits, a claimant must prove he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which he seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). A pre-existing condition does not disqualify a claim for compensation if a workplace accident or exposure aggravates, accelerates, or combines with a pre-existing condition to produce disability or a need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). The mere fact that an employee experiences symptoms at work does not compel a conclusion that the symptoms were caused by the employment. *Garamella v. Paul's Creekside Grill, Inc.*, W.C. No. 4-519-141 (March 6, 2002). Rather, the claimant must prove the symptoms were proximately caused by their work activity. A claimant need not present expert medical evidence regarding causation, and can rely on any combination of admissible evidence, including competent lay testimony, to prove their case. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997).

Claimant failed to prove the testicular torsion was caused or aggravated by his work. While the ALJ does not doubt Claimant's description of his work activities on November 28, 2018 and the onset of symptoms, there is no persuasive evidence linking the development of testicular torsion to his work. Dr. Matus opined the condition was not work-related. Dr. Dall'Era opined the condition "may" be related to heavy lifting but is "typically" a congenital issue. The ALJ is most persuaded by Dr. Heppe's analysis and conclusions. The fact that Claimant experienced symptoms at work was probably coincidental. As Dr. Heppe explained, there is no good empirical evidence that testicular torsion is associated with activity. In fact, it most commonly occurs at rest. After reviewing all the evidence, the ALJ concludes Claimant failed to prove the testicular torsion he experienced on November 28, 2018 was causally related to his work activities.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference,

see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 3, 2019

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

Whether Claimant has proven by a preponderance of the evidence that a spinal cord stimulator trial is reasonable and necessary to relieve the effects of her March 25, 2014 industrial injury.

FINDINGS OF FACT

1. On March 25, 2014 Claimant suffered an admitted industrial injury to her left foot. Claimant was walking into work from Employer's parking lot when she stepped on an uneven part of the ground, rolled her left ankle and broke a bone in her left foot.

2. Claimant subsequently underwent four foot surgeries between 2014 and 2017. The surgeries included hardware insertion and removal as well as a bone fusion.

3. Claimant explained that she began to develop numbness in her left foot after the hardware removal procedure in September of 2014. She specifically experienced burning, diffuse pain throughout the left foot, intermittent swelling and a throbbing/burning sensation on the bottom of her foot. The top of Claimant's left foot also became sensitive to touch.

4. Claimant has received medications and injections from numerous medical providers. She has also undergone diagnostic testing for Chronic Regional Pain Syndrome (CRPS).

5. On September 28, 2016 Claimant visited Authorized Treating Physician (ATP) John J, Aschberger M.D. for an examination. Dr. Aschberger noted that Claimant exhibited left foot swelling. However, skin temperature and moisture were symmetrical between the feet. He "doubt[ed] a significant complex regional pain syndrome issue." However, because of her chronic pain complaints and swelling, he ordered a thermogram to test for CRPS.

6. On October 16, 2016 Claimant visited David Reinhart, M.D. for thermogram testing. Dr. Reinhart determined the test results were positive for CRPS. However, he remarked that an additional positive test was necessary to confirm the CRPS diagnosis and recommended lumbar sympathetic blocks.

7. On December 15, 2016 Claimant visited Albert Hattem, M.D. for an examination. Claimant obtained 80-90% relief from a lumbar sympathetic block. However, the relief only lasted for one week and the pain returned to previous levels. The examination was not consistent with CRPS because there was no swelling, skin discoloration or atrophic skin changes.

8. On December 16, 2016 Claimant underwent a left lumbar sympathetic block with John Sacha, M.D. Dr. Sacha concluded that Claimant exhibited a non-diagnostic response with 0% pain relief.

9. On February 9, 2017 Claimant completed QSART testing with George V. Schakarachwili, M.D. A QSART autonomic battery of the left lower extremity revealed a "high probability for the presence of [CRPS]."

10. On September 19, 2017 Claimant underwent an independent medical examination with Kathleen D'Angelo, M.D. After reviewing Claimant's medical records and conducting a physical examination, Dr. D'Angelo determined that Claimant did not qualify for a diagnosis of CRPS pursuant to the Colorado Level II *Medical Treatment Guidelines* (*Guidelines*) because of the lack of objective findings. She specifically noted that Claimant did not exhibit temperature changes, coloring, hair growth, muscular atrophy, edema, allodynia or hyperalgesia. Dr. D'Angelo concluded that Claimant's CRPS symptoms had resolved.

11. On April 25, 2018 Claimant underwent a Division Independent Medical Examination (DIME) with Richard L. Stieg, M.D. Dr. Stieg reviewed Claimant's medical records and conducted a physical examination. He diagnosed Claimant with CRPS-II "secondary to posterior tibial and superficial peroneal neuropathy in association with work-related cuneiform fracture and subsequent surgical procedures." He also diagnosed an adjustment disorder with depressed mood. Dr. Steig concluded that Claimant had not reached Maximum Medical Improvement (MMI). He recommended the following treatment to reach MMI: (1) an EMG of the left lower extremity to rule out blockade of the superficial peroneal and posterior tibial neuropathy from scar tissue; (2) the exhaustion of all pharmacological means of treating Claimant's pain; and 3) the trial of a spinal cord stimulator if the preceding options failed.

12. On June 11, 2018 Claimant visited Joel Cohen, Ph.D. for a psychological evaluation regarding the possible trial of a spinal cord stimulator. Dr. Cohen noted that he would have Claimant complete the Millon BehavioraLMedicine Diagnostic and a pain patient profile. He remarked that Claimant would return in two weeks to review the results of the testing.

13. On July 16, 2018 Claimant returned to Dr. Cohen for an evaluation. Dr. Cohen noted that Dr. Aschberger had referred Claimant to Giancarlo Barolat, M.D. for consideration of a spinal cord stimulator trial. He remarked that a spinal cord stimulator trial was not a curative intervention, but would provide better pain control and improve function on a daily basis. Dr. Cohen commented that he had filed psychological support for the consultation request and would see Claimant after her visit with Dr. Barolat.

14. On August 31, 2018 Dr. D'Angelo conducted a second independent medical examination of Claimant. Dr. D'Angelo performed a physical examination and reviewed additional medical records. She concluded that Claimant remained at MMI. Dr. D'Angelo detailed that her physical examination did not reveal objective findings of CRPS as enumerated in the *Guidelines*. She specifically noted that Claimant did not exhibit

temperature changes, coloring, hair growth, muscular atrophy, edema, allodynia or hyperalgesia. Because of the lack of objective findings, Dr. D'Angelo could not diagnose Claimant with CRPS and recommended additional objective thermography and QSART testing. Dr. D'Angelo determined that Claimant was not an appropriate candidate for a spinal cord stimulator trial because she did not exhibit symptoms of active CRPS. Finally, she recommended an independent psychological evaluation with comprehensive psychometric testing to "determine the presence of a psychological condition complicating the patient's healing from her ankle injury."

15. Claimant subsequently visited Dr. Barolat for consideration of a spinal cord stimulator trial. On September 24, 2018 Dr. Barolat issued a report addressing Dr. D'Angelo's August 31, 2018 independent medical examination. He disagreed with Dr. D'Angelo's determination that Claimant did not suffer from CRPS. Dr. Barolat specifically noted Claimant's positive instrument evaluation or diagnostic testing and his clinical evaluation. He thus concluded that Claimant "is suffering from a chronic, severe, by now most likely permanent neuropathic pain condition with the characteristics of CRPS."

16. On November 27, 2018 Respondents filed a Final Admission of Liability (FAL). Respondents authorized additional medical treatment as recommended by Dr. Stieg.

17. On March 21, 2019 Claimant visited Dr. Barolat for an examination. Dr. Barolat recorded that Claimant's symptoms have remained unchanged over the previous four years. However, he noted that Claimant's symptoms may have become more severe and "extend further into the foot and ankle." Dr. Barolat remarked that Claimant's left foot exhibited discoloration, temperature changes and allodynia. He thus reiterated that Claimant suffers from a "chronic, permanent neuropathic pain condition with the characteristics of CRPS." Moreover, "instrumental evaluation has also confirmed the diagnosis." Dr. Barolat emphasized that Claimant's neuropathic pain condition "could be an indication for the trial of a spinal cord stimulator." He summarized that Claimant has failed her previous treatment and the only remaining modality is a spinal cord stimulator trial.

18. On May 20, 2019 Dr. D'Angelo issued an addendum to her independent medical examination report. After reviewing additional medical records from Drs. Aschberger and Barolat regarding Claimant's CRPS diagnosis and spinal cord stimulator trial, Dr. D'Angelo emphasized the lack of objective findings supporting a CRPS diagnosis. She reiterated that Claimant should undergo repeat testing to confirm the presence of CRPS.

19. On August 22, 2019 the parties conducted the pre-hearing evidentiary deposition of Dr. Steig. Dr. Steig maintained that Claimant suffers from CRPS Type II as a result of her March 25, 2014 industrial injury. He explained that CRPS is a chronic condition characterized by unrelenting pain. Dr. Steig noted that CRPS changes over time and includes symptoms of coldness, swelling and discoloration in the affected limb. Although Dr. Steig explained that the criteria outlined in the *Guidelines* for diagnosing CRPS were overly restrictive, Claimant nonetheless satisfied the criteria.

20. Dr. Steig remarked that Claimant has not exhausted all pharmacological options to treat her CRPS. He specifically identified anticonvulsive drugs such as Lyrica, topical agents and potentially opioid medications. He also commented that a nerve conduction test and possible exploration and decompression of nerves might provide sufficient pain relief. Dr. Steig summarized that, if a pharmacological combination of drugs or nerve compression failed to provide adequate pain relief, a spinal cord stimulator trial would be warranted.

21. Claimant testified at the hearing in this matter. She explained that she has been suffering increased stabbing and burning pain in her left foot. Claimant noted discoloration and temperature changes of her left foot that wax and wane without a pattern. She commented that she has exhausted her pharmacological options because none of the medication combinations have relieved her symptoms "to a level where I feel like I can function normally without pain." Claimant also noted that she underwent a psychological evaluation with Dr. Cohen prior to the recommendation for a spinal cord stimulator trial. Furthermore, Claimant remarked that she had an EMG nerve conduction study in May 2019 as recommended by Dr. Steig. She explained that she wished to proceed with the spinal cord stimulator trial because it was the "only other option" available.

22. Dr. D'Angelo testified at the hearing in this matter. She maintained that Claimant did not exhibit any objective findings of CRPS. Dr. D'Angelo commented that 74% of CRPS patients go into remission and Claimant requires repeat diagnostic testing. She explained that, because Claimant has not undergone repeat testing to confirm the existence of active CRPS, a spinal cord stimulator trial is not reasonable or necessary. Dr. D'Angelo detailed that "I have examined the patient twice. I have reviewed examinations by other physicians. I have reviewed the literature. My concern is that we are going to treat this patient with an invasive procedure for a condition she may or may not have." She summarized that Claimant was not an appropriate candidate for a spinal cord stimulator trial because she did not exhibit symptoms of active CRPS.

23. Claimant has failed to prove that it is more probably true than not that a spinal cord stimulator trial is reasonable and necessary to relieve the effects of her March 25, 2014 industrial injury. Although the medical records reflect considerable debate about whether Claimant currently has CRPS, her diagnosis is not determinative in deciding whether a spinal cord stimulator trial is reasonable and necessary. Instead, the critical inquiry is whether a spinal cord stimulator trial would improve Claimant's function and decrease her pain. A review of the medical records and consideration of the *Guidelines* reflects that Claimant has failed to undergo a comprehensive psychological evaluation, demonstrate that she has exhausted less invasive treatment modalities or establish that a spinal cord stimulator trial would provide functional improvement.

24. Initially, the *Guidelines* specify that the candidate for a spinal cord stimulator trial must undergo a comprehensive psychological evaluation. The procedure is inappropriate if there are any psychological "red flags." The record reveals that Claimant visited psychologist Dr. Cohen for an evaluation. However, the record is devoid of evidence that Claimant underwent a comprehensive evaluation including a standardized

detailed personality inventory with validity scales, a pain inventory with validity measures and a clinical interview with complete review of the medical records. In fact, Dr. D'Angelo recommended an independent psychological evaluation with comprehensive psychometric testing to "determine the presence of a psychological condition complicating the patient's healing from her ankle injury." In the absence of a comprehensive psychological evaluation, a spinal cord stimulator trial is inappropriate.

25. Second, the record demonstrates that Claimant has not exhausted less invasive treatment modalities. Notably, Claimant testified that she has exhausted her pharmacological options because none of the medication combinations have relieved her symptoms "to a level where I feel like I can function normally without pain." However, Dr. Steig acknowledged that Claimant has not exhausted all pharmacological options to treat her CRPS. He specifically identified anticonvulsive drugs such as Lyrica, topical agents and potentially opioid medications. Moreover, Dr. D'Angelo commented that 74% of CRPS patients go into remission and Claimant requires repeat diagnostic testing. She noted the lack of objective findings to confirm a CRPS diagnosis. Dr. D'Angelo explained that, because Claimant has not undergone repeat testing to confirm the existence of active CRPS, a spinal cord stimulator trial is not reasonable or necessary.

26. Finally, Claimant has not demonstrated that a spinal cord stimulator trial would improve her function and decrease her pain. The *Guidelines* specifically mention that, before surgical intervention, "the patient and treating physician should identify functional goals and the likelihood of improving the ability to perform activities of daily living or work activities." In conjunction with the lack of a comprehensive psychological evaluation and the failure to exhaust less invasive treatment modalities, the lack of functional improvement goals reflects that a spinal cord stimulator trial is not reasonable and necessary to relieve the effects of her March 25, 2014 industrial injury. Accordingly, Claimant request for a spinal cord stimulator trial is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as

unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

5. It is appropriate for an ALJ to consider the *Guidelines* in determining whether a certain medical treatment is reasonable and necessary for a claimant's condition. *Deets v. Multimedia Audio Visual*, W.C. No. 4-327-591 (ICAO, Mar. 18, 2005); see *Eldi v. Montgomery Ward*, W.C. No. 3-757-021 (ICAO, Oct. 30, 1998) (noting that the *Guidelines* are a reasonable source for identifying the diagnostic criteria). The *Guidelines* are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). Nevertheless, the *Guidelines* expressly acknowledge that deviation is permissible.

6. The Guidelines provide a list of surgical indications for spinal cord stimulators. Spinal cord stimulators are appropriate for patients who exhibit the following:

> persistent functionally limiting radicular pain greater than axial pain who have failed conservative therapy including active and/or passive therapy, pre-stimulator trial psychiatric evaluation and treatment, medication management, and therapeutic injections.

W.C.R.P. 17 Exhibit 9(H)(1)(c). In specifically addressing CRPS, the *Guidelines* provide that spinal cord stimulators "may be most effective in patients with CRPS I or II who have not achieved relief with oral medications, rehabilitation therapy, or therapeutic nerve blocks, and in whom the pain has persisted for longer than 6 months." W.C.R.P. 17 Exhibit 9(H)(1)(a). Moreover, before surgical intervention, the patient and treating physician should identify functional goals and the likelihood of improving the ability to perform activities of daily living or work duties. W.C.R.P. 17 Exhibit 9(H).

7. Prior to a stimulator trial a candidate must undergo a "comprehensive psychiatric or psychological evaluation." The evaluation should include the following:

> a standardized detailed personality inventory with validity scales (e.g., MMPI-2, MMPI-2-RF, or PAI); pain inventory with validity measures (e.g., BHI 2, MBMD); clinical interview and complete review of the medical records. The psychologist or psychiatrist performing these evaluations should not be an employee of the physician performing the implantation. This evaluation must be completed, with favorable findings, before the screening trial is scheduled.

W.C.R.P. 17 Exhibit 9(H)((1)(c)(ii). Moreover, neurostimulation is inappropriate unless there are no psychiatric "red flags," the patient understands the risks and benefits of the procedure, the patient has demonstrated a history of adherence to prescribed treatments and all reasonable surgical and non-surgical treatment has been exhausted. W.C.R.P. 17 Exhibit 9(H)(1)(c)(ii).

8. The Guidelines provide that "[i]t is particularly important that patients meet all of the indications before a permanent neurostimulator is placed because several studies have shown that workers' compensation patients are less likely to gain significant relief than other patients." W.C.R.P. 17 Exhibit 9(H)(1)(a). A trial is considered successful if the patient experiences a 50% decrease in radicular or CRPS pain and "demonstrates objective functional gains or decreased utilization of pain medications." Functional improvement includes: "standing, walking, positional tolerance, upper extremity activities, increased social participation, or decreased medication use." W.C.R.P. 17 Exhibit 9(H)(1)(c)(iii).

9. As found, Claimant has failed to prove by a preponderance of the evidence that a spinal cord stimulator trial is reasonable and necessary to relieve the effects of her March 25, 2014 industrial injury. Although the medical records reflect considerable debate about whether Claimant currently has CRPS, her diagnosis is not determinative in deciding whether a spinal cord stimulator trial is reasonable and necessary. Instead, the critical inquiry is whether a spinal cord stimulator trial would improve Claimant's function and decrease her pain. A review of the medical records and consideration of the *Guidelines* reflects that Claimant has failed to undergo a comprehensive psychological evaluation, demonstrate that she has exhausted less invasive treatment modalities or establish that a spinal cord stimulator trial would provide functional improvement.

10. As found, initially, the *Guidelines* specify that the candidate for a spinal cord stimulator trial must undergo a comprehensive psychological evaluation. The procedure is inappropriate if there are any psychological "red flags." The record reveals that Claimant visited psychologist Dr. Cohen for an evaluation. However, the record is devoid of evidence that Claimant underwent a comprehensive evaluation including a standardized detailed personality inventory with validity scales, a pain inventory with validity measures and a clinical interview with complete review of the medical records. In fact, Dr. D'Angelo recommended an independent psychological evaluation with comprehensive psychometric testing to "determine the presence of a psychological

condition complicating the patient's healing from her ankle injury." In the absence of a comprehensive psychological evaluation, a spinal cord stimulator trial is inappropriate.

11. As found, second, the record demonstrates that Claimant has not exhausted less invasive treatment modalities. Notably, Claimant testified that she has exhausted her pharmacological options because none of the medication combinations have relieved her symptoms "to a level where I feel like I can function normally without pain." However, Dr. Steig acknowledged that Claimant has not exhausted all pharmacological options to treat her CRPS. He specifically identified anticonvulsive drugs such as Lyrica, topical agents and potentially opioid medications. Moreover, Dr. D'Angelo commented that 74% of CRPS patients go into remission and Claimant requires repeat diagnostic testing. She noted the lack of objective findings to confirm a CRPS diagnosis. Dr. D'Angelo explained that, because Claimant has not undergone repeat testing to confirm the existence of active CRPS, a spinal cord stimulator trial is not reasonable or necessary.

12. As found, finally, Claimant has not demonstrated that a spinal cord stimulator trial would improve her function and decrease her pain. The *Guidelines* specifically mention that, before surgical intervention, "the patient and treating physician should identify functional goals and the likelihood of improving the ability to perform activities of daily living or work activities." In conjunction with the lack of a comprehensive psychological evaluation and the failure to exhaust less invasive treatment modalities, the lack of functional improvement goals reflects that a spinal cord stimulator trial is not reasonable and necessary to relieve the effects of her March 25, 2014 industrial injury. Accordingly, Claimant request for a spinal cord stimulator trial is denied and dismissed.

ORDER

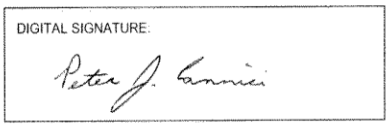
Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request for a spinal cord stimulator trial is denied and dismissed.

2. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: December 3, 2019.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

ISSUES

I. Whether Respondent overcame Dr. Linda Mitchell's DIME opinion on permanent impairment by clear and convincing evidence.

FINDINGS OF FACT

1. Claimant is a 57-year-old woman who is employed by Employer as a Clicklist Supervisor.

2. On May 25, 2018, Claimant sustained an admitted industrial injury when a pallet jack struck Claimant from behind and knocked her to the ground. Immediately following the work injury Claimant presented to authorized provider Concentra. Claimant reported falling and hitting her head with no loss of consciousness. She complained of headaches and vomiting. Claimant was sent to the emergency room at St. Anthony Hospital for a CT scan. At St. Anthony Hospital Claimant reported neck pain, headaches, nausea, vomiting and vision changes. CT scans of the head and neck were negative for acute injury. Claimant was diagnosed with a concussion without loss of consciousness and cervical myofascial strain.

3. Claimant returned to St. Anthony Hospital on May 28, 2018 with complaints of ongoing headaches. She denied neck pain.

4. On May 29, 2018, Claimant returned to Concentra reporting neck pain. Chelsea Rasis, PA-C diagnosed Claimant with a concussion, contusion of sacrum and neck sprain. Claimant attended follow-up appointments at Concentra on May 31, 2018, June 6, 2018, June 13, 2018, and June 29, 2018. At times Claimant reported improvement of her symptoms and worsening at other times. The medical records on these dates note both "neck range of motion limited secondly to discomfort" and full cervical range of motion. Claimant's course of treatment included medication and physical therapy.

5. On June 29, 2018, physical therapy records note Claimant's cervical range of motion as 30 degrees of flexion, 30 degrees of extension, 25 degrees of right side bending and 25 degrees of left side bending, and right/left rotation within functional limits. July 6, 2018 physical therapy records note Claimant's cervical range of motion as 30 degrees of extension, 50 degrees of right rotation and 60 degrees of left rotation. July 11, 2018 physical therapy records note cervical range of motion of 30 degrees extension, 48 degrees right rotation, and 52 degrees left rotation.

6. On July 27, 2018, a Concentra medical evaluation record notes cervical range of motion of 45 degrees flexion, 60 degrees right rotation, and 45 degrees left rotation.

7. Concentra records dated July 5, 2018, July 18, 2018, July 20, 2018, August 10, 2018, August 15, 2018, August 29, 2018, September 12, 2018 and September 27, 2018 note painful cervical range of motion with no specific measurements included. At the August 15, 2018 evaluation, Claimant reported experiencing increased headaches with new stresses at work and in her personal life.

8. Claimant underwent a neuropsychological consultation on September 5, 2018 with Kevin Reilly, Psy.D. Claimant reported her primary symptoms were headaches at the base of her skull and forgetfulness. Claimant reported some personal trauma and increased stress due to recent losses. Dr. Reilly opined that the evaluation was indicative of intact neurocognitive capacities. He noted that continuing cognitive symptoms related to a concussion were unlikely. His assessment included Somatic Symptom Disorder. Dr. Reilly concluded Claimant had made an "excellent recovery" from her concussion and that her ongoing headache symptoms could be due to recent psychosocial stressors that may be magnifying her pain experience. Behavioral medicine treatment was recommended.

9. At the request of Respondent, Claimant attended a neuropsychiatry Independent Medical Examination ("IME") with Hal Wortzel, M.D. on October 17, 2018. Claimant reported some ongoing "neck tension" and a constant ongoing dull headache that intensified when under stress. Claimant further reported that she had been appreciating decreased frequency and intensity of headaches until she started getting busy at work and encountered some personal losses. Dr. Wortzel opined Claimant sustained a concussion in the work-related accident, underwent the anticipated course of recovery typical for a mild traumatic brain injury, and stated it was "highly unlikely" that the concussion represented a significant contribution to her current neuropsychiatric status or functional abilities. Dr. Wortzel noted that a few months out from the work injury, Claimant experienced a "resurgence of symptoms." He further noted that documentation from August 15, 2018 described Claimant's worsening headaches in the setting of various psychosocial stressors. Dr. Wortzel stated that Claimant's history at the IME was generally consistent with the records and suggested increased symptoms in the context of psychosocial stressors, including a couple of significant losses. He opined Claimant was at maximum medical improvement ("MMI") without permanent neuropsychiatric impairment and did not require maintenance care.

10. On October 4, 2018, Claimant attended an IME with Mark Paz, M.D. at the request of Respondent. Claimant reported that her current symptoms included headaches and left-sided neck pain. On physical examination, Dr. Paz noted full active range of motion in three planes of the cervical spine "on gross inspection." Dr. Paz diagnosed Claimant with work-related concussion without loss of consciousness, left leg contusion, posttraumatic headache and cervical myofascial pain. He opined Claimant reached MMI as of the date of his IME and assigned 5% whole person impairment for post-concussive headache under Table 1 page 109 of the AMA Guides.

11. On return to Dr. Theodore Villavicencio at Concentra on November 1, 2016, Claimant reported minimal headaches and resolving cognitive symptoms. Examination revealed painful range of motion and tenderness in the cervical spine.

12. On November 26, 2018, Dr. Villavicencio placed Claimant at MMI with no permanent impairment, noting Claimant's headaches were resolving. On examination of the cervical spine, Dr. Villavicencio noted full and painless cervical range of motion. Specific cervical range of motion measurements were not included in his report.

13. On May 16, 2019, Linda Mitchell, M.D. performed a DIME evaluation of Claimant. Claimant reported 6/10 headaches occurring several times per week. On examination, Dr. Mitchell noted tenderness in the suboccipital regions bilaterally reproducing headache with no tenderness over the greater occipital nerves. Dr. Mitchell measured cervical range of motion using the two inclinometer method and noted the following measurements: 40 degrees flexion, 30 degrees extension, 20 degrees right lateral flexion 15 degrees left lateral flexion, 60 degrees right rotation and 70 degrees left rotation. Under the Section in her DIME Report titled "Pertinent Issues from Applicable Records," Dr. Mitchell lists the dates of each medical record she reviewed along with notes regarding each record. Per the list, Dr. Mitchell reviewed, *inter alia*, Concentra and St. Anthony Hospital records, physical therapy records, and the reports of Drs. Reilly, Wortzel, and Paz. Regarding the November 26, 2018 evaluation at which Dr. Villavicencio placed Claimant at MMI, Dr. Mitchell specifically noted Dr. Villavicencio found full cervical range of motion.

14. Dr. Mitchell diagnoses Claimant with a mild traumatic brain injury, cervical strain, headaches of unclear etiology and psychological factors affecting a general medical condition. She agreed with Dr. Villavicencio that Claimant reached MMI as of November 26, 2018. Dr. Mitchell assigned 16% whole person impairment under the AMA Guides, consisting of 4% whole person impairment for cervical strain under Table 53(II)(B) and 12% whole person impairment for the loss of cervical range of motion. She specifically stated she found no other ratable conditions. In explaining her impairment rating, Dr. Mitchell stated,

> [Claimant's] only complaint at this time is of throbbing, suboccipital headaches. She has a history of poorly controlled hypertension, which leads me to believe the headaches may be due to her high blood pressure, at least in part. She also has documented cervical tightness and tenderness, and so I have given her an impairment rating of the cervical spine.

15. At the request of Respondent, Dr. McCranie performed an IME on September 3, 2019. Dr. McCranie performed a medical records review and physically examined Claimant. Claimant reported headaches in the occipital area along with neck pain at the base of her head. Claimant reported that her headaches and neck pain were improved by November of 2018, but increased again in December 2018 or January 2019, which Claimant associated with increased stress. A physical examination was positive for

tenderness in the bilateral suboccipital musculature, left cervical paraspinal and left upper trapezius muscle. Cervical range of motion was 60 degrees of flexion, 60 degrees of extension, 45 degrees of right and left lateral flexion, and 80 degrees of left and right rotation. Dr. McCranie's impression was history of concussion without loss of consciousness, and headaches, tension type with associated cervical strain.

16. Dr. McCranie agreed with Dr. Mitchell that Claimant reached MMI as of November 26, 2018, but disagreed with Dr. Mitchell's assessment of permanent impairment. Dr. McCranie felt Claimant should be not rated for both headaches and neck pain as the two symptoms were linked with continuing symptomatology in the same location. Accordingly, Dr. McCranie opined that any examiner would need to choose to rate either the cervical spine or the headaches. She noted Dr. Paz assigned an impairment for Claimant's headaches, which she agreed with as Claimant's headaches were the prominent focus of her treatment. Notwithstanding the foregoing, Dr. McCranie did not feel it was error, in and of itself, to rate the cervical spine. However, she opined that Dr. Mitchell erred in not taking into consideration the previous normal range of motion measurements as outlined by both Dr. Paz and Dr. Villavicencio. Dr. McCranie noted that Claimant reported increased neck stiffness around January 2019 related to personal stressors. Accordingly, she opined that Dr. Mitchell's range of motion findings were erroneous as they were inconsistent with the medical records and unrelated to the work injury. Dr. McCranie noted that Claimant's cervical range of motion at the time of her IME was near normal with only mild decreased cervical extension. She opined that, if she were to assign permanent impairment for the cervical spine, Claimant would receive 4% under Table 53 for spinal disorders and 1% for loss of range of motion, for a total 5% whole person impairment. Accordingly, Dr. McCranie opined that Claimant's whole person impairment is 5% whether she was rated for the headaches or for the cervical spine.

17. Dr. McCranie testified by pre-hearing deposition on October 9, 2019 as a Level II accredited expert in physical medicine and rehabilitation. Dr. McCranie testified consistent with her IME report. Dr. McCranie explained that Claimant sustained a soft-tissue cervical strain as a result of the work injury, which would typically heal within the first three months with continued healing in three to six months. She opined that the medical records show Claimant's cervical strain was healing over time, referencing the range of motion findings in the physical therapy records and findings of full range of motion by Dr. Paz in October 2018 and Dr. Villavicencio in November 2018 when placed at MMI. Dr. McCranie testified that, after being placed at MMI, Claimant reported increased symptoms related to increased stress. However, she testified that this type of pain could be caused by a variety of events other than a traumatic injury, such as poor positioning, muscle tension from anxiety or stress, or body habitus.

18. With regard to Dr. Mitchell's impairment rating, Dr. McCranie testified she felt it was appropriate to do an impairment rating for either the head or neck, but not both. Dr. McCranie testified that if a rating were assigned for the cervical spine, it was important to consider how the range of motion progressed over the course of Claimant's treatment, as a worsening of Claimant's condition or worsening of range of motion

would not be attributable to the work injury. Dr. McCranie opined that Dr. Mitchell erred by failing to compare her range of motion measurements to previous range of motion from other providers. Dr. McCranie testified that Dr. Mitchell did not err in using Table 53(II)(B). She further testified that Dr. Mitchell's measurements were not inconsistent or invalid, but they were significantly different from the measurements of other evaluators. Specifically, Dr. McCranie opined that Dr. Mitchell's range of motion measurements were similar to Claimant's range of motion when she was initially injured. Which Dr. McCranie stated is inconsistent with the medical records which document improved range of motion leading up to being placed at MMI.

19. Dr. McCranie testified that if there is a significant discrepancy, the DIME examiner should comment on the comparison and provide a rationale for the discrepancy in findings. Dr. McCranie opined that Dr. Mitchell did not do this in her report and did not otherwise consider the cause of the decreased range of motion between MMI and the DIME evaluation, which Dr. McCranie testified was an error. Dr. McCranie further opined that the range of motion measurements documented by Dr. Mitchell did not make sense based on Claimant's history and documentation in the medical records. Dr. McCranie testified that Dr. Mitchell's range of motion measurements could have been the result of Claimant having a bad day or failing to give full effort. She testified that, as a DIME examiner, they are trained that if someone is having a bad day, those measurements should not be used. Dr. McCranie further testified that Claimant should have either been brought back on a different day or Dr. Mitchell could have adopted the findings of other providers.

20. Claimant credibly testified at hearing that she had no issues with her head or neck prior to the work injury. Claimant further testified that, when placed at MMI, she was still experiencing headaches and neck symptoms, which have continued. She stated the frequency of her headaches did increase during periods of stress, but that she could not definitively attribute stress as the cause of her headaches.

21. The ALJ finds Dr. Mitchell's DIME opinion more credible and persuasive than the opinions of Drs. McCranie, Villavicencio and Paz.

22. Respondent failed to prove it is highly probable Dr. Mitchell's DIME opinion on permanent impairment is incorrect.

23. Evidence and inferences contrary to these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of

proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Overcoming the DIME

The finding of a DIME physician concerning the claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995); *Lafont v. WellBridge D/B/A Colorado Athletic Club* W.C. No. 4-914-378-02 (ICAO, June 25, 2015).

As a matter of diagnosis the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003); *Sharpton v. Prospect Airport Services* W.C. No. 4-941-721-03 (ICAO, Nov. 29, 2016). Consequently, a DIME physician's finding that a causal relationship does or does

not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998); *Watier-Yerkman v. Da Vita, Inc.* W.C. No. 4-882-517-02 (ICAO Jan. 12, 2015); Compare *In re Yeutter*, 2019 COA 53 ¶ 21 (determining that a DIME physicians opinion carries presumptive weight only with respect to MMI and impairment). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000).

The questions of whether the DIME physician properly applied the *AMA Guides*, and ultimately whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000); *Paredes v. ABM Industries* W.C. No. 4-862-312-02 (ICAO, Apr. 14, 2014). A mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO, Mar. 22, 2000); *Licata v. Wholly Cannoli Café* W.C. No. 4-863-323-04 (ICAO, July 26, 2016).

As found, Respondent failed to overcome Dr. Mitchell's DIME opinion on permanent impairment by clear and convincing evidence. Respondent contends Dr. Mitchell erred by failing to consider or comment on the differences between her cervical range of motion measurements and those of prior providers and examiners. Dr. Mitchell's DIME report indicates she conducted an extensive review of the medical records and was aware of the cervical range of motion findings noted throughout Claimant's course of treatment and when placed at MMI. Dr. Mitchell specifically explained that she assessed permanent impairment for Claimant's cervical condition because of the documented cervical tightness and tenderness. Dr. McCranie testified there was no error in using Table 53(II)(B) to rate a cervical condition and acknowledged Dr. Mitchell's range of motion measurements met the validity criteria. There is no indication Dr. Mitchell's measurements were invalid such that she should have required Claimant to return for additional measurements or chosen to use the prior measurements of another examiner. The ALJ is not persuaded that, based on the totality of the evidence, a failure in these specific circumstances to further elucidate on differences in range of motion measurements constitutes error rendering Dr. Mitchell's DIME opinion highly probably incorrect. To the extent Dr. McCranie and other examiners and providers assessed different impairment ratings, this represents a mere difference of opinion which does not rise to the level of clear and convincing evidence.

ORDER

1. Claimant failed to overcome Dr. Mitchell's DIME opinion by clear and convincing evidence. In accordance with Dr. Mitchell's assessment, Claimant's is assigned a 16% whole person impairment rating.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 4, 2019

Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether Respondents have established that Claimant's injury was caused by Claimant's willful failure to obey a reasonable safety rule and whether Respondents are therefore entitled to a fifty percent reduction in Claimant's temporary total disability benefits pursuant to § 8-42-112(1)(b), C.R.S.

FINDINGS OF FACT

1. Claimant is a 34-year old male and is employed by Employer in the position of Senior Scale.

2. Claimant was initially hired by Employer in October of 2018 for the position Drive Cattle Inside, working the second shift. This job was inside and entailed standing by the slaughter line where cattle are in a single file line. Claimant was required to prod the cattle to keep walking in the line if they froze or stopped. Claimant testified that he used rattle paddles frequently and shook the paddles to make noise to get the animals moving. Claimant did not work in an animal pen or outside in this role. *See* Exhibits 1, F

3. In January of 2019, Claimant was promoted/transferred to the position of Senior Scale, working the third shift. *See* Exhibits 1, F

4. Claimant's job duties in Senior Scale include weighing trucks in and out at Employer's facility. Claimant weighs trucks full of cattle when they arrived, gets information from the truck driver on gender/type, directs the driver to a specific chute to unload the cattle, and then weighs the trucks out on departure to figure out the weight of the cattle dropped off. Claimant testified that this position was a promotion and was a position mainly involving paperwork. Claimant testified that they receive approximately 1,000 cows per day and that he constantly moves trucks full of cattle in and out.

5. On July 15, 2019, Claimant was working his Senior Scale position. Claimant testified that a truck driver didn't wait for instructions and dumped his truckload of cows on top of other cows. Claimant testified that they were urgently called to un-mix the cows to avoid stopping slaughter production.

6. Claimant testified that he went outside to the pens to help. Claimant testified that initially he was helping open and shut gates as the cows were being un-mixed and that he was taking direction from a handler and from co-worker Jeremy K_____. Claimant testified that he was not aware whether any handling aids were available. Claimant testified that they had almost all the cattle un-mixed except for one last cow. Claimant testified that he was told to wave his hands and push the cow on the

head to get it to move and that he did so. The cow charged Claimant, knocked him to the ground, and Claimant sustained injuries.

7. Video of the incident was entered into evidence. The video initially showed three cows in one pen. Claimant is in the pen holding onto a gate, opening and closing the gate as he and two other workers try to sort the cattle. Two of the three cows moved into different pens and one cow was left. One co-worker attempted to wave at the remaining cow to get it to move and was unsuccessful. Claimant approached the cow head on, and Claimant pushed the cow on the head while pointing and waving to the pen they wanted the cow to go to. Claimant contacted the cow's head area approximately five times while waving and pointing. Claimant then turned his back and walked away from the cow. Claimant re-approached the cow within 10 seconds and while walking toward the cow head on, the cow lowered its head and charged Claimant, causing Claimant to fall and sustain injury. Any audio from inside the pen and/or between the workers is not on the video. *See* Exhibit H.

8. Saker M_____ was one of the two other workers in the pen with Claimant. Mr. M_____ filled out a witness statement. Mr. M_____ indicated that he was helping Claimant sort out cattle from pen 22 after a trucker unloaded cattle without permission causing two different lots to get mixed. Mr. M_____ stated that they got most of the cattle sorted out but struggled with one steer that would not go to the pen they wanted it to go. Mr. M_____ stated that Claimant walked up to the steer, slapped the animal on the head two or three times as he said "come on mother fucker come and get me" and that the steer did not move at all until Claimant turned his back on the animal. Mr. M_____ stated that the steer then rammed Claimant from behind and lifted Claimant about three feet off the ground bouncing him off a gate that Mr. M_____ was holding. *See* Exhibits 1, G.

9. Jeremy K_____ was the other worker in the pen with Claimant and he also filled out a witness statement. Mr. K_____ indicated that on July 15, 2019 while sorting cattle, he directed Claimant to contact a cow on and around the cow's head in order to get it to move from a pen. Mr. K_____ indicated there was no certification or courses to make someone qualified for the task of cattle sorting while the cattle are mixed in the pens. Mr. K_____ stated that he verbally directed Claimant to contact the cow in pen 22 when the cow was not moving where it should have and was not responding to handlers. Mr. K_____ stated that he was a humane handling certified union worker and gave Claimant direction to contact the cow and that Claimant was not a union worker but was instructed to perform a union worker task. Mr. K_____ stated that he instructed Claimant to use his open hand to contact the cow on its head and push it into pen 20 from pen 22. Mr. K_____ stated that Claimant was a scale operator and is not a cattle pusher or cattle pen worker and that Claimant was not certified in cattle sorting. *See* Exhibit 2.

10. On July 15, 2019, Claimant filled out a Report of Employee Incident form indicating that he had been run over by a cow in pen 22 while sorting cattle that a driver had mixed. Claimant indicated pain in his right leg at a severity of 9/10. An initial nurse note taken provides a statement from Claimant that cattle had been dropped into the

wrong pen and that the cow involved was particularly aggressive and that other coworkers had been unable to move the cow successfully when he attempted to guide the cattle to the correct area and the cow charged. Claimant was referred by Employer's occupational health nurse to UC Health Emergency and Surgery. *See* Exhibit A.

11. On July 15, 2019 at UC Health Emergency Department, Claimant underwent x-rays. The clinical impression was closed fracture of the right ankle and closed fracture of the proximal end of the right fibula. Claimant was provided pain medication, a splint, crutches, and was recommended to follow up with orthopedics on an outpatient basis. *See* Exhibits B, C.

12. On July 16, 2019, Cathy Smith, M.D. evaluated Claimant. Claimant reported a breakdown in the sorting process and that cattle were mixed together at work. Claimant reported that he had to physically get into a corral to sort cattle and that during the process he was charged by a steer, lifted off his feet, and thrown to the ground. Claimant reported that his right leg was then stepped on by the steer. Dr. Smith recommended continued ice, elevation, crutches, splint usage, and medications. Dr. Smith recommended immediate orthopedic evaluation to discuss possible surgical intervention. *See* Exhibit D.

13. On July 18, 2019, Claimant underwent an open reduction and internal fixation of the right bimalleolar ankle fracture with closed reduction and fixation of syndesmotic ligament rupture. The surgery was performed by Robert Baer, M.D. *See* Exhibit D.

14. Respondents admitted liability including payment of temporary total disability benefits.

15. On August 21, 2019, Respondents filed a Petition to Modify, Terminate, or Suspend Compensation based upon an allegation that Claimant committed a violation of safety rule and that he inhumanely handled the cow thereby causing the cow to react. Respondents seek to reduce Claimant's temporary benefits by fifty percent.

16. On August 27, 2019, Claimant filed an objection to the Petition.

17. Employer has adopted reasonable safety rules for its employees and requires its employees to undergo certain training sessions, depending on the job they are hired for.

18. In October of 2018, when he was initially hired, Claimant received a copy of Employer's employee handbook. *See* Exhibits 1, F.

19. Claimant was also required to undergo various training sessions while employed. Claimant's transcript from training indicates he completed courses in stunning in pens, security knocker, and various other general and food safety related sessions. *See* Exhibits 1, F.

20. Exhibit I, entered into evidence, shows completed training sessions for a different employee who is also employed by Employer. This transcript shows completion of courses including stunning in pens, security knockers, proper handling and movement of cattle, animal handling, humane stunning practices for cattle, unloading and receiving cattle at processing, and various other general and food safety related sessions. *See* Exhibit I.

21. Employer has a standard operating procedure titled Humane Handling Violations- Disciplinary Action Guidance. The procedure was in the category of animal handling with the purpose to ensure that disciplinary action for violation of animal handling was implemented fairly, consistently, and appropriate for the violation. Employer's policy indicates that animals are to be treated humanely and that for any disciplinary action to be taken against an employee an investigation must be completed within 48 hours of the incident and must conclude that a violation of animal handling rules or procedures occurred and that the employee received appropriate training prior to the incident in question. The policy continues to state that the investigation must conclude that the employee committing the violation was aware of should have been aware that his actions were a violation of animal handling rules, procedures, or policies. Employer's policy indicates that for disciplinary action to be taken due to a violation of animal handling policies, the employee must have been trained and that all violations will result in disciplinary action up to and including termination. An egregious violation includes kicking, beating, or hitting an animal and the disciplinary action for an egregious action is listed as termination. *See* Exhibits 1, 5, F.

22. The Humane Handling Violations-Disciplinary Action Guidance standard operating procedure also indicates that each employee shall receive training covering the requirements of humane handling during new hire orientation with refresher training conducted at least annually. Claimant testified credibly that he never received this disciplinary action guidance procedure and that he was not trained on humane handling. *See* Exhibits 1, 5, F.

23. Employer also had a handout titled handling aids with pictures of plastic bags, rattle paddles, and electric prods. The handout indicates that handling aids should never be applied to sensitive areas of an animal such as the head, udder, genitals, or anus. Claimant testified credibly that he did not receive this handout during his training. *See* Exhibits 1, 5, F.

24. A document titled Chapter 2, Recommended Animal Handling Guidelines was also presented by Employer at hearing. This document indicates correct positions for handlers to move livestock. Claimant testified credibly that he did not receive this document during his training. *See* Exhibits 1, 5, F.

25. Neil T_____, a human resources manager for Employer, testified at hearing. Mr. T_____ indicated that all employees who receive and initial that they have received an employee handbook are expected to read the handbook and know the contents and requirements. Mr. T_____ testified that everyone who is hired undergoes standard training and then, based on the position they are hired for, would

potentially undergo additional training that can include humane animal handling. Mr. T_____ testified that both jobs Claimant performed, Drive Cattle Inside and Senior Scale, required humane animal handling training.

26. Mr. T_____ testified that Employer uses computer based training where an employee will watch a video and then have to answer questions with their remote. Mr. T_____ testified that the handling aids handout was given during the initial training and that the recommended animal handling guidelines are also covered during initial training. Mr. T_____ testified that Claimant's stunner course and knocker course start with and cover humane handling. Mr. T_____ testified that Employer enforces policies and has previously terminated and demoted workers who have violated the rules. Mr. T_____ testified that Employer has a safety interest in the rules because animals can be irritated and dangerous as well as that they do not want the product from the animal to be downgraded or bruised due to improper handling.

27. Mr. T_____ agreed that Claimant's position as Senior Scale would not be routinely expected to handle cattle in a pen. Mr. T_____ also acknowledged that the course on proper handling and movement of cattle was not in Claimant's transcript, but testified that other classes Claimant took discuss handling at the beginning. Mr. T_____ could not confirm whether Claimant received a copy of the handout titled handling aids or the document titled Chapter 2, recommended animal handling guidelines. Mr. T_____ reviewed the video of the injury involving Claimant and testified that it appeared Claimant was in front of the cow and struck the cow at least two times before Claimant was run over by the cow.

28. Mr. K_____ testified at hearing. Mr. K_____ testified that both he and Claimant worked the same shift and that on the date of Claimant's injury one trucker mixed cattle when unloading. Mr. K_____ testified that the trucker unloaded cattle without notifying them, that the cattle were all mixed up, and that they received a radio call to urgently get the cattle un-mixed. Mr. K_____ testified that one cow would not move and that this was not a common situation. Mr. K_____ testified that he told Claimant to tap the cow on the head and to wave at it to get it moving. Mr. K_____ testified that he had no training on un-mixing cows and that they were just doing their best to get them un-mixed as quickly as they could. Mr. K_____ testified that typically he uses a plastic bag to help move animals but that on the day in question it was a priority to un-mix the cows quickly and that they didn't use any handling tools. Mr. K_____ testified that when training is going on for employees, other employees will often answer questions for people using their remotes when they have to the leave the room.

29. Claimant testified at hearing that he never took a course on the proper handling or movement of cattle. Claimant testified that he had no humane handling courses, no courses on un-mixing cattle, and that he did not know what stunner or knocker training even was until litigation in this case. Claimant testified that he has been asked to return to work since the injury and that he has been told he will be fine as far as his job and discipline. Claimant testified that all the animal handling positions with Employer are union positions and that he is not a union worker and is not supposed to be handling animals per union guidelines. Claimant agreed that how he tried to move the cow was a

bad decision in hindsight but testified that he was just doing what he was told and trusted his co-workers. Claimant testified that he pushed the cow on the head and waved his hands as he was instructed but did not strike or beat the cow.

30. Claimant's testimony is found credible and persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Safety Rule

Section 8-42-112(1)(b), C.R.S. authorizes a fifty percent reduction in compensation for an employee's "willful failure to obey any reasonable rule adopted by the employer for the safety of the employee." A safety rule does not have to be either

formally adopted or in writing to be effective. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office,* 907 P.2d 715, 719 (Colo. App. 1995). To establish that a violation of §8-42-112(1)(b), C.R.S. has been willful, a respondent must prove by a preponderance of the evidence that a claimant acted with "deliberate intent." *In re Alverado,* W.C. No. 4-559-275 (ICAO, Dec. 10, 2003). Willful conduct may be proven by circumstantial evidence including evidence of frequent warnings, the obviousness of the risk, and the extent of deliberation evidenced by claimant's conduct. *See In re Heien*; W.C. No. 5-059-799-01 (ICAO, Nov. 29, 2018).

Respondents need not establish that an employee had the safety rule in mind and decided to break it. In re Alverado, W.C. No. 4-559-275 (ICAO, Dec. 10, 2003). Rather, it is sufficient to show the employee knew the rule and deliberately performed the forbidden act. *Id.* However, willfulness will not be established if the conduct is the result of thoughtlessness or negligence. *In re Bauer*, W.C. No. 4-495-198 (ICAO, Oct. 20, 2003). "Willfulness" also does not encompass "the negligent deviation from safe conduct dictated by common sense." *In re Gutierrez*, W.C. No. 4-561-352 (ICAO, Apr. 29, 2004). Whether an employee has deliberately violated a safety rule is a question of fact to be determined by the ALJ. *Lori's Family Dining, Inc.*, 907 P.2d at 719.

Generally, an employee's violation of a rule to facilitate the accomplishment of the employer's business does not constitute willful misconduct. *Grose v. Rivera Electric*, W.C. No. 4-418-465 (ICAO, Aug. 25, 2000). However, an employee's violation of a rule to make the job easier and speed operations is not a "plausible purpose." *Id.*; *see* 2 *Larson's Workers' Compensation Law*, § 35.04.

Respondents have failed to establish, by a preponderance of the evidence, that they are entitled to take a 50% reduction in Claimant's compensation. Claimant did not willfully fail to obey a reasonable safety rule adopted by Employer. Claimant did not receive sufficient training nor is there a sufficient showing to establish that Claimant was aware of the rules including not touching an animal about the face/head and not approaching an animal head on. Claimant is credible that he was following the direction of a co-worker he trusted who advised him to push the animal on the head and wave at it to get it moving. Mr. K_____ confirmed that he advised Claimant to do so. Further, as shown by Exhibit I, there are additional training sessions specific to the proper handling and movement of cattle, animal handling, humane stunning practices for cattle, and unloading and receiving cattle at processing that Claimant has not completed. The evidence is insufficient to show, more likely than not, that Claimant was aware of the safety rule and deliberately performed forbidden acts.

The lack of discipline imposed by Employer also supports the conclusion that Claimant was unaware of the safety rules. As noted above, Employer has a standard operating procedure regarding discipline for humane handling violations. Employer's own policy requires an investigation be completed within 48 hours of the incident and that for discipline to be imposed, there must be a conclusion that the employee received appropriate training prior to the incident in question. The policy also states that, in order for discipline to be imposed, the investigation must conclude that the employee was aware of or should have been aware that his actions were a violation of animal handling

rules, procedures, or policies. Claimant has not faced any disciplinary action despite Respondents allegations of a safety violation and Employer's own policy indicating that all violations will result in disciplinary action.

The situation at Employer's facility on July 15, 2019 was unusual with mixing of cattle by an impatient truck driver. Claimant was urgently called to the pens where he does not regularly work to help sort the cattle. Claimant, being untrained in this type of process, followed directions of co-workers. Claimant was not aware of the safety rules in place for handling and moving cattle and did not willfully fail to obey the rules or act with deliberate intent. Therefore, a 50% reduction has not been established to be appropriate.

ORDER

It is therefore ordered that:

1. Respondents have failed to establish that Claimant's injury was caused by Claimant's willful failure to obey a reasonable safety rule. Respondents are not entitled to a fifty percent reduction in Claimant's temporary total disability benefits pursuant to § 8-42-112(1)(b), C.R.S.

2. Any issues not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, *see* section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 4, 2019 /s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge

ISSUES

- Whether the claimant has demonstrated, by a preponderance of the evidence, that he suffered an injury arising out of and in the course and scope of his employment with the employer on September 11, 2018.

- If the claimant proves a compensable injury, whether the claimant has demonstrated, by a preponderance of the evidence, that medical treatment he has received is reasonable and necessary to cure and relieve him from the effects of the work injury.

- If the claimant proves a compensable injury, whether the claimant has demonstrated, by a preponderance of the evidence, that he is entitled to temporary total disability (TTD) benefits.

FINDINGS OF FACT

1. The claimant is employed with the employer as a recycling truck driver. The claimant's job duties include driving to customer homes and picking up recycling. This involves lifting recycling bins and dumping them into the recycling containers on the truck. The claimant testified that he is paid $23.00 per hour and works 45 to 50 hours per week.

2. The claimant testified that on September 11, 2018, he was performing his normal job duties collecting recycling. While the claimant was dumping a customer's recycling bin onto the truck, that bin fell into the truck container. The claimant testified that it was necessary to climb up onto the truck to remove the bin. While doing so, the claimant's left leg became stuck in the truck container.

3. The claimant testified that he did not immediately feel pain. However, as he continued to work his shift, he experienced pain, swelling, and discoloration in his left knee. As a result, the claimant placed his weight on his right leg to complete his job duties.

4. The claimant testified that he notified his supervisor of the September 11, 2018 incident approximately four days later. The claimant also testified that paperwork was completed by Mr. A_____ regarding the incident.

5. Mr. A_____, Operations Manager with the employer, testified at hearing. Mr. A_____ testified that the claimant did not report a work injury to him. There were instances in which the claimant reported knee pain, but did not express a specific incident or injury. Mr. A_____ also testified that the claimant continues to be employed with the employer.

6. The claimant's primary care provider is Mountain Family Health Centers. Medical records entered into evidence show that the claimant reported back pain and joint pain on May 14, 2018 when he was seen at Mountain Family Health Centers by Mary Patterson, FNP.

7. Thereafter, on July 16, 2018, the claimant returned to Mountain Family Health Centers and reported to Claire Graff, PA-C that he had bilateral knee pain with a sudden onset four days prior. The claimant reported similar complaints on July 30, 2018, when he was seen by Corrine Johnson, PA-C. At that time, Ms. Johnson opined that the claimant had a "small meniscal tear" on his left knee and administered an injection to the claimant's left knee.

8. Following the September 11, 2018 incident, the claimant again sought treatment at Mountain Family Health Centers. On September 21, 2018, the claimant was seen at that practice by Dr. Sarah Rieves. At that time, the claimant reported that he had left knee pain for four months, with no history of trauma. The claimant also reported that he had increased swelling in his left knee during the prior three weeks. Dr. Rieves opined that the claimant's symptoms could be caused by osteoarthritis or gout. At that time, she made a referral for an orthopedic consultation. On September 21, 2018, the claimant did not mention the mechanism of injury that he described in his testimony at hearing.

9. On September 24, 2018, the claimant was seen by orthopedic surgeon Norman Harris. The claimant told Dr. Harris that he injured his left knee when he was climbing down from a truck, stepped in a hole, and twisted his knee. Dr. Harris noted that the claimant had chronic bilateral knee issues and opined it was due to arthritis in the medial compartment. Dr. Harris also opined that the claimant suffered a new and acute injury to his left knee. Dr. Harris ordered a magnetic resonance image (MRI) of the claimant's left knee.

10. On October 3, 2018, an MRI of the claimant's left knee showed tricompartmental osteoarthritis; Grade IV chondromalacia in the medial compartment; horizontal and radial tears of the medical meniscus; a Grade 3 sprain of the medial collateral ligament; and edema.

11. On October 8, 2018, the claimant returned to Dr. Harris. At that time, Dr. Harris recommended an arthroscopic meniscectomy of the claimant's left knee to address the meniscal tear.

12. On October 16, 2018, Dr. Peter Weingarten reviewed the request for left knee surgery. In his report, Dr. Weingarten opined that the claimant has advanced and significant arthritic changes in his left knee. Dr. Weingarten further opined that the claimant did not sustain a tear to his meniscus on September 11, 2018. Based upon the opinions of Dr. Weingarten, the respondents denied authorization for the left knee surgery.

13. The claimant chose to undergo the recommended left knee surgery as well as a right knee procedure. Specifically, on October 25, 2018, Dr. Harris performed bilateral knee arthroscopy with medial meniscectomy and chondroplasty. These procedures were paid for by the claimant and his personal health insurance. The claimant testified that he underwent the right knee procedure because of increased symptoms in that knee.

14. Following the October 25, 2018 surgeries, the claimant reported to Dr. Harris that he had improvement in his right knee. However, the claimant continued to experience left knee symptoms including pain and swelling. On December 12, 2018, Dr. Harris administered an intra-articular aspiration and steroid injection to the claimant's left knee.

15. Thereafter, on December 26, 2018, Dr. Harris recommended "a Visco supplement" to address the swelling in the claimant's left knee. On December 28, 2018, Dr. Harris administered a Monovisc injection into the claimant's left knee.

16. The claimant returned to Dr. Harris on March 13, 2019 and continued to complain of left knee symptoms. At that time, Dr. Harris recommended that the claimant undergo either a high tibial osteotomy or unicompartmental knee replacement.

17. At the request of the respondents, Dr. Kathy D'Angelo conducted a medical records review and opined regarding the causation of the claimant's left knee condition and symptoms. In her August 22, 2019 report, Dr. D'Angelo opined that the claimant did not sustain an injury at work on September 11, 2018. Dr. D'Angelo noted that the claimant has a history of generative changes to his knee and those changes are not causally related to an acute injury. Dr. D'Angelo specifically noted that the MRI of the claimant's left knee showed a chronic and degenerative tear. She also opined that it is not medically probable that a chronic tear, (which was symptomatic months prior to an alleged work incident), was causally related to the claimant's mechanism of injury. In addition, In addition, Dr. D'Angelo opined that the claimant did not suffer an aggravation of his preexisting left knee osteoarthritis.

18. The ALJ does not find the claimant's testimony to be credible or persuasive. The ALJ credits the medical records and the opinions of Drs. Weingarten and D'Angelo over the contrary opinions of Dr. Harris. The claimant has failed to demonstrate that it is more likely than not that he suffered an injury at work on September 11, 2018. The claimant has also failed to demonstrate that it is more likely than not that his preexisting left knee condition was aggravated or accelerated by an incident at work. The ALJ places weight on the July 30, 2018 medical record in which Ms. Johnson opined that the claimant had a meniscal tear at that time, approximately six weeks prior to September 11, 2018. The ALJ also places weight on the September 21, 2018 medical record in which the claimant made no reference to a work incident or injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2018).

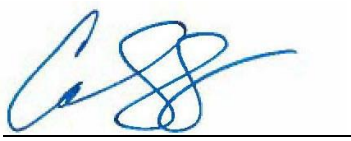
4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment." *See H & H Warehouse v. Vicory, supra.*

5. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that he suffered a compensable injury arising out of and in the course and scope of his employment with the employer. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that his preexisting left knee condition was aggravated or accelerated by an incident at work. As found, the medical records and the opinions of Drs. Weingarten and D'Angelo are credible and persuasive.

ORDER

It is therefore ordered that the claimant's claim for workers' compensation benefits related to a September 11, 2018 incident is denied and dismissed.

Dated this 9th day of December, 2019.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. **In addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

ISSUES

1. Whether Respondents have demonstrated by a preponderance of the evidence that Claimant's left hip injury was not caused by her November 13, 2018 work activities.

2. Whether Claimant has established by a preponderance of the evidence that the total left hip arthroplasty recommended by Authorized Treating Physician (ATP) John Schwappach, M.D. is reasonable, necessary and causally related to her November 13, 2018 work activities.

STIPULATIONS

The parties agreed to the following:

1. The issues of Temporary Total Disability (TTD) and Temporary Partial Disability (TPD) are not ripe for adjudication because Claimant has not lost any time from work as a result of her contested Workers' Compensation claim.

2. Claimant earned an Average Weekly Wage (AWW) of $599.44.

FINDINGS OF FACT

1. Employer is an assisted living facility for the elderly. Claimant works for Employer as a Housekeeper. Her job duties involve cleaning residents' rooms, maintaining common areas and bathrooms, restocking the housekeeping closet and removing trash.

2. On November 13, 2018 Claimant was replenishing her housekeeping closet with trash liner boxes. She visited a downstairs closet and loaded boxes onto a laundry cart. After loading the cart, Claimant went up to her floor and unloaded the boxes into her housekeeping closet. While unloading the third box, Claimant twisted and felt a sharp pain in her left hip.

3. Claimant's supervisor Business Office Coordinator Dana Gill testified that Claimant reported her injury on November 13, 2018. Ms. Gill specifically recounted that Claimant reported she was putting away supplies and stocking closets with toilet paper, paper towels, cleaning supplies and trashcan liners when she began to experience left hip pain.

4. On the day of the incident, Claimant received medical instructions over the telephone. Because the recommendations were unsuccessful, Ms. Gill arranged treatment at Concentra Medical Centers.

5. On November 27, 2018 Claimant visited Concentra for an examination. Claimant reported that, while lifting boxes at work on November 13, 2018, she "pulled something on her left leg from hip area down to knee, the pain is constant." An x-ray of the left hip area did not reveal any "significant radiologic findings." Valerie M. Skvarca, PA-C diagnosed Claimant with a left hip strain. She concluded that, in the absence of the November 13, 2018 work incident, it was "51% medically probable that the patient would not have this diagnosis and require treatment." Steve E. Danahey, M.D. determined that Claimant had not reached Maximum Medical Improvement (MMI) but released her to full duty employment.

6. On November 30, 2018 Claimant returned to Concentra for an evaluation. Claimant reported continuing left hip pain that was improving with physical therapy. A physical examination of the left hip revealed full range of motion, no tenderness and normal strength. PA-C Skvarca determined that Claimant had reached MMI and released her from medical care.

7. On December 7, 2018 Claimant again visited Concentra for an examination. Claimant reported mild left hip pain that was generally improving. PA-C Skvarca maintained that Claimant suffered a left hip strain. She reiterated that Claimant had reached MMI and could resume full duty employment.

8. On January 2, 2019 Claimant returned to Concentra for a re-evaluation of her left hip. Claimant reported that she was experiencing shooting pain from the "crease" of her left femur joint down to her knee. She specifically noted worsening symptoms in the left lateral hip, groin, buttock, thigh and knee areas. After performing a physical examination, PA-C Skvarca diagnosed Claimant with a left hip strain and prescribed medications. PA-C Skvarca also recommended an MRI of the left hip and spinal canal. She noted the claim had been re-opened and recommended a follow-up visit in 7-10 days.

9. On January 24, 2019 Claimant underwent a left hip MRI. The MRI revealed a "large region of avascular necrosis in the anterior, central, and superior femoral head measures approximately 34 mm AP by 26 mm transverse. Superior and anterior femoral head subchondral collapse measures up to 3 mm. There is extensive edema throughout the femoral head and neck."

10. On January 30, 2019 Claimant visited Orthopedic Surgeon John Schwappach, M.D. for an examination. Dr. Schwappach noted that Claimant developed the acute onset of left hip pain while at work "doing some twisting and turning." He commented that the left hip MRI revealed a "left femoral head avascular necrosis which appears to be acute or chronic on acute." The MRI also reflected "subchondral collapse of the superior and anterior femoral head," moderate hip effusion, diffuse full-thickness cartilage loss and "chondral thinning of the superior and anterior acetabulum." After conducting a physical examination, Dr. Schwappach recommended a total left hip arthroplasty. Because Claimant did not have hip pain prior to November 13, 2018 and the MRI demonstrated an acute injury, he concluded that Claimant's left hip arthroplasty should be covered under the Workers' Compensation system.

11. On February 4, 2019 Claimant returned to Dr. Schwappach for an evaluation. Dr. Schwappach recounted that Claimant was experiencing shooting pain from her left hip down to her knee that caused walking and weight-bearing difficulties. He remarked that Claimant had failed NSAIDS and physical therapy. Dr. Schwappach summarized that Claimant's avascular necrosis was causing disabling pain and functional disability.

12. On February 12, 2019 Claimant visited Linda Thomas, M.D. for an examination. After reviewing Claimant's medical records and performing a physical examination, Dr. Thomas noted that Claimant's left hip symptoms radiated into her left knee area. She diagnosed Claimant with avascular necrosis of the left hip bone and a left hip strain. Dr. Thomas remarked that Dr. Schwappach had requested authorization for a total left hip replacement.

13. On April 17, 2019 Claimant underwent an independent medical examination with William Ciccone, II, M.D. Dr. Ciccone recounted that in November 2018 Claimant was moving 13-pound boxes. While lifting the third box, Claimant twisted and suffered a burning sensation in her left hip. Dr. Ciccone specified that most of Claimant's pain was located over the anterior and posterior aspects of the hip and radiated into the groin. He reviewed Claimant medical records and conducted a physical examination.

14. Dr. Ciccone concluded that Claimant's left hip injury was not causally related to her November 13, 2018 work activities for Employer. He explained that the mechanism of injury of moving boxes was not associated with hip trauma. Dr. Ciccone detailed that the avascular necrosis observed on the left hip MRI constituted a degenerative, pre-existing condition. He remarked that avascular necrosis is often an idiopathic condition that causes weakening of the humeral head and subsequent collapse. Dr. Ciccone explained that, while Claimant has avascular necrosis with subchondral collapse, she also suffers from degenerative changes including full thickness cartilage loss in the hip. In patients with avascular necrosis the degenerative changes usually occur after the bone collapse has been present for a while. Dr. Ciccone commented that Claimant's level of degenerative disease "denotes a more chronic history of bone deformity." He thus determined that Claimant's work activities did not aggravate or accelerate any underlying disease. Nevertheless, Dr. Ciccone acknowledged that, if Claimant had no previous complaints of left hip pain, "it is possible that the chondral collapse occurred while performing normal work activities." He concluded that Dr. Schwappach's recommendation for a total left hip replacement was appropriate, but the need for the procedure was not causally related to the November 13, 2018 work incident.

15. On April 24, 2019 Respondents filed a General Admission of Liability (GAL). The GAL acknowledged that Claimant was entitled to receive medical benefits for her November 13, 2018 work injury.

16. On May 7, 2019 Claimant returned to PA-C Skvarca for an evaluation. PA-C Skvarca recounted that Claimant had been diagnosed with a left hip strain and acute on chronic avascular necrosis. She noted that, after Claimant underwent an independent medical examination with Dr. Ciccone, Insurer's adjustor informed her that Insurer would

only cover medical benefits for the left hip strain. Insurer's adjuster remarked that the left hip injury was not work-related and the claim should be closed. PA-C Skvarca thus discharged Claimant from care at MMI and released her to full duty employment.

17. On July 22, 2019 Claimant underwent an independent medical examination with John S. Hughes, M.D. Dr. Hughes recounted that on November 13, 2018 Claimant lifted boxes and twisted to place them down. While moving the boxes, Claimant had "sharp, sharp pain in her left lower abdomen and hip." After reviewing Claimant's medical records, Dr. Hughes determined that Claimant did not have any hip problems prior to November 13, 2018. However, Claimant did not sustain an avascular necrosis with collapse of the femoral head on the date of the incident because the condition would have been visible on the November 27, 2018 x-ray.

18. Dr. Hughes agreed with Dr. Ciccone that Claimant described a "relatively low-energy work-related incident that caused onset of her left hip avascular necrosis." However, based on Claimant's pain symptoms associated with the November 13, 2018 work incident, Dr. Hughes reasoned that the event "led to a progressive series of vascular events culminating in avascular necrosis of the left hip." Dr. Hughes thus concluded that Claimant had not reached MMI. He recommended a left hip total arthroplasty.

19. Claimant challenged the MMI determination and sought a Division Independent Medical Examination (DIME). On September 10, 2019 Claimant underwent a DIME with Timothy O. Hall, M.D. Dr. Hall explained that on November 13, 2018 Claimant was lifting boxes weighing about 8-13 pounds from her cart, rotating and putting them down on the floor. He noted that Claimant had not experienced any prior left his symptoms and there were no abnormalities on the November 27, 2018 x-ray. However, Dr. Hall remarked that the only reasonable explanation for Claimant's left hip condition on the MRI involved trauma. He reasoned that Claimant's hip condition developed as a result of her November 13, 2018 work activities. Dr. Hall thus concluded that Claimant's need for a left hip replacement was a consequence of her work injury.

20. Dr. Ciccone testified at the hearing in this matter. He maintained that Claimant's left hip avascular necrosis was not causally related to her November 13, 2018 work activities for Employer. He reasoned that Claimant's left hip MRI revealed the degenerative condition of cartilage loss along the acetabulum with chondral thinning in the socket of the hip. Dr. Ciccone clarified that the acute findings on the left hip MRI referred to the subchondral collapse while the chronic findings pertained to the pre-existing avascular necrosis. Dr. Ciccone testified that it was unlikely Claimant's disease process began on the day of the work event and the collapse occurred within about nine weeks. He further commented that, even in studies involving traumatic hip fractures where there was a clear and complete disruption of the blood supply, there were no changes for three to six months. Therefore, Dr. Ciccone concluded that it was highly unlikely Claimant's November 13, 2018 mechanism of injury caused her avascular necrosis.

21. Respondents have failed to demonstrate that it is more probably true than not that Claimant's left hip injury was not caused by the November 13, 2018 work incident.

Initially, while moving boxes as part of her housekeeping duties for Employer on November 13, 2018, Claimant suffered a sharp pain in her left hip area. PA-C Skvarca diagnosed Claimant with a left hip strain. She concluded that, in the absence of the November 13, 2018 work incident, it was "51% medically probable that the patient would not have this diagnosis and require treatment." A left hip MRI subsequently revealed a large region of avascular necrosis and a femoral head subchondral collapse. ATP Dr. Schwappach commented that Claimant developed the acute onset of left hip symptoms while at work "doing some twisting and turning." Similarly, Dr. Hughes recounted that, while Claimant was moving boxes on November 13, 2018 she suffered "sharp, sharp pain in her left lower abdomen and hip." After reviewing Claimant's medical records, Dr. Hughes determined that Claimant did not have any hip problems prior to November 13, 2018. Finally, Dr. Hall noted that Claimant had not experienced any prior left hip symptoms. He remarked that the only reasonable explanation for Claimant's left hip condition on the MRI involved trauma to the hip. Dr. Hall reasoned that Claimant's hip condition developed as a result of her November 13, 2018 work activities.

22. In contrast, Dr. Ciccone concluded that Claimant's left hip injury was not causally related to her November 13, 2018 work activities for Employer. He explained that the mechanism of injury of moving boxes was not associated with hip trauma. Dr. Ciccone detailed that the avascular necrosis evident on the left hip MRI constituted a degenerative, pre-existing condition. He commented that it was unlikely that Claimant's disease process began on the day of the work event and the collapse occurred within about nine weeks. However, Dr. Ciccone's analysis fails to adequately acknowledge that Claimant's November 13, 2018 work incident aggravated her pre-existing left hip condition and precipitated a cascade of events that caused avascular necrosis. As Dr. Hughes explained, Claimant's November 13, 2018 work incident, "led to a progressive series of vascular events culminating in avascular necrosis of the left hip." The persuasive opinions of multiple medical providers reflect that Claimant's November 13, 2018 work activities aggravated, accelerated or combined with her pre-existing left hip condition to produce a need for medical treatment. Accordingly, Respondents' request to withdraw their GAL is denied and dismissed.

23. Claimant has established that it is more probably true than not that the surgery recommended by ATP Dr. Schwappach, is reasonable, necessary and causally related to her November 13, 2018 industrial injury. Dr. Schwappach recommended a total left hip arthroplasty because Claimant did not suffer hip pain prior to November 13, 2018 and the MRI demonstrated an acute injury. He remarked that Claimant had failed NSAIDS and physical therapy. Dr. Schwappach summarized that Claimant's avascular necrosis was causing disabling pain and functional disability. He concluded that Claimant's left hip arthroplasty should be covered under the Workers' Compensation system. Moreover, Dr. Hughes reasoned that the November 13, 2018 event caused a series of vascular events resulting in avascular necrosis of the left hip. He concluded that Claimant has not reached MMI and recommended a left hip total arthroplasty. Finally, Dr. Ciccone acknowledged that, if Claimant had no previous complaints of left hip pain, "it is possible that the chondral collapse occurred while performing normal work activities." He noted that Dr. Schwappach's recommendation for a total left hip replacement was appropriate, but the need for the procedure was not causally related to the November 13,

2018 work incident. A review of the medical records and the opinions of multiple physicians reflect that a total left hip arthroplasty constitutes a reasonable and necessary procedure designed to treat Claimant's avascular necrosis. Furthermore, Claimant's November 13, 2018 work activities aggravated, accelerated or combined with her pre-existing left hip condition to produce a need for surgery. Accordingly, Claimant's request for a total left hip arthroplasty is granted.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4. For a claim to be compensable under the Act, a claimant has the burden of proving that she suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAO, Aug. 18, 2005).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAO, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAO, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAO, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. When the respondents attempt to modify an issue that previously has been determined by an admission, they bear the burden of proof for the modification. §8-43-201(1), C.R.S.; see also *Salisbury v. Prowers County School District*, W.C. No. 4-702-144 (ICAO, June 5, 2012); *Barker v. Poudre School District*, W.C. No. 4-750-735 (ICAO, July 8, 2011). Section 8-43-201(1), C.R.S., provides, in pertinent part, that "a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification." Specifically, respondents must prove by a preponderance of evidence that the claimant did not suffer a compensable injury as defined under Colorado law. §8-43-201(1), C.R.S.

8. As found, Respondents have failed to demonstrate by a preponderance of the evidence that Claimant's left hip injury was not caused by the November 13, 2018 work incident. Initially, while moving boxes as part of her housekeeping duties for Employer on November 13, 2018, Claimant suffered a sharp pain in her left hip area. PA-C Skvarca diagnosed Claimant with a left hip strain. She concluded that, in the absence of the November 13, 2018 work incident, it was "51% medically probable that the patient would not have this diagnosis and require treatment." A left hip MRI subsequently revealed a large region of avascular necrosis and a femoral head subchondral collapse. ATP Dr. Schwappach commented that Claimant developed the acute onset of left hip symptoms while at work "doing some twisting and turning." Similarly, Dr. Hughes recounted that, while Claimant was moving boxes on November 13, 2018 she suffered "sharp, sharp pain in her left lower abdomen and hip." After reviewing Claimant's medical records, Dr. Hughes determined that Claimant did not have any hip problems prior to November 13, 2018. Finally, Dr. Hall noted that Claimant had not experienced any prior left hip symptoms. He remarked that the only reasonable explanation for Claimant's left

hip condition on the MRI involved trauma to the hip. Dr. Hall reasoned that Claimant's hip condition developed as a result of her November 13, 2018 work activities.

9. As found, in contrast, Dr. Ciccone concluded that Claimant's left hip injury was not causally related to her November 13, 2018 work activities for Employer. He explained that the mechanism of injury of moving boxes was not associated with hip trauma. Dr. Ciccone detailed that the avascular necrosis evident on the left hip MRI constituted a degenerative, pre-existing condition. He commented that it was unlikely that Claimant's disease process began on the day of the work event and the collapse occurred within about nine weeks. However, Dr. Ciccone's analysis fails to adequately acknowledge that Claimant's November 13, 2018 work incident aggravated her pre-existing left hip condition and precipitated a cascade of events that caused avascular necrosis. As Dr. Hughes explained, Claimant's November 13, 2018 work incident, "led to a progressive series of vascular events culminating in avascular necrosis of the left hip." The persuasive opinions of multiple medical providers reflect that Claimant's November 13, 2018 work activities aggravated, accelerated or combined with her pre-existing left hip condition to produce a need for medical treatment. Accordingly, Respondents' request to withdraw their GAL is denied and dismissed.

Medical Benefits

10. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

11. As found, Claimant has established by a preponderance of the evidence that the surgery recommended by ATP Dr. Schwappach, is reasonable, necessary and causally related to her November 13, 2018 industrial injury. Dr. Schwappach recommended a total left hip arthroplasty because Claimant did not suffer hip pain prior to November 13, 2018 and the MRI demonstrated an acute injury. He remarked that Claimant had failed NSAIDS and physical therapy. Dr. Schwappach summarized that Claimant's avascular necrosis was causing disabling pain and functional disability. He concluded that Claimant's left hip arthroplasty should be covered under the Workers' Compensation system. Moreover, Dr. Hughes reasoned that the November 13, 2018 event caused a series of vascular events resulting in avascular necrosis of the left hip. He concluded that Claimant has not reached MMI and recommended a left hip total arthroplasty. Finally, Dr. Ciccone acknowledged that, if Claimant had no previous complaints of left hip pain, "it is possible that the chondral collapse occurred while performing normal work activities." He noted that Dr. Schwappach's recommendation for a total left hip replacement was appropriate, but the need for the procedure was not

causally related to the November 13, 2018 work incident. A review of the medical records and the opinions of multiple physicians reflect that a total left hip arthroplasty constitutes a reasonable and necessary procedure designed to treat Claimant's avascular necrosis. Furthermore, Claimant's November 13, 2018 work activities aggravated, accelerated or combined with her pre-existing left hip condition to produce a need for surgery. Accordingly, Claimant's request for a total left hip arthroplasty is granted.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents' request to withdraw their GAL acknowledging Claimant's November 13, 2018 industrial left hip injury is denied and dismissed.

2. Claimant's request for a total left hip arthroplasty is granted.

3. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: December 9, 2019.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Respondents proved by a preponderance of the evidence Claimant's indemnity benefits should be reduced by 50% for the willful violation of a safety rule.

FINDINGS OF FACT

1. Claimant worked for Respondents as a truck driver.

2. Claimant sustained an industrial injury on January 5, 2019. Claimant was on the back of a trailer assisting Kyle Wareham in loading sets of stairs onto the trailer. When Claimant attempted to grab a set of falling stairs, he was flung off of the trailer and fell approximately seven feet to the ground. Claimant was not wearing any fall protection gear. As a result of the fall, Claimant sustained injuries to multiple body parts, including a traumatic brain injury, fractured ribs and a punctured lung.

3. Respondents filed a General Admission of Liability (GAL) on February 13, 2019. Respondents took the position Claimant was in violation of a safety rule and reduced his benefits by 50%. Respondents allege Claimant violated Employer's safety rules prohibiting employees from being on the back of a trailer while the trailer is being loaded and requiring employees to wear fall protection gear at heights above four feet.

4. Nick Graczyk, Chief Financial Officer, testified on behalf of Respondents. Mr. Graczyk testified Employer follows Occupational Safety and Health Administration (OSHA) standards, which requires fall protection gear at heights above four feet. He testified Claimant received Employer-provided safety training including OSHA training and a test required by a third party company that runs a site where drivers pick up equipment. Mr. Graczyk stated that the purpose of the training is to ensure the safety of employees and equipment. Mr. Graczyk testified that Employer's policy prohibits employees from being on the back of a trailer while the trailer is being loaded. He stated the policy is not written, but is communicated to employees during training. Mr. Graczyk further testified that Employer enforces safety rules by administering disciplinary actions depending on the severity of the violation. Mr. Graczyk did not reference any specific instances of employees being disciplined for safety rule violations. Mr. Graczyk testified he is located out of state and relies on Mr. Selby to ensure the rules are communicated and enforced. He was not aware of any other employees sustaining injuries of this nature.

5. Lars Selby, Vice President of Operations and Safety, testified on behalf of Respondents. Mr. Selby testified Employer does not have a written policy regarding fall protection, but does follow OSHA and Mine Safety and Health Administration (MSHA) standards. Mr. Selby testified that, per OSHA standards, employees are required to wear fall protection when working at heights over four feet. He testified Claimant was present during Employer's training regarding fall protection. Mr. Selby further testified he

has personally told employees to not be on the back of a trailer while the trailer was being loaded. Mr. Selby stated employees who fail to follow Employer's safety policies could be subject to discipline depending on the severity of the infraction. Mr. Selby did not reference any specific instances of employees being disciplined for safety rule violations. Mr. Selby testified that drivers are on a staggered schedule so two drivers are not always at the same site at the same time, but there could be occasional overlap. As other workers are not always accompanying the drivers, Mr. Selby stated the Employer trusts the drivers to follow their training and comply with the safety rules. Mr. Selby denied ever telling workers to be on the back of a trailer while it was being loaded and denied that he had ever been on the back of a trailer while it was being loaded. Mr. Selby could not confirm he always wore fall protection when working at heights over four feet.

6. Frank Gabaline, Lead Supervisor, testified on behalf of Respondents Mr. Gabaline worked with Claimant on one occasion. Mr. Gabaline testified he personally told Claimant to not be on the back of a trailer while the trailer was being loaded and has given the same instruction to other employees. Mr. Gabaline denied that he has ever been on the back of a trailer while it was being loaded. He admitted he has not always worn fall protection when at heights over four feet. Mr. Gabaline testified Employer provides drivers fall protection harnesses in their Employer-provided trucks; however, he acknowledged no fall protection gear was in the truck provided to Claimant at the time of the work injury.

7. Claimant testified he was never instructed to not be on the back of a trailer while the trailer was being loaded. Claimant testified he has undergone OSHA 10 training as well as training with a prior employer regarding wearing a fall protection harness when working more than four feet off the ground. Claimant testified he was driving the same Employer-provided truck for six to seven months prior to the work injury and was not provided any fall protection gear by Employer.

8. Claimant further testified that on multiple occasions Mr. Selby and Mr. Gabaline specifically instructed him to get on the back of a trailer while the trailer was being loaded in order to ensure the loads were properly positioned and strapped down. Claimant testified Mr. Selby would call him derogatory names if he did not get on the back of the trailer while it was being loaded. Claimant testified if he failed to do as instructed by Employer he would not have been given more work. Claimant testified that he, Mr. Selby, and other drivers had been on the back of a trailer more than four feet above the ground without wearing fall protection. Claimant testified he personally observed Mr. Selby on the back of a trailer while it was being loaded. Claimant testified that, to his knowledge, Employer never disciplined him nor anyone else for failing to follow safety rules.

9. Kyle Wareham testified on behalf of Claimant. Mr. Wareham works for a third party company that contracts with Employer to use Employer's trucks to move rig mats and doghouse stairs to different locations. Mr. Wareham was working with Claimant at the time of the work injury loading sets of stairs onto the trailer. Mr. Wareham testified he is unaware of Employer's specific safety rules. He testified that on other occasions he observed Claimant on the back of a trailer while it was being loaded, and had also

observed Mr. Selby on the back of a trailer while it was being loaded. Mr. Wareham testified neither Claimant nor Mr. Selby were wearing fall protection gear on those occasions.

10. Claimant's wife testified on behalf of Claimant. She previously worked for Employer in a power plant and did not undergo the same safety training as Claimant. Claimant's wife occasionally accompanied Claimant on oil rig moves. She testified she personally observed Claimant, Mr. Selby, Scott Newman, and Jason Hodziewich on the back of trailers while the trailers were being loaded, as well as on trailers over four feet from the ground without fall protection. She testified she never saw any employees of Employer wearing fall protection. She further testified she witnessed Mr. Selby telling Claimant to make sure he got on the trailer while it was being loaded to ensure the load was properly positioned.

11. Jason Hodziewich testified on behalf of Claimant. Mr. Hodziewich performed work for Employer as an independent contractor and did not undergo any Employer training. Mr. Hodziewich testified he was not made aware of any safety rule prohibiting workers from being on the trailer while the trailer was being loaded or requiring fall protection at heights over four feet. Mr. Hodziewich testified Mr. Selby personally instructed him to get on the back of a trailer while it was being loaded. He further testified he has observed Claimant, Mr. Selby, Mr. Newman and Mr. Gabaline on the back of trailers while they were being loaded and not wearing fall protection.

12. Mr. Hodziewich's significant other, Charity Davis, testified on behalf of Claimant. Ms. Davis accompanied Mr. Hodziewich on multiple jobs and testified she personally observed Mr. Selby on the back of a trailer while it was being loaded and without wearing fall protection. Ms. Davis further testified she personally witnessed Mr. Selby telling Mr. Hodziewich to hurry up and get on the back of a trailer while it was being loaded.

13. The ALJ finds the testimony of Claimant, Claimant's wife, Mr. Wareham, Mr. Hodziewich and Ms. Davis more credible and persuasive than the testimony of Mr. Graczyk, Mr. Selby, and Mr. Gabaline.

14. The ALJ specifically finds that, at the time of the work injury, Respondents adopted a reasonable safety rule requiring fall protection at heights over four feet and the rule was communicated to Claimant. Employer also had a purported safety rule prohibiting being on the back of a trailer while the trailer was being loaded; however, this purported rule was not communicated to Claimant and Claimant was instructed to do the opposite. Employer did not enforce either rule, as multiple employees, including supervisors, participated in, encouraged, and acquiesced to violations of the purported rules.

15. Respondents failed to prove it is more likely than not Claimant willfully failed to obey a reasonable safety rule.

16. Evidence and inferences contrary to these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Safety Rule Violation

Section 8-42-112(1)(b), C.R.S. authorizes a fifty percent reduction in compensation for an employee's "willful failure to obey any reasonable rule adopted by the employer for the safety of the employee." A safety rule does not have to be either formally adopted or in writing to be effective. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office,* 907 P.2d 715, 719 (Colo. App. 1995). To establish that a violation of §8-42-112(1)(b), C.R.S. has been willful, a respondent must prove by a preponderance of the evidence that a claimant acted with "deliberate intent." *In re*

Alverado, W.C. No. 4-559-275 (ICAO, Dec. 10, 2003). Willful conduct may be proven by circumstantial evidence including evidence of frequent warnings, the obviousness of the risk, and the extent of deliberation evidenced by claimant's conduct. *See In re Heien*; W.C. No. 5-059-799-01 (ICAO, Nov. 29, 2018).

Respondents need not establish that an employee had the safety rule in mind and decided to break it. In re Alverado, W.C. No. 4-559-275 (ICAO, Dec. 10, 2003). Rather, it is sufficient to show the employee knew the rule and deliberately performed the forbidden act. *Id.* However, willfulness will not be established if the conduct is the result of thoughtlessness or negligence. *In re Bauer*, W.C. No. 4-495-198 (ICAO, Oct. 20, 2003). "Willfulness" also does not encompass "the negligent deviation from safe conduct dictated by common sense." *In re Gutierrez*, W.C. No. 4-561-352 (ICAO, Apr. 29, 2004). Whether an employee has deliberately violated a safety rule is a question of fact to be determined by the ALJ. *Lori's Family Dining, Inc.*, 907 P.2d at 719.

Generally, an employee's violation of a rule to facilitate the accomplishment of the employer's business does not constitute willful misconduct. *Grose v. Rivera Electric*, W.C. No. 4-418-465 (ICAO, Aug. 25, 2000). However, an employee's violation of a rule to make the job easier and speed operations is not a "plausible purpose." *Id.*; *see* 2 *Larson's Workers' Compensation Law*, § 35.04.

An employer's failure to enforce its safety rule may render the rule unavailable as a basis to reduce compensation/impose a reduction of benefits. *Lori's Family Dining, Inc.* 907 P.2d at 719 ("The most frequent ground for rejecting imposition of a penalty, whether it be for violation of a safety rule or willful misconduct, is the lack of enforcement of the rule or policy by an employer with knowledge of and acquiescence in its violation").

As found, Respondents failed to meet their burden to establish Claimant willfully failed to obey a reasonable, known safety rule. The ALJ is not persuaded Employer's purported rule prohibiting being on the back of a trailer while the trailer is being loaded was clearly communicated to Claimant and enforced by Employer. Claimant credibly testified he was never told about the rule and, in fact, was specifically instructed by supervisors to do the opposite. The ALJ is persuaded that, at the time of the work injury, Claimant was on the back of the trailer while it was being loaded to ensure the load was properly positioned, which was an effort to facilitate Employer's business. Claimant credibly testified he believed Employer would not give him more work if he failed to do as instructed. The credible and persuasive evidence establishes that on multiple occasions Claimant and others, including supervisors, were on the back of trailers while the trailers were being loaded. It cannot be found Claimant willfully violated a purported safety rule when he was specifically instructed by supervisors to do the opposite and when Claimant and others, including those supervisors, routinely did not comply with the purported rule.

The ALJ is persuaded Employer adopted a safety rule requiring wearing fall protection at heights over four feet and this rule was clearly communicated to Claimant. Claimant was not in compliance with the rule at the time of injury as he was working at a height over four feet and not wearing fall protection gear. However, the credible and persuasive evidence establishes Employer also did not enforce this rule and there was

no willful violation by Claimant. Mr. Gabaline testified Employer provides fall protection gear in its trucks used by drivers. It is unrefuted that, at the time of the work injury, Claimant's truck did not contain fall protection gear. There was no evidence offered indicating Employer had provided Claimant the required fall protection gear. Claimant cannot be said to have willfully violated a rule requiring wearing fall protection if Employer was responsible for providing the gear and failed to do so. Furthermore, Claimant credibly testified that on multiple occasions he and others, including supervisors, did not wear fall protection while working at heights over four feet. This was corroborated by the credible testimony of Mr. Wareham, Mr. Hodziewich, Claimant's wife and Ms. Davis. Additionally, Mr. Selby and Mr. Gabaline acknowledged that they did not always wear fall protection when working at heights over four feet.

The totality of the credible and persuasive evidence establishes violations of the purported safety rules were known and acquiesced by Employer. As the preponderant evidence does not establish Claimant willfully failed to obey Employer's safety rules, a 50% reduction of benefits under Section 8-42-112(1)(b), C.R.S. is not appropriate.

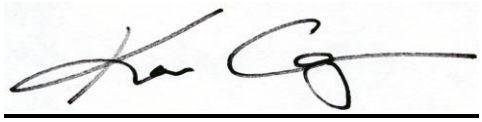
ORDER

1. Respondents failed to prove by a preponderance of the evidence Claimant willfully violated a reasonable safety rule adopted by Employer in violation of §8-42-112(1)(b) C.R.S. Claimant's benefits shall not be reduced by 50%.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 12, 2019



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Did Claimant prove he is entitled to an additional scheduled rating for left knee range of motion deficits?
- Did Claimant prove entitlement to a general award of medical benefits after MMI?
- Disfigurement.

FINDINGS OF FACT

1. Claimant works for Employer as a gas pipeline welder and wildland firefighter.

2. Claimant suffered an admitted injury to his left knee on September 5, 2018 while working on a welding project. He arose from a kneeling position, twisted his left knee, and felt a pop and pain.

3. Respondent referred Claimant to its designated occupational health clinic, where he saw Dr. Kyle Akers.

4. Claimant had an MRI of the left knee on October 5, 2018, which showed complex medial meniscal tears with a 3mm peripheral extrusion.

5. After reviewing the MRI report, Dr. Akers referred Claimant to Dr. David Walden for an orthopedic evaluation.

6. Claimant had two steroid injections that provided only temporary relief.

7. Dr. Walden performed left knee arthroscopic surgery on November 28, 2018. He wrote to Dr. Akers the next day and reported, "We identified a significant medial meniscus tear treated with a partial medial meniscectomy. He also had some pseudogout[1] crystals in the knee."

8. The surgery only partially relieved Claimant's symptoms. On January 3, 2019, Claimant told Dr. Walden his knee swelled badly after working a full eight-hour shift, so he reduced his schedule to four hours. Dr. Walden stated, "the patient was concerned about the swelling in his knee. This is likely exacerbated by his underlying pseudogout and osteoarthritis." He gave Claimant a steroid injection "to calm this process down." Dr. Walden also documented left knee range of motion of "0- 115°."

[1] In his deposition, Dr. Walden explained the precise nomenclature is "calcium pyrophosphate deposition."

9. On January 24, 2019, Claimant told his physical therapist he was "doing more at the gym" and had "minimal stiffness and swelling."

10. Claimant followed up with Dr. Walden on January 31, 2019. The physical examination showed full extension with improved flexion to 125 degrees. He was "doing well" overall but having difficulty kneeling. Dr. Walden noted, "The patient did have some residual effusion which may be exacerbated by the fact that he had some pseudogout crystals in the knee at the time of surgery. These were debrided, but may lead to persistent effusions." He gave Claimant another steroid injection.

11. That same day, Claimant's physical therapist documented left knee flexion of 120 degrees.

12. Dr. Akers released Claimant to work without restrictions on February 1, 2019.

13. On February 7, 2019, the physical therapist documented Claimant's knee range of motion was "0-125°."

14. Claimant saw Dr. Walden again on February 28, 2019. The previous injection had helped for several weeks, but his symptoms returned with increased activity, particularly cardio workouts and climbing ladders. His knee was typically stiff and swollen in the morning. He was still regularly using ice and OTC anti-inflammatories. Dr. Walden injected the knee with "longer-lasting medications," and opined, "hopefully this will resolve his symptoms. If not, other care could be discussed. As it stands now we're not having him schedule any specific follow-up but we would like it left so that he may have a couple of maintenance visits in the next three months as needed."

15. PA-C Paula Homberger evaluated Claimant on March 12, 2019. Claimant reported 5/10 pain with "popping & clicking at times." PA-C Homberger documented "full" knee range of motion with no visible swelling. Claimant was finished with therapy and had transitioned to independent exercises. PA-C Homberger reported, "we discussed that he may have some chronic low level pain as a result of his injury and this may be the normal course of healing." She believed Claimant was approaching MMI, but wanted him to see Dr. Walden again "to ensure that there is no further [treatment] needed or if repeat injection would be warranted."

16. Claimant saw PA-C Rachel Cerchia in Dr. Walden's office on March 14. His most bothersome symptom was "a deep aching sensation within the medial aspect of his knee." On examination, PA-C Cerchia noted, "there is a small effusion present but it does not limit his motion which is noted to be full." She opined, "it is too close to his prior injection to place another steroid injection. We did discuss the possibility of a Toradol and Marcaine injection but not a steroid injection at this time. He elected to wait until the first week of April when the full injection can be placed. He is treating this appropriately with Advil and ice."

17. Claimant saw Dr. Nicholas Kurz at Employer's occupational health clinic for an MMI evaluation on March 29, 2019. Dr. Akers had left the clinic, and Dr. Kurz took his

place. Dr. Kurz noted, "He had prior injections with Dr. Walden, but they seem to have worn off, providing no sustained benefit." Dr. Kurz determined Claimant was at MMI, with a 5% lower extremity rating for the partial meniscectomy. The report states he measured Claimant's knee "using AMA guideline techniques" and found normal range of motion (0-150 degrees).[2] Regarding future treatment, Dr. Kurz opined,

> The pt has an underlying degenerative knee condition w/ medial joint space narrowing and osteophytic changes noted on x-rays and Grade II scattered tricompartmental chondral fibrillation/thinning, also, pseudogout issues noted at time of surgery requiring crystal deposit debridement, that were/are not related to his work injury/mechanism . . . . The patient was advised and agrees to follow-up with his PCP, on his private insurance, for these chronic pre-existing conditions, as these are not work-related or a result of this claim.

18. Dr. Kurz concluded, "This patient has returned to his full duties, is not requiring any scheduled medications, so no Medical Maintenance is needed."

19. Claimant saw Dr. Walden again on April 9, 2019, and reported continued aching in the knee. Knee range of motion was 0-125 degrees with crepitation. Dr. Walden noted the previous injections "help[ed] with the deep aching sensation present in the medial aspect of his knee." Claimant was still using ice and OTC anti-inflammatories, and performing independent exercises "as tolerated." Dr. Walden stated,

> The patient has had some persistent irritation on the inside portion of his knee. Previously it has responded to steroid injections. One additional steroid injection is considered. . . . The patient has some known osteoarthritis, however with tearing and partial medial meniscectomy, there is some chondral overload on the inside portion of his knee.

20. Dr. Walden gave Claimant another steroid injection. No follow-up appointment was requested or scheduled.

21. Claimant went back to see Dr. Walden on September 5, 2019. He was still having pain, particularly with stairs and ladders. He could only jog for a minute or so before developing severe pain. Claimant related an example of country dancing three songs "which resulted in him being unable to do almost anything the following day." Examination of the knee showed a trace effusion, crepitus with range of motion from 0-125 degrees, and tenderness to palpation. Dr. Walden noted,

> Patient has questions about the origin of his pain and who will cover him for future injuries. His case has been closed and he is concerned that he may require ongoing treatment. I explained . . . this is not necessarily an obvious straightforward medical question but he does have likely components of pain both from missing some of his medial meniscus as well as the

[2] Dr. Kurz mistakenly referenced Claimant's right shoulder in the report, but the remainder of the report makes clear he was addressing Claimant's left knee.

> arthritis/pseudogout component. As to whether or not this would hurt without an underlying injury, no one would really know, however it would make sense that increasing stresses over the knee may irritate him more now that he is missing some of his medial meniscus. Treatment options for this can include over-the-counter anti-inflammatory medications, modalities such as pace, and injections (steroid, Vicso supplementation, or PRP). Future surgeries are not currently contemplated but likely would involve knee arthroplasty.

22. Dr. Walden testified via deposition on October 21, 2019. He testified he had removed the damaged portion of Claimant's meniscus because it was "badly torn" and not repairable. Dr. Walden testified the "pseudogout crystals" were probably calcium pyrophosphate depositions. He explained the condition can be symptomatic in some individuals and asymptomatic in others. He opined the surgery probably aggravated the previously asymptomatic crystals in Claimant's knee,

> [W]hen you go in surgically and you debride . . . basically you stir the pot a little bit, and some of those crystals float around in the knee and become irritable and create a reaction in the joint, which you hope eventually will just go back down to baseline, which in his case, I don't think he was having a lot of symptoms from those prior to his surgery. At least I wasn't aware of any symptoms that he was having, based on his history. . . . [That] made me think that those were probably just stirred up from the surgery little bit.

23. Dr. Walden opined the partial meniscectomy has rendered Claimant's knee more susceptible to symptomatic aggravation due to "chondral overload." He explained removing part of the meniscus subjects the joint and the articular cartilage to greater forces than if the meniscus were intact. The body may eventually adapt by strengthening the bone, but it is common for the joint to be "irritated" during or despite that adaptive process. He testified steroid injections are "not curative; they just kind of knock inflammation down a bit." Dr. Walden explained some patients recover fully from surgery but "they don't all go away happily ever after." Many patients require periodic aspirations or injections, and "it looks to me like he may be one of them." Dr. Walden opined Claimant was a candidate for viscosupplementation or PRP injections, and he is willing to provide those or other modalities.

24. Dr. John Hughes performed a record review for Respondent and issued a report dated August 26, 2019. He also testified at hearing to elaborate on his opinions. Dr. Hughes opined Claimant "had concurrent calcium pyrophosphate depositions and osteoarthritis but appears clearly to have sustained an acute injury with associated partial tearing of the medial meniscus." He agreed the surgery was reasonably necessary to treat the work injury, and accepted the MMI date assigned by Dr. Kurz. Dr. Hughes opined, "I do not find an indication at the present time for maintenance medical treatment," but in the next sentence said, "it does appear likely that he will sustain flare-ups and may at some point require a repeat corticosteroid injection into his left knee."

25. Dr. Hughes testified Claimant has calcium pyrophosphate deposition disease ("CPPD") in his left knee that became apparent during surgery. He testified CPPD usually results from a metabolic imbalance that causes precipitation of calcium phosphate crystals. It differs from gout, which involves uric acid, although both are "crystalline arthropathies." CPPD can cause inflammation, sometimes after trauma and sometimes spontaneously. People can have the condition with no symptoms. Dr. Hughes referred to Claimant's CPPD as "previously occult," meaning it was "hidden" or "unrealized until the person was evaluated." He opined the CPPD was not caused by the work accident.

26. Dr. Hughes testified maintenance care is indicated if a patient's condition is generally stable but they may have "flare-ups" and require prescriptive treatment such as injections or viscosupplementation. He opined additional steroid injections would be reasonable if Claimant has a flare-up, but he could not predict future flares with any degree of precision. He opined Claimant's daily dosage of ibuprofen "is approaching the degree to where we would recommend medical monitoring," including lab work to evaluate kidney function. Dr. Hughes opined PRP and viscosupplementation are "potentially" appropriate maintenance treatments, but he saw no current need for them. He opined it is "an open question" whether any future flares would be related to CPPD or the effects of the work injury. He admitted there is no record of any left knee problems before the work injury. Dr. Hughes agreed the work injury "aggravated and brought to light" the previously asymptomatic CPPD. Regarding impairment, he testified it is "probable" Dr. Kurz measured Claimant's range of motion based on the MMI report and accompanying worksheet.

27. Claimant credibly testified his knee hurts "just about daily." Claimant's job as a welder requires him to be on his knees frequently, and climb ladders and stairs. As a wildland firefighter, he expresses knee pain when walking down hills on uneven ground. As documented in Dr. Walden's notes, Claimant primarily manages his pain with ice and OTC ibuprofen. He typically begins his day by taking 200mg of Advil. Depending on his activities, he may take another 800mg at lunch. When he returns home in the evening, he frequently takes 800mg more Advil and ices his knee.

28. Claimant had no problems with his left knee before the work accident. His knee was asymptomatic, and he did not know he had CPPD.

29. Claimant proved a probable need for future medical treatment to relieve the effects of his industrial injury. The persuasive evidence shows Claimant's ongoing knee symptoms are causally related to his admitted work injury, and he is reasonably likely to require future treatment to manage his symptoms. At a minimum, Claimant's regular use of OTC supports an award of post-MMI medical benefits.

30. Claimant failed to prove he should receive an additional scheduled rating for knee range of motion deficits.

31. Claimant has three (3) ½-inch diameter discolored arthroscopic surgery scars around the left patella and slight but noticeable swelling around the patella. The ALJ finds Claimant shall be awarded $1,250 for disfigurement.

CONCLUSIONS OF LAW

A. Medical benefits after MMI

Respondents are liable for authorized medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101(1)(a); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Medical benefits may extend beyond MMI if a claimant requires treatment to relieve symptoms or prevent deterioration of their condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). If the claimant establishes the probability of a need for future treatment, he is entitled to a general award of medical benefits after MMI, subject to the respondents' right to dispute causation or reasonable necessity of any particular treatment. *Hanna v. Print Expediters, Inc.*, 77 P.3d 863 (Colo. App. 2003). A claimant need not be receiving treatment at the time of MMI or prove a particular course of treatment has been prescribed to obtain a general award of *Grover* medical benefits. *Miller v. Saint Thomas Moore Hospital*, W.C. No. 4-218-075 (September 1, 2000). Proof of a current or future need for "any" form of treatment will suffice for an award of post-MMI benefits. *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). The claimant must prove entitlement to post-MMI medical benefits by a preponderance of the evidence. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997).

A pre-existing condition does not preclude a claim for medical benefits if an industrial injury aggravated, accelerated, or combined with the pre-existing condition to produce the need for medical treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). The ultimate question is whether the need for treatment was the proximate result of an industrial aggravation or merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

The Director has adopted Medical Treatment Guidelines (MTGs) to advance the statutory mandate to assure quick and efficient delivery of medical benefits to injured workers at a reasonable cost to employers. WCRP 17, Exhibit 6 addresses lower extremity injuries. As the arbiter of disputes regarding medical treatment, the ALJ may consider the MTGs as an evidentiary tool, but is not bound by them when determining whether requested treatment is reasonably necessary or injury-related. Section 8-43-201(3); *Logiudice v. Siemans Westinghouse*, W.C. No. 4-665-873 (January 25, 2011). The lower extremity MTGs recognize steroid injections as "generally accepted, well-established procedures that can be performed as analgesic or anti-inflammatory procedures." The MTGs also support PRP injections in patients with functionally limiting knee pain.

As found, Claimant proved a probable need for future treatment to relieve the effects of his industrial injury. As a threshold matter, Claimant proved a sufficient causal nexus between his ongoing symptoms and the work accident. He had a serious injury to his meniscus that led to a partial meniscectomy. Although ongoing post-surgery symptoms were not inevitable, they are neither uncommon nor unexpected. The confounding factor here is the CPPD. Claimant had CPPD before the accident, but it was

asymptomatic and "occult." The ALJ considers it unlikely the condition would have spontaneously become a problem absent the knee trauma and resulting surgery. Dr. Walden persuasively opined the surgery probably "stirred up" the CPPD, and Dr. Hughes agreed the injury "aggravated and brought to light" the previously asymptomatic condition.

It is reasonably probable Claimant will require future treatment to relieve the effects of his injury. Claimant received a steroid injection in April 2019 after being put at MMI. The injection was not intended to cure Claimant's condition, but was merely provided for pain relief. As such, the April 9, 2019 injection was administered for the purposes outlined in *Grover* (*i.e*., to relieve the effects of the injury). Claimant went back to Dr. Walden in September 2019 and reported ongoing pain that substantially interferes with activities. Dr. Walden suggested several potential treatment options. He ordered no specific treatment, but that was probably because Claimant told him the claim was "closed" and he was merely seeking Dr. Walden's opinions and recommendations. Dr. Hughes agreed steroid injections would be reasonable to treat flare-ups, but considered the need for specific injections "speculative." The ALJ disagrees. Although the timing of any flare-ups may be speculative, the likelihood they will occur is not. Claimant has remained continuously symptomatic since the accident, with frequent aggravations due to routine activities. That pattern will probably continue for the foreseeable future.

Moreover, Claimant's regular use of OTC ibuprofen provides a legally sufficient basis for a general award of medical benefits after MMI. The ICAO has repeatedly held that OTC medications are a permissible form of *Grover* benefits. *E.g*., *Guillotte v. Pinnacle Glass Company*, W.C. No. 4-443-875 (November 20, 2001) ("the fact [a] medication is available without a prescription does not vitiate its compensability or nullify the award of *Grover*-style medical benefits."); *Mann v. Ridge Erection Company*, W.C. No. 4-225-122 (April 4, 1996) (no distinction between "over the counter" medications and prescribed medications for purposes of *Grover* benefits); *Ashton-Moore v. Nextel Communications, Inc*., W.C. No. 4-431-951 (September 12, 2002) (recommendation to use OTC anti-inflammatories "as necessary for pain" can support a *Grover* award).

B. Range of motion rating

Where, as here, the claimant suffers a purely scheduled impairment, he must prove entitlement to a rating by a preponderance of the evidence. *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691 (Colo. App. 2000); *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998).

As found, Claimant failed to prove he should receive an additional rating for range of motion. There is conflicting evidence regarding whether Claimant had ratable range of motion deficits at the time of MMI. Dr. Kurz stated he measured normal range of motion "using AMA guides techniques," but Claimant testified Dr. Kurz performed no measurements. Claimant's testimony appeared credible, but Dr. Kurz's report is also credible on its face. Dr. Hughes opined Dr. Kurz "probably" measured range of motion, as reflected in the narrative report and on the rating worksheet. Medical records in January and early February 2019 show Claimant's knee progressively improved, culminating with reports noting full range of motion by PA-C Homberger and PA-C

Cerchia on February 28, 2019 and March 14, 2019, respectively. Thus, the record contains reports from three different providers showing normal range of motion within a month of MMI. Dr. Walden subsequently documented 125 degrees of flexion on April 9, 2019, but that was after MMI during an appointment at which Claimant requested an injection for a flare-up. Claimant has the burden of proof in this matter, and given the contradictory evidence on this point, the ALJ does not believe he proved a range of motion rating to the level of "more probably true than not."

C. Disfigurement

Section 8-42-108(1) provides for additional compensation if a claimant is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view." As found, Claimant suffered visible disfigurement to his left knee. The ALJ concludes Claimant should be awarded $1,250 for disfigurement.

ORDER

It is therefore ordered that:

1. Respondent shall cover reasonably necessary medical treatment after MMI from authorized providers to relieve the effects of Claimant's injury or prevent deterioration of his condition.

2. Claimant's request for additional PPD benefits is denied and dismissed.

3. Respondent shall pay Claimant $1,250 for disfigurement. Respondent may take credit for any disfigurement benefits previously paid on account of Claimant's left knee injury.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 12, 2019

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that he suffered a compensable work injury to his lower back and legs on April 12, 2019?

II. If said injury is compensable, has Claimant shown, by a preponderance of the evidence, that he is entitled to a general award of medical benefits to treat his work injury?

III. Has Claimant shown, by a preponderance of the evidence, that he is entitled to temporary disability benefits?

IV. If Claimant is entitled to temporary disability benefits, have Respondents shown, by a preponderance of the evidence, that Claimant was responsible for his wage loss?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

Background

1. Claimant, Ruben Carrillo, was an employee for Seaboard Foods, where he had been employed as a sow farm manager since 2016. Claimant had been working in a related capacity at the predecessor corporation, Christianson Farms, for about eight years before Seaboard took over those operations.

2. Claimant's position involved maintaining livestock, overseeing pig production, and completing corresponding inventory paperwork. He was responsible for overseeing three farms for Seaboard: Farm 31, Farm 180, and Farm 799.

Injury of April 12, 2019

3. Claimant testified that on April 12, 2019, [the ALJ administratively notices that 4/12/2019 is a Friday] he was in a pen with 10-12 sows in order to read each sow's ear tag. Each sow weighs 500-600 pounds.

4. While Claimant was standing in the pen, two of the sows started to fight and one attempted to run away. The fleeing sow ran into Claimant from behind and knocked him to the ground. He did not see this collision coming, and he went straight down to his knees on the concrete floor. No other part of his body hit the ground besides his knees; he got back to his feet shortly thereafter.

5. After being knocked to the concrete floor, Claimant felt pain in both sides of his lower back as well as his left knee. Claimant then stopped work immediately, and called his supervisor, Andy Allum, right away. He also filed a written report on April 15, 2019, pursuant to company policy (Ex. P, pp. 95-96).

Symptoms and Treatment for April 12, 2019 Injury

6. Claimant first received medical treatment for his work injury on April 16, 2019, at Stevens County Medical Clinic. At that evaluation, Claimant testified that he advised Nurse Rapp that he was suffering from low back pain after being hit by a sow and had back pain that radiated from his low back and into his left leg. (Ex. A, p. 2.) Claimant advised Nurse Rapp that lying flat, prolonged sitting, raising his legs in a supine position and walking aggravated his symptoms. Claimant also denied any prior treatment to his low back. (*Id.*) Nurse Rapp assessed work restrictions to include no bending, climbing, squatting or other strenuous activity at work or home. *Id* at 4.

7. Claimant returned to work the following day, but did not provide Seaboard with any work restrictions. He testified he was able to perform his job duties as a Sow Farm Manager with those restrictions, and testified that he never saw Nurse Rapp again. Mr. Allum likewise testified that Claimant, as a Sow Farm Manager, would have been able to perform his job with those restrictions.

8. X-rays taken of Claimant's low back and pelvis area on April 16, 2019 revealed a normal lumbar spine with normal disc spaces and mild degenerative changes of the bilateral hips with mild marginal osteophyte formation. (Ex. A, pp. 6-8.).

9. Claimant was seen by Dr. Abbott for his low back injury on May 25, 2019. Dr. Abbott refused to treat the Claimant, indicating that Claimant had a regular physician in La Junta, and that Claimant had sustained a prior workers' compensation injury. He referred Claimant to his prior physician in La Junta. (Ex. D, p. 33.).

10. Claimant then saw Dr. Cameron on May 29, 2019. (Ex. B, pp. 24-27.) At that evaluation, Claimant reported that he was hit by a pig on April 12, 2019, and fell forward onto his knees. Claimant told Dr. Cameron that since that event he had low back pain, numbness and weakness down both his right and left legs with bilateral knee pain. Dr. Cameron opined that he needed to obtain Claimant's medical records from Kansas before proceeding any further. *Id* at 27.

11. Claimant followed up with Dr. Cameron on June 6, 2019, and advised him that he had started a new job and would be starting work there on that Tuesday.

12. Claimant then followed up with Dr. Ray for treatment of his 2019 low back injury. Dr. Ray initially saw Claimant on July 5, 2019, noting that Claimant was there for a medication refill. Dr. Ray noted no obvious issues in his examination and wanted to obtain Claimant's prior medical records before proceeding any further. (Ex. B, pp. 14-16).

13. On August 16, 2019, Dr. Ray recommended an MRI. On September 13, 2019, Dr. Ray saw Claimant following completion of that MRI scan. (Ex. B, pp. 11-12). By September 13, 2019, Dr. Ray had not only received the results of the MRI scan he ordered; he also received the MRI scan results from Claimant's 2015 injury. Dr. Ray indicated in his September 13, 2019 report that Claimant's recent MRI scan revealed degenerative changes in his lumbar spine without any acute findings.

14. Claimant advised Dr. Ray during this evaluation that he had continued to have pain following his last visit with his treating physician in 2015, but was told that his case was closed and it was 'too late' to reopen his 2015 claim. *Id* at 11. Claimant denied continuing leg symptoms at that evaluation. Dr. Ray opined Claimant's injury appeared to be a soft tissue injury with chronic myofascial type pain syndrome. The MRI did indicate some mild disc protrusion, but without nerve root encroachment. *Id*

15. Dr. Ray also noted:

> On exam the patient reports some mild central spinal tenderness over about the L2-L3 level. He reports paired vertebral tenderness at the lumbar level bilaterally, but worse on the left side. He can flex at the hips to about 60° before he starts experiences pain in the lumbar region of the back. He can do extension to about 15° before discomfort sets in. Side to side rotation of the hips causes a straining type discomfort in the lower back. (Ex. B, p. 11).

16. Claimant also reported to Dr. Ray that the meloxicam helps his back pain "somewhat", but that he is managing his [new] work duties since he does not need to do a lot of lifting. Because Dr. Ray was unclear if the MRI revealed a pain generator, he referred Claimant to Occupational Medicine for evaluation and potential treatment options. *Id.*

17. At hearing, Claimant testified that his lower back pain is typically about a 3 or 4 on a scale of 10. Claimant's lower back pain is intensified with activity like bending over. Claimant continues to experience pain in his left knee and it prevents activities like jogging or running he would do prior to the work injury.

Claimant does not believe he has been placed at maximum medical improvement yet by a physician.

Prior Injuries and Treatment

18. Claimant's history of low back pain began in 2002 when he alleged an injury to his low back while working with pigs for Outwest on October 31, 2002. (Ex. D, p. 47.) His back symptoms improved, and by November 20, 2002, he was placed at MMI for this injury.

19. Claimant sustained a subsequent injury to his low back while picking up dead pigs for Christianson Farms on April 23, 2015. (Ex. D, p. 41.) Claimant initially believed his low back pain was caused by performing yard work as reported to his Dr. Hudson, contrary to his testimony at the hearing. On April 30, 2015, Claimant was brought to the clinic by ambulance and treated with Dr. Hudson as his pain complaints were radiating into his right leg. Dr. Hudson diagnosed lumbar strain and myalgia and prescribed the Claimant mediations for pain. *Id* at 42.

20. On June 12, 2015, Claimant returned to Dr. Hudson in follow up seeking a release to full duty as he wanted to get back to full time work. Dr. Hudson recommended an MRI scan of Claimant's low back and discussed lumbar disc disease with him during this evaluation. (Ex. D, pp. 38-39.

21. On July 15, 2015, Claimant attempted to follow up with Dr. Hudson for his 2015 back injury; however, because he had his case closed he was denied any further treatment. Dr. Hudson diagnosed ruptured lumbar discs and intervertebral disco degeneration and advised Claimant to object to the Final Admission and see if he could pursue additional treatment. .

22. Claimant's 2015 low back injury caused pain that would radiate to the upper right side of his back and down the *right* leg to the back of the right knee. (Ex. 7, p. 64) (emphasis added).

23. The current work injury to Claimant's lower back produces bilateral lower back pain with pain that radiates down into Claimant's *left* lower extremity. (Ex. 6) (emphasis added).

Claimant's Termination from Employment by Seaboard

24. At hearing, Andy Allum testified that Claimant had continual problems with his job performance since 2017. On December 4, 2017 Mr. Allum perform a review of Claimant's job performance and noted performance in one or more critical areas did not meet expectations. (Ex. F, pp. 67-70.) Specifically, Mr.

Allum testified Claimant was struggling with following Seaboard's Standard Operating Procedures (SOPs).

25. Mr. Allum also testified that that there were multiple occasions where emergency supplies had to be sent to Farm 31, due to lack of planning by Claimant. At hearing, Mr. Allum was unable to supply the specific dates this occurred, but indicated he could check his records and recite those dates.

26. On November 6, 2018, Mr. Allum issued Claimant a written warning concerning seven critical areas of Claimant's job performance that needed improvement. (Ex. G, p. 71.) The first of those critical issues listed was Claimant's failure to make sure all SOPs are being followed correctly.

27. Mr. Allum testified that he met with Claimant on November 5, 2018 to explain why he was issuing this written warning, what Claimant needed to do to improve his work performance, the consequences of not meeting expectations, and that Claimant was to come by his office the following day to sign and receive the written warning.

28. After this November 6, 2018, written warning Claimant had received, Claimant was offered to participate in management meetings. Claimant testified he was unable to attend most of the management meetings because of work to be done at the farms he managed and the distance needed to travel to attend meetings in Kansas.

29. Mr. Allum further testified that after receiving this written warning, Claimant's job performance improved, although by December, 2018 Claimant was once again struggling to follow Seaboards SOPs. Under "Manager Comments", Mr. Allum wrote:

> Farm 31 have had a disaster year for Breeds, farrows, and Fall out, we have not made a good job of adapting to the pen system and need to continue to work on this going forward. Ruben has struggled at times to stick to the Seaboard SOPS and at times have switched back to some "old ways" he needs to make a better job this coming year following up and making sure that the SOP's are being followed at all times, he also needs to hold his employees accountable for their actions. (Ex. H, p. 73) [sic].

30. Despite this warning, Claimant received a substantial salary bonus, approximately $8,000.00, at the end of 2018.

31. On April 10, 2019, Claimant submitted his first quarterly parity inventory sheet to Mr. Allum tracking all of the live animals on the three farms he oversaw for Seaboard. (Ex. J, p. 77.) That sheet listed a total number of animals of 4105.

32. Mr. Allum testified that the daily inventory sheets Claimant had submitted to him prior to that quarterly report did not match the total number of animals Claimant reported on his parity sheet. As such, he elected to travel to Claimant's farms and conduct a total heard count in person.

33. On April 15, 2019 Mr. Allum conducted an investigation of Claimant's parity calculations and conducted a total heard count of Farms 31, 180 and 799. His results revealed that Claimant's farms were short 65 animals based on his inventory sheets. (Ex. J, p. 76). He met with the Claimant in person on that date and discussed his findings with Claimant as he was responsible for accurately reporting the livestock on the farms he managed. Claimant was not able to provide an explanation for the missing animals.

34. Mr. Allum testified that during his meeting with the Claimant on April 15, 2019 Claimant did not mention anything about having sustained a back injury at work. Mr. Allum also testified at hearing that Claimant's reported work injury had nothing to do with his termination from work.

35. On April 17, 2019 Mr. Allum testified that he met with the Claimant in person to discuss Claimant's termination. At that meeting, Mr. Allum, Claimant and Renee Guerrero, Seaboard's human resources representative, were present. Mr. Allum provided the Claimant the termination memo, and discussed with Claimant the problems with Claimant's job performance and reason for his termination. (Ex. L, p. 80). Claimant refused to sign this document.

36. A Seaboard "Personnel Action Form" prepared on 4/17/2019 indicated that the reason for termination was "Falsification of Information". Claimant did not sign this document, although it is unclear from the face of the document that he was invited to do so. (Ex. M, p. 81).

37. When shown this document at hearing, the following exchange took place:

> Q (By Ms. Mowry) Would you turn to ..Exhibit M, as in Mary, page 81. The bottom third of this section has a termination block. Do you see that?"
>
> A Yes, ma'am.

Q That's because you provided him [Andy Allum] false inventory reports during the year or a false parity sheet, one of the two, and that was inaccurate (inaudible).

A Yes, ma'am. (Hearing Transcript, p. 49).

38.Claimant requested a copy of his employment termination paperwork and Employer refused to provide it. (Ex. N, p. 82).

39.Claimant testified that following his termination he applied for unemployment benefits but was denied. He testified he thereafter was able to secure employment with Stope Farms, an agricultural company, working primarily as a driver. He testified he works between 40 and 50 hours per week earning $21.00 per hour and has never needed to take a day off work due to his back injury, despite his advisement to Nurse Rapp that prolonged sitting aggravates his symptoms and his testimony at hearing that his condition has continued to worsen since his date of injury.

40. Claimant testified that he has not requested any time off work from his present employer, because he is the primary wage earner for his family and needs the income. He further testified that this position requires driving or mostly seated activity.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

1. The purpose of the Workers' Compensation Act ("Act") of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. §8-40-102(1), C.R.S. However, it is the Claimant in a workers' compensation claim who carries the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.,* 104 P.3d 273, 275 (Colo. App. 2004). Furthermore, the facts in a workers' compensation case are not to be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. It is axiomatic that a workers' compensation case must be decided on its merits. *Id.*

2. The ALJ's factual findings in a workers' compensation case concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every

piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings in this matter as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility of witnesses, the ALJ should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); C.J.I, Civil 3:16 (2007). While there are some discrepancies between the testimony of Andy Allum and Claimant, the ALJ finds that both persons testified sincerely, from their respective points of view, to the best of their abilities.

Compensability, Generally

4. A Claimant is entitled to workers' compensation benefits when an injury arises out of and occurs in the course of the employee's employment. C.R.S. § 8-41-301(1)(b). "The 'course of employment' requirement is satisfied when it is shown the injury occurred within the time and place limits of the employment relation and during an activity that had some connection with the employee's job-related functions. An injury 'arises out of' employment when it has its origin in an employee's work-related functions and is sufficiently related thereto as to be considered part of the employee's service to the employer in connection with the contract of employment." *Wild West Radio v. Industrial Claim Appeals Office*, 905 P.2d 6, 8 (Colo. App. 1995), *citing Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991).

5. Additionally, a Claimant must prove by preponderance of evidence direct and proximate causal relationship between an injury and the need for medical treatment sought. C.R.S. § 8-43-301(b)-(c), *Faulkner*, 12 P.3d at 844; *see also Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Indus. Claim Appeals Office*, 989 P.2d 251, 252 (Colo. App. 1999).

6. Causation is the issue of fact to be determined by the ALJ based on an examination of the totality of the circumstances. *Lori's Family Dining, Inc. v. Indus. Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995). Such causality can even be inferred if the claimant presents evidence of circumstances indicating that the industrial injury necessitated medical treatment with reasonable probability. *Indus. Comm'n v. Riley*, 441 P.2d 3 (Colo. 1968).

7. The mere fact that a claimant suffers from a pre-existing condition does not disqualify a claim for compensation or medical benefits if the work-related activities aggravated, accelerated, or combined with the pre-existing condition to produce disability or a need for medical treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Pain is a typical symptom from the aggravation of a pre-existing condition, and the claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment-related activities and not the underlying pre-existing condition. *Merriman v. Industrial Commission*, 210 P.2d 448

(Colo. 1949). The Claimant must prove by a preponderance of the evidence that his symptoms were proximately caused by an industrial aggravation of a pre-existing condition rather than simply the natural progression of the condition. *Melendez v. Weld County School District #6*, W.C. No. 4-775-869 (ICAO, October 2, 2009).

8. Claimant was performing one of his usual job duties when he was knocked to the ground by a sow weighing more than 500 pounds. Claimant began to experience pain symptoms and reduced range of motion for both his knee and lower back following the fall onto the concrete floor. Claimant timely reported his injury and began seeking medical attention. Despite the lack of corroborating witnesses, the ALJ finds that this incident occurred as described by Claimant.

9. Claimant's current low back and radicular symptoms differ from those reported in 2015 for a low back injury, which showed pain going into his *right* leg. The radicular symptoms are in the *left* leg as a result of this work injury. This indicates that he suffered a new injury on April 12, 2019, rather than a worsening of a prior injury or condition, regardless of whether Claimant might have moved to reopen his 2015 case.

10. Respondents assert that to the extent Claimant suffered an injury on April 12, 2019, the injury was temporary. This argument does not determine whether an industrial injury is compensable under the Workers' Compensation Act or negate an injury that has been suffered. Even if an injury is deemed temporary by trained medical physicians, compensability is still established for the injury as long as the worker was in the course and scope of employment and the injury arose from the employment. Such is the case here, and Claimant was entitled to treatment for this injury.

11. Dr. Ray noted on September 13, 2019, that Claimant's lumbar MRI revealed a protrusion in the upper lumbar spine. It was unclear at that time (and remains unclear) whether the protrusion was a pain generator, and Claimant was to be referred out for evaluation and treatment recommendations if appropriate. Dr. Ray's physical examination revealed considerable evidence that Claimant had suffered an injury. This shows that Claimant suffered injury and was not yet at maximum medical improvement. There has not been any medical evidence presented opining that Claimant's work injury was temporary and fleeting. No such opinion has been offered by Dr. Ray, Claimant's treating physician in this case, or any retained expert. Respondents did not request Claimant undergo an independent medical examination as of September 13, 2019. Claimant has shown by a preponderance of the evidence that he was in the course and scope of his employment when his work injury to his back and legs occurred on April 12, 2019.

Medical Benefits

12. Once causation is established, respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. C.R.S. § 8-42-101(1)(a); *Colorado Comp. Ins. Auth. v. Nofio,* 886 P.2d 714 (Colo. 1994). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the

ALJ. *In re Parker,* W.C. No. 4-517-537 (May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (Nov. 13, 2000).

13. The fact that Claimant has "toughed it out" in order to maintain his current employment is not indicative that he may not have suffered a serious work injury. In this case, since only a *general award of medical benefits* is being sought, that is all the ALJ will order at this time. (Parenthetically, the ALJ notes that the treatment sought by Claimant to date appears to be reasonable, necessary, and related to his work injury, as well as the referral by Dr. Ray to Occupational Medicine to identify a pain generator).

Temporary Total / Partial Disability

14. To establish entitlement to TTD and TPD benefits the Claimant maintains the burden to proof by a preponderance of the evidence that his wage loss has some connection to his industrial injury. *PDM Molding v. Stanberg*, 898 P.2d 542 (Colo. 1995). Once Claimant establishes entitlement to temporary disability benefits, it becomes incumbent upon the Respondent to prove, by a preponderance of the evidence, that the temporarily disabled employee is responsible for his termination of employment, and if proven, the resulting wage loss of the injured worker shall not be attributable to the on-the-job injury. C.R.S. sec. 8-42-105 (4), sec. 8-42-103 (1)(g), *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004).

15. Although Claimant established that he sustained a compensable industrial injury on Friday, April 12, 2019, he did not receive medical treatment until Tuesday, April 16, 2019 wherein he was assessed temporary work restrictions. Regardless of who issued the temporary restrictions on April 16, 2019, Claimant testified that he was able to and in fact did return to his regular work duties on April 17, 2019, did not sustain a wage loss and did not need an accommodation. Thus, Claimant has not met his burden of proof in establishing entitlement to disability benefits from April 12, 2019 through April 17, 2019.

Termination of Temporary Disability / Responsible for Own Termination

16. Claimant will be held responsible for his separation of employment from the insured if he performed some volitional act, or exercised some control over the circumstances of the termination. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1994) (opinion after remand, 908 P.2d 1185 (Colo. App. 1995)). The determination of the fault issue is ordinarily one of fact for resolution by the ALJ. *Id.*

17. Claimant acknowledged at the hearing that it was his responsibility to accurately report his inventory of the animals on the farms he managed on a daily basis, and admitted that he did not do this. The testimony of Mr. Allum concerning his advisement to Claimant that he needed to follow Seaboard's standard operating procedures and that he failed to accurately report significant losses of animals he was accountable for on his farms is sufficient to warrant Claimant's termination. Further, it is noted that Claimant received a generous year-end bonus for his performance for 2018, well before Seaboard concluded that his continued employment was no longer tenable.

18. Claimant exercised some control over the circumstances of his termination. Claimant was required to provide daily, accurate inventory logs of all animals over which he had control on the three farms he managed to his supervisor, Mr. Allum. He was responsible for ensuring these daily logs were accurate. He clearly failed to do this. Under his management, he failed to provide accurate daily logs to Mr. Allum and reported a discrepancy of 65 animals in his parity report. After an investigation and a complete headcount of his farms was conducted on April 15, 2019, it was determined that he was responsible for failing to account for the loss of 65 animals from the farms he oversaw – a monetary loss estimated to be more than $20,000 to Seaboard. Claimant was not terminated because animals died or were otherwise lost or stolen; he was terminated because he failed to accurately and timely report these inventory losses when they occurred.

19. The ALJ makes additional findings and conclusions at this time, to wit: *There is insufficient evidence to conclude that Claimant engaged in any intentional misconduct.* Nor does the ALJ find that Claimant was a party to any theft, or engaged in an alleged "cover-up". *The ALJ rejects any notion that Claimant willfully "falsified" company records.* Claimant was responsible for his own termination for his failure to competently manage the farms he was responsible for, and to keep proper records. That is all.

20. Claimant's competence concerns were at issue for many months before he was formally terminated. *The ALJ declines to find that Claimant was terminated in retaliation for reporting a work injury;* the timing of his injury and the head count were purely coincidental. *Conversely, the ALJ explicitly rejects any notion that Claimant reported his 4/12/2019 injury in retaliation for being fired.* Claimant did not, sua sponte, bring up his work injury when he met with Mr. Allum on 4/15/2019, since they were there to discuss inventory counts, not a work injury. Therefore, the ALJ draws no adverse inferences from this non-event.

21. Nonetheless, Claimant was responsible for his termination of employment with Seaboard Corporation and as such, he is precluded from receipt of temporary disability benefits from April 17, 2019 and ongoing.

ORDER

It is therefore Ordered that:

1. Claimant suffered a compensable work injury on April 12, 2019.

2. Respondents shall pay for all medical expenses that are reasonable, necessary, and related to cure Claimant of his work injury.

3. Claimant's claim for Temporary Disability Benefits is denied and dismissed.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 13, 2019

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that she suffered a right knee injury during the course and scope of her employment with Employer on February 6, 2019.

2. If compensable, whether Claimant has established by a preponderance of the evidence that the total right knee arthroplasty recommended by Authorized Treating Physician (ATP) John S. Xenos, M.D. is reasonable, necessary, and causally related to her February 6, 2019 injury.

STIPULATIONS

The parties agreed to the following:

1. Because Claimant has not suffered a wage loss she is not entitled to receive any Temporary Total Disability (TTD) or Temporary Partial Disability (TPD) benefits.

2. Claimant earned an Average Weekly Wage (AWW) of $873.60.

FINDINGS OF FACT

1. Employer operates a retirement facility. Claimant is a 55-year old female who worked for Employer as Head Painter. Her job duties involved preparing, painting and detailing parts of Employer's facility.

2. Claimant underwent right knee surgeries in 2014 and 2018. The procedures involved meniscus repair.

3. On February 6, 2019 Claimant was walking from a carpeted to linoleum surface during the course and scope of her employment with Employer. Claimant explained that she slipped on water, fell to the floor and struck both knees. She remarked that one leg went behind her and the other leg moved out to the side. Co-workers helped Claimant into a chair. Employer referred her to Concentra Medical Centers for treatment.

4. Claimant visited Concentra for an examination. She reported that she slipped, fell to the floor and struck her knees. Physician's Assistant Jordan M. Maas diagnosed Claimant with a left knee contusion. She received an ACE wrap for compression and was released to full duty employment.

5. Claimant explained that her right knee condition failed to improve after her visit to Concentra. On February 28, 2019 Claimant thus sought treatment with John S. Xenos, M.D. at Colorado Orthopedics. Dr. Xenos had performed Claimant's 2018 right

knee meniscus repair. He diagnosed Claimant with an unspecified meniscus tear and a right knee MCL sprain.

6. On March 28, 2019 Claimant underwent a right knee MRI. The MRI revealed a prior partial medial meniscectomy, a horizontal tear to the posterior horn with early to moderate medial compartment chondromalacia, an MCL sprain and a subtle bone bruise.

7. On April 23, 2019 Claimant visited Orthopedic Specialist Nathan Faulkner, M.D. at Concentra for an examination. Dr. Faulkner recounted that Claimant was turning to walk into a different room at work on February 6, 2019 when she slipped and fell. She sustained a "valgus load to her right knee." Although right knee x-rays were negative, an MRI revealed "evidence of previous partial medial meniscectomy with likely new tear of the posterior horn of the body medial meniscus." After reviewing treatment options, Claimant elected to proceed with therapy and steroid injections.

8. On April 23, 2019 Claimant returned to Concentra and visited Thomas Corson, D.O. for an evaluation. Dr. Corson noted that Dr. Faulkner had mentioned a possible "new tear of the posterior horn medial meniscus, though she's also had prior surgical repair of the medial meniscus."

9. On May 7, 2019 Claimant returned to Concentra for an evaluation with Dr. Corson. Dr. Corson referred Claimant back to Dr. Xenos because Dr. Xenos had prior knowledge of Claimant's pre-existing meniscal damage and whether the new injury was amenable to surgery.

10. On May 16, 2019 Claimant returned to Dr. Xenos to discuss treatment options. Claimant explained that she was evaluated by both Dr. Xenos and his partner Ryan Carr, M.D. The providers noted that Claimant had undergone two prior right knee scopes without significant relief. They remarked that Claimant had some tearing in the medial meniscus and a repeat scope was unlikely to provide any relief. The providers determined that Claimant suffered a "work related injury which has caused a precipitation, aggravation, and acceleration of her condition." They discussed a total knee replacement with Claimant and she decided to proceed.

11. On May 28, 2019 Claimant returned to Dr. Corson at Concentra. He recommended visiting an orthopedist so there was no confusion in treatment options. Claimant elected to visit Dr. Xenos for continuing care. She chose to proceed with a total knee replacement instead of PRP injections.

12. On August 22, 2019 Claimant underwent an independent medical examination with Mark S. Failinger, M.D. Dr. Failinger authored a report dated October 15, 2019. He explained that Claimant's March 28, 2019 right knee MRI did not reveal any evidence of a new meniscus tear. He recounted that Claimant had previously undergone a right knee meniscectomy and there was little remaining evidence of meniscus material that could have been re-torn. Dr. Failinger detailed that he did not see evidence of a "major nor acute chondral loss and no significant change in the chondral surface, on the

MRI of 3/28/2019 when comparing that to the MRI of 6/21/2018." He thus determined that there was no objective evidence of pathology as a result of the February 6, 2019 work incident "to the articular cartilage, nor to the chondral surfaces, nor to any intraarticular structures." Dr. Failinger concluded that, based on the objective evidence of the right knee MRI's and x-rays, a total knee replacement was not reasonable, necessary or related to the February 6, 2019 industrial accident.

13. On September 12, 2019 Dr. Failinger issued an addendum report to his independent medical examination. He acknowledged that Claimant may have suffered an MCL sprain. He noted the MRI specified that "perhaps there was some mild lateral tibial condyle bruising with an MCL mild sprain. That would indicate a valgus force, which is consistent with [Claimant's] history notes that could cause some lateral compartment pathology." However, because Dr. Failinger did not find evidence of any other acute pathology, Claimant's right knee symptoms were more reasonably related to the MCL sprain and bone bruising in the lateral compartment.

14. On November 11, 2019 Dr. Failinger issued another addendum report. He reiterated that there are two primary factors used to determine whether to recommend a right knee arthroplasty. Specifically, there must be "significant pathology, in other words, high grade chondromalacia or arthritis of the compartment that is to be replaced" and "significant and recalcitrant pain symptoms." Dr. Failinger remarked that the March 28, 2019 right knee MRI did not reflect significant degenerative changes. He concluded that the proposed right knee arthroplasty was not reasonable, necessary or causally related to the February 6, 2019 industrial incident.

15. On November 15, 2019 the parties conducted the pre-hearing evidentiary deposition of Dr. Failinger. Dr. Failinger maintained that the proposed right knee arthroplasty was not reasonable, necessary or causally related to the February 6, 2019 industrial incident. Notably, after comparing Claimant's right knee MRI's from August of 2018 and June of 2019 he noted the "expected loss of the meniscus where Dr. Xenos would have trimmed out some of the meniscus in the posterior horn." However, Dr. Failinger did not see any significant deepening or worsening of a meniscal tear. The MRI films simply did not reveal any areas that had worsened between August of 2018 and June of 2019. Accordingly, even if Claimant suffered a right knee injury on February 6, 2019, the lack of pathology reflected on the MRI's demonstrates that a right knee replacement is not warranted.

16. Claimant has demonstrated that it is more probably true than not that she suffered a right knee injury during the course and scope of her employment with Employer on February 6, 2019. On February 6, 2019 Claimant was walking from a carpeted to linoleum surface while performing her job duties. She slipped, fell to the ground and struck both knees on the floor. Although Claimant initially received treatment for a left knee contusion, she continued to experience right knee symptoms. Notably, Claimant had undergone two previous surgeries for right knee meniscal repair. A right knee MRI reflected a horizontal tear to the posterior horn with early to moderate medial compartment chondromalacia, an MCL sprain and a subtle bone bruise. Dr. Faulkner specified that the MRI revealed "evidence of previous partial medial meniscectomy with

likely new tear of the posterior horn of the body medial meniscus." Drs. Xenos and Carr determined that Claimant had some tearing in the medial meniscus and suffered a "work related injury which has caused a precipitation, aggravation, and acceleration of her condition." Finally, Dr. Failinger acknowledged that Claimant may have suffered an MCL sprain. He commented the MRI "indicate[d] a valgus force, which is consistent with [Claimant's] history notes that could cause some lateral compartment pathology." Accordingly, based on the overwhelming medical evidence from numerous providers, Claimant's February 6, 2019 work accident aggravated, accelerated or combined with her pre-existing right knee condition to produce a need for medical treatment.

17. Claimant has failed to establish that it is more probably true than not that the total right knee arthroplasty recommended by ATP Dr. Xenos is reasonable, necessary, and causally related to her February 6, 2019 injury. Drs. Xenos and Carr explained that Claimant had undergone two prior right knee scopes without significant relief. They noted that Claimant had some tearing in the medial meniscus and a repeat scope was unlikely to provide any relief. The physicians thus recommended a total right knee replacement.

18. In contrast, Dr. Failinger explained that there are two primary factors in determining whether a total knee replacement is appropriate. Specifically, there must be "significant pathology, in other words, high grade chondromalacia or arthritis of the compartment that is to be replaced" and "significant and recalcitrant pain symptoms." Dr. Failinger remarked that the March 28, 2019 right knee MRI did not reflect significant degenerative changes. He detailed that he did not see evidence of major or acute "chondral loss and no significant change in the chondral surface" on the March 28, 2019 MRI as compared to the June 21, 2018 MRI. Dr. Failinger thus determined that there was no objective evidence of new right knee pathology as a result of the February 6, 2019 work incident "to the articular cartilage, nor to the chondral surfaces, nor to any intraarticular structures." He concluded that the proposed right knee arthroplasty was not reasonable, necessary or causally related to the February 6, 2019 industrial incident.

19. The persuasive opinion of Dr. Failinger and a review of the medical records demonstrate that a total right knee replacement is not reasonable, necessary or related to Claimant's February 6, 2019 slip and fall at work. Although the bulk of the evidence reflects that Claimant suffered a right knee MCL sprain and possible meniscus tear as a result of the February 6, 2019 work incident, her accident did not likely cause right knee pathology in the form of significant changes to the chondral surface that would warrant a total knee replacement. The MRI films simply do not reveal any objective evidence of worsening or degeneration of the right knee between August of 2018 and June of 2019. Although Dr. Xenos recommended a total right knee replacement, his analysis omits sufficient explanation or justification for the procedure based on the February 6, 2019 work accident. Accordingly, the proposed right knee arthroplasty is not reasonable, necessary or causally related to the February 6, 2019 industrial incident. Claimant's request for a total right knee replacement is thus denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4. For a claim to be compensable under the Act, a claimant has the burden of proving that she suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAO, Aug. 18, 2005).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAO, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAO, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAO, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. As found, Claimant has demonstrated by a preponderance of the evidence that she suffered a right knee injury during the course and scope of her employment with Employer on February 6, 2019. On February 6, 2019 Claimant was walking from a carpeted to linoleum surface while performing her job duties. She slipped, fell to the ground and struck both knees on the floor. Although Claimant initially received treatment for a left knee contusion, she continued to experience right knee symptoms. Notably, Claimant had undergone two previous surgeries for right knee meniscal repair. A right knee MRI reflected a horizontal tear to the posterior horn with early to moderate medial compartment chondromalacia, an MCL sprain and a subtle bone bruise. Dr. Faulkner specified that the MRI revealed "evidence of previous partial medial meniscectomy with likely new tear of the posterior horn of the body medial meniscus." Drs. Xenos and Carr determined that Claimant had some tearing in the medial meniscus and suffered a "work related injury which has caused a precipitation, aggravation, and acceleration of her condition." Finally, Dr. Failinger acknowledged that Claimant may have suffered an MCL sprain. He commented the MRI "indicate[d] a valgus force, which is consistent with [Claimant's] history notes that could cause some lateral compartment pathology." Accordingly, based on the overwhelming medical evidence from numerous providers, Claimant's February 6, 2019 work accident aggravated, accelerated or combined with her pre-existing right knee condition to produce a need for medical treatment.

Medical Benefits

8. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

9. As found, Claimant has failed to establish by a preponderance of the evidence that the total right knee arthroplasty recommended by ATP Dr. Xenos is reasonable, necessary, and causally related to her February 6, 2019 injury. Drs. Xenos and Carr explained that Claimant had undergone two prior right knee scopes without significant relief. They noted that Claimant had some tearing in the medial meniscus and a repeat scope was unlikely to provide any relief. The physicians thus recommended a total right knee replacement.

10. As found, in contrast, Dr. Failinger explained that there are two primary factors in determining whether a total knee replacement is appropriate. Specifically, there must be "significant pathology, in other words, high grade chondromalacia or arthritis of the compartment that is to be replaced" and "significant and recalcitrant pain symptoms." Dr. Failinger remarked that the March 28, 2019 right knee MRI did not reflect significant degenerative changes. He detailed that he did not see evidence of major or acute "chondral loss and no significant change in the chondral surface" on the March 28, 2019 MRI as compared to the June 21, 2018 MRI. Dr. Failinger thus determined that there was no objective evidence of new right knee pathology as a result of the February 6, 2019 work incident "to the articular cartilage, nor to the chondral surfaces, nor to any intraarticular structures." He concluded that the proposed right knee arthroplasty was not reasonable, necessary or causally related to the February 6, 2019 industrial incident.

11. As found, the persuasive opinion of Dr. Failinger and a review of the medical records demonstrate that a total right knee replacement is not reasonable, necessary or related to Claimant's February 6, 2019 slip and fall at work. Although the bulk of the evidence reflects that Claimant suffered a right knee MCL sprain and possible meniscus tear as a result of the February 6, 2019 work incident, her accident did not likely cause right knee pathology in the form of significant changes to the chondral surface that would warrant a total knee replacement. The MRI films simply do not reveal any objective evidence of worsening or degeneration of the right knee between August of 2018 and June of 2019. Although Dr. Xenos recommended a total right knee replacement, his analysis omits sufficient explanation or justification for the procedure based on the February 6, 2019 work accident. Accordingly, the proposed right knee arthroplasty is not reasonable, necessary or causally related to the February 6, 2019 industrial incident. Claimant's request for a total right knee replacement is thus denied and dismissed.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

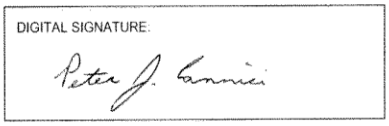
1. Claimant suffered a compensable right knee injury on February 6, 2019.

2. Claimant's request for a total right knee arthroplasty is denied and dismissed.

3. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: December 17, 2019.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that he suffered a compensable work injury to his left shoulder on May 6, 2019?

II. If this claim is compensable, has Claimant shown, by a preponderance of the evidence, that he is entitled to medical benefits which are reasonable, necessary, and related to his work injury - including, but not limited to, the shoulder surgery as recommended by Dr. Walden?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

Background and Hearing Testimony

1. Claimant was employed as a journeyman HVAC (heating, ventilation, and air conditioning) installer. He began work with Employer in April of 2019. At hearing, Claimant testified that on May 6, 2019, he and co-worker Peter Gonzales were working at a building under construction in Colorado Springs. The men, along with another person, were moving a heavy metal "gang box" in which tools and work materials are stored. They were moving the gang box from one floor of the building to another.

2. The gang box had handles on it. Claimant and Mr. Gonzales lifted one end of the gang box and Claimant felt a "strain" in his left shoulder. The men rolled the gang box towards the door of a room into which they intended to put the gang box. They had to pick up and slide one end of the gang box to position it properly in front of the doorway so it could be pushed into the room. When Claimant picked up and slid the end of the gang box, he experienced more pain in his shoulder.

3. Claimant testified "that's when I really felt it." He released the gang box and walked away from it. He told Pete Gonzales that "I messed up man – something happened." Claimant testified that as the day went on, his shoulder pain "got worse and worse." He described what felt like "a major strain, a sharp strain" in his left shoulder, but was able to continue working that day.

4. When Claimant awoke the next morning (May 7), his left shoulder was "locked up pretty good" and he had trouble moving his arm. He called off from work and

told Employer about his injury. He filled out an "Incident Investigation Report" for Employer on which he noted the injury occurred when "moving gang box" and "tryed [sic] to lift & slide gang box (feel pull)." (Ex. 8, pp. 101, 102). Claimant did not go in to work on May 8 due to the injury.

5. Claimant testified that between the time he was placed at MMI on September 19, 2018 for the October 26, 2017 injury, and when he was injured on May 6, 2019, his left shoulder had a "nagging" pain, that fluctuated depending on his work activities. He was able to perform full-duty work during that time. After the May 6, 2019 incident he experienced a "night and day" change in his pain level, and "it blew up, basically, and it hurt significantly worse." The location of the pain in the shoulder remained the same, but the pain was much worse. Claimant testified he experienced no other injuries to his left shoulder between October 26, 2017 and May 6, 2019.

6. Claimant admitted that in July 2019, he began employment with John Bowman, Inc. Claimant testified that the job duties were identical to his employment with Bruce Mechanical. Further, Claimant testified that on July 11, 2019, he executed an employment document with John Bowman in which he confirmed he could do the essential functions of the job, which included being able to lift materials weighing as much as 100 pounds, along with lifting materials from the ground to overhead. Claimant confirmed that the job application which he executed provided a space to list any accommodations he felt would be necessary for him to perform his job and he did not list any limitations related to his left shoulder. Additionally, Claimant testified that he has performed his full duties as an HVAC installer since July 2019.

7. Pete Gonzalez also testified at hearing. He testified that prior to the date of injury, he would go out of his way to assist Claimant as he was aware of his previous right shoulder injury. Additionally, Mr. Gonzales testified that prior to the May 2019 incident, the Claimant complained of left shoulder pain and as a result he would go out of his way to assist the Claimant with some work activities.

8. He is also a HVAC installer and was working with Claimant on May 6, 2019. He confirmed the men were moving a gang box that weighed approximately 200 pounds. He testified he was standing next to Claimant and that at one point, Claimant "kind of winced" and said something about his shoulder hurting. He testified that when they slid the gang across the floor, "that's when he really hurt his shoulder." He knew that because Claimant "stopped, and went off in pain, holding his shoulder."

9. Mr. Gonzalez and other workers finished placing the gang box where it needed to be. Afterwards, he saw Claimant at various times during the day, and Claimant was "either holding it or complaining about it" (referring to the left shoulder).

Treatment History

10. Claimant went to Emergicare on May 9, 2019. On the intake form, Claimant indicated he injured his left shoulder when "moving cart & gang box." (Ex. 2,

p. 42). Erik Ritch, M.D., reported the mechanism of injury as "Moving a large tool box, starting feeling pain in shoulder." *Id* at 40. On examination, Dr. Ritch reported, "…Left shoulder is tender over supraspinatus, anterior shoulder, and subacromial space. ROM limited to about 60 degrees abduction and 80 degrees flexion due to pain. Patient is able to fully internally rotate, external rotation is only 10-15 degrees...slightly decreased sensation in the left hand, especially in the 4th and 5th fingers although there is no weakness and sensation is not completely gone…" *Id* at 39.

11. An X-ray of the left shoulder was performed. (Ex. 5, p. 90). Dr. Ritch noted it was "abnormal: ac joint arthritis, no other significant abnormalities." Dr. Ritch diagnosed "strain of unspecified muscle, fascia, and tendon at shoulder and upper arm level, left arm, initial encounter." He administered an injection of toradol, recommended physical therapy and medications, and imposed work restrictions. (Ex. 2, p. 36).

12. On May 10, 2019 physical therapist Andrew Weiner reported, "…Patient is presenting with an acute non-specific shoulder injury which at this moment is much too guarded to establish a working diagnosis. DN [dry needling] today did not change symptoms. Passive pain suggests articular dysfunction in passive tissue however cannot rule out RTC [rotator cuff] involvement…" (Ex. 2, pp. 33-34)

13. On May 14, 2019, PT Weiner noted, "…Patient is currently a poor candidate for PT due to high levels of perceived pain and fear in moving the shoulder. Recommend further diagnostic testing to rule out major pathology." (Ex. 2, p. 32).

14. Dr. Erik Ritch, MD saw Claimant on May 17, 2019 and reported, "…Pt [patient] says he sees no improvement. Pt has not seen a specialist since last visit. Pt rates pain 7/10 today…No change in symptoms. He is working light duty. Still pain with any attempt to flex/abduct beyond 90 degrees. Discussion with PT indicates that they are not able to get much additional motion from him either actively or passively." (Ex. 2, p. 25). Dr. Ritch recommended a MRI of the left shoulder, with cessation of physical therapy in the meantime. He opined, "This is a work related injury." *Id* at 26.

15. An MRI was performed on May 30, 2019 (Ex. 5, pp. 88-89). This MRI was performed by Colorado Springs Imaging, and was interpreted by Frank Crnkovich, MD. The report notes that it was compared to the X-ray from May 9, 2019, but makes no reference to any prior MRIs.

16. This MRI report notes, under **"Technique":**

> MRI evaluation of the left shoulder was performed using the GE high field magnet. Images were generated in the oblique coronal and oblique sagittal planes utilizing PD and PD FS sequences. A PD fat-sat axial sequence was also performed. *Id* at 88.
>
> Pertinent **"Findings"** were noted:
>
> Rotator cuff: The *supraspinatus* tendon is scuffed, amorphous, and irregular. Anterior third margins, I believe, are *torn*, sequence 7

> images 9 and 10. Middle fibers to posterior fibers irregular and edematous, sequence 7 images 10 through 13. *Infraspinatus* shows tendinosis/tendinopathy change with intrasubstance fluid tracking along the myotendinous junction. Developing ganglion cyst formation. Teres minor tendon intact. Subscapularis shows moderate tendinosis change but remains intact. The area of tearing of the *supraspinatus* tendon complex, I believe, measures approximately 10 x 10 mm. Fluid in the subacromial and subdeltoid bursas. *Id* at 88. (emphasis added).
>
> The pertinent **"Impression"** makes no mention of the infraspinatus tendon, but notes:
>
> 1. Obliquely-oriented complex fraying and irregularity anterior insertional footplate of the *supraspinatus* tendon. Id at 89.

17. Claimant saw Dr. Ritch on June 15, 2019 and he reported, "…Pt states that pain is a little bit better. No PT…Shoulder is about the same as it has been. MRI shows possible linear tear of supraspinatus. Working with restrictions. Still not able to reach overhead…" (Ex. 2, p. 21). Dr. Ritch referred Claimant to orthopedic surgeon Dr. David Walden and noted "…He will look at your MRI and decide what the best next step is for you…" *Id.*

18. Respondents filed a Notice of Contest on June 18, 2019. (Ex. 7, p. 95).

19. Claimant returned to Dr. Ritch on October 4, 2019. The doctor reported, "…Since he was last seen, his shoulder has stayed about the same. He has mild pain at rest but any attempts at overhead movement cause significant pain in the shoulder. He has a new job and is *managing to do everything but overhead work."* (Ex. 2, p. 16) (emphasis added).

20. Dr. Ritch noted, "…We will give another referral for you to see Dr. Walden. Based on your symptoms I think you still need to see an orthopedist. I would not be surprised if he thinks you need surgery." Dr. Ritch again imposed work restrictions and again opined, "This is a work related injury." *Id* at 17.

21. Dr. Walden met with Claimant on October 17, 2019 and reported, "…He injured his left shoulder on May 6, 2018. He was sliding again [a gang] box into a room. It became stuck and he had to pick the box up. He felt as though there was a pull and pain in the shoulder. He felt as though he strained his shoulder at the time but progressively it became worse. He states he had progressive pain that day and trouble with use…Patient states a little over a year ago he was hit by a forklift in his left shoulder. It caused his opposite shoulder to strike and [an] I-beam. He saw Dr. Wally Larson for both shoulders he states. The opposite shoulder had a rotator cuff repair performed. He reports he was able to do his job before the most recent injury and that the injury at his job caused increasing pain and weakness in his left shoulder…" (Ex. 1, p. 4).

22. Dr. Walden reviewed the film and written report of the MRI performed May 30, 2019. He also reviewed a MRI which had already been performed March 24, 2019. (Ex. 1, p. 7). That MRI had been ordered by Anne Underhill, PA, in reference to a reported work injury from 10/26/2017, after Claimant had been struck on his left side by a forklift. It was performed at Penrad Imaging, was read by Nicholas Moore, MD. This report does not note which particular instrument was used.

23. Under **"Technique",** the report notes:

> MRI shoulder Lt [left] without contrast. Fat-saturated proton density in axial and coronal planes. Fat saturated T2 in sagittal and coronal planes. Spin-echo T1 in sagittal plane (Ex. 5, p. 91).
>
> Under **"Findings":**
>
> Muscle quality of the rotator cuff is normal. At the *infraspinatus* tendon insertion, there is *moderate-to-severe* focal tendinopathy with subtle superimposed interstitial tearing. No deep surfacing rotator cuff tendon tear is identified, however. There is *milder supraspinatus* insertional tendinopathy, involving bursal-sided fibers. No other rotator cuff tendon injury is identified.
>
> Under **"Impression",** pertinently:
>
> 2. Focal moderate-to-severe *infraspinatus* insertional tendinopathy with interstitial tearing. *Id* (emphasis added).

24. Dr. Walden then reported:

> …At this point, the patient is experiencing pain and weakness in his left shoulder and has a work up, including an MRI scan, consistent with a rotator cuff tear. *This generally represents a surgical problem.* I talked to the patient about treatment options including continued nonoperative options. He does not feel he is getting better. I would recommend an arthroscopic evaluation of the shoulder with a probable repair (arthroscopic) of the *supraspinatus* tendon. If approved, we will begin the scheduling process…" (Ex. 1, p. 4)(emphasis added).

Dr. Walden's physical exam revealed that Claimant had "full passive motion in the shoulder but has pain and altered mechanisms for full forward flexion and abduction. He has *pain and weakness* with resisted supraspinatus positioning as well as external rotation testing. None exists with resisted internal rotation testing or isolated biceps testing. (Ex. 1, p. 6) (emphasis added). Dr. Walden's diagnosis was "*traumatic complete tear* of left rotator cuff, initial encounter." *Id* at 4.

25. Dr. Walden submitted a request for authorization of left shoulder surgery on October 18, 2019. *Id* at 3. Insurer denied it on October 21, 2019. *Id* at 2.

IME and Deposition Testimony of Dr. Ciccone

26. Dr. William Ciccone performed an Independent Medical Exam ("IME") for Respondents on September 11, 2019. His appointment with Claimant lasted approximately 15 minutes and 20 seconds. (Ex. 6). Dr. Ciccone issued a report dated September 27, 2019. He stated, "…It is my opinion that the claimant did not suffer a work related injury to the left shoulder on 5/6/2019. *While there is no question that one could injure a shoulder lifting a heavy box,* in this situation, the claimant did not have a specific injury. He did not fall or impact the shoulder in any way, he simply had pain that he noticed later…" (Ex. A, p. 13)(emphasis added).

27. Dr. Ciccone testified by deposition on October 23, 2019. He is a practicing orthopedist, Level II accredited, and also evaluates patients with knee and shoulder injuries. He testified regarding the left shoulder MRI's of March 24, 2019 (pre-injury) and May 30, 2019 (post-injury). He opined the two MRI's were "essentially the same" (Depo, p. 21, ll 9-12). In his view there would have to be some sort of different pathology on the second MRI in order for there to be an "objective finding" of an injury. He opined, ultimately, that Claimant did not suffer a work injury on May 6, 2019.

28. Based upon his interview with Claimant, Dr. Ciccone understood the mechanism of injury to have been 'sliding' the box, but nonetheless, when asked if such action was consistent with Claimant's subjective symptoms, he stated "Potentially." (Depo., p 11, ll 17-21).

29. When asked, based upon his examination and his review of both MRIs, if Claimant had a rotator cuff tear, he replied:

> A. Well, *I would say it is really difficult to tell.* I mean, a lost of times with a balanced rotator cuff tear, you don't have a lot of weakness. You can have some pain with motion of the shoulder, but not necessarily a lot of weakness.
>
> So in acute traumatic rotator cuff pathology, people lose motion and have significant pain and symptoms directly from the event at the time. So *I think it is difficult to tell on his examination whether or not he actually has a full-thickness rotator cuff tear.*
>
> Q. Did you have the opportunity to review Dr. Walden's report dated October 17th, 2019?
>
> A. Yes.
>
> Q. Okay. And what was Dr. Walden's assessment?
>
> A. He felt that the claimant had signs and symptoms consistent with a rotator cuff tear.
>
> Q. And did he…express any opinion regarding the two MRI films?..

A ….He said on the May 30th, 2019 film, that it showed a rotator cuff tear about 10 by 10 millimeters and there was some degeneration within the other muscles of the rotator cuff as well.

Compared to the MRI in [sic] March 24th, notes subacromial bursitis with moderate to severe insertional tendinopathy of the rotator cuff.

Q. *Okay. So do you read that as he is saying the May 2019 MRI report shows a rotator cuff tear but the March [3/24/2019] MRI does not?*

A. *Yes.*

Q. Okay. And again, why do you disagree with Dr. Walden?

A. I think it is really hard to tell on the MRI scan. On my reading of the MRI, the tendon is so degenerative, it is difficult to tell. *He [Claimant] may have had a full-thickness rotator cuff tear on May 30th, 2019.* (Depo, pp.14-15)(emphasis added).

30. Dr. Ciccone agreed that those findings constitute a "surgical problem." Dr. Ciccone testified that surgery is reasonable, and that if Claimant were his patient he would perform the same procedure Dr. Walden recommended. He opined that Dr. Walden has a good reputation as an orthopedist. Dr. Ciccone testified about possible causes of the worsened left shoulder pain Claimant experienced on and after May 6, 2019; "I mean, it could be – it could be from continued degeneration of the tendon. *It could be from a minor strain at work.* I mean, it could – anything could have caused an aggravation of his pain." (Depo, p. 24, ll. 7-19) (emphasis added).

Previous Right Shoulder Injury / Complaints of Left

31. Claimant sustained a previous injury to his right shoulder in a forklift accident on October 26, 2017 (W.C. No. 5-062-726). He later claimed to have injured the left shoulder at the same time.

32. Claimant presented to Concentra on October 27, 2017 where David Kleberger, NP, noted, "…Reports on 10/26/17 he was on the 3rd floor of a building loading construction trash onto an elevated forklift. He says the forklift was not secured/leveled properly on the ground. The lift arm shifted suddenly when the trash load shifted. The lift arm hit him and knocked him into a beam where he hit his right shoulder and fell to the ground. C/o [complains of] moderate right shoulder pain…Still has 8/10 shoulder pain with movement." (Ex. B, p. 16). Mr. Kleberger diagnosed contusion and strain of the right shoulder. He prescribed medications, recommended physical therapy, and imposed work restrictions.

33. Dr. Wallace Larson performed surgery on December 21, 2017 consisting of; "Right shoulder arthroscopy, extensive debridement, subacromial decompression, arthroscopic rotator cuff repair, and open subpectoral biceps tenodesis." (Ex. C, p. 21).

34. On January 10, 2018, Claimant returned to the authorized treating physician. On that date, "Today patient is stating that his left shoulder also now hurts. Patient claims left shoulder was injured along with the right shoulder on the date of injury but the right was so painful that he didn't think much about the left." The report indicates that Claimant denied any previous left shoulder injuries. (Ex. D).

35. On April 26, 2018, Claimant presented to Dr. Larson, who reported, "The patient reports that he injured his left shoulder at the time he was hit by a forklift and has been having some left shoulder pain." *(Ex. F)*

36. Dr. Larson followed-up with Claimant for the right shoulder on May 29, 2018 and noted, "…I have told them that I anticipate he probably will need some left shoulder surgery but not until the right shoulder is more completely recovered." (Ex. H, p. 38). Dr. Larson did not perform any causation analysis in his reports regarding Claimant's left shoulder, nor did he at any time indicate what type of surgery he might eventually recommend for Claimant's left shoulder.

37. On June 5, 2018, Claimant returned to Dr. Neubauer. Dr. Neubauer noted, "The patient continues to complain of some left shoulder pain and is currently doing home exercises for his left shoulder." (Ex. I)

38. On July 3, 2018, Claimant returned to Dr. Neubauer continuing to complain of "bilateral" shoulder pain. The pain diagram filled out by Claimant indicated left shoulder symptoms. (Ex. J)

39. John Burris, M.D., performed an IME for Respondents in the other case on July 10, 2018. Dr. Burris opined Claimant had "…nonspecific myofascial left shoulder pain." (Ex. 11, p. 141). He opined it was not related to the work injury because; "…If the left shoulder were involved with the original 10/26/2017 workplace event, subjective complaints and objective findings would have existed within days of the event. Mr. Gallegos' left shoulder complaints cannot, within a reasonable degree of medical probability, be causally associated with the 10/26/2017 workplace event because 1) no injury was identified to the left shoulder at the initial ED visit on 10/26/17, including no pain reported and no pain upon palpation, 2) on 11/21/17 (1 month after the workplace event) the orthopedic surgeon, Dr. Larson, identified a normal examination of the left shoulder with full range of motion and no tenderness, and 3) the first notation of subjective left shoulder complaints are recorded on the 1/10/18 clinic visit (2-1/2 months after the workplace event." (Ex. 11, p. 142). Dr. Burris concluded, "…As stated above, Mr. Gallegos's left shoulder complaints cannot be causally related to the 10/26/17 workplace event. Therefore, no treatment of his left shoulder is reasonable or necessary through the workers' compensation system." *Id.*

40. On July 30, 2018, (after Dr. Burris issued his report), Dr. Larson reported, "…I have explained to him that he probably does meet the criteria for maximum medical improvement [for his right shoulder]. I have had a lengthy discussion with the patient

about this issue." (Ex. L, p. 61). Dr. Larson made no mention about any surgery to the left shoulder, and released Claimant from care.

41. Thomas Centi, M.D., at CCOM placed Claimant at MMI on September 19, 2018. He imposed no permanent work restrictions for either shoulder. (Ex. M, p. 67). On October 22, 2018, he issued a 14% upper extremity rating for the right shoulder injury. He confirmed no permanent restrictions were indicated. (Ex. N, p. 69).

42. Anjmun Sharma, M.D., performed a DIME on January 18, 2019 for the 10/26/2017 injury. Claimant requested Dr. Sharma address "left shoulder and right shoulder." (Ex. 10, p. 110). Dr. Sharma agreed Claimant had reached MMI, and he issued a 13% extremity rating for the right shoulder. (Ex. 10, pp. 109, 125).

43. Concerning the left shoulder, Dr. Sharma reported, "…I noticed that the patient's left shoulder had excellent range of motion. I do not suspect any internal derangement on the examination…The patient wanted to know whether he would require any further medical care for his left shoulder. I advised him that he would likely not need surgery on the left shoulder. It is a very stable shoulder and that from a personal perspective, talking to other patients and reviewing the medical notes that this would not be something that would be necessary to repair, especially with an excellent range of motion that is documented…I concur with the reports that the injured worker likely did not injure his shoulder on the date of the injury. I do not believe that he sustained an injury…" *Id* at 125, 126. Dr. Sharma's diagnoses included, "Left Shoulder NOT CLAIM RELATED." *Id* at 126 (emphasis in original). Respondents in W.C. No. 5-062-726 filed a FAL on April 2, 2019, admitting to the right shoulder impairment rating per Dr. Sharma. (Ex. 9, p. 107).

44. Claimant saw orthopedic surgeon Dr. Wiley Jinkins on February 25, 2019 "…for an evaluation and consultation regarding both shoulders." (Ex. 3, p. 54). Dr. Jinkins had previously treated Claimant for bilateral knee problems. Dr. Jinkins took a history of the shoulder injuries, and reported that; "…Physical examination of both shoulders revealed all testing for impingement to be positive with a positive Neer sign, Hawkins's sign, O'Brien's sign and 'empty can test.' There was tenderness in the area of both trapezii. His symptoms were markedly reproduced with forced abduction against resistance…" *Id.* X-rays revealed only "some very mild degenerative changes." Dr. Jinkins diagnosed "Industrial injury to both shoulders, status post right shoulder arthroscopic rotator cuff repair with persistent symptoms and symptoms of impingement on the left." *Id* (emphasis added).

45. Claimant was seen by Anne Underhill, PA, in the office of his personal physician on February 28, 2019. Ms. Underhill reported, "…History [of] trauma when he was hit by a forklift 10/2017 from the left side. His right shoulder took the initial insult and as a result he needed rotator cuff repair surgery. Since that time he has increasing chronic dull left shoulder pain with and without movement. He does heavy manual labor for work and has noticed he has pain with lifting, raising the left arm above his head and

when he lays on the left shoulder." (Ex. 4, p. 70). Ms. Underhill ordered a MRI of the left shoulder, and it was performed on March 24, 2019. (Ex. 5, p. 91) (details from this same MRI are referenced in Findings of Fact # 22, 23, above).

46. Dr. Burris issued a supplemental report on April 3, 2019 after reviewing the MRI performed on March 24, 2019. He reported the MRI "…is consistent with impingement syndrome secondary to degenerative changes of the acromioclavicular joint. This condition occurs absent trauma and is a normal degenerative process. No acute abnormalities are identified. The 3/24/19 MRI of the left shoulder supports the opinions provided in my July 10, 2018 IME which are unchanged. Specifically, Mr. Gallegos' left shoulder complaints cannot the [sic] causally associated with the 10/26/17 workplace event." (Ex. 11, p. 130).

47. Claimant returned to Dr. Jinkins on April 15, 2019. He again reviewed the mechanism of injury as well as the recent MRI. Dr. Jinkins diagnosed "Left shoulder post-traumatic subacromial impingement syndrome…with MRI evidence of some interstitial tearing of the supraspinatus with a moderate to severe tendinopathy." (Ex. 3, p. 53). Dr. Jinkins injected the left shoulder and afterwards noted, "…His strength appeared to be improved and provocative symptoms for impingement appeared to be much less pronounced. *At this point in time, I still feel that <u>symptoms on the left</u> can be treated appropriately conservatively…" Id.* (emphasis added).

48. Dr. Jinkins wrote to Claimant's attorney on May 13, 2019, although he did not see Claimant on that date. Dr. Jinkins noted, "…*At this point in time, I would recommend vigorous ongoing conservative management.* He [Claimant] did note fairly significant improvement following the initial corticosteroid injection…which was accomplished on April 15, 2019." (Ex. 3, p. 50)(emphasis added). Dr. Jinkins made no mention of the 5/6/2019 injury in this letter, suggesting he might not yet known of it.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. §8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case

must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. §8-43-201, C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

D. In this instance, the ALJ finds Pete Gonzalez to have testified sincerely, and to the best of his abilities. He openly acknowledged Claimant's reported issues with his left shoulder even prior to the incident at work on May 6, 2019. Claimant supplied sufficiently consistent versions of the mechanism of injury, and of his symptoms he experienced, to match his objective findings by imaging and physical examinations. While Claimant no doubt "fudged" on his most recent job application regarding his ability to perform the work involved, he did so for an obvious reason; to wit: to get the job. From the records, it appears he has been managing his condition overall, but with issues with working overhead.

E. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968). As will be addressed forthwith, the ALJ finds that the medical experts involved have each provided medical opinions to the best of their abilities; thus their opinions will be evaluated in terms of persuasiveness, as opposed to credibility per se.

F. Further, courts are to be "mindful that the Workmen's Compensation Act is to be liberally construed to effectuate its humanitarian purpose of assisting injured workers." *James v. Irrigation Motor and Pump Co.*, 503 P.2d 1025 (Colo. 1972).

Compensability of Left Shoulder Injury

G. It is the claimant's burden to prove a causal relationship between the industrial injury and the medical condition for which he seeks benefits. Section 8-43-301, C.R.S. 2001; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). However, the claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which he seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley* , 165 Colo. 586, 441 P.2d 3 (1968).

H. To sustain his burden of proof concerning compensability, Claimant must establish that the condition for which he seeks benefits was proximately caused by an injury arising out of and in the course of employment. *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Section 8-41-301(I)(b), C.R.S.*

I. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988).

J. The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001).

K. The "in the course of" requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976).

L. This injury occurred within the time and place limits of Claimant's employment relationship with Employer and during an activity, specifically moving a heavy "gang box" which was connected to his duties and position as an HVAC technician. However, the question remains whether Claimant's condition and need for surgery resulted from his work-related activities on May 6, 2019, or rather was the result of his pre-existing left shoulder condition.

M. A pre-existing condition "does not disqualify a claimant from receiving workers' compensation benefits." *Duncan v. Indus. Claim Appeals Office*, 107 P.3d 999 (Colo. App. 2004). A claimant may be compensated if a work-related injury "aggravates, accelerates, or combines with" a worker's pre-existing infirmity or disease to "produce the disability for which workers' compensation is sought." *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Moreover, an otherwise compensable injury does not cease to arise out of a worker's employment simply because it is partially attributable to the worker's pre-existing condition. *Subsequent Injury Fund v. Thompson*, 793 P.2d 576, 579 (Colo. 1990); *Seifried v. Indus. Commission*, 736 P.2d 1262, 1263 (Colo. App. 1986)("[I]f a disability were [ninety-five percent] attributable to a pre-existing, but stable, condition and [five percent] attributable to an occupational injury, the resulting disability is still compensable if the injury has caused the dormant condition to become disabling.")

N. Dr. Burris opined Claimant's left shoulder complaints could not be causally related to the earlier, October 26, 2017 accident. DIME Dr. Sharma unequivocally stated "…I do not believe that he sustained an injury…" to the left shoulder. Claimant was released with no permanent restrictions for either shoulder when he was placed at MMI by Dr. Centi on September 19, 2018. Dr. Larson in the previous case made a vague reference on May 29, 2018 to possible left shoulder surgery, but pursued it no further and released Claimant from his care on July 30, 2018. No physician has made a definitive surgical recommendation until after Claimant was injured on May 6, 2019.

O. Initially, Dr. Ciccone opined that the MRIs from March 24, 2019 ("March MRI") and May 30, 2019 ("May MRI") were "essentially the same." However, the ALJ notes that they were ordered by different providers, were performed by different imaging services (possibly on different instruments), and were interpreted by different radiologists. The testing protocols used were similar, but not identical. Eventually Dr. Ciccone acknowledged that it was "difficult to tell" if both MRIs showed a torn rotator cuff or not, in addition to the degenerative findings. Additionally, the narrative emphasis of the March MRI on to the *infraspinatus* tendon insertion, with the *supraspinatus* insertional tendinopathy being "milder" by comparison. By the May MRI, there was ['believed to be'] a 10 x 10 mm *tear* of the *supraspinatus* tendon, and the *infraspinatus* received far less emphasis. The ALJ simply not concur that these MRIs are 'essentially the same'. Nor did Dr. Walden appear to concur on this point.

P. In fact, Dr. Ciccone, later acknowledged that there might indeed be a full-thickness rotator cuff tear in the May MRI, that it could have occurred from even a *minor* strain at work, and that the surgery proposed by Dr. Walden under these circumstances would be "reasonable". In the end - and to his credit - Dr. Ciccone simply could not be certain of the causation of Claimant's reported symptoms. Shortly before Claimant's May 6, 2019 injury, Dr. Jinkins felt that Claimant's left shoulder symptoms could best be managed conservatively. This all changed when Claimant tried to lift the gang box, which greatly intensified his symptoms, pre-existing though they were, to become sufficiently disabling to warrant a finding of compensability.

Q. The ALJ concludes, by a preponderance of the evidence, that Claimant aggravated his left shoulder condition on May 6, 2019, resulting in the disability for which he seeks workers' compensation benefits. Claimant has proved by a preponderance of the evidence that his left shoulder injury of May 6, 2019 is compensable.

Medical Benefits

R. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). Claimant must prove entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

S. As noted above, on October 17, 2019 Dr. Walden diagnosed a "traumatic complete tear of left rotator cuff" and the following day he requested authorization for left shoulder arthroscopic decompression and rotator cuff repair. The ALJ concludes, based upon the facts as found and conclusions drawn, that Claimant has proven, by a preponderance of the evidence, that the left shoulder surgery recommended by Dr. Walden is reasonable and necessary to cure or relieve the effects of Claimant's compensable May 6, 2019 work injury.

ORDER

It is therefore Ordered that:

1. Claimant suffered a compensable work injury on May 6, 2019.

2. Respondents shall pay for all reasonable, necessary, and related medical benefits in connection therewith, including, but not limited to, the shoulder surgery as recommended by Dr. Walden on October 18, 2019.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 18, 2019

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

I. Has Claimant, by clear and convincing evidence, overcome the DIME opinion of Dr. Sharma on the issue of MMI for an alleged work injury to his *left* shoulder?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Claimant was hired by Employer as an HVAC installer on February 1, 2017. Claimant injured his right shoulder while picking up trash on a jobsite on October 26, 2017. On that date, Claimant and co-workers, including Pete Gonzalez, were working the third floor of a building under construction. They were tasked with gathering construction trash which was then placed into a makeshift "bin" on a forklift that reached from the ground level to the third floor. The forklift operator would then lower the bin to ground where it was emptied. The process would be repeated until the task was finished.

2. At hearing, Claimant testified he could see the forklift operator from his position on the third floor. He was giving hand-signals to the forklift operator to direct him to place the bin in the appropriate place. He signaled the operator to stop the movement of the forklift, but it continued to move. This was apparently due to uneven ground that caused the forklift to become unbalanced and it shifted. When it shifted, part of the forklift struck Claimant's left shoulder.

3. Claimant testified that he saw it coming right before it hit him and had only a "split second" to try and turn away from it. He further testified that the force of the impact knocked him into a steel I-beam, about five feet away. Claimant's right shoulder struck an edge of the I-beam and he fell to the ground. Pete Gonzalez was standing nearby and witnessed the event.

4. Claimant went to the emergency room at Parker Adventist Hospital in Parker, where, "He complains *only of right shoulder pain* . . . ." (emphasis added) Claimant had right shoulder pain, but, "No pain in his other extremities." The examiner wrote, "There is no tenderness of his left upper extremity . . . . " "His only complaint is that of the right shoulder pain . . . ." (Ex. C, pp. 34-35)

5. Claimant underwent a physical examination in the emergency room. His physical exam revealed tenderness in his right shoulder. His left shoulder was also examined at the emergency room. The examiner noted, "There is *no tenderness* of his left upper extremity . . . ." (emphasis added)

6. A right shoulder x-ray showed no fracture or other acute injury. Claimant was given IV Dilaudid, a prescription for Vicodin, and a sling. He was discharged that same day with instructions to see his workers' compensation provider for additional care. Respondents admitted liability for Claimant's right shoulder injury, and he returned to work with restrictions accommodated by employer.

7. Claimant selected Concentra as his designated provider for his treatment in this claim, and saw David Kleberger, N.P. on October 27, 2017. At this appointment, Claimant said he injured his right shoulder. He did not voice any injury, to, complaints about, or symptoms in, his left shoulder. In his Patient Information form he completed at this visit, Claimant wrote: "Right shoulder is injured".

8. In the diagram of his body in that form, when asked to circle the areas where he was injured, Claimant circled only his right shoulder. The provider's hand written note on that same form also stated Claimant only had right shoulder pain. Claimant, when asked to check which side of his body was injured, had the option of just the right side, just the left side, or both. Claimant checked the right side only. (Ex. F, p. 82)

9. Mr. Kleberger's physical exam on October 27, 2017, revealed no abnormalities to his left arm. Claimant's diagnoses were right shoulder strain and right shoulder contusion. Claimant had his first physical therapy session on October 27, 2017, and he did not mention any left shoulder symptoms at that therapy visit. His complaint was, Global R[ight] shoulder pain." (Ex. F, pp. 87-90). The therapist observed "protective cradling of arm," and noted, "Appearance/Palpation comment: Unable to assess due to pain," and "Deferred patient unwilling to perform an AROM [active range of motion]." She reported, "…Patient presents with severe guarding of R UE [right upper extremity]. Unable to perform pendulum ex due to pain with weight of arm dangling." *Id.*

10. Claimant had an unscheduled appointment at Concentra on November 1, 2017, complaining of severe right shoulder pain despite his Vicodin, and use of a sling to immobilize his right shoulder. Dr. Randall Jones saw Claimant at this visit. He said no more narcotic pain medication would be provided. Claimant made no mention of symptoms or any injury to his left shoulder. All provocative tests for a right shoulder rotator cuff tear were positive, and Dr. Jones referred Claimant for an MRI for a possible rotator cuff tear. Dr. Jones also referred Claimant to Wallace Larson, M.D., an orthopedic surgeon, for an evaluation.

11. MRI findings of the right shoulder on November 7, 2017 included "full-thickness rotator cuff tear with retraction and severe adjacent tendinosis." (Ex. 6, p. 179).

12. Claimant told Dr. Larson at his first appointment on November 21, 2017, that physical therapy worsened this pain. Claimant did not voice any complaints of left shoulder symptoms to Dr. Larson. Despite the lack of left-sided complaint, Dr. Larson also examined claimant's left shoulder. Dr. Larson wrote: *The left shoulder has no tenderness. Range of motion is normal*. *There is no instability. Motor and sensory examination are intact. No evidence of muscle atrophy.* (Ex. E, p. 45) (emphasis added).

13. Dr. Larson requested authorization for a right shoulder arthroscopy, decompression, rotator cuff repair and biceps tenodesis on November 27, 2017. That surgery was approved by Pinnacol Assurance, and occurred December 21, 2017, without complication.

14. While at Concentra, Claimant also completed intake/questionnaire forms asking him to, "Mark the areas on your body where you feel the described sensations. Use the appropriate symbol or symptoms. Mark areas of radiation. Include all affected areas." Claimant made follow-up up visits to Concentra on Nov. 1, Nov. 3, Nov. 8, Nov. 10, Nov. 29, and Dec. 3, 2017. Claimant's pain levels at these visits was consistently described as a six on a 10-point pain scale. Claimant was able to fully discuss his symptoms, advocate for treatment, obtain treatment, and work within restrictions during these weeks after the claim's injury. At no point was his left shoulder mentioned.

15. On November 28, 2017, the claim representative assigned to this claim at Pinnacol Assurance, Ms. Marilyn Anderson, spoke with Claimant regarding his injury and his claim. At no time during that approximately 10-minute conversation, (Ex. K), did Claimant claim that he injured his left shoulder, or even mention his left shoulder. Claimant had ample opportunity to do so during this conversation. Claimant's statements heard in this telephone conversation also demonstrate that he was a forceful advocate when he felt he was not being adequately treated, and the ALJ so finds.

16. Dr. Larson performed this preapproved surgery on December 21, 2017 consisting of; "Right shoulder arthroscopy, extensive debridement, subacromial decompression, arthroscopic rotator cuff repair, and open subpectoral biceps tenodesis." (Ex. 3, pp. 127-128).

17. Claimant returned to Concentra on January 10, 2018 and on a pain diagram someone wrote, "*Left shoulder is having pain*. R shoulder still has pain. 12/21/17 surgery." However, the left shoulder is not actually marked on this diagram. (Ex. 2, p. 74). Under History of Present Illness, PA Scofield noted:

> 01/10/18 GS: recheck right shoulder- patient had RTC repair on 12/21/17. Has ortho f/u 02/01/18. Patient in sling today. Patient was fired from this employer and no longer works there. *Today patient is stating that his left shoulder also now hurts.* Patient claims left shoulder was *injured* along with the right shoulder *on the date of injury* but the right shoulder was so painful that he didn't think much about the left. Right shoulder today is 3/10 and left is 2/10. No prior left shoulder injuries." (Ex. 2, p. 70)(emphasis added).

18. At a follow-up appointment on February 1, 2018 Dr. Larson reported, "…Status post repair of very large rotator cuff tear. The patient tolerates early range of motion quite well. This time he may remove the abduction brace but retained the arm sling portion. He was referred to therapy for passive range of motion but no active or strengthening exercises." (Ex. 3, p. 122).

19. Claimant began physical therapy on February 2, 2018 and the therapist reported palpation yielded only "mild tenderness operated shoulder." (Ex. 7, p. 192).

20. Claimant requested a change of provider, stating that it was too difficult for him to drive from his home in Colorado Springs to the Concentra office in Centennial to continue treatment there. Claimant saw Jay Neubauer, M.D. at that office on February 6, 2018. Claimant said his primary problem was pain in his right shoulder that was slightly improving. Claimant had resumed physical therapy on February 2, 2018. Claimant did not voice any left shoulder symptoms at this appointment. When Claimant returned to Dr. Neubauer on February 13, 2018, he said he was slightly better. He was doing passive range of motion in physical therapy. Dr. Neubauer checked the physician's database for opioid medications, and saw multiple prescriptions having been written by multiple providers. He said he therefore would not prescribe narcotics. There was no mention of left shoulder pain in the report from this visit. At Claimant's next appointment, he said he was going quite well. Claimant had full neck range of motion. There was no mention of left shoulder symptoms at this appointment, or at Claimant's next appointment on March 15, 2018. Pain diagrams were only marked on the right shoulder. (Ex. F, pp. 131-145).

21. Dr. Larson met with Claimant on March 29, 2018 and reported, "…the patient has a significant increase in his range of motion but still has some pain. I have explained to him that this is quite normal. Clinically he appears to be definitely improving…The patient may discontinue the arm sling and continue to work on range of motion exercises." Dr. Larson reiterated that "The patient did have a very large rotator cuff tear." (Ex. 3, p. 116)

22. On April 5, 2018 Dr. Neubauer reported, "…He continues to complain of *left shoulder pain* which he states has been present since the beginning as he was struck in the *left* shoulder. He states the *left* shoulder has been largely ignored. His pain level is a 4." (Ex. 1, p. 41) (emphasis added). Dr. Neubauer's diagnoses included "Contusion of *left* shoulder, initial encounter." Dr. Neubauer indicated, "The cause of this problem is related to work activities." *Id* at 42

23. On April 10, 2018 the physical therapist noted, "…pt states, 3/10, CCOM says, might add some stretches for the L side." On April 12 the therapist noted, "…pt states, R shoulder 3/10 and same with L shoulder." On April 17: "…Some gains, but pt's very disappointed [secondary to] no authorization for PT on L shoulder." (Ex. 7, p. 188).

24. Dr. Larson saw Claimant on April 26, 2018 and noted, "…The patient reports that he injured his *left shoulder at the same time that he was hit by a forklift and has been having some left shoulder pain*. At this time he is receiving physical therapy for his right shoulder and reports some improvement in range of motion and some decrease in pain but relatively slow progress." (Ex. 3, p. 13) (emphasis added).

25. At a follow-up, Claimant circled both shoulders in a CCOM pain diagram on April 30, 2018. (Ex. 1, p. 39).

26. On May 21, 2018 Dr. Neubauer reported, "…The patient continues to complain of some *left shoulder pain* and is currently doing home exercises for his *left shoulder* which he received for his right shoulder." (Ex. 1, p. 31) (emphasis added).

27. Dr. Larson saw Claimant on May 29, 2018 and noted, "…He does report *left shoulder pain* and apparently is in the process of submitting this to Workers' Compensation. I have told them that I anticipate he probably will need some *left shoulder surgery* but not until the right shoulder is more completely recovered. I will plan to recheck him in one month." (Ex. 3, p. 110) (emphasis added). Dr. Larson did himself not opine that Claimant's *left* shoulder complaints were work-related.

28. On June 5, 2018 Dr. Neubauer again reported, "…The patient continues to complain of some *left shoulder pain* and is currently doing home exercises for his *left shoulder." (*Ex. 1, p. 26) (emphasis added).

29. On June 14, 2018 a therapist noted, "…pt cont to have left shoulder pain-waiting for court date to try to add left shoulder." (Ex. 7, p. 185).

30. On July 3, 2018 Dr. Neubauer reported, "…He continues to complain of 2-3/10 aching bilateral shoulder pain…He had follow up with Dr. Larson last week and expressed frustration regarding his recovery. Dr. Larsen informed him that he had a significant tear that will take considerable time to rehabilitate…" (Ex. 1, p. 23).

31. Dr. Larson met with Claimant on July 30, 2018 and reported, "…it does appear that the patient is fairly stable in terms of range of motion and I have explained to him that he probably does meet the criteria for maximum medical improvement…The patient does explain to me that in the end of September he has a workers' compensation hearing regarding his *left shoulder*. *He is reporting* this as being work-related." (Ex. 3, p. 103) (emphasis added).

32. From the available record, it appears Thomas Centi, M.D., took over for Dr. Neubauer at CCOM effective August 6, 2018. He followed Claimant until September 19, 2018, at which time he placed him at MMI. (Ex. 1, p. 11). On October 22, 2018, he issued a 14% upper extremity for the right shoulder injury. Dr. Centi did not believe Claimant had any permanent physical restrictions, and that he required no maintenance medical benefits. Dr. Centi did not find or document any injury or impairment to Claimant's left shoulder. . (Ex. 1, pp. 8-10).

33. Respondents filed a FAL consistent with Dr. Centi's opinions on October 29, 2018. (Ex. 11, p. 241).

34. Claimant timely objected to the October 29, 2018, Final Admission of Liability, and requested a Division IME. Dr. Anjmun Sharma performed the Division IME on January 18, 2019. Dr. Sharma noted the lack of medical documentation of any left shoulder injury at the time of and following after the injurious event. Dr. Sharma examined both of Claimant's shoulders, and noted in his report:

> January 18, 2019……The patient is seen and examined for his division independent medical examination of the right shoulder and left shoulder……*The patient's left shoulder was also examined in comparison to the right shoulder. I noticed that the patient's left shoulder had excellent range of motion. I do not suspect any internal derangement on the examination. More importantly, did have pain in his left shoulder* but the right shoulder was the primary pain generator because this is where the primary complaint originating from [sic]. The patient wanted to know whether he would require any further medical care for his left shoulder. I advised him he would likely not need surgery for the left shoulder. *It is a very stable shoulder* and that from a personal perspective, talking to other patients and reviewing the medical notes that this would not be something that would not be necessary to repair, especially with an excellent range of motion that is documented….(Ex. B, p. 30) (emphasis added).

35. Under IMPAIRIMENT RATING, Dr. Sharma considered claimant's allegation that he also injured his left shoulder in this claim's October 26, 2018, injury. He found Claimant had a 13% right upper extremity impairment for this claim's injury, and that Claimant reached MMI on October 22, 2018. He said Claimant did not require maintenance care, and had no restrictions. He wrote:

> Finally, the patient had a left shoulder complaint of pain. It is in the record that the patient reported pain well after the date of injury in January 2019. I concur with the reports that *the injured worker likely did not injure his [left] shoulder on the date of the injury…*Certainly I could understand that there was a direct blow to the opposite shoulder but in this case, *it does appear that at the brunt of the injury occurred to the right shoulder.* More importantly, during the examination, which I completed with the patient in the examination room, I did note that *the patient's left shoulder range of motion was actually better, improved than the right side. Overall, the left shoulder did not appear to have any significant pathology based upon my clinical exam;* otherwise I do not suspect the labral tear or rotator cuff derangement. The patient had no crepitus in the shoulder as well….(Ex. B, p. 31) (emphasis added).

36. The parties' attorneys met with the DIME on March 15, 2019. Dr. Sharma issued an addendum to his January 18, 2019, report, stating Claimant reached MMI on September 18, 2018. He also once again addressed Claimant's left shoulder's relatedness to this claim's injury, reaching essentially the same conclusion.

37. Respondents had also obtained an IME with John Burris, M.D. Dr. Burris saw Claimant on July 10, 2018, and after reviewing and summarizing claimant's medical records and performing a physical exam, concluded Claimant's left shoulder symptoms diagnosed as "nonspecific myofascial left shoulder pain," were not related to claimant's injury covered by this claim. In response to a query from Respondents on the delay in reporting the left shoulder, he replied:

> If the left shoulder were involved with the original 10/26/2017 workplace event, subjective complaints and objective findings would have existed within days of the event. Mr. Gallegos' left shoulder complaints cannot, within a reasonable degree of medical probability, be causally associated with the 10/26/2017 workplace event because 1) no injury was identified to the left shoulder at the initial ED visit on 10/26/2017, including no pain and no pain upon palpation, 2) on 11/21.2017 (1 month after the workplace event) the orthopedic surgeon, Dr. Larson, identified a normal examination of the left shoulder with full range of motion and no tenderness, and 3) the first notation of subjective left shoulder complaints are recorded on the 1/10/2018 clinic visit (2-1/2 months after the workplace event) (Ex. A, p. 11).

38. When asked what could explain the reported onset of symptoms on 1/10/2018, Dr. Burris explained:

> Shoulder pain is one of the most common physical complaints seen in our society. The MRI for Mr. Gallegos' right shoulder injury displayed elements of impingement morphology and degenerative changes. Those conditions occur absent trauma, are usually symmetrical, and are most likely also present in the left shoulder. Impingement syndrome is an extremely common shoulder disorder and is usually a combination of anatomical and functional factors. Mr. Gallegos' nonspecific left shoulder complaints are likely some combination of these common factors, given the fact that these complaints cannot be causally related to the workplace event, as described above. *Id* at 11.

39. Dr. Burris issued an an addendum report concerning this claim's dispute. On April 3, 2019, he reviewed an MRI of claimant's left shoulder. Dr. Burris stated that left shoulder MRI:

> The provided MRI of the left shoulder on 3/24/2019 is consistent with impingement syndrome secondary to degenerative changes of the acromioclavicular joint. *This condition occurs absent trauma and is a normal degenerative process.* No acute abnormalities are identified. (Ex. A, p. 15) (emphasis added).

40. Claimant saw orthopedic surgeon Dr. Wiley Jinkins on February 25, 2019 "…for an evaluation and consultation regarding both shoulders." (Ex. 4, p. 14). Dr. Jinkins previously treated Claimant for bilateral knee problems. Dr. Jinkins took a history of the shoulder injuries, and reported that; "…Physical examination of both shoulders revealed all testing for impingement to be positive with a positive Neer sign, Hawkins's sign, O'Brien's sign and 'empty can test.' There was tenderness in the area of both trapezii. His symptoms were markedly reproduced with forced abduction against resistance…" X-rays revealed only "some very mild degenerative changes." Dr. Jinkins diagnosed "Industrial injury to both shoulders, status post right shoulder arthroscopic rotator cuff repair with persistent symptoms and symptoms of impingement on the left." *Id.*

41. Claimant was seen by Anne Underhill, PA, in the office of his personal physician on February 28, 2019. Ms. Underhill reported, "…History [of] trauma when he was hit by a forklift 10/2017 from the left side. His right shoulder took the initial insult and as a result he need rotator cuff repair surgery. Since that time he has increasing chronic dull left shoulder pain with and without movement. He does heavy manual labor for work and has noticed he has pain with lifting, raising the left arm above his head and when he lays on the left shoulder." (Ex. 5, p. 156). Ms. Underhill ordered a MRI of the left shoulder, which was performed on March 24, 2019. (Ex. 6, p. 176).

42. Claimant was seen by Mailin Celestine, NP, on April 3, 2019 for "chronic pain of both shoulders." (Ex. 5, p. 143). She reported, "…Left shoulder MRI was completed. Chronic pain since 2017. Injury after being hit by forklift. Limited ROM. Referral to ortho will be made after MRI is completed. Reviewed MRI of left shoulder with patient. MRI shows subacromial-subdeltoid bursitis, moderate to severe infraspinatus interstitial tendinopathy with interstitial tearing and advanced acromioclavicular tearing." *Id* at 145. On examination of the left shoulder, Ms. Celestine noted, "...He exhibits decreased range of motion, pain and decreased strength." *Id* at 147.

43. Claimant returned to Dr. Jinkins on April 15, 2019. He again reviewed the reported mechanism of injury, as well as the recent MRI. Positive findings were again noted on examination of the left shoulder. Dr. Jinkins diagnosed *"Left shoulder post-traumatic subacromial impingement syndrome*…with MRI evidence of some interstitial tearing of the supraspinatus with a moderate to severe tendinopathy." (Ex. 4, p. 139). Dr. Jinkins injected the left shoulder and afterwards noted, "…His strength appeared to be improved and provocative symptoms for impingement appeared to be much less pronounced. At this point in time, *I still feel that symptoms on the left can be treated appropriately conservatively…" Id* at 139 (emphasis added).

44. On May 13, 2019, Dr. Jinkins confirmed the injection provided "…fairly significant transient improvement." (Ex. 4, p. 136). He reviewed the history of the case and noted that initially, "…Mr. Gallegos indicated that he had a significant problem with the right shoulder with the right shoulder pain significantly overshadowing the left, to the point that he was actually not having nearly as much problem initially on the left than he was on the right. He did undergo a surgical repair on the right, as noted above. His right arm was immobilized following the surgical procedure and he had to accomplish essentially all activities of daily living with the left arm. It was during this time that his symptoms did significantly increase." *Id* at 135.

45. Dr. Jinkins elaborated; "…Once again, the problem on the right was at the time of the original injury much more severe and did significantly overshadow the problems he was having on the left. He has recovered significantly following his right shoulder surgery done by Dr. Larson and it was during the period following the right shoulder surgery that the left became more pronounced. His MRI findings are completely consistent with his present symptomatology. It is not unusual for an individual, who has multiple injuries, to 'fixate' on the most serious one initially, to the point that the other problems are not notably as pronounced initially…**My opinion** *is that his present left shoulder problem is a direct result of the initial injury of October 26, 2017*…At this point

in time, I would recommend vigorous ongoing conservative management. (emphasis added).

46. Dr. Jinkins did note fairly significant improvement following the initial corticosteroid injection, as noted above, which was accomplished on April 15, 2019. As far as his MMI status, I do not feel he is at MMI in regard to the left shoulder, insomuch that it is presently being addressed and with vigorous ongoing rehabilitation and conservative management, hopefully symptoms will improve, to the point that surgery on the left may not be necessary, however, he is still significantly symptomatic…" (Ex. 4, p. 136). Dr. Jinkins confirmed that "…it is *my opinion* that 100% of his present symptoms are directly related" to the October 26, 2017 accident. *Id.* At no point in Dr. Jinkins' reports does he critique the DIME examination by Dr. Sharma.

47. Claimant testified at hearing about his subsequent treatment. He explained that in the emergency room the right shoulder was "killing me" with pain. He had pain in the left shoulder, which he described as feeling like a "charley horse" but the right shoulder pain "dwarfed it." Claimant testified regarding pain diagrams he filled out at Concentra on November 1, 10, and 29, and on December 13, 2017. He circled his right shoulder in those diagrams, but not his left. At hearing Claimant explained he was told to circle the thing "that hurts the most" so he did. During these appointments, it was the right shoulder. He testified he verbally informed the medical providers of his left shoulder pain, but the right shoulder pain was so bad that the left "paled in comparison."

48. Claimant further testified the right shoulder surgery was beneficial, and that afterwards he was in a sling for about 6 weeks. He primarily used his left arm because he could not use the right. As the right shoulder began feeling better and "calmed down" after surgery, the pain in the left shoulder became more apparent. Claimant experienced left shoulder pain ever since the injury, but as noted, the right shoulder pain was much worse.

49. Pete Gonzalez testified at hearing. He was a co-worker of Claimant, and witnessed Claimant's injury. He testified he was standing about 10 to 12 feet away from Claimant when the "boom part" of the forklift struck Claimant in the left shoulder. He explained the "boom part" is where the forks attach to the forklift. The impact knocked Claimant into an I-beam, and then Claimant fell to the ground. The forklift then struck a nearby post and left an imprint in its foam insulation. Mr. Gonzalez testified the impact of the forklift on Claimant's left shoulder was such that, "if it had hit me it probably would've broken my arm." Mr. Gonzalez went to Claimant afterward and asked whether he was "OK." He tried to help Claimant up. Claimant told Mr. Gonzalez that his right shoulder hurt. Mr. Gonzalez and forklift operator Scott Courtmarsh drove Claimant to the emergency room.

50. Pete Gonzalez was present for the first few minutes when Claimant was talking to medical personnel. He described Claimant as "pretty shook up," "kind of in shock," and "scared." He testified Claimant told the medical personnel he had been hit on the left shoulder and "kind of landed on his right side," and the right side "seemed to be where most of his injury was."

51. Shane Samborsky, former safety director for employer, testified at hearing. Mr. Samborsky testified that he was with Claimant in the emergency room at Parker Adventist Hospital on October 26, 2017, during his examination and evaluation. Mr. Samborsky testified Claimant never mentioned or complained of any left shoulder injury in the emergency room, and did not tell the evaluating and examining medical provider there that he had injured his left shoulder, or that he had symptoms in his left shoulder. Claimant complained only of a right shoulder injury and symptoms. Claimant held his right shoulder and arm with his left hand and arm throughout his time in the emergency room.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. §8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. §8-43-201, C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential*

Insurance Co. v. Cline, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Claimant's testimony is addressed separately. The ALJ finds the testimony of Pete Gonzalez and Shane Samborsky to be sincere in intent, but simply not outcome-determinative.

D. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968). The ALJ finds that each expert has rendered their opinions to the best of their ability, based upon the information they were provided. The real issue here is one of *persuasiveness.*

E. Further, courts are to be "mindful that the Workmen's Compensation Act is to be liberally construed to effectuate its humanitarian purpose of assisting injured workers." *James v. Irrigation Motor and Pump Co.*, 503 P.2d 1025 (Colo. 1972).

Overcoming the DIME Opinion on MMI, Generally

F. The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*; *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590, 592 (Colo. App. 1998); *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186, 189-190 (Colo. App. 2002); *Sholund v. John Elway Dodge Arapahoe,* W.C. No. 4-522-173 (ICAO October 22, 2004); *Kreps v. United Airlines,* W.C. Nos. 4-565-545 and 4-618-577 (ICAO January 13, 2005). The MMI determination requires the DIME physician to assess, as a matter of diagnosis, whether the various components of a claimant's medical condition are casually related to the injury. *Martinez v. ICAO*, No. 06CA2673 (Colo. App. July 26, 2007). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding the cause of a particular component of a claimant's overall medical impairment, MMI or the degree of whole person impairment, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001).

G. This enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.* Where the evidence is subject to conflicting inferences a mere difference of opinion between qualified medical experts does not necessarily rise to the level of clear and convincing evidence. Rather it is the province of the ALJ to assess the weight to be assigned

conflicting medical opinions on the issue of MMI. *Oates v. Vortex Industries,* WC 4-712-812 (ICAO November 21, 2008).

H. As a matter of diagnosis the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000).

Overcoming the DIME Opinion, as Applied

I. No doubt Claimant was in distress on the day his right shoulder was injured. It is certainly plausible that someone in Claimant's position might well fail to notice a lesser injury in the moments, possibly even hours, following an incident such as occurred here. However, this is not a compound fracture victim failing to note some abrasions in the ER. In this case, Claimant failed to report such symptoms for approximately 2½ months, despite ample opportunity to do so. When Claimant finally did report his alleged symptoms, by his own admission he had recently been fired by Employer-for reasons not entirely clear from this record, but apparently based upon attendance. As noted by the ALJ in Finding of Fact #15, Claimant is no shrinking violet when it comes to advocating for himself. To the extent Claimant contends that he was not provided an outlet by his numerous medical providers to express left shoulder symptoms, the ALJ is simply not persuaded.

J. Similarly, the ALJ is not persuaded that Claimant would have been told, in effect, just to mark the areas that hurt "the worst," and ignore the rest. Such "advice" (which the ALJ does not find occurred) contraindicates every motivation for the providers to comprehensively treat injured workers. It's part of their job, and it pays to do so. Noting and addressing all reported symptoms is also a great way to avoid malpractice claims. It is worth noting that nowhere in the DIME report does Claimant tell the DIME physician that he had been stymied in his efforts to complain of left shoulder symptoms in the 2 1/2 months following his injury.

K. This lack of timely reporting factored significantly in the opinions of Dr. Sharma and Burris that the left shoulder complaints are not related to this work incident. It is further noted that Dr. Larson (appropriately, but without prompting from the Claimant) examined the left shoulder, and found no abnormalities. While Claimant-months later- *reported* to him that his left shoulder was injured at work, Dr. Larson performed no such analysis, nor reached such a conclusion. While Dr. Jinkins is no doubt sincere in his analysis that he feels the left shoulder was work-related, it is

unclear what records were at his disposal. In the final analysis, the opinions of Dr. Jinkins are merely that - differences in medical opinions with those of the DIME physician. **At no time does Dr. Jinkins ever critique the DIME report, or explain why it is highly probably incorrect.**

L. In this case the Division Examiner, Dr. Sharma, found Claimant reached MMI on September 19, 2018, as did Claimant's ATP Thomas J. Centi. No ATP has stated these determinations are erroneous or incorrect. Dr. John Burris' conclusions that this date is claimant's date of MMI and that Claimant's left shoulder is unrelated to Claimant's October 26, 2017, injury are also persuasive. Combined, the collective, informed opinions of Dr. Burris, Dr. Sharma, and Dr. Centi are significantly more persuasive than the contrary opinion of Dr. Jinkins. The ALJ therefore concludes that the DIME physician's opinion on MMI has not been overcome by clear and convincing evidence.

ORDER

It is therefore Ordered that:

1. The DIME opinion of Dr. Sharma on MMI has not been overcome.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 11, 2019

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-100-520-002

ISSUES

I. Whether Respondents overcame the opinion of the DIME physician, Dr. Douthit, that Claimant is not at MMI.

STIPULATIONS

The parties stipulated that if the DIME doctor's opinion of "not at MMI" stands, then:

i) The average weekly wage would be $448.36; and

ii) The authorized treating physician would be Dr. Kristin Mason or Dr. Roberta Anderson-Oeser.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. Claimant is currently 57 years old. She works as a "part-time loader" at United Parcel Service (UPS), working about 25 hours a week, since July 1, 2018. (*Tr. at 58:11-18*). Her first language is Spanish, and while she feels comfortable speaking English, she is more comfortable speaking Spanish, especially in medical and legal situations. (*Tr. at 58:22-59:7*). During the hearing, Claimant used the services of an interpreter.

2. On November 11, 2018, Claimant was working in an area where she did not typically work. After being in the area only one or two minutes, something hit her on the left side of her head and shoulder. (*Tr. at 59:12-14, 60:1-4*). Her immediate reaction was to hunch down, and the item then fell on the left side of her back. (*Tr. at 59:14-17*). At once, she "felt a lot of pain." She looked down, and realized she had been hit by a large gray bag that fell from a conveyer belt ten feet or so above her head, which was filled with envelopes and boxes. (*Tr. at 60:1-11*; *Cl's Ex. 3 at 36*). Since she had not been working with the particular bag that hit her, she did not know what it specifically weighed, but estimated it weighed somewhere between 15 and 30 to 40 pounds. (*Tr. at 60:12-22*). She did not pick it up to check its weight, but observed that the bag was full. (*Tr. at 60:23-61:1; 69:15-16*). She guesstimated that weight because she often carries those bags for work. (*Tr. at 70:2-3*). Claimant described the bag as approximately four feet by two feet, or the size of a large garbage bag. (*Tr. at 61:2-10*).

3. Claimant provided a video to the Court of the place in UPS where she was injured. She indicated that the location from which the bag fell from was on top of the

conveyor belt, which was at least ten feet above her head, and the bag that fell on her was similar to the bags on the video. (*Cl's Ex. 11; Tr. at 61:22-64:20; Cl's Ex. 3 at 36*).

4. After the bag fell on top of her, Claimant turned around to see if there was someone who could help due to her immediate pain levels, but no one was there. (*Tr. at 59:15-17, 69:23-24*). She then went to the second floor and spoke with her supervisor and the manager, and they filled out a report. (*Tr. at 59:18-20*). Claimant explained to them that the bag had originally fallen on the left side of her head, onto her shoulder, and then when she crunched down, it hit her back. (*Tr. at 69:1-13*). The biggest impact was to her shoulder. *Id*. Claimant was given the option of going to the emergency room or home to rest, as it was about 10:00 p.m. (*Tr. at 59:20-22*). She chose to go home because of the pain she was in, but then went to a clinic, Advanced Urgent Care (AUC), the following day. (*Tr. at 59:23-25*).

5. On November 12, 2018, at Claimant's first visit at Advanced Urgent Care, she was seen by Brittany Blanchard, PA-C. (*Cl's Ex. 1 at 4*). There is no indication Claimant was provided with an interpreter or that the medical provider spoke fluent Spanish. Claimant testified that she explained how the injury occurred (a bag filled with boxes and shipping envelopes fell on top of her from 10 feet above) and that the bag weighed between 15 pounds and 30 to 40 pounds. (*Tr. at 70:21-23, 60:1-11*). Claimant testified that Ms. Blanchard, a Physician's Assistant, asked her if she was in pain, and that she responded "yes . . . it's my shoulder." (*Tr. at 60:1-11, 65:12-17*). Claimant also indicated that Ms. Blanchard then asked her to do a movement with her left arm, and Claimant complied and stated there was pain with the movement. (*Tr. 65:17-20*). According to Claimant, Ms. Blanchard indicated to Claimant that the pain would disappear within 10 days, and that she should use ice and Aleve for the pain. (*Tr. at 60:1-11, 65:19-22*). Claimant also testified that she also explained to Ms. Blanchard that she had left-sided neck pain and some pain in her left lower back. (*Tr. at 60:1-11, 65:23-66:4*). Conversely, the medical record filled out by Ms. Blanchard indicates that a box, weighing approximately 15 pounds, fell from 10 feet and hit Claimant on top of her head. (*Cl's Ex. 1 at 6*). While the record documented Claimant's muscle aches of the low back and neck, as well as a contusion of the head, it failed to document Claimant's pain in her left shoulder. *Id*. Furthermore, according to the medical records and Claimant's history, Ms. Blanchard never performed a comprehensive physical exam of Claimant, but rather just asked her to move her arm. (*Tr. at 50:11-12*). Thereafter, Ms. Blanchard checked the box on the M-164 form that Claimant was at "full duty." (*Cl's Ex. 1 at 6*).

6. Prior to this incident on November 11, 2018, Claimant had never had any problems with her left shoulder, nor had she seen a doctor or received any treatment for her left shoulder. (*Tr. at 66:10-15, 23:14-23*). Claimant also did not have any subsequent injuries after November 11, 2018 to her left shoulder. (*Tr. at 67:2-4*).

7. Claimant testified that about the third day following the injury, she felt a pop in her left shoulder, and "it felt like a little ball." (*Tr. at 66:16-18*). Her left shoulder has continued to pop since then on a regular basis, and more often when she is working. (*Tr. at 66:19-24*). And, when it pops, it also hurts. (*Tr. at 66:25-67:1*).

8. On November 19, 2019, Claimant's second visit to Advanced Urgent Care, she again saw Physician's Assistant Blanchard. At that time, Ms. Blanchard documented strain of neck muscle, low back strain, and injury of head. (*Cl's Ex. 1 at 8, 11*). There is no indication Ms. Blanchard tried to clarify the history of the injury or even discuss the mechanism of injury with Claimant. (*Cl's Ex. 1 at 8-11*). Ms. Blanchard noted that the low back was improving, but again failed to mention Claimant's shoulder, and placed Claimant at MMI with no restrictions, maintenance medical treatment, or permanent impairment. (*Cl's Ex. 1 at 8*).

9. On November 29, 2019, and despite Ms. Blanchard not providing Claimant with a follow-up appointment, Claimant returned to Advanced Urgent Care. Again, Claimant was not evaluated by a medical doctor. Instead, she saw Emily Kuper, FNP-C. Ms. Kuper documented that Claimant was still having left-sided neck pain. She also documented that Claimant had left shoulder pain and strain, and that Claimant indicated she felt a "pop" in her left shoulder around November 23, 2018. (*Cl's Ex. 1 at 14*). But, Ms. Kuper did not indicate that was the only time Claimant had felt a pop in her shoulder since the work accident. Ms. Kuper sent Claimant for an x-ray of her left shoulder, which came back negative, and recommended ice, heat, NSAIDS, and rest. She further provided lifting and carrying restrictions of 10 pounds, and no reaching overhead at all, and determined Claimant was not at MMI. *Id. at 12, 14*. There is also a note of providing rehab exercises for a rhomboid muscle strain. *Id. at 14.* Although Ms. Kuper noted that there was a question as to whether Claimant's shoulder pain was related to the initial work-related injury, she eventually determined that Claimant had "work related medical diagnosis(es) [of] strain of neck and L[eft] shoulder." *Id. at 14, 12*.

10. On December 11, 2018, at Claimant's fourth visit at Advanced Urgent Care, she finally saw a medical doctor. Julie Parsons, M.D., evaluated Claimant, a month following the initial injury. Dr. Parsons documented that the location of the injury body part was "Shoulder L"; the quality of the injury was "aching"; the duration was from the "Date Of Injury: 11/11/2018"; alleviating factors were NSAIDS, heat, and ice; and aggravating factors included lifting, twisting/turning, and movement. (*Cl's Ex. 1 at 19*). Dr. Parsons also noted that Claimant had joint pain and minimal pain over the AC joint, and that Claimant had a half-dollar sized thermal burn over her left anterior shoulder as a result of icing her left shoulder directly on her skin. Id. Dr. Parsons diagnosed a left shoulder strain, neck pain, and a thermal burn. *Id. at 20, 17*. Dr. Parsons, the only physician to ever treat Claimant for her injury, then checked the box on the M-164 form stating that the objective findings were consistent with history and/or work related mechanism of the injury, and that the "work related medical diagnosis(es)" included "L[eft] shoulder strain; burn [from] ice L[eft] shoulder." *Id. at 20, 17*. Dr. Parsons also provided Claimant with rehab exercises for rhomboid muscle strain. *Id*. Dr. Parsons placed Claimant back at full duty, but determined that she was not at MMI. *Id. at 17*; (*Tr. at 35:18-36:12*).

11. On December 26, 2018, Claimant returned to Advanced Urgent Care and again saw Ms. Blanchard. Once again, just as when Ms. Blanchard saw Claimant before, she again placed Claimant at MMI. (*Cl's Ex. 1 at 21*). This time, she documented the work-related medical diagnoses as left shoulder strain, neck sprain, and

thermal burn. *Id*. Ms. Blanchard continued to also document a rhomboid muscle strain. (*Cl's Ex. 1 at 23*).

12. On February 13, 2019, at a follow-up visit, Ms. Blanchard changed her mind again and determined Claimant's left shoulder pain was unrelated to her initial injury. *Id. at 26*. Claimant disputed Ms. Blanchard's opinion because "I always complain that the pain is in my left shoulder since the accident in November 2018." (*Tr. at 75:4-8, 77:23-25*). In fact, when asked specifically about this appointment at Advanced Urgent Care, Claimant stated "I always go there for pain in my left shoulder". (*Tr. at 74:22-75:3*). Ms. Blanchard again placed the Claimant at MMI, even though, by this point, Claimant was complaining of joint pain in her left shoulder, occasional pins and needles radiating down her left arm, and a frequent pinching feeling in her left shoulder joint radiating in her neck. *Id*. *at 28*. Ms. Blanchard documented that Claimant's aggravating factors included movement, specifically overhead. *Id*. Further, Ms. Blanchard objectively documented tenderness on palpation over the left AC joint with a palpable subdermal nodule. *Id*.

13. On March 4, 2019, Respondents filed a Final Admission of Liability admitting Claimant suffered a compensable injury on November 11, 2018. (*Cl's Ex. 4*.) Respondents admitted liability for medical benefits, but denied all other benefits based upon Claimant being placed at MMI without any impairment by Ms. Blanchard on December 26, 2018. *Id*. As noted on the December 26, 2018, report, Dr. Parson's signed off on Ms. Blanchard's findings and conclusions. (*Cl's Ex. 1 at 21*.)

14. Claimant subsequently requested and attended a Division Independent Medical Exam (DIME) with John Douthit, M.D. The purpose of the DIME was to assess, as a matter of diagnosis, whether the various components of Claimant's medical condition, which included her left shoulder complaints, were causally related to her compensable industrial injury for which Respondents had admitted liability.

15. As part of his examination, Dr. Douthit took a history from Claimant, reviewed her medical records from her date of injury, and physically examined her. (*Cl's Ex. 2 at 31-32*). On examination, he found "popping and crepitation of the left acromioclavicular joint with tenderness at the AC joint on active motion of the left shoulder." *Id. at 32*. He also found tenderness in the left trapezius area. *Id*. Dr. Douthit determined that Claimant had the following work-related medical conditions: 1) sprain of the cervical spine, which was at MMI without impairment, and 2) separation of the AC joint of the left shoulder, which was not at MMI. *Id. at 33.* Dr. Douthit provided a provisional extremity impairment rating of the left shoulder of 12%, which converted to 7% whole person. *Id*. Dr. Douthit reasoned that "[t]he claimant has had popping of the AC joint of the left shoulder which is a separation of the AC joint and popping of the clavicle on the acromion. This is painful and can be corrected surgically." *Id*. He further concluded that Claimant "is not at MMI. She needs an orthopedic consultation and possible surgery of her left shoulder." *Id. at 34*. The ALJ finds Dr. Douthit's conclusions to be credible and persuasive because they are consistent with Claimant's testimony, which the ALJ credits and finds persuasive. Moreover, Dr. Douthit's conclusions are consistent with Dr. Failinger's testimony that the mechanism of injury described by Claimant

and clarified by the video submitted at hearing could definitely injure Claimant's left shoulder and the AC joint.

16. On August 5, 2019, Respondents filed an Application for Hearing to overcome the opinion of Dr. Douthit. In their Application, they endorsed the issue of causation and relatedness. But, Respondents did not move to withdraw their Final Admission of Liability in order to dispute the threshold question as to whether Claimant sustained a compensable injury in the first instance. (*Cl's Ex. 5*).

17. Following the determination by Dr. Douthit Claimant was not at MMI due to her shoulder injury, Respondents sent Claimant to Dr. Failinger to perform an independent medical examination (RIME). Dr. Failinger agreed with the history provided by Claimant that she was injured when a bag full of things, which included boxes and mailing envelopes, fell onto her. He noted that he was the only provider who asked enough follow-up questions to fully understand the make-up of the bag and what it contained. (*Tr. at 23:24-24:5, 27:14-19, 76:17-21*). He noted that Claimant described to him the bag falling ten feet, and then hitting the left side of her head, the left shoulder, and then as she flinched forward, her left back. (*Tr. at 24:6-14*). While Dr. Failinger originally was confused whether it was ten feet off the ground or ten feet above Claimant's head, (*Tr. 24:6-12, 15-20*), after reviewing the video of the area, he determined that the fall of the bag was likely from 10 feet above Claimant's head. (*Tr. at 27:3-6*). Claimant reported to Dr. Failinger that she had pain in the left shoulder immediately and that she was worse by the end of the day. (*Tr. at 28:2-5*). Dr. Failinger reported that Claimant told him that Advanced Urgent Care placed her on lifting restrictions of ten pounds, (which Dr. Failinger disputed was in the medical record from the first day, but the clinic actually did place her on 10 pound restrictions at her third visit). (*Tr. at 28:9-11*).

18. Upon physical examination, regarding Claimant's left shoulder, Dr. Failinger found left paraspinal tenderness to deep palpation; as well as left shoulder girdle tenderness in the distal one quarter with bony palpation of the clavicle; tenderness at the AC joint; some tenderness in the bicipital groove in the anterior joint; and tenderness at the greater tuberosity with palpation. (*Tr. at 33:1-10; R's Ex. II.C. at 30-31*). Additionally, Dr. Failinger determined that her left shoulder adduction was decreased from the right; external rotation in the left arm was abducted, less than on the right; there was mild discomfort at the AC joint with adduction of arm across the chest; Hawkins test was positive on the left, showing some potential rotator cuff inflammation or even a tear; and O'Brien's test was equivocal on the left. (*Tr. at 33:12-34:14; R's Ex. II.C. at 30-31*).

19. Upon a discussion between Dr. Failinger and Claimant regarding pain, Claimant described to Dr. Failinger that she had tightness or pain in her left paraspinal region and popping in the left shoulder, as well as some spasm in her left trapezius. (*Tr. at 37:5-8*). She had difficulty sleeping on her left side after the incident, and described a needle sensation in the left shoulder. (*Tr. at 28:17-22*). She noted that would ice her shoulder, but ultimately received some kind of burn from icing it too much without some kind of towel cover. (*Tr. at 28:23-29:3*).

20. Dr. Failinger determined that Claimant had symptoms in her AC joint, and it was probably inflamed. (*Tr. at 32:24-33:2*). Dr. Failinger agreed that sometimes Claimant hears popping in the left shoulder with some discomfort with the popping. (*Tr. at 32:11-13*). And, while Dr. Failinger did not specifically remember Claimant stating "did you hear that" at minute 27 of the RIME, he had no doubt that popping occurred during the exam as "that's classic for an AC joint." (*Tr. at 31:14-18*). While he additionally did not remember specifically Claimant telling him during the exam that when her shoulder pops, it also hurts, he stated "that [pain during popping] would [also] be classic for an AC joint." (*Tr. at 21:19-23*). Dr. Failinger noted in his report that he had some questions about the timing of when the initial popping occurred following the injury, but that he "chose to not ask her" about the topic during his examination of Claimant. (*Tr. at 51:1-15*).

21. Dr. Failinger agreed with Dr. Douthit's diagnosis of separation of the AC joint in the left shoulder. (*Tr. at 38:3-5*). Yet, he determined that because Ms. Blanchard did not include in the history from the first appointment that Claimant had been hit with the bag falling from ten feet above her directly onto the left shoulder, and she did not document Claimant having any left shoulder pain during the initial visits, then the separation of the AC joint was not related to the initial work injury. Importantly, Dr. Failinger did opine that if Claimant had received a direct blow on her left shoulder from the bag, then the left shoulder could "absolutely" be related. (*Tr. at 38:22-39:4; 50:2-5, 40:2-5*). Rather than giving primacy to the history provided by Claimant regarding how the injury occurred and the immediate pain in her left shoulder, Dr. Failinger gave primacy to the records of Brittney Blanchard, "a PA who saw [Claimant] four different times; and three of those times, sent her out the door and said she has nothing wrong with her." (*Tr. at 40:6-11*). Finally, Dr. Failinger agreed that Dr. Douthit did not violate the AMA Guides, Third Edition Revised, in reaching his conclusions, and that the mere difference of opinions between Dr. Failinger and Dr. Douthit came down to the fact that Dr. Douthit believed Claimant's history of the event, while Dr. Failinger did not believe that same consistent history. (*Tr. at 40:21-41:17; 42:5-12*).[1]

22. The ALJ finds that Claimant provided credible and persuasive testimony concerning her work accident, injuries, and interactions with the various medical professionals. Claimant's testimony was supported and corroborated by the video she submitted into evidence. The video clarified and provided context as to how the accident occurred and how she incurred the various injuries, including the injury to her left shoulder. It also highlighted the inaccuracy contained in the initial medical records regarding the mechanism of injury and how that inaccuracy resulted in different causation determinations regarding the injury to her left shoulder. As established at hearing, a single box did not fall and strike Claimant on her head. Instead, a large bag full of boxes and mail envelopes fell from an overhead conveyor belt and landed on Claimant's head and left shoulder.

[1] Dr. Failinger initially noted in his report that he did not believe that Dr. Douthit had reviewed the initial records from Ms. Blanchard, but this is not accurate as Dr. Douthit stated, "review of her medical records was noted from date of injury. There was a form filled out noting that she was working without restrictions. No diagnosis was given by Brittney Blanchard, physician assistant. It was noted she was seen for neck and SI joint injury." (*Cl's Ex. 2 at 21; Tr. at 42:13-43:13*). No other medical record, except that of the first visit, notes an SI joint injury. See, (*Cl's Ex. 1*).

23. There are some variances between AUC's medical records and Claimant's testimony. For example, Claimant testified about an appointment where her shoulder was evaluated and she was prescribed ice and ultimately suffered a skin burn from using the ice. Although Claimant contends her shoulder was evaluated, and ice prescribed at the first visit, the medical records indicate that occurred at the third visit, which was approximately 3 weeks after the work accident. However, the ALJ credits Claimant's testimony over AUC's medical records for a number of reasons.

- First, AUC's medical records do a poor job of capturing and conveying exactly what occurred during each medical appointment. For example, it appears that each medical report prepared by AUC regarding each of Claimant's appointments is an electronic medical record that is created by the merging of various data inputs. Complicating the ALJ's ability to understand what transpired at each visit is that the ALJ is unable to determine whether the information contained in each field or section of each report is, or is supposed to be:

    i. A direct quote from Claimant;

    ii. The evaluator's attempt to interpret what Claimant reported and the evaluator's attempt to state it in Claimant's words;

    iii. The evaluator's attempt to interpret what Claimant reported and the evaluator's attempt to state it in the evaluator's words;

    iv. The evaluator's attempt to provide a diagnosis based purely on Claimant's subjective complaints, or based on Claimant's subjective complaints and the evaluator's objective findings;

    v. Prepopulated data that is automatically generated or carried forward from other appointments;

    vi. A combination of any of the above; or

    vii. Something else.

  To demonstrate the problems with AUC's records, the following section is copied from Claimant's first medical appointment at AUC on July 12, 2018. As shown below, it is difficult to determine the nature and extent of the conversation between Claimant and the medical provider during Claimant's first medical appointment for her work accident. And, based on the information contained in the report, it is difficult to determine, with much accuracy, exactly how Claimant was injured at work and what transpired during her medical appointment. A section from the July 12, 2018, AUC report provides the following information:

HPI

Trauma/Injury
Reported by patient.

Location/Where on body?: back **(neck, SI joints)**
Quality/Description of Symptom (i.e. burning, cramping, constant): neck stiff, burning, lower back sharp, stays in lower back more so on left
Severity/Pain Level: pain level 6/10
Duration/How long? date of injury **(11.11.18)**
Context/How did it occur? work injury **(box fell and hit on top of head, ~15lbs drop from 10feet)**
Notes: Denies LOC, dizziness, change in vision, or HA. She c/o neck stiffness/soreness and low back soreness. Denies previous neck or low back injury/pain. Denies radicular pain, paresthesias, or B/B changes.

ROS

Patient reports **muscle aches (low back, neck)** but reports no swelling. She reports no fever, no significant weight gain, and no significant weight loss. She reports no vision change and no irritation of the eyes. She reports no ear pain, no nose/sinus problems, no sore throat, and no loss of hearing. She reports no cough, no shortness of breath, and no wheezing. She reports no chest pain and no palpitations. She reports normal bowel movements, no abdominal pain, no nausea, and no vomiting. She reports no hematuria and no difficulty urinating. She reports no headaches, no dizziness, and sleeping well. She reports no skin discoloration, no rash, and no skin lesion(s). She reports no depression.

(*Cl's Ex. 1 at 6*).

The section above demonstrates the cryptic and fragmented nature of the medical records that document the evaluation and treatment of Claimant. Moreover, it is this type of cryptic and fragmented medical note that was used by the majority of the medical providers in this case to determine the extent of Claimant's work accident and whether she injured her left shoulder during the work accident.

- Second, the reliability of the information contained in the cryptic and fragmented medical records from AUC is diminished even more since Claimant's primary language is Spanish. This is not to say that Claimant is not sufficiently fluent in English to communicate at work and perform her job, which may not require a lot of precise communication in English. But, Claimant testified that she is more comfortable using an interpreter for important matters like testifying in court and at medical appointments where it has become apparent that linguistic precision matters.

- Third, before Claimant attended the RIME with Dr. Failinger, not a single medical provider and/or evaluator was able to understand the mechanism of injury and clearly document and articulate what fell on Claimant in their medical notes/reports. It was not until Claimant was evaluated by Dr. Failinger that it was articulated in a medical report that a bag of boxes fell onto Claimant and not a single box. Moreover, it was not until the hearing and the video was played showing the conveyor belt and the height from which the bag fell that it was clearly understood what transpired during the accident and how Claimant's injuries occurred.

- Fourth, AUC's medical records that attempt to document and capture what transpired during each medical appointment are not internally consistent. For example, and as found above, the November 12, 2018 report from AUC documents Claimant's neck is supple with full range of motion, but yet also documents Claimant's neck is stiff, spasmatic, and that Claimant is complaining of a stiff neck.

24. To the extent Dr. Failinger's testimony and opinions, support the DIME doctor's report, the ALJ finds them credible and persuasive. To the extent they are not supportive or contradictory to the DIME report, the ALJ rejects them as not persuasive.

25. Dr. Failinger credibly testified that his causation opinion regarding Claimant's left shoulder and MMI status is based upon his decision to rely upon AUC's medical records instead of the history provided by Claimant. In support of his decision to rely upon AUC's medical records, instead of the information provided by Claimant during the DIME and RIME, he stated the following:

> Medical records are the most objective form of documentation of various injuries and events that have occurred in the past in order to be able to determine whether or not there is a reasonable relationship between a work event and the subsequent development of symptoms. As stated in the **AMA Guides to the Evaluation of Injury & Disease Causation, Second Edition**, timeliness or the temporal reporting of symptoms following the incident is the most important and is the only critical element in determining the relationship between the development of symptoms following an incident. There does not appear to be a reasonable temporal reporting, or timely reporting, of the patient's symptoms on either 11-29-2018, nor on 02-13-2019 for there to be a relationship between the work incident of 11-11-2018 and the subsequent development of symptoms. Dr. John Douthit later identified the left shoulder being symptomatic and he felt her symptoms were related to the 11-11-2018 work incident. I disagree with that based on record review, which is distinctly different from the patient's history at the Independent Medical Examination of 09-05-2019.

26. The problem the ALJ has with Dr. Failinger's first premise, (i.e., that medical records are the most objective form of documentation of various injuries and events that have occurred in the past), is that it assumes the medical records are reliable, accurate, and complete. And, in this case, the ALJ has determined that the medical records relied upon by Dr. Failinger are not reliable, accurate, and complete. Moreover, if you assume his second premise is also true, (i.e., that timeliness or the temporal reporting of symptoms following the incident is the most important and is the only critical element in determining the relationship between the development of symptoms following an incident), the ALJ has found that Claimant developed shoulder pain after the accident and that there was a sufficient temporal relationship between the accident and her shoulder symptoms.

27. Moreover, the ALJ is not persuaded by his quotation from the **AMA Guides to the Evaluation of Injury & Disease Causation, Second Edition**, which he contends stands for the proposition that the "timeliness or the temporal reporting *is the only critical element* in determining" causation (emphasis added). Although the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised), have

been adopted and incorporated into the Colorado Workers' Compensation Act, the AMA Guides quoted by Dr. Failinger have not. Thus, the ALJ is not persuaded by Dr. Failinger's attempt to support his opinion, via an appeal to authority of the **AMA Guides to the Evaluation of Injury & Disease**, when there is no agreement or finding by this ALJ that the Guides to which he cites are authoritative or persuasive based on the facts of this case. In the end, the ALJ disagrees with the underlying premise used by Dr. Failinger in his assessment of causation and its application to the facts of this case.

28. Dr. Failinger determined, based on his familiarity with Rule 16-5 as a level II accredited physician and as an expert in occupational medicine, that Advanced Urgent Care did not follow that Rule requiring a medical doctor to evaluate the injured worker by the third visit. (*Tr. at 45:8-25*).

29. Claimant has not had sufficient evaluations and treatment of her left shoulder. (*Tr. at 68:3-6*). Even though Claimant has been in constant pain since her work injury, she has never stopped working. (*Tr. at 67:13-21*). As she stated in her testimony, the medical treaters had conveyed to her that she did not have any problems and that she needed to go back to work, and so that is what she did. *(Id. & Tr. at 71:2-6*). She continues to work full duty, but is in pain when she lifts packages with her left arm. (*Tr. at 71:7-10*).

30. The work accident resulted in an injury to Claimant's left shoulder. Claimant needs additional medical treatment to fully diagnose the extent of her left shoulder injury and determine the medical treatment that is reasonable and necessary to cure her from the effects of her injury or improve her condition.

31. Claimant is not at MMI.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or

every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Respondents overcame the opinion of the DIME physician, Dr. Douthit, that Claimant is not at MMI.

Litigants bear a high burden of proof when challenging opinions rendered by a DIME physician. The opinion of the DIME physician concerning MMI and impairment is binding unless overcome by clear and convincing evidence. Section 8-42-107(8), C.R.S. Both determinations inherently require the DIME physician to assess, as a matter of diagnosis, whether the various components of Claimant's medical condition are causally related to the industrial injury. *Leprino Foods Co. v. Indus. Claim Appeals Office of State*, 134 P.3d 475, 482–83 (Colo. App. 2005); *Egan v. Indus. Claim Appeals Office,* 971 P.2d 664 (Colo. App. 1998); *Qual-Med, Inc., v. Indus. Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998). Therefore, a DIME physician's determination concerning causation are binding unless overcome by clear and convincing evidence. *Id*. Moreover, the party challenging the DIME physician's MMI determination bears the burden of proof by clear and convincing evidence. *See, Leprino* at 482, 483.

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of an injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. However, it is inconsistent with a finding of MMI that additional diagnostic procedures and/or medical evaluations offer a reasonable prospect for defining the extent of Claimant's work injury and need for additional medical treatment. *See Patterson v. Comfort Dental East Aurora*, WC 4-874-745-01 (ICAO February 14, 2014); *Hatch v. John H. Garland Co*., W.C. No. 4-638-712 (ICAO August 11, 2000).

Under the clear and convincing standard, the party challenging a determination by the DIME physician must produce evidence that shows that it is highly probable that the

IME determination is incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d at 414. The evidence contradicting the DIME must be "unmistakable and free from serious or substantial doubt." *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002). The enhanced burden of proof reflects the underlying assumption that a physician selected by an independent and unbiased tribunal (the Division) will provide a more reliable medical opinion. *Qual-Med*, 961 P.2d at 592. A mere reasonable difference of opinion between physicians usually fails to constitute clear and convincing evidence. *See Garner v. Home Depot USA, Inc*., W.C. No. 4-644-099 (July 23, 2008); *Villalobos-Chaparro v. Benny's Concrete*, W. C. No. 4-356-868 (Jan. 4, 2001).

As found, Dr. Douthit, the DIME physician, assessed, as a matter of diagnosis, whether the various components of Claimant's medical condition, which included her left shoulder, were causally related to the industrial injury. Dr. Douthit concluded Claimant's left shoulder condition is causally related to, and a component of, her compensable injury.

As found, Dr. Douthit further opined that Claimant is not at MMI since she needs additional treatment for her left shoulder that was injured during the work accident. Dr. Douthit reasoned that "[t]he claimant has had popping of the AC joint of the left shoulder which is a separation of the AC joint and popping of the clavicle on the acromion. This is painful and can be corrected surgically." He further concluded that Claimant "is not at MMI. She needs an orthopedic consultation and possible surgery of her left shoulder." The ALJ found Dr. Douthit's conclusions to be credible and persuasive because they are consistent with Claimant's testimony, which the ALJ credited and found persuasive. Moreover, Dr. Douthit's conclusions are consistent with Dr. Failinger's testimony that the mechanism of injury described by Claimant and clarified by the video submitted at hearing could definitely injure Claimant's shoulder and the AC joint.

As found above and as concluded now, Respondents have failed to meet their heightened burden of proof. Respondents contend that the lack of documentation of left sided shoulder complaints in the initial records from AUC establishes Claimant's left shoulder condition is not related to her work accident and therefore she is at MMI. However, the ALJ did not find the AUC records to be reliable in documenting exactly what occurred during each medical appointment. Instead, the ALJ credited the statements made by Claimant contained in the DIME, RIME, as well as her testimony at hearing, that she did have the immediate onset of left shoulder pain after the work accident. Thus, the ALJ did not find those records to be persuasive in establishing by either a preponderance of the evidence - or by clear and convincing evidence - that Claimant did not injure her shoulder at work and is therefore at MMI.[2]

Moreover, Respondents also relied upon the opinions of Dr. Failinger to overcome the DIME opinion that Claimant is not at MMI. Dr. Failinger did opine that Claimant's left

[2] Respondents contend in their proposed order that their burden of proof as it relates to whether Claimant suffered an injury to her left shoulder in the first instance is a preponderance of the evidence. This raises two issues. First, if they are correct and they still have the burden of proof, but it is only a preponderance of the evidence, the ALJ also finds and concludes that Respondents failed to overcome the DIME opinion regarding MMI by a preponderance of the evidence. Second, if under Respondents contention, Claimant has the burden to prove she suffered a compensable shoulder injury in the first instance, the ALJ also finds Claimant met her burden and established that she suffered a compensable left shoulder injury by a preponderance of the evidence.

shoulder condition is not related to her work accident and therefore she is at MMI. However, the underpinnings of his opinions regarding causation and MMI are the AUC records that the ALJ has found to be unreliable. And, "[l]ike a house built on sand, the expert's opinion is no better than the facts on which it is based." *Kennemur v. State of California*, 184 Cal. Rptr. 393, 402–03 (Cal. Ct. App. 1982). Therefore, because the data upon which Dr. Failinger relied upon to determine causation is not reliable, the ALJ did not find his opinion to be persuasive at is relates to causation and MMI.

On the other hand, Dr. Failinger admitted that if Claimant suffered a direct strike to the left shoulder AC joint, then it was "absolutely" possible that the work injury caused her left shoulder problems. And, the ALJ did credit that portion of his opinion and found it to be persuasive.

The findings of fact set forth above compel the conclusion that the Claimant suffered a compensable injury to her left shoulder and she is not at MMI and that Respondents have failed to overcome Dr. Douthit's opinion by credible or persuasive evidence, much less clear and convincing evidence.[3] Therefore, the ALJ finds and concludes that Claimant is not at MMI and she should be evaluated and treated for her left shoulder injury under this claim.

The ALJ accepts the stipulation of the parties with respect to AWW and authorized provider.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents have failed to overcome the DIME physician's opinion of "not at MMI."
2. Claimant is not at MMI for her compensable left shoulder injury;
3. Claimant is entitled to choose a new authorized treating physician, either Dr. Kristin Mason or Dr. Roberta Anderson-Oeser;
4. Claimant's average weekly wage is $448.26; and
5. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to

[3] *Id*.

the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 20, 2019.

/s/ *Glen Goldman*

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that he sustained a work-related injury on January 15, 2019.

- Whether Claimant has proven by a preponderance of the evidence that he is entitled to medical benefits.

FINDINGS OF FACT

1. Claimant began working for Respondent in June, 2016 in the bakery department of its store #24. After approximately five months, Claimant transferred to store #137 as an assistant manager of the produce department. One of Claimant's job duties involved receiving and unloading produce shipments. Claimant testified that on January 15, 2019, he was trying to unload a box of bananas from the top of an unstable palette when he felt a painful pop in his neck.

2. Claimant testified that he "knew right away that something was very wrong," and that his pain radiated to his low back. Claimant finished his shift and worked the following day, allegedly worsening his symptoms. However, Claimant did not report his injury until January 19, 2019, although he had four previous workers' compensation claims and acknowledged that Respondent had also trained him to immediately report any injuries.

3. Claimant acknowledged that at the time of his alleged injury he was taking opioid pain medications for preexisting gout, and shoulder, foot, and ankle pain. Claimant also admitted to being addicted to opioid pain medications prior to the date of the hearing.

Claimant's Pre-Existing Injuries

4. In 2013 Claimant sustained injuries to his neck, bilateral shoulders and low back while working for a different employer. Claimant received a 17% whole body rating and was assigned permanent work restrictions. As of January 2018, Colleen Grady, FNP, at Claimant's primary care clinic, NextCare, documented that Claimant was addicted to opioid medications as a result of the 2013 injuries but could not seek alternative treatments because he did not have health insurance. Notwithstanding his addiction, Nurse Grady continued to prescribe Percocet to Claimant.

5. On May 2, 2018, Claimant returned to Nurse Grady again requesting additional opioid medication because he was unable to seek alternative treatments with a spinal specialist or pain management physician. Nurse Grady documented that she gave Claimant "post-dated scripts" for Claimant's opioid medications because Claimant's insurance would be expiring, and Claimant would not be able to return to NextCare.

Pharmacy records indicate that Claimant filled prescriptions for opioid medications on May 2, June 2, and July 2, 2018.

6. On November 24, 2018, Claimant returned to NextCare complaining of back spasms for the past six days and "requesting a refill of Valium and Percocet." Physician's Assistant Kerrie Kim documented she declined to prescribe Percocet, but did provide a "short Rx of Valium."

Claimant's testimony as to the alleged injury on January 15, 2019, is not credible

7. A few days before Christmas 2018, Claimant transferred to Employer's Store No. 137 in Arvada as an assistant produce manager. A large part of Claimant's job duties included unloading pallets of produce off the delivery truck into the cooler room by use of pallet jacks, removing or "breaking down" the boxes of produce from the pallets and storing the boxes of produce in the cooler room or cutting room.

8. Claimant testified that he injured his neck/right shoulder and low back on January 15, 2019, while lifting a box of bananas off an unstable pallet onto the floor. Claimant testified that the incident occurred immediately after receiving a load off the truck. Claimant was working with at least one coworker at the time he alleges he was injured, but the coworker did not witness the event.

9. One of the store's surveillance cameras captured Claimant's activities while breaking down the pallets in the cooler room after the load arrived. The pallet containing the bananas is seen clearly in the store video as it is wheeled through the cooler room and into the cutting room by another employee at 5:11:47 p.m.

10. Claimant follows the pallet jack into the cutting room at 5:12:10 p.m. Claimant testified that he immediately unloaded the bananas off the pallet because the pallet was unstable so he wanted to prevent the boxes of produce from falling off the pallet. Claimant further testified that after removing the bananas from the pallet he immediately felt pain which caused him to realize something was wrong and which required him to stop unloading the bananas to walk the pain off.

11. However, Claimant's testimony is inconsistent with the video which shows the pallet jack with the bananas being wheeled to the left side of the cutting room and coming to a stop at 5:12:22 p.m. A third employee opens the doors between the cutting room and the cooler at 5:12:42 p.m., at which time Claimant is seen standing at the far end of the cutting room with no boxes in his hands. Claimant's body is visible through the left window into the cutting room from 5:12:42 p.m. as he walks from the back of the cutting room through the doors into the cooler with the other employee at 5:12:55 p.m. Thus, the period of time that Claimant could have unloaded the pallet and removed the bananas was only *twenty seconds* – from the time the pallet jack drops the pallet on the left side of the cutting room at 5:12:22 p.m. until Claimant is seen at the back of the cutting room when the third employee exits the cutting room at 5:12:42 p.m.

12. Even if the coworker assisted Claimant unloading the pallet, the twenty seconds when Claimant was not visible in the cutting room is not sufficient time for both employees to cut the plastic off the two brown trays containing product at the top of the pallet, remove those trays, cut the plastic from the 12 boxes of bananas, remove the 12 boxes of bananas from the pallet, and then Claimant to walk to the back of the cutting room where he is seen at 5:12:42 p.m.

13. After Claimant returns to the cooler room at 5:12:54 p.m., Claimant's activities are captured on video for the next eight minutes. Claimant is seen unloading multiple boxes from the pallets and distributing the boxes throughout the cooler room without any apparent pain, frequently bending at the waist and rising on his toes using both hands overhead to remove boxes from the top of pallets and move them to other areas of the cooler room. These activities are inconsistent with Claimant's testimony of significant pain from an injury to his neck, low back or right shoulder area.

14. Claimant leaves the cooler room at 5:20:35 p.m., and returns at 6:03:28. Over the next eight minutes, Claimant again lifts numerous boxes from carts and pallets and distributes the produce throughout the cooler room without any apparent pain, several times placing boxes on his right shoulder to carry through the cooler room. Claimant's activities again are visible from 6:19:21 p.m., through 6:24:38 p.m., and from 6:45:53 through 6:48:34 p.m. During both of these periods, Claimant lifts and distributes boxes without apparent pain.

Claimant did not report the alleged injury until January 19, 2019

15. Claimant has filed at least four prior workers' compensation claims and also testified that he was aware that Employer had a policy requiring all work-related injuries to be reported to store management. However, Claimant did not report the alleged injury to store management on January 15, 2019. Instead, Claimant returned to work on January 16, 2019, and alleged that his work duties on that date made his condition even worse.

16. The ALJ reasonably infers based on Claimant's prior workers' compensation claims that Claimant knew Employer was required to provide medical treatment to an employee who sustained a work-related injury. Claimant's medical records from NextCare show that he did not have health insurance and could not afford to treat his pre-existing neck, low back and shoulder pain. Thus, if Claimant knew he had sustained a "very, very severe" injury, the ALJ finds it more probably true than not that Claimant would have reported the injury to Employer and sought medical treatment immediately.

Claimant testified untruthfully regarding the reason for taking Gabapentin

17. Claimant testified that he was not taking any medications for his pre-existing neck, shoulder and low back conditions at the time of his alleged injury, and that the gabapentin was prescribed to treat his bilateral lower extremity gout. Claimant's

testimony is contradicted by the medical records which establish that Claimant was taking gabapentin for his prior neck/shoulder complaints.

- On September 15, 2016, Jennifer Allison, FNP, documented Claimant's history of gout in his bilateral big toes. Allison documented that Claimant was switched to colchicine at his last visit "for the first time. He found this to be very effective at controlling his symptoms. Saw improvement within 2-3 hours of starting treatment." Nurse Allison started Claimant on allopurinol for gout.

- On November 17, 2016, Charlene Archulet, FNP, documented that Claimant "reports good response to allopurinol. Last gout flare was > 2 weeks ago."

- On November 13, 2017, almost one year after Claimant's last treatment for gout-related pain, Claimant returned to NextCare complaining of pain to the upper back and neck radiating to his bilateral arms and causing both hands to go numb. Paul Mack, PAC, assessed Claimant with "Neck Pain (M54.2) start Neurontin cervical paraspinal muscle spasm (M62.838) start Neurontin." Thus, the gabapentin (generic Neurontin) was prescribed for Claimant's cervical spine pain radiating into his upper extremities, at a time when Claimant had not had any complaints of gout-related pain for almost a full year.

- On December 14, 2017, Colleen Grady, FNP, documented Claimant's statement that gabapentin "makes him sleepy but is very effective for nerve pain and upper extremity numbness." Nurse Grady's Assessment was "Chronic pain of both shoulders (M25.512) Comments: Stable, improved with gabapentin."

- On November 24, 2018, Claimant returned to NextCare requesting a prescription for opioid medications for increased upper back pain. Kerri Kim, PA-C, documented that Claimant "will refill his gabapentin on Monday for his neuropathy." Claimant had no complaints of gout pain or symptoms on this visit, clearly showing that Claimant's gabapentin was prescribed for his upper back, neck and bilateral shoulder pain.

- On January 21, 2019, Jenelle Tittelfitz, PA-C, documented "Patient reports he is on long-term Gabapentin for pain associated with the shoulders."

- On January 24, 2019, Janine Kennedy, PA-C, documented that Claimant stated "He is on gabapentin chronically for his shoulders."

- On January 31, 2019, Karen Larson, M.D., documented that Claimant stated "He is 1 [sic] on chronic gabapentin for chronic shoulder pain after prior work injury."

18. Despite the persuasive medical evidence that Claimant knew his medical providers prescribed gabapentin to treat his neck and bilateral upper extremity numbness, Claimant testified that he was prescribed gabapentin for his gout and that he never told

any of the Concentra physicians that it was prescribed for his neck/shoulder pain. All three Concentra providers used different wording to document that Claimant was taking gabapentin for his shoulder condition, which indicates that the providers did not simply copy the information from a prior note but rather obtained the information directly from Claimant, as it is extremely unlikely that all three providers would have misunderstood Claimant and incorrectly documented that Claimant stated he was taking gabapentin for his shoulder condition.

Claimant attempted to hide his prior treatment records

19. When Claimant reported the alleged injury on January 19, 2019, he was sent to Employer's Assistant Store Manager Brandon Blakley to complete the Kroger Associate Incident Report Packet. Mr. Blakley testified that he completed an Employee Incident Questionable Claim Form because Claimant "disclosed that he had been to the doctor before the injury for nerve and muscle pain … also stated that the doctor had given him some medication to help with pain prior to injury." Mr. Blakley recalled that Claimant may have stated he received either an injection or medication the day before the alleged injury.

20. Claimant denied receiving any treatment shortly before the injury. However, Mr. Blakley and Claimant both testified that they had not previously discussed Claimant's medical treatment or medical condition. Thus, when Mr. Blakley completed the Employee Incident Questionable Claim Form on January 19, 2019, he would have had no way of knowing that Claimant ever had any "nerve and muscle pain" or received any medication prior to the alleged injury date unless Claimant told Mr. Blakley that information when he reported the alleged injury on January 19, 2019. Weighing the evidence, the Administrative Law Judge finds that it is more likely than not that Claimant told Mr. Blakley that he had received treatment or an injection only the day or two before the alleged injury.

21. Claimant attempted to hide his prior treatment records from Respondent and the court:

- On February 7, 2019, Claimant's attorney sent a letter to the adjuster disclosing four prior medical providers: NextCare, St. Anthony's Hospital, Concentra, and Lutheran Medical Center.

- On March 5, 2019, Claimant's discovery responses identified four additional health care facilities providing prior treatment: Touchstone Imaging, Hampden Surgery Center, Cary Motz, M.D., and Panorama Physical Therapy.

- On March 28, 2019, a Pre-Hearing Conference Order granted Respondent's motion to compel Claimant to provide an authorization to release pharmacy records. Those pharmacy records disclosed evidence of treatment with at least eight additional medical providers Claimant had not previously disclosed.

- At hearing, Claimant testified that has seen “ninety-plus” medical providers in the five years prior to the alleged injury.

Claimant’s allegation of an injury is based entirely on his Claimant’s testimony

22. Claimant introduced into evidence a letter on Concentra letterhead purportedly from James Cross, COD. Dr. Larson testified that Mr. Cross is not a physician but the Concentra center operations director and her supervisor “from an administrative standpoint.” Neither Dr. Larson nor Mr. Cross signed the letter, and Dr. Larson testified that she had no recollection of answering any of the questions posed.

23. Claimant argues that the letter establishes Dr. Larson’s opinion that Claimant sustained an injury on January 15, 2019. However, Dr. Larson’s testimony at hearing differed from the unsigned letter of which Dr. Larson has no recollection. At hearing, Dr. Larsen testified that she found no objective evidence of an injury when she examined Claimant on January 31, 2019, and based her recommendations for treatment solely on Claimant’s complaints of pain and restricted ranges of motion.

24. When Dr. Larson initially examined Claimant, he asked for Valium and Percocet by name. Dr. Larson did not prescribe them because Claimant “looked comfortable.”

25. Respondent obtained an Independent Medical Examination from F. Mark Paz, M.D., on April 25, 2019. Dr. Paz testified by deposition that Claimant’s subjective symptoms are not supported by objective findings on physical examination or diagnostic testing. During the interview portion of the examination, Claimant denied prior neck or back pain. Dr. Paz described Claimant as a poor historian, and described Claimant’s answers as vague and elusive. Dr. Paz testified that the CT scan of the cervical spine showed only arthritis and no evidence to explain Claimant’s alleged tingling of his hands. Dr. Paz further testified that the March 18, 2019 MRI of the lumbar spine showed an L5-S1 disc extrusion on the left, which had been documented on an MRI taken on August 2, 2013, so it was not a new findings and is on the opposite side of Claimant’s right-sided low back complaints. Dr. Paz’s ultimate opinion was that to a reasonable degree of medical probability, Claimant did not sustain an injury or an aggravation of an industry on January 15, 2019.

26. The Administrative Law Judge finds that Dr.Larson’s testimony that there was no objective evidence of an injury is more credible than the opinions purportedly expressed in Ex. 17. Dr. Larson has no recollection of responding to the questions as set forth in Ex. 17. Further, even assuming that Dr. Larson did respond to the questions as set forth in Ex. 17, it is unclear what information she may have reviewed or how much time she spent in considering the questions. Dr. Larson’s testimony at hearing was more detailed and in response to direct questions posed to her. Further, her testimony is consistent with Dr. Paz’s testimony that no objective evidence supports a finding that Claimant sustained an injury on January 15, 2019.

27. The Administrative Law Judge finds that Claimant has failed to prove it more likely than not that he sustained an injury or an aggravation of his pre-existing condition on January 15, 2019. Claimant's testimony regarding the mechanism of injury is not supported by surveillance video. The store video shows the period of time that Claimant could have unloaded the pallet in the cutting room and removed the bananas was only twenty seconds, which was not sufficient time for Claimant to have cut the plastic off the two brown trays containing product at the top of the pallet, remove those trays, cut the plastic from the 12 boxes of bananas, and remove the 12 boxes of bananas from the pallet. Claimant's testimony that the alleged injury occurred shortly before his shift ended at 7:04 p.m.is contradicted by the video over the next 90 minutes which shows Claimant bending, twisting, and lifting multiple boxes over his head and onto his shoulders without any noticeable discomfort. Claimant did not report the injury until January 19, 2019, despite testifying that he knew lifting the box caused a serious injury on both January 15, 2019, and January 16, 2019. When Claimant reported the injury to Mr. Blakley on January 19, 2019, he specifically told Mr. Blakley that he had received either an injection or other medical treatment a day or two before his alleged work injury. Claimant also engaged in a conscious and systematic attempt to hide his prior treatment records from Respondent to prevent Respondent from presenting evidence of Claimant's pre-existing medical treatment.

28. Claimant has a history of opioid dependence and drug-seeking behavior since his 2013 injury to neck and low back, the same body parts Claimant alleges he injured on January 15, 2019. Claimant was unable to obtain any opioid medications from July 2, 2018, until he alleged this injury on January 15, 2019; and immediately began requesting opioid medications despite Dr. Larson testifying that Claimant appeared comfortable and not in need of opioid medications. Claimant's testimony of an injury on January 15, 2019, is not credible.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it

is for the Administrative Law Judge to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the Administrative Law Judge. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the Administrative Law Judge may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. V. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

A pre-existing condition "does not disqualify a claimant from receiving workers' compensation benefits." *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). A claimant may be compensated if his or her employment "aggravates, accelerates, or combines with" a worker's pre-existing infirmity or disease "to produce the disability for which workers' compensation is sought." *H&H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Moreover, an otherwise compensable injury does not cease to arise out of a worker's employment simply because it is partially attributable to the worker's pre-existing condition. *See Subsequent Injury Fund v. Thompson*, 793 P.2d 576, 579 (Colo. 1990); *Seifried v. Industrial Comm'n*, 736 P.2d 1262, 1263 (Colo. App. 1986) ("[I]f a disability were [ninety-five percent] attributable to a pre-existing, but stable, condition and [five percent] attributable to an occupational injury, the resulting disability is still compensable if the injury has caused the dormant condition to become disabling."). However, the injury must be a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. *Reynolds v. U.S. Airways, Inc*, W. C. Nos. 4-352-256, 4-391-859, 4-521-484 (May 20, 2003). It is the claimant's burden to prove a causal relationship between the industrial injury and the medical condition for which she seeks benefits. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The question of whether an industrial injury is the cause of a subsequent need for medical treatment is largely one of fact for determination by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997).

The Administrative Law Judge's factual findings concern only evidence found to be dispositive of the issues involved; the Administrative Law Judge has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

The Administrative Law Judge finds that Claimant has failed to prove it more likely than not that he sustained an injury or aggravation of his pre-existing condition on January 15, 2019. Both Dr. Larson and Dr. Paz testified that there was no objective evidence of an injury. Claimant's claim of injury is based almost entirely on his subjective, self-serving

testimony of an incident occurring while lifting a box of bananas. However, his testimony is not consistent with the store surveillance video of his activities and his testimony on various points is not credible. The inconsistencies in Claimant's reported mechanism of injury and Claimant's attempts to hide his prior treatment undermine Claimant's credibility.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant failed to prove by a preponderance of the evidence that he sustained a compensable injury on January 15, 2019.

2. All maters not determined herein are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.

Dated: December 23, 2019

/s/ Kimberly Turnbow
Kimberly Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, Fourth Floor
Denver, CO 80203

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 1525 Sherman Street, 4th Floor, Denver, CO 80203	
In the Matter of the Workers' Compensation Claim of: **P,** Claimant, vs. **B,** Employer, And **SELF INSURED,** Insurer, Respondents.	▲ **COURT USE ONLY** ▲ **CASE NUMBER:** **WC 5-074-433-001**

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Administrative Law Judge (ALJ) Margot W. Jones presided at a hearing in this matter held on September 13, 2019, convening at 9:00 a.m. in Greeley, Colorado. Claimant was present and represented by _____, Esq. Respondents were represented by _____, Esq. Exhibits 1-8 and A-O were admitted into evidence.

In this order, the ALJ refers to P as "Claimant," B as "Self Insured Employer" and "Respondent."

The ALJ may use the following acronyms in this Order: "C.R.S." refers to Colorado Revised Statutes (2019); "the Act" refers to the Workers' Compensation Act of Colorado, Sections 8-40-101, et seq., C.R.S.; "OAC" refers to the Office of Administrative Courts; "OAC Rules" refers to the Office of Administrative Courts Rules of Procedure, 1 Code Colo. Reg. 104-1; and "WCRP" refers to Workers' Compensation Rules of Procedure, 7 Code Colo. Reg. 1101-3.

ISSUES

1. What is Claimant's average weekly wage (AWW)?

2. Whether Claimant proved by a preponderance of the evidence that she is entitled to an order awarding reasonably necessary medical benefit, specifically, whether Claimant's need for surgery to her right knee, as recommended by Dr. Gardner, Dr. Noonan and Dr. Brogmus, is a reasonably necessary and related medical benefit?

STIPULATION OF FACT

The parties stipulate and agree that Claimant's AWW is $1525.00.

FINDINGS OF FACT

1. Claimant was employed with Respondent and sustained an admitted injury to her right knee on January 19, 2018, when she slipped on food while serving patients.

2. Claimant testified that she slipped on unseen food, went into a deep lunge, hyperextended her right knee with her knee striking the ground. She got up after the fall, took Advil and tried to rest her knee as much as she could.

3. Claimant credibly testified she had never had an injury to her right knee before January 19, 2018, and had never had any pain, swelling or problems with her right knee before the incident at work. She had never received any medical care or treatment for her right knee before the work incident.

4. Claimant waited three days to seek medical care because she rested, iced and elevated her right leg.

5. On January 22, 2018, Claimant was examined at Urgent Care at which time she presented with a chief complaint of right knee pain after falling with her knee in flexion on January 19, 2018, at work. Claimant reported that she had never injured her knee before. She was assessed with a right knee strain and given restriction of no weight bearing on her right leg.

6. Bryan D. Copas, PA-C, (PA Copas) examined Claimant at Respondent's Clinic on January 23, 2018, for Claimant's right knee pain and swelling. Claimant reported slipping on food while serving the noon meal at work. Claimant reported never having similar problems with her right knee. PA Copas diagnosed Claimant with a contusion of the right knee and fitted her with a knee brace and recommended she use a cane. He provided work restrictions of walking and standing 10 minutes per hour and reported his findings to be consistent with a work related mechanism of injury.

7. On March 8, 2018, Claimant returned PA Copas at which time she reported her pain was worse; tenderness had increased and her swelling had increased. He requested an MRI and referred Claimant for physical therapy.

8. Claimant underwent physical therapy treatment at Banner Therapy/McKee Rehabilitation from March 22, 2018, to April 4, 2018.

9. An MRI of Claimant's right knee was taken on March 27, 2018, which showed a full-thickness radial tear at the posterior root of the medial meniscus with associated meniscal extrusion; uniform deep partial thickness cartilage loss on the weight bearing medial compartment articular surfaces with prominent subchondral edema on both sides of the joint; mild patellar chondromalacia and large volume joint effusion with synovitis.

10. Dr. Donna Brogmus and PA Copas, referred Claimant for an orthopedic evaluation on March 27, 2018.

11. An orthopedic evaluation was performed on April 8, 2018, by William Eschrich, PA and Eric Gardner, M.D. Claimant reported she fell on a flexed right knee and had immediate associated pain on January 19, 2018. Claimant was assessed with a medial meniscus tear and chondromalacia of the right knee. Corticosteroid injections and arthroscopy for medial meniscus repair were discussed. Claimant elected to proceed with arthroscopy.

12. Respondent requested Dr. William Ciccone II perform a medical record review. Dr. Ciccone performed the record review on April 18, 2018. His impression was of right knee degenerative changes and right knee degenerative meniscus tear. He opined that Claimant did not suffer a work-related injury as a result of the fall. He opined that the meniscus tear was degenerative in nature and unrelated to the fall at work. He opined that the request for surgery should be denied under workers' compensation.

13. Respondent sent a letter with specific questions to Dr. Eric Gardner concerning Dr. Ciccone's record review. Dr. Gardner opined that Claimant suffered a work related injury which exacerbated a pre-existing condition, degenerative joint disease (DJD), and more likely than not caused her meniscal root tear. He further reported that a degenerative meniscus tear and a posterior root tear are different medical conditions. Dr. Gardner reported Claimant's x-rays show minimal DJD and that she had a posterior meniscal root tear which will rapidly cause DJD. He opined that not fixing the root tear will lead to the need for a total knee replacement. Dr. Gardner faulted Dr. Ciccone for rendering his opinion without examining Claimant or reviewing radiographic studies.

14. Respondent sent Claimant to Dr. Mark Failinger for an independent medical examination which he performed on May 7, 2018. Dr. Failinger opined that it does appear the patient's symptoms are related to the incident of January 19, 2018. Dr. Failinger noted there was nothing in the record noting a previous history of symptomatology, treatment or problems of the right knee prior to her fall. He opined that it appears the patient sustained an exacerbation of pre-existing arthritis. He recommended a steroid injection, viscosupplementation and additional physical therapy. He opined that knee arthroscopy was not medically probable to help this patient's symptoms, given the MRI reading.

15. Claimant returned to Dr. Brogmus on June 26, 2018, for evaluation of her right knee pain. Dr. Brogmus stated that she agreed with sending Claimant for a steroid injection and she ordered more physical therapy sessions. Dr. Brogmus opined that Claimant will need a meniscal repair.

16. A right knee steroid injection was performed on July 5, 2018, by Rayan Ritchhart, PA of Dr. Gardner's office.

17. Claimant underwent physical therapy treatments at Banner Therapy/McKee Rehabilitation from July 11, 2018, through July 24, 2018.

18. Dr. Brogmus examined Claimant on July 24, 2018, for a follow up evaluation for her right knee. She noted Claimant to walk with an antalgic gait and diagnosed her with peripheral tear of medial meniscus, current injury, right knee. Dr. Brogmus requested a univisc injection.

19. A univisc injection was performed on Claimant's right knee on August 3, 2018 by Dr. Gardner.

20. Claimant returned to Dr. Gardner on August 24, 2018, for a routine post injection follow up. He reported it was a root tear and that essentially the entire meniscus was nonfunctional and as a result she was going to be putting increased loading pressure on the cartilage on the inside of her knee which would lead to premature arthritis. He opined that it was in her best interest to try and fix the meniscus to prolong the potential need for her to have a knee replacement.

21. On August 28, 2018, Dr. Brogmus opined that she concurred with Dr. Gardner's assessment that Claimant's fall at work probably aggravated any underlying condition and she did not think she had a symptomatic meniscal tear before the injury.

22. Dr. Failinger prepared an Addendum Report dated November 26, 2018, and stated that after reviewing the MRI taken on March 27, 2018, the patient had

a preexisting underlying degenerative changes and he agreed with Dr. Ciccone's recommendation of a denial of approval for an arthroscopy.

23. Claimant returned to Dr. Brogmus on November 29, 2018, for a follow up evaluation. Dr. Brogmus reported Claimant was having more difficulty walking especially noting sharp pain with walking on ramps and not taking a full stride to compensate for the pain. Dr. Brogmus requested an MRI.

24. A right knee MRI was taken on January 4, 2019, showing complex tearing of the posterior horn root ligament of the medial meniscus with peripheral extrusion of the medial meniscus body; moderate to advanced medial compartment degenerative joint disease with associated reactive bone marrow edema in the medial femoral condyle and medial tibial plateau; focal cartilage defect overlying the patellar eminence and large knee joint effusion with areas of lipoma arborescens.

25. Dr. Brogmus evaluated Claimant on January 18, 2019, at which time Claimant again noted medial posterior right knee pain which had remained since her injury. Claimant noted she cannot be as active with her knee. It was noted Claimant continued to look symptomatic despite a steroid and synvisc injection. Dr. Brogmus referred Claimant to Dr. Thomas Noonan for a consultation and recommendations.

26. On February 7, 2019, Thomas Noonan, M.D. of Steadman Hawkins Clinic evaluated Claimant for right knee pain. Claimant reported her symptoms began January 19, 2018, when she slipped on some food and fell into a deep knee bend and noted pain, instability and swelling since then. Dr. Noonan reported that given Claimant's age, 46 years old, he opined that arthroscopic debridement was a reasonable treatment option and may delay the need for knee replacement. He also stated that despite the fact that her chondral degeneration preexisted her injury he thought her current symptomatology was from her fall at work.

27. Claimant returned to Dr. Brogmus on February 15, 2019, for follow up. Dr. Brogmus reported that with over one year of conservative care and increasing pain and shortening of her stride Claimant wanted to proceed with right knee arthroscopy. Dr. Brogmus concurred with this plan.

28. On March 15, 2019 Claimant returned to Dr. Brogmus. Claimant reported no improvement and some worsening of her condition. She was unable to pivot without significant pain and noted even with walking that her steps were shorter. Her right knee was more swollen. Dr. Brogmus reported Claimant continued to look symptomatic despite a steroid and synvisc injection and was not back to pre-existing activity level. She concurred with Dr. Noonan's arthroscopic recommendation.

29. Claimant testified that since the incident of January 19, 2018, she has seen slight improvement in the swelling of her right knee. She testified that she has pain with every step and walks with a pretty severe limp. Her endurance is much less. She has difficulty with walking up an incline or down a decline and cannot pivot on her right knee. She testified that although her work duties have not changed since the incident that her co-workers have had to assist her with several duties. She testified that she cares for adult dementia patients and they are able to walk faster than her which creates problems when they try to leave the facility.

30. Dr. Failinger testified that his diagnoses were degenerative joint disease, significant arthritis and a meniscus tear. He felt the tear was degenerative based on the MRI taken on March 27, 2018, but stated that the MRI was of poor quality. He testified that in his opinion surgery was not reasonably expected to improve Claimant's condition and not medically probable to change her pain pattern. He testified that he felt her pain was coming from arthritis and not the meniscus tear and would not recommend arthroscopic surgery. He stated that in his opinion Claimant's symptoms were caused by the fall. Dr. Failinger acknowledged that his opinion regarding the arthroscopic surgery differs from the opinions of Dr. Brogmus, Dr. Gardner and Dr. Noonan and Dr. Failinger's opinion was deemed less credible.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo 306, 592 P.2d 792 (1979).

2. Assessing the weight, credibility and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the

testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Moreover, the weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part or none of the testimony of an expert witness. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

3. In this case, Claimant has proven by a preponderance of the evidence that she sustained an injury to her right knee including a meniscus tear after falling at work on January 19, 2018. The evidence presented established that this compensable injury is the proximate cause of Claimant's need for medical treatment and the recommended arthroscopic surgery.

4. Claimant credibly testified that she had never suffered an injury to her right knee before the work incident on January 19, 2018. She credibly testified that she did not have any pain or swelling in her right knee and had never sought or received any medical care to her right knee prior to the work incident on January 19, 2018.

5. Claimant underwent conservative care including medications, physical therapy, cortisone injection and synvisc injection but her symptoms did not improve and have worsened since the admitted injury. She is continuing to experience pain with every step, walking with a limp, inability to pivot and difficulty walking on inclines or declines.

6. Dr. Donna Brogmus is Claimant's primary treating physician for her work injury and has treated her since the incident on multiple occasions. Dr. Brogmus stated that she did not agree with the denial of Dr. Noonan's recommended arthroscopic surgery. Dr. Brogmus stated that Claimant had done conservative treatment for 14 months and her condition continued to worsen. She further stated that she concurred with Dr. Noonan's arthroscopic recommendation. Dr. Brogmus' opinion is credible and persuasive as she has examined Claimant on multiple occasions since the admitted work injury.

7. Eric Gardner, M.D., an orthopedic surgeon, examined Claimant on several occasions and reported her MRI demonstrated a medial meniscal tear and chondromalacia. He opined that the residual symptoms she was having were as a result of her nonfunctioning meniscus. Dr. Gardner also stated that Claimant's work injury exacerbated a pre-existing condition and more likely than not caused the meniscal root tear. Dr. Gardner strongly disagreed with the medical record review of Dr. Ciccone and the denial of Claimant's surgery. He opined that it

was in Claimant's best interest to try and fix the meniscus to prolong the potential need for her to have a knee replacement.

8. Thomas Noonan, M.D. of Steadman Hawkins evaluated Claimant for her right knee pain and opined that arthroscopic debridement was a reasonable treatment option which may delay the need for knee replacement. He also stated that despite the fact that her chondral degeneration pre-existed her injury he felt her current symptomatology was from her fall at work. Dr. Noonan was also deemed credible.

9. Dr. Ciccone performed a records review and did not examine the Claimant and did not personally review the x-rays or MRI. Dr. Ciccone's opinion is not credible or persuasive.

10. Dr. Failinger's opinion is also not persuasive. He stated that it does appear the patient's symptoms are related to the work incident and reported there was nothing in the record, nor was there any history which noted any previous history of symptomatology, treatment, or problems of the right knee prior to her fall. He also stated that it appears the patient sustained an exacerbation of pre-existing arthritis. He stated that in his opinion the arthroscopic surgery would not be successful and therefore it should be denied. Dr. Failinger reviewed the MRI taken on March 27, 2018 but did not review the MRI taken on January 4, 2019. He stated that the MRI he reviewed was of poor quality. Dr. Failinger also did not review the medical record or opinion of Dr. Noonan as Dr. Noonan's examination and medical record were performed and prepared after Dr. Failinger's last Addendum dated November 28, 2018.

11. The opinions of Claimant's treating and examining physicians including Dr. Brogmus, Dr. Gardner and Dr. Noonan are more credible and persuasive than the opinions of Dr. Ciccone who performed a record review and Dr. Failinger who performed an independent medical examination concerning the need for the arthroscopic surgery for Claimant's right knee work injury.

12. Based on the totality of the credible and persuasive evidence, Claimant has proven by a preponderance of the evidence the right knee arthroscopic surgery recommended by Dr. Gardner and Dr. Noonan is reasonable, necessary and related.

13. The ALJ accepts as credible and persuasive the opinions of Dr. Brogmus, Dr. Gardner and Dr. Noonan and reject opinions to the contrary. Claimant established that it is more probably true than not that she is entitled to receive reasonable, necessary and related medical treatment including arthroscopic surgery to relieve the effects of her admitted January 19, 2018, right knee injury or prevent further deterioration of her condition.

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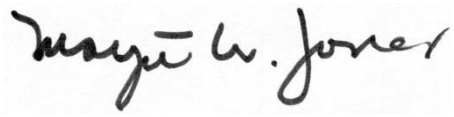
ORDER

It is ordered as follows:

1. Claimant has proven by a preponderance of evidence that the right knee arthroscopy is reasonably necessary to cure or relieve Claimant from the effects of the admitted work injury.

2. Respondent shall pay the costs of the right knee arthroscopy subject to the Division of Workers Compensation Medical Fee Schedule.

DATED: December 23, 2019.



MARGOT W. JONES
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 1525 Sherman Street, 4th Floor, Denver, CO 80203	
In the Matter of the Workers' Compensation Claim of: **R,** Claimant, vs. **F** Employer, And **L,** Insurer, Respondents.	▲ **COURT USE ONLY** ▲ **CASE NUMBER:** **WC 5-092-188-002**

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Administrative Law Judge (ALJ) Margot W. Jones presided at a hearing in this matter held on October 8, 2019, convening at 8:30 a.m. in Courtroom 3 in Denver, Colorado. Claimant was present and represented by , Esq. Respondents were represented by , Esq. Exhibits 1-9 and A-J were admitted into evidence.

In this order, the ALJ refers to R as "Claimant," F. as "Employer" and to L as "Insurer." "Respondents" refers to both Employer and Insurer, collectively.

The ALJ may use the following acronyms in this Order: "C.R.S." refers to Colorado Revised Statutes (2019); "the Act" refers to the Workers' Compensation Act of Colorado, Sections 8-40-101, et seq., C.R.S.; "OAC" refers to the Office of Administrative Courts; "OAC Rules" refers to the Office of Administrative Courts Rules of Procedure, 1 Code Colo. Reg. 104-1; and "WCRP" refers to Workers' Compensation Rules of Procedure, 7 Code Colo. Reg. 1101-3.

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that he sustained a compensable work-related injury on July 25, 2018.

2. Whether Claimant has established an entitlement to reasonable and necessary medical benefits to treat his alleged July 25, 2018, injury.

3. What is Claimant's average weekly wage.

4. Whether Claimant established that he is disabled from his usual employment and entitled to an order awarding temporary partial disability benefit from July 25, 2018, and continuing until terminated by law.

FINDINGS OF FACT

1. Claimant was working for Employer on July 25, 2018. He had been working for the Employer for six or seven months. He alleges he sustained an injury to his left knee on July 25, 2018, which is the primary subject of this litigation.

2. Claimant testified that he felt pain in his left knee after hearing a pop. He testified that he felt the pain when he was putting a tote on a pallet. He turned his body to put down a tote, which he alleged caused the onset of left knee pain. Claimant continued to work and finished the remainder of his shift after the alleged incident. He did not have to stop working as a result of the alleged work injury.

3. Claimant was first seen by his authorized treating physician (ATP) Nicole Huntress, MD on July 26, 2018. The medical record contains no objective evidence of a traumatic injury. The medical record explained that Claimant had "not had any swelling" and the physical examination section noted, "no soft tissue swelling, ecchymosis, erythema, effusion, or deformity."

4. Claimant returned to his ATP at Concentra five days after the alleged injury on July 30, 2018. At that appointment, there was no objective evidence of a work injury and again the note indicated, "no swelling appreciated." and "no soft tissue swelling, ecchymosis, erythema, effusion, or deformity."

5. Dr. Huntress noted the possibility that Claimant could be suffering from degenerative joint disease and not an acute tear, but that an MRI would be necessary to make a final determination.

6. An x-ray of the Claimant's left knee was taken on July 30, 2018, which revealed no joint effusion, no acute bony abnormality and degenerative

changes. There was no evidence of an acute injury in the medical records or in the initial diagnostic testing.

7. Claimant initially testified that he had never had pain in his knee prior to the alleged work injury on July 25, 2018. Subsequently, Claimant admitted that he had in fact had pain and other problems with his left knee due to old age and arthritis prior to July 25, 2018.

8. Dr. O'Brien credibly testified within a reasonable degree of medical certainty that Claimant did not sustain a traumatic injury to his left knee. Dr. O'Brien explained that when the Claimant was examined on July 26, 2018, his knee was quiescent with no effusion, no bruising or swelling, and no objective evidence of tissue breakage or yielding.

9. Dr. O'Brien explained that when a traumatic tearing of the meniscus occurs, there will be objective findings such as redness, bruising, swelling, warmth due to increased metabolic activity. He noted that there would be signs of bleeding in the knee on diagnostic studies such as the MRI and the x-rays that were performed.

10. On August 9, 2018, Claimant underwent an MRI to assess pathology. Dr. Huntress noted in her report that the MRI revealed "complex medial meniscus tearing" and added end stage osteoarthritis to the Claimant's diagnosis. The MRI report concluded that the Claimant has tricompartmental osteoarthritis with grade 3 cartilage fissuring and loss in the medial compartment.

11. Dr. Failinger examined the Claimant and discussed the findings of the MRI, which he noted revealed "beyond severe patellofemoral degenerative joint disease with remodeling of the retropatellar surface and severe lateral femoral condylar arthritic changes," "some medial compartment moderate chondromalacia and degenerative meniscus tearing," and that "the lateral compartment has degenerative changes as well as minimal fraying of the lateral meniscus."

12. Dr. Failinger did not find evidence of an acute or traumatic injury, but rather characterizes Claimant's condition as degenerative in nature. Dr. Failinger also commented that Claimant was unable to straighten his knee because of the severe patellofemoral arthritis and explained that the Claimant's arthritis was so severe that there is essentially no chance of a knee scope helping his condition.

13. Shortly after being evaluated by Dr. Failinger, Claimant was given viscosupplementation to treat his "severe arthritic changes" in his left knee. Viscosupplementation involves lubrication being injected into the knee to help reduce pain from the severe arthritis.

14. Claimant was referred to John Burris, MD and was evaluated on November 30, 2018. Dr. Burris noted in his report that Claimant's initial examination by Dr. Huntress was "benign with no evidence of effusion or signs of trauma to the knee." Dr. Burris also noted that the MRI that was performed on August 9, 2018, "revealed tricompartmental osteoarthritis with no acute abnormalities."

15. Dr. Burris explained that the Claimant's alleged work-event "did not likely cause, aggravate, or contribute to [the Claimant's] preexisting condition." Dr. Burris placed the Claimant at MMI and opined that no work restrictions or maintenance care were appropriate. Dr. Burris concluded by noting that Claimant could seek Viscosupplementation injections for his preexisting arthritis, but that this would not be related to his workers' compensation claim.

16. Dr. Huntress and Dr. Burris at Concentra and Dr. Ballinger at Advanced Orthopedic all agree with Dr. O'Brien that Claimant's complaints are the result of the end-stage osteoarthritis in his left knee and not the result of any work-related incident. All of the Claimant's treating physicians found that Claimant's condition is due to a severe end stage degenerative condition.

17. Claimant's IME Physician, Dr. Yamamoto is the only doctor who found the knee condition to be work-related. However, when providing testimony, Dr. Yamamoto confirmed that the degeneration in the Claimant's knee is so bad the Claimant may even have bone-on-bone contact. Dr. Yamamoto also confirmed that when a physician refers to a meniscal tear as "complex" it means that the patient's meniscus is starting to fall apart in multiple places due to degeneration of the meniscus. Dr. Yamamoto also confirmed that viscosupplementation injections like the ones recommended to treat Claimant, are a medical treatment that is performed to treat patients suffering from severe degeneration by lubricating the knee to help it function.

18. Dr. Yamamoto initially testified that the MRI of August 9, 2018, revealed edema and swelling in the Claimant's knee. However, Dr. Yamamoto conceded that arthritis alone can cause such "trace fluid" in the knee.

19. Dr. Yamamoto's causation opinion is found to not be credible.

20. Timothy O'Brien, MD, an orthopedic surgeon, performed a review of the Claimant's medical records and provided an expert opinion. Dr. Tim O'Brien reviewed the mechanism of injury and opined mechanism of injury was very low energy and did not exceed the injury threshold for the meniscus. Dr. Brien opined that Claimant did not suffer a traumatic injury to his meniscus on July 25, 2018.

21. Dr. O'Brien supported the opinions of Claimant's ATPs, Dr. Burris, Dr. Failinger, and Dr. Huntress that Claimant's stated complaints of pain in his left knee are only related to his preexisting arthritis and are not related to the incident on July 25, 2018.

22. Dr. O'Brien explained that given the advanced nature of Claimant's tricompartmental osteoarthritis in his left knee, Claimant's assertion that he did not have any pain or functional limitation prior to July 25, 2018 is medically unlikely.

CONCLUSIONS OF LAW

General Legal Principles

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo 306, 592 P.2d 792 (1979).

2. In accordance with Section 8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. Assessing the weight, credibility and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the

testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Moreover, the weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part or none of the testimony of an expert witness. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

Compensability

4. The claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp*., 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center*, WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc*., WC 4-606-563 (ICAO August 18, 2005).

5. Claimant failed to establish, by a preponderance of the evidence, that he sustained a work-related injury on July 25, 2018. Claimant failed to establish that his work aggravated or accelerated the advanced tricompartmental osteoarthritis that was present in his left knee prior to July 25, 2018.

6. Although the Claimant alleges he experienced pain in his knee while at work, there is insufficient evidence to establish that the Claimant's work duties caused his symptoms or aggravated/accelerated his condition.

7. The credible testimony provided by Dr. O'Brien and supported by the medical records confirms that the mechanism of injury described by the Claimant was very low energy and likely did not exceed the injury threshold necessary to produce a meniscus tear.

8. Rather, the symptoms that Claimant experienced after putting a tote on a pallet are more likely the result of Claimant's pre-existing tricompartmental osteoarthritis and unrelated to his employment. As found above, the MRI that was completed in August of 2018 showed numerous findings consistent with advanced end-stage arthritis and "complex" degenerative tearing. The medical records from the Claimant's authorized treating physicians persuasively indicate that the MRI of Claimant's knee supports a finding that Claimant had degenerative changes in his knee and no evidence of any acute injury. Dr. O'Brien persuasively testified that if Claimant had in fact sustained a traumatic injury, there would have been clear signs of the traumatic injury in the MRI including significant swelling.

9. Although Dr. Yamamoto testified and provided an IME report indicating that the Claimant sustained an aggravation of his pre-existing osteoarthritis, his opinion is not persuasive. It is noted that Dr. Yamamoto's medical opinion was based on the assumption that Claimant did not have pain or limitations in his left knee prior to July 25, 2018, which, during live testimony, was found to be inaccurate.

10. The medical records and medical opinions of Dr. O'Brien, Dr. Failinger, Dr. Huntress and Dr. Burris, that the Claimant's pain is the result of severe arthritis in his left knee and that no work-related event of July 25, 2018 caused, aggravated, or contributed to the Claimant's preexisting condition, is persuasive over the testimony and written opinion of Dr. Yamamoto.

11. Claimant has failed to establish that an injury occurred on July 25, 2018 or that his employment aggravated or accelerated his right knee condition. Therefore, his claim is denied and dismissed and no medical benefits are awarded.

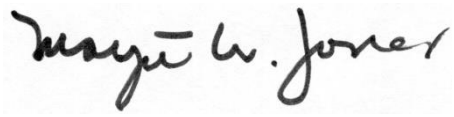
ORDER

It is ordered as follows:

1. Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable work related injury to his left knee on July 25, 2018.

2. Claimant's request for temporary disability and medical benefits is denied with prejudice.

DATED: December 23, 2019.



MARGOT W. JONES
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-070-396-002

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

[Redacted],

Claimant,

v.

[Redacted],

Employer,

and

[Redacted],

Self-Insured / Respondent.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on August 7, 2019 and concluded on November 15, 2019, in Denver, Colorado. The hearing was digitally recorded (reference: Courtroom 1, 8/7/19, beginning at 1:30 PM, ending at 4:15 PM; and, 11/15/19, beginning at 1:30 PM, and ending at 2:10 PM).

The Claimant was present in person and represented by [Redacted], Esq., and Scott Meiklejohn, Esq. Respondent was represented by [Redacted], Esq., Assistant City Attorney. .

Hereinafter [Redacted] shall be referred to as the "Claimant." [Redacted], shall be referred to as the "Employer." All other parties shall be referred to by name.

Claimant's Exhibits 1 through 17 were admitted into evidence, without objection. Respondents' Exhibits A through L were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ established a post-hearing briefing schedule. Claimant's opening brief was mailed on November 14, 2019 (one day before the concluding hearing). Respondent's answer brief was filed on November 8, 2019 (7 days before the concluding hearing. Both briefs were designated as "proposed

findings," apparently in anticipation of a favorable ruling. The ALJ gave the Claimant 2 days within which to file a reply brief, however, in light of the fact that the answer brief preceded the opening brief, the opening brief is hereby considered a combined opening and reply brief. The matter was deemed submitted for decision on November 15, 2019.

A transcript of the August 7, 2019 hearing was lodged on or about September 20, 2019 (hereinafter "Tr., followed by a page and line number).

ISSUES

The issues to be determined by this decision concern: (1) whether the Claimant has overcome the opinion of the Division Independent Medical Examination (DIME) of Richard Gordon, M.D., in his determination that the Claimant did not have a work-related impairment of his lumbar spine;, (2) or, in the alternative, whether the admitted left lower extremity (LLE) rating of 26% scheduled LLE rating should be converted to a whole person (WP) rating by virtue of a situs of functional impairment extending to the lumber spine; and, (3) post maximum medical improvement (MMI) maintenance medical care.

The Claimant's burden of proof for overcoming the DIME is by "clear and convincing evidence." His burden for converting the scheduled LLE rating and for maintenance medical care is by a "preponderance of the evidence."

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The parties stipulated that the Claimant reached MMI on July 9, 2018.

2. The Respondent filed a Final Admission of Liability (FAL), dated February 7, 2019, admitting an MMI date of July 9, 2018; an average weekly wage of $1,706.08; temporary total disability (TTD) benefits through April 22, 2018, 26% scheduled left lower extremity (LLE) permanent partial disability (PPD), pursuant to DIME Dr. Gordon's rating; and, for post-MMI medical maintenance benefits, pursuant vto the opinion of Cynthia Kuehn, M.D. The Claimant timely requested a hearing to challenge the DIME rating.

3. The Claimant is a 48- year old Firefighter for Employer and has been employed in this position since 2008. On August 3, 2017, he suffered a compensable injury while responding to a fire. While stepping on a pile of debris at a fire scene, the debris gave way, causing the Claimant to jump off the debris and twist his back with an

injury to his back and his left lower extremity (LLE) on landing. When he jumped he felt a twinge in his lower back (Respondent's Exhibit A, pp. 1-3). Mark S. Hughes, M.D., testified at his deposition that the Claimant told him that when he fell he caught himself by holding onto a demolition pole that he was using at the time [Claimant's Exhibit 16, Bates Stamp (hereinafter "BS") 00190 lines 1-4).

Medical

4. The Claimant was first seen by Denver Health on the date of the injury, August 3, 2017. Joan Mankowski, M.D., noted that the Claimant had jumped 6-8" off a pile of debris at a fire scene and landed on the floor. He denied falling but recalled a moderate jolt on impact. His left low back ache occurred within one half hour of the incident, associated with a burning and stabbing pain. He reported limping since the incident and noted anterior hip pain. The pain was noted as being "aching, burning, constant stabbing with the left lower back aching. Left hip is burning and stabbing. The Claimant was referred for conservative care and was restricted to sedentary work. The note indicates that the Claimant had a right sided L5-S1 herniation in 2008, treated with acupuncture and physical therapy and no surgical intervention. It resolved within a short period of time (Claimant's Exhibit 4, BS 006-008; Respondent's Exhibit A. pp 1-3)

5. On August 7, 2017, a lumbar MRI (magnetic resonance imaging) found minimal facet atropathy and related listhesis at L5-S1, multilevel degenerate disc disease and a "previously identified disc herniation at L4-5 and L5-S1 that are no longer present (Respondent's Exhibit D, BS 23).

6. On August 9, 2017, the Claimant was referred for a course of physical therapy. There is a note that his condition is unchanged (Respondent's Exhibit D, BS 023).

7. The notes from the Denver Health visit with Sadie Sanchez, M.D., notes that Claimant has a dull back ache at rest and that his condition is worsening (Respondent's Exhibit D, BS 027).

8. On September 6, 2017, the Claimant was seen by Dr. Sanchez. She noted that Claimant had a dull ache in his back at rest but his left leg nerve pain had improved. He was taking Ibuprofen and Tylenol. He wanted to fast track his issue to return to full duty. There is a note that the condition is worsening (Respondent's Exhibit D BS 027).

9. The left hip MRI taken on September 8, 2017, found moderately severe degenerative changes of the left hip with synovitis and extensive complex labral tearing with several paralabral cysts (Respondent's Exhibit F. BS 097).

10. On September 25, 2017, the Claimant was seen at COSH and reported ongoing pain in the left hip which would worsen with repetitive movement. He also reported that back pain increases to 2-3/10 at the end of the day that is partially relieved

by heat. He reports low but persistent pain in the lower back (Respondent's Exhibit D, BS 30-32).

11. On October 2, 2017, Nathan Faulkner, M.D., did an orthopedic evaluation of the Claimant's left hip. Dr. Faulkner noted that the Claimant had degenerative changes in his left hip that were likely preexisting but had become symptomatic after the work injury. Any recommendations concerning the lower back were deferred until after the hip injection was done (Respondent's Exhibit E). The hip injection was done on October 23, 2017. the examination of Samuel Chan, M.D., on November 20, 2018, noted that the Claimant was involved in physical therapy. There was tenderness to palpation over the left PSIS and sacral sulcus. The left SI joint engages somewhat slower than the right with lumbar forward flexion. With physical therapy and oral steroids the numbness and tingling have improved (Respondent's Exhibit E. BS 75).

Medical Record Review by Allison Fall, M.D. and Dr. Chan

12. Dr. Fall undertook a medical records review on October 27, 2017. She was of the opinion that the most likely etiology of the LLE pain was irritation of the peroneal component of the Claimant's sciatic nerve due to a large paralabral cyst in the left hip. She noted that while the degenerative changes in the hip were pre-existing, there was no indication that Claimant was symptomatic prior to the injury. She stated that she did not feel that an epidural steroid injection would be beneficial and Claimant would not meet the criteria for such an injection (Respondent's Exhibit H).

13. Dr. Chan's notes from January 4, 2018, indicate that the patient did have a diagnostic as well as a therapeutic response to the epidural steroid injection. Dr. Chan felt there was a good prognosis if the patient continues to follow through with an active exercise program. The importance of following through with a core stabilization exercise program was discussed (Respondent's Exhibit E, BS 084-85).

14. Dr. Chan noted after a visit on January 29, 2018, that the Claimant had an antalgic gait **which was rather significant**. The Claimant had low back pain at 4/10 but had a significant diagnostic response to the epidural steroid injection. He was continued with Lyrica (Respondent's Exhibit E, BS 86-7).

15. In the notes from the appointment with Dr. Chan on February 18, 2018, it was noted that Bryan Castro, M.D.(the orthopedic surgeon) felt that the majority of the back pain could well be stemming from the left hip joint. There is still pain over the lumbar spine area causing numbness. He was still using Lyrica and rates his pain to be 3-4/10 (Respondent's Exhibit E, BS 088). The ALJ places considerable weight on Dr. Castro's orthopedic opinion and finds that it supports functional impairment stemming from the left hip, as a consequence of the left hip injury. It does not support a specific injury to the back.

16. The Claimant returned to COSH on March 8, 2018. He reported that he was still taking Lyrica, participating in chiropractic treatment with acupuncture and medical massage (Respondent's Exhibit D BS 56-58)

17. Dr. Chan's notes from the Claimant's March 15, 2018, visit notes that there is still pain at 3/10. He (Claimant) still uses Lyrica. The notes indicate there is tenderness in his lumbar spine and that the lumbar range of motion is slightly limited in flexion as well as extension because of pain. There was a direction that Claimant continue with Lyrica and his core stabilization program (Respondent's Ex.hibit E, BS 091-092).

18. Dr. Chan's April 17, 2018, note reported that the Claimant was still on Lyrica for nerve pain and that he should continue physical therapy (PT) for range of motion (ROM) strengthening and gait training. The patient walked with a mild antalgic gait with the limp on the LLE. The summary on the left side of the report notes no low back pain (Respondent's Exhibit G. BS 102-103).

19. May 3, 2018, Dr. Chan noted that the Claimant was still on Lyrica, did not have back pain and should still continue with the PT program (Respondent's Exhibit E, BS 094).

Cynthia Kuehn, M.D.

20. Dr. Kuehn saw the Claimant on June 12, 2018, and noted that there was improvement. She noted that Claimant had aching pain in his low back rated at 1/10. He was continued with Lyrica and there is no note of low back complaints other than what was indicated in the note (Respondent's Exhibit D, BS 64-65).

21. On June 20, 2018, Dr Kuehn noted that the Claimant was ready for a trial of full duty. She noted tightness in the low back, no pain. She noted that the Claimant is no longer taking Lyrica (Respondent's Exhibit D, BS 066-067).

22. Dr. Kuehn placed the Claimant at MMI on July 9, 2018. She noted that he could work full duty as a firefighter. She noted there was soreness in his lower back which comes and goes. She noted heat and rest and stretching help alleviate the problem and that he was still using the H wave or TENS machine. Dr. Kuehn provided an 18% whole person impairment for the lumbar spine and a 42% scheduled rating for the left hip (Respondent's Exhibit D, BS 068-073).

Dennis H. Chang, M.D.

23**.** On September 11, 2018, the Claimant saw Dr. Chang who did the hip surgery. There was no indication of low back pain (Respondent's Exhibit G, BS 108-109). Dr. Chang indicated that there should not be long distance running and jogging but no other limitations were placed. on the Claimant.

DIME Exanminer Richard Gordon, M.D.

24. Dr. Gordon performed the DIME and indicated that there was a diagnosis of post left hip total arthroplasty with extensive complex labral tearing and several para-labral cysts, lumbar spondylosis L5-S1 currently asymptomatic and referred LLE pain resolved. Dr. Gordon found the the Claimant was at MMI effective July 9, 2018. He provided a 26% scheduled impairment rating for the left hip (Respondent's Exhibit C, BS 006-013).

25. In addressing the lumbar spine, Dr. Gordon made specific findings on causation stating:

> This examiner does not feel that any permanent impairment was sustained to the lower back. It is this examiner's opinion that his left lower extremity pain was most likely due to irritation of the peroneal component of his sciatic nerve due to the large paralabral cyst in the posterior superior acetabulum. This is consistent with Dr. Fall's impression from her medical record review performed on 10/27/17 and the 3/13/18 visit with Dr. Chang where the patient history section did not mention any current low back or lower extremity radicular symptoms. The majority of the discussion regarding his complaints revolved around left hip pain. There were clinic visits with Dr. Chan on 5/3/18 and 7/31/18, after the patient underwent left total hip arthroplasty, where there was no mention of low back pain or left lower extremity radicular pain and no objective findings of lumbar spine mediated pain and with normal lower extremity neurological exam. Postoperative follow-up visits with Dr. Chang on 4/17/18, 5/15/18 and 6/12/18 also did not document low back or left lower extremity radicular symptoms. Furthermore, [Claimant] does not complain of any current low back pain or radicular symptoms. Therefore, it was determined by this examiner that he would not be assigned an impairment rating pertaining to his lumbar spine (Respondent's Exhibit , BS 14).

26. The ALJ finds that aggregate medical opinions seemingly to the contrary of DIME Dr. Gordon's opinion concerning the Claimant's back amount to differences of opinion and do not rise to the level of making it highly probable, unmistakable and free from serious and substantial doubt that DIME Dr. Gordon's opinion concerning the Claimant's back as a specifically rateable body part was in error. Nonetheless, Dr. Gordon does not persuasively address the referred pain from the LLE to the back, which functionally impairs the Claimant, thus, making the situs of functional impairment overlapping the LLE and the low back.

John S. Hughes, M.D.—Claimant's Independent Medical Examiner (IME)

27. The Claimant was seen for an IME with Dr. Hughes on March 14, 2019. Dr. Hughes noted that he definitely had an improvement in his back from a corticosteroid injection done in December 2017. He noted that after the total hip arthroplasty in April 2018, the Claimant had recrudescence of his lumbar spine pain which has persisted. He described an aching numbness pain in his lumbar spine which fluctuates with respect to severity and currently has a magnitude of 5/10. The physical examination noted limitations on the lumbar spinal ranges of motion. Dr. Hughes is of the opinion that the waxing and waning of low back pain represents a loss of function extending beyond the region of the left hip into the region of the lumbosacral spine. Dr. Hughes notes that there was a benefit and a therapeutic response to the epidural steroid injection done on December 6, 2017. The ALJ finds that Dr. Hughes' opinion does not persuasively support a separate and rateable impairment of the low back, however, it supports a situs of functional impairment overlapping the LLE and the lumbar spine.

John Burris, M.D.

28. Dr. Burris stated that he has no evidence that the Claimant had any symptoms of low back pain in the eight or nine years prior to the August 3, 2017, work-related injury.

29. The Claimant had no treatment for his back before August 3, 2017, except for brief treatment eight or nine years prior which had resolved. He was asymptomatic with regard to his back prior to the August 3, 2017 injury (Tr., p 87, ln l 2-6)..

30. Dr. Burris agreed that from August 2017 until July 2018, the Claimant had a lot of treatments on his back (Tr, p 80, ln l 7-11). These treatments included c). He also agreed that there was a therapeutic response to Lyrica which is used to treat nerve pain (Tr. p. 79, ln14-18).

31. Dr. Burris agreed that there was low back pain at the time of the hearing and that was the Claimant's initial complaint after the injury on August 3, 2017 (Tr. p. 68, lns 22-25). Dr. Burris also agreed that at the time of his examinations on October 18, 2018 and June 18, 2019 the Claimant complained of back pain (Tr. p. 74,, lns 1-7; Respondent's Exhibit L, BS 117-140).

Claimant's Testimony

32**.** According to the Claimant, he has done physical therapy, chiropractic, acupuncture, massage therapy and utilized Lyrica and a TENS unit. He still utilizes that for back pain. As Judge Felter noted the unit confounds nerve signals and thus mitigates pain (Tr., p. 31, lns 12-14). The Claimant stated that it helps keep pain at bay. He stated that he has constant pain that fluctuates from a lower level to a higher level

(Tr., p. 31, ln 20). The Claimant also does yoga and core strengthening exercises for his back on a daily basis.

33. According to the Claimant, he used Lyrica for a long time, is somewhat apprehensive about drugs but because of its good results he would be willing to try it again (Tr., p. 32, lns16-17).

34. According to the Claimant, around June 20, 2018, at the time of his return to work examination, he still felt the effects of the Lyrica, was on PT, doing yoga daily and still was using the H wave or TNS unit (Tr., p. 32, lns 19-22).

35. According to the Claimant, the pain in his back was a 2/10 and can spike to a 4/10 for pain depending on whether he is standing too long, standing on hard surfaces and on the activities he is doing (Tr. p. 34 ,lns 7-10). The Claimant states that he has been dealing with back pain for some time and believes that one gets used to dealing with it (Tr., p. 35, lns 17-19). He stated that when he went back to work he stopped taking Lyrica and was supplementing with over the counter medication like Ibuprofen and Aleve (Tr., p. 39, lns 22-25).

36. At the continuation hearing on November 15, 2019, the Claimant stated that he has been continuing to go to PT for continued back pain, has ongoing appointments with Dr. Chan, Dr. Chang and would like to be able to resume Lyrica. He modified some tasks with the Employer, testing for his condition. He pulled a dummy rather than directly carrying the dummy so that he could remain in a more upright position. He does grass mowing and other household activities in small segments to minimize back pain.

37. When the Claimant identified to Dr. Burris an area in his low back that was tender to palpation, Dr. Burris touched another spot, not the one which the Claimant indicated was tender.

38. According to the Claimant, even after the removal of the cyst on his acetabulum, it did not eliminate the back pain (Tr. pp .47-49).

39. According to the Claimant, he was always anxious and wanting to go back to full duty and this desire may have colored his pain complaints (Tr., p. 88 lns2-5).

Ultimate Findings

40. The ALJ finds the opinion of Dr. Hughes persuasive and credible insofar as it supports a situs of functional impairment that overlaps the LLE and the low back, however, the ALJ also finds DIME Dr. Gordon's opinion of no specific impairment to the back credible and persuasive against a backdrop of the totality of the evidence, which does not exclude the situs of functional impairment as overlapping the LLE and low back. Consequently, Dr. Gordon's converted rating for the LLE of 10% whole person is an appropriate measure of the Claimant's permanent medical impairment.

41. Based on the totality of the evidence, the Claimant has failed to prove that DIME Dr. Gordon's declining to rate impairment of the Claimant's back as a separate and specific matter was clearly erroneous. Specifically, the Claimant failed to prove, by clear and convincing evidence that DIME Dr. Gordon was in error by declining to specifically rate the Claimant's back. Dr. Gordon, however, did not persuasively address the issue of the situs of functional impairment. In this regard, it is likely, that Dr. Hughes' opinion, supporting the situs of functional impairment as overlapping the LLE and low back is more probably correct.

42. The Claimant, along with the totality of the evidence, proves, by preponderant evidence that a conversion of DIME Dr. Gordon's 26% LLE scheduled rating to his 10% whole person rating, accurately establishes the degree of Claimant's permanent medical impairment.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad

discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the opinion of Dr. Hughes was persuasive and credible insofar as it supports a situs of functional impairment that overlaps the LLE and the low back, however, as found, DIME Dr. Gordon's opinion of no specific impairment to the back was credible and persuasive against a backdrop of the totality of the evidence, which does not exclude the situs of functional impairment as overlapping the LLE and low back. Consequently, Dr. Gordon's converted rating for the LLE of 10% whole person was an appropriate measure of the Claimant's permanent medical impairment.

Overcoming the DIME

b. The party seeking to overcome a DIME physician's opinions bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). *Also see Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475 (Colo. App. 2005). The DIME physician's determination of MMI and degree of permanent impairment is binding unless overcome by "clear and convincing evidence." *Metro Moving & Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995); *See also Peregoy v. Indus. Claim Appeals Office,* 87 P.3d 261 (2004); and § 8-42-107(b)-(c), C.R.S. *Also see Whiteside v. Smith,* 67 P.3d 1240 (Colo. 2003). Where the threshold determination of compensability is not an issue, a DIME physician's conclusion that an injured worker's medical problems were components of the injured worker's overall impairment constitutes a part of the diagnostic assessment that comprises the DIME process and, as such the conclusion must be given presumptive effect and can only be overcome by clear and convincing evidence. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475, 482 (Colo. App. 2005); *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 400 (Colo. App. 2009). "Clear and convincing evidence" is evidence, which is stronger than preponderance, is unmistakable, makes a fact or facts highly probable or the converse, and is free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert, supra; Leming v. Indus. Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). In other words, a DIME physician's finding may not be overcome unless the evidence establishes that it is "highly probable" that the DIME physician's opinion is incorrect. *Postelwait v. Midwest Barricade,* 905 P. 2d 21 (Colo. App. 1995). To overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt". *Adams v. Sealy, Inc.,* W.C. No. 4-476-254 [Indus. Claim Appeals Office (ICAO), Oct. 4, 2001]. A mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.,* W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Bush, Inc.,* W.C. No. 4-380-560 (ICAO, Nov. 17, 2000). As found, the Claimant failed to overcome the DIME physician's declining to rate the Claimant's low back as a specific body part by clear and convincing evidence.

Conversion to Whole Person/Burden of Proof

c. It is well-established that the question of whether a claimant sustained a scheduled loss within the meaning of § 8-42-107 (2) (a), C.R.S., or a whole person medical impairment compensable under § 8-42-107 (8) (c), C.R.S. is one of fact for determination by the ALJ. *Delaney v. Indus. Claim Appeals Office,* 30 P.3d 691 (Colo. App. 2000). In resolving this question, the ALJ must determine the situs of a claimant's "functional impairment," and the situs of the functional impairment is not necessarily the situs of the physical injury itself.. *Langston v. Rocky Mountain Healthcare Corp.,* 937 P.2d 883 (Colo. App. 1996); *Strauch v. PSL Swedish Healthcare System,* 917 P.2d 366 (Colo. App. 1996). Further, pain and discomfort which limit a claimant's ability to use a portion of his body may be considered as "functional impairment" for purposes of determining whether an injury is on or off the schedule. *Also see, Fresquez v. Montrose School District RE-1J,* W.C. No. 4-969-602-01 [Indus. Claim Appeals Office (ICAO). April 14, 2017]. For a conversion, the party seeking it must accept the four corners of an ATP's or DIME'S opinion letter. The standard of proof is then "preponderance of the evidence." As found, a conversion to DIME Dr. Gordon's whole person rating of 10% whole person has been proven by preponderant evidence. A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984).

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Division Independent Medical Examiner's opinion has **not** been overcome insofar as it did not rate the Claimant's low back as a specific body part.

B. The Respondent .shall pay the costs of all causally related and reasonable necessary medical maintenance benefits, pursuant to the Final Admission of Liability, subject to the Division of Workers' Compensation Medical fee Schedule.

C. Respondent shall forthwith pay the Claimant permanent partial disability benefits, based on 10% whole person disability.

D. Respondent is entitled to a credit for all schedule permanent disability benefits paid pursuant to the Final Admission of Liability

E. Respondent shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts of indemnity benefits due and not aid when due.

DATED this 26th day of December 2019.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 1525 Sherman Street, 4th Floor, Denver, CO 80203	
In the Matter of the Workers' Compensation Claim of: **K,** Claimant, vs. **A,** Employer, And **S,** Insurer, Respondents.	▲ **COURT USE ONLY** ▲ **CASE NUMBER:** **WC 5-069-188-002**

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Administrative Law Judge (ALJ) Margot W. Jones presided at a hearing in this matter held on September 13, 2019, convening at 1:30 p.m. in Greeley, Colorado. Claimant was present and represented by _____, Esq. Respondents were represented by _____, Esq. Exhibits 1-7 and A-D were admitted into evidence.

In this order, the ALJ refers to K as "Claimant," A as "Employer" and S as "Insurer." Employer and Insurer collectively will be referred to as "Respondents."

The ALJ may use the following acronyms in this Order: "C.R.S." refers to Colorado Revised Statutes (2019); "the Act" refers to the Workers' Compensation Act of Colorado, Sections 8-40-101, et seq., C.R.S.; "OAC" refers to the Office of Administrative Courts; "OAC Rules" refers to the Office of Administrative Courts Rules of Procedure, 1 Code Colo. Reg. 104-1; and "WCRP" refers to Workers' Compensation Rules of Procedure, 7 Code Colo. Reg. 1101-3.

ISSUES

1. Whether Claimant is entitled to temporary benefits.

2. Whether the surgery requested by Dr. Joshua Snyder is reasonable, necessary, and related to the work-related injury.

FINDINGS OF FACT

1. Claimant sustained a compensable injury to her right hip and groin on January 27, 2018.

2. Respondents offered Claimant modified duty within her restrictions on February 15, 2018. Claimant was able to perform the modified duty and was paid her regular wages.

3. Claimant worked varying amounts at the modified duty position.

4. Claimant testified that she was often unable to complete her entire shift or assigned hours at the modified duty position due to her ongoing symptoms.

5. Claimant further testified that the offered and accepted modified duty position was always within the restrictions given by her authorized treating physicians.

6. Claimant testified that when she felt she was unable to continue to meet the requirements of her modified duty position at the A_____, she would sometimes request accommodations from her supervisor. Claimant testified that her supervisor would allow her to work in a different area, such as the jewelry counter where she could sit, or offer other accommodations as needed.

7. As Claimant's restrictions from her authorized treating physicians changed, her modified duties changed as well. Claimant's schedule changed from one 10-hour shift per week to five two-hour shifts per week.

8. At no time did employer or any supervisor require Claimant to perform work outside her restrictions in place at any given time.

9. Dr. Joshua Snyder evaluated Claimant on April 16, 2019. He diagnosed Claimant with right hip pain with signs of impingement and concern for chondral injury in the acetabulum due to a labral cyst. He recommended Claimant undergo a hip MRI.

10. Claimant underwent a hip MRI on May 7, 2019. The MRI showed degenerative cysts in the right anterior acetabulum consistent with mild right

hip osteoarthritis, otherwise no discrete muscle or tendon injury was identified.

11. Dr. Snyder saw Claimant again on May 14, 2019. He reviewed the MRI. He noted that it was difficult to discern any labral tear on the MRI. Nevertheless, he disagreed with the MRI interpreter. He opined the cyst is a red flag for articular cartilage delamination and recommended a right hip arthroscopy, debridement of cyst, possible micro fracture, and possible labral repair.

12. Dr. William Ciccone performed a records review and issued a report on May 27, 2019. Dr. Ciccone is Level II certified by the Division of Workers' Compensation and is board-certified in orthopedics and orthopedic sports medicine.

13. Dr. Ciccone agreed with Dr. Snyder that the cyst present is probably related to articular cartilage degeneration, and that Claimant probably had a small labral tear. However, he opined that those injuries were degenerative in nature, and not the result of any acute injury. Dr. Ciccone opined that up to 70% of all individuals in their 30's have labral tears, and 24% have chondral defects. He further opined that Claimant's mechanism of injury would not have caused the hip pain; but that given the degenerative nature of her condition, some intermittent hip and groin pain is to be expected.

14. Dr. Snyder issued another report on June 25, 2019. He apparently reviewed a job description and opined that it does appear it could be something that causes labral pain. He admitted that Claimant's hip pain was intermittent in nature, but went on to state that she did not have hip pain prior to her injury, and therefore her condition must be related.

15. It cannot be determined that Dr. Snyder reviewed Claimant's medical records prior to this injury. Although he notes Claimant's pain in 2017, he does not address any specifics.

16. Dr. Ciccone testified by deposition. He testified that he performed a records review, but did not examine Claimant. Dr. Ciccone testified that the fact that he did not examine Claimant did not impact or influence his opinions. Rather, he stated that his opinions were based on the objective findings in the medical records.

17. Dr. Ciccone opined that the findings on the hip MRI were not acute, but rather degenerative. He stated that cyst formation is a common finding associated with pre-existing degenerative changes, resulting from fluid and cartilage chronic changes.

18. Dr. Ciccone also stated that any labral injury is degenerative in nature as well as it is a common occurrence from early arthritis. He stated labral tears

are so common that it would be out of the ordinary if she did not have one, given her degenerative condition and age group.

19. Per Dr. Ciccone, degenerative conditions frequently present with intermittent symptoms that can be brought on by activity, but that alone does not indicate an acute injury. Rather, it is a normal presentation of a degenerative condition.

20. Dr. Ciccone testified that surgical intervention in this matter is not a common next step where Claimant failed conservative treatment.

21. Finally, Dr. Ciccone testified that simply experiencing pain at work does not necessarily reflect an injury occurred. Claimant's degenerative condition is reason for her to have pain. He further opined that the described mechanism of injury in this matter would not cause any injury, because there were simply no acute findings on the MRI. In Dr. Ciccone's opinion, he chronological progression of Claimant's pain is not an indication of any acute injury, but in fact the intermittent nature of the pain is directly associated with early degenerative changes.

22. Dr. Snyder did not specifically opine that Claimant's current condition is related to a work injury. Rather, he qualified his opinions by stating that the injury "could" be a cause, or that it "could have been" resulting from an injury.

23. Neither Dr. Ciccone nor Dr. Snyder opined that Claimant definitely has a labral tear, as both stated that it was not visible on the MRI.

24. Dr. Snyder's opinions are based on speculation without objective evidence of any acute injury. Both Dr. Ciccone and Dr. Snyder opined that the cyst is not an acute injury. Dr. Snyder's rationale for requesting the surgery is based on an assumption of a labral tear, for which there is no evidence. Further, Dr. Snyder cannot and does not state that there is an acute injury, only that there could be. Finally, Dr. Snyder himself admits that Claimant does have degenerative changes in her hip and offers no rebuttal to Dr. Ciccone's conclusions.

25. Dr. Ciccone's opinions and testimony are credible. Although he did not examine Claimant, he relied on the medical records, which were based on Claimant's own statements. Claimant did not testify or otherwise offer any evidence that the description of the mechanism of injury as set forth in the records was incorrect or contained any misstatements. Dr. Ciccone's reliance on the records is reasonable.

26. Claimant failed to meet her burden of proof to show entitlement to temporary benefits. Although Claimant testified that she felt unable to

complete her shifts due to pain at times, she failed to offer any evidence that her modified job duties were outside her restrictions as approved by the authorized treating physicians. She further testified that, when requested, she received additional accommodations to allow her to continue working. Claimant also did not offer any evidence that her supervisor or employer sent her home due to pain or inability to work.

27. Claimant did not offer any evidence that her injury caused any reduction in earnings. Rather, the credible evidence shows that Claimant's lost wages were due solely to her own subjective complaints.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo 306, 592 P.2d 792 (1979).

2. Assessing the weight, credibility and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Moreover, the weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all,

part or none of the testimony of an expert witness. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

3. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Wal-Mart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990). Factual determinations related to this issue must be supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. Substantial evidence is that quantum of probative evidence which a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence*. Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411, 415 (Colo. App. 1995).

4. Here, Claimant failed to meet her burden of proof to show the requested surgery is reasonable, necessary, and related to her injury. The evidence shows that Claimant's symptoms are more likely than not caused by her degenerative condition, and not the result of her work injury. Dr. Ciccone's opinions were found more credible than Dr. Snyder.

5. To prove entitlement to temporary partial disability (TPD) benefits, claimant must prove that the industrial injury contributed to some degree to a temporary wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Thus, if the injury in part contributes to the wage loss, TPD benefits must continue until one of the elements of Section 8-42-106(2), *supra,* is satisfied. *Champion Auto Body v. Industrial Claim Appeals Office, supra*.

6. Here, Claimant returned to modified duty. Claimant was able to perform the modified duty and received her regular wages. The evidence showed that the modified duty was within her restrictions, and she was offered the same number of hours. Claimant failed to meet her burden of proof to show any temporary wage loss resulting from her injury.

ORDER

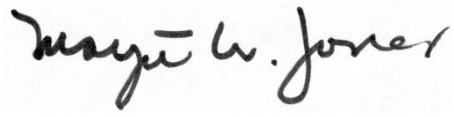
It is ordered as follows:

1. Claimant's claim for temporary benefits is DENIED and DISMISSED.

2. Claimant's request for the surgery recommended by Dr. Snyder is DENIED and DISMISSED.

3. Any issues not determined in this decision are reserved for future determination.

DATED: December 26, 2019.



MARGOT W. JONES
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUE

Whether Respondents have established by a preponderance of the evidence that they are no longer financially responsible for providing Fentanyl patches and Oxycodone pursuant to their August 1, 2017 Final Admission of Liability (FAL) that acknowledged reasonable, necessary and related medical maintenance benefits designed to relieve the effects of Claimant's January 20, 2013 industrial injury or prevent further deterioration of her condition pursuant to *Grover v. Industrial Comm'n.,* 759 P.2d 705 (Colo. 1988).

FINDINGS OF FACT

1. On January 20, 2013 Claimant suffered admitted industrial injuries to her right upper extremity when she slipped and fell during the course and scope of her employment with Employer. Claimant subsequently underwent two right shoulder surgeries, thoracic outlet surgery and two right wrist surgeries.

2. On June 30, 2017 Authorized Treating Physician (ATP) David W. Yamamoto, M.D. determined that Claimant had reached Maximum Medical Improvement (MMI) and assigned an 18% whole person impairment rating, a 40% right upper extremity rating and a 3% psychological impairment.

3. On August 1, 2017 Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Yamamoto's MMI and impairment determinations. Respondents also acknowledged post-MMI reasonable, necessary and related medical maintenance benefits.

4. On October 31, 2017 Claimant underwent an independent medical examination with John S. Hughes, M.D. Dr. Hughes recounted Claimant's extensive medical history subsequent to her January 20, 2013 industrial injuries. He noted Dr. Yamamoto's impairment ratings for her injuries. Dr. Hughes remarked that Claimant's current medications included Metformin, Lisinopril, Omeprazole, Gabapentin, Topiramate, Lidocaine, Morphine, Fentanyl and Zolpidem.

5. After conducting a physical examination, Dr. Hughes determined that Claimant had undergone significant surgical treatment without "measurable benefits" other than partial restoration of right wrist function. He agreed with Dr. Yamamoto that Claimant had reached MMI. Dr. Hughes noted that Claimant was not permanently and totally disabled but recommended work restrictions. He suggested monitoring of Claimant's continued opioid tapering process and remarked that her "opioid-induced hyperalgesia" would abate as she eliminated opioid medications.

6. On April 18, 2018 Dr. Yamamoto authored a report recommending a transfer of care to Amar G. Patel, M.D. for interventional pain management. Dr. Patel subsequently performed Botox and epidural steroid injections.

7. On June 3, 2019 Claimant underwent a second independent medical examination with Dr. Hughes. Dr. Hughes reviewed additional medical records and performed a physical examination. He noted that Claimant had an 'increasingly perplexing medical history." Dr. Hughes remarked that he originally attributed Claimant's pain generator to her January 20, 2013 musculosketal injuries. However, Claimant experienced "progressive ambulatory difficulties, difficulties with sensation and motor control [and] a loss of coordination." He thus concluded that Claimant actually suffers from progressive diabetic retinopathy and has sustained substantial functional losses. Because Dr. Hughes determined that Claimant suffered neuropathic rather than musculoskeletal pain, he reasoned that she no longer has opioid-induced hyperalgesia.

8. On August 21, 2019 Dr. Yamamoto responded to an inquiry from Claimant's counsel regarding Dr. Hughes' second independent medical evaluation. Dr. Yamamoto agreed that Claimant likely suffers from diabetic peripheral neuropathy. However, he also remarked that Claimant continued to require opioid and other prescribed medications as outlined in Dr. Hughes' June 3, 2019 report.

9. On September 4, 2019 Dr. Patel's Physician's Assistant David Eastlund responded to inquiries from Claimant's counsel. In addressing whether he agreed with Dr. Hughes that Claimant likely suffers from diabetic peripheral neuropathy, P.A. Eastlund explained that opioid pain medications helped Claimant control chronic, sharp pain in her neck, shoulders, upper arms, forearms, hands and fingers. He noted that Gabapentin and other medications treated Claimant's consistent numbness and tingling. Furthermore, P.A. Eastlund commented that Claimant would require opioid and other medications even in the absence of diabetic peripheral neuropathy. P.A. Eastlund specified that "[o]ur objective is to decrease reported chronic pain levels while increasing overall physical function. I feel these goals are being met through the use of intervention procedures and the current opioid and other prescribed medications."

10. On October 9, 2019 Claimant visited P.A. Eastlund for an examination. P.A. Eastlund noted that Claimant's medications included Cymbalta, Topiramate, Gabapentin, Omeprazole, Fentanyl, MS Contin and Oxycodone. He remarked that he had been addressing the slow tapering of extended release opioid medications for treatment of Claimant's chronic right shoulder and neck pain.

11. On October 25, 2019 P.A. Eastlund issued an addendum report regarding Claimant's medications. He remarked that he discussed with Claimant the best way to safely and effectively taper her opioid medications. P.A. Eastlund commented that the use of a Fentanyl patch makes it difficult to taper medications because of the fixed amount of medication in the patch. He thus recommended the following: (1) stopping Fentanyl patches; (2) beginning extended release Morphine Sulfate; (3) continuing Oxycodone; (4) ceasing Oxycodone and starting instant release Morphine next month and; (5) in two months tapering IR or extended release by 5-10%.

12. Claimant testified at the hearing in this matter. She explained that her current medications decrease her pain and increase her function. Claimant noted that without her pain medications her functional abilities would be greatly reduced. Nevertheless, Claimant recognized that she would like to eliminate opioids but it has been a difficult process.

13. Dr. Hughes testified at the hearing in this matter. He noted that the Colorado Division of Workers' Compensation *Medical Treatment Guidelines* (*Guidelines*) suggest limitations on the duration of opioid pain medications. Notably, the *Guidelines* specify "12 visits within a 12-month period to review the opioid plan." The *Guidelines* also recommend "[l]aboratory and other monitoring." WCRP 17, Exhibit 9 (I)(6). Dr. Hughes remarked that the use of opioid medications should be linked to functional improvements. He agreed with the tapering plan of P.A. Eastlund regarding the elimination of Fentanyl patches and Oxycodone.

14. Respondents have established that it is more probably true than not that they are no longer financially responsible for providing Fentanyl patches and Oxycodone pursuant to their August 1, 2017 FAL that acknowledged reasonable, necessary and related medical maintenance benefits designed to relieve the effects of Claimant's January 20, 2013 industrial injury or prevent further deterioration of her condition pursuant to *Grover v. Industrial Comm'n.,* 759 P.2d 705 (Colo. 1988). Initially, on January 20, 2013 Claimant suffered admitted industrial injuries to her right upper extremity when she slipped and fell during the course and scope of her employment with Employer. Claimant underwent two right shoulder surgeries, thoracic outlet surgery and two right wrist surgeries. She subsequently received significant interventional pain management treatment including numerous medications.

15. P.A. Eastlund explained that opioid pain medications helped Claimant control chronic, sharp pain in her neck, shoulders, upper arms, forearms, hands and fingers. He specified that "[o]ur objective is to decrease reported chronic pain levels while increasing overall physical function." By October 9, 2019 P.A. Eastlund noted that Claimant's medications included Cymbalta, Topiramate, Gabapentin, Omeprazole, Fentanyl, MS Contin and Oxycodone. He remarked that he had been considering the slow tapering of extended release opioid medications for treatment of chronic right shoulder and neck pain. By October 25, 2019 P.A. Eastlung commented that the use of Fentanyl patches makes it difficult to taper medications because the patches provide a fixed amount of medication. He thus recommended the following: (1) stopping Fentanyl patches; (2) beginning extended release Morphine Sulfate; (3) continuing Oxycodone; (4) ceasing Oxycodone and starting instant release Morphine next month and; (5) in two months tapering IR or extended release by 5-10%. Dr. Hughes agreed with the tapering plan of P.A. Eastlund regarding the elimination of Fentanyl patches and Oxycodone. He noted that the *Guidelines* suggest limitations on the duration of opioid pain medications. Notably, the *Guidelines* specify "12 visits within a 12 month period to review the opioid plan" and laboratory monitoring. WCRP 17, Exhibit 9 (I)(6). Dr. Hughes also remarked that the use of opioid medications should be linked to functional improvement.

16. Claimant explained that her current medications decrease her pain and increase her function. She noted that without her pain medications her functional abilities would be greatly reduced. Nevertheless, Claimant stated that she would like to eliminate opioids, but it has been a difficult process. The *Guidelines* reflect that opioid medications should be used to provide pain reduction and promote functional improvement. Moreover, as Dr. Hughes remarked, the *Guidelines* suggest limitations on the duration of opioid pain medications. P.A. Eastlund persuasively delineated a process for tapering the medications. The process is consistent with the appropriate use of opioid medications outlined in the *Guidelines*. Furthermore, Dr. Hughes agreed with P.A. Eastlund's tapering plan regarding the elimination of Fentanyl patches and Oxycodone. The medical records reveal that continued treatment with Fentanyl patches and Oxycodone would not be designed to relieve the effects of Claimant's January 20, 2013 industrial injury or prevent further deterioration of her condition. Accordingly, Respondents are no longer financially responsible for providing Fentanyl patches and Oxycodone pursuant to their August 1, 2017 FAL.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. To prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo.

1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995). Once a claimant establishes the probable need for future medical treatment he "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna v. Print Expediters, Inc.*, 77 P.3d 863, 866 (Colo. App. 2003); *see Karathanasis v. Chilis Grill & Bar,* W.C. No. 4-461-989 (ICAP, Aug. 8, 2003). Whether a claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 919 P.2d 701, 704 (Colo. App. 1999).

5. However, when the respondents attempt to modify an issue that previously has been determined by an admission, they bear the burden of proof for the modification. §8-43-201(1), C.R.S.; see also *Salisbury v. Prowers County School District*, W.C. No. 4-702-144 (ICAO, June 5, 2012); *Barker v. Poudre School District*, W.C. No. 4-750-735 (ICAO, July 8, 2011). Section 8-43-201(1), C.R.S., provides, in pertinent part, that "a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification." Specifically, respondents must prove by a preponderance of evidence that the claimant did not suffer a compensable injury as defined under Colorado law. §8-43-201(1), C.R.S.

6. It is appropriate for an ALJ to consider the *Guidelines* in determining whether a certain medical treatment is reasonable and necessary for a claimant's condition. *Deets v. Multimedia Audio Visual*, W.C. No. 4-327-591 (ICAO, Mar. 18, 2005); see *Eldi v. Montgomery Ward*, W.C. No. 3-757-021 (ICAO, Oct. 30, 1998) (noting that the *Guidelines* are a reasonable source for identifying the diagnostic criteria). The *Guidelines* are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). Nevertheless, the *Guidelines* expressly acknowledge that deviation is permissible.

7. The *Guidelines* provide, in relevant part, that "medications should be clearly linked to improvement of function, not just pain control." WCRP 17, Exhibit 9 (I)(6). Furthermore, the *Guidelines*, specify that, "examples of routine functions include the ability to perform work tasks, drive safely, pay bills or perform math operations, remain alert and upright for 10 hours per day, or participate in normal family and social activities." WCRP 17, Exhibit 9(I)(6).

8. As found, Respondents have established by a preponderance of the evidence that they are no longer financially responsible for providing Fentanyl patches and Oxycodone pursuant to their August 1, 2017 FAL that acknowledged reasonable, necessary and related medical maintenance benefits designed to relieve the effects of Claimant's January 20, 2013 industrial injury or prevent further deterioration of her condition pursuant to *Grover v. Industrial Comm'n.,* 759 P.2d 705 (Colo. 1988). Initially, on January 20, 2013 Claimant suffered admitted industrial injuries to her right upper extremity when she slipped and fell during the course and scope of her employment with Employer. Claimant underwent two right shoulder surgeries, thoracic outlet surgery and two right wrist surgeries. She subsequently received significant interventional pain management treatment including numerous medications.

9. As found, P.A. Eastlund explained that opioid pain medications helped Claimant control chronic, sharp pain in her neck, shoulders, upper arms, forearms, hands and fingers. He specified that "[o]ur objective is to decrease reported chronic pain levels while increasing overall physical function." By October 9, 2019 P.A. Eastlund noted that Claimant's medications included Cymbalta, Topiramate, Gabapentin, Omeprazole, Fentanyl, MS Contin and Oxycodone. He remarked that he had been considering the slow tapering of extended release opioid medications for treatment of chronic right shoulder and neck pain. By October 25, 2019 P.A. Eastlung commented that the use of Fentanyl patches makes it difficult to taper medications because the patches provide a fixed amount of medication. He thus recommended the following: (1) stopping Fentanyl patches; (2) beginning extended release Morphine Sulfate; (3) continuing Oxycodone; (4) ceasing Oxycodone and starting instant release Morphine next month and; (5) in two months tapering IR or extended release by 5-10%. Dr. Hughes agreed with the tapering plan of P.A. Eastlund regarding the elimination of Fentanyl patches and Oxycodone. He noted that the *Guidelines* suggest limitations on the duration of opioid pain medications. Notably, the *Guidelines* specify "12 visits within a 12 month period to review the opioid plan" and laboratory monitoring. WCRP 17, Exhibit 9 (I)(6). Dr. Hughes also remarked that the use of opioid medications should be linked to functional improvement.

10. As found, Claimant explained that her current medications decrease her pain and increase her function. She noted that without her pain medications her functional abilities would be greatly reduced. Nevertheless, Claimant stated that she would like to eliminate opioids, but it has been a difficult process. The *Guidelines* reflect that opioid medications should be used to provide pain reduction and promote functional improvement. Moreover, as Dr. Hughes remarked, the *Guidelines* suggest limitations on the duration of opioid pain medications. P.A. Eastlund persuasively delineated a process for tapering the medications. The process is consistent with the appropriate use of opioid medications outlined in the *Guidelines*. Furthermore, Dr. Hughes agreed with P.A. Eastlund's tapering plan regarding the elimination of Fentanyl patches and Oxycodone. The medical records reveal that continued treatment with Fentanyl patches and Oxycodone would not be designed to relieve the effects of Claimant's January 20, 2013 industrial injury or prevent further deterioration of her condition. Accordingly, Respondents are no longer financially responsible for providing Fentanyl patches and Oxycodone pursuant to their August 1, 2017 FAL.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

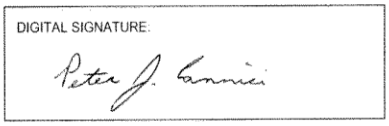
1. Respondents are no longer financially responsible for providing Fentanyl patches and Oxycodone pursuant to their August 1, 2017 FAL.

2. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street,

4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: December 23, 2019.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Did Claimant overcome the DIME's MMI determination by clear and convincing evidence?
- If Claimant did not overcome the DIME regarding MMI, did he overcome the DIME's determination he has no psychiatric impairment?
- If Claimant did not overcome the DIME regarding MMI, did he prove entitlement to post-MMI mental health treatment by a preponderance of the evidence?

STIPULATIONS

1. Claimant is entitled to disfigurement benefits of $9,949.17, the maximum payable for his date of injury. Respondent has already paid the disfigurement benefit.

2. Respondent will reimburse Claimant $845 for treatment from Dr. Schrader.

FINDINGS OF FACT

1. Claimant worked for Employer as part of a crew operating a downhill ski course. He was injured in a work-related snowboarding accident on December 31, 2016, when he lost control on an icy slope at a high rate of speed and crashed into a wall.

2. Claimant initially assumed he suffered a severe left ankle sprain. He and his supervisor decided not to report the injury as work-related because Claimant did not think he could pass Employer's mandatory post-accident drug test.

3. Claimant went to Avon Urgent Care later that afternoon and reported he injured his ankle falling down some stairs. A CT scan showed multiple severe fractures, and occlusion of the posterior tibial artery immediately above the ankle.

4. Claimant was airlifted to St. Anthony Hospital in Lakewood where he underwent emergency surgery. Unfortunately, his leg had suffered severe vascular damage and progressively worsened over the next several days. Attempts at revascularization failed, and Claimant had a below-knee amputation on January 6, 2017.

5. Claimant filed a workers' compensation claim on January 23, 2017. Respondent denied the claim because the injury had originally been reported as a non-work-related accident.

6. Claimant has a longstanding diagnosis of bipolar disorder for which he received treatment before the work accident. He has seen Dr. Larry Sanders, a psychiatrist, since September 2012. He initially sought treatment for problems such as

racing thoughts, inability to sleep, and difficulty maintaining steady employment. Claimant was serving in the Army National Guard at the time. His PCP was been prescribing antidepressants and clonazepam, which were not helping. Dr. Sanders diagnosed bipolar II and prescribed Seroquel and lamotrigine.

7. At his deposition, Dr. Sanders clarified that technically Claimant did not meet the criteria for bipolar II in 2012, which indicates "severe depression, incapacitating depression, with hypomania, some moderate manic symptoms." Dr. Sanders opined a better diagnosis would have been bipolar NOS because Claimant did not have severe depression and was primarily hypomanic.

8. On January 4, 2013, Claimant told Dr. Sanders he had stopped Seroquel and lamotrigine because they were too expensive and "marijuana helps as much." He had been discharged from the National Guard.

9. Claimant and his family subsequently moved to North Carolina. A new psychiatrist changed his medication to Abilify 10mg, and he remained on that dose for several years.

10. Claimant and his family returned to Colorado in 2016, and he resumed treatment with Dr. Sanders on August 1, 2016. Claimant told Dr. Sanders Abilify "helped" to keep his mood swings at a "minor" level." He had stopped taking medication because his PCP was not comfortable managing his psychiatric condition, which caused him to lose his job. Claimant had also lost his license for a year for driving under the influence of marijuana. Dr. Sanders increased Abilify to 15mg and added Concerta. He also prescribed gabapentin for insomnia.

11. Claimant saw Dr. Sanders again on November 1, 2016. He had recently been fired from a job for missing work after a motor vehicle accident. Dr. Sanders stopped Concerta because it was not helping, but continued Abilify 15mg and gabapentin.

12. Claimant's next appointment was on January 23, 2017, a few weeks after the work accident. His main complaint was akathisia (restlessness), which Dr. Sanders believed was probably related to the accident. Claimant was taking opioids for pain but did not want to become addicted. He stated the Abilify "helped a lot" with the bipolar symptoms. Claimant was in "high spirits" and seemed hopeful that "everything was going to work out." Dr. Sanders added clonazepam for the akathisia.

13. Claimant returned a week later (January 30, 2017) and reported the clonazepam resolved the akathisia. Claimant again appeared to be doing well with no noticeable depression. Dr. Sanders noted he was "coping very well."

14. In his deposition, Dr. Sanders testified how surprised he was by Claimant's presentation in January 2017 after the accident. He testified, "So I'm expecting to see a really depressed kid come in. And he comes in, I mean, almost jovial. It was weird . . . you see the opposite of what you anticipated." Dr. Sanders opined Claimant was probably "in denial" about the loss of his leg.

15. Claimant appeared worse at his March 14, 2017 appointment, describing significant irritability and frustration. Dr. Sanders added lamotrigine for depression, irritability, and to help Claimant "not get so overwhelmed by things." Adding lamotrigine confirms a worsening of Claimant's condition because he could no longer be optimally managed solely with Abilify. Confusingly, at that same appointment Dr. Sanders circled a template notation that Claimant's condition was "very much improved." No explanation was provided for this inconsistency.

16. Claimant followed up with Dr. Sanders on August 14, 2017. He had recently had a "mental breakdown" because "loss of [my] leg hit me." His irritability was "less frequent" but "more intense" since starting lamotrigine. Dr. Sanders credibly testified Claimant's breakdown in the summer of 2017 "was due to finally getting past the denial state and into the more emotional state of loss." The accompanying treatment note incongruously rated Claimant's illness as "normal, not at all," and "very much improved." The ALJ gives no weight to those notations, as they are inconsistent with other persuasive evidence regarding Claimant's mental status at the time.

17. Claimant's next scheduled appointment was November 13, 2017. Dr. Sanders was running late that day, and Claimant left the office before he could be seen. Dr. Sanders spoke with Claimant by phone that evening and "he was going through a very difficult time." His girlfriend had robbed and left him. His car broke down and he had no money. Then the connection was lost. Dr. Sanders called back several times but could not reconnect with Claimant.

18. Claimant was very distressed at his next appointment on December 7, 2017. He was living in an RV parked at his parents' house. He had recently been working a job he liked in Leadville, but lost the job because a former "friend" had "slept with [his girlfriend] and told boss lies that pt doing drugs." Dr. Sanders prescribed Latuda for Claimant's worsening depression. In his deposition, he explained Ability treats the manic or hypomanic portion of bipolar disorder, whereas Latuda treats the depressive component. Dr. Sanders further testified,

> Q. [W]hat was the change in the level of depression that . . . led you to prescribe [Latuda]?
>
> A. One was . . . I could see that he was struggling with the loss of his limb. And then at that time he also had a breakup with his girlfriend, and a lot of psychosocial issues were occurring. . . . [S]tarting Latuda would certainly indicate that . . . his depression was very significant. Because, again, Abilify does not treat bipolar depression. Latuda does.

19. On December 20, 2017, the parties attended a hearing to decide compensability. Judge Goldman found the claim compensable in a final order dated February 9, 2018.

20. Claimant returned to Dr. Sanders on March 20, 2018 and appeared somewhat better. He brought a support dog to the appointment, and noted the dog "helps

make him get out of bed." He said he felt "worthless" but also said he was being hard on himself and "life is pretty good." He was not having manic symptoms and his depression was "mild recently." He described "small freak-outs" with "increased heart rate, mind racing, can't think." Dr. Sanders indicated Claimant was "doing pretty well," but added alprazolam (Xanax) to use prn for the panic attacks.

21. After receiving Judge Goldman's order, the parties agreed to Dr. Annu Ramaswamy as Claimant's ATP. Claimant's initial visit with Dr. Ramaswamy was on March 27, 2018. Before the appointment, Claimant had a bipolar rage outburst triggered by an unruly child in the waiting room. Dr. Ramaswamy's staff had to remove Claimant from the waiting room to deescalate the situation. Claimant "was fairly upset and angry" at the beginning of the appointment, but calmed down "fairly quickly" after the evaluation started. Claimant cried while describing the work accident. Claimant told Dr. Ramaswamy he had bipolar disorder and PTSD and was getting medication from Dr. Sanders. Claimant was "very upset" about his injury and angry with his employer, but was not interested in counseling. Claimant was using marijuana regularly, which helped his phantom pain. Dr. Ramaswamy was not willing to prescribe narcotics while Claimant was using marijuana, so he referred Claimant to Dr. Ogin (a physiatrist) for pain management. From a physical standpoint, Claimant was functioning relatively well with his prosthesis, and Dr. Ramaswamy thought he was approaching MMI.

22. Claimant saw Dr. Ogin on April 23, 2018, who reported,

> [He] tells me that he is doing well from a physical standpoint. He has been able to return to walking and running[1] and wants to get back to snowboarding, particularly when he gets a better prosthetic. He did suffer quite a bit emotionally. He has a history of bipolar disorder, which is adequately controlled with Abilify. He also has mild PTSD related to being in the Army. . . . He works with a psychiatrist, Dr. Larry Sanders. His Abilify dosage has been stable.[2] His mood overall has been stable, and he seems well motivated.

23. Dr. Ogin commented that Claimant "seems remarkably well-adjusted." Claimant indicated he found marijuana helpful for pain control but also asked about opioids. Citing literature showing marijuana for pain control can help reduce narcotic usage, Dr. Ogin prescribed low-dose oxycodone to supplement the marijuana. He also ordered a compound cream to help the neurogenic pain in Claimant's stump. Dr. Ogin recommended Claimant obtain a new prosthesis and was "likely approaching MMI."

24. Claimant followed up with Dr. Ramaswamy on April 26, 2018. He was "depressed and little down today," but stated this was "normal for him." Dr. Ramaswamy noted, "He does have a history of bipolar condition and states that he is pretty much back

[1] Based on information later provided by Claimant's mother, the ALJ finds Claimant's description of his activity level is probably inaccurate.

[2] Claimant overstated the stability of his medication regimen, as he neglected to mention Dr. Sanders had recently added Latuda for depression and alprazolam for anxiety. Claimant likely downplayed the severity of his mental status at this appointment.

to his baseline state from a mental health standpoint." The report contains no further analysis or discussion regarding Claimant's mental status or psychiatric history. Dr. Ramaswamy opined Claimant was at MMI with permanent restrictions against working at heights. He recommended post-MMI pain management with Dr. Ogin and periodic replacement of his prosthesis. Dr. Ramaswamy assigned a 70% lower extremity impairment rating.

25. Respondent filed a Final Admission based on Dr. Ramaswamy's report, and Claimant timely requested a DIME. Dr. Yamamoto was selected as the DIME physician.

26. Claimant returned to Dr. Sanders on August 16, 2018. His depression continued to worsen since his last appointment in March. His mother also attended the appointment and gave Dr. Sanders additional insight regarding Claimant's mental status. Claimant's mother reported, "Any challenges, he explodes. [He] can't get past anger to remedy anything. Lasts about half a day. He apologizes, remorseful. Punches himself in the face so he won't hit others." Claimant was distraught because "I can't get help. Not disability, not VA." He was angry about being denied food stamps and threatened to blow up a building. His mother noted he was "so down on himself." Claimant was "tired of feeling like a failure." Because Abilify and Latuda were not working, Dr. Sanders tried Vraylar to stabilize Claimant's mood. Vraylar is a relatively new atypical antipsychotic medication that can effectively treat both the manic and depressive elements of bipolar disorder. Vraylar proved to be very helpful for Claimant.

27. On or about August 29, 2018, Dr. Sanders wrote a letter addressing Claimant's mental condition. He stated,

> [Claimant] has bipolar disorder which is now well controlled by medications. He also has ADHD and issues from loss of [his] left leg following a traumatic accident. Despite his bipolar symptoms being well controlled, many deficits still persist from that and the other two conditions mentioned above. In order for him to learn how to overcome these deficits, he must be in psychotherapy to learn coping and self-management skills. I referred him to Dorianna Schrader. It is a good fit for him with an excellent therapist.

28. Claimant followed up with Dr. Ogin on September 4, 2018. His mother also attended the appointment. Dr. Ogin noted Claimant had been on psychotropic medications for years, but "the trauma from his injury has aggravated his underlying psychiatric condition. . . . [He] is clearly going through a period of adjustment and has had worsening mood and anger issues as well as depression." Claimant told Dr. Ogin the recent addition of Vraylar helped "quite a bit." But Dr. Sanders still wanted him to see a psychologist to work on coping strategies and accepting the loss of his leg. Claimant had seen Dr. Schrader once and was motivated to continue working with her. Dr. Ogin agreed psychotherapy "would be quite helpful in offering him pain management strategies and to assist with the grieving process." He made a formal referral for therapy. He also gave Claimant a prescription for Latuda, but deferred to Dr. Sanders whether it should be covered under the claim.

29. Dr. David Yamamoto saw Claimant for the DIME on September 18, 2018. His mother went with him to give more detailed and accurate information than Claimant would likely have given himself. Dr. Yamamoto spent considerable time reviewing Claimant's records and going over the history. Dr. Yamamoto documented,

> Psychologically, he has been unstable. His mother notes that over the past 6-8 weeks, his mood has been more labile and he can lose his temper easily. His mood will fluctuate significantly from day to day or week to week. His mother adds that he will give misleading information and will tell providers that he is much more functional than he actually is, saying that he is able to run and do climbing which he does not do. His mother notes that he does have a strong desire to get back to being very physically active although there are periods where he does not believe he can do anything.

30. Dr. Yamamoto opined the work injury aggravated Claimant's pre-existing bipolar disorder, and he was not at MMI from a psychiatric perspective. Dr. Yamamoto noted Claimant had been stable on relatively low doses of Abilify for many years before the injury but had required escalating medications since the accident. Although Dr. Yamamoto's report contains errors regarding the pre-injury dose of Abilify, his overall impression is consistent with the record and Dr. Sanders' testimony.

31. The Division subsequently struck Dr. Yamamoto's DIME because he had called Claimant's mother after the appointment to get additional information without obtaining prior approval. Dr. Yamamoto's report was submitted into evidence as a claimant's IME, not a DIME. It is entitled to no special weight.

32. Dr. David Orgel was chosen as the new DIME physician, and the appointment was scheduled for April 1, 2019.

33. Claimant saw Dr. Ogin on March 1, 2019, one month before his upcoming DIME with Dr. Orgel. Dr. Ogin had a lengthy conversation with Claimant and his mother regarding Claimant's mental status before and after the injury. He noted Claimant saw Dr. Sanders more frequently after the accident and required multiple medication changes. Vraylar was helping stabilize his moods. Claimant had attended approximately ten psychotherapy sessions with Dr. Schrader at his own expense to work on coping and self-management skills. Claimant thought the sessions were "very effective," and his mother confirmed, "he was quite diligent in doing his homework." Unfortunately, he had to discontinue treatment because Respondent would not reimburse the cost. Dr. Ogin indicated Claimant would continue to manage his pain primarily with medical marijuana, which "has proven quite effective." He prescribed 60 oxycodone, which he anticipated would last approximately six months because Claimant used it sparingly for breakthrough pain. Dr. Ogin opined it was reasonable for Claimant "to receive psychiatric treatment through the occupational claim." His opinion was based on his impression that Claimant's mental state was worse than his pre-injury baseline, and "furthermore, his necessity to see a pain psychologist is directly due to his loss of limb and chronic pain."

34. Claimant attended the DIME with Dr. Orgel on April 1, 2019. For unknown reasons, Claimant's mother did not accompany him to the appointment. Unfortunately, the evaluation was cut short because Claimant became irate and stormed out of the office. Based on the information available to him, Dr. Orgel concluded Claimant's mental health issues were purely related to his pre-existing bipolar disorder. He agreed with Dr. Ramaswamy's MMI date and impairment rating. He concluded Claimant's ongoing mental health issues were not related to the industrial injury. But Dr. Orgel recognized he did not have a complete picture of Claimant's mental health condition, and left the door open for changing his opinion. He stated,

> Additional information in this regard may be helpful.
>
> First, **a pain psychology evaluation with extensive testing** must be done to determine any confounding or pre-existing problems. **This should be obtained before any additional psychiatric evaluation**. This may be sufficient to determine the work relatedness of his psychiatric complaints.
>
> However, if it is not, either a psychiatric Independent Medical Examination to determine impairment or inquiry directly to Dr. Sanders about the change in [Claimant] as relates to his work injury might change my mind about his psychiatric impairment. (Bold text in original).

35. Claimant saw Dr. Robert Kleinman for an IME at Respondent's request on July 11, 2019. He interpreted Dr. Sanders' pre-injury records as showing "an up and down course, with difficulty maintaining stability." He opined Claimant's pre-existing bipolar disorder complicated his recovery from the work injury and "made him difficult to treat" because he became angry at doctors easily and was not always cooperative. Dr. Kleinman opined the injury temporarily exacerbated Claimant's pre-existing condition, and Dr. Sanders had appropriately recommended psychotherapy. He opined the treatment with Dr. Schrader was "likely" injury-related and helpful, although "he is still sad, and is still grieving." Despite Claimant's "lingering grief," Dr. Kleinman opined he "has had a complete course of psychotherapy to deal with grief and loss regarding the amputation." In Dr. Kleinman's opinion, any further therapy would be related to his pre-existing condition. He agreed with Dr. Ramaswamy and Dr. Orgel that Claimant has returned to his pre-injury baseline.

36. Dr. Sanders testified in a lengthy deposition on September 25, 2019. Dr. Sanders believes Claimant's work injury aggravated his pre-existing bipolar disorder. He reviewed the reports from Dr. Ramaswamy, Dr. Yamamoto, and Dr. Orgel and opined Dr. Yamamoto's report "was by far the most accurate report of any of the evaluations that I read." He added, "The other reports . . . I had my red pen out writing "What?" and exclamation points . . . ." He opined Claimant needs psychotherapy despite the benefit he has received from Vraylar because,

> [T]hat's more of a change in self-reception, and that's usually something you have to do through talk therapy . . . and you have to go through the grieving stages, and finally come to a level of acceptance. And that's done

with talk therapy; whereas bipolar disorder would be mostly through medication.

37. Dr. Sanders' opinions are credible and persuasive.

38. Dr. Orgel's determination Claimant reached MMI on April 26, 2018 was highly probably incorrect. Claimant overcame the DIME regarding MMI by clear and convincing evidence.

CONCLUSIONS OF LAW

A DIME's determination of whether a claimant has reached MMI is binding unless overcome by "clear and convincing evidence." Section 8-42-107(8)(c). Clear and convincing evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). The party challenging a DIME's conclusions must demonstrate it is "highly probable" that the DIME is incorrect. *Qual-Med v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). The DIME's opinion regarding the cause of a claimant's condition is an "inherent" part of the diagnostic assessment that comprises the DIME process of determining MMI and rating permanent impairment. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1988). Therefore, the DIME's finding that a particular condition is or is not related to the industrial injury is binding unless overcome by clear and convincing evidence. *Id*.

As found, Claimant overcame the DIME's determination he was at psychiatric MMI on April 26, 2018 by clear and convincing evidence. Dr. Ramaswamy did not put much effort into determining whether Claimant was at psychological MMI. His conclusion was based simply on Claimant's response to casual questioning. Claimant certainly did not help himself by minimizing his mental issues and overselling how "well adjusted" he was. Nevertheless, asking a young bipolar male to rate and compare his symptomology and functionality was not a very effective way to assess Claimant's mental status or need for additional treatment. Claimant has previously demonstrated unwillingness to frankly and accurately describe the severity of his condition. Moreover, Dr. Ramaswamy only met Claimant twice and did not have an opportunity to build trust and rapport, making Claimant even less likely to open up. A more effective approach would have been to speak with Claimant's mother, and better yet, discuss the matter with Dr. Sanders. Instead, Dr. Ramaswamy simply accepted Claimant's statement he was back to baseline, without exploring whether that statement was accurate.

Although Claimant's bipolar disorder adversely affected his life before the injury, it got worse after the accident. Claimant became increasingly unstable as he grappled with the ramifications of his life-changing injury. His explosive episodes became more frequent and intense. There is no persuasive pre-injury evidence of behaviors such as punching himself in the face or threatening to blow up buildings. Claimant was primarily hypomanic before the accident, whereas depression became a much more prominent component of his illness after the accident. Dr. Sanders initially added Latuda to treat the worsening depression, and eventually switched to Vraylar, which was much more effective. Vraylar

was the most significant treatment modality to stabilize Claimant's condition, but it was not implemented until several months after he was put at MMI. Dr. Sanders also recommended psychotherapy to help Claimant develop insight and tools to manage his situation from an emotional perspective. All of this should have been done before putting Claimant at MMI.

Moreover, the ALJ considers Dr. Orgel's determination of MMI to be relatively "soft".[3] He recognized he did not have a complete picture of Claimant's mental health condition, and conceded additional information from Dr. Sanders might change his mind. Dr. Orgel did not have the benefit of Dr. Sanders' testimony, but the ALJ does. Dr. Sanders' deposition testimony is compelling. Dr. Sanders has a longitudinal perspective regarding Claimant's mental status not shared by any other treating or examining provider. Dr. Ramaswamy saw him twice and primarily focused on his physical condition. Dr. Orgel saw Claimant only once, and the evaluation was cut short by an explosive confrontation. The ALJ has credited Dr. Sanders' opinion that the accident aggravated Claimant's bipolar disorder, and he needed Vraylar to stabilize his mental state and psychotherapy to help him cope with the emotional sequelae of the injury. This essentially fills in the gaps in Dr. Orgel's understanding of Claimant's situation.

Additionally, Dr. Kleinman's opinions support a determination Claimant was not at MMI in April 2018. Dr. Kleinman agreed psychotherapy was reasonably necessary and related to the accident. The ALJ notes Claimant did not start therapy until ***after*** the MMI date declared by Dr. Ramaswamy and the DIME. Although Claimant went to therapy on his own, he could not continue because of cost. Although the ALJ does not necessarily agree that Claimant had a "complete course" of therapy as opined by Dr. Kleinman, the ALJ will leave that decision to a treating provider. Regardless, Claimant was most certainly not at MMI before starting therapy.

The ALJ has no serious or substantial doubt Claimant had not returned to baseline and was not at MMI on April 26, 2018. Accordingly, Dr. Orgel's MMI determination was highly probably incorrect, and Claimant overcame the DIME on MMI by clear and convincing evidence. Based on this determination, issues of permanency and post-MMI treatment are premature.

ORDER

It is therefore ordered that:

1. Claimant's request to set aside the DIME's determination he reached MMI on April 26, 2018 is granted.

2. Respondent shall cover reasonably necessary and related treatment to bring Claimant to MMI.

[3] This is not to suggest Dr. Orgel's conclusion is not entitled to the presumptive weight accorded all DIMEs, or that Claimant has any lesser burden. It simply acknowledges that Dr. Orgel appreciated the limits of his knowledge and expressed doubts about the correctness of his conclusion.

3. All issues not decided herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 31, 2019

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that he suffered a compensable work injury to his right leg on June 9, 2019?

II. If the injury is compensable, has the right of selection of an Authorized Treating Provider passed to Claimant?

III. If the injury is compensable, has Claimant shown, by a preponderance of the evidence, that the medical treatment rendered to date by Dr. Simpson and others is reasonable, necessary, and related to his work injury?

IV. If the injury is compensable, is Claimant entitled to Temporary Total Disability payments?

STIPULATIONS

I. Claimant's Average Weekly Wage is $565.93.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

Claimant's Job Duties on Date of Injury

1. Claimant was a fuel driver for Employer. He would pick up and deliver fuel to different store locations in Colorado. Part of the process of delivering fuel required Claimant to set up a safety area so that motorists would not run over the fuel hoses, or strike the driver, while he was working.

2. In the evening of June 9, 2019, Claimant arrived at King Soopers on Stetson Hills Boulevard in Colorado Springs, Colorado and began performing his job duties necessary to deliver fuel to that location. This included setting up the orange safety cones for his safety area. While Claimant's truck also had orange safety cones on it, he would use the cones supplied by the stores, because those cones were larger and more visible, thereby providing him a safer work area.

3. Claimant began to retrieve the station's safety cones from behind the gas station attendant's enclosure. This was located on a small island, which was raised above grade level by a few inches-in effect, a small curb. He made one trip to retrieve some cones to set them up, then returned to this same location on the island a second time for more cones.

Claimant's Work Injury

4. As Claimant was returning to his safety area for the second time, having retrieved additional cones, he took a misstep with his left foot stepping off this curb. The misstep caused him to roll his left ankle, followed by his right ankle. During this fall, Claimant's right leg folded behind him and to the left and he heard a ripping sound come from his right knee.

5. Claimant's fall was captured King Soopers' closed circuit television, and has been viewed by the ALJ. Right after this fall, Claimant lay on the pavement for several minutes, before eventually being assisted. At hearing, Claimant described the pain as "excruciating", leaving him unable to breathe. He described the physical appearance of his right knee as being "deformed" in appearance. He initially thought his right knee had been dislocated, due to its appearance.

6. When he was physically able, Claimant notified his Employer's dispatch of his injury and need for medical treatment by phone. Claimant also arranged through his dispatch for other employees of Employer to come to his injury location to secure the fuel truck. He hid the keys in the truck for his relief driver to find. Claimant also called his supervisor "Breanne", and informed her what had occurred. Claimant waited until it was confirmed that relief was on the way, prior to calling for an ambulance.

Claimant's Medical Treatment

7. Claimant was transported to Penrose/St. Francis Medical Center by ambulance. Claimant was diagnosed to have suffered a right quadriceps tendon rupture.

8. Claimant was instructed by St. Francis Medical Center personnel to contact Dr. Michael Simpson for a surgical consultation, which Claimant did. Dr. Simpson's office advised Claimant that he would have to be referred to him by a place like Concentra since Claimant's injury was work-related. Based on this information, Claimant began treating with Dr. George Johnson with Concentra, and was then referred to Dr. Simpson for a surgical consultation by Dr. Johnson. Dr. Simpson ultimately performed a surgical repair of Claimant's right quadriceps tendon on June 17, 2019. (Ex K).

9. Dr. Simpson, stated, "[Claimant's] preoperative workup was consistent with a traumatic quadriceps tendon injury with a full-thickness disruption of the squad [sic.]. While his weight may have contributed to the severity of the injury, it does not change the fact that *the injury was a direct and immediate cause of the problem that required treatment. This would not have been a pre-existing condition. A patient cannot walk with a complete rupture of the quadriceps tendon.* The patient would not have been able to do any type of work had this been a pre-existing condition." (Ex. 4, p. 63) (emphasis added).

10. Following surgery, Claimant was initially in physical therapy through Concentra but was referred to Colorado Sport & Spine by Dr. Simpson, due to his workers' compensation claim being denied and physical therapy being discontinued with Concentra.

Employers' Response to Claimant's Injury

11. Respondent Employer filed a First Report of Injury ("WC1")(Ex. A) on June 10, 2019. On Employer's WC1, it notes that they were notified on the same day of the injury [June 9, 2019], and the following question was asked "What was the employee doing just before the accident occurred?" Employer's answer was "Stepped off small ledge ***while prepping load/& heard knee pop/Knee strain"*** (Ex A, p. 1) (emphasis added).

12. For reasons unclear, Employer's WC1 under "Initial Treatment," indicated "None", despite Employer knowing (from two different phone calls from Claimant) that Claimant had been transported to the ER. *Id.*

13. Respondents later filed a *Notice of Contest* on June 20, 2019, and indicated that the claim was being denied, as the injury/illness was *"Not work-related".* (Ex. B).

14. Claimant testified at hearing that he also received two letters from Employer. The first, dated 6/10/19, informed him that he would be placed on suspension status if he did not return to work within 30 days. The second, dated 6/20/19, [after he informed his supervisor that he had hired an attorney, due to the denial of his claim] informed him that he was being terminated, instead of suspended. Claimant's understanding, as of the hearing date, is that he had been terminated from Employer.

15. Claimant testified that at no point in the process has Employer tendered a list of Authorized Treating Providers, nor provided any guidance on how to obtain one.

Dr. O'Brien's IME Report and Deposition Testimony

16. Claimant underwent an independent medical examination ("IME") with Dr. Timothy O'Brien on September 26, 2019. Dr. O'Brien issued two reports, the first dated October 14, 2019, and the second, an addendum report, dated November 13, 2019. (Ex. O).

17. Dr. O'Brien conducted a review of Claimant's pre-existing and claim-related medical records and conducted a physical examination. He ultimately opined that Claimant was predisposed to a quadriceps tendons rupture for a number of reasons related to several pre-existing health conditions. (Ex. O, pp. 165-167).

18. Dr. O'Brien noted that MRI scans of Claimant's *left* knee from 2006 demonstrated a lateral tilt of the patella as well as chondromalacia. He further noted that a repeat MRI of the left knee in 2017 demonstrated "profound quadriceps and patellar tendinosis." He stated that, due to how the aging process and DNA controlled rate of desiccation plays

out, there was “near 100 percent certainty that the same process equally affected the right knee.” Dr. O’Brien opined that this condition “dramatically” affected the competency of the knee quadriceps and patellar tendon, thereby predisposing the Claimant to this type of injury. *Id.*

19. Dr. O’Brien was also deposed on November 25, 2019. He testified that the 2006 MRI revealed a “normally hydrated” quadriceps tendon while the 2017 MRI revealed “really significant changes of desiccation, losses of water.” He explained how in layman’s terms, the diagnosis of “tendinosis” refers to hydration changes over time. He further explained that from 2006 to 2017, these changes were “substantial.” Dr. O’Brien stated that you “can’t say that’s a normal [quadriceps] tendon. If it had been normal, a common fall might not have resulted in an uncommon rupture.” He again testified that in his medical experience, including the available MRI scans, there was near 100-percent certitude that what was occurring in the left knee [loss of normal hydration] was also present in Claimant’s right knee.

20. Dr. O’Brien also noted that the prior MRI results revealed a “laterally tilted patella.” (Ex. O, p. 165). He reiterated that this anatomic alignment would have equally impacted his right knee, thereby resulting in an altered biomechanical state. He explained how the patella is not supposed to be tilted outward; rather, it should be equally articulating on the medial and lateral facet of the trochlear groove. However, because Claimant did not have a normally aligned patella, this condition predisposed the Claimant to tendinosis of the quadriceps tendon and patellar tendon, which in turn predisposed the Claimant to a quadriceps tendon rupture. *Id.*

21. During his deposition, Dr. O’Brien expanded on this finding, testifying that in a normal knee, the patella has a “keel,” similar to that of a ship, which literally sits in a groove on the top of the femur, such that its position creates symmetry for both the medial and lateral side of the keel. He explained that, unlike in a normal knee, this symmetrical alignment did not exist in Claimant’s knee. Dr. O’Brien testified in detail about the effects of this tilt on surrounding knee musculature, which included medial and lateral muscles existing at varying strengths, thereby pulling differently on the medial and lateral aspects of the knee. He reiterated that, absent some strange abnormality, the presence of this condition on the left side would similarly be present on the right.

22. Dr. O’Brien also opined that Claimant’s morbid obesity predisposed him to this type of injury. On the date of his examination, Dr. O’Brien recorded that Claimant stood 6’ tall, and weighed 325 pounds. Dr. O’Brien opined that obesity adversely impacts the tissues in the body. He concluded that Claimant’s obesity contributed to the onset of the quadriceps and patellar tendinosis, which in turn weakened the patellar tendon and the quadriceps tendon of Claimant’s right knee.

23. Dr. O'Brien also opined that his wieght had an adverse impact on Claimant's "proprioception," or awareness of bodily position and movement. Dr. O'Brien testified that proprioception involves our brain, gravity, and overall balance and put simply, is the literal phenomenon that keeps someone upright. He stated that people with morbid obesity tend to have alterations in their center of gravity, and experience an altered and less reliable sense of proprioception and balance. Dr. O'Brien concluded that this phenomenon also contributed to the Claimant's fall. (Ex. O, p. 166).

24. In his 10/14/19 report, Dr. O'Brien, wrote, in pertinent part, his "IMPRESSION":

> The **June 9, 2019 work injury,** *which occurred while Mr. Richardson was employed at Groendyke Transport, Inc.,* **resulted in** a closed complete right knee **quadriceps tendon rupture.** The facts in this case are concordant.
>
> The injury mechanism was sufficient to have produced the pathology documented on exam and MRI scan. Mr. Richardson did not delay seeking medical attention after this incident occurred. His exam findings and behavior after the incident occurred were entirely consistent with an acute quadriceps tendon rupture. The MRI scan corroborated the presence of the quadriceps tendon rupture, and Dr. Simpson, more importantly, documented the presence of the acute quadriceps tendon rupture at the time of his surgical intervention. (Ex. O, p. 161) (emphasis added).

25. In this original [10/14/19] report, Dr. O'Brien was asked the following Question #1:

> Does Claimant have any pre-existing injuries and/or conditions? Please explain, including any prior care he sought.
>
> Response: Yes, he has pre-existing patellofemoral arthritis, but *that did not lead to his quadriceps tendon tear.* He has pre-existing ill health aerobically and musculoskeletally and that *probably predisposed him to a quadriceps tendon rupture,* but ultimately he was a fit enough individual and the quadriceps tendon rupture was in essence unavoidable and **it was <u>definitely</u> work related.** (emphasis added).

On 10/14/19, Dr. O'Brien was also asked Question #2:

> Are Claimant's symptoms and conditions allegedly caused by or related to his employment consistent with Claimant's described mechanism of injury? **Are Claimant's symptoms and conditions caused by or related to his employment with Groendyke Transport, Inc. on June 9, 2019,** and was there any specific triggering event on June 9, 2019 that caused the avulsion of the quadriceps tendon, or was the avulsion solely caused by a pre-existing condition?

Response: **Yes.** See *"Impression"* section above. (emphasis added).

26. In his supplemental [11/13/2019] report, Dr. O'Brien was asked the following question:

> To a reasonable degree of medical probability, what is the likelihood that Claimant's preexisting injuries and/or conditions led to his quadriceps tendon rupture? Please explain.
>
> Response: In my opinion, Mr. Richardson's predisposition for quadriceps tendon was at least 50 percent responsible for the *rupture* that occurred on the date of injury that is being considered: June 9, 2019. If Mr. Richardson has not had these pre-existing factors at play in his life on June 9, 2019, it is unlikely that he would have *ruptured his quadriceps tendon* due to the fact that *he misstepped off the curb and then fell.* This is not an uncommon injury mechanism. The vast majority of people who experience this type of injury mechanism, do not end up *rupturing* a quadriceps tendon which is not a common injury for orthopedic surgeons to address. (Ex. O, p. 176)(emphasis added).

At no point in his supplemental report [11/13/19], nor in his deposition testimony, did Dr. O'Brien walk back the Conclusions and Impressions he reached in his original [10/14/19] report. He merely elaborated on what he saw as Claimant's elevated risk factors for sustaining such an injury in the manner in which it occurred.

27. During his deposition, Dr. O'Brien elaborated on this conclusion, stating that "quadriceps tendon ruptures are exceedingly rare." He testified that the quadriceps tendon is "massive," and patellar tendon ruptures are more common due to their smaller size. Dr. O'Brien testified that over the course of his career as an Orthopedic Surgeon, in which he has performed over 9,000 surgeries, including 3,000 knee replacements, he had dealt with less than 10 quadriceps tendon ruptures.

28. Dr. O'Brien explained how, in his experience, quadriceps tendon ruptures were the result of eccentric loading where the knee is flexing, the bodyweight loads the tendon, and the quadriceps contracts with such massive force that the quadriceps tendon is overcome. He went on to explain that the patella has to be exactly in the right location for that to occur, since the weaker patellar tendon "really is the one that should go." In other words, "the quadriceps tendon is so much stronger than the patellar tendon that in order to rupture, it necessarily entails the positioning of the knee." He reiterated that, to a reasonable degree of medical probability, the positioning in Claimant's right knee was not normal.

29. Dr. O'Brien testified that, "[t]he reason I said that it's more than 50 percent likely that predisposing factors contributed to this quadriceps tendon rupture is because ***Mr. Richardson did something that we commonly do; he fell.*** But he did something that

was uncommon ***as a result of that fall; he <u>ruptured</u> his quadriceps tendon*.** And I think that the predisposing factors play a role in that regard." (emphasis added).

Dr. Stull's Deposition Testimony

30. During his deposition, Dr. Stull testified that a quadriceps tendon rupture is not a common injury. He concurred with Dr. O'Brien regarding what can cause a quadriceps tendon rupture; namely, deep flexion of the knee and eccentric loading placed on the knee. He estimated that in his 24-year career, he had only treated "dozens" of quadriceps tendon tears.

31. Nonetheless, Dr. Stull was unable to offer a reason as to why a quadriceps tendon rupture was not a common injury. When asked how much force was required to rupture the tendon, he stated that he was unsure since he was not an engineer. When asked if the injury is not that common because the amount of force required is not something that is encountered in day-to-day activities, he responded with "[m]aybe, but I can't say for certain."

32. Dr. Stull agreed that existing MRIs of Claimant's left knee demonstrated degenerative findings. On the date of his own examination, he even took x-rays of Claimant's right knee, which revealed patellofemoral joint space narrowing. (Ex. 10, p. 126).

33. Dr. Stull acknowledged that on the date of his examination he did not record the Claimant's height and weight, though he testified that arthritic, degenerative changes in the knee can occur, in part, from how much weight a person carries. He described the Claimant as "a fairly robust built man…he wasn't ginormously [*sic*] obese."

34. When asked if he agreed with Dr. O'Brien's conclusion that the Claimant's pre-existing issues predisposed him to a quadriceps tendon rupture, Dr. Stull testified that he would "not necessarily" concur. He opined that maybe Dr. O'Brien knew the Claimant better than he did, stating "[b]ut I don't know the patient that well, right, I met him for half an hour, chatted with him about his injury…." Earlier in his testimony, Dr. Stull acknowledged that his examination consisted only of a "directed history" related to the knee injury and he did not take a more detailed medical history.

35. Dr. Stull was also asked if the quadriceps tendon tear was "idiopathic", and he was clear that it was traumatic in nature. *"They [quad tendons]…. just don't spontaneously rupture."* (emphasis added).

36. Dr. Stull testified that certain medications could weaken particular tendons in the body. No such medications were identified in Claimant's records. On follow-up, when asked if anything else could contribute to a weaker tendon he responded, "I don't think so. …. I was thinking about it as you asked that…..diabetes, and I don't know any literature … that says – or my experience has not been diabetics have a higher… percentage

rupture of body tendons, people with cardiovascular health. I don't know of any literature to support that either, and I don't have any clinical experience to support that either…." Once again, nothing of this sort was revealed in any of Claimant's records.

Claimant's Pre-Existing Issues with his Knees, Weight, and Prior Incidents of Slipping and Falling

37. At hearing, Claimant testified that the MRI taken in 2006 for his left knee was the result of reporting for treatment due to pain he was experiencing in the knee. He estimated that the pain had existed for approximately a year or two before that.

38. Claimant further testified that the prior surgery on his left knee was "basically, cutting tissue on the inside of the .. the kneecap there…it was, basically, … to see if that kneecap would move back on its own. When asked if his understanding of the treatment was to address a tilting of his patella, Claimant responded affirmatively.

39. Claimant confirmed that his understanding from his treating providers was that the titling of the patella in his left knee was similarly present in his right knee. He testified, "Yes. Yes, usually, if there's one, there's two."

40. The MRI from 2017, under the History section states as follows: "Fell a few weeks ago. Patient has a prior history of patellar instability. Numerous injections over the past 10 years." (Ex. G, p 19). When asked about what precipitated this MRI, Claimant responded, "God, I didn't even remember that one. That … would have been while I was working at Love's. I don't remember that. Did – did it happen at work?" He testified that while he did not remember much about it, it must have been the result of a slip-and-fall at work where he missed a step climbing down off his truck. Claimant confirmed that from 2006 to 2017, he remained symptomatic for pain in his left knee.

41. In terms of his weight, Claimant testified that he presently weighed approximately 340 lbs. On June 9, 2019, he estimated that he weighed around 310 lbs. He has gained the weight since the injury as a result of inactivity.

42. Claimant also noted that he had two prior work-related injuries related to his right and left shoulders. He testified that "both" of those injuries were the result of falls at work. Claimant reiterated that the left knee injury in 2017 was also the result of a fall at work. Thus, when asked if slipping and falling was something that has happened to him on a fairly regular basis, Claimant responded, "It does. It's – I'm just a very hard worker…." Claimant then testified, however, that he did not slip-and-fall on a regular basis in a non-work-related capacity."

43. Claimant further testified that while the physical layout and surfaces of the service stations varied, he did not always work on flat surfaces, noting the presence of snow and curbs, depending on the location. He agreed that someone walking outside, and

stepping either up onto, or down off, a curb was a common mechanism of day-to-day living. Claimant stated that throughout his life, it was something he had done a number of times.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. §8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. §8-43-201, C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

D. In this instance, the ALJ finds that Claimant has testified sincerely and credibly in every aspect of his testimony. He also provided accurate medical histories to

every medical provider involved in this process. The fact that he has suffered prior work injuries to his shoulders or elsewhere has no bearing on the evidence in this case.

E. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968). As will be addressed forthwith, the ALJ finds that the medical experts involved have each provided medical opinions to the best of their abilities; thus their opinions will be evaluated in terms of *persuasiveness*, as opposed to *credibility* per se.

F. Further, courts are to be "mindful that the Workmen's Compensation Act is to be liberally construed to effectuate its humanitarian purpose of assisting injured workers." *James v. Irrigation Motor and Pump Co.*, 503 P.2d 1025 (Colo. 1972).

Compensability, Generally

G. It is the Claimant's burden to prove a causal relationship between the industrial injury and the medical condition for which he seeks benefits. Section 8-43-301, C.R.S. 2001; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). However, the Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which he seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley* , 165 Colo. 586, 441 P.2d 3 (1968).

H. To sustain his burden of proof concerning compensability, Claimant must establish that the condition for which he seeks benefits was proximately caused by an injury arising out of and in the course of employment. *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Section 8-41-301(I)(b), C.R.S.*

I. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988).

J. The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001).

K. The "in the course of" requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d

379, 381 (Colo. 1991). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976).

Pre-existing Medical Conditions

L. A pre-existing condition "does not disqualify a claimant from receiving workers' compensation benefits." *Duncan v. Indus. Claim Appeals Office*, 107 P.3d 999 (Colo. App. 2004). A claimant may be compensated if a work-related injury "aggravates, accelerates, or combines with" a worker's pre-existing infirmity or disease to "produce the disability for which workers' compensation is sought." *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Moreover, an otherwise compensable injury does not cease to arise out of a worker's employment simply because it is partially attributable to the worker's pre-existing condition. *Subsequent Injury Fund v. Thompson*, 793 P.2d 576, 579 (Colo. 1990); *Seifried v. Indus. Commission*, 736 P.2d 1262, 1263 (Colo. App. 1986)("[I]f a disability were [ninety-five percent] attributable to a pre-existing, but stable, condition and [five percent] attributable to an occupational injury, the resulting disability is still compensable if the injury has caused the dormant condition to become disabling.")

M. Assuming, arguendo, that Dr. O'Brien is correct in all of his assessments of Claimant's elevated risk factors for such an injury, nothing changes. It does not matter that Claimant was overweight. It does not matter that he came into this position with poorly aligned kneecaps. It does not matter that Claimant had desiccated tendons, wrought by age, or that he might have below-average proprioception. It does not matter that a more "typical" worker might have fallen, but not suffered a *rupture*, as Claimant did in this case. Claimant might have risk factors for falling and injuring his quad tendon elevated by 90% above the average worker for all we know. So what? None of this matters. A highly credentialed expert might [quite convincingly] opine that tall persons are more likely to bump their heads, or ageing Boomers who were big into Zeppelin are more likely to miss forklift beepers, or petite home healthcare workers who lift patients are more susceptible to back injuries, or that stupid people are at elevated risk to get hurt by power tools. It's still a work injury, and in the final analysis, Dr. O'Brien got it right.

Idiopathic Condition

N. A "but-for" test is used in cases that involve an unexplained fall and the "arises out of" element is satisfied "if the fall would not have occurred *but for* the fact that the conditions and obligations of employment placed the employee in a position where he or she was injured." *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014). An unexplained fall is considered to be within the "neutral risk" category" and the "but-for" test is applied to determine whether unexplained falls "arise out of" employment. *Id.*

O. “Employees must only demonstrate that there were specific connections to employment in cases *not* involving neutral risks. For example, if an employee has epilepsy and is injured after having a seizure at work, the employee must show that he or she was exposed to and additional ‘special hazard’ of employment.” The “special hazard” doctrine, therefore, only applies to cases involving an idiopathic condition.

P. **This is no “unexplained fall”.** Claimant fell while performing his work duties. He momentarily lost focus. As a direct result of his work-related fall, he was seriously injured. Not one person, expert, or entity (except Employer, for reasons unclear) disputes this simple fact. It was captured on video. It was credibly described by Claimant at hearing. It was documented on Employer’s own WC1. It was corroborated not only by Drs. Simpson and Stull; it was unequivocally corroborated by Respondents’ own expert, Dr. O’Brien.

Q. **Claimant’s medical condition is not “idiopathic”.** Not even close. The ALJ declines to find that Claimant’s quad tendon spontaneously avulsed, apparently right as he stepped off the curb, but before his other foot hit the ground. The cause and effect relationship is direct. Claimant took a step, landed awkwardly, fell, and got hurt on the job. The ALJ finds, by a preponderance of the evidence (and them some) that Claimant has suffered a compensable work injury.

Authorized Treating Providers/Right of Selection

R. Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). However, the Colorado Workers’ Compensation Act requires that respondents must provide injured workers with a list of at least four designated treatment providers. §8-43-404(5)(a)(I)(A), C.R.S. Section 8-43-404(5)(a)(I)(A), C.R.S. states that, if the employer or insurer fails to provide an injured worker with a list of at least four physicians or corporate medical providers, “the employee shall have the right to select a physician.” W.C.R.P. Rule 8-2 further clarifies that once an employer is on notice that an on-the-job injury has occurred, “the employer shall provide the injured worker with a written list of designated providers.” W.C.R.P. Rule 8-2(E) additionally provides that the remedy for failure to comply with the preceding requirement is that “the injured worker may select an authorized treating physician of the worker’s choosing.” An employer is deemed notified of an injury when it has “some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim.” *Bunch v. industrial Claim Appeals Office,* 148 P.3d 381, 383 (Colo. App. 2006).

S. In this instance Employer was put on notice right away by Claimant’s phone calls that he suffered a work injury. Despite the pain, Claimant took heroic efforts to assure that his load got delivered. Employer then found a back-up driver so Claimant’s route could be finished. A “reasonably conscientious manager” would have followed up, and provided a list of medical providers upon Claimant’s release from the

ER. Instead, Claimant worked for Groendyke. Employer denied medical treatment without even inquiring further. At no point did Employer provide a designated provider list. Instead, Groendyke threatened to suspend their own seriously injured worker, then followed through with a firing, while he was still at home, suffering a total disability. There is nothing in the record indicating that Employer even tried to speak with Claimant, in person or over the phone, after the date of injury.

T. Dr. Simpson, in an abundance of caution (and since the work-related nature was blatantly obvious to all concerned) wanted to send Claimant through the Workers Compensation system to get a referral. Claimant dutifully, and in good faith, complied by going through Concentra, but in an effort to secure Dr. Simpson's services. A surgery was inevitable. In this case, the right of selection has passed to Claimant in its entirety, and the ALJ so finds. The ALJ is not persuaded that Concentra, by Dr. Johnson, remains the ATP - unless Claimant desires it. At no point did *Employer* provide this name; it was Dr. Simpson, who was attempting to create a proper Workers Compensation conduit for medical treatment. Employer, through its own conduct, has surrendered any influence over who will treat Claimant. Dr. Simpson, and his designees, are now Claimant's Authorized Treating Providers.

Medical Benefits

U. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). Claimant must prove entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

V. Claimant has suffered a compensable work injury. Claimant has shown, by a preponderance of the evidence, that all treatment rendered to date has been reasonable, necessary, and related to his work injury. This includes, but is not limited to, his treatment in the ER, any services rendered by Concentra, all services provided by Dr. Simpson, all medications prescribed, as well as all physical and occupational therapy as recommended by Dr. Simpson.

Temporary Total Disability

W. To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* Sections 8-42-(1)(g), 8-42-105(4); *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to

establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term “disability” connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)).

X. Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant’s testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

Y. The ALJ finds, by a preponderance of the evidence, that Claimant continues to suffer a Temporary Total Disability as a result of his work injury. Ample evidence in support includes Claimant’s credible testimony, the medical records from Dr. Simpson, and even the expert opinions of Dr. O’Brien. Claimant has not reached MMI. He has not been released by his ATP at this point to return to work, even on a limited basis. He was terminated from employment, in a manner that the ALJ finds unconscionable, and thus will not be returning to work for Employer in any modified capacity. As a result, he is entitled to Temporary Total Disability payments, until terminated by operation of law.

ORDER

It is therefore Ordered that:

1. Claimant’s injury is compensable.

2. Claimant’s Authorized Treating Provider is now Dr. Michael Simpson, MD, and his designees.

3. Respondents shall pay for all medical treatment rendered to date for Claimant’s work injury.

4. Claimant’s Average Weekly Wage is $565.93.

5. Respondents shall pay Temporary Total Disability to Claimant until terminated by operation of law.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 31, 2019

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
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